SUPREME COURT COPY

In the Supreme Court of the State of California

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

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

SUPPLEMENTAL BRIEF

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The People respectfully submit the following supplemental brief describing new authorities, new legislation, and other matters that were not available in time to be included in the People's briefs on the merits. (See Cal. Rules of Court, rule 8.520(d).)

1. *New authorities.* California courts continue to apply this Court's "'general principle or policy of deference to United States Supreme Court decisions'" when construing a state constitutional provision that parallels one in the federal Constitution. (RBOM 20, quoting *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353; see *id.* at pp. 20-26.) In *People v. Gonzalez* (2015) 241 Cal.App.4th 1103, for example, the Court of Appeal addressed an issue of first impression involving the double jeopardy clause of the state Constitution. (See *id.* at pp. 1114-1115.) It noted that "when we interpret a provision of the California Constitution that is similar to a provision of the federal Constitution, cogent reasons must exist before we will construe the Constitutions differently and depart from the construction placed by the Supreme Court of the United States." (*Ibid.*, quoting *People v. Monge* (1997) 16 Cal.4th 826, 844, internal quotation marks omitted.) In light of this policy of deference, the Court of Appeal adhered to an analytical framework adopted by the federal Supreme Court, noting, among other things, that "the purpose behind the state and the federal double jeopardy clauses is the same." (*Id.* at p. 1115.) Here, there are no "cogent reasons" to depart from the approach of the federal Supreme Court in *Maryland v. King* (2013) 569 U.S. 435 when resolving whether it was constitutional to collect DNA identifying information from Buza while booking him following a felony arrest. (See RBOM 20-29; Reply 6-22; cf. *People v. Harris* (2017) 15 Cal.App.5th 47, 62-66, review granted Nov. 21, 2017,

S244792 [relying on *King* in rejecting a challenge to the DNA Act involving the California Constitution's right to privacy].)[1]

As the People explained in their briefs on the merits, although there are some differences between the California statute at issue in this case and the Maryland statute upheld in *King*, those differences are not of constitutional significance. (See RBOM 12-20; Reply 3-6.) Courts in other jurisdictions have rejected Fourth Amendment challenges to laws requiring the collection of DNA identification information from arrestees, even when those laws differed from the Maryland statute in some of the respects addressed in Buza's briefing. (See Reply 3, fn. 1; ABOM 94-99.) Recently, in *People v. Valdez* (Colo.Ct.App. 2017) 405 P.3d 413, cert. denied (Colo. 2017, No. 17SC353), the Colorado Court of Appeals held that a statute requiring the collection of DNA identification information from every adult felony arrestee is consistent with the federal and Colorado Constitutions. The court rejected several arguments similar to those advanced by Buza here, including that the statute was unconstitutional because: it applies to all felony arrests, including for non-violent offenses (see *id.* at pp. 417-418); its declaration of purpose "refer[red] to 'preventing' and 'solving' crimes," among other things (*id.* at p. 418); and "a person charged with a felony has the burden of requesting expungement of the DNA sample" (*ibid.*; see *id.* at pp. 418-419). The *Valdez* court also invoked the concurring opinion in *Haskell v. Harris* (9th Cir. 2014) 745 F.3d 1269, 1274, which "explained that 'the *King* Court did not view Maryland's expungement procedures as important to the constitutionality of Maryland's law,'" and that *King* did not "'suggest that post-collection

[1] In *People v. Harris*, this Court granted review and deferred further action pending consideration and disposition of a related issue in *In re C.B.*, S237801, and *In re C.H.*, S237762.

expungement procedures would affect the constitutional inquiry.'" (*Valdez*, *supra*, at p. 419, quoting *Haskell*, *supra*, at p. 1274 (conc. opn. of M. Smith, J.).)[2]

Although Buza briefed an argument under the privacy clause in article I, section 1 of the state Constitution (see, e.g., ABOM 1), that issue is not directly before this court (see Reply 54). The Court of Appeal observed that this case "does not involve a claim of invasion of privacy in violation of article I, section 1, and, in any event, such a privacy claim in the search and seizure context would not offer more protection than a claim under article I, section 13." (Opn. p. 53, citing *People v. Crowson* (1983) 33 Cal.3d 623, 629; see also RBOM 22-24 & fn. 10; Reply 13-14, 54.) To the extent the Court is nevertheless inclined to consult authority applying the privacy clause, that authority only confirms the constitutionality of the DNA Act. (See Reply 54-56.) This Court recently clarified in *Lewis v. Superior Court* (2017) 3 Cal.5th 561 that a defendant generally need not demonstrate a "compelling" interest to survive a privacy clause challenge, except in rare situations where—unlike here—a "fundamental autonomy right" is at stake, such as in cases involving "involuntary sterilization" or "the freedom to pursue consensual family relationships." (*Id.* at pp. 572-

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[2] Both the Court of Appeal below and Buza relied on *State v. Medina* (Vt. 2014) 102 A.3d 661, which struck down an arrestee DNA statute under the Vermont Constitution. (See Opn. pp. 27-28, 31, 45, 47, 51 fn. 30; ABOM 6, 38-39, 52, 57, 60, 62, 91-92.) As the People have explained, *Medina* provides no basis for invalidating California's DNA Act under either the federal or state Constitutions. (See Reply 21-22 & fn 13.) The People are not aware of any other court, in the more than three years since the Vermont Supreme Court decided *Medina*, that has struck down a DNA statute under a state constitution. Other than the opinion below, the *Medina* decision has been cited only three times in cases available on Westlaw or Lexis, all in opinions issued by courts in Vermont.

573; see also *Williams v. Superior Court* (2017) 3 Cal.5th 531, 556-557.) Instead, if the complaining party meets the three threshold elements of a claim under the privacy clause, the claim is then adjudicated under a "general balancing" test. (*Lewis*, *supra*, 3 Cal.5th at p. 573.) Under that balancing analysis, "'[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a *competing* interest,'" and the defendant is not typically required to show that its policy is the "least restrictive means of achieving its legitimate objectives." (*Id.* at pp. 573-574, italics added, quoting *Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 49.) In the context of this case, whether conducted under the federal or state search-and-seizure provisions, or the state privacy clause, the constitutional balance tilts steeply in favor of constitutionality. (See RBOM 30-66; Reply 23-56.)

Indeed, Division One of the Fourth District Court of Appeal recently reached a similar conclusion in applying this general balancing framework in a case involving a defendant whose DNA identification profile was entered into the State's database upon her arrest for a felony offense that was subsequently reduced to a misdemeanor by Proposition 47. (See *People v. Harris*, *supra*, 15 Cal.App.5th at pp. 52, 63-65.) The court held "that neither the collection of Harris's DNA sample nor the state's retention of the sample after her felony conviction was reduced to a misdemeanor under Proposition 47 violated her privacy rights under the federal and state constitutions." (*Id.* at p. 62.) Relying on *King* as well as this Court's decision in *People v. Robinson* (2010) 47 Cal.4th 1104, 1120, the court concluded that the collection and storage of Harris's DNA effected only a "minimal[]" intrusion on her legitimate privacy expectations. (*Id.* at p. 64.) In support of that conclusion, it pointed to the minimally invasive collection process, an arrestee's diminished expectations of privacy, the "strict[]" statutory limits on how the sample may be used, the "minimal amount of

information contained in" a DNA identification profile, and the established principle "'that individuals in lawful custody cannot claim privacy in their identification.'" (*Id.* at pp. 64-65, quoting *People v. Robinson, supra*, 47 Cal.4th at p. 1121.) These "minimal intrusion[s]" were "greatly outweigh[ed]" by the substantial government interests served by the DNA Act, including "knowing who has been arrested; ensuring that the custody of an arrestee does not create inordinate risks for facility staff and detainees; ensuring that persons accused of crimes are available for trial; preventing crime by arrestees by assessing the danger they pose to the public; and freeing a person wrongfully imprisoned for a crime the arrestee committed." (*Id.* at p. 65.) Finally, the Court of Appeal held that "[b]ecause the collection of Harris's DNA sample was lawful, she does not have a constitutional right to its expungement." (*Ibid.*, citing *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809, 823 and *People v. Baylor* (2002) 97 Cal.App.4th 504, 507-508; see also RBOM 63-66; Reply 50-53.)

2. *New Statutes*. Since the completion of merits briefing, Indiana joined the federal government and the growing majority of States in requiring the collection of DNA identifying information from certain arrestees. (See Ind. Code § 10-13-6-10(a)(1) [applies to any "person arrested for a felony after December 31, 2017"].) Oklahoma has expanded its statute to apply to all felony arrestees. (Okla. Stat. tit. 74, § 150.27a(A); Okla. Stat. tit. 22, § 210.) The widespread adoption of such laws, by a large and diverse group of States from across the Nation, underscores the reasonableness of California's policy for collecting DNA identification profiles from felony arrestees who are subject to a custodial arrest based on a police officer's finding of probable cause. (See RBOM 25 & fn. 12.)

Congress also recently enacted the Rapid DNA Act of 2017. (Pub.L. No. 115-50 (Aug. 18, 2017) 131 Stat. 1001.) That Act requires the FBI to issue standards and procedures for the use of rapid DNA instruments and

allows for the deployment of rapid DNA technology to police booking stations. (See *ibid.*; H.R.Rep. No. 115-117, 1st Sess., p. 2 (2017).) Whereas jail officials presently collect DNA samples at booking stations and send them to remote labs that "type" the samples to obtain arrestees' DNA identification profiles, rapid DNA instruments will take approximately 90 minutes to generate DNA profiles. (H.R.Rep. No. 115-117, *supra*, at p. 2.) When validated and deployed, they will "be used in a booking station to help identify suspects in the same way a fingerprint is currently used." (*Ibid.*) In this respect, the evolution of technology for generating and using DNA identification profiles tracks the evolution of fingerprint technology. Prior to 1999, it often took "weeks or months" to process a single set of fingerprints obtained from an arrestee at booking; only in the last two decades has technology made it possible to quickly compare booking fingerprints against a database of prints from known persons to confirm the name and criminal history of an arrestee. (Answer to Amicus Curiae Briefs 17).[3] But even before those technological advancements, courts recognized the powerful and legitimate interests served by collecting and retaining fingerprints (and other identifiers) from persons who were subject to a custodial arrest based on an officer's finding of probable cause. (See, e.g., *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 865; *United States v. Kelly* (2d Cir. 1932) 55 F.2d 67, 69; see also RBOM 32-35; Reply 24-26.) The same interests are served by collecting DNA identification profiles at booking.

[3] Even today, it can still take days to evaluate whether a new set of "booking" fingerprints matches any of the "latent" fingerprints associated with unsolved crimes. (See Burea of Forensic Services, Cal. Dep't of Justice <https://oag.ca.gov/bfs/prop69/faqs#effects> [FAQ: Effects of the All Adult Arrestee Provision, Question 1].)

3. *Other developments.* The total number of "hits" and the average "hits" per month under California's DNA Act have increased substantially. (See RBOM 46-47.) The total number of hits to the DNA identification profiles of known offenders or arrestees since January 2009 now exceeds 52,000. In the year ending November 2017, there were an average of 644 hits per month. (See Cal-DNA Hits Reported January 1984 to November 2017 <https://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/cal-dna-hit-trend-11-17.pdf> [as of Dec. 21, 2017].) Each month, a substantial percentage of the hits have been to DNA profiles in the arrestee database. (See Answer to Amicus Curiae Briefs p. 22, fn. 17.) And the experience of law enforcement officials on the ground confirms the legitimate public and government interests advanced by obtaining the most precise identification metric from those who are subject to a lawful custodial arrest based on probable cause to believe they have committed a felony. (See, e.g., Br. of Amicus Curiae California District Attorneys Association 14-23; Br. of Amicus Curiae Los Angeles District Attorney 12-18, 28-37; cf. Doleac, *The Effects of DNA Databases on Crime* (2017) 9 Am. Economic J.: Applied Economics 165.)

Dated: December 22, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Supplemental Brief uses a 13-point Times New Roman font and contains 2,100 words, as counted by the Microsoft Word word-processing program and excluding all parts that may be excluded under Rule 8.204(c)(3) of the California Rules of Court.

Dated: December 22, 2017

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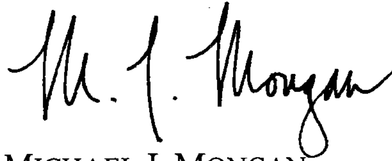

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DECLARATION OF SERVICE BY U.S. MAIL

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Case No.: **S223698**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 22, 2017, I served the attached **SUPPLEMENTAL BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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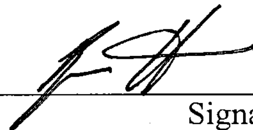
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