FIRST DISTRICT APPELLATE PROJECT

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December 21, 2017

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350 McAllister St.
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People v. Mark Buza, S223698 – Oral Argument Set for January 3, 2017

Pre-Argument Letter Brief re New Authorities (Rule 8.520(d))

Dear Mr. Navarrete:

The Court has calendared oral argument for January 3, 2017. Counsel for appellant Mark Buza respectfully submits this short letter brief to apprise the Court of new post-briefing authorities, pursuant to Cal. Rules of Court, rule 8.520(d).

Amendments of DNA statutes contingent on disposition of *People v. Buza.*

- Stats. 2015, c. 487 (A.B. 1492), eff. Jan. 1, 2016.

At the time of Appellant's Answer Brief on the Merits (AABM), the Legislature was considering A.B. 1492, which would make certain amendments of California's DNA search statutes, *contingent upon this Court's ultimate disposition of People v. Buza.* (AABM 89-91.) That is, *the amendments will take effect only if this Court (like the Court of Appeal) finds the existing statutory regimen unconstitutional.* The Legislature ultimately enacted A.B. 1492. But, due to intervening amendments, that final legislation makes fewer changes to the California statutes than previously reported. *In contrast to the earlier version of the bill summarized in the Answer Brief, the enacted legislation does not limit the kinds of felony arrests which will trigger mandatory DNA searches.* As enacted, AB. 1492 does not amend Penal Code section 296. That statute continues to require a DNA search immediately upon arrest for "any felony offense." (§ 296(a)(2)(C).)

The final legislation does enact contingent amendments of section 298 and 299. Those amendments: (1) would defer forwarding of a DNA sample to the state Department of Justice until there has been a finding of probable cause, in the form of an arrest warrant, a grand jury indictment, or a judicial finding of probable cause (§ 298(a)(1)(A), as amended by A.B.

1492, § 3); and (2) would provide for automatic expungement of the DNA profile and destruction of the sample from an arrest not resulting in a felony conviction (§ 299, as amended by A.B. 1492, § 5). As noted earlier, these contingent amendments will take effect only if this Court "rules to uphold" the Court of Appeal's 2014 decision in *Buza II.* (§§ 298(d), 299(g), as amended by A.B. 1492, §§ 3, 5.)

As stated in Buza's Answer Brief, this Court should decide the case solely on the basis of the statutes extant at the time of Buza's conviction for refusal to consent to a DNA search at the time of his arrest (prior to any judicial determination of probable cause). The Court should not issue an advisory opinion regarding the validity of the contingent amendments included in A.B. 1492. (AABM 90-91.)

Materiality of state privacy clause to construction of state search clause.

- *Pena-Rodriguez v. Colorado* (2017) __ U.S. __, 137 S.Ct. 855.

  In *Pena-Rodriguez*, the U.S. Supreme Court held that the Sixth Amendment guarantee of a fair jury trial required consideration of juror affidavits showing the deliberations were tainted by statements of racial bias, notwithstanding a state rule prohibiting impeachment of a verdict with evidence of the content of the deliberations. In so holding, the Court construed the Sixth Amendment in view of the later-enacted Civil War Amendments, a "central purpose" of which was the "elimination of racial discrimination" in state proceedings. (*Id.* at 867.) "The unmistakeable purpose underlying these precedents is that discrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.' [Citation.]" (*Id.* at 868.) The Supreme Court held that the later Civil War Amendments must also inform construction and application of the Sixth Amendment right to a fair jury trial. "This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments." (*Id.* at 867.)

  Similar principles should guide this Court's construction of the California Constitution. As Buza has argued, **the later-enacted constitutional Privacy Initiative (art. I, § 1), with its core focus on *informational privacy*, should also inform the construction and application of the state charter's longstanding prohibition on "unreasonable seizures and searches" (art. I, § 13).** (See AABM) 30-34.)

Just as the later-enacted Civil War Amendments' focus on redress of racial injustice must also guide application of the Sixth Amendment fair trial guarantee, the same is true of the interplay between the state privacy and unreasonable search clauses. As the Court of Appeal observed, the privacy clause's protection of informational privacy is especially material to recognition of the scope of "what *California* society would consider a legitimate expectation of privacy. The values reflected in the state constitutional right to privacy necessarily inform and illuminate the scope of this aspect of a claim under article I, section 13 – the reasonable expectation of privacy of a California arrestee." (Slip opn., p. 54 (emphasis in original).)

The severity of the privacy intrusion represented by indefinite retention of a DNA sample providing potential access to "a wealth of additional, highly personal information."

- *Birchfield v. North Dakota* (2016) __ U.S. __, 136 S.Ct. 2160.

In *Birchfield* and its companion cases, the Supreme Court addressed the constitutionality of criminal penalties for DUI suspects' refusals of two distinct kinds of warrantless tests to measure blood alcohol level. The Supreme Court drew a sharp distinction between refusal of a warrantless breath test and refusal of a warrantless blood test, due to the much greater invasion of privacy interests represented by the latter test. Not only is a blood test more physically intrusive than a breath test. It also has far greater privacy implications, because the retention of a blood sample poses the potential for future law enforcement access to highly personal information beyond the suspect's alcohol level.

The physical intrusion of a breath test is "almost negligible" and the privacy implications "slight." (*Birchfield*, 136 S.Ct. at 2176, 2184.) A breath test does not extract anything from a person's body but simply measures the alcohol level of the air the suspect exhales. The *only* information revealed by a breath test is alcohol level, and the procedure does not involve retention of any sample that could potentially provide access to any other kind of information about the suspect.

In so holding, *the Court explicitly contrasted the de minimis intrusion of a breath test with the far more profound privacy infringement of a warrantless DNA test, like those considered in Maryland v. King.* Because "breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject's breath," "they contrast

sharply with the sample of cells collected by the swab in *Maryland v. King*." Although the Maryland law stated that the DNA "could lawfully be used only for identification purposes [citation]," the Court recognized that this benign stated purpose was *not* enough to resolve the potential future privacy invasion posed by the state's indefinite retention of a DNA sample: "*[T]he process put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could be obtained.* A breath test, by contrast, results in a BAC reading on a machine, nothing more. *No sample of anything is left in the possession of the police.*" (*Birchfield* at 2177 (emphasis added).)

"Blood tests are different." (*Id.* at 2178.) Rather than test the air a suspect has already exhaled, a blood test involves taking a sample of biological material from a person's body. Most importantly, the state's retention of the sample presents a potential danger of later extraction of additional private information, beyond the legitimate object of alcohol level. "[A] blood test, unlike a breath test, places in the hands of law enforcement authorities *a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading.* Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, *the potential remains and may result in anxiety for the person tested.*" (*Id* at 2178 (emphasis added).) In view of these distinctions in the degree of potential privacy infringement posed by the two kinds of procedures, the Court concluded that a state could legitimately impose criminal penalties for a suspect's refusal of a warrantless breath test *but not for refusal of a warrantless blood test.* Because "Birchfield was threatened with an unlawful search" and was "prosecuted for refusing a warrantless blood draw," the Court overturned his conviction for that refusal. (*Id.* at 2186.)

Like Birchfield, Buza is not challenging the admission of the fruits of a search but his separate criminal conviction (under Pen. Code § 298.1(a)) for his refusal of warrantless search. Like a blood draw, a DNA search involves the physical collection of cells from a person's body – rather than simply the measurement of something that has already left the body. Most importantly – as the Supreme Court explicitly recognized – blood draws and DNA tests each involve long-term *retention of biological samples from which the state could potentially extract "a wealth of additional, highly personal information"* – notwithstanding the existing law's nominal preclusion of the samples' use for any other purpose. (*Birchfield* at 2176.)

The Supreme Court reversed Birchfield's conviction because there was "no indication in the record ... that a breath test would have failed to satisfy the State's interests in acquiring evidence" of his BAC. (*Id.* at 2186.) Similarly, there has never been any suggestion here why ordinary fingerprinting would not have been sufficient for the authorities to identify Buza. (The state has never suggested this was one of those rare cases where fingerprinting would have been ineffective due to some physical anomaly or other circumstance.)

As Buza has argued all along, the state's representation that it is interested only in the putative "noncoding" DNA is inadequate to resolve the concerns posed by the state's indefinite retention of the sample itself. As the Court of Appeal here held, "the far greater danger to privacy lies in the DNA *samples* from which the CODIS profiles are developed, which ... contain the entire genome." (Slip opn., pp. 24-25 (emphasis in original).)

Two other distinctions make this an even more compelling case for reversal than *Birchfield*. First, as discussed thoroughly in Buza's Answer Brief, the several salient distinctions between California's DNA regimen and the Maryland law at issue in *King* skew the balance between legitimate law enforcement identification interests and an arrestee's privacy interests. California's failure to provide for *automatic* expungement of samples from arrests that do not result in convictions and its very cumbersome procedures for an exonerated arrestee to petition for expungement exacerbate the continuing privacy infringement posed by the state's retention of DNA samples. Consequently, *Birchfield*'s explicit recognition of the privacy risk posed by the state's retention of biological samples supports Buza's argument that his conviction for refusal to submit to a warrantless DNA search violates the Fourth Amendment.

The necessity for reversal is still greater under the California Constitution, *because it provides far greater constitutional protection for the "informational privacy" threatened by the state's indefinite retention of a DNA sample providing potential access to "a wealth of additional private information."* Article I, section 1's explicit elevation of "privacy" as an "inalienable" right must also inform application of article I, section 13's proscription on unreasonable searches. (AABM 30-34; slip opn., p. 54) Because the California Constitution places much greater weight on privacy, especially "informational privacy," than the Fourth Amendment, this Court must strike a different, more privacy-protective balance in assessing Buza's conviction for

refusal of a warrantless DNA search under the California Constitution.

Recognition under international law of the privacy implications of retention of DNA samples and other biometric data.

- *Puttaswamy v. Union of India* (Supreme Ct. of India, Aug. 24, 2017) Writ Petition No. 494 of 2012.[1]

  In construing the California Constitution, this Court may look to the treatment of similar rights under international law, including the high courts of other democratic nations. (See, e.g., *In re Marriage Cases* (2008) 43 Cal.4th 757, 853 fn. 70 (noting judicial decisions in South Africa and Canada authorizing same-sex marriage).) In *Puttaswamy*, the Supreme Court of India has held that privacy represents a constitutionally protected fundamental right under the Indian Constitution. The case arose on a challenge to a governmental program for "compilation of biometric data" from citizens. (*Puttaswamy*, lead opn., p. 5 ¶ 3.) Because the object of the reference to the Supreme Court was resolution of the constitutional status of privacy, the Court did not resolve the particulars of the challenge to that program but instead addressed the general parameters of the privacy right. Like this Court in its construction of California's privacy clause, the Indian Supreme Court placed particular emphasis on "informational privacy" as a core component of the constitutional right. (Lead opn., pp. 246-260 ¶¶ 170-185, pp., 264-265 Concl. ¶ 5.)

  In construing the privacy right under its own Constitution, the Indian Supreme Court drew upon judicial decisions on privacy in the United States and numerous other countries, as well as prior Indian precedents. Of particular note, the Indian Supreme Court looked to a prior decision of the European Court of Human Rights (ECHR) with direct relevance to California's DNA regimen – *S. and Marper v. United Kingdom* (2008) ECHR 1581.[2] (*Puttaswamy*, lead opn., pp. 183-186.) In *S. and Marper*, the Grand Chamber of the ECHR held that the government's indefinite retention of arrestees' DNA samples *after the termination of criminal proceedings* (by

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[1] http://supremecourtofindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf {reviewed as of Dec. 18, 2017}.

[2] https://hudoc.echr.coe.int/eng#{"itemid":["001-90051"]} {English translation of *S. and Marper*; reviewed as of Dec. 18, 2017}.

acquittal or dismissal) violated the protection of "private life" under the European Convention of Human Rights and Fundamental Freedoms.[3]

Like the appellate court in *Buza*, the ECHR recognized that "the retention of cellular samples and DNA profiles" poses more grave privacy consequences than fingerprint databases "in view of the stronger potential for future use of the personal information contained" in DNA. (*S. and Marper,* English trans., p. 21 ¶ 69.) The ECHR too noted that the authorities' current limited use of the DNA data did not cure the danger posed by the potential future use of the samples for other purposes. "Given the nature and the amount of personal information contained in cellular samples, their retention *per se* must be regarded as interfering with the respect for the private lives of the individuals concerned. That only a limited part of this information is actually extracted or used by the authorities and that no immediate detriment is caused in a particular case does not change this conclusion.." (*Id.*, p. 22, ¶ 73.) The ECHR too was concerned with the prospect of the potential use of DNA "for familial searching with a view to identifying a possible genetic relationship between individuals." (*Id.*, p. 23 ¶ 75.)

The European Court of Human Rights concluded that the retention of the samples and profiles "of persons suspected but not convicted of offences ... fails to strike a fair balance between the competing public and private interests." (*Id.*, p. 35 ¶ 125.)

Like the U.S. Supreme Court's recent observations in *Birchfield v. North Dakota*, the ECHR's decision in *S. and Marper* attests to the greater privacy risk posed by California's indefinite retention of DNA samples *and its failure to provide for automatic expungement of the samples of arrestees who are not ultimately convicted.*. Though the state insists it has no intent to use those samples for any purpose other than identification, those assurances are not enough to eliminate the potential for future extraction of more sensitive personal information from that genetic data.

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[3] Counsel first became aware of the ECHR's prior decision in *S. and Marper* in the course of reviewing the 2017 decision of the Indian Supreme Court in *Puttaswamy*. Because the ECHR's analysis of DNA retention under the European Convention's privacy clause is plainly relevant to this Court's application of the California's Constitution similar guarantee, we regret not citing it in the Answer Brief. To ensure that this Court has the benefit of all relevant authorities, domestic and international, we respectfully request the Court to consider *S. and Marper*, despite its late citation.

Updated citation for Joh law review article on DNA expungement.

The amicus curiae of Electronic Frontier Foundation cited a pre-publication law review article by Prof. Elizabeth Joh on the "myth" of DNA expungement. (EFF Br. 13-16) That article has now been published:

- Joh, *The Myth of Arrestee DNA Expungement* (2015)164 U.Pa.L.Rev.Online 51.

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Please submit this letter to the Court. Thank you for your consideration.

Respectfully submitted,

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Word Count Certificate

Counsel for Mark Buza hereby certifies that this brief consists of **2770** words (excluding proof of service and this certificate), according to the word count of the computer word-processing program. (California Rules of Court, rule 8.520(d)(2)).)

Dated: December 21, 2017

J. Bradley O'Connell
Assistant Director

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Re: *People v. Mark Buza* **Case No.: S223698**

Court of Appeal Case No.: A125542

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of Alameda, State of California. My business address is 475 Fourteenth Street, Suite 650, Oakland, CA 94612. My electronic service address is eservice@fdap.org. On December 21, 2017, I transmitted a PDF version of **Pre-Argument Letter Brief Citing New Authorities** by TrueFiling to the following:

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