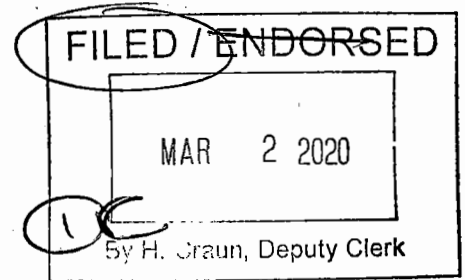


1 ANNE MARIE SCHUBERT
District Attorney
2 CHERYL M. TEMPLE #190316
Deputy District Attorney
3 901 G Street
Sacramento, California 95814
4 Telephone: (916) 874-6218

5 Attorneys for Plaintiff



6 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

7 **COUNTY OF SACRAMENTO**

8
9 **THE PEOPLE OF THE STATE OF CALIFORNIA,**

10 Plaintiff,

11 v.

12 **JOSEPH DEANGELO,**

13 Defendant.

CASE No.: 18FE008017

**NOTICE OF MOTION AND MOTION TO COMPEL
THE TAKING OF BUCCAL SWABS FROM THE
DEFENDANT**

DATE: MARCH 12, 2020

TIME: 1:30 P.M.

DEPT: 61

14 TO THE HONORABLE JUDGE STEVE WHITE, THE DEFENDANT, JOSEPH DEANGELO, AND HIS ATTORNEY
15 OF RECORD, DEPUTY PUBLIC DEFENDERS ALICE MICHEL AND JOSEPH CRESS:

16
17 NOTICE IS HEREBY GIVEN that on the above date and time, at the above-entitled court, located
18 at 720 9th St., Sacramento, CA 95814, the People of the State of California, Plaintiff herein, will
19 move the court to order the defendant to submit to the collection of five buccal swabs for additional
20 DNA testing and comparisons.


21
22 This motion will be based on the attached Memorandum of Points and Authorities and any
23 evidence that may be introduced at the hearing on this matter.

Dated:

3/2/20

Respectfully Submitted,

ANNE MARIE SCHUBERT, District Attorney
County of Sacramento, State of California

By: 
CHERYL M. TEMPLE
Deputy District Attorney

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The People need five buccal swabs from the defendant in order to directly compare his reference DNA sample with crime scene samples previously analyzed by Contra Costa County Crime Laboratory, Ventura County Crime Laboratory, Orange County Crime Laboratory, and the California Department of Justice Crime Laboratory (on behalf of Santa Barbara County). Even after a case is filed, and regardless of the penalty, the law allows the prosecution to obtain additional nontestimonial evidence to prove its case. Nothing cited by the defendant holds otherwise. This additional investigative step, lawfully pursued, will save hours (if not days) of court time, prevent confusion of the jury, and save thousands of dollars in expert witness fees.

On February 3, 2020, based upon a search warrant filed under seal with an affidavit outlining probable cause, this court signed a search warrant ordering law enforcement to obtain additional buccal swabs from the defendant for exactly this purpose. After the prosecution notified defendant’s counsel and invited them to be present during the taking of the buccal swabs, defendant’s counsel objected. The prosecution agreed to delay execution of the warrant to give the defendant an opportunity to raise his objection with the court. On February 5, 2020, the prosecution was informed the court had signed, ex-parte, an order from the defendant based on the defendant’s motion. The order stated, “Good cause appearing, the Sacramento County District Attorney’s Office and its agents, including the Sacramento County Sheriff’s Department, Ventura County law enforcement, and any other prosecutors or law enforcement agencies, are hereby ordered to not obtain **any further evidence** from the defendant in this case until further order of the court.”

(Defendant’s “Order,” emphasis added.) The prosecution was served with the defendant’s motion and order that afternoon, after it was signed. The court did not issue any additional written ruling or cite the legal reasoning behind the order.

The prosecution herein refutes incorrect factual allegations contained in the defendant’s moving papers, corrects the defendant’s misstatements and omissions of law for the court’s benefit,

1 seeks a new court order to allow the seizure of additional buccal swabs from the defendant
2 consistent with the search warrant on February 3, 2020, and asks the court to completely lift the
3 Order signed on February 5, 2020. Contrary to the unsupported claims in defendant's motion, both
4 the acquisition of a search warrant and the seizure of physical evidence during the pendency of a
5 filed case 1) are not discovery within the meaning of Penal Code section 1054 et seq. as they
6 concern nontestimonial evidence; 2) are not court proceedings within the meaning of Penal Code
7 section 190.9; and 3) are not a critical stage in the proceedings for which the defendant's Sixth
8 Amendment right to counsel attaches and, in any event, the defendant's attorneys were provided
9 the identical written affidavit presented to the court and they *were actually* notified of the evidence
10 collection. The people further request the defendant's Order now imposed on the People be lifted,
11 as it is unconstitutionally overbroad and an unjustified intrusion into the executive branch's
12 authority to continue its investigation in this case.

14 II. FACTUAL SUMMARY

15 DNA evidence collected from eight separate crime scenes identified the defendant as the
16 perpetrator of these and other crimes. ¹ Recounted briefly² here for purposes of this motion only (as
17 they were addressed in detail in the affidavit previously submitted under seal by Det. Robert
18 Peters), DNA evidence was collected from crimes that occurred in Contra Costa, Ventura, Orange,
19

20
21 ¹ Beginning with the murder of Claude Snelling on September 11, 1975, and proceeding chronologically, there are 62
22 crime scenes across 13 counties tied by DNA or other means to the defendant. Some scenes involved multiple victims,
23 including young children; and in total they comprise well over 100 criminal acts of burglary, assault by means of force
24 likely to produce great bodily injury, rape, sodomy, forcible oral copulation, forcible digital penetration, kidnapping,
25 robbery, false imprisonment, attempted murder, and/or murder, along with numerous other associated and/or lesser
26 included offenses. While the guilt phase of this trial will encompass only the 26 counts currently charged on the
27 complaint and a select number of crimes the prosecution will seek to introduce under Evidence Code §1101(b) and/or
28 Evidence Code §1108, this motion only addresses the crimes from which DNA evidence was derived, as they form the
basis for the prosecution's request and support the court's order. This motion does not, in any way, limit the crimes (by
type or number) the prosecution intends to introduce in either the guilt or penalty phase and should not be read as such.

² Reports relating to these crimes have been discovered to the defense and contain additional details not relevant to nor
recounted for purposes of this motion.

1 and Santa Barbara Counties. These crimes were properly joined with and charged in Sacramento
2 County and form the basis of the prosecution's current request to obtain additional buccal swabs
3 from the defendant.

4
5 **A. CRIMES FOR WHICH THE PROSECUTION HAS DNA EVIDENCE**

6 **1. KIDNAP FOR PURPOSES OF ROBBERY OF JANE AND JOHN DOE (1): Count 25,**
7 **Contra Costa County, October 28, 1978**

8
9 On October 28, 1978, victims Jane and John Doe (1)³ were attacked in their bedroom in
10 Contra Costa County. They were bound, threatened, robbed, and Jane Doe (1) was kidnapped and
11 forcibly raped. Neither Jane nor John Doe (1) could identify their attacker. It was dark, he forced
12 them to look away, and he blindfolded Jane Doe (1).

13 Semen was detected on evidence collected from the rape of Jane Doe (1). That semen was
14 later analyzed by the Contra Costa County Sheriff's Crime Laboratory using Profiler Plus and
15 COfiler DNA typing systems and an unknown male DNA profile was obtained (laboratory item
16 #78-79744-1, VCCL 00059).

17
18 **2. RAPE OF JANE DOE (2): Uncharged Assault the Prosecution Will Seek to**
19 **Admit Pursuant to Evidence Code § 1108, Evidence Code § 1101(b), and**
20 **Penal Code § 190.3 (b); Contra Costa County, December 8, 1978**

21
22 On the night of December 8, 1978, Jane Doe (2) was alone, asleep in her bed, when she was
23 attacked in a similar manner. Jane Doe (2) could not identify her attacker. It was dark, he forced
24 her to look away, and he blindfolded Jane Doe (2).

25
26 ³ Numerical listing of Jane and John Doe victims applies to this motion only. The total number of Jane and John Doe
27 victims, and the sequence in which they will be called, will be different at the preliminary hearing and both the guilt
28 and penalty phases of trial.

1 Semen was detected on evidence collected from the rape of Jane Doe (2). That semen was
2 later analyzed by the Contra Costa County Sheriff's Crime Laboratory using the Profiler Plus and
3 COfiler DNA typing systems and an unknown male DNA profile was obtained (laboratory item
4 #78-80408-1, VCCL 00059).

5
6 **3. KIDNAP FOR PURPOSES OF ROBBERY OF JANE AND JOHN DOE (3): Count 26,**
7 **Contra Costa County, June 11, 1979**

8
9 During the night of June 11, 1979, Jane and John Doe (3) were attacked in their bedroom in
10 Contra Costa County. They were bound, threatened, robbed, and Jane Doe (3) was kidnapped and
11 forcibly raped. Neither Jane nor John Doe (3) could identify their attacker. It was dark, he forced
12 them to look away, and he blindfolded both Jane and John Doe (3).

13 Semen was detected on evidence collected from the rape of Jane Doe (3). That semen was
14 later analyzed by the Contra Costa County Sheriff's Crime Laboratory using the Profiler Plus and
15 COfiler DNA typing systems and an unknown male DNA profile was obtained (laboratory item
16 #79-2325-1; discovery page VCCL 00059).

17
18 **4. MURDER OF CHARLENE AND LYMAN SMITH: Counts 8 and 9, Ventura**
19 **County, March 13, 1980**

20
21 On the afternoon of March 16, 1980, the bound and bloodied bodies of Charlene and Lyman
22 Smith were discovered in their beds by Lyman's then 12-year old son. Both victims had been
23 bludgeoned to death, suffering several blows to the head by a blunt object. A wooden log was
24 found on the bed that appeared similar to logs in a pile of firewood on the north side of the victims'
25 residence. Both victims were found covered with blood-soaked bedding. Beneath the bed cover,
26 Lyman was nude, face down on the bed, with his wrists and ankles tightly bound with pieces of
27

1 drapery cord. Charlene was nude from the waist down, and was positioned face up on the bed, with
2 her wrists bound behind her back and her ankles tied together, also with drapery cord. The Smiths'
3 home had been extensively ransacked.

4 Semen was detected on evidence collected during the autopsy of Charlene Smith. That semen
5 was analyzed by the Ventura County Sheriff's Office Crime Laboratory in 1997 using CTT,
6 D1S80, and DQ Alpha DNA typing systems and an unknown male DNA profile was found
7 (laboratory item 97-53073, VCCL 00059). The sperm portion of the vaginal swab was analyzed
8 again in 2018 using GlobalFiler™ PCR Amplification typing systems, and an unknown male STR
9 DNA profile was obtained (Ventura County Sheriff's Crime Laboratory item 9JDN2_SP;
10 discovery page VCCL00427).

11
12 **5. MURDER OF PATRICE AND KEITH HARRINGTON: Counts 10 and 11, Orange**
13 **County, August 21, 1980**

14
15 On the afternoon of August 21, 1980, the bloodied bodies of Patrice and Keith Harrington
16 were discovered in their bed by Keith Harrington's father. Both had been bludgeoned to death,
17 suffering several blows to the head by a blunt object. Both victims were found covered with blood-
18 soaked bedding. Beneath the bed cover, Keith was found nude, and Patrice was wearing only a
19 short robe. Both victims had marks on their wrists and ankles indicating they had recently been
20 bound; however, the bindings had been removed.

21 Semen was detected on evidence collected during the autopsy of Patrice Harrington. That
22 semen was analyzed by the Orange County Sheriff's Department Crime Laboratory using RFLP,
23 CTT, D1S80, and DQ alpha typing systems (OCDS FR # 96-49643, discovery page VCCL00059),
24 and an unknown male DNA profile was obtained. (OCCL000188). The sperm portion of the semen
25 was analyzed again in 2018 using GlobalFiler™ PCR Amplification typing systems, and the same
26
27
28

1 unknown male STR DNA profile was obtained (Orange County Crime Laboratory item 96-I2Z-
2 VO; discovery page OCCL001408).

3
4 **6. MURDER OF MANUELA WITTHUHN: Count 12, Orange County, February**
5 **6, 1981**
6

7 On the afternoon of February 6, 1981, the bloodied body of Manuela Witthuhn was found in
8 her bed by her mother, who came looking for her when her husband (who was then hospitalized)
9 could not locate her by telephone. Manuela's mother found her daughter covered in a blood-soaked
10 sleeping bag. Manuela had been bludgeoned to death; she had suffered several blows to the head
11 by a blunt object. Inside the sleeping bag she was nude, lying on her stomach. Manuela had ligature
12 marks on her wrists and her right ankle indicating she had recently been bound, but no bindings
13 were present.

14 Semen was detected on evidence collected during the autopsy of Manuela Witthuhn. That
15 semen was analyzed by the Orange County Sheriff's Department Crime Laboratory using RFLP,
16 CTT, D1S80, and DQ alpha, and an unknown male DNA profile was obtained (OCDS FR # 96-
17 51124; discovery page VCCL00059). The sperm portion of the semen was analyzed again in 2018
18 using GlobalFiler™ PCR Amplification typing systems, and the same unknown male STR DNA
19 profile was obtained (Orange County Crime Laboratory item HH-7RQ; discovery page
20 OCCL02931).

21 **7. MURDER OF CHERI DOMINGO AND GREG SANCHEZ: Counts 6 and 7, Santa**
22 **Barbara County, July 27, 1981**
23

24 On the afternoon of July 27, 1981, the bloodied bodies of Cheri Domingo and Greg Sanchez
25 were found by a real estate agent bringing clients to view the home where Cheri had been
26 housesitting. Greg was found nude, face down on the floor, partially in the bedroom closet. He had
27

1 suffered one non-fatal gunshot wound in his left cheek but had been bludgeoned to death by 24
2 blows to the head from an unknown object. His head had been covered with clothing. Cheri was
3 found nude, lying face down on the bed, covered by bedding. She, too, had been bludgeoned to
4 death by several blows to the head by a blunt object. Cheri's arms were found behind her back and
5 ligature marks were present on both wrists, although no bindings were present.

6 A semen stain on the bedding near Cheri's body was collected and analyzed by the
7 Department of Justice Crime Laboratory in Richmond, California, and an unknown male DNA
8 profile was obtained; that profile was later uploaded to the California Department of Justice
9 CODIS database (specimen ID BK110321 410-A, incident date 07/27/1981). (Discovery page
10 VCCL00072-3.)

11

12 **8. MURDER OF JANELLE CRUZ: Count 13, Orange County, May 5, 1986**

13

14 On the morning of May 5, 1986, the bloodied body of Janelle Cruz was found lying face up in
15 her bed. Janelle's left arm and hand were positioned under the midsection of her back, and her right
16 wrist bore an abrasion consistent with having recently been bound, although no bindings were
17 present. Like Charlene Smith, Lyman Smith, Patrice Harrington, Keith Harrington, Manuela
18 Witthuhn, Cheri Domingo, and Greg Sanchez before her, Janelle had been bludgeoned to death by
19 a blunt object. She had suffered numerous lacerations and contusions to her head and three of her
20 teeth had been knocked out.

21 Semen was detected on evidence collected during the autopsy of Janelle Cruz. That semen
22 was analyzed by the Orange County Sheriff's Department Crime Laboratory using RFLP, CTT,
23 D1S80, DQ alpha, and later with Profiler Plus and COfiler, and a single male DNA profile was
24 obtained (OCDS FR # 89-1769; discovery page VCCL00059). The sperm portion of the semen was
25 analyzed again in 2018 using GlobalFiler™ PCR Amplification typing systems, and the same
26

1 unknown male STR DNA profile was obtained (Orange County Crime Laboratory item IB-9UN;
2 discovery page OCCL04580).

3
4 **B. DNA COMPARISONS**

5
6 The above eight DNA samples were later found to identify the same person. But getting to
7 this result was a time-consuming and complicated process involving multiple crime labs and
8 dozens of people. After each crime described above, each county wherein the crime occurred
9 analyzed its own forensic unknown crime scene sample. Over the ensuing years, the DNA profiles
10 obtained from each of the crime scenes and/or victims' bodies were compared against each other in
11 a variety of ways, including (but not limited to) the following:

12 In 1996, the Orange County Sheriff's Crime Laboratory concluded that the Orange County
13 murders of Patrice and Keith Harrington, Manuela Witthuhn, and Janelle Cruz were shown to have
14 been committed by the same person, as all of the sperm fractions of the semen collected from the
15 female victims in those cases had the same DNA profile. (Discovery page OCCL000064). In 1997,
16 the unknown male DNA profile generated from the vaginal swab of Charlene Smith taken after the
17 Ventura County murders of her and her husband was matched by Orange County Sheriff's Crime
18 Laboratory to the unknown male profile from the Orange County murders. (Discovery page
19 VCCL00013.) In 2001, Contra Costa Sheriff's Office Crime Laboratory matched the DNA profiles
20 from three of their cases (listed above in section II(A)(1) – (3), *supra*) to the DNA profile from the
21 Orange County murders. (Discovery pages VCCL00060; OCCL000319.) In January 2018, the
22 Ventura County Crime Laboratory retested a portion of the vaginal swab from Charlene Smith
23 using GlobalFiler™ PCR amplification Kit (item # 9JDN2_SP) and uploaded the resulting profile
24 to the California Department of Justice CODIS database. The Ventura County Crime Laboratory
25 immediately received notification of a CODIS case-to-case hit. The CODIS notification indicated
26 that the unknown male DNA profile generated from the Ventura County murders matched the

1 profile submitted from a rape that occurred in Contra Costa County (already matched to the other
2 two rapes/kidnappings for purposes of robbery in Contra Costa County described above and the
3 murders in Orange County) and matched the DNA profile submitted from the Santa Barbara
4 County murders of Cheri Domingo and Greg Sanchez. (Discovery pages VCCL00071-3.)
5

6 **C. DEFENDANT'S REFERENCE SAMPLE: Sacramento County, April 24, 2018**
7

8 Through the efforts of dozens of scientists and experts, the above-described collection and
9 testing over the years showed that one male suspect left his semen at all eight of these crime
10 scenes. Through extensive investigation after the CODIS hit, one suspect was identified as the
11 potential source of that DNA: the defendant. He was put under surveillance, and in April of 2018, a
12 discarded facial tissue from the defendant was collected and analyzed by the Sacramento County
13 Crime Laboratory. The tissue contained a single DNA profile, and that DNA profile matched the
14 profile from the sperm portion of the vaginal swab from Charlene Smith (Ventura County Item
15 9JDN2_SP) and from Manuela Witthuhn (Orange County Item HH-7RQ) and, therefore, all eight
16 of the crime scenes where DNA was obtained. (Discovery pages VCCL00001-3.)

17 The defendant was arrested on April 24, 2018, and, pursuant to a warrant issued at that time, a
18 single buccal swab for confirmation was collected the next day by Sacramento Sheriff's Office Lt.
19 Paul Belli.⁴ At the time of the collection, Lt. Belli explained the collection method to the defendant
20 and asked him to take the buccal swab collection stick and place it in his mouth to facilitate
21 collection of the sample. (*Id.*) The defendant did not respond, verbally or otherwise, to this request.
22 (*Id.*) Lt. Belli then had to, himself, put the buccal swab collection stick into the defendant's mouth
23 and collect the sample pursuant to the instructions for the kit.⁵ (*Id.*) The defendant's post-arrest
24

25 ⁴ See Declaration of Sacramento County Sheriff's Office Sergeant Kenneth Clark, attached as Exhibit 1.

26 ⁵ The defendant's lack of cooperation to earlier attempts to obtain a buccal swab justify an order by this court that law
27 enforcement be allowed to use force to retrieve subsequent samples, if necessary.
28

1 buccal swab was analyzed by the Sacramento County District Attorney's Crime Laboratory, and it
2 matched the DNA profile from the tissue he had previously discarded, confirming his identity as
3 the source of the unknown profile. (Item 239-01; discovery pages VCCL00005-00008).

4 5 **III. ARGUMENT**

6
7 The defendant's identity as a rapist, murderer, kidnapper, and robber has been established, in
8 significant part, by the matching DNA profiles generated in this case by multiple laboratories
9 encompassing multiple jurisdictions. While the responsibility of conducting DNA analyses on
10 crime scene evidence originally fell to the laboratories in the counties when and where the crimes
11 occurred, the Sacramento County Crime Laboratory has become the jurisdictional and investigative
12 epicenter for all of the defendant's known crimes (some charged, some uncharged)⁶, and first
13 obtained and analyzed the defendant's reference buccal swab and compared his profile to the crime
14 scene profiles.⁷ Additional buccal swabs are now necessary so that each laboratory involved in this
15 case can independently generate the defendant's DNA profile from a buccal swab and compare it to
16 the DNA profiles generated from crime scene evidence using its own validated protocols and
17 procedures. Rather than present a comparison of a crime scene sample (tested by lab A) to a
18 reference sample (tested by lab B) and dive into the intricacies of each lab's protocols, the
19 prosecution is entitled to put on a more efficient and streamlined case, wherein each crime scene
20 DNA profile is matched directly to the defendant's DNA profile by the same laboratory – in some
21 cases even by the same analyst – with validated procedures and protocols, and as few procedural
22

23
24 ⁶ Sacramento County is continuing to investigate crimes committed by the defendant in Contra Costa, Santa Barbara,
25 San Joaquin, Stanislaus, Yolo, Santa Clara, and Alameda Counties; and is now poised to conduct additional DNA
26 testing on evidence, including possible re-testing (which may not occur in the same laboratory that originally tested
27 that evidence) depending on availability.

28 ⁷ The remaining portion of the defendant's original buccal swab was transferred from Sacramento County to Orange
County (see Exhibit 1, declarations 12 and 13), where it was analyzed by Orange County Crime Laboratory and
compared to previously tested evidence. However, additional testing may still be performed.

1 differences and links in the chain of custody, as possible. This will save countless hours of court
2 time, potential confusion of the jury, and thousands of dollars in expert witness fees.

3
4 There can be no question that identity of the defendant is the main – perhaps the *only* – issue
5 in this case. While factual similarities and the crime scene DNA link all eight crimes together,
6 conclusive comparison from each scene to the defendant’s DNA proves the defendant’s guilt. None
7 of the above victims could identify him. He attacked at night, disoriented and blinded his victims
8 with light, blindfolded them, made them look away, and occasionally wore a mask. The defendant
9 peddled disinformation during his attacks, calling some victims by their real names, implying he
10 knew them (he didn’t); demanding money and food (which he didn’t need); and claiming he had a
11 “van” (which he didn’t have). Or he murdered them.

12 It is the People’s burden to prove identity beyond a reasonable doubt. The People have
13 received no offer from the defendant to stipulate to his identity as the culprit for all charged and
14 uncharged offenses that will be presented in the upcoming trial; nor has he offered to stipulate to
15 the propriety of the collection, transportation, extraction, amplification, interpretation, or
16 comparison of any of the crime scene DNA samples or of his own reference sample. In the absence
17 of such broad stipulations by the defendant, the People must prove his culpability.

18
19 **A. THE COLLECTION OF ADDITIONAL BUCCAL SWABS FOR DNA TESTING IS NOT**
20 **DISCOVERY**

21
22 The defendant argues that the physical evidence sought by the prosecution amounts to
23 “discovery” that must comport with the procedures set out in Penal Code section 1054. et seq. For
24 this proposition, he cites Penal Code sections 1054 and 1054.5. Curiously, the defendant omitted
25 reference to Penal Code section 1054.4, which plainly states:

1 “Nothing in this chapter shall be construed as limiting any law enforcement or prosecuting
2 agency from obtaining **nontestimonial evidence** to the extent permitted by law on the
3 effective date of this section.”

4 (California Pen.Code § 1054.4, eff. June 6, 1990, emphasis added.)

5 Neither the collection of a buccal swab nor its subsequent analysis is “testimonial,” as it has
6 no tendency to disclose the thoughts of the person involved. It is physical evidence. That it may be
7 incriminating is of no moment. An individual can be compelled to, for example, provide samples of
8 his DNA,⁸ saliva,⁹ urine,¹⁰ breath,¹¹ handwriting,¹² or appear in a lineup,¹³ all of which are
9 nontestimonial and may be obtained outside of discovery provisions, because these processes do
10 not reveal the mental processes of the individuals involved.

11 Courts have long held that the self-incrimination privilege is inapplicable to nontestimonial
12 evidence such as this. For instance, in *Schmerber v. California* (1966) 384 U.S. 757, the United
13 States Supreme Court found that a blood sample, drawn from the defendant against his will and
14 over his objection to be analyzed for alcohol concentration, was properly seized as nontestimonial
15 evidence that did not compel him to be a witness against himself:

16 “In the present case, however, no such problem of application is presented. **Not even a**
17 **shadow of testimonial compulsion upon or enforced communication by the accused was**
18 **involved either in the extraction or in the chemical analysis.** Petitioner's testimonial
19 capacities were in no way implicated; indeed, his participation, except as a donor, was
20 irrelevant to the results of the test, which depend on chemical analysis and on that
21 alone. Since the blood test evidence, although an incriminating product of compulsion, was

22 ⁸ *Maryland v. King* (2013) 569 U.S. 435; *People v. Buza* (2018) 4 Cal.5th 658, 673 [characterizing buccal swabs as a
23 “minimal intrusion”].

24 ⁹ *People v. Kemp* (1961) 55 Cal.2d 458, 478.

25 ¹⁰ *People v. Saldivar* (1967) 249 Cal.App.2d 670, 672.

26 ¹¹ *People v. Sudduth* (1966) 65 Cal.2d 543, 546.

27 ¹² *Gilbert v. California* (1967) 388 U.S. 263, 266-67.

28 ¹³ *United States v. Wade* (1967) 388 U.S. 218, 222-23.

1 neither petitioner's testimony nor evidence relating to some communicative act or writing by
2 the petitioner, it was not inadmissible on privilege grounds.

3 *Id.* at 765 (emphasis added).

4 *United States v. Wade, supra*, 388 U.S. 218, further supports that a buccal swab is
5 nontestimonial evidence. In *Wade*, at issue was whether requiring the accused to submit to an in-
6 person line-up in the absence of counsel (already chosen to represent him) and utter the same
7 words as did the robber for a voice comparison violated his Fifth Amendment rights. In a robust
8 opinion, the United States Supreme Court said it did not:

9 We have no doubt that compelling the accused merely to exhibit his person for observation by a
10 prosecution witness prior to trial **involves no compulsion of the accused to give evidence**
11 **having testimonial significance**. It is compulsion of the accused to exhibit his physical
12 characteristics, not compulsion to disclose any knowledge he might have. It is no different from
13 compelling *Schmerber* to provide a blood sample or *Holt* to wear the blouse,¹⁴ and, as in those
14 instances, is not within the cover of the privilege. Similarly, compelling *Wade* to speak within
15 hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was
16 not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as
17 an identifying physical characteristic, not to speak his guilt. We held in *Schmerber, supra*, 384
18 U.S. at 761 [], that the distinction to be drawn under the Fifth Amendment privilege against
19 self-incrimination is one between an accused's communications in whatever form, vocal or
20 physical, and compulsion which makes a suspect or accused the source of real or physical
21 evidence. *Schmerber, supra*, at 764[]. We recognized that both federal and state courts have
22 usually held that (the privilege) offers no protection against compulsion to submit to
23 fingerprinting, photography, or measurements, to write or speak for identification, to appear in
24 court, to stand, to assume a stance, to walk, or to make a particular gesture. *Id.* at 764[]. None
25 of these activities becomes testimonial within the scope of the privilege because required of the
26 accused in a pretrial lineup.

19 *Id.* at 222-23 (emphasis added, internal citations omitted).

20 Even the subsequent DNA analysis of the buccal swabs to be done by Ventura, Orange, Santa
21 Barbara, and Contra Costa Crime laboratories will be nontestimonial, should the analyst become
22 unavailable. (See, e.g. *People v. Holmes* (2012) 212 Cal.App.4th 431; *People v. Barba* (2013) 215
23 Cal.App.4th 712.) The only authority cited by the defendant in support of his contention that the

25 ¹⁴ *Holt v. United States* (1910) 218 U.S. 245. In *Holt*, the accused, prior to trial and over his protest, was forced to put
26 on a blouse that fitted him. The ensuing evidence was admissible. Justice Holmes, rejected Holt's objection as "based
27 upon an extravagant extension of the 5th Amendment," ... "[T]he prohibition of compelling a man in a criminal court to
be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from
him, not an exclusion of his body as evidence when it may be material." *Id.* at 252-53.

1 buccal swabs being sought by the prosecution are testimonial evidence covered under discovery
2 provisions is *Verdin v. Superior Court* (2008) 43 Cal.4th 1096. However, *Verdin* addressed mental
3 examinations of the defendant by a prosecution expert, an examination clearly designed to elicit
4 thoughts and statements of the defendant or, in other words, testimonial evidence. The defendant
5 acknowledges that his cited authority had to do with a mental examination, which was found to be
6 a form of discovery, and then states, without support, “[s]o too is access to obtain physical
7 discovery.” But the physical, nontestimonial, evidence sought here falls squarely within Penal
8 Code section 1054.4; *Verdin* is not applicable in the present case.
9

10
11 **B. A Search Warrant is Not a Legal Proceeding Within the Meaning of Penal Code**

12 **Section 190.9**

13
14 Defendant contends on page 5 of his motion that the presentation of a search warrant by Det.
15 Robert Peters of the Sacramento County Sheriff’s Department amounted to a violation of Penal
16 Code section 190.9 by the court and the People. His allegation is unfounded, and the People
17 respectfully request an affirmative statement by this court, on the record, that no such violation
18 occurred, nor could it have occurred.

19 Penal Code section 190.9(a)(1) states, in relevant part:

20 In any case in which a death sentence may be imposed, all proceedings conducted in
21 the superior court, including all conferences and proceedings, whether in open court, in
22 conference in the courtroom, or in chambers, shall be conducted on the record with a court
reporter present.

23 The defendant suggests that, once a death penalty prosecution has commenced, law
24 enforcement’s ability to obtain nontestimonial evidence from the defendant is halted. To support
25 this extraordinary position, the defendant cites: absolutely nothing.
26

1 A search warrant is not a “proceeding” within the meaning of Penal Code section 190.9. “[A]
2 warrant application involves no public or adversary proceedings: it is an ex parte request before a
3 magistrate or judge.” (*U.S. v. U.S. Dist. Court for Eastern Dist. Of Mich., Southern Division* (1972)
4 407 U.S. 297, 321.) Pursuant to Penal Code section 1523, “A search warrant is an order in writing,
5 in the name of the people, signed by a magistrate, directed to a peace officer, commanding him or
6 her to search for a person or persons, a thing or things, or personal property, and, in the case of a
7 thing or things or personal property, bring the same before the magistrate.”

8 “An application for search warrant, however, almost invariably is presented ex parte and turns
9 upon the adequacy of the factual showing of probable cause for its issuance.” (*People v. Mack*
10 (1977) 66 Cal.App.3d, 839, 845.) Once probable cause is shown, the order shall issue; there is no
11 debate envisioned by the legislature. “If the magistrate is thereupon satisfied of the existence of
12 the grounds of the application, or that there is probable cause to believe their existence, he or
13 she **must issue** a search warrant [] to a peace officer in his or her county, commanding him or
14 her forthwith to search the person or place named for the property or things or person or
15 persons specified...” (Penal Code §1523(a) emphasis added.)

16
17 Detective Peters, who presented the search warrant and affidavit to the court, was not then and
18 is not now capable of initiating or conducting “proceedings” against the defendant. Only “the
19 district attorney” (or her designee) may “initiate and conduct on behalf of the people all
20 prosecutions for public offenses.” (California Government Code § 26500.) The ability of law
21 enforcement – indeed the *duty* of law enforcement – to conduct additional investigation, including
22 the obtaining of search warrants for additional physical evidence, does not terminate upon the
23 filing of a criminal case. The defendant presents no authority that the law holds otherwise, yet
24 substantial caselaw supports the idea that, particularly in serious cases (like multiple murders),
25 more than one search warrant may frequently be needed for law enforcement to properly do its job.
26

1 (See, e.g., *People v. Kraft* (2000) 23 Cal.4th 978, 1045-1048 [three warrants issued after multiple-
2 murder defendant's arrest].)

3 The defendant's complaints that a violation of Penal Code section 190.9 occurred are further
4 without merit because the defendant cannot show he has been prejudiced. (See *People v. Huggins*
5 (2006) 38 Cal.4th 175.) Moreover, the defendant *actually possesses* the affidavit in question which
6 was presented to the magistrate to justify the search. The affidavit need not even have been in
7 writing, as Penal Code section 1526(b) allows for the oral statement of a peace officer to suffice.
8 But in this case, the affidavit was presented in writing, and the defendant has it. And the defendant
9 has a remedy for any defect in the warrant, which he has notably not pursued: If he believes the
10 warrant affidavit contained a recklessly or intentionally false statement that undermines the
11 probable cause in support of the warrant, he can make that claim. *Franks v. Delaware* (1978) 438
12 U.S. 154, at 155-56. He has not done so. But he cannot otherwise block the government from
13 obtaining evidence once probable cause has been shown for its collection.
14

15
16 **C. No Violation of the Sixth (or Fourteenth) Amendment Occurred**

17
18 Although the defendant makes a separate argument that his Sixth Amendment (through the
19 Fourteenth Amendment) rights were violated, any such claim is intertwined with his other two
20 claims, as he must show that either the acquisition of nontestimonial evidence, or the obtaining of a
21 search warrant before a magistrate, is a critical proceeding at which he is entitled to counsel. But
22 neither is.

23 Regarding the acquisition of nontestimonial evidence being a critical proceeding entitling the
24 defendant to counsel, the U.S. Supreme Court rejected this claim most directly in *Schmerber v.*
25 *California* (*supra*) 384 U.S. 757, when, immediately after dispensing with the defendant's claim
26

1 that compelling his blood draw was testimonial evidence, it held the forced blood draw and
2 subsequent analysis did not violate petitioner's Sixth Amendment rights, either:

3 This conclusion also answers petitioner's claim that, in compelling him to submit to the test in
4 face of the fact that his objection was made on the advice of counsel, he was denied his Sixth
5 Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the
6 privilege, he has no greater right because counsel erroneously advised him that he could assert
7 it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by
8 counsel's advice, to be left inviolate. No issue of counsel's ability to assist petitioner in respect
9 of any rights he did possess is presented. **The limited claim thus made must be rejected.**

10 *Id.* at 765-66 (emphasis added).

11 There are, as defendant states, critical stages of the proceedings between arraignment and trial
12 during which he is entitled to assistance of counsel. But "[p]reparatory steps such as systematized
13 or scientific analyzing of [an] accused's fingerprints, blood sample, clothing, hair, and the like, are
14 **not critical stages of proceedings at which [the] accused has [the] right to presence of counsel,**
15 and thus denial of [the] right to have counsel present at such analyses does not violate the Sixth
16 Amendment." *United States v. Wade, supra*, 388 U.S. 218, HN 9 (emphasis added).¹⁵

17 Compelled handwriting exemplars, discussed in section III (A), *supra*, as not violating the
18 defendant's Fifth Amendment rights because they are nontestimonial evidence, similarly do not
19 violate the defendant's Sixth Amendment rights when taken without counsel present:

20 **The taking of the exemplars was not a 'critical' stage of the criminal proceedings**
21 **entitling petitioner to the assistance of counsel.** Putting aside the fact that the exemplars
22 were taken before the indictment and appointment of counsel, there is minimal risk that the
23 absence of counsel might derogate from his right to a fair trial. Cf. *United States v. Wade,*
24 *supra*. If, for some reason, an unrepresentative exemplar is taken, this can be brought out and
25 corrected through the adversary process at trial since the accused can make an unlimited
26 number of additional exemplars for analysis and comparison by government and defense
27 handwriting experts.

28 *Gilbert v. California (supra)* 388 U.S. 263, at 267 (emphasis added).

¹⁵ The *Wade* court held that an in person line-up requiring the defendant to utter the same words as the robber, while not a violation of the Fifth Amendment as it was nontestimonial, can and does violate the Sixth Amendment if done without counsel present given the unique nature of line-ups and the inability of the defendant to duplicate the identical exercise at a later time with his own expert.

1 Nor does a compelled fingerprint exemplar ordered by a court during proceedings on a filed
2 case. (See *Virgle v. Superior Court* (2001) 100 Cal.App.4th 572.) If there is any question as to the
3 defendant's DNA, he can have his own expert obtain his sample and present that evidence at trial.
4 Neither the taking of the buccal swab nor its subsequent analysis is a critical stage of the
5 proceeding within the meaning of the Sixth Amendment. Other states besides California have
6 addressed this same issue.¹⁶

7
8 Even if the taking of a buccal swab was a critical stage of the proceeding at which the
9 defendant is entitled to counsel, his counsel were notified and invited to be present. No Sixth
10 Amendment violation exists.

11 **D. The Court's Order Should Be Lifted**

12
13
14 The defendant submitted to this court, and this court signed, an order that states, "Good cause
15 appearing, the Sacramento County District Attorney's Office and its agents, including the
16 Sacramento County Sheriff's Department, Ventura County law enforcement, and any other
17 prosecutors or law enforcement agencies, are hereby ordered to not obtain **any further evidence**
18 from the defendant in this case until further order of the court." (Defendant's "Order," emphasis
19 added.) In light of the authority contained herein, the People respectfully request the court lift the
20

21
22 ¹⁶ "Execution of an ex parte search warrant did not constitute a violation of a defendant's right to counsel. In this case, a
23 rape defendant claimed that an ex parte application for and issuance of a search warrant allowing for a blood sample to
24 be taken from defendant for DNA testing violated his right to counsel because he had a right to counsel from the time
25 the presentment was returned, and therefore was entitled to participate through counsel, in the determination of whether
26 probable cause existed for the warrant. In an issue of first impression, the court found that the post-presentment, ex-
27 parte search warrant proceeding was not a critical stage of the prosecution to allow the defendant to participate in the
28 probable cause determination. The court noted that search warrant proceeding did not diminish the defendant's right to
a fair trial as defendant was entitled to file a motion to suppress the evidence obtained. The court also noted that
allowing defendant and counsel to participate in search warrant process would have prevented State from extending
affiants and witnesses the secrecy and confidentiality it relied on to elicit testimony necessary to meet its probable
cause requirement." *State v. Blye*, 2004 WL 350637 (Tenn. 2004).

1 order, as it improperly interferes with the Constitutional mandate of the District Attorney to
2 perform its investigative and prosecutorial functions.

3 The California Constitution establishes a system of state government in which power is
4 divided among three coequal branches (Cal. Const., art. IV, § 1 [legislative power]; Cal.
5 Const., art. V, § 1 [executive power]; Cal. Const., art. VI, § 1 [judicial power]), and further
6 states that those charged with the exercise of one power may not exercise any other (Cal.
7 Const., art. III, § 3). [] This division of power limits the authority of one of the three branches
of government to arrogate to itself the core functions of another branch. [] Through this
limitation, we avoid both the concentration of power in a single branch of government, and
the overreaching by one branch against the others.[]

8 *People v. Lamoureux* (2019) 42 Cal.App.5th 241 at 262-3 (citations omitted).

9
10 Based upon the timing and circumstances under which the court issued its order, the People
11 presume the court intended only to retract its authorization of the February 3, 2020, search warrant.
12 However, the plain language of the order prohibits the prosecution, and any of its agents, from
13 obtaining “any evidence” from the defendant. Under this interpretation, the People would
14 unreasonably be limited in its ability to exercise its investigatory power as the executive branch.
15 For example, if the defendant were to possess in his cell a weapon with which he intended to harm
16 someone, would the order prohibit the People from seizing this weapon from the defendant? Or, if
17 the defendant were to voluntarily blurt out to deputies a confession of his crimes, would the order
18 prohibit the People from documenting and presenting this evidence? To remove any ambiguity as
19 to the scope of the court’s order, the People respectfully request that it be lifted in its entirety.

20
21 **E. The Requested Order is Also Authorized by Penal Code Section 1542, and the**
22 **Sample May Be Taken in Open Court**

23
24 Under Penal Code section 1542, this court may issue an order that the defendant be searched
25 in the court’s presence for “anything which may be used as evidence of the commission of the
26 offense.” Although the People do not seek to consume court time with such a procedure, we are

1 prepared to execute the requested order for buccal swabs immediately following the hearing, in the
2 presence of the court. The law supports such a method, and it would eliminate future complaints by
3 the defendant about any of the above.

4 5 **IV. CONCLUSION**

6
7 As explained herein, there is no legal barrier to law enforcement obtaining additional
8 nontestimonial evidence that will show, conclusively, the defendant's guilt at trial while saving
9 countless hours of testimony and immense expense and avoid confusing the trier of fact. As the
10 defendant acknowledges, the scope of this case is large and – if not well-presented – complex. The
11 court was correct to sign the original search warrant, and the court will be correct in signing the
12 requested order now, as the order is supported by probable cause to search the defendant and seize
13 from him evidence that tends to show a felony has been committed and that a particular person has
14 committed a felony within the meaning of Penal Code section 1524(a)(4). That the Prosecution
15 seeks solid evidence, beyond reproach or criticism, in a case of this magnitude, in which the death
16 penalty is being sought, should be of no surprise.

17 For the foregoing reasons, the People respectfully request the court explicitly state on the
18 record that, contrary to the allegations contained in the defendant's motion, the original search
19 warrant obtained by the people did not constitute a violation of either Penal Code section 1054 or
20 190.9; nor has there been any violation of the defendant's Sixth Amendment right to counsel. The
21 People also request the court lift the defendant's Order signed on February 5, 2020, precluding the
22 prosecution from obtaining "any additional evidence" in this case.

23 The People further request that the court sign the attached Order authorizing law enforcement
24 from law enforcement agents from or acting at the direction of the Sacramento County District
25 Attorney's Office, including the Sacramento County Sheriff's Department, Ventura County District
26 Attorney's Office, Orange County District Attorney's Office, Contra Costa County District

1 Attorney's Office, and/or Santa Barbara County District Attorney's Office, to collect of five (5)
2 buccal swabs from the defendant, Joseph DeAngelo, by consent or by force, forthwith.
3

4
5 Dated: 3/2/20

Respectfully Submitted,

6 ANNE MARIE SCHUBERT, District Attorney
7 County of Sacramento, State of California

8
9 By: 
10 CHERYL M. TEMPLE
11 Deputy District Attorney
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 1

1 SUPERIOR COURT OF CALIFORNIA,
2 COUNTY OF SACRAMENTO

3
4 THE PEOPLE OF THE STATE OF CALIFORNIA,)
5 Plaintiff,)
6 vs.)
7 Joseph James DEANGELO,)
8 Defendant.)

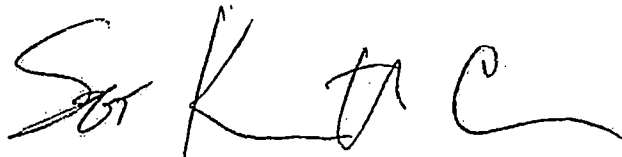
Case No. 19FE008017
DEPT.
SERGEANT KENNETH CLARK'S
DECLARATION
February 26, 2020

9
10
11
12 I, Sergeant Kenneth Clark, declare the following:

- 13 1. I have been assigned as an investigator of the above-entitled case employed by the
14 Sacramento County Sheriff's Office.
- 15 2. I have read the reports and videotape evidence generated in connection with this
16 matter, and/or am familiar with the relevant DNA collection in this case;
- 17 3. On April 25th, 2018, I was present in an interview room with defendant Joseph
18 James DEANGELO following his arrest on this matter.
- 19 4. While in the room, prior to his transport to the Sacramento Main Jail, Lieutenant
20 Paul Belli used a buccal DNA reference kit to collect a DNA sample from defendant
21 Joseph James DEANGELO.
- 22 5. Lieutenant Belli verbally explained the collection method to defendant DEANGELO
23 and asked him to take the buccal swab collection stick and place it in his mouth to
24 collect the sample.
- 25 6. Defendant DEANGELO did not respond verbally or otherwise to this request.
- 26 7. Lieutenant Belli placed the buccal swab collection stick into defendant
27 DEANGELO's mouth and collected the sample pursuant the instructions for the kit.
- 28

- 1 8. Lieutenant Belli packaged and labeled the swab and kit in accordance with the
2 instructions.
- 3 9. The DNA collection kit was stored in a locked cabinet at the Centralized
4 Investigations Division offices, and retrieved by Detective Courtney Bartilson of the
5 Sheriff's Homicide Bureau on April 26th, 2018 and transported to the Sacramento
6 County District Attorney's Crime Lab.
- 7 10. Detective Bartilson signed the DNA collection kit form at 0918 Hours, April 26th,
8 2018, transferring custody of the kit to the Sacramento County District Attorney's
9 Crime Lab.
- 10 11. On May 1st Criminalist Nikki Sewell of the Sacramento County District Attorney's
11 Crime Lab retrieved the sample from evidence storage, took a sample of the filter
12 paper containing possible genetic material, resealed the DNA collection kit, and
13 returned it to evidence storage on May 3rd, 2018.
- 14 12. Detective Rob Peters and I, Sergeant Clark, of the Sacramento Sheriff's Homicide
15 Bureau picked up the DNA collection kit from the Sacramento County District
16 Attorney's Crime Lab and drove it directly to Orange County, California.
- 17 13. I transferred the DNA collection kit to Investigator Erika Hutchcraft of the Orange
18 County District Attorney's Office.

19
20 Subscribed to and sworn this 26th day of February, 2020,

21 
22
23
24
25
26
27
28

1
2
3 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
4 **COUNTY OF SACRAMENTO**

5 **THE PEOPLE OF THE STATE OF CALIFORNIA,**

6 Plaintiff,

7 v.

8 **JOSEPH DEANGELO,**

9 Defendant.

CASE No.: 18FE008017

**[PROPOSED] ORDER AUTHORIZING
COLLECTION OF BUCCAL SWABS FROM
DEFENDANT**

DATE: MARCH 12, 2020

TIME: 1:30 P.M.

DEPT: 61

10
11
12 GOOD CAUSE APPEARING, it is hereby ordered by this court that law enforcement agents from
13 or acting at the direction of the Sacramento County District Attorney's Office, including the
14 Sacramento County Sheriff's Department, Ventura County District Attorney's Office, Orange
15 County District Attorney's Office, Contra Costa County District Attorney's Office, and/or Santa
16 Barbara County District Attorney's Office, seize from the defendant, Joseph James DeAngelo
17 (DOB 11/08/1945), samples of his saliva and mouth cells, to be taken as five (5) individual buccal
18 swabs, for purposes of his identification.

19 If the defendant refuses to comply with the buccal swab collection, the above-named law
20 enforcement agents are hereby authorized to use reasonable force to obtain five (5) buccal swabs
21 from the defendant or, if noncompliance continues, blood samples.

22 DATED: March 12, 2020

23 _____
24 The Honorable Steve White
25 JUDGE OF THE SUPERIOR COURT