IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MARK BUZA,** **Defendant and Appellant.**	**No. S223698**

First Appellate District, Division Two, No. A125542
San Francisco County Superior Court, No. 207818
Honorable Carol Yaggy, Judge

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PLAINTIFF/RESPONDENT PEOPLE OF THE STATE OF CALIFORNIA

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The California District Attorneys Association as amicus curiae hereby seeks permission to file the enclosed amicus curiae brief in support of Plaintiff/Respondent the People of the State of California.

The California District Attorneys Association (CDAA) is the statewide organization of California prosecutors. CDAA is a professional organization that has been in existence for over 90 years, and was incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2,800 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutors' views as amicus curiae in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

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

Your amicus believes that further argument and briefing will be of benefit to the Court in its evaluation and resolution of this case. Amicus is able to present

and demonstrate to the Court how the principles and practices at issue in this case, namely, the collection of DNA samples pursuant to statute from persons arrested for felonies, serve an overwhelming public interest. Such matters are relevant to the disposition of this case.

Pursuant to Rule 8.520(f)(4), applicant states that no party nor counsel for a party in this appeal authored in whole or in part the proposed amicus brief, nor made any monetary contribution to fund the preparation or submission of the proposed amicus curiae brief. Applicant further states that no person or entity made any contribution to fund the preparation or submission of the proposed amicus brief other than amicus curiae and its members.

Accordingly, applicant asks this Court to permit the filing of the attached amicus curiae brief and allow the California District Attorneys Association to appear as amicus curiae in support of respondent the People of the State of California.

Date: November 18, 2015 Respectfully submitted,

MARK ZAHNER
Chief Executive Officer
California District Attorney Association

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ISSUES PRESENTED

1. Whether the statutory requirement (Penal Code § 296) that a person under lawful arrest for a felony provide a DNA sample for forensic database identification purposes violates the search and seizure clause of the Fourth Amendment.

2. Whether the same statutory requirement violates the search and seizure clause of Article I, section 13 of the California Constitution.

FACTS AND PROCEDURAL SUMMARY

Appellant was arrested for felony arson (setting fire to a police vehicle). After his arrest, while he was in custody and before his first court appearance, he was asked to provide a post-arrest DNA sample as required under Penal Code § 296. The sample was to be connected with a swab rubbed against the inside of the cheek. Buza refused to do so, even when told his refusal constituted a crime. At trial, he was convicted of both the arson offenses and a violation of Penal Code § 298.1, failure to provide a required DNA sample.

Appellant claimed on appeal that being required to provide a DNA sample before conviction violates the Fourth Amendment. The Court of Appeal agreed, and in August 2011 reversed the DNA sample conviction, citing the Fourth Amendment to the U.S. Constitution.

This Court granted review in October 2011. California Supreme Court No. S196200. After briefing, in January 2013 this Court deferred consideration of the case pending the ruling of the United States Supreme Court in *Maryland v. King*,

No. 12-207 in that Court. When the U.S. Supreme Court issued its ruling in *King* in June 2013 (569 U.S. __, 133 S.Ct. 1958), this Court referred the case back to the Court of Appeal, for reconsideration in light of *King*.

Following additional briefing, in December 2014 the Court of Appeal again reversed. The new reversal relied not on the Fourth Amendment of the U.S. Constitution, but rather on the search and seizure clause of the California Constitution, Article I, section 13.

The Attorney General again petitioned for review, which this Court granted.

ARGUMENT

I. INTRODUCTION

Crime in California continues to pose a significant public safety threat. In 2014, there were 151,425 violent crimes reported in California (1,697 homicides, 9,397 rapes, 48,650 robberies, and 91,681 aggravated assaults). *Crime in California 2014,* a publication of the California Department of Justice, Division of California Justice Information Services, Bureau of Criminal Information and Analysis, Criminal Justice Statistics Center, at p. 5. The overall clearance rate for these crimes was less than half (47.2%). Id., p. 15. These statistics demonstrate that tens of thousands of violent crimes remain unsolved every year.

The use of state and national CODIS[1] or DNA database programs, when operated to the fullest extent as authorized by state law, serve a critical role in the 21st century justice system: fully identifying arrested persons, including connecting them with their crimes, so that their danger to jail staff and the community can be assessed in making decisions about their custody status; the connected purposes of solving and prosecuting criminal offenses, obtaining justice

[1] CODIS is an acronym for Combined DNA Index System.

for victims, and holding predatory criminals accountable. It promotes judicial economy, aids in the effective allocation of incarceration resources, assists in the prevention of crime, provides crime victims with an earlier resolution than would otherwise exist, and exonerates innocent persons who might otherwise be the focus of criminal investigation. Taking a DNA sample after arrest is a minimal intrusion, no greater than fingerprinting, which is far outweighed by the public interest served.

Your amicus agrees with the points made in the excellent briefing put forward by the Attorney General in this matter. Amicus submits this brief to bring to this Court's attention additional information and arguments in support of the arrestee DNA collection program enacted by the votes of more than 7 million California voters, over 62%.

II. DIFFERENCES AS TO THE OFFENSES TARGETED IN THE CALIFORNIA ARRESTEE DNA PROGRAM AND THE PROGRAM APPROVED IN *MARYLAND V. KING* DO NOT WARRANT THE REJECTION OF THE CALIFORNIA STATUTE

Appellant and the Court of Appeal contend that differences between the Maryland program for arrestee DNA sampling upheld in *Maryland v. King*, supra, and the California program argue against striking the balance of interests in favor of the California statute. One point of particular focus is that the California scheme covers persons arrested for any felony, while the Maryland scheme embraces only a specified list of crimes. Slip Opinion, pp. 15-17; Appellant's Answer Brief on the Merits (hereafter AAB), pp. 65-71. Appellant characterizes these as "selected violent crimes." AAB, p. 66. In fact, the Maryland framework approved in *King* includes burglaries committed without violence, some misdemeanors under Maryland law, and crimes that are felonies in Maryland but could only be misdemeanors in California.

As the U.S. Supreme Court recognized, Maryland DNA arrestee sampling includes burglary of the first, second or third degree. *King*, supra, 133 S.Ct. at

1967; Md. Pub.Saf.Code Ann. §§ 2-501(b), 2-504(a)(3)(i). Third degree burglary includes breaking and entering the dwelling of another with intent to commit *any* crime. Md. Crim.Law Code Ann. § 6-204.[2]

The breaking requirement for Maryland burglary in one sense makes that crime more narrow than in California (where breaking is not required). Yet "breaking" can be minimal – lifting a latch, turning a knob, pushing open a door, or raising an unfastened window. *Reagan v. State*, 2 Md.App. 262, 234 A.2d 278 (1967). And in another respect Maryland law is broader. California residential burglary requires the perpetrator intend to commit theft or any *felony*. California Penal Code § 459.[3] The Maryland statute for third degree burglary is violated if the perpetrator intends to commit *any* crime, not limited to felonies. Md. Code Ann. Crim.Law § 6-204(a).

This puts perspective on *King*'s discussion of "serious crimes," and any comparison of the Maryland and California schemes. An offender who pushes open a door and enters with the intent to commit misdemeanor destruction of property (vandalism) or simple assault, common scenarios, would commit felony third degree burglary under Maryland law, subject to DNA collection. In California, he would only be guilty of misdemeanor trespass under Penal Code § 602.5(a) or (b), and not subject to DNA collection.

It is also noteworthy that in Maryland, "attempts" are common law misdemeanors. *Wyatt v. State*, 901 A.2d 271, 274 (Md. Ct. Sp. App. 2006); *State v. North*, 739 A.2d 33, 35 (Md. 1999). Since an "attempt" to commit a Maryland

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[2] Maryland first degree burglary is breaking and entering a dwelling with intent to commit theft or a crime of violence; second degree is breaking and entering a storehouse with intent to commit theft, a crime of violence, arson, or taking a firearm. Md. Code Ann. Crim. Law §§ 6-202, 6-203.

[3] California Penal Code § 459 states: "Every person who enters any house… with intent to commit grand or petit larceny or any felony is guilty of burglary." Section 460 specifies burglaries of an inhabited dwelling are first degree; others are second degree.

"violent felony" is also a listed violent crime, such "attempt" misdemeanors qualify a Maryland arrestee for DNA collection. Md. Pub.Saf.Code Ann. §2-504(a)(3)(i); Md. Code Ann. Crim.Law. § 14-101(a)(17).

In considering this point, it is important not to be misled by California statutes listing certain felonies as "serious" or "violent." Those categories are for sentencing enhancements for certain prior convictions. California Penal Code §§ 667.5(c), 667(a), 1192.7(c). The fact some prior convictions are sentencing enhancements in California does not mean other crimes are not "serious," as that term is uses in *King*. *King* in fact speaks of serious *crimes* (not felonies).

What is "serious" for *King*/DNA purposes should be viewed in light of the authority *King* cited. *King* relied on factors weighed in *Florence v. Board of Chosen Freeholders*, 556 U.S. __, 132 S.Ct. 1510 (2012). *Florence* approved procedures requiring persons arrested and booked for failure to pay a fine to submit to a strip search and "close visual inspection," including moving or spreading genitals, and coughing in a squatting position. The fact *Florence* approved these invasive intrusions for a booked suspect for even minor offenses undercuts appellants' argument that for the lesser intrusion of a DNA cheek swab, *King* only permits the procedure for a short, restrictive list of felonies. See *King*, supra, 133 S.Ct. at 1964 – 1978.

III. CASES CITED BY APPELLANT AND THE COURT OF APPEAL UNDER CALIFORNIA CONSTITUTION ARTICLE I, § 13, DO NOT SUPPORT THE CONCLUSION THAT PROVISION SHOULD RESTRICT FELONY BOOKING PROCEDURES MORE THAN THE U.S. CONSTITUTION

In support of the argument that California Constitution Article I, § 13 should be looked to as independent state grounds for invalidating Penal Code § 296 and the arrestee DNA collection process, appellant and the Court of Appeal looked to several California cases dealing with search following arrest. None of

them supports the conclusion that the California Constitution compels the invalidation of § 296.

The lead case of this series, *People v. Brisendine* (1975) 13 Cal.3d 528, involved a defendant arrested initially for the misdemeanor of illegal campfire. He was escorted from the camping area, and his belongings were searched for a weapon. In a frosted bottle and a tin foil packet in an envelope, which obviously had no weapons, officers found illegal drugs (pills) and marijuana. While approving a check for weapons under the circumstances, this Court held the search had gone too far once it was obvious there were no weapons, and for the campfire offense the defendant would have been given a simple citation to appear, not booked into jail. The Court relied on Article I, § 13 of the California Constitution, declining to follow U.S. Supreme Court precedent under the Fourth Amendment to the U.S. Constitution (*United States v. Robinson* (1973) 414 U.S. 218). *Brisendine* must be read in conjunction with *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, on which it relied, which dealt with a search following a traffic arrest, and noted that under California law, the traffic arrest would only warrant a citation.

Other cases relied on by the appellant and the Court of Appeal include *People v. Norman* (1975) 14 Cal.3d 929, which involved a vehicle stop, where the defendant threw a tobacco pouch (found to contain drugs) under a vehicle; and *People v. Longwill* (1975) 14 Cal.3d 943 which involved a misdemeanor arrest for public intoxication, when marijuana was found on the defendant's person. These cases again involve offenses where the procedures relating to the arrest for minor offenses would not necessarily, or even likely, involve jail booking. The use of the California Constitution to determine the scope of permissible intrusion on a defendant in these cases naturally would be determined with reference to the flexible, non-jail booking procedures California statutes provide for such minor offenses.

But none of these cases considered or decided the scope of permissible intrusion, including the taking of biometric records and samples, in a felony arrest and booking. *Brisendine* expressly stated that it was not addressing the scope of intrusions on a person who would be booked and incarcerated, which the defendant in that case would not have been. 13 Cal.3d at 547. *Norman* and *Longwill*, which also dealt with arrests for minor offenses that would not involve custodial booking, should be viewed in the same way.

Similarly, *People v. Laiwa* (1983) 34 Cal.3d 711 involved a defendant arrested for the misdemeanor of being under the influence of drugs, and the search at the place of arrest of an arrestee's tote bag which the prosecution justified as being an "accelerated booking search." Since state law applicable at that time had held that a search at the scene of the crime or arrest could not be justified as simply being an accelerated booking search, the evidence was suppressed. The case did not address the scope of permissible taking of biometric records and samples at the time of a felony booking.

Thus, while these cases do construe California Constitution Article I, § 13, they do not address in any way how that clause should be interpreted when considering the procedures permitted for recording identity and taking biometric markers and samples in a felony booking.

IV. BALANCING THE MINIMAL INTERESTS OF THE DEFENDANT AGAINST THE SUBSTANTIAL INTERESTS OF THE STATE, UNDER EITHER THE U.S. CONSTITUTION OR THE CALIFORNIA CONSTITUTION, THE STATE'S INTERESTS ARE SUFFICIENT TO JUSTIFY TAKING A DNA SAMPLE ON A FELONY ARREST

Appellant and the Court of Appeal contend the imposition on the defendant of taking his DNA sample is a significant intrusion that outweighs any state interest, under the California Constitution. In fact, the intrusion is slight, comparable to the taking of fingerprints. Other concerns raised, relating to the extent of the genome revealed and the retention of the DNA sample, when properly analyzed, do not increase the weightiness of the defendant's interests. On

the other hand, the state's interests are substantial, and under both the U.S. Constitution and the California Constitution, justify California's statutory scheme for felony arrestee DNA samples.

A. The Imposition on the Defendant of Taking a DNA Sample, Comparable to Taking Fingerprints, is Minor

The buccal swab process involves the collection of epithelial cells from the inner surface of the cheek. The cells are captured with a collection device, which may be a simple cotton swab, or a plastic device, similar in size and shape to a popsicle stick, which has one surface with specialized paper, fabric, or foam rubber. The collection device is rubbed several times against the inner surface of the cheek. It is no more intrusive and takes less time than brushing one's teeth. Written instructions from three different agencies (California State Department of Justice, Ohio Department of Rehabilitation and Correction, and the FBI) describing the process can be found on-line:

> http://ag.ca.gov/bfs/pdf/collection_kit.pdf (California Department of Justice, Buccal DNA Collection Kit Instructions) [4] One should note these instructions call for the subject to use the swab himself/herself, further reducing the intrusiveness of the process.
>
> http://www.drc.ohio.gov/web/drc_policies/documents/52-RCP-05.pdf (Ohio Department of Rehabilitation and Correction, DNA Sample, Instructions for Using Buccal Collection Kit)
>
> https://www.fbi.gov/about-us/lab/biometric-analysis/federal-dna-database/image/easicollect/image_view_fullscreen (FBI, EasiCollect Instructions)

[4] This website citation, and all website citations following, were last viewed on November 14, 2015.

Two training videos demonstrating the taking of a buccal swab for a DNA sample (with the collection device in the mouth for less than 10 seconds) can be found online at:

http://www.youtube.com/watch?v=tFQKYzQZ0yE&feature=related

http://www.youtube.com/watch?v=R4FCz7pQexA&feature=related

Reviewing these materials, it is not surprising that buccal swab DNA sampling has been called "perhaps the least intrusive of all seizures." Epstein, "Genetic Surveillance – The Bogeyman Response to Familial DNA Investigations," 2009 U.Ill. J.L. Tech & Pol'y 141, at 152 (2009).

By comparison, the traditional method for taking a fingerprint sample involves the examiner inking the tips of each of the subject's fingers, then holding each finger, one at a time, and rolling it across the surface of a white card, to leave an inked image of the finger ridge impressions. Videos showing the process for taking inked prints can be viewed online at:

http://www.youtube.com/watch?v=d7N-4UNAzsw

http://www.youtube.com/watch?v=Yh8hXrPO0k4&feature=related

Modern technology adopted by some agencies allows the examiner to forego ink when using an electronic device with a glass surface, from which the fingerprints are scanned electronically. This technology, however, still requires the examiner to hold and manipulate the subject's hands and fingers in the same way as when taking inked prints:

http://www.youtube.com/watch?v=YX68sxEyjYc&feature=related

Even with the inkless, electronic scan method, the subject's hands and each finger are handled, controlled and manipulated by the officer taking the prints for approximately one minute – four to five times longer than taking a buccal swab. Using ink to roll fingerprints onto a white fingerprint card takes even longer, and requires time afterwards for the subject to clean the ink from his/her fingers.

Simple observation of these sources demonstrates taking a buccal swab is no greater physical intrusion or imposition on the person than fingerprinting.

Just as the physical process for taking a DNA sample is no more intrusive than that for taking fingerprints, neither is the use to which the sample is put any different. Both booking fingerprints and booking DNA profiles are saved, entered into a national database, then compared in that database to evidence from unsolved crimes, to identify the arrestee with respect to things in his background which demonstrate his dangerousness, including not only his known, but also his and unknown crimes.

The DNA Identification Act of 1994 (42 U.S.C. § 14132) authorized the FBI to operate the Combined DNA Index System, or CODIS, accepting DNA profiles from federal, state and local laboratories meeting certain qualifications. In its early stages, CODIS accepted only DNA profiles from convicted persons. A 2005 amendment to the federal law (P.L. 109-162, amending 42 U.S.C. § 14132, 14135a), allowed CODIS to accept DNA profiles from states which collect and analyze it at the time of arrest. Today, twenty-eight states and the federal government have arrestee DNA sampling. As of September 2015, CODIS contained nearly 12 million convicted offender DNA profiles, and over 2 million arrestee DNA profiles. See FBI website, CODIS, NDIS Statistics, http://www.fbi.gov/about-us/lab/codis/ndis-statistics.

CODIS also accepts DNA profiles from forensic samples (i.e. crime scene evidence, rape exam evidence, autopsy samples, etc.), with the purpose of attempting to identify perpetrators of unsolved crimes. As of September 2015, CODIS has over 657,000 forensic samples from all 50 states, as well as Puerto Rico, the District of Columbia, and from federal sources. Id. Due to the nationwide nature of the system, a state or local agency will often rely on comparisons with the DNA profiles provided by agencies from all over the country. The CODIS system, in place for over two decades and accepting arrestee

DNA profiles for half of that time, has produced over 296,000 hits, assisting in more than 282,000 investigations. Id.

Fingerprints taken at booking are used in the same fashion. The FBI operates the Integrated Automated Fingerprint Identification System, or IAFIS, which stores not only inked or electronically recorded fingerprints from known subjects, but also is used for the search and comparison of latent (i.e. crime scene) fingerprints to the repository of known fingerprints. The FBI plainly states that part of the function of IAFIS is to "solve and prevent crime." See FBI website, CJIS, Fingerprints & Other Biometrics, IAFIS, available online at: http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis. Latent crime scene prints entered into IAFIS are subject to further analysis and pattern matching, via computer, just as CODIS does for DNA. See Kaye, "A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases," 15 U.PA.J.Const.L. 1095, at 1099 (2013).

In this regard, the assertion by Justice Scalia in his dissenting opinion in *King* that latent prints from crime scenes are not systematically searched against the IAFIS database is puzzling. See *King*, 133 S.Ct. at 1987 (Scalia, J. dissenting). Justice Scalia claims crime scene prints are not systematically checked against IAFIS, "since that requires more forensic work." Id. Why "more forensic work" is a greater barrier obstructing systematic checks in fingerprint cases but not in DNA cases he does not explain. Nor does he address the actual use of IAFIS for crime investigation. Hits of crime scene fingerprints matching known subject prints in IAFIS are estimated to be approximately 50,000 per year. National Institute of Justice, *The Fingerprint Sourcebook,* (August 2011), Moses, Kenneth, "Chapter 6, Automated Fingerprint Identification System (AFIS)," pp. 6-11; Kaye, supra, 15 U.Pa.J.Const.L. at 1099. Of course, since this is only the number of hits, the total number of checks (which would include inquiries where there was no hit) must be even higher. With all due respect to Justice Scalia, how one can assert that 50,000 hits per year (more than 135 per day) is anything other than the

systematic use of the IAFIS database in the investigation of unsolved crimes makes no sense.

In short, arrestee DNA profiles are used in databases to identify the arrested person with respect to both his known and also his previously unknown crimes in the same way fingerprints are.

The Court of Appeal attempted to distinguish DNA sampling from fingerprints in part based on the claim that while the DNA loci used for identification have no known purpose under current scientific knowledge, the DNA buccal swab contains the entire human genome, with genetic information concerning disease predisposition, physical attributes, ancestry, and potentially other factors. Slip opinion, pp. 23 - 25. Appellant likewise emphasizes that the buccal swab DNA sample contains the subject's entire genome. AAB, p. 43. But the DNA sample is only analyzed at specific genetic loci (genes) that have no known biological purpose, to establish identity. It is the profile derived from analysis of these genes that is entered into the CODIS database. The statutes provides strict prohibitions against use of the arrestee's DNA for any purpose other than identification. Penal Code §§ 295.1, 295.2, 299.5(i).

Neither the Court of Appeal nor appellant offer any plausible reason for indulging in the presumption that these statutes will be ignored. Indeed, appellant goes so far as to wildly speculate that genetic evidence might be exploited to find a tendency to engage in criminal behavior, and perhaps lead to preventive detention to stop crime before it happens. AAB, p. 47. This unfounded fantasy completely ignores the direct prohibition about such use of the DNA samples found in Penal Code § 299.5(i) (which prohibits DNA use other than for identification or exclusion) and § 295.2 (which specifically prohibits use of the DNA material for testing to find a causal link between genetics and human behavior). Neither appellant nor the Court of Appeal can point to a single instance of misuse or abuse of the DNA database. Speculation about hypothetical misuse

of technology has no place in search and seizure analysis. As the U.S. Supreme Court succinctly explained in *United States v. Karo* (1984) 468 U.S. 705

> … we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment. A holding to that effect would mean that a policeman walking down the street carrying a parabolic microphone capable of picking up conversations in nearby homes would be engaging in a search even if the microphone were not turned on. It is the exploitation of technological advances that implicates the Fourth Amendment. 468 U.S. at 712

The Court of Appeal and appellant fail to recognize a simple judicial solution to the use of DNA samples for purposes other than identification – prohibit other uses if they are improper, but do not prohibit the use of the DNA for identification. The overreaching and unnecessary solution proposed by appellant and the Court of Appeal is to prohibit the taking of the DNA altogether so that it cannot be used for any purpose, throwing out the baby with the bath water. This conclusion, grounded in the fear that law enforcement officials will disregard the authorizing statutes, does not provide a principled distinction between the taking of fingerprints and the taking of DNA samples at arrest.

In a connected point, the Court of Appeal, and some other authorities, suspect questionable government purposes in the fact the state retains the buccal swab sample after the DNA profile has been developed. Slip opinion, pp. 16, 34, 55; see also *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2009), at 1237 (Schroeder, J., dissenting) (ruling vacated and appeal dismissed, 659 F.3d 761); *United States v. Kincade* 379 F.3d 813 (9th Cir. 2004) (cert. den. 544 U.S. 924) (O'Scannlain, J., plurality opinion at 837, Reinhardt, J., dissenting at 850); see also AAB, pp. 41-47.

This line of argument is based on an unwarranted suspicion or misapprehension of the reasons for retaining the sample. In fact, the swab sample

is retained for quality control and confirmation purposes, in the event a hit is made. California Department of Justice, "BFS DNA Frequently Asked Questions – Retention of Offender DNA Samples," online at http://oag.ca.gov/bfs/prop69/faqs. Other states with similar requirements give the same explanation for retention of the DNA sample. See Texas Department of Public Safety, "Statewide CODIS DNA Database Program – Overview," online at http://www.txdps.state.tx.us/CrimeLaboratory/CODIS/index.htm; Washington State Patrol, "CODIS Laboratory," online at http://www.wsp.wa.gov/forensics/docs/crimelab/codis_brochure.pdf. This is evidence of sound forensic practice, not some intent on the part of the state to invade the privacy of the individual beyond identification analysis.

The attacks on the analogy between DNA sampling and fingerprinting are based on misunderstanding, speculation, or poor analysis. They are, in the whole, unconvincing. Neither appellant nor the Court of Appeal articulate a persuasive theoretical basis for prohibiting DNA arrestee sampling (and its use in a searchable database) that distinguishes the practice from taking fingerprints.

B. The State's Interests in Arrestee DNA Sampling Are Weighty, Providing Ample Justification for the Program

While the imposition on appellant is slight, the interests of the state in arrestee DNA sampling are weighty. The government has substantial interests in the proper identification of those arrested, to ensure that the person arrested is indeed the person who was sought; to ensure it is the same person who later returns to court; to ensure, if the person escapes or flees, that the same person is brought back under the jurisdiction of the court; and to ensure that the subject's prior offenses are known, so that any punishment appropriately accounts for any recidivism, or lack thereof. To these ends, courts have approved taking various records and biometric measurements of arrestees for over a century. *State ex rel. Burns v. Clausmeier*, 154 Ind. 599, 57 N.E. 541 (1900); *Shaffer v. United States*,

24 D.C. App. 417, 425-426 (1904). DNA sampling is simply the most recent and accurate method for meeting these important government purposes.

Indeed, this Court has recognized that a person's identity can be described for purposes of filing a criminal case by reference to his/her DNA profile alone. *People v. Robinson* (2010) 47 Cal.4th 1104. An arrestee DNA sample provides a means whereby the state can identify a person arrested in one case as being the subject of such a "John Doe DNA warrant" issued in another case, analogous to what would happen if a name check or fingerprint check revealed an outstanding arrest warrant. *Robinson* provides a clear example how identification is not just what a person's name is, but also what the person has done, with DNA making the link between the two.

As the U.S. Supreme Court noted in *Maryland v. King*, supra, a related and substantial government interest in DNA sampling is for authorities to know whether a defendant is responsible for a violent crime, a factor that is especially probative in determining whether he/she should be released on bail. 133 S.Ct. at 1973. A person arrested for grand theft will be more likely to appear in court in response to release on own recognizance, or bail, if that is the only crime in his background; less likely if he knows there is a previously undisclosed rape or murder in his background which may be discovered, especially if his conviction for grand theft will trigger the taking of a DNA sample. Police, prosecutors, and courts routinely and properly take a person's background into account when making decisions about bail and jail release, both with respect to whether the person will return to court, and also the danger her or she presents to the community. Even if the person has already been released, new evidence from a DNA sampling hit can be the basis for revaluating bail or release on own recognizance. California law directs that the judge or magistrate setting or denying bail shall take into account the protection of the public, and the probability that the defendant will appear for future hearings, or for trial. Penal Code § 1275(a); see also California Constitution, Article I, section 28(a)(4).

Failing to take advantage of DNA sampling at arrest affects this evaluation. As the Supreme Court noted in *King*, "government agencies around the Nation found evidence of numerous cases in which felony arrestees would have been identified as violent through DNA identification matching them to previous crimes but who later committed additional crimes because such identification was not used to detain them." 133 S.Ct. at 1973.

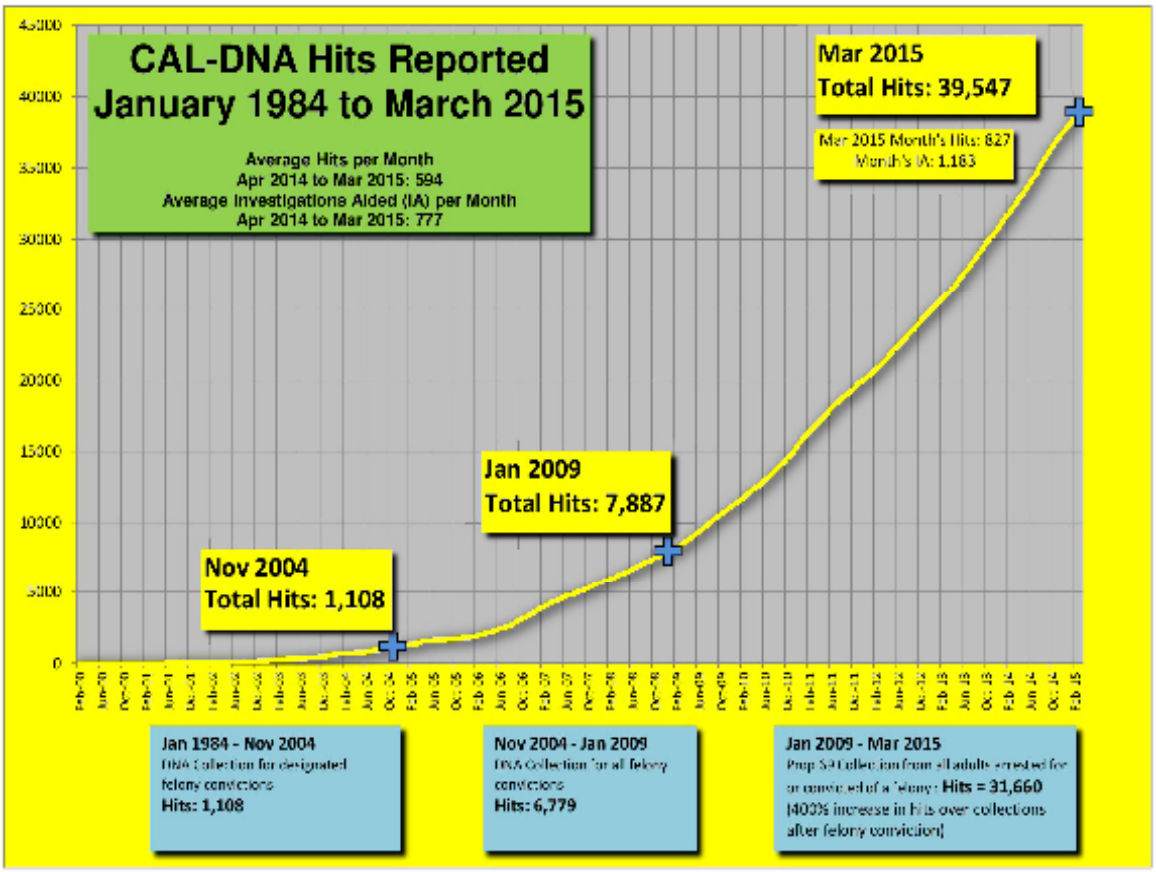
An example of the successful use of an arrestee DNA sample in precisely this fashion is the Octavio Castillo case from Santa Cruz County. In 2011, Castillo was arrested for receiving stolen property. The DNA buccal swab sample taken at the time of his arrest led to his identification as the perpetrator of the kidnapping and rape of a 28-year-old woman. Castillo had been released on his own recognizance (OR) in the receiving stolen property case, and the DNA hit enabled law enforcement to have the OR immediately revoked, preventing him from reoffending. See California Department of Justice website, Bureau of Forensic Services, BFS DNA Frequently Asked Questions, "Effects of the All Adult Arrestee Provision," available at http://oag.ca.gov/bfs/prop69/faqs. Castillo has since been convicted by plea and sentenced to 15 years in prison.

Not all cases where there is an arrestee DNA hit will lead to a change in the bail or OR status in the same case involving the arrest in which the DNA sample was taken, as happened in the Castillo case. Law enforcement may simply arrest the subject for the newly discovered offense, and rely on the bail or custody determination made in that case. In either event, the same public interest is served – having the defendant's overall custody and bail status determined by an informed decision based on the best information about all the crimes he is responsible for, and the threat he poses as a flight risk and to public safety.

Also important is the government interest in solving crimes. As the discussion above demonstrates, this interest is interconnected with the interest in properly assessing a defendant's bail and custody status.

Since the 2013 decision in *King*, evidence of the value of arrestee DNA for these intertwined interests has increased. The latest report from the Bureau of Forensic Services, California Department of Justice (operator of the state's DNA database) indicates since January 2009 (when California began arrestee DNA collection), hits identifying suspects to crimes increased 400% over hits made when the sampling was just from felony convicts – from fewer than 200 per month, to 827 hits in March 2015 alone. In total, more than 31,600 of the 39,547 hits made to crimes have occurred after California began collecting and analyzing arrestee DNA. See statistics and chart posted on the Department of Justice website, "BFS-DNA Frequently Asked Questions – Effects of All Adult Arrestee Provision," at: http://oag.ca.gov/bfs/prop69/faqs; https://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/cal_dna_hit_trends.pdf

A copy of the chart is included here:



The statistics cited above concerning the positive results of CODIS in crime investigations are numbers that represent real cases, with real offenders, and real victims. Examples include:

- People v. Joshua Packer, Ventura Superior Court Nos. 2010013013 and 2012015764 – In May 2009, Brock Husted and his pregnant wife Davina were stabbed to death in their Faria Beach home in Ventura County. DNA samples from the crime were entered into the CODIS database, with no initial hit. In 2010, Joshua Packer was arrested in Santa Barbara County for attempted robbery. A DNA sample from that arrest led to a CODIS match with the Husted murders. See *Ventura County Star*, "Joshua Packer Gets Life Without Parole for Husted Killings," http://www.vcstar.com/news/local-news/courts/joshua-packer-gets-life-without-parole-for-husted-killings_63059796

- People v. Christopher Rogers, Sacramento Superior Court No. 09F07686 – On Thanksgiving Day 2004, Juanita Johnson was found murdered in Sacramento. Evidence indicated a sex assault had occurred. DNA evidence from the crime was uploaded into the CODIS system, with no immediate match. In April 2009, Christopher Rogers was arrested for assault with a deadly weapon, and a DNA sample was taken. When uploaded into the CODIS system, Rogers' DNA matched the DNA from the Juanita Johnson murder. Rogers was prosecuted and convicted at jury trial, and sentenced in March 2011. See Attorney General Press Release, "Brown Releases Study Showing DNA Collected at Arrests Helps Solve Murders, Rapes and Other Violent Crimes," (6/16/2010), published online at http://oag.ca.gov/news/press_release?id=1936; *Sacramento Bee 911 Blog*, "Man Sentenced to 50 Years to Life for Sacramento Murder"

(3/18/2011), published online at http://blogs.sacbee.com/crime/archives/2011/03/man-sentenced-t-6.html

- People v. Shelby Shamblin, Riverside Superior Court No. SWF1101032 – In January 1980, 67 year old Elizabeth Crossman was sexually assaulted and strangled in her home in Hemet. Years later, DNA evidence from the crime was uploaded into the CODIS database, but there was no immediate hit. In October 2010, Shelby Shamblin was arrested on drug charges, and a DNA sample was taken. When entered into CODIS, it matched the Crossman murder case. See *Los Angeles Times*, "Riverside Man Convicted in 33-year-old Murder Case" (6/25/2103), published online at http://articles.latimes.com/2013/jun/25/local/la-me-ln-hemet-cold-case-conviction-20130625

- People v. Anthony Vega, Orange County Superior Court No. 09NF3398 – In 2007 a burglary was committed in Orange County. In 2008, an armed kidnap and home invasion robbery took place in the same county. In both cases, crime scene DNA was located and entered into CODIS, without immediate results. In May 2009, Anthony Vega was arrested in neighboring Los Angeles County on drug charges. The DNA sample taken from Vega at that time, when uploaded into CODIS, matched the 2007 burglary and 2008 home invasion robbery in Orange County. According to the Orange County Superior Court website, Vega was convicted in June 2011. See Attorney General Press Release, "Brown Releases Study Showing DNA Collected at Arrests Helps Solve Murders, Rapes and Other Violent Crimes," (6/16/2010), published online at http://oag.ca.gov/news/press_release?id=1936;

- People v. Keith Wright, Sacramento Superior Court No. 11F05836 – On August 21, 2011, a man entered a home in Sacramento, robbed and sexually assaulted a woman at gunpoint. After he released her, DNA from the assault was analyzed and entered into the CODIS database. It was found to match the DNA of Keith Wright, which had been entered into the database after he was previously arrested. The case was later linked to two other home invasion robberies. Wright was convicted of 19 counts at trial and sentenced to life in prison. See *Sacramento Bee 911 Blog*, "Man Suspected of Home Invasions and Sexual Assault," (8/30/2011), published online at http://blogs.sacbee.com/crime/archives/2011/08/man-suspected-o-11.html; *The Natomas Buzz*, "Police Arrest Sexual Assault Suspect," (8/30/2011), published online at http://www.natomasbuzz.com/2011/08/police-arrest-sexual-assault-suspect.html; *KCRA 3*, "Ex-NFL Player Sentenced in Sacramento for Robberies, Sex Assault," (11/30/2012) published online at http://www.kcra.com/news/local-news/news-sacramento/Ex-NFL-player-sentenced-in-Sacramento-for-robberies-sex-assault/17615802.

- People v. Rene Hernandez, Santa Cruz Superior Court No. WF00983 – On February 11, 2009, a man pulled a woman from a street in Watsonville into the bushes and raped her. After she reported the assault, DNA evidence was collected from her person. When it was uploaded into CODIS, at first there was no match. Later that year, Rene Hernandez was arrested on an unrelated assault charge, and his DNA sample was taken and uploaded into CODIS. It matched the DNA from the February rape. Hernandez was convicted at trial in July 2011. *Santa Cruz Sentinel*, "Jury Finds Watsonville Man Guilty of Rape, Other Crimes," (7/6/2011), published online at http://www.mercurynews.com/ci_18421404

- People v. Donald Carter, Sacramento Superior Court No. 09F05363 – In May 1989, 80 year old Sophia McAllister was found murdered in her Sacramento home. A DNA sample from the crime was entered into CODIS, without immediate results. In 2009, Donald Carter was arrested on felony drug charges, and a DNA sample was taken. When entered into CODIS, Carter's DNA matched the forensic sample from the McAllister murder. The case proceeded to trial, and Carter was convicted of rape and murder. See *Sacramento Bee 911 Blog*, "Man Convicted of 1989 Rape-Murder of Sacramento Woman," (9/27/2010), published online at http://blogs.sacbee.com/crime/archives/2010/09/man-convicted-o-8.html; Attorney General Press Release, "Brown Releases Study Showing DNA Collected at Arrests Helps Solve Murders, Rapes and Other Violent Crimes," (6/16/2010), published online at http://oag.ca.gov/news/press_release?id=1936

- People v. Ryan Roberts, Sacramento Superior Court No. 13F05054 – Thirteen-year-old Jessica Funk-Haslam was found dead in a Sacramento park on March 6, 2012. Despite exhaustive police work, investigation was at a dead-end until August 2013. Then, the DNA database produced a hit with the arrestee DNA of Ryan Roberts. Roberts was not a suspect before the DNA hit, which became possible after his arrest for domestic violence offenses in May 2013. Charges had not been filed in that case when the DNA hit was made. Roberts was convicted at trial on September 21, 2015. See: "Jessica Funk-Haslam Murder: Ryan Roberts Makes First Court Appearance in Teen's Death," (8/9/2013) CBS13 Sacramento, published online at http://sacramento.cbslocal.com/2013/08/09/jessica-funk-haslam-ryan-roberts-first-court/ ; "Roberts Found Guilty of Murdering 13-year-old Girl," *Sacramento Bee,* published online at http://www.sacbee.com/news/local/crime/article35997270.html

- **Interstate case** (Colorado and California): People v. Billy Jene Wilson, Denver District Court No. 11 CR 20001, illustrates the importance of arrestee DNA across state lines. In 2004, the body of Gina Gruenwald was found in Denver; she had been stabbed twice in the neck. No suspect was initially identified, but a DNA sample from her body was analyzed and entered into CODIS. In February 2011, Billy Jene Wilson was arrested for felony grand theft in San Francisco. An arrestee DNA sample was taken and entered into CODIS. It matched the sample from Gruenwald's body. He was extradited to Colorado, where he was tried and convicted of murder and attempted sexual assault. See Denver District Attorney News Release, "Man Found Guilty in '04 Cold Homicide Case," available online at http://www.denverda.org/News_Release/Releases/2012%20Release/Wilson%20Conviction.pdf.

These are but a few of the cases where arrestee DNA sampling, and CODIS, have brought offenders to justice, brought closure to victims and their families, and protected the public by preventing future crimes.

Arrestee DNA sampling also serves the public and governmental interest of exonerating innocent persons. As described in *Haskell v. Harris* (9th Cir. 2012) 669 F.3d 1049, David Allen Jones was wrongly convicted of three murders in the Los Angeles area in 1995. The true culprit, Chester Dwayne Turner, was later linked to two of the murders by DNA evidence. His DNA was not collected, however, until he was convicted of rape in 2002. But he had been arrested some twenty times in the fifteen years before that, going back to 1987. Had arrestee DNA sampling been in place, it is likely Turner would have been identified much sooner, and Jones would never have been prosecuted or convicted, much less spent

nine years in prison before his exoneration. See *Haskell*, supra, 669 F.3d at 1064-1065.[5]

The governmental interests in arrestee DNA testing are substantial. Whether the balancing of interests is conducted under the standard of the Fourth Amendment to the U.S. Constitution, or Article I, Section 13 of the California Constitution, the result is the same. The important government purposes served by arrestee DNA sampling – proper identification of arrested subjects, including their past offenses, proper evaluation of the bail and custody status of those subjects, the related matter of investigation of serious crimes, bringing perpetrators to justice, and exonerating innocent persons – outweigh the minor imposition of taking a buccal swab, and is consistent with over a century's jurisprudence concerning information, samples and measurements taken at a felony arrest.

C. Arguments Appellant and the Court of Appeal Make to Undercut the Government's Interest in Arrestee DNA Sampling Are Not Convincing.

Seeking to undercut the importance of the government's interest, appellant claims that changing the Penal Code § 296 sampling process to require that it not take place until after the suspect has been charged and arraigned would only delay the DNA sampling process by two-to-four days. AAB, pp. 72 – 75. This conclusion is based on appellant's assertion that all arrested felons must be arraigned within two to four days of arrest. AAB, p. 73. As the Attorney General points out, this is simply incorrect, since arrested subjects who are released on bail or on their own recognizance need not be arraigned within two to four days, and commonly are not. Attorney General's Reply Brief on the Merits (hereafter AGRB), pp. 37-38; Penal Code §§ 1269b(a), 1269(c), 1270.

[5] The *Haskell* opinion cited here was by the original three judge panel to hear the case. The opinion was later vacated when the 9th Circuit agreed to hear the case en banc. It is cited here not for any holding, but for its description of the facts of the Jones/Turner case.

An additional circumstance where the defendant is not arraigned within four days of arrest is when the prosecutor defers making a filing decision, pending further investigation. The standard for making an arrest is probable cause, the prosecution may legally file a felony complaint based on probable cause, and indeed should prevail at preliminary hearing based on probable cause. But prosecutors do not always make decisions to file cases with a myopic view focused on this minimum standard; evaluation of the ultimate standard to be met at trial, proof beyond a reasonable doubt, comes into play. Prosecutors will often defer filing charges pending further investigation by the police agency, which may take several weeks, to evaluate whether or not there will be sufficient evidence to prove guilt at trial. When this occurs, a variety of local arrangements may affect the length of the delay and the relationship of the original arrest to the ultimate filing of charges.[6] For these reasons as well as those cited by the Attorney General, appellant's attempt to undermine the state's interest by asserting that only a couple of days are at stake is misinformed, misleading, or both.

Also seeking to undercut the importance of the governmental interest, the Court of Appeal asserts that claims to the efficacy of DNA databases for investigative purposes may be overstated, in part because the inclusion of offender samples to the database does not improve matches (or hits) as much as adding crime scene samples. Slip opinion, p. 37, fn. 20. The support for this argument comes from a 2010 study by the RAND Corporation which evaluated certain aspects of DNA databases. See RAND Corp., Center on Quality Policing, *Towards a Comparison of DNA Profiling and Databases in the United States and England* (2010). That study compared the DNA database in England with several DNA databases in the United States, considering (among other points) which

[6] For example, when defendant is represented by counsel, his attorney may agree that appearance in court at some date later than was assigned in the original OR or bail bond notice will still relate back to the original arrest, since otherwise the defendant would have to go through the inconvenience and perhaps expense of a second arrest, booking, and bail bond.

strategy would improve the number of "hit" (or match) outcomes – increasing the number of offenders in the database, or increasing the number of unknown forensic (i.e. crime scene) samples. The study opined (among other things) that "hit" outcome measures would be improved more by devoting resource to analyzing and uploading crime scene samples, as opposed to known offender samples. See RAND, *Towards a Comparison etc.*, supra, at p.18.

Read in context, the RAND study simply states the obvious truth that the more crime scenes are entered into a database, the more crime scenes can be linked to some offender. See RAND, *Towards a Comparison etc.*, supra, at pp. 17 – 20. The study did not find that adding offender samples is worthless; adding offender samples was found to increase the number of "hits" – a .53% increase for every 1% increase in offender entries, compared to a .86% increase for every 1% increase in crime scene entries. Id., at p. 20. In the end, this is a budget or allocation of resources argument – whether a finite amount of crime lab resource is better dedicated to analyzing offender samples, or analyzing crime scene samples. It is not a valid argument, of constitutional dimension, that taking arrestee samples is an unreasonable search. If it were, then as soon as California (or any other state) eliminated any backlog of crime scene DNA samples, the balance would swing in favor of the reasonableness of allowing arrestee DNA samples. Your amicus doubts that appellant, or others arguing against the taking of arrestee DNA samples, would agree that the constitutional measure of reasonableness can or should be tipped based on such workload trends, or budgeting decisions. And in fact, Proposition 69 (which enacted arrestee DNA sampling) included budget provisions for funding both types of work – taking offender samples, and analyzing and entering crime scene samples. See Government Code § 76104.6(b)(3).

V. CONCERNS ABOUT FAMILIAL DNA ANALYSIS ARE MISPLACED, AND DO NOT WARRANT INVALIDATING CALIFORNIA'S ARRESTEE DNA PROGRAM

Both appellant and the Court of Appeal argued that one of the evils which will follow from arrestee DNA sampling and testing is familial DNA analysis. See AAB, pp. 48-49. Forensic familial DNA analysis occurs when a crime scene DNA sample from an unknown suspect is compared to known DNA, usually from a database containing many known samples, to find a partial match such that there is a high likelihood the crime perpetrator is a close biological relative (i.e. parent, child, sibling, etc.) of the person who provided the known sample. In the view of appellant and the Court of Appeal, this procedure means that the DNA sample taken at arrest not only invades the privacy of the arrestee, but also the privacy of his/her family. The Court of Appeal, in particular, seems fixated on this issue, using the word "familial" 23 times in different points of discussion (excluding reference citations), scattered across 11 separate pages of the slip opinion. Slip opinion, pp. 16, 17, 24, 26, 35 (footnote), 36, 37, 45, 51, 52.

One should first note that the issue does not arise in the facts of the case at bar. The Court of Appeal wanders off topic in addressing the matter. But in any event, it is a false, invalid concern.

With respect to the person whose DNA sample was actually taken, familial DNA searching does not invade his privacy, since by definition in this type of analysis, his DNA sample does not match the unknown crime sample. The only privacy interest of the arrestee is his interest in not having it discovered or known that he has a close relative who committed a crime, hardly an interest of constitutional dimension.

The Court of Appeal seems more concerned about "the infringement of arrestees' relatives' privacy." Slip opinion, p. 52; see also AAB, p. 49. This misplaced apprehension fails on two grounds. First, the California Department of Justice does not conduct familial DNA searches with a database that includes

arrestee DNA. Familial searches are limited to a database having only the samples of persons who have been convicted. See Department of Justice website, "BFS-DNA Frequently Asked Questions – California's Familial Search Policy," at: http://oag.ca.gov/bfs/prop69/faqs; Slip opinion, pp. 17, 36. The procedure challenged in the case at bar is not the taking of DNA samples from convicted persons. The Court of Appeal acknowledges this, but cannot resist rushing on to its parade of horribles for familial DNA testing.

Second, the Court of Appeal simply ignores the point that a familial DNA partial match does not lead directly to the immediate arrest of anyone. It is simply an investigative lead, like any other – like a witness statement, an anonymous crime tip, a partial license plate number that yields a list of potential suspect vehicles, or any other lead that gives the police reason to focus on a possible suspect. Like an anonymous tip or a partial license plate number, the familial DNA partial match is not by itself considered enough evidence to arrest any particular person. The police must still develop sufficient evidence to arrest and prosecute the person who is the potential suspect. The police develop this evidence through a confirming investigation.

The usual tactic is to obtain a DNA sample of the relative who has become a suspect, which can then be tested to see if it produces a full match to the crime sample. Police could ask the relative for a consensual DNA sample, but usually will not, to avoid alerting the suspect about the investigation. Most commonly, police will try to obtain a DNA sample by locating and retrieving some item the suspect has handled, used, and then abandoned. Examples of this type of investigation, undertaken because of a familial DNA search and partial hit, include:

- Tyrone Holloway, (chicken bones and soda straw from a fast food meal thrown in the trash), see "Brother's DNA Leads to Rape Conviction in Williamsburg," *Richmond Times-Dispatch*, 2/22/14,

http://www.richmond.com/news/local/crime/article_90431ad3-5989-5122-b274-05805ea30a77.html;

- Lonnie Franklin (partially eaten pizza slice left behind at a restaurant table), see *Los Angeles Times*, "DNA Evidence in Grim Sleeper Case Was Legally Taken, Judge Rules," 1/10/14, http://www.latimes.com/local/la-me-grim-sleeper-20140108-story.html;

- Dereck Sanders (soda straw thrown in the trash), see CBS13 Sacramento, "Sacramento 'Roaming Rapist' Suspect Arrested 14 Years After First Attacks," 11/9/12, http://sacramento.cbslocal.com/2012/11/09/sacramento-county-sheriff-roaming-rapist-in-custody/.

When the police retrieve an item with the suspect's DNA that the suspect has abandoned, there is no unconstitutional search or invasion of privacy issue. See *California v. Greenwood* (1988) 485 U.S. 35 (trash left in a plastic bag on the curb for garbage pickup may be legally searched by police); *People v. Gallegos* (2010) 190 Cal.App.4th 388 (seizure of discarded cigarette butt for DNA analysis held proper); *People v. Thomas* (2011) 200 Cal.App.4th 338 (traffic stop, DUI investigation, where a preliminary alcohol screening device [PAS] was used; retrieval of the PAS mouthpiece with the suspect's saliva for DNA testing, held proper).

The confirming investigation provides the full DNA match with the suspect that supports arrest and prosecution. The basis for infringing the suspect's liberty is not the familial DNA search, it is the evidence developed in the confirming investigation. The familial DNA search simply gave the police a lead to follow. The confirming investigation is no different than if the lead which caused police to focus on the suspect was an anonymous telephone tip, rather than a familial DNA search. In either circumstance, it is the confirming investigation with the full

DNA match which provides the evidence to support arrest and prosecution. Liberty is not infringed until the independent confirming evidence inculpates the suspect.

The intervening step of the confirming investigation answers another concern about familial DNA testing – the supposed discriminatory effect of familial DNA searches. The Court of Appeal and appellant contend that because certain minority groups are disproportionately represented in the population of felons, familial DNA testing will disproportionately cast suspicion on members of those minority groups. Slip opinion, pp. 51-52; AAB p. 49. But to prevail on such a claim, intentional discrimination must be shown. See *McClesky v. Kemp* (1986) 481 U.S. 279, 292-297; *Balyut v. Superior* Court (1996) 12 Cal.4th 826, 832-833. The confirmatory investigation will establish whether or not the relative who has become a suspect is or is not the perpetrator of the crime, based on whether there is a full DNA match, or a DNA exclusion. Confirmatory evidence of a full DNA match, and not any improper racial animus, becomes the basis of the prosecution. So long as the inclusion of samples within the database and the DNA database search are based on racially neutral criteria, no colorable constitutional claim of discrimination is implicated. See Kaye, "The Genealogy Detectives: A Constitutional Analysis of 'Familial Searching,' " 50 American Criminal Law Review 109, at 125-127 (2013).

VI. CONCLUSION

DNA evidence is one of the greatest tools ever developed in the search for truth, the protection of society, conviction of the guilty, and exoneration of the innocent. The collection of DNA samples from felony arrestees serves an overwhelming public interest in the pursuit of justice. It provides the most accurate means of fully identifying the subject, including linking him to his criminal acts, so that he may be dealt with appropriately

in custody/bail matters, in jail housing decisions, and in the ultimate adjudications of his cases. It helps prevent suspicion from falling on innocent persons. The procedure is so minimally intrusive as to be insignificant. It presents no violation of the Fourth Amendment of the U.S. Constitution, or of California Constitution, Article I, § 13. For the reasons expressed by the Attorney General, as well as those set forth above, amicus curiae respectfully requests that the judgment of the Court of Appeal be reversed, and that appellant's conviction be affirmed.

DATED: November 18, 2015

Respectfully submitted,

MARK ZAHNER
Chief Executive Officer, California District Attorneys Association
ALBERT C. LOCHER
Attorneys for the California District Attorneys Association

CERTIFICATE OF WORD COUNT

Pursuant to Rules of Court 8.204 and 8.520(c), I certify that this amicus curiae brief was prepared using a computer, that it is proportionally spaced, that the type is 13 point, and that the word count is 8,360 words as determined by the word count feature of the word processing system.

DATED: November 18, 2015

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Albert C. Locher

DECLARATION OF SERVICE

I, Laura Bell, declare:

I am 18 years of age or older and not a party to this matter. On November 18, 2015, I served the within

> **"APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PLAINTIFF/RESPONDENT PEOPLE OF THE STATE OF CALIFORNIA"**

in this matter by placing a true and correct copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named below, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 18, 2015, at Sacramento, California.

_____

Laura Bell