

Case No. 10-15152
(U.S.D.C.N.D. Cal., Case No. C-09-04779 CRB)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ELIZABETH AIDA HASKELL, REGINALD ENTO, JEFFREY PATRICK
LYONS, JR., and AAKASH DESAI, on behalf of themselves and others
similarly situated,
Plaintiffs-Appellants,

v.

EDMUND G. BROWN, JR., Attorney General of California;
EVA STEINBERGER, Assistant Bureau Chief for DNA Programs,
California Department of Justice,
Defendants-Appellees.

**MOTION TO FILE AMICUS CURIAE BRIEF AND
PROPOSED BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT
ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEES
AND IN SUPPORT OF AFFIRMANCE**

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**MOTION OF AMICUS CURIAE
CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE**

TO: The Honorable Chief Judge Alex Kozinzki, and the Honorable Judges of the Court of Appeals for the Ninth Circuit:

The California District Attorneys Association as amicus curiae hereby moves the Court for leave to file the enclosed amicus curiae brief in support of appellees Edmund G. Brown, Jr., Attorney General of California, and Eva Steinberger, Assistant Bureau Chief for DNA Programs, California Department of Justice.

The California District Attorneys Association (CDAA) is the statewide organization of California prosecutors. CDAA is a professional organization that has been in existence for over 90 years, and was incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutor's views as amicus curiae in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

This case presents issues of interest and concern to prosecutors. Your amicus is familiar and experienced with the issues presented here, specifically with the use of DNA evidence in the investigation and prosecution of criminal cases.

Your amicus believes that further argument and briefing will be of benefit to the Court in its evaluation and resolution of this case. Amicus is able to present and demonstrate to the Court how the principles and practices at issue in this case, namely, the collection of DNA samples pursuant to statute from persons arrested of felonies, serve an overwhelming public interest. Such matters are relevant to the disposition of this case.

Accordingly, the California District Attorneys Association respectfully requests that this Court permit the filing of the proposed amicus curiae brief in support of appellees and in support of affirmance.

Date: March 24, 2010

Respectfully submitted,

/s/Albert C. Locher

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Attorney for Amicus Curiae
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STATEMENT OF INTEREST

The California District Attorneys Association (CDAА) has a significant interest in this case. CDAА has been in existence for over 90 years and represents the interests of California's prosecutors.

Crime in California continues to pose a significant public safety threat. In 2008 alone, there were 185,233 violent crimes reported in California.¹ Of these violent crimes, 2143 were homicides, 8906 were rapes, 69,391 were robberies, and 104,793 were aggravated assaults.

Furthermore, the clearance rate² for these violent crimes was as follows: 57.3% for homicide cases; 41.6% for rapes; 27.3% for robbery cases; and 54.1% for aggravated assaults.

These statistics demonstrate that thousands of violent crimes remain unsolved every year. The use of state and national DNA database programs

¹ *Crime in California 2008*, A Publication by the California Department of Justice, Division of California Justice Information Services, Bureau of Criminal Information and Analysis, Criminal Justice Statistics Center, Released February 2010.

² A case was deemed "cleared" if at least one person was arrested, charged with the commission of the crime, and turned over to the court for prosecution or referred to juvenile authorities. *See Crime in California 2008*, A Publication by the California Department of Justice, Division of California Justice Information Services, Bureau of Criminal Information and Analysis, Criminal Justice Statistics Center, page 21.

to their fullest extent as authorized by state law is a critical component of solving and prosecuting criminal offenses in California, obtaining justice for victims, and holding predatory criminals accountable for their crimes.

The California District Attorneys Association as amicus curiae submits this brief in support of the continued collection DNA samples from felony arrestees because of its vital role in public safety and bringing closure to victims and their families.

SUMMARY OF ARGUMENT

This Court should uphold the Trial Court's Order Denying Motion for Preliminary Injunction, and permit the continued collection of DNA samples from felony arrestees in California pursuant to California Penal section 296(a)(2)(c).

The collection of DNA samples from individuals arrested for felony crimes provides law enforcement with the enhanced ability to solve past crimes in conjunction with prosecution for current offenses. DNA collection from felony arrestees also promotes judicial economy, assists in the prevention of crime and provides victims of crime with an earlier resolution than currently exists, and exonerates innocent persons who might otherwise be the focus of criminal investigation.

ARGUMENT

I. THE COLLECTION OF DNA SAMPLES FROM FELONY ARRESTEES SERVES AN OVERWHELMING PUBLIC INTEREST

DNA technology has provided law enforcement with an unparalleled tool for seeking the truth, convicting the guilty and exonerating the innocent. (See e.g. *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813; *People v. Robinson* (2010) 47 Cal. 4th 1104; *People v. Wesley* (1988) 533 N.Y.S. 2d 643, 644 noting that forensic DNA technology “constitute[s] the single greatest advance in the ‘search for truth’, and the goal of convicting the guilty and acquitting the innocent, since the advent of cross-examination.”) As U.C. Berkeley Professor and Biochemist Paul Kirk wrote long before the advent of DNA for crime solving:

Wherever he steps, whatever he touches, whatever he leaves, even unconsciously, will serve as a silent witness against him. Not only his fingerprints or his footprints, but his hair, the fibers from his clothes, the glass he breaks, the tool mark he leaves, the paint he scratches, the blood or semen he deposits or collects. All of these and more bear mute witness against him. This is evidence that does not forget. It is not confused by the excitement of the moment. It is not absent because human witnesses are. It is factual evidence. Physical evidence cannot be wrong, it cannot perjure itself, it cannot be wholly absent. Only human failure to find it, study and understand it can diminish its value.³

³ *Crime Investigation: Physical Evidence and the Police Laboratory*; (1953, reprint 1974) Interscience Publishers, Inc.

In 2004, the People of the State of California through Proposition 69, provided law enforcement the ability to expeditiously link suspects to their criminal acts by collection of forensic identification DNA samples from all adult felony arrestees at booking. Despite plaintiffs' proclamations to the contrary, as law enforcement officials we are well aware that violent criminals commit all kinds of predicate felony crimes, including drug offenses, fraud offenses, and lower level crime. In the past, these offenders might be released unknowingly into the community after their arrest for such offenses or be tried for only a fraction of their crimes. Now, law enforcement has the tool to better protect California communities from escalating crime. Public safety is greatly enhanced by Proposition 69 and its provisions that permit DNA sample collection at arrest.

Nor is California alone in collecting DNA samples from arrestees. According to the National Conference of State Legislatures, 21 states have laws requiring collection of DNA samples from certain or all felony arrestees.⁴ Federal Law also provides for collection of DNA samples from arrestees. 42 U.S.C. § 14135a.

⁴ See "State Laws on DNA Data Banks: Qualifying Offenses, Others Who Must Provide Sample," pub. online by the National Conference of State Legislatures, 2/25/ 2010, at: <http://www.ncsl.org/default.aspx?tabid=12737>

DNA technology has been increasingly pivotal in solving numerous cold case⁵ rapes and murders. Since 2002, the Sacramento County District Attorney's Office alone has filed 19 cold case murders, dating back as far as 1972, where DNA evidence has been critical to the prosecution.

A. The Collection of DNA Samples from Felony Arrestees Solves Past Crimes

As the electorate of California overwhelmingly found in 2004, the collection of DNA samples from individual arrested for felony crimes solves past crimes more expeditiously and efficiently than limiting the DNA database program to convicted offenders only. Already, there are numerous examples of California cases where cold hits have resulted from collection of DNA from felony arrestees—even though California's DNA arrestee collection provision has been fully operative for little more than one year. Each example illustrates the judicial efficiency and public safety interests served by arrestee collections. While many of these cold hits are still being investigated by law enforcement and suspects are being sought, there are cases which have been charged and are currently pending that were solved as a result of a sample collected from a felony arrestee. The California State

⁵ "Cold case" murders include cases solved by a cold hit to the DNA Data Bank or those that would not have been solved except for DNA technology.

Department of Justice recently published a study of the types of qualifying arrests that have produced cold hits to murder, rape and robbery cases.

Studying a sample of 69 cases, violent crimes accounted for only 25% of the qualifying arrests that produced the DNA sample for the database leading to the cold hit; 75% were for non-violent, “lower level” felony crimes such as drug offenses, fraud, or other property crimes.⁶

Your amicus highlights a few of the cases pending in California Superior Courts where arrestee DNA led to cold hits. Amicus requests the court to take judicial notice of these cases (Federal Rule of Evidence 201); further basis for this material is set out in the declaration of Anne Marie Schubert included below in this brief.

1. People v. Donald E. Carter: Sacramento Co. Case 09F05363

On May 23, 1989, 80 year old Sophia McAllister was found murdered in her Sacramento home. The pathologist collected swabs from the victim’s vaginal area. The sexual assault kit was analyzed in June 2005 and a male DNA profile was developed and entered into the DNA Databank. At that time, there was no match.

⁶See “Arrestee Hits to Serious Crimes: Qualifying Offenses for DNA Collection,” California State Department of Justice, Bureau of Forensic Services, pub. online 3/19/2010, at: http://ag.ca.gov/bfs/pdf/arrestee_3192010.pdf

In June 2009, a DNA database cold hit identified Donald E. Carter as the perpetrator. DNA from Donald Carter had been collected on March 19, 2009, following his felony arrest for possession of a controlled substance (Sacramento Case no. 09F02216). The murder of Sophia McAllister was solved as a result of the DNA collection from Donald Carter at the time of his felony arrest. The murder charges against Donald Carter are currently pending trial.

2. People v. Christopher Rogers: Sacramento Case No. 09F07686

On November 25, 2004, Juanita Johnson was shot to death outside a residence in Sacramento County. A sexual assault kit was collected at the time of Ms. Johnson's autopsy. DNA testing was performed on this case in June 2006 and uploaded into CODIS at that time. In July 2009, a cold hit DNA database match identified Christopher Rogers as the perpetrator. DNA had been collected from Christopher Rogers on April 23, 2009 when he was arrested on a felony arrest warrant for assault (Sacramento Case No. 09F02991) and other traffic and misdemeanor warrants. The murder charges against Christopher Rogers are currently pending trial.

3. People v. Rene Hernandez: Santa Cruz County Case No. WF00983)

In February 2009, a 56-year-old woman was kidnapped while walking to a friend's house in Watsonville. She was dragged into some bushes,

sexually assaulted, beaten and robbed. A sexual assault kit was later collected and analyzed for DNA evidence. The DNA profile from the sexual assault kit was uploaded to CODIS. In October 2009, a cold hit was made to Rene Hernandez. Rene Hernandez had been arrested on August 16, 2009 for felony assault and booked into the Santa Cruz County jail. A DNA sample was collected at the time of booking. He had no prior felony convictions at the time.

Rene Hernandez is currently pending charges for kidnap for purpose of rape, multiple counts of sexual assault, robbery, false imprisonment, and assault.

4. People v. Orlando Avila: Orange County Case No. 09CF2993

On December 15, 2006, a residential burglary occurred in the city of Orange. The burglar left behind a water bottle. DNA testing performed on this bottle led to a DNA profile that was entered into CODIS on December 9, 2009. On December 10, 2009, a John Doe warrant was issued for the individual with this DNA profile. On December 13, 2009, a DNA Database cold hit identified Orlando Avila. Orlando Avila's DNA had been collected when he was arrested on April 15, 2009 for felony domestic violence on April 15, 2009. Orlando Avila is currently pending charges for burglary.

5. People v. Anthony Vega: Orange County Case No. 09NF3398

On March 13, 2007, a home in La Habra Police was ransacked and burglarized. Police collected a blood sample from a door frame that appeared to be the point of entry. A DNA profile was developed from this bloodstain.

In a second case, on November 29, 2008, woman was outside her La Habra house gardening when she was confronted by a man with a gun. He forced her inside, where he confronted the victim's son with the gun and forced both of the victims into a bedroom. The man stole money, jewelry, and a wallet from the victims. A suspect crime scene DNA profile was developed from a DNA sample collected from a closet door. This DNA profile matched the DNA from the March 13, 2007, burglary.

This DNA profile was then entered into CODIS. On May 2, 2009, Anthony Vega's DNA was collected after he was arrested for possessing drugs. In July 2009, a DNA database cold hit identified Anthony Vega as the perpetrator of the burglary and armed home invasion robbery. Vega is currently pending charges for both of these offenses, including kidnap, robbery and burglary.

6. People v. Rogelio Zaragoza: Sonoma County Case Nos. SCR 572377 and SCR 565937

Rogelio Zaragoza is currently charged in two separate sexual assault cases from 2006 and 2009. In case SCR 572377, Zaragoza is charged with multiple counts of rape in concert and false imprisonment occurring on July 28, 2006. In this case, evidence at the preliminary hearing established that the victim got into a car with some men and agreed to go look for drugs. After realizing the suspects were not driving in the right direction, the victim fought to get out of the car. The men drove her to an unknown winery and raped her. The victim was later released by the perpetrators. The next day, the victim reported this incident and a sexual assault kit was collected and sent to the Department of Justice for DNA testing. A DNA profile was developed and entered into CODIS. A DNA database cold hit identified Zaragoza as one of the perpetrators. His DNA had been collected for his July 24, 2009 arrest.

In case SCR 565937, Zaragoza is charged with kidnapping with intent to commit rape, rape, rape in concert, and assault with a deadly weapon. Additionally, life term enhancements for use of a knife are alleged. Evidence at the preliminary hearing established that on July 24, 2009, Rogelio Zaragoza and his brother Leonel kidnapped an 18 year old woman as she was walking down a Santa Rosa street. While Rogelio drove, Leonel raped her at knifepoint. The rape stopped when a California Highway Patrol

Officer pulled them over for speeding. Both suspects fled from the car but were later arrested. DNA was collected at the time of this felony arrest and uploaded to CODIS in September 2009.

On October 28, 2009, the Sonoma County District Attorney's Office received notice from the Department of Justice of a DNA database match to the July 28, 2006 case involving Rogelio Zaragoza.

The above cases provide real-world examples of the efficacy and importance of collecting DNA from felony arrestees to solve serious crimes – home invasion robberies, rapes, and murders. Such DNA collection will continue to provide crucial evidence in solving past crimes.

B. The Collection of DNA Samples from Felony Arrestees Promotes Judicial Economy and Early Resolution for Victims of Crime

In November 2004, the voters of California passed Proposition 69. This Proposition's proposed law stated in part:

SEC. II. Findings and Declarations of Purpose

The people of the State of California do hereby find and declare that:

- (a) Our communities have a compelling interest in protecting themselves from crime.
- (b) There is critical and urgent need to provide law enforcement officers and agencies with the latest scientific technology available for accurately and expeditiously identifying, apprehending, arresting, and convicting criminal offenders and exonerating persons wrongly suspected or accused of crime.

(c) Law enforcement should be able to use the DNA Database and Data Bank Program to substantially reduce the number of unsolved crimes; to help stop serial crime by quickly comparing DNA profiles of qualifying persons and evidence samples with as many investigations and cases as necessary to solve crime and apprehend perpetrators; to exonerate persons wrongly suspected or accused of crime; and to identify human remains. (Proposition 69 § II)

The collection of DNA samples from felony arrestees promotes the purpose of this law, enhances judicial economy and provides early resolution for victims of crime.

Before passage of Proposition 69, DNA could only be collected from certain qualifying *convicted* offenders. Collection from felony arrestees was not allowed. This requirement of waiting – sometimes months or years – for a conviction seriously undermines law enforcement’s ability to expeditiously identify, arrest and convict repeat offenders. The collection of DNA from felony arrestees has the ability to:

- a. Promote judicial economy by allowing multiple crimes to be tried at one time;
- b. Reduce the number of times a crime victim or family member is required to testify;
- c. Reduce the amount of investigation, time and resources that are expended on unsolved cases; and

This ability to promote judicial economy and provide early resolution to crime victims is not just a possibility. It is a reality. In fact, the two separate murder cases of People v. Langimaa Faulalo (Sacramento Superior Court case numbers 04F02695 and 09F05092), described in the Declaration of Anne Marie Schubert, attached, demonstrate the overwhelming need for collecting DNA at the time of a felony arrest. These two murders occurred within just two months of each other in 2004. Amicus again requests the Court to take judicial notice of these Sacramento Superior Court cases. (Federal Rule of Evidence 201.)

On January 10, 2004, 17-year-old Eddie Heyderagha was murdered in his father's Citrus Heights apartment. The Sacramento Sheriff's Department investigated and collected blood from the scene that was believed to have been left by one of the suspects. This blood was later tested for DNA by the Sacramento County District Attorney's Laboratory of Forensic Services. On November 9, 2004, the DNA profile obtained from this bloodstain was entered into CODIS. At that time there was no match.

On March 10, 2004, Danny Johnson was murdered in his south Sacramento home. The Sacramento Police Department investigated this case and arrested Langimaa Faulalo on March 19, 2004 for his murder. Faulalo was charged with this murder on March 23, 2004 in Sacramento County

Case no. 04F02695. In 2006, this case went to jury trial and Faulalo was convicted. On March 2, 2007, Faulalo was sentenced. As a result of this conviction, Faulalo's DNA was collected on March 3, 2007 by the Sacramento County Sheriff's Department. His DNA was thereafter uploaded to CODIS.

On June 26, 2007, the Sacramento District Attorney's Laboratory of Forensic Services received notification that a CODIS hit had been made on the Eddie Heyderagha case to Langimaa Faulalo.

The lesson is painfully clear: Had Faulalo's DNA been collected at the time of his March 2004 arrest and entered into CODIS, the Eddie Heyderagha murder would have been solved years earlier. In fact, had his DNA been entered into CODIS in March 2004, the match to the Heyderagha case would have been made shortly after the evidence from the Heyderagha scene was processed and uploaded into CODIS in November 2004. Instead, law enforcement and the victim's family waited years to know if the crime could be solved, and who would be charged with this murder.

On June 23, 2009, following the development of additional evidence, Langimaa Faulalo was charged with the robbery and murder of Eddie Heyderagha (09F05092).

Had both murder cases been discovered in 2004, the District Attorney's Office could have prosecuted these murders together. To the extent that evidence from the now closed Johnson murder would be admissible either as to guilt or penalty issues in the Heyderagha murder, witnesses in that closed murder case must be re-contacted and subpoenaed to testify yet another time. Had the murders been tried together, this duplication of effort, and revisiting of a painful event by family and witnesses, would not now be necessary. The early resolution of both of these cases would benefit the witnesses and surviving family of the victims of these crimes.

This case presents a stark example of the need for the collection of DNA from felony arrestees.

C. The Collection of DNA Samples from Felony Arrestees Assists in the Prevention of Future Crime

California's citizenry has a strong interest in reducing recidivism. See *Ewing v. California* (2003) 538 U.S. 11, 26. Empirical studies demonstrate that California has the nation's highest recidivism rate for parolees, with 68-70% returning to prison after being released on parole. See *Samson v. United States* (2006) 547 U.S. 843, 854 (citing several supporting studies). As the *Samson* court stated, "This Court has acknowledged the grave safety concerns that attend recidivism." *Id.*

The collection of DNA samples from felony arrestees serves an overwhelming public interest in preventing future crimes. In passing Proposition 69, California voters demonstrated their will and desire to prevent future crime through the collection of DNA from felony arrestees.

II. CONCLUSION

DNA evidence is one of the greatest tools ever developed in the search for truth, the protection of society, conviction of the guilty, and exoneration of the innocent. The collection of DNA samples from felony arrestees serves an overwhelming public interest in the pursuit of justice. For the reasons set forth above, amicus curiae respectfully requests that the lower court's Order Denying Motion for Preliminary Injunction be affirmed

DATED: March 24, 2010

Respectfully submitted,

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Chief Executive Officer, California
District Attorneys Association
JAN SCULLY, District Attorney,
ANNE MARIE SCHUBERT,
Supervising Deputy District Attorney
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/s/ ALBERT C. LOCHER

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DECLARATION OF ANNE MARIE SCHUBERT

I, Anne Marie Schubert, declare:

1. I am a Supervising Deputy District Attorney for the County of Sacramento and have been so employed for over thirteen years;
2. In 2002, the Sacramento District Attorney's Office implemented a Cold Case Prosecution Unit. This unit was designed to re-open unsolved murder cases that occurred in our county and determine if forensic DNA testing could be utilized in the investigation. Because I was the coordinator of this unit, I am familiar with the cold case murders that have been filed in our office since 2002, especially those with DNA evidence. I have also spoken with Assistant Chief Deputy District Attorney John O'Mara, the supervisor of the Homicide Unit in my office, regarding the number of cold case murders that have been filed in our office since 2002. As of March 2010, nineteen (19) cold case murders dating back to 1972 have been filed by the Sacramento District Attorney's Office where a cold hit occurred or DNA played a pivotal role in filing the case.
3. In preparation for writing this brief, in February 2010, I met with Linton von Beroldingen, the CODIS State Administrator for the California Department of Justice DNA Laboratory. The purpose of this meeting was to discuss cases where CODIS cold hits have occurred where the suspect DNA

was collected at the time of a felony arrest. Mr. von Beroldingen provided me with several confidential documents detailing pending cases where cold hits had occurred.

4. After receiving these documents, I contacted several law enforcement agencies throughout California to determine the status of the particular cold hit investigation. Several of these cases involved violent crimes, including rapes and murders. After contacting numerous law enforcement agencies, I found that many of these investigations are still pending and an arrest has not yet been made. As a result, the pending investigations are not being used in support of this brief.

5. In preparation for this brief, I located several cases where arrests have been made and an individual has been charged. These cases are still pending in the court system. These cold hit examples are cases where DNA was collected from a felony arrestee and a hit was made to DNA evidence in a particular case. The information concerning these cases set out here is derived from the court documents of record in each case; and from official law enforcement records as to the date and circumstances of taking of DNA samples from individual defendants. These examples are also detailed in the body of this brief. For each of the cases given (paragraphs six through eleven below), the defendant has no prior felony conviction which could

have been the basis for taking a post-conviction DNA sample, but the defendant does have a felony arrest which occurred after the enactment of Proposition 69 in 2004, and thus had a DNA sample taken at the time of the felony arrest, which led to the defendant being linked to the cases identified and described below.

6. I have obtained copies of arrest warrant affidavits, pleadings and preliminary hearing transcripts for the cases of People v. Donald Carter (Sacramento Superior Case No. 09F05363); and I have reviewed the state and local criminal history for Donald E. Carter. A review of this history shows that Donald Carter was arrested on March 19, 2009 for a felony Health & Safety Code § 11350 (possession of narcotics); DNA was collected on March 20, 2009; and the felony narcotics charge was subsequently dismissed on April 10 2009. Donald Carter is charged in 09F05363 with the murder of Sophie McAllister, committed in her home on or about March 19, 1989. The pathologist who conducted the autopsy collected swabs from the victim's vaginal area. The sexual assault kit was analyzed in June 2005 and a male DNA profile was developed and entered into the DNA Databank. At that time, there was no match. In June 2009, following the taking of the DNA sample from Donald Carter in March 2009, a DNA database cold hit

identified Donald E. Carter as the perpetrator of the McAllister homicide.

The murder charges against Donald Carter are currently pending trial.

7. I have obtained copies of arrest warrant affidavits, pleadings and preliminary hearing transcripts for the case of People v. Christopher Rogers (Sacramento Superior Court Case No. 09F07686); and I have reviewed the state and local criminal history for Christopher Rogers. A review of this history shows that Christopher Rogers was arrested on April 23, 2009 for a felony arrest warrant for violation of Penal Code section 245 (Sacramento Case No. 09F02991) and other traffic and misdemeanor warrants; the felony charge of PC 245 (Case No. 09F02991) was later dismissed in July 2009 in exchange for a misdemeanor plea to Penal Code section 243(e)(1), but DNA was collected from Christopher Rogers by the Sacramento Sheriff's Department on April 24, 2009. In case 09F07686, Rogers is charged with the murder of Juanita Johnson, occurring on or about November 25, 2004. Juanita Johnson was shot to death outside a residence in Sacramento County. A sexual assault kit was collected at the time of Ms. Johnson's autopsy. DNA testing was performed on this case in June 2006 and uploaded into CODIS at that time. In July 2009, a cold hit DNA database match identified Christopher Rogers as the perpetrator. The murder charges against Christopher Rogers are currently pending trial.

8. I have reviewed the felony complaint and arrest warrant for Santa Cruz County case number WF00983, People v. Rene Hernandez. I have also reviewed the criminal history of Rene Hernandez; a review of his state criminal history also reveals that he was arrested for a violation of Penal Code section 245 on August 16, 2009; a DNA sample was collected at the time of booking; he had no prior felony convictions at the time. In February 2009, a 56-year-old woman was kidnapped while walking to a friend's house in Watsonville; was dragged into some bushes, sexually assaulted, beaten and robbed; and a forensic sexual assault kit was later collected from the victim and analyzed for DNA evidence. The DNA profile from the sexual assault kit was uploaded to CODIS. In October 2009, a cold hit was made to Rene Hernandez. Rene Hernandez is currently pending charges for kidnap for purpose of Rape, multiple counts of sexual assault, robbery, false imprisonment, and assault.

9. I have reviewed the felony complaint and arrest warrant for Orange County case number 09CF2993, People v. Orland Avila; additionally, I have reviewed criminal history of Orlando Avila, which shows that Avila was arrested on April 15, 2009 for a violation of Penal Code section 273.5. I was further advised by the Department of Justice DNA Laboratory that a DNA sample was collected at the time of this arrest April 15, 2009 arrest and

uploaded to the DNA Database in July 2009. Additionally, I was advised by the Department of Justice that a CODIS hit was made to the DNA profile developed in Orange County Case number 09CF2993 to Avila's DNA on December 13, 2009. A review of the arrest warrant affidavit in 09CF2993 shows that on December 15, 2006, a residential burglary occurred in the city of Orange; further that the burglar left behind a water bottle; that DNA testing was later performed on this bottle and the resulting profile was entered into CODIS on December 9, 2009. On December 10, 2009, a John Doe warrant was issued for the individual with this DNA profile. On December 13, 2009, a DNA Database cold hit identified Orlando Avila. Orlando Avila's DNA had been collected when he was arrested on April 15, 2009 for domestic violence on April 15, 2009. Orlando Avila has been charged with this burglary and the case is currently pending.

10. I have reviewed the felony complaint and arrest warrant for Orange County case number 09NF3398 charging Anthony Vega with violations of Penal Code sections 209 (kidnapping), 211 (robbery) and 459 (burglary). In addition, I have reviewed Anthony Vega's criminal history as set forth in his CII rap sheet; that criminal history shows no felony convictions; it further shows that on May 2, 2009, he was arrested for a felony violation of Health and Safety Code section 11377 (possession of narcotics); and that these

charges were later dismissed. I have been advised by Linton von Beroldingen that DNA was collected from Vega at the time of this May 2, 2009 arrest and submitted to the California Department of Justice DNA Laboratory; further, that the analysis of the sample resulted in two separate cold hits for crimes that occurred in 2007 and 2008. On March 13, 2007, a home in La Habra Police was ransacked and burglarized. Police collected a blood sample from a door frame that appeared to be the point of entry. A DNA profile was developed from this bloodstain. In a second case, on November 29, 2008, woman was outside her La Habra house gardening when she was confronted by a man with a gun. He forced her inside, where he confronted the victim's son with the gun and forced both of the victims into a bedroom while threatening to shoot them if they moved. The man stole money, jewelry, and a wallet from the victims. A suspect crime scene DNA profile was developed from a DNA sample collected from a closet door; this DNA profile matched the DNA from the March 13, 2007, burglary. In July 2009, a DNA database cold hit identified Anthony Vega as the perpetrator of the burglary and armed home invasion robbery. Vega is currently pending charges for both of these offenses, including kidnap, robbery and burglary.

11. I have spoken to Sonoma County Deputy District Attorney Tania Partida who provided me with a summary of the facts of the cases of People v. Rogelio Zaragoza case number SCR 565937, and People v. Rogelio Zaragoza, case number SCR 572377; reviewed the Sonoma County Preliminary Hearing transcripts for in both cases; and have reviewed Zaragoza's criminal history record. In case SCR 565937, Zaragoza is charged with kidnapping with intent to commit rape, rape, rape in concert, and assault with a deadly weapon. Evidence at the preliminary hearing established that on July 24, 2009, Rogelio Zaragoza and his brother Leonel kidnapped an 18 year old woman as she was walking down a Santa Rosa street; while Rogelio drove, Leonel raped her at knifepoint; the rape stopped when a California Highway Patrol Officer pulled them over for speeding; both suspects fled the car but were chased and arrested. DNA was collected at the time of this felony arrest, and I have been advised by Linton von Beroldingen that this DNA sample was uploaded to CODIS in September 2009. Thereafter, on October 28, 2009, the Sonoma County District Attorney's Office received notice from the Department of Justice of a DNA database match between Rogelio Zaragoza and a case which arose July 28, 2006; that case came to be charged as case SCR 572377. In case SCR 572377, evidence at the preliminary hearing established that the victim got

into a car with some men and agreed to go look for drugs; the men drove her to an unknown winery and raped her; the victim was later released by the perpetrators; the next day, the victim reported this incident and a sexual assault kit was collected and sent to the Department of Justice for DNA testing; a DNA profile was developed and entered into CODIS; as a result, when the July 2009 arrest of Zaragoza yielded his DNA sample which was uploaded to CODIS in September 2009, a DNA database cold hit identified Zaragoza as one of the perpetrators.

12. I am also familiar with the two separate murder cases filed in Sacramento County against Langimaa Faulalo (Sacramento Superior Court Nos. 04F02695 and 09F05092). I have reviewed the arrest warrant issued in 09F05092, as well as laboratory reports associated with both of these murders. The court records and investigation records in these two cases show the following time line:

January 10, 2004 – victim Eddie Heyderagha was murdered in his home; investigators found blood at the crime scene that was not the victim's blood; following DNA analysis, a DNA profile was developed from this foreign blood and entered into the CODIS database November 9, 2004 [this murder would ultimately become the subject of People v. Faulalo, Sacramento Court No. 09F05092].

March 10, 2004 – victim Danny Johnson was murdered in his home.

March 19, 2004 – Faulalo was arrested for the murder of Johnson.

March 23, 2004 – Faulalo was charged in Sacramento Court No. 04F02695 with the Danny Johnson murder.

March 2, 2007 – Faulalo was convicted in the Danny Johnson murder following jury trial.

March 3, 2007 – following his conviction, a DNA sample was taken from Faulalo. This sample was analyzed, a DNA profile was developed, and uploaded into CODIS.

June 26, 2007 – The Sacramento District Attorney’s Laboratory of Forensic Services was notified that a cold hit had been made in the Heyderagha murder, matching the foreign blood sample at the scene of that case to Faulalo. Further investigation developed additional evidence linking Faulalo to the Hederagha murder

June 23, 2009 – Faulalo was charged in Sacramento Superior Court No. 09F05092 with the Heyderagha murder.

I have reviewed Faulalo’s criminal history, which shows no prior arrests before the Danny Johnson murder that occurred on March 10, 2004. If Faulalo’s DNA had been collected at the time of this March 2004 arrest, law enforcement would have aware of the hit to Heyderagha’s murder in or

shortly after November 2004. Instead, nearly three years went by before Faulalo's DNA was collected following his conviction and entered into CODIS system, and a hit was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of March, 2010, in Sacramento, California.

/s/ Anne Marie Schubert
Anne Marie Schubert

**CERTIFICATE OF COMPLIANCE
WITH RULE 32(a)**

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

I certify that pursuant to Federal Rule of Appellate Procedure 29(b)5) and 32(a)(7)(C)(i) the attached Amicus Curiae Brief is proportionately spaced, has a typeface of 14 points or more and contains fewer than 7000 words (one-half the maximum word count permitted for a party's principal brief), and specifically that this brief contains 5484 words, as determined by the word-count feature of the word processing system, including the Declaration of Anne Marie Schubert, and excluding tables, certificates, and disclosure statements.

DATED: March 24, 2010

Respectfully submitted,

/s/Albert C. Locher

Albert C. Locher

**CORPORATE DISCLOSURE STATEMENT
RULE 26.1**

The California District Attorneys Association is a non-profit public benefit corporation under the laws of the state of California. There is no parent corporation and no publicly held corporation owning 10% or more of the stock of the California District Attorneys Association.

Date: March 24, 2010

/s/ Albert C. Locher

Albert C. Locher
Co-chair, Appellate Committee
California District Attorneys Association

DECLARATION OF SERVICE

I, Albert C. Locher, declare:

I am 18 years of age or older and not a party to this matter. On March 24, 2010, I filed the following document with the clerk of the court using the CM/ECF system:

**MOTION TO FILE AMICUS CURIAE BRIEF AND PROPOSED
BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT
ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEES AND
IN SUPPORT OF AFFIRMANCE**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished through the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 24, 2010, at Sacramento, California.

Albert C. Locher
Declarant

/s/ Albert C. Locher
Signature