STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, Plaintiff, v. THERESA ROSE BENTAAS, Defendant.	49CRI19-001657 **DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO SUPPRESS**

Defendant Theresa Rose Bentaas respectfully submits this Brief in Support of Defendant's Motion to Suppress DNA Extraction, Testing, Sequencing and DNA Profile.

I. BACKGROUND

On September 3, 2009, Baby Doe was exhumed by the Sioux Falls Police Department. The body was shipped via FedEx to the University of North Texas where it was examined and DNA was extracted. The DNA extracted was then sent to the South Dakota Forensic Lab. A DNA profile was obtained by DNA Forensic Expert Stacey Smith. Baby Doe's DNA profile was saved in the South Dakota Database.

In Summer 2018, Detective Webb contacted Virginia-based Parabon Labs to assist with DNA and Genealogy through their open source available Databases. The University of North Texas provided Parabon with a large enough sample to work with. Parabon's analysis determined the race and ethnicity. The sample was then analyzed to develop a family tree.

Filed: 2/14/2020 2:20 PM CST Minnehaha County, South Dakota 49CRI19-001657

In January 2019, Parabon and its genealogy expert advised Detective Webb that research had uncovered some family names – Brech and Josten – in the Sioux Falls and Hutchinson County areas. Numerous reports on possible family trees were provided. Parabon advised that "what they had found so far was approximately a third cousin which was fairly far out from the direct DNA of this baby."

Using Parabon's information, Detective Mertes embarked on his own research to fill in the family trees. Detective Mertes shared what he had found on Paulette Brech-Fischer and her three children – Robert Josten, Anne Marie Podhradsky (Josten), and Theresa Bentaas (Josten) with Parabon. Parabon indicated that Detective Mertes' research was accurate. "From there [Detective Mertes and Detective Webb] coordinated on how to get possible DNA from one of these local sources to determine if in fact we were on the right track with this family tree."

On February 11, 2019, a trash pull was conducted at Theresa Bentaas' home located at 3308 S. Saugaro Avenue in Sioux Falls, SD, by Detective Smidt, Detective Schoepf and Officer Mertes. The trash was brought back to the Law Enforcement Center for processing. Cigarettes and cigarette butts, cotton swabs, Kleenex with hair, hair with yellow cardboard, ear plugs, water bottles, glass bottles, beer cans, beer bottles, and dental floss were seized.

On February 12, 2019, Officer Mertes submitted eleven items to the South Dakota DCI Forensic Lab to be tested for DNA. On February 15, 2019, State Lab Director Joon Bierne called Detective Webb and informed him that the "initial examination was that Theresa Josten-Bentaas is the mother of this baby as well as the father, Dirk Bentaas, date of birth 03-13-60."

Detective Mertes applied for a search warrant to obtain buccal swabs from Theresa Bentaas and Dirk Bentaas. The search warrant was signed on February 20, 2019 by the Honorable Robin Houwman. The search warrant was served on February 27, 2019.

The buccal swabs obtained through the search warrant were sent to the DCI Forensic Lab for analysis. On March 4, 2019, DCI Forensic Expert Stacey Smith issued a report stating that "[g]iven the DNA profiles of Theresa Bentaas and Dirk Bentaas and the DNA profile obtained from Andrew John Doe, Theresa Bentaas and Dirk Bentaas cannot be excluded as being the biological parents of Andrew John Doe."

Theresa Bentaas was arrested on March 8, 2019.

II. ARGUMENT AND AUTHORITIES

The Fourth Amendment to the U.S. Constitution and Article VI, § 11 of the South Dakota Constitution prohibit unreasonable searches and seizures by law enforcement. Generally, "police officers must obtain a warrant based on probable cause issued by a judge in order to seize someone's property." *State v. Christensen*, 2003 SD 64, ¶ 11, 663 N.W2d 691, 694; *Terry v. Ohio*, 392 U.S.1, 20 (1968). For Fourth Amendment protections to apply, "[a]n individual must have a reasonable expectation of privacy in the place searched or the article seized." *Id*. (citing *Katz v. United States*, 389 U.S. 347 (1967)).

> A two-part test determines whether an individual has a reasonable expectation of privacy in a particular area. First, we consider whether [an individual] exhibited an actual subjective expectation of privacy in the area searched. Second, we consider whether society is prepared to recognize that expectation of privacy as reasonable. Whether [an individual] has a legitimate expectation of privacy is determined on a case-by-case basis, considering the facts of each situation.

State v. Zahn, 2012 SD 19, ¶ 20, 812 N.W.2d 490, 496 (internal citations omitted).

Typically, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* ¶ 20, 812 N.W.2d at 497 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967). "But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.*

> More recently, the Court has recognized that "property rights are not the sole measure of Fourth Amendment violations. In *Katz v. United States*, we

> established that "the Fourth Amendment protects people, not places" and expanded our conception of the Amendment to protect certain expectations of privacy as well. When an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.

Carpenter v. U.S., 138 S.Ct. 2206, 2213 (2018) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967); quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)).

A. DNA Extraction, Testing, and Sequencing is an Unreasonable Search Under the 4th Amendment

> One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic makeup.

Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260, 1269 (9th Cir. 1998).

An individual's DNA profile can reveal family relationships, ancestry, and propensity for and existence of medical conditions. Whenever law enforcement extracts, tests, and sequences DNA it gains access to the entirety of a person's genetic blueprint, not just the short tandem repeats that enable identification analysis. DNA is not only contained within one's "person," it is the basis for the body's very existence and operation. In short, DNA *is* the person.

Although people shed their DNA constantly, its diffusion occurs unknowingly, involuntarily, and in a wide variety of ways. Even with DNA's continuous dissemination into the public domain, DNA and the information obtained through testing and sequencing is protected by positive law. Absent court order or consent, an individual's medical information is fiercely protected by federal law (HIPAA; Individual with Disabilities Act) and state law (SDCL § 1-27-1.5, SDCL § 19-19-503; SDCL § 58-2-40; SDCL § 19-2-13). Familial information and personally identifiable information is also guarded against disclosure on the federal (Family Educational Rights and Privacy Act) and state level (SDCL § 28-1-31; ARSD 67:14:32:20; ARSD 67:42:16:14).

South Dakota devotes an entire chapter to the handling, use, analysis, access, and confidentiality of DNA Samples. SDCL 23-5a.

> Any DNA record or DNA sample submitted to the South Dakota State Forensic Laboratory pursuant to this chapter is confidential and may not be disclosed to or shared with any person or agency unless disclosure is authorized by this chapter.

SDCL § 23-5A-22

> Any DNA record or DNA sample submitted to the South Dakota State Forensic Laboratory pursuant to this chapter is confidential and is not a public record under chapter 1-27.

SDCL §23-5A-23.

> Any DNA record or DNA sample submitted to the South Dakota State Forensic Laboratory may only be released for the following authorized purposes:
>
> (1) For law enforcement identification purposes, including the identification of human remains, to federal, state, or local criminal justice agencies;
>
> (2) For criminal defense and appeal purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged or was convicted;
>
> (3) If personally identifiable information is removed, for forensic validation studies, forensic protocol development or quality control purposes and for establishment or maintenance of a population statistics database, to federal, state, or local forensic laboratories or law enforcement agencies; and
>
> (4) If ordered by the court for determination of parentage and if there is no other available DNA sample and all other reasonable opportunities to locate a known sample have been exhausted.

SDCL § 23-5A-25.

Even the software and database structures used by the South Dakota State Forensic Lab to implement its protocols regarding handling, utilizing, and analyzing DNA is confidential. SDCL § 23-5A-27. Interestingly, this chapter is found under Title 23 – Law Enforcement.

South Dakota law and law enforcement already recognize that obtaining and subsequently extracting, analyzing, and sequencing an individual's DNA demands a search

warrant. Here, Detective Mertes sought a search warrant for Theresa and Dirk Bentaas' buccal swabs for submission to the South Dakota Forensic Lab. The privacy interest that requires a search warrant for the buccal swab of a free person is the same privacy interest that requires a search warrant to extract, analyze and create a DNA profile from items seized from a free person. The State's failure to obtain a search warrant to extract, test, and sequence the DNA on the items submitted to the SD Forensic Lab violated Bentaas' Fourth Amendment right against unreasonable search and seizure.

In 2012, the Fourth Circuit U.S. Court of Appeals in *U.S. v. Davis* recognized that the warrantless extraction and testing of an individual's profile for use in a murder investigation constituted an unreasonable search and seizure under the Fourth Amendment. 690 F.3d 226 (4th Cir. 2012). Davis arrived at a hospital in August 2000 with a gunshot wound to his leg. *Id*. at 230. "He claimed to be a robbery victim and reported that he had been shot by the purported robber." *Id.* An officer found Davis "lying on a bed in the emergency room." *Id.*

> Davis' pants and boxer shorts had been removed by hospital personnel and placed in a plastic hospital bag, which was stored on a shelf beneath the bed. Officer King observed Davis' gunshot wound and secured Davis' pants and boxer shorts as evidence of the reported shooting. He did so without express permission from Davis (although Davis saw him take the clothing) and without a warrant. He then gave those items to his colleague, Detective Steven Lampe, who placed them in the HCPD 'property room,' to be held as evidence in the prosecution of Davis' assailant.
> ...
> No one was ever charged in the August 2000 shooting of Davis, and neither his clothing nor the blood on it were ever tested in connection with that shooting. Davis was not contact or advised that the shooting investigation was no longer being pursued by the HCPD, nor was he offered the opportunity to retrieve his clothing. Instead, Davis' clothes, containing his DNA material, were simply retained by the HCPD.
> ...
> The government does not dispute that Davis' clothing was seized initially because it was evidence of a crime in which he was a victim. The clothing was logged into the HCPD property room, however, on the same sheet with the marijuana found in the car and the false ID card Davis had presented. It was also Davis' arrest

> record on the drug offense that later led the PGCPD to inquire and learn about the existent of the seized clothing. When the clothing was later checked out to the PGCPD for testing in a subsequent murder investigation, however, the form indicated that the clothes and blood were from the victim of a shooting. In effect, then, David had a "dual status" throughout the events in this case – he was both victim and arrestee – a fact which becomes important when analyzing his Fourth Amendment claims.
>
> In June 2002, an individual named Michael Neal was murdered in Prince George's County. In April 2004, a PGCPD homicide investigating the Neal murder, Detective K. Jernigan, learned that Davis had previously been arrested in Howard County and that the HCPD had Davis' clothes. The PGCPD suspected Davis was involved in the Neal murder. As a result, they requested and obtained Davis' clothing, without a warrant, from the HCPD.
>
> In June 2004, the PGCPD extracted Davis' DNA from the blood stains on Davis' pants, again without a warrant, and created a DNA profile from the test results. That DNA was compared to an unknown DNA sample recovered from the scene of the Neal homicide, but there was no match. Despite the fact that Davis' DNA profile excluded him as the source of the evidentiary sample from the Neal murder, the GCPD nonetheless retained his DNA profile, and approximately one week later, included it in their local DNA database.
> ...
> As noted earlier, in the course of the investigation of the robbery and murder of Mr. Schwindler, when the DNA profile recovered from the Schwindler crime scene was entered into the PGCPD DNA database, a "cold hit" resulted with the DNA sample that had been lifted from Davis' clothing. The PGCPD then secured a search warrant to obtain a DNA sample directly from Davis. That subsequent DNA profile of Davis also matched the DNA samples from the Schwindler crime scene.
> ...
> Davis moved to suppress the DNA evidence against him, arguing that it was obtained in violation of the Fourth Amendment. In a lengthy order denying suppression, the district court addressed each of Davis' challenges. The court concluded that Davis' Fourth Amendment rights were violated only when his DNA profile was retained in the local DNA database, after Davis' profile did not match the DNA sample from the Neal murder, but found no other violations. As to the retention of Davis's profile, the court concluded that the "good faith" exception should be applied and thus the application of the exclusionary rule was not warranted.

Id. at 230-32.

On appeal, the Fourth Circuit's analysis "turned on the question of whether Davis had a reasonable expectation of privacy in his clothing and the blood and DNA it contained, once it

was in the lawful custody of the" police. *Id.* at 242. The Government argued that there was "no search and seizure, relying primarily on *United States v. Edwards*, 415 U.S. 800 (1974) . . . ." *Id*. at 242. The Fourth Circuit acknowledged that the "government reads *Edwards* to stand for the proposition that once the police have lawful police custody of evidence, like Davis' clothing here, further scientific examination conducted on it by that particular police department or by any other law enforcement body does not first require that a search warrant be obtained." *Id.* at 243. The Fourth Circuit noted, however, that the *Edwards* Court "did not adopt the categorial rule advanced by the government." *Id.*

> In *Edwards,* the class of person whose item was seized, an arrestee, and the type of item seized, evidence, were material considerations in the Court's analysis. Further, *Edwards* recognized that even an arrestee, who has a diminished expectation of privacy, does not forfeit forever all privacy interests in his effects. Therefore, the *Edwards* decision itself does not support the government's broad categorical assertion that any item in the lawful custody of law enforcement can be subjected to laboratory analysis at any later time and for any purpose related to law enforcement.
>
> Moreover, because the analysis of biological samples, such as those derived from blood, urine, or other bodily fluids, can reveal "physiological data" and a "host of private medical facts," such analyses may "intrude[ ] upon expectations of privacy that society has long recognized as reasonable." *Skinner,* 489 U.S. at 616–17, 109 S.Ct. 1402. Therefore, such analyses often qualify as a search under the Fourth Amendment. *Id.* at 618, 109 S.Ct. 1402 (concluding that "the collection and subsequent analysis of the requisite biological [blood and urine] samples must be deemed Fourth Amendment searches"). Similarly, an analysis required to obtain a DNA profile, like the chemical analysis of blood and urine at issue in *Skinner,* generally qualifies as a search, because an individual retains a legitimate expectation of privacy in the information obtained from the testing. *See, e.g., United States v. Mitchell,* 652 F.3d 387, 407 (3d Cir.2011) (en banc) (after discussing the Fourth Amendment search that occurs when a DNA sample is collected directly from a person's body, discussing separately "[t]he second 'search' at issue," which was, "of course, the processing of the DNA sample and creation of the DNA profile for CODIS. This search also has the potential to infringe upon privacy interests.").
>
> By contrast, in *Edwards,* the analysis at issue examined paint chips found in the defendant's clothing, which did not implicate the privacy concerns inherent in the use of physiological and medical information obtained from DNA analysis that

> was addressed in *Skinner. See Edwards,* 415 U.S. at 801–02, 94 S.Ct. 1234. Thus, in the present case, while Davis may not have had any expectation of privacy in the outward appearance of the clothing once it was in police custody, we nevertheless must consider the type of analysis conducted on that clothing to determine whether Davis retained a reasonable expectation of privacy in his DNA on the clothing, or in the DNA profile obtained from it.

Id. at 243–44.

The Fourth Circuit held *Edwards* inapplicable because Davis' clothing was seized when his status was that of a reported crime victim, not pursuant to an arrest. *Id.* at 244.

> Our conclusion that Davis' status as a victim materially distinguishes the present case from *Edwards* is supported by our precedent and by decisions of our sister circuits. These decisions, in addressing whether, and under what circumstances, the Constitution allows the collection of DNA samples, uniformly recognize that persons who have not been arrested have a greater privacy interest in their DNA than would persons who have been arrested, such as the arrestee in *Edwards.*
>
> First, our decision in *Jones v. Murray,* 962 F.2d 302 (4th Cir.1992), is instructive. There, we rejected a Fourth Amendment challenge to a Virginia law that required convicted felons in custody to submit blood samples for DNA analysis. We concluded that the identification of a person arrested upon probable cause "becomes a matter of legitimate state interest and he can hardly claim privacy in it." *Id.* at 306. Additionally, we recognized that "we do not accept even [a] small level of intrusion, [such as fingerprinting] for free persons without Fourth Amendment constraint." *Id.* at 306–07 (citing *Davis v. Mississippi,* 394 U.S. 721, 727, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969)). Thus, we emphasized that a court's constitutional analysis may differ depending on whether the person is an arrestee or a "free person."
>
> Our sister circuits, in upholding DNA collection statutes against Fourth Amendment challenges, likewise have recognized that the status of an individual whose DNA is sought is material to the issue whether he had a reasonable expectation of privacy in that DNA. In *Mitchell,* for example, the Third Circuit sitting en banc upheld the suspicionless collection of DNA samples from arrestees principally on the basis that the fingerprinting of arrestees did not violate the Fourth Amendment. 652 F.3d at 411 (citing *Hayes v. Florida,* 470 U.S. 811, 813–18, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) and *Davis,* 394 U.S. at 727, 89 S.Ct. 1394); *see also Mitchell,* 652 F.3d at 402 & n. 13 (collecting authority and noting that "[e]very federal circuit court to have considered [the federal DNA Act and its state law analogues] as applied to an individual who has been convicted and is either incarcerated or on probation, parole, or supervised release has upheld the constitutionality of the challenged statute"). Additionally, in *United States v. Kincade,* 379 F.3d 813 (9th Cir.2004) (en banc), a plurality of the Ninth Circuit held that the federal DNA act requiring the collection of DNA samples from

convicted felons was constitutional. *See* 379 F.3d at 835–36 (O'Scannlain, J., plurality opinion) (noting "the obvious and significant distinction between the DNA profiling of law-abiding citizens who are passing through some transient status (*e.g.,* newborns, students, passengers in a car or on a plane) and lawfully adjudicated criminals whose proven conduct substantially heightens the government's interest in monitoring them and quite properly carries lasting consequences that simply do not attach from the simple fact of having been born, or going to public school, or riding in a car"); *see also Green v. Berge,* 354 F.3d 675, 678–79 (7th Cir.2004) (rejecting Fourth Amendment challenge to law requiring DNA samples from felons and contrasting felons from persons not otherwise in custody); *id.* at 679–81 (Easterbrook, J., concurring) (constitutional challenges to DNA—collection statutes differ depending on the status of the person whose DNA is being collected, and noting that "[t]his appeal does not present the question whether DNA could be collected forcibly from the general population").

Unlike the cases cited immediately above, however, which concerned parolees, persons on supervised release, convicted felons, or arrestees, the HCPD had possession of Davis' DNA because he was the victim of a crime. Thus, the above cases inferentially provide support for Davis' position, because they all distinguish an arrestee or one convicted of a crime from members of the general public at large.

These cases, however, do not directly answer the question before us, because they involved challenges to the *collection* of DNA samples, and not, as here, a challenge to the extraction of DNA or retention of a DNA profile when the police already had lawful possession of the DNA sample. And, for the same reason, these cases do not eliminate any consideration of *Edwards* in circumstances like these. *But see United States v. Weikert,* 504 F.3d 1, 16–17 (1st Cir.2007) (suggesting that "it may be time to reexamine the proposition that an individual no longer has any expectation of privacy in information seized by the government so long as the government has obtained that information lawfully.... In short, there may be a persuasive argument on different facts that an individual retains an expectation of privacy in the future uses of her DNA profile"). Nevertheless, we are persuaded by the Supreme Court's analysis in *Skinner,* as applied in *Mitchell* and other cases in the context of DNA, that the extraction of DNA and the creation of a DNA profile result in a sufficiently separate invasion of privacy that such acts must be considered a separate search under the Fourth Amendment even when there is no issue concerning the collection of the DNA sample. *See Mitchell,* 652 F.3d at 407 (citing *United States v. Sczubelek,* 402 F.3d 175, 182 (3d Cir.2005) (citing *Skinner,* 489 U.S. at 616, 109 S.Ct. 1402)).

Based on the foregoing, we conclude that the holding in *Edwards* does not give a law enforcement agency carte blanche to perform DNA extraction and analysis derived from clothing lawfully obtained from the victim of a crime in relation to the investigation of other crimes. Instead, a victim retains a privacy interest in his

> or her DNA material, even if it is lawfully in police custody. Therefore, we conclude that the extraction of Davis' DNA sample from his clothing and the creation of his DNA profile constituted a search for Fourth Amendment purposes.

Id., at 244–46.

Based upon the Court's determination that Davis "retained a reasonable expectation of privacy in his DNA profile" but that his expectation "may have been diminished to some degree because Davis knew that the police had retained his clothing, yet had taken no action to retrieve his personal effects following his release," the searches' reasonableness was then analyzed under the totality of the circumstances approach. *Id.* at 248.

> Applying the totality of the circumstances test here requires us to "assess [ ], on the one hand, the degree to which [the search] intrudes upon [Davis'] privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Knights,* 534 U.S. at 119, 122 S.Ct. 587. When considering the magnitude of the intrusion upon Davis' privacy, we think it very significant that these DNA searches were conducted in 2004, at a time when Davis was a free citizen and had never been convicted of a felony. The PGCPD extracted Davis' DNA from his clothing, created Davis' DNA profile, and checked that profile against evidence on the CODIS database, all while Davis was a free citizen who retained a reasonable privacy interest in his DNA sample and DNA profile, as we have discussed. However, his privacy interest was diminished to a degree by the fact that he knew that the police had retained his bloody clothing, and yet did nothing to retrieve the clothing or otherwise claim ownership in it.

Id. at 249.

In considering the government's interest in conducting the search, the Court noted law enforcement's "strong and important interest in apprehending and prosecuting those who have committed violent crimes." *Id.*

> In balancing these competing interests to determine the reasonableness of the searches at issue, we are guided by the weighty reasons underlying the warrant requirement: to allow a detached judicial officer to decide "[w]hen the right of privacy must reasonably yield to the right of search," and not "a policeman or Government enforcement agent." *Johnson v. United States,* 333 U.S. 10, 13–14, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (quoted in *Davis,* 657 F.Supp.2d at 653.) The right protected is "a right of personal security against arbitrary intrusions by official power." *Coolidge v. New Hampshire,* 403 U.S. 443, 455, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The importance of the judge or magistrate in the process is why the exceptions to the warrant requirement are "jealously and carefully drawn." *Id.*

Id. at 249.

After performing the requisite balancing, the Fourth Circuit ruled that the extraction, testing, and creation of Davis' DNA profile was an unreasonable search.

> In this case, by contrast, Davis' DNA was specifically sought as a result of police suspicions that he was involved in the Neal murder, and based on some quantum of proof amounting to less than probable cause. Indeed, the parties' briefs and the record before us are devoid of any factual basis for concluding that Davis was involved in the Neal murder. Thus, the precise concern that the warrant requirement was designed to alleviate is plainly before us here. That fact alone severely diminishes the reasonableness of the search. Thus, our comparison of the respective interests leads us to conclude that the government's extraction of Davis' DNA sample from his clothing and creation of his DNA profile for testing in the Neal murder investigation constituted unreasonable searches under the Fourth Amendment.

Id. at 250.

Up until March 8, 2019, Bentaas was a member of the general public. Bentaas' status as a completely free person carries an even greater privacy interest in her DNA than that of Davis – a reported crime victim who was aware that law enforcement was in possession of his DNA materials. Despite the lawful trash pull, law enforcement's "extraction of DNA and the creation of a DNA profile" from the items seized is a "separate invasion of privacy ... that must be considered a separate search under the Fourth Amendment." *Id*. at 246 (citing *U.S. v. Mitchell,* 652 F.3d 387 (3rd Cir. 2011); *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989)).

Parabon Labs advised Detective Webb that its research had uncovered family names in the Sioux Falls and Hutchinson County areas, but that "what they had found so far was approximately a third cousin which was fairly far out from the direct DNA of this baby." Bentaas' DNA was specifically sought as a result of police attempting to "determine if in fact we were on the right track with this family tree" that had been started by Parabon Labs, "and based

on some quantum of proof amounting to less than probable cause." *Davis*, 690 F.3d at 250. Here, as in *Davis*, "the precise concern that the warrant requirement was designed to alleviate is plainly [before this court]." *Id.*

Bentaas' "right of personal security against arbitrary intrusions by official power" is not at law enforcement's discretion. *Id.* at 249 (quoting *Coolidge v. New Hampshire,* 403 U.S. 443, 455 (1971)). As a free member of the general public, law enforcement's extraction of Bentaas' DNA from the items pulled from the trash and the subsequent creation of her DNA profile for testing in the Baby Doe case constitutes an unreasonable search under the Fourth Amendment. All evidence obtained from the violation of Bentaas' constitutional right against unreasonable search seizure must be suppressed.

B. *Schwartz* and Abandonment Doctrine Cases Remain Good Law

It is undisputed that the trash pull was permissible under South Dakota and federal law.

> It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.

California v. Greenwood, 486 U.S. 35, 40-41 (1988).

Although the abandonment doctrine, as discussed in *Greenwood* and *State v. Schwartz*, 2004 SD 123, 689 N.W.2d 430, permits police to seize an item discarded by an individual without a warrant, it does not permit law enforcement to search any DNA unavoidably deposited by that person on an item. In *Schwartz*, the trash pull revealed "approximately twenty-two pieces of tin foil with black burn marks on them," "one yellow pen tube with apparent white powder

residue inside and a small portion of a green, leafy substance." *Schwartz*, ¶ 3, 689 N.W.2d at 432-33. All items were in the trash can on the Schwartzs' curb. *Id.* at 432. DNA is constantly dispersed – but this spontaneous and uncontrolled act is separate and distinct from placing an item into the trash and then placing that trash on the curb for third-party pickup. Though a party expects that their trash may be viewed or accessed by others, an individual expects that his or her DNA sequence will remain unanalyzed and anonymous.

In affirming the trial court's decision not to suppress the evidence obtained from the trash pull, the South Dakota Supreme Court employed a "two-part test to determine whether an individual has a sufficient privacy interest in the area search for constitutional protection to apply: '(1) whether the defendant has exhibited and actual subjective expectation of privacy and (2) whether society is willing to honor this expectation as being reasonable.'" *Id.* (quoting *Cordell v. Weber*, 2003 SD 143, § 12, 673 N.W.2d 49, 53. The Court held that the Schwartzs' had not shown a subjective or an objection privacy expectation privacy in their trash. *Id.* ¶¶ 17-19, at 435-36.

> There is no showing of any subjective expectation by Schwartzes as to their claim of privacy in the trash. Neither of them testified at the suppression hearing. They fail to point to any other evidence in the record that would establish that expectation.
>
> The trash was discarded into a standard City of Brookings garbage receptacle. Awaiting collection by the Brookings Sanitation Department, the trash receptacle was placed on the curb of a city street, an area readily accessible to the public. In addition, the trash pulls were conducted according to the City's normal garbage collection schedule. Agent Even had articulable reasons for focusing on the Schwartzes' trash. This was not some police action on caprice or whim or a random check of an entire neighborhood's garbage. We simply do not believe that society as a whole contemplated the necessary expectation of privacy under these facts to preclude the warrantless search of the Schwartzes' trash. Accordingly, the warrantless trash pulls conducted by Agent Even were not unreasonable searches and seizures under either the Fourth Amendment or the South Dakota Constitution, and the trial court properly denied the Schwartzes' motion to

suppress the evidence found during these searches.

Id. ¶ ¶ 18-19, at 436.

The logical extension of the rationale and result in *Schwartz* supports constitutional protection for warrantless extraction and creation of a DNA profile. The multitude of statutes and federal acts protecting the private and confidential information contained within DNA illustrates both Bentaas' subjective and objective expectation of privacy. Society has not only contemplated the necessary expectation of privacy for DNA but it has firmly and consistently recognized, relied upon, and demanded that expectation of privacy. Accordingly, and without disrupting *Schwartz*, the warrantless extraction and creation of a DNA profile in this matter is an unreasonable search in violation of the Fourth Amendment.

C. Exclusionary Rule Suppresses All Evidence Obtained Following the Extraction, Testing, and Sequencing of DNA

"When the issue is whether challenged evidence is the fruit of a Fourth Amendment violation, the defendant bears the initial burden of establishing the factual nexus between the constitutional violation and the challenged evidence." *State v. Heney*, 2013 SD 77, ¶ 11, 839 N.W.2d 558, 562 (quoting *United States v. Marasco*, 487 F.3d 543, 547 (8th Cir. 2007)). Once Bentaas "has carried the burden of proving that the challenged evidence is the fruit of the poisonous tree, the burden again shifts to the government to ultimately 'show that its evidence is untainted.'" *Id.* ¶ 22 n.2 (quoting *Alderman v. United States,* 384 U.S. 165, 183 (1969)).

> Evidence obtained because of an unlawful seizure ordinarily must be suppressed under the exclusionary rule. [T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree. However, the progenitor of the 'fruit of the poisonous tree' doctrine—*Wong Sun*—recognized that original lawless conduct would not taint all evidence forever. The question becomes whether 'the connection between the

> lawless conduct of the police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint.'

State v. Tenold, 2019 SD 66, ¶ 23, 937 N.W.2d 6, 13 (internal citations omitted).

But for the illegal search and seizure of Bentaas' DNA, a warrant authorizing law enforcement to obtain buccal swabs from Bentaas or her husband would not have been issued.

> [W]hen a search warrant is based partially on tainted evidence and partially on evidence arising from independent sources, [if] the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant apart from the tainted information, the evidence seized pursuant to the warrant is admitted. [T]he question is whether the remaining information presented to the magistrate, after the tainted evidence is excluded, contains adequate facts from which the magistrate could have concluded that probable cause existed for the issuance of the search warrant.

Id. ¶ 27, at 14 (internal citations omitted).

The standard for determining whether probable cause exists sufficient to support the issuance of a warrant is "a showing of probability of criminal activity." *State v. Helland*, 2005 SD 121, ¶ 16, 707 N.W.2d 262, 260. "For a search warrant to issue, the judge must be able 'to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before [the judge], including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Tenold*, ¶ 30, 937 N.W.2d at 15 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

The Honorable Judge Robin Houwman was presented with Detective Mertes' Affidavit of Search Warrant for buccal swabs from Theresa and Dirk Bentaas. *Exhibit 1 – 2019-02-20 Affidavit in Support of Search Warrant*. The tainted evidence is the last paragraph before the buccal request is made:

> 21. On 2-15-2019 Your Affiant received the SDFL report from the items sent for testing. The report stated that female DNA was located on a water bottle, Coors Light can and cigarette butts. The report stated the female DNA could not be

> excluded as being from the biological mother of Baby Doe. The report stated that male DNA was located on a water bottle. The report stated the male DNA could not be exclude (sic) as being the biological father of Baby Doe. The report stated a 2nd male DNA was located on a Samuel Adams Cold Snap bottle is consistent with being from the same paternal lineage (brother to Baby Doe).

Exhibit 1 – 2019-02-20 Affidavit in Support of Search Warrant, pg. 4-5.

After excising this part of the Affidavit, the remainder breaks down to a historical case recitation, a sixth to seventh degree and a sixth to eighth degree link between two possible genetic familial relationships, a family tree created by Detective Mertes, and the attachment of appendices alleged to support the assertions regarding Parabon Labs' results.

A review of Appendices A-B reveals that the reports purported to substantiate law enforcement's claims in paragraphs 12-14 were not attached. *Exhibit 1 – 2019-02-20 Affidavit in Support of Search Warrant*, pg. 6-14. Appendix A is not a Snapshot Genetic Genealogy Report completed by Parabon Labs on Baby Doe – it is the explanation of Parabon Lab's Snapshot Genetic Genealogy service that is available on Parabon's website. *Exhibit 1 – 2019-02-20 Affidavit in Support of Search Warrant*, pg. 6-13. Appendix B is not a Snapshot Genetic Genealogy Report completed by Parabon Labs on Baby Doe – it is a generic Degree of Consanguinity table found at LegacyTree.com. *Exhibit 1 – 2019-02-20 Affidavit in Support of Search Warrant*, pg. 14.

Absent paragraph 21, the February 20, 2019 search warrant does not support a "fair probability that contraband or evidence of a crime will be found" via Bentaas' buccal swab. *Tenold*, ¶ 30, 937 N.W.2d at 15 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). The decision to seek a search warrant for Bentaas' DNA only after receiving the DNA results from the trash pull items speaks for itself. Detective Mertes' reference to the Parabon Labs' Reports without actually providing them further highlights the search warrants deficiencies.

> The exclusionary rule serves to 'make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person.' Once the exclusionary rule is triggered, 'indirect as well as direct evidence; physical tangible materials obtained either during or as a result of an unlawful invasion, come at by exploitation of the illegal search; and testimony of matters observed during an unlawful invasion' are excluded.

State v. Ludemann, 2010 SD 9, ¶ 18, 778 N.W.2d 618, 623 (quoting *State v. Spotted Horse*, 462 N.W.2d 463, 468-69 (S.D. 1990)).

III. Good Faith Exception Does Not Apply

The purpose of the exclusionary rule is to deter police misconduct. *State v. Belmontes*, 2000 SD 115, ¶ 13, 615 N.W.2d 634, 638.

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the *official action was pursued in complete good faith,* however, the deterrence rationale loses much of its force.

State v. Boll, 2002 SD 114, ¶¶37-38, 651 N.W.2d 710, 720-21 (quoting *U.S. v. Leon*, 468 US 897, 919 (1984)).

For an officer's offending conduct to qualify for the good faith exception, the officer must have "acted in the objectively reasonable belief that [his] conduct did not violate the Fourth Amendment." *Id.* "Suppression is not justified unless 'the challenged evidence is in some sense the product of illegal governmental activity.'" *State v. Heney*, 2013 SD 77, ¶ 11, 839 N.W.2d 558, 562 (quoting *Segura v. United States*, 468 U.S. 796, 815 (1984)).

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.

U.S. v. Leon, 468 U.S. at 923.

A. Detective Mertes Exaggerated Parabon Labs' Results and Remarks

Detective Mertes was advised by Detective Webb in January 2019 that Parabon Labs had gotten a DNA match that "was possibly up to a third cousin the family tree" for Baby Doe. Detective Mertes and Detective Webb had a conference call with Parabon Labs. Detective Mertes received both a Snapshot Genetic Genealogy and a Snapshot Phenotype Report from Parabon Labs. Detective Mertes took the information and put together a "basic family tree." Detective Mertes shared that family tree with Parabon's genealogist. Detective Mertes was "advised by their genealogist that this family tree that I had composed looked promising as being a familiar link. They did recommend follow-up DNA to possibly establish if this in fact was correct based on the family tree that they had been provided."

Detective Mertes boasts more than a decade of law enforcement experience. As illustrated by Detective Mertes' February 20, 2019 request for a search warrant for a buccal swab, he is aware that DNA extraction requires compliance with Fourth Amendment protections. Detective Mertes knew that the information he had collected could not meet the necessary search warrant threshold. Had it, he would have sought a search warrant for Bentaas' buccal swab earlier. Under the guise of a trash pull, Detective Mertes circumvented the search warrant requirement for DNA and deprived Bentaas of her Fourth Amendment right against unreasonable search and seizure.

Additionally, the Genetic Genealogy and Phenotype Reports from Parabon are far less definitive than the assertions Detective Mertes made in the search warrant provided to Judge Houwman.

> The genetic genealogy (GG) assessment resulted in 0 promising matches from a genealogy perspective (>300 cM of shared DNA; second cousin or closer) and 1 potential helpful math (70cM-300cM; third cousin or closer). A centimorgan (cM)

> is a measure of genetic distance. Closer relatives share larger amounts of DNA (more cM).
>
> This sample was assigned a Level 4 on Parabon's genetic genealogy assessment scale.

Exhibit 2 – Parabon Snapshot Phenotype Report – SFPD-SD-1981-6509 Snapshot, pg. i.

> Your case has been assigned a Genetic Genealogy (GG) assessment level ranging from 1-5, depending on our estimation of whether it can be solved using GG analysis – i.e., result in a list of highly promising candidate subjects – with one (1) being the most promising and five (5) being the least promising:
>
> ...
>
> **Level 4: Low Probability of being solved by GG analysis, but likely to generate actionable info.** This case was determined to be workable, but highly unlikely to be solvable with standard GG analysis alone. However, a collaborative investigation that combines Parabon's genetic genealogy expertise with your investigative capabilities is likely to generate actionable information for your case. We will start with GG analysis and produce the riches set of family trees possible with our resources to kickstart your investigation.

Exhibit 2 – Parabon Snapshot Phenotype Report – SFPD-SD-1981-5609 Snapshot, pg. 3-4.

> The "Top DNA Match" for Baby Doe was listed as "John Howard" from Gilbert, AZ.

Exhibit 3 – Parabon Snapshot Genetic Genealogy Report – SFPD-SD-1981-5609 Snapshot, pg. 1. "The amount of genetic sharing between John and the Subject is most consistent with a sixth to seventh degree relationship, which includes second cousins once-removed through third cousins, or genetically equivalent." *Id.* "The second top match was listed as "DAEGates" and was identified as Dorothy A. Gates (maiden name Esser) of Madison, WI, b. Jul, 1941." *Id.* "The amount of genetic sharing between Dorothy and the Subject is most consistent with a sixth to eighth degree relationship, which includes second cousins once-removed through third cousins, or genetically equivalent." *Id.* at 2.

> **D. Conclusions**
>
> Based on the amount of DNA shared with the top matches, we have been able to identify some ancestral couples from which the Subject is likely to descent. The

> Subject is likely to be of Germanic and Norwegian ethnicity. However, Parabon has not been able to determine the connections between the second match, Dorothy (Esser) Gates, and the other matches, beyond the identified connection between her and Heidi Rose Ross. It is our hope that with an additional block of research time, collaboration with the agency, and targeted DNA testing, Parabon will be able to further narrow down the field of potential candidates and provide a more solid conclusion regarding the likely identify of the Subject.

Id. at. 5.

Detective Mertes' ends justify the means approach in extracting DNA from the trash pull items without a search warrant and the subsequent search warrant presented to Judge Houwman removes his conduct from good faith consideration. *Boll*, ¶¶37-38, 651 N.W.2d at 720-21 (quoting *U.S. v. Leon*, 468 US 897, 919 (1984)). All the evidence, direct and indirect, should be suppressed as "the product of illegal government activity." *Heney*, ¶ 11, 839 N.W.2d at 562 (quoting *Segura v. United States*, 468 U.S. 796, 815 (1984)).

B. 4th Amendment Protections Must Evolve with Technology; Deterrence Critical

Detective Mertes' unconstitutional conduct is the type this Court should seek to deter. This is especially true given the constantly evolving landscape of DNA analysis capabilities. Law enforcement's use and reliance upon Parabon Labs and similar companies is only in its beginning stages.

By March 2019, less than a year from Parabon Labs' introduction of its "Snapshot Genetic Genealogy Service," "Parabon has assisted law enforcement agencies in making positive identifications in nearly 50 cases that were cold for over 1,000 years in total." *Exhibit 4 – 2019-03-12* Parabon Helps Investigators Solve 1,000 Years of cold Cases in 9 Months, https://www.ammoland.com/2019/03/parabon-investigators-solve-1000-years-of-cold-cases-in-9-months/#axzz6DlZL3299. By October 2019, the number of positive identifications jumped to 69. *Exhibit 5 – 2019-10-18* A local company is helping catch cold case criminals from coast to coast. Here's where it's gone to work,

https://www.bizjournals.com/washington/news/2019/10/18/a-local-company-is-helping-catch-cold-case.html.

> If you've read a news story in the past year and a half about a new lead in an unsolved crime, chances are Parabon NanoLabs Inc. has come onto your radar.
>
> And if not, it's about to.
>
> The Reston-based DNA technology company has been helping police crack decades-old cases – hundreds of thousands of gruesome murders, rapes, abductions and assaults – to narrow suspect lists and find new openings in long-stalled investigations.
>
> The new information can heat those cold cases back up, law enforcement has found, as agencies use Parabon's leads to pinpoint and then investigate possible perpetrators, many of whom plead guilty when a direct DNA match is confirmed. And, slowly but surely, the tight knots around a seemingly impossible collection of unresolved crimes begin to loosen and, then, unravel.

Exhibit 5.

"As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, [the Supreme] Court has sought to 'assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *U.S. v. Kubasiask*, 2018 WL 4846761, *4 (U.S. Dist. Ct., E.D. WI 2018) (unreported in Fed Supp.) (quoting *Carpenter v. U.S.*, 138 S.Ct. 2206, 2214 (2018)).

> Fourth Amendment jurisprudence has evolved as technology has evolved. For example, in *Kyllo*, the Supreme Court held that a thermal imager used to detect heat radiating from the side of a home was a search under the Fourth Amendment and required a warrant. 533 U.S. 27, 34 (2001). The Court reasoned that the government could not have obtained the information without physical intrusion into a constitutional protected area. *Id.* More recently, the Supreme Court held that the government's use of a GPS tracking device attached to a vehicle registered to the defendant's wife constituted a search for Fourth Amendment purposes. *United State v. Jones*, 565 U.S. 400, 404 (2012). Three months ago, the Supreme Court held that the government's acquisition of cell-site location information (CSLI) violated the Fourth Amendment. *Carpenter v. United States*, 138 S.Ct. 2206, 2217. The Court reasoned that mapping a cell phone's location over the course of 127 days provided an "intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Id.*

Id.

DNA extraction and testing by law enforcement is an intrusion of constitutional dimension supported by U.S. Supreme Court precedent in *Kyllo, Carpenter,* and *Jones.* The continued and rapid scientific and technological advancements utilized by law enforcement demand that this Court act to "instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *Boll*, ¶¶37-38, 651 N.W.2d at 720-21 (quoting *U.S. v. Leon*, 468 US 897, 919 (1984)). Deterring officers, such as Detective Mertes, from future intrusions in "areas more personal and more likely to implicate privacy interests" such as those "of one's health or genetic makeup" without a warrant is critical to preserving Bentaas and all South Dakota citizens' Fourth Amendment rights. *Norman-Bloodsaw*, 1355 F.3d at 1269.

IV. CONCLUSION

Based upon the foregoing, Defendant Theresa Rose Bentaas respectfully requests this Court GRANT the Motion to Suppress DNA Extraction, Testing, Sequencing and DNA Profile and exclude from trial the following evidence obtained from the unlawful invasion and subsequent exploitation of the illegal search:

- Laboratory Report No. 17-0050.3;
- 2-27-19 Interview of Dirk Bentaas by Detective Patrick Mertes
- 2-27-19 Interview of Dirk Bentaas by Officer Christopher Schoepf;
- 2-27-19 Interview of Theresa Bentaas by Officer Detective Harris;
- 2-27-19 Interview of Theresa Bentaas by Detective Michael Webb;
- 2-28-19 Interview of Paulette Brech-Josten by Detective Patrick Mertes;

- 2-28-19 Interview of Paulette Brech-Josten by Detective Michael Webb;
- 2-28-19 Interview of Kim Balk Phelps by Detective Patrick Mertes;
- Buccal Swab of Theresa Bentaas;
- Buccal Swab of Dirk Bentaas; and
- Laboratory Report No. 17-0050.

Dated this 14th day of February, 2020.

/s/ Raleigh Hansman

Clint Sargent
Raleigh Hansman
MEIERHENRY SARGENT LLP
315 S. Phillips Ave.
Sioux Falls, SD 57104
clint@meierhenrylaw.com
raleigh@meierhenrylaw.com
(605) 336-3075
Attorneys for Theresa Rose Bentaas

Filed: 2/14/2020 2:20 PM CST Minnehaha County, South Dakota 49CRI19-001657