IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	**S223698**
Plaintiff and Respondent,	**Court of Appeal No. A125542**
v.	
MARK BUZA,	**San Francisco County Superior Court No. 207818**
Defendant and Appellant.	

APPELLANT'S ANSWER BRIEF ON THE MERITS

After Decision by the Court of Appeal
First Appellate District, Division Two
Filed December 3, 2014

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES

STATE CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES

California Welfare and Institutions Code

Maryland Criminal Law Code Annotated

OTHER AUTHORITIES

QUESTIONS PRESENTED

"Whether the collection and analysis of forensic identification DNA database samples from all adult felony arrestees, as required by Proposition 69, violates article I, section 13 of the California Constitution or the Fourth Amendment of the United States Constitution." (Pet. Review.) More specifically, the issues are these:

1. Does the California DNA Act[1] (Pen. Code § 295 et seq.)[2] violate the independent unreasonable search clause of the California Constitution (art. I, § 13) and its separate express protection of "privacy" (art. I, § 1), where:

   (a) the search occurs immediately following arrest, prior to any prosecutorial charging decision or judicial determination of probable cause and without regard to whether the arrest is for a violent or serious felony;
   (b) the function of the search is *investigation* of possible other criminal conduct, rather than "identification" of the arrestee in any ordinary meaning of that term; and
   (c) there is no automatic expungement of the DNA of arrestees who are not charged and convicted and a former arrestee must navigate a cumbersome petition process, where a court retains discretion to deny expungement?

2. Does the California DNA Act violate the Fourth Amendment in view of the many distinctions between the California Act and the Maryland regimen upheld in *Maryland v. King* (2013) __ U.S. __, 133 S.Ct. 1958, including California's inclusion of all felonies rather than a subset of violent offenses, its advancement of the search to the time of arrest prior to any charging decision or arraignment, and its failure to provide for automatic expungement of the DNA of arrestees who are not convicted or even charged?

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[1] Official title: "Forensic Identification Database and Data Bank Act of 1998," as amended.

[2] Statutory references are to the Penal Code unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

A. Mark Buza's Conviction for Refusal of a DNA Search on Arrest.

On January 21, 2009, San Francisco police officers arrested appellant Mark Buza for setting fire to a police vehicle. (CT 113; RT 17-27.) Later that day, when Buza was booked into jail (but prior to any prosecutorial charging decision), a deputy directed him to submit to a DNA search. Buza declined to provide the sample, even after he was advised that California law mandates DNA collection from all felony arrestees and that he could be charged with a misdemeanor for refusing to comply. (RT 107-110.)

Buza was later charged with three felonies – arson (§ 461(d)), possession of combustible material or an incendiary device (§ 453(a)), and vandalism (§ 594) – and with a separate misdemeanor for his refusal to submit to a DNA search (§ 298.1(a)). (CT 7-8.)

At trial, the defense challenged the constitutionality of the section 298.1(a) charge via a motion for acquittal (§ 1118.1). The defense argued that a mere arrest, as opposed to a conviction, provided a constitutionally inadequate basis for a mandatory DNA search. (CT 38-40.) The trial court rejected that challenge and denied the section 1118.1 motion. (CT 59.) The jury convicted Buza on all four counts, including the section 298.1(a) misdemeanor. (CT 85-89.) The court sentenced Buza to 16 months on the three felony counts and to a concurrent six-month jail term for refusal to submit to a DNA search at the time of his original arrest. (CT 149-150.)

Buza *did* later submit to a DNA search following his conviction. (RT 289) This appeal concerns only the constitutionality of his separate criminal conviction, under section 298.1(a), for his refusal of a DNA search at a time when he had not yet been charged or held over by a magistrate, much less convicted, of any felony. It does not challenge the constitutionality of the

post-conviction DNA search.

B. *Buza I* – the 2011 Appellate Opinion under the Fourth Amendment.

On appeal, Buza renewed his argument that his misdemeanor conviction for refusal of a DNA search at the time of his warrantless arrest offended the federal and state constitutions. In its initial opinion, filed August 31, 2011, the Court of Appeal unanimously found that California's requirement of a DNA search at the time of every felony arrest violated the Fourth Amendment. (*People v. Buza* (2011) 129 Cal.Rptr.3d 753 ("*Buza I*").) In that 2011 opinion, the appellate court did not reach Buza's state constitutional arguments.

This Court granted review (S196200, review gr., Oct. 19, 2011), and the case was briefed on the merits. The Court did not ultimately decide the matter, but instead remanded it to the Court of Appeal for reconsideration in light of the U.S. Supreme Court's intervening opinion in *Maryland v. King* (2013) __ U.S. __, 133 S.Ct. 1958. In that sharply-divided opinion, the majority rejected a Fourth Amendment challenge to a Maryland law mandating DNA searches of a substantially more narrow group of charged and arraigned arrestees.

C. *Buza II* – the Post-Remand Opinion Under the California Constitution.

On remand, the Court of Appeal again unanimously found California's regimen for mandatory DNA searches at the time of all felony arrests unconstitutional and reversed Buza's section 298.1 misdemeanor conviction for refusal of such a search. (*People v. Buza* (2014) 180 Cal.Rptr.3d 753 ("*Buza II*").) This time, the Court of Appeal based its disposition "solely upon article I, section 13, of the California Constitution, which in our view undoubtedly prohibits the search and seizure at issue." (Slip opn., p. 2) The appellate court held that "the express protection for the right to privacy

enshrined in the California Constitution" (art. I, § 1) must "inform and illuminate the scope" of "the reasonable expectation of a California arrestee" for purposes of the search-and-seizure clause (art. I, § 13). (Slip opn., p. 54.)

Because the appellate court found the infirmity of the arrestee search mandate under the California Consitution dispositive of the appeal, it was unnecessary to decide whether those provisions also violated the Fourth Amendment. (Slip opn., pp. 2, 17-18.) However, the court observed that, "because of significant differences between the California DNA Act and the Maryland law considered in *King*, we question whether *King* establishes the validity of the California Act's application to arrestees under the Fourth Amendment." (Slip opn., p. 2.) Those differences "include that the DNA Act applies to persons arrested for *any* felony, requires immediate collection and analysis of arrestees' DNA even before a judicial determination of probable cause, and does not provide for automatic expungement of DNA data if an arrestee is not in fact convicted of a qualifying crime." (Slip opn., p. 15 (emphasis in original).)

SUMMARY OF ARGUMENT

As Justice O'Connor began the opinion in another case implicating a state's sovereignty and the independence of its procedures, "This is a case about federalism." (*Coleman v. Thompson* (1991) 501 U.S. 722, 726.)[3] The Court of Appeal's decision invalidating California's regimen for mandatory pre-charging DNA searches for all felony arrests reflects the longstanding principle that the California Constitution is a document of "independent force."

Though the federal Constitution sets a minimum constitutional floor, the rights of California residents under the state Constitution are not solely dependent upon the U.S. Supreme Court's construction of parallel provisions of the federal charter. California courts can and must construe the state proscription against unreasonable searches and seizures (art. I, § 13), as well as other provisions, independently where a decision of the U.S. Supreme Court affords insufficient protection for the core rights guaranteed by the California Constitution. The independence of the rights guaranteed by the California Constitution represents such an integral component of our state's system of government that this Court struck down, as beyond the authority of the initiative process, a provision of a 1990 ballot measure (Prop. 115) that purported to remove the California courts' authority to construe the state charter independently. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349-355.)

The DNA Act's mandate for pre-charging, pre-arraignment DNA searches of all felony arrestees presents exactly the kind of situation in which this Court has often looked to the more robust protections of the state search

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[3] *Coleman* was not a search-and-seizure case. The necessity to respect the independence of a state's rules arose in the context of federal habeas review.

clause. The U.S. Supreme Court recently upheld a more closely drawn Maryland DNA statute against a Fourth Amendment challenge in *Maryland v. King* (2013) __ U.S. __, 133 S.Ct. 1958. However, *King* was a closely-divided 5-4 decision. In addition to Justice Scalia's incisive dissent in *King* (also joined by Justices Ginsburg, Sotomayor, and Kagan), the *King* opinion has been the subject of substantial critical academic commentary.

The *King* majority disposition rests on a troubling conflation of *investigation of possible crimes unrelated to the arrest* with "identification" of the arrestee, which stretches the concept of "identification" beyond any ordinary understanding of that term. That reasoning is highly problematic, even as to the less sweeping arrestee search provisions of the Maryland law, which included more effective safeguards, including automatic expungement for arrestees not ultimately convicted. The Vermont Supreme Court recently struck down that state's DNA arrestee search regimen, on those grounds, under the Vermont Constitution, which (like Cal. Const., art. I, § 13) has long provided "heightened" protections against unreasonable searches, especially in the arrestee context. (*State v. Medina* (Vt. 2014) 102 A.3d 661, 663.)

As addressed in the appellate opinion in *Buza II*, there are still more compelling reasons for finding the California DNA Act unconstitutional under the "more exacting" standard of article I, section 13 (as well as the separate state privacy clause, art. I, § 1). The California Act sweeps more broadly and has fewer procedural protections than the Maryland regimen, in three crucial respects.

- Unlike the Maryland statute, which applies only to arrests for a discrete set of sexual assaults and other violent offenses, the California DNA Act mandates DNA searches for *any* felony arrest, including for the scores of non-violent offenses that have no reasonable correlation with

a propensity toward violent offenses.

- Under the Maryland statute, as well as those of many other states, there is no submission of DNA for inclusion in state and national databases until *a prosecutor has charged the arrestee with a qualifying felony* and *a magistrate has made a preliminary determination of probable cause at arraignment*. But, as the Buza's case illustrates, in California it is the *police decision* to arrest someone for a felony which triggers the DNA collection and and testing. The search occurs prior to either a prosecutorial charging decision or any preliminary judicial review of probable cause. Conducting the search upon arrest, rather than arraignment, advances the testing by only two-to-four days, but that modest benefit has immense privacy consequences. It results in retention of the genetic data of the tens of thousands of arrestees who are not even charged or whose cases are dismissed within days of arrest.

- The Maryland statute provides for *automatic expungement* of the DNA of any former arrestee who is not ultimately convicted of a qualifying felony. California's expungement provisions could not be more different. Although California makes non-convicted former arrestees *eligible* to seek expungement, the process is not automatic. The onus is entirely on the arrestee to initiate a cumbersome petition process, usually without assistance of counsel and without even notice from the state of its existence and requirements. Even then, there is no assurance of expungement. A prosecutor may veto any expungement request, *and* a trial court has discretion to deny it. To cap things off, a denial of expungement is not reviewable, either by appeal or writ.

The Court of Appeal properly found that the California DNA Act could

not survive scrutiny under the California Constitution. Because that state ground was dispositive, the appellate court found it unnecessary to resolve whether the DNA Act also offended the Fourth Amendment. This Court should do the same and should decide the matter under the California Constitution. There is no reason to decide the federal question.

In any event, as the appellate court observed, the significant differences between the California and Maryland statutes — in California's coverage of arrests for all felonies, its submission of DNA at the time of arrest prior to charging or arraignment, and its failure to provide for automatic expungement – provide ample grounds for distinguishing *Maryland v. King*. In all these respects, the governmental interest in California's more sweeping DNA regimen is substantially lesser, while the invasion of reasonable expectations of privacy is far greater. These distinctions decisively skew the delicate balance struck in *King*. Should this Court reach the issue, it should find that the California DNA Act violates the Fourth Amendment, as well.

I. AN OVERVIEW OF THE PROVISIONS OF THE CALIFORNIA DNA ACT MANDATING DNA COLLECTION FROM ALL ADULT FELONY ARRESTEES

A. The History of DNA Collection in California

Over the past three decades, California has successively expanded its collection and retention of DNA in the criminal justice system. The current sweeping statutory mandate for compulsory collection of DNA from all adult felony arrestees is but the latest and most consequential extension.

Since 1984, the state has collected samples from offenders *convicted* of certain enumerated serious crimes. (See *Haskell v. Brown* (N.D. Cal. 2009) 677 F.Supp. 2d 1187, 1190.)[4] In 1998, the Legislature enacted the California DNA Act (§§ 295- 300.3), authorizing DNA collection from an expanded group of offenders convicted of specified serious and violent crimes. (*Haskell* at 1190; *People v. Robinson* (2010) 47 Cal.4th 1104, 1116-1117.)

In November 2004, California voters enacted Proposition 69, which amended the DNA Act to mandate collection from a still broader set of convicted offenders and from specified arrestees. The amended statute

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[4] As discussed in the appellate opinion, *Haskell* arose on a federal civil rights challenge to the California DNA Act. The district court declined to enjoin the state's collection of DNA from arrestees. The Ninth Circuit affirmed that decision in a terse per curiam opinion, based on the plaintiffs' concession that they could not satisfy the prerequisites for a class-wide injunction. (*Haskell v. Harris* (9th Cir. 2014) 745 F.3d 1269.) Due to the narrow, procedural basis of that disposition, the Ninth Circuit "did not adjudicate the constitutionality of the DNA Act; it only held that plaintiffs were not entitled to a preliminary injunction." (Slip opn., p. 18 fn. 6.) We cite the district court decision in *Haskell*, not for its legal analysis (which was superseded by the later Ninth Circuit decision), but solely for its explanation of the mechanics of California's DNA search protocols, because the district court had the benefit of a more fully developed factual record.

required DNA samples from all adults and juveniles *convicted* of any felony, of any misdemeanor with a prior felony conviction, or of any offense requiring sex offender or arson registration. (§§ 296, 296.1.)[5] Also, effective immediately in 2004, the amendments required collection of DNA upon arrests for specified violent offenses – sexual assaults, murder and voluntary manslaughter. (§ 296(a)(2).)

Most importantly, Proposition 69 mandated the collection of DNA from *all adults arrested for any felony*, beginning in January 2009. (§ 296(a)(2)(C).)[6] The stated purpose of the California DNA Act "is to assist ... in the expeditious and accurate detention and prosecution of individuals responsible for sex offenses and other crimes." (§ 295(c).)

B. The Mechanics of DNA Testing in California

California mandates the collection and retention of DNA from every

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[5] This Court and the appellate courts upheld these provisions requiring DNA collections from convicted offenders. (*Robinson*, 47 Cal.4th at 1119-1121; *People v. Travis* (2006) 139 Cal.App.4th 1271; *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492.)

[6] California's continuing expansion of DNA collection corresponds to a nationwide trend. All fifty states require the collection of DNA from those convicted of felonies. (*Maryland v. King*, 133 S.Ct. at 1968.) Twenty- seven states, in addition to California, mandate DNA collection from those arrested for some or all felonies. (Respondent's Opening Brief on Merits (ROBM) 1, 25.) Federal law has followed a similar trajectory. Since 2000, the federal DNA Act has required the collection of DNA from convicted offenders – first, only for convictions of violent offenses and later for all felonies. In 2006, Congress expanded DNA collection to arrests for all felonies, sex offenses or violent crimes, effective January 2009. (*United States v. Mitchell* (3rd Cir. 2011) 652 F.3d 387, 399, 401, 405; *United States v. Kriesel* (9th Cir. 2007) 508 F.3d 941, 942.)

felony arrestee. No warrant or individualized suspicion is required; nor does the statute require any reason to believe the DNA will assist in investigation of the arrest offense. Collection occurs "immediately following arrest" or "as soon as administratively practicable after arrest, but in any case, prior to release....from confinement or custody." (§§ 296.1(a)(1)(A); 295(i)(1)(A); *Haskell*, 677 F.Supp. 2d at 1190.)

In contrast to many states' regimens, submission of the DNA for testing and inclusion in the database occurs immediately upon arrest and booking – prior to any prosecutorial charging decision or arraignment.[7] It is the police decision to arrest the individual and to designate the suspected offense as a felony that triggers the DNA search, rather than any decision by a prosecutor or judge. (Slip opn., p. 5)

Before collecting the DNA sample, police verify an arrestee's identity through fingerprints and California ID and access his criminal records to determine if DNA was collected on a prior arrest or conviction. (§ 295(h)(1); *Haskell*, 677 F.Supp.2d at 1190, 1199; Slip opn., p. 31.) The state collects DNA only if the arrestee has not previously provided a sample. The officer takes a sample by scraping a buccal swab on the arrestee's inner cheek. (See § 295(e); *Haskell*, at 1190.)

The arrestee's DNA sample is immediately sent to the Department of Justice's DNA laboratory for "forensic analysis" and indefinite storage. (§ 298.3; *Haskell*, 677 F.Supp.2d at 1190-1191.) The lab creates an "offender profile" "based on 13 genetic loci known as 'noncoding' or 'junk' DNA because they are not known to be associated with any particular genetic trait,

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[7] Compare *King*, 133 S.Ct. at 1967 (Maryland's deferral of submission until after prosecutorial charging and probable cause finding at arraignment).

disease or predisposition." (Slip opn., p. 5.)[8]

The offender profile is uploaded into California's data bank, which is part of the Combined DNA Index System (CODIS), a national database linking DNA profiles from federal, state and local collection programs. (Slip opn., pp. 6-7; *Haskell* at 1190; *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 819.) The offender profile is compared to DNA profiles from unsolved crimes, which are maintained in a separate crime scene index. CODIS performs a systemwide comparison of crime scene and offender profiles every week. (*Haskell* at 1191; *Kincade,* at 819.)

A "hit" occurs when an offender profile matches a crime scene profile. The submitting lab retrieves the offender's original DNA sample, re-extracts the "junk DNA," and generates a new profile, which is compared to the crime scene profile to confirm the match. (*Haskell,* 677 F.Supp.2d at 1191.)

If an arrestee is *not* charged and convicted, he is eligible to seek expungement. Unlike Maryland's procedures, California's expungement process is not automatic. The state retains a former arrestee's profile and DNA sample indefinitely, unless he successfully initiates and navigates a *discretionary* petition process. (§ 299; slip opn., pp. 7-9; see Pt. VI-C, *infra.*)

C. The Numbers of Arrestees Affected by California's Extension of DNA Searches to All Felony Arrests and Its Advancement of the Searches to the Time of Arrest, Prior to Charging and Arraignment.

The state's own arrest statistics document the scale of California's DNA collection and the consequences of its extension of such searches to all felony

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[8] Cal. Dept. of Justice, Bureau of Forensic Services, Frequently Asked Questions ("Cal. DOJ, FAQ's"), "Searching the CAL-DNA Data Bank and CODIS," Q.3, & "Collection Mechanics." <http://oag.ca.gov/bfs/propr69/bfs> {as of Aug. 3, 2015}.

arrests, at the time of arrest, prior to any charging decision or judicial arraignment. California's statutory mandate has resulted the collection and retention of DNA from hundreds of thousands of arrestees – a substantial portion (about one third) of whom are never convicted and many of whom are not even charged or are released within two to four days of arrest

From 2009 through 2014, approximately 300,000 California adults were arrested for felonies every year.[9] For those arrestees who are ultimately convicted, California's more sweeping practice only affects the timing of a search that would have occurred anyway, just at a later date. Consequently, California's extension of DNA collection to all felony arrestees principally impacts those who are *not convicted, including those who are never charged.*

In California, almost one-third of all adult felony arrestees (approximately 30 to 33%) are not convicted, an average of 95,000 people every year.[10] Most significantly, almost 20% of felony arrestees are *never charged* with a crime. While a very small percentage (about 3%) are released by police without referral to a prosecutor, in most of these cases (approximately 15%), prosecutors decline to file charges.[11] Prosecutors' decisions not to file charges, rather than later dismissals or acquittals, account

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[9] There were 315,782 adult felony arrests in 2014 and 305,503 in 2013. (Cal. Dept. of Justice, *Crime in California 2014* ("*Crime in California 2014*"), Tables 37 & 38A.) <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd14/ cd14.pdf> {as of August 12, 2015}. (These tables are the source for all statistics discussed in this subsection.)

[10] In 2014, 31.1% of felony arrestees were not convicted. From 2009 through 2013, the figures ranged from 30.2 to 33%.

[11] In 2014, 58,462 (18.5%) of felony arrestees were not charged. The police released 10,227 (3.2%), and prosecutors declined to charge 48,235 (15.3%). The statistics reflect similar percentages in prior years.

for almost half of the felony arrests that do not result in convictions. Consequently, although the state's collection of DNA upon arrest, rather than after charging and arraignment, only advances the analysis of the DNA by two-to-four days, that modest head-start effectively doubles the volume of collection from arrestees who are not ultimately convicted. Due to the lack of automatic non-discretionary expungement, the DNA samples and profiles of those non-convicted former arrestees, including those who were never charged, will likely remain indefinitely in state possession, .

As Justice Scalia underscored in his *King* dissent: "The only arrestees to whom the outcome here will ever make a difference are those who have been acquitted of the crime of arrest (so that their DNA could not have been taken upon conviction). In other words, [the Maryland Act] manages to burden uniquely the sole group for whom the Fourth Amendment's protections ought to be most jealously guarded: people who are innocent of the State's accusations." (*King,* 133 S.Ct. at 1989 (Scalia, J., dis. opn.).) As the appellate court added here: "In California, the burdened group includes not only those ultimately acquitted of criminal conduct but also those never charged." (Slip opn., p. 46.)

II. BACKGROUND TO BOTH THE STATE AND FEDERAL ISSUES: THE DIVIDED OPINION IN *MARYLAND V. KING*

The 5-4 opinion in *Maryland v. King* (2013) __ U.S. __, 133 S.Ct. 1958, provides the background for review of the California DNA Act under both the Fourth Amendment and the California Constitution. Justice Kennedy's majority opinion and Justice Scalia's dissent (also joined by Justices Ginsburg, Sotomayor and Kagan) frame the debate over DNA arrestee searches in general. The dispute over the *King* majority's characterization of the process as merely an "identification" of the arrestee should inform this Court's independent assessment of whether to adopt that disputed label in applying the California Constitution. (Pt. V, *infra*.)

Understanding the specific features of the Maryland Act at issue in *King* is necessary to both state and federal constitutional analysis of the California statutes. California's DNA regimen is more sweeping and has substantially fewer safeguards in the scope of arrests covered (all felonies), the timing of the procedure (arrest, prior to charging or arraignment), and in its discretionary, non-automatic expungement process. Those differences are material to this Court's judgment whether to *extend* the reasoning under which the *King* upheld the more narrow Maryland Act to the more intrusive California regimen. (Pt. VI, *infra*.) Each of these features attenuates the asserted governmental interest while increasing the infringement of reasonable privacy expectations. These distinctions alter the fragile constitutional balance struck in *King* and bring the California Act into conflict with the Fourth Amendment, as well.

A. The Features of the Maryland Act at Issue in *King*.

The *King* majority upheld a Maryland regimen requiring collection and analysis of DNA from arrestees charged with violent crimes and burglaries,

and detained pending trial following a judicial finding of probable cause. (*King*, 133 S.Ct. at 1966, 1980.)

The Maryland law applied only to arrestees charged with one of 24 enumerated "crimes of violence" (including murder, rape or other sexual assaults, manslaughter, robbery, kidnapping, and "first degree" assault) or burglary or attempted burglary (Md. Code. Ann. Pub. Saf., § 2-504(a)(3)(I); Md. Code Ann. Crim. Law, § 14-101.) In Maryland, the DNA is not collected until "the individual is *charged,*" and the sample is not submitted for testing until after arraignment. (Md. Code Ann. Pub. Saf., § 2-504(b)(1), (d)(1).) Testing and inclusion in the database occur only if the magistrate finds probable cause for pre-trial detention on a qualifying violent felony or burglary. (*King*, 133 S.Ct. at 1967.)

Maryland law requires *automatic expungement* of a former arrestee's DNA if he is not convicted of a qualifying offense. (*King* at 1967.) Expungement is automatic if the magistrate does not find probable cause at arraignment or if the charges do not result in conviction of a qualifying offense for any other reason (dismissal, acquittal, etc.). (Md. Code Ann. Pub. Saf., §§ 2-504(d)(2), 2-511.)

B. Justice Kennedy's Majority Opinion.

Justice Kennedy wrote for a five-justice majority in upholding the Maryland Act against a Fourth Amendment challenge. The majority acknowledged that DNA collection is a Fourth Amendment search. "[U]sing a buccal swab on the inner tissues of the person's cheek in order to obtain DNA samples is a search," an "intrusion into the human body," and "an invasion of cherished personal security." (*King,* 133 S.Ct. at 1968-1969.)

The majority recognized a governmental interest in "identification" of charged arrestees, held in pre-trial custody for specified violent offenses or

burglaries. (*King,* 133 S.Ct. at 1970-1977.) In what has proven one of the most controversial aspects of *King*, the majority posited that "identification" entails more than verification of an arrestee's true name and documented history of prior arrests or convictions. According to the majority, "identification" also includes inquiry into any previously unsuspected criminal history – by comparison of the arrestee's DNA with unsolved crime scene profiles. (*Id.* at 1971-1972.)

The *King* majority focused on *arrestees charged with violent and serious crimes and held on a judicial finding of probable cause.* (*King* at 1972-1975.) Because extended pre-trial custody or supervision on bail entails assessment of dangerousness, DNA testing assertedly allows "the criminal justice system [to] make informed decisions concerning pretrial custody." (*Id.* at 1980.) Any finding linking the arrestee to a previously unsolved crime may then inform jail classification or bail supervision decisions. (*Id.* at 1972-1974, 1977.)[12]

The majority next weighed that asserted governmental interest in a pre-trial detainee's possible connection to any uncharged criminal conduct against the degree of the intrusion on legitimate privacy expectations. (*King,* 133 S.Ct. at 1978-1980.) The Court dismissed the search at issue – collection of DNA from the inner cheek with a buccal swab – as a brief and minimal

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[12] In predicating DNA arrestee searches on the asserted necessity for informed pretrial custody decisions, the *King* majority did *not* invoke the objectives commonly cited in decisions upholding DNA searches of *convicted offenders*. In view of the documented high recidivism rates of convicts, there is a legitimate governmental interest in continued monitoring to ensure against re-offense. (Slip opn., p. 11; see, e.g., *United States v. Kincade,* 379 F.3d at 833, 835, 838-840; *United States v. Kriesel* (9th Cir. 2007) 508 F.3d 941, 949; *People v. Travis*, 139 Cal.App.4th at 1285; *People v. Adams* (2004) 115 Cal.App.4th 243, 258.)

intrusion. (*Id.* at 1968-1969, 1978-1979.) Charged arrestees detained in pre-trial custody already have reduced reasonable expectations of privacy due to the needs of jail security. (*Id.* at 1978.) The state's interest in "informed decisions concerning pretrial custody" assertedly outweighed the minor privacy intrusion of "a brief swab of his cheeks." (*Id.* at 1980.)

C. Justice Scalia's Dissent.

Justice Scalia authored what the appellate court here aptly described as a "piercing dissent," joined by Justices Ginsburg, Sotomayor and Kagan. (Slip opn., p. 13.)

Justice Scalia debunked the premise that the function of the DNA search was "identification" of the arrestee. Because the plain objective of these searches was *to solve cold cases*, the purpose was ordinary law enforcement *investigation*, not "identification" in any conventional sense of that term. "The court's assertion that DNA is being taken, not to solve cold cases, but to *identify* those in the State's custody, taxes the credulity of the credulous." (*King,* 133 S.Ct. at 1980 (Scalia, J., dis. opn.) (emphasis in original).) Because it was an investigative search, not supported by any reasonable suspicion, the process violated elementary Fourth Amendment principles. "Solving unsolved crimes is a noble objective, but it occupies a lower place in the pantheon of noble objectives than the protection of our people from suspicionless law enforcement searches." (*Id.* at 1989.)

As Justice Scalia recounted, the Supreme Court had previously allowed suspicionless searches only for a "closely guarded category" of "special needs" searches, *conducted for reasons "other than crime detection,"* but never where the "primary purpose was to detect evidence of ordinary criminal wrongdoing." (*Id.* at 1981-1982 (quoting *City of Indianapolis v. Edmund* (2000) 531 U.S. 32, 38).) "If identifying someone means finding out what unsolved crimes he has

committed, then identification is indistinguishable from the ordinary law-enforcement aims that have never been thought to justify a suspicionless search." (*Id.* at 1983.)

As Justice Scalia described, the mechanics of law enforcement DNA comparisons DNA belie the notion that their function is "identification" "in the normal sense of that word"– verification of who the arrestee is. When the state creates a new offender profile from an arrestee's DNA, it does *not* "compare that DNA against the Convict and Arrestee Collection" of known perpetrators, although that would be "the logical thing to do" if the purpose was "to identify someone in custody." Instead, the state runs the new offender profile against the "Unsolved Case Collection" of crime scene profiles. "That is sensible if what one wants to do is solve those cold cases." (*Id.* at 1984-1985.)

Justice Scalia rejected any analogy between DNA and fingerprints, finding they "could not be more different.... Fingerprints of arrestees are taken primarily to identify them (though the process sometimes solves crimes); the DNA of arrestees is taken to solve crimes (and nothing else)." (*Id.* at 1987.)

Finally, Justice Scalia warned that the limitation of DNA searches to arrests for "serious offenses" would likely soon give way. "If one believes that DNA will "identify" someone arrested for assault, he must believe that it will also "identify" someone arrested for a traffic offense." (*Id.* at 1989.) He further cautioned that DNA collection might not stop with arrestees, but that the law enforcement might invoke "the beneficial effect of solving more crimes" as grounds for such searches of "anyone who flies on an airplane, ... applies for a driver's license, or attends a public school." (*Id.* at 1989.)

"I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection." (*Ibid.*)

III. THE CALIFORNIA CONSTITUTION IS "A DOCUMENT OF INDEPENDENT FORCE." THE COURT OF APPEAL PROPERLY EVALUATED THE DNA ACT UNDER THE INDEPENDENT AND MORE ROBUST PROTECTIONS OF THE STATE SEARCH AND PRIVACY CLAUSES, RATHER THAN ROTELY FOLLOW THE *KING* MAJORITY'S MORE NARROW VIEW OF THE FOURTH AMENDMENT.

Respondent leads its arguments with an issue which the Court of Appeal did not even decide – the asserted constitutionality of the California DNA Act under the Fourth Amendment, as construed by the five-justice majority in *Maryland v. King* (2013) 133 S.Ct. 1958. (ROBM 12-20.) The Fourth Amendment question is far more difficult than respondent imagines, due to the material differences between the Maryland and California statutes. (Pts. VI-VII.) But, as the appellate opinion amply demonstrates, it is unnecessary to reach the Fourth Amendment issue, because the California Constitution "undoubtedly prohibits the search and seizure at issue." (Slip opn, p. 2.)

In deciding the matter under the independent and more robust protections of the California Constitution, the Court of Appeal followed the same course this Court has charted in similar instances where a sharply-divided and much criticized U.S. Supreme Court opinion accorded less weight to core interests historically protected under the independent constitutional safeguards of the state charter.

This Court should do the same here, in view of the California Constitution's "more exacting" prohibition against unreasonable searches (art. I, § 13; *People v. Ruggles* (1985) 39 Cal.3d 1, 11-12) and its explicit protection of "privacy" (art. I, § 1).

A. This Court Should Look First to the More Robust Protections of the California Constitution in Assessing the California DNA Act's Blanket Mandate for Time-of-Arrest Searches of All Felony Arrestees.

The California Constitution is "'a document of independent force.'" (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 325; *Committee to Defend Reproductive Rights v. Myers* (1980) 29 Cal.3d 252, 262.) "Rights guarantee by this Constitution are not dependent on those guarantee by the United States Constitution." (Cal. Const., art. I, § 24.) This Court is free to strike a different balance between competing governmental and privacy interests than adopted by the majority of the U.S. Supreme Court.

The federal Constitution merely establishes a "floor" – the "minimum constitutional standards" which states must abide. (*Serrano v. Priest* (1976) 18 Cal.3d 729, 765, fn. 43.) "[W]e remain free to delineate a higher level of protection" (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 510) in "'develop[ing] and expound[ing] the principles embedded in our [state] constitutional law'" (*Serrano* at 765 fn. 13). As history shows, this Court has done so on countless occasions. (See *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 354 (and cases cited there).)

Some of these were cases in which the Court expressly disagreed with a recent U.S. Supreme Court precedent (often a divided decision). On other occasions, where the federal question was difficult or uncertain, this Court has relied upon the more robust provisions of the California Constitution and has found it unnecessary to resolve the federal issue.

It is appropriate to look *first* to the independent state charter, which imposes a "more exacting standard." (E.g., *Ruggles*, 39 Cal.3d at 11-12.) "[W]e need not address the precise reach of the Fourth Amendment unless persuaded that our state charter provides no protection against" the challenged

state practice. (*People v. Cook* (1985) 41 Cal.3d 873, 876 fn. 1.) The Court took that approach in many of its landmark opinions of the past half-century. (E.g., *People v Wheeler* (1978) 22 Cal.3d 258, 272 (state constitutional prohibition on discriminatory peremptory challenges 8 years before similar federal holding in *Batson*); *In re Johnson* (1965) 62 Cal.3d 325 (state constitutional right to counsel in all misdemeanor cases); *Serrano v. Priest* (1976) 18 Cal.3d 729 (disparities in school funding unconstitutional under state equal protection clause).)

More recently, the Court relied on the state equal protection guarantee of the California Constitution in striking down the state's ban on same-sex marriage (*In re Marriage Cases* (2008) 43 Cal.4th 757) – seven years before the U.S. Supreme Court followed suit under the Fourteenth Amendment (*Obergefell v. Hodges* (2015) __ U.S. __, 135 S.Ct. 2584).

"'[G]ood reasons exist to rely on our state Constitution even before we consider whether the federal Constitution applies.'" (*People v. Barrett* (2013) 54 Cal.4th 1081, 1112 (Werdegar, J.,conc. & dis. opn.); *id.* at 1144-1146 (Liu, J., conc. & dis. opn); accord *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 906 (Mosk, J., conc. opn.).)

Reliance on the California Constitution is especially appropriate here. There are several consequential differences between the California DNA Act and the Maryland law at issue in *King*, which "significantly alter the weight of the governmental interests and privacy considerations to be balanced in determining constitutionality under the Fourth Amendment." (Slip opn., p. 17.) Rather than *extend* the *King* majority's reasoning to the more problematic provisions of the California law, the appellate court grounded its holding on the more firm foundation of the state search clause. That independent state constitutional holding "renders it academic whether the Act is also unlawful

under the Fourth Amendment." (Slip opn., p. 18.)

B. The Court of Appeal's Reliance on the Independent Protections of the California Constitution Was Consistent with *Lance W.* and *Raven*, Because, Unlike Most Search Questions in Criminal Cases, Buza's Claim Does Not Seek Exclusion of Evidence.

The California Constitution states with unmistakeable clarity that its protections "are not dependent on those guaranteed by the United States Constitution" (art. I, § 24).

Although this Court's opinions have continued to attest to the independence of the state charter, the Court has had little occasion over the past 30 years to apply the state search clause (art. I, § 13) – despite numerous decisions on that subject in the 1970's and 1980's. *Most* search and seizure issues in criminal cases arise on suppression motions seeking exclusion of evidence obtained through an assertedly-illegal search. However, the "truth in evidence" provision of Proposition 8, adopted in 1982 (art. I, § 28(d)), precludes *exclusion of evidence* as a remedy, except when mandated by the U.S. Constitution. (*In re Lance W.* (1985) 37 Cal.3d 873, 886-887.) As a practical matter, Proposition 8's preclusion of an independent state exclusionary remedy has deterred litigation over the substantive scope of article I, section 13. Where a search issue arises on a suppression motion, a court no longer has the option of reliance on the state Constitution and must decide the matter under the Fourth Amendment.

But Buza's appeal does not seek any exclusionary remedy. Buza challenges his separate misdemeanor conviction (§ 298.1) for his refusal to

accede to a DNA search immediately after his arrest.[13] Because the state may not impose separate criminal punishment for a refusal to submit to an unconstitutional search, the validity of Buza's section 298.1 misdemeanor conviction necessarily depends upon the constitutionality of the DNA Act's mandate of time-of-arrest searches of all felony arrestees.

Because Buza is not invoking any exclusionary rule, this Court can and must evaluate the legality of that search mandate under the California Constitution.[14] *Proposition 8 did not alter the substantive scope of article I, section 13, and other provisions*, nor did it constrain the California courts' continuing responsibility to construe those clauses independently of federal prececents. In *Lance W.*, this Court firmly reiterated the continuing independence of the California Constitution as to the substance of its protections:

> Proposition 8 did not repeal either section 13 or section 24 of article I. The substantive scope of both provisions remains unaffected by Proposition 8. *What would have been an unlawful search or seizure in this state before the passage of that initiative would be unlawful today, and this is so even if it would pass muster under the federal Constitution.* (*Lance W.*, 37 Cal.3d at 886-887 (emphasis added).)

The Court's disposition of a subsequent initiative extinguishes any doubts on that score. Proposition 115 (adopted in 1990) purported to nullify

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[13] Indeed, in the trial court, Buza's challenge to the constitutionality of the arrestee search mandate did not arise on a section 1538.5 suppression motion – because there was no evidence to suppression – but on a section 1118.1 motion for acquittal on the section 298.1 misdemeanor count.

[14] In this crucial respect, *Buza* differs from the other DNA search case currently before this Court, *People v. Lowe*, S215727. *Lowe* does concern a motion to suppress evidence obtained through a DNA search.

the courts' authority to construe the California Constitution's protections of criminal defendants' rights independently from the federal Constitution. "This [California] Constitution shall not be construed ... to afford greater rights to criminal defendants than those afforded by" the U.S. Constitution. (Prop. 115 amendment of art. I, § 24 (quoted in *Raven v. Deukmejian*, 52 Cal.3d at 350).)

This Court found that this attempted abrogation of the judiciary's authority to construe the state charter independently would have effected such a radical overhaul of the state constitutional framework that it represented "a constitutional *revision*," beyond the authority of the initiative process, "rather than a mere amendment." (*Raven* at 349 (emphasis in original).) The new provision "would vest all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court. From a qualitative standpoint, the effect of Proposition 115 is devastating." (*Id.* at 352 (emphasis in original).)

Because the California courts had historically construed "the state Constitution as extending protection to our citizens beyond the limits imposed by the high court under the federal Constitution [citations]," Proposition 115 would have "substantially alter[ed] the preexisting constitutional scheme and framework." (*Raven*, 52 Cal.3d at 352.) The Court rebuffed that "broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights" and struck down that portion of the initiative as an "invalid revision of the California Constitution." (*Id.* at 355.)

Mark Buza challenges the state's authority to convict him of a separate criminal offense for refusing to accede to a warrantless time-of-arrest search which he contends the state had no constitutional authority to conduct. Because he does not seek any exclusionary remedy, the appellate court properly construed the substantive scope of article I, section 13, independently

of the five-justice *King* majority's much-debated construction of the Fourth Amendment.

C. The California Constitution Provides Greater Protection for Informational Privacy and Places Greater Limitations on Arrestee Searches.

This Court has long recognized that the state constitution provides greater protection in two crucial areas implicated by the California DNA Act's blanket mandate of DNA searches upon arrest – the right to "informational privacy" and the state's more strict limitations on arrestee searches generally.

1. The California Search Clause Provides Greater Protection Against Investigative Searches of Arrestees.

California's independent proscription on "unreasonable seizures and searches" (art. I, § 13) has historically provided more robust protections than the Fourth Amendment in the specific area of *arrestee searches*. This Court has not hesitated to construe section 13 independently, when U.S. Supreme Court precedents have accorded insufficient protection of an arrestee's right to freedom from an investigative search not supported by individualized probable cause or required for security reasons.

In *People v. Brisendine* (1975) 13 Cal.3d 528, this Court revisited its prior incident-to-arrest cases in light of intervening U.S. Supreme Court opinions, which authorized a full search of the person, even where the arrestee was merely to be transported to post bail, rather than booked into jail. (*United States v. Robinson* (1973) 414 U.S. 218; *Gustafson v. Florida* (1973) 414 U.S. 260.) Rather than follow *Robinson* and *Gustafson*, this Court elected to adhere to its own prior decision, *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, which had allowed only a protective patdown for weapons, not a full body search, under such circumstances. (*Brisendine* at 543-548, 552.) *Simon* had originally been decided under the Fourth Amendment. In

Brisendine, the Court stood by its prohibition on full searches in that context, but it repositioned that holding upon article I, section 13. (*Id.* at 545-547, 552.) As in its other independent construction cases, this Court "afforded respectful consideration" to the intervening federal decisions but recognized that they represented "merely another source of authority" in the exercise of its independent obligation "in establishing the outer limits of protection afforded by" the state constitution. (*Id.* at 552.)

The Court continued to take a more circumscribed view of the scope of allowable arrestee searches in several subsequent cases involving different factual permutations. (E.g., *People v. Laiwa* (1983) 34 Cal.3d 711, 726-727 (disallowing "accelerated booking search"); *People v. Longwill* (1975) 14 Cal.3d 943; *People v. Norman* (1975) 14 Cal.3d 929.)

This Court has already struck a different balance than the U.S. Supreme Court between privacy interests and asserted institutional or security purposes in the specific area of arrestee searches. The Court has found federal decisions unpersuasive in giving insufficient weight to arrestees' privacy interests.[15] It has eschewed any "blanket authority" for full searches of all arrestees and instead has tailored the permissible searches to the actual security needs of particular arrest situations – such as by limiting "full body searches" to those who "are actually to be incarcerated." (*Longwill*, 14 Cal.3d at 951, 952.)

Maryland v. King presented the Court of Appeal with a dilemma similar to those this Court faced in *Brisendine* and other cases, because the appellate court had already conducted its own extensive analysis of the balance between

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[15] "[W]e cannot accept the *Robinson* implication that 'an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person.'" (*Brisendine*, 13 Cal.3d at 547.)

privacy interests and the asserted objectives of DNA arrestee searches in its original, unanimous 2011 opinion in *Buza I*. As with this Court's consideration in *Brisendine* of intervening federal opinions at odds with prior California precedents taking a more circumscribed view of arrestee searches, the Court of Appeal properly considered the state constitutional implications of its holding opinion in *Buza I* that the asserted governmental interests did not justify the California law's sweeping collection of DNA at the time of every felony arrest.[16]

2. The California Constitution Recognizes an Inalienable Right to "Privacy," Especially "Informational Privacy."

There is no explicitly-enumerated right to "privacy" in the U.S. Constitution. Federal privacy protection arises only indirectly from the "penumbra" of other provisions. (*Griswold v. Connecticutt* (1965) 381 U.S. 479, 484-485.)

It's a different story under the California Constitution, which recognizes an express "inalienable" right to "privacy" (art. I, §1). "Not only is the state constitutional right of privacy embodied in explicit constitutional language not present in the federal Constitution, but past California cases establish that, in many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts. [Citations.]" (*American Academy of Pediatrics v. Lungren*, 16 Cal.4th at 326; *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 357.)

The "search" concept at the heart of the Fourth Amendment has

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[16] "The [U.S.] Supreme Court has taken like facts and reached a contrary result" to the appellate court's carefully reasoned treatment of DNA searches in *Buza I*. (*Brisendine*, 13 Cal.3d at 547.)

sometimes proven an uneasy fit with the challenges to privacy posed by new technologies. Esoteric debates over that term have occasionally resulted in an exaggerated focus on the physical intrusiveness of a procedure, rather than on its more consequential effect in governmental collection of an individual's most private information.[17]

The *King* majority's dismissal of a "buccal swab" as a "gentle" "light touch" and "minimal intrusion" is an unfortunate example of the federal standard's elevation of the form of the acquisition over the substance of the invasion of a citizen's most personal information. Yet that preoccupation with the physical means of the procedure drove the *King* majority's analysis – "The fact that an intrusion is negligible is of central relevance to determining reasonableness...." (*King*, 133 S.Ct. at 1969.)[18]

But governmental collection of an individual's genetic data is certainly not "negligible" under the California Constitution. "Informational privacy is the core value furthered by" article I, section 1's explicit protection of "privacy." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35.) The authors of the 1972 "Privacy Initiative," which added that provision, were prescient in their recognition of "the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection

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[17] For example, though the Supreme Court recognized attachment of a GPS tracking device as a "search," the justices disagreed over the relationship between the Fourth Amendment and "common law trespass." (*United States v. Jones* (2012) __ U.S. __, 132 S.Ct. 945, 949-952 (maj. opn.); compare *id.* at 954-957 (Sotomayor, J., conc. opn.); *id.* at 957-964 (Alito, J., conc. opn.).)

[18] *King* did not address the more consequential search represented by analysis of the sample to create a genetic offender profile or of the state's possibly indefinite retention of that information in its database. (See Pt. IV.)

activity in contemporary society." (*White v. Davis* (1975) 13 Cal.3d 757, 774.) Its principal object was to ensure that vast governmental databases like CODIS received *greater scrutiny under the California Constitution* than provided under other existing laws, including the federal Constitution.

While "informational privacy" encompasses a wide range of matters, there is no question that, like medical history,[19] genetic data lies near the heart of that protected zone. "DNA contains an extensive amount of sensitive personal information beyond mere identifying information, and people therefore have a strong privacy interest in controlling the use of their DNA. [Citation.]" (*County of San Diego v. Mason* (2012) 209 Cal.App.4th 376, 381.)

The privacy clauses's core concerns of protection of informational privacy and limitation of governmental databases of private information require that this Court accord greater weight to those interests in conducting its independent state constitutional review than federal precedents might otherwise require. "Constructing this balance requires a meticulous evaluation of the privacy right asserted, the degree of the imposition on that right, and the interests militating for and against any intrusion on privacy. [Citation.]" (*Los Angeles Gay & Lesbian Center,* 194 Cal.App.4th at 307.)

3. The California Constitution's Express Constitutional Protection of Privacy and its Core Concern with Informational Privacy Must Inform the Construction of the Unreasonable Search Clause As Well.

This Court has generally elected to evaluate most searches in criminal cases under the rubric of the federal and/or the state search clauses rather than

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[19] E.g., *Los Angeles Gay & Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 307.

under the state privacy clause. An elliptical passage in the two-justice lead opinion in *People v. Crowson* (1983) 33 Cal.3d 623, has engendered some confusion as to the precise relationship between the two state clauses. In *Crowson*, a badly-splintered Court rejected a privacy clause challenge to a recording of two arrestees' conversation in the back of a police car. The privacy clause challenge represented "the only issue before us" (*id* at 629-630); Crowson did *not* assert any unreasonable search claim under either the Fourth Amendment or article I, section 13. In holding that Crowson had no reasonable expectation of privacy as to a conversation in a police car, the lead opinion commented: "In the search and seizure context, the article I, section 1 'privacy' clause has never been held to establish a broader protection than that provided by the Fourth Amendment of the United States Constitution or article I, section 13 of the California Constitution." (*Id.* at 629.)

Justice Kaus was writing for only himself and Justice Mosk in *Crowson*. The three separate concurring and dissenting opinions confirm that this statement did not command a majority of the Court,[20] and the comment on the relationship between the privacy and search clauses cannot be considered

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[20] Justice Richardson concurred only "to the extent" the disposition affirmed the convictions, but did not elaborate on his reasoning. (*Crowson* at 636 (Richardson, J., conc. & dis. opn).) Justice Broussard disagreed with the lead opinion's conclusion that there was no reasonable expectation of privacy, but he concurred in the disposition on an entirely different ground – non-retroactivity of an intervening jailhouse privacy opinion decided months after the recording. (*Id.* at 635-636 (Broussard, J.,conc. & dis. opn).) Chief Justice Bird and Justice Reynoso dissented from rejection of the privacy challenge and specifically critiqued the suggestion that the protections of privacy clause were "coextensive" with the state or federal search clauses. (*Id.* at 637-638 (Bird, C.J., (conc. & dis. opn.,).) Thus, the lead opinion's brief commentary on the relationship among the various constitutional provisions received the support of only two or, at most, three justices (including Justice Richardson).

a holding of the Court. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 829.)

The Court passingly quoted the *Crowson* dictum in two subsequent cases which, like *Crowson* itself, involved challenges under the state privacy clause *only* (art. I, § 1) but did not present any unreasonable search claims under the Fourth Amendment or article I, section 13. (*Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th at 30 fn. 9; *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 1001.) The latter case, however, demonstrates that the privacy clause may sometimes provide greater protection, even in a search context.

Sheehan arose out of the San Francisco 49ers' policy of subjecting all ticketholders to patdown searches. The Court found that the patdowns implicated "autonomy privacy,"and that the complaint sufficiently alleged the components of an infringement of privacy under article I, section 1.[21] The Court remanded for further factual development on the reasonableness of the patdown policy in view of the "competing social interests" of public safety and the ticketholders' privacy. (*Sheehan*, 45 Cal.4th at 1000-1003.) Yet the allegations in *Sheehan* would not even have come close to stating a possible Fourth Amendment violation, because that provision has no application to searches conducted by a private entity like the 49ers. (*Sheehan* at 1001; cf. *Burdeau v. McDowell* (1921) 256 U.S. 465.) The Court's remand allowing the state privacy claim to go forward for further development demonstrates that article I, section 1, does sometimes provide greater protection than the Fourth Amendment, even in search and seizure contexts.

There is far greater cause to review DNA arrestee searches under article

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[21] "(1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest." (*Sheehan*, 45 Cal.4th at 998.)

I, section 1. While the patdowns in *Sheehan* implicated only the ticketholders' "autonomy privacy" (*Sheehan*, 45 Cal.4th at 999-1000), extraction of an arrestee's DNA represents a grievous encroachment on "informational privacy," which is "the 'principal focus' or 'core value' of the constitutional privacy right. [Citation.]" (*Ibid.*)

It is academic whether or not the privacy clause, by itself, provides any "broader protection" in the search context than the state search clause. *Each* of these state constitutional clauses (art. I, §§ 1, 13) is independent from and often provides greater protection than the Fourth Amendment or any other federal constitutional provision. **The state privacy and unreasonable search provisions complement one another, and each should inform the construction of the other**, especially in matters which implicate both, such as a search which intrudes upon informational privacy.

The California Constitution's explicit protection of "privacy" (art. I, § 1) and its "core value" of "informational privacy" necessarily represent the foundation for a California citizen's "reasonable expectation of privacy" for purposes of the search-and-seizure clause (art. I, § 13), as well. (Slip opn., p. 54, citing *White v. Davis*, 13 Cal.3d at 774; *Hill v. National Collegiate Athletic Assn.*,7 Cal.4th at 27, 34.)

In view of the long-recognized purposes of the privacy clause, Californians have a reasonable and legitimate expectation of protection against governmental "stockpiling [of] unnecessary information" and maintenance and indefinite retention of "profiles" of individuals' private information in digital databases. (Slip opn., p. 54.) The state's elevation of "informational privacy" to an "inalienable" constitutional right necessarily means that *Californians have a greater and more firmly-established reasonable expectation of informational privacy*, for purposes of article I, section 13, than the residents

of states without such separate privacy guarantees:

> [T]he express protection for the right to privacy enshrined in the California Constitution cannot be ignored in considering 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))

D. This Court Should Not Extend the Rationale of the Divided *King* Opinion to the Substantially Different Features of the California DNA Act.

Although this Court has the authority to construe the California Constitution independently, respondent urges it to refrain from doing so here and to defer to and "follow" the *King* opinion. (ROBM 20) However, the factors that have historically informed this Court's decisions whether to adopt federal precedents all strongly militate against uncritical acceptance of the divided and much criticized *King* opinion. (Slip opn., pp. 20-21.)

Respondent's framing of the question is not quite accurate. There are multiple differences between the Maryland and California statutes – in the scope of arrest offenses covered, in the timing of the searches, and in expungement procedures. (See Pt. VI.) The true question is not whether to "follow" *King* but whether this Court should extend the *King* majority's rationale to the substantially different features of the California DNA Act.

In considering whether to go a step farther than *King* in tolerating suspicionless searches of arrestees' private genetic material, the Court of Appeal properly considered *both* the flaws in the *King* majority's reasoning *and* the import of the differences between the two states' regimens on the balance between governmental objectives and constitutionally protected privacy interests.

"[W]e have on occasion been influenced not to follow parallel federal decisions by *the vigor of dissenting opinions and the incisive academic criticism* of those decisions. [Citations.]" (*People v. Teresinski* (1982) 30 Cal.3d 822, 836 (emphasis added); see, e.g., *id.* at 836, 839 (adopting reasoning of "unanimous" U.S. Supreme Court decision which had "not inspired extensive criticism"); compare *People v. Ramos* (1984) 37 Cal.3d 136, 151-159 (declining to adopt "closely divided" U.S. Supreme Court opinion which had upheld penalty phase "Briggs Instruction" on governor's commutation power); *People v. Bustamante* (1981) 30 Cal.3d 88, 100 ("commentators have generally condemned" Supreme Court decision limiting right to counsel at line-up); *Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d at 267 fn. 17 ("recent academic commentaries ... have criticized" Supreme Court decision limiting abortion rights).)

King was *not* an unanimous opinion, but a "closely divided" 5-4 decision. (*Ramos*, 37 Cal.3d at 151.) And Justice Scalia's dissent – also joined by Justices Ginsburg, Sotomayor, and Kagan – was nothing if not "vigorous" (cf. *Teresinski*, 30 Cal.3d at 836). "Make no mistake about it. As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason." " (*King*, 133 S.Ct. at 1988 (Scalia, J., dis. opn.).)

King has proven equally controversial in the larger legal and academic community. (Cf. *Committee to Defend Reproductive Rights*, 29 Cal.3d at 267 fn. 17.) Commentators have critiqued its conflation of "identification" with criminal investigative purposes, its unacknowledged departure from the usual limitations on suspicionless investigative searches, and its disregard of the

depth of privacy infringement posed by collection of genetic data.[22]

Respondent asserts that, because there is little textual difference between article I, section 13, and the Fourth Amendment, "the drafters intended to mirror the federal provision." (ROBM 21) This Court rejected that line of reasoning long ago. "[S]tate courts are the ultimate arbiters of state law, *even textually parallel provisions of state constitutions....*" (*People v. Brisendine*, 13 Cal.3d at 548 (emphasis added).) Although the federal and state provisions serve similar interests, this Court has long refused to make the constitutional rights of Californians dependent upon federal constructions. Article I, section 13, imposes a "more exacting standard for cases arising

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[22] E.g., Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court* (2013) 127 Harv.L.Rev. 161; Donahoe, *Fourth Amendment "Cheeks" and Balances: The Supreme Court's Inconsistent Conclusions and Deference to Law Enforcement Officials in Maryland v. King and Florence v. Board of Chosen Freeholders, etc.* (2014) 63 Cath. U. L. Rev. 549; Joh, *Maryland v. King: Policing and Genetic Privacy* (2013) 11 Ohio St.J.Crim. 281; Roth, *Maryland v. King and the Wonderful, Horrible DNA Revolution in Law Enforcement* (2013) 11 Ohio St.J.Crim. 295; Dery, *Opening One's Mouth "for Royal Inspection": The Supreme Court Allows Collection of DNA From Felony Arrestees in Maryland v. King* (2014) 2 Va.J.Crim.L. 166; Reimer, *The Scalia Dissent in Maryland v. King: Exposing a Contrived Rationale Today and a Dangerous Precedent for Tomorrow* (2013) 14 Engage: J. Federalist Soc'y Prac. Groups 34; Comment, *Twenty-First Century Surveillance: DNA "Data-Mining" and the Erosion of the Fourth Amendment* (2013) 51 Hous.L.Rev. 229; Comment, *Dethroning King: Why the Warrantless DNA Testing of Arrestees Should Be Prohibited Under State Constitutions* (2014) 83 Miss.L.J. 1111; Note, *Arrestee Number Two, Who Are You? Suspicionless DNA Testing of Pre-Trial Arrestees and the Fourth Amendment Implications* (2014) 79 Mo.L.Rev. 755. Even commentators generally supportive of expanded DNA searches have described *King*'s putative "identification" rationale as "contrived" or worse. (E.g., Kaye, *Why So Contrived: Fourth Amendment Balancing, Per Se Rules, and DNA Databases After Maryland v. King* (2014) 104 J. Crim.L. & Criminology 535.)

within this state." (*Brisendine* at 545; *Ruggles*, 39 Cal.3d at 11-12.) Moreover, respondent's textual similarity argument ignores that the state's explicit privacy clause (art. I, § 1) has no express federal counterpart.

Respondent argues that, because it was a "case of first impression," *Maryland v. King* did not really change anything. (ROBM 24) Though it was the Court's first DNA search case, *King* represented a marked departure "from prior Fourth Amendment jurisprudence on suspicionless searches and searches incident to arrest." (Slip opn., p. 21.) The Court had previously forbidden suspicionless searches "'whose primary purpose was to detect evidence of ordinary criminal wrongdoing.'" (*King*, 133 S.Ct. at 1981-1982 (Scalia, J., dis. opn.), quoting *City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 38.)

King accomplished that remarkable extension only through a verbal sleight-of-hand – its characterization of an investigative search into *other crimes* possibly committed by the arrestee as no more than "identification" of the arrestee. (See Pt. V.) Because California search cases have long adhered to the pre-*King* understanding precluding suspicionless investigative searches and limiting arrestee searches to those necessary for institutional security, the Court of Appeal correctly viewed the *King* majority's rationale as a significant erosion of those vital limitations.

A disputed U.S. Supreme Court ruling taking a restrictive view of a federal constitutional right presents exactly the situation in which our system of federalism calls upon state courts to step into the breach and to afford greater protection under their state constitutions. "A blind following of Supreme Court precedent would frustrate our ability to protect rights enjoyed by Californians and to maintain consistency in California law. [Citation.]" (*Bustamante*, 30 Cal.3d at 97.)

The *King* opinion has prompted academic commentary calling upon

state courts to do exactly that. "Fortunately, the doctrine of federalism allows the states to overcome the Supreme Court's restriction on individual privacy rights. [Fn.] .... [S]tate courts should hold that the warrantless testing is prohibited by state constitutions." (Comment, *Dethroning King: Why Warrantless DNA Testing Should Be Prohibited Under State Constitutions*, 83 Miss.L.J. at 1131-1132.)

It is useful to consider other state courts' analyses of similar issues under their respective constitutions. In *Brisendine*, this Court noted that the Hawaii Supreme Court too, construing that state's constitution, had rejected the reasoning of a U.S. Supreme Court precedent and had adopted a more limited view of a search incident to an arrest for a citation offense. (*Brisendine*, 13 Cal.3d at 551-552.)

Similarly here, another state high court has also recently assessed arrestee DNA searches under its state constitution. The Vermont Supreme Court struck down that state's regimen for pre-conviction DNA searches, based upon the "heightened standards and requirements" of the Vermont search and seizure clause. (*State v. Medina* (Vt. 2014) 102 A.3d 661, 663.)

Several aspects of the Vermont Supreme Court's analysis are especially material to this Court's consideration of the California DNA regimen. Like this Court, the Vermont Supreme Court has historically taken a more narrow view of the permissible scope of arrestee searches than U.S. Supreme Court precedents. For example, the Vermont Court too has long rejected the notion that any arrest, even one not involving booking for jail, authorizes a full search of the person – just as this Court did in *Brisendine*. (*Medina* at 676-677.)

The Vermont Supreme Court's opinion in *Medina* rejects the identical rationales for DNA arrestee searches which respondent has advanced before this Court, including the putative analogy to fingerprinting and

characterization of the search's purpose as mere "identification" of the arrestee. (*Id.* at 674-675, 682-683.) The Vermont holding is still more noteworthy because the Vermont regimen is considerably more circumscribed than California's. Much like the Maryland law in *King*, the Vermont statute deferred DNA testing until after a finding of probable cause at arraignment. *and* it provided a strong *automatic* mechanism for expungement of the samples of arrestees not ultimately convicted. (*Id.* at 664-666) Yet still the Vermont Supreme Court found that "[t]he marginal weight of the State's interest in DNA collection at the point of arraignment" was insufficient to overcome "the weight of the privacy interest retained by arraignees prior to conviction." (*Id.* at 683.)

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Even if California's DNA regimen were identical to Maryland's, the controversy over the *King* opinion – as reflected in the four-justice dissent, the extensive negative academic commentary, and the Vermont Supreme Court's opinion in *Medina* – would provide ample cause for a fresh examination of the question under the California Constitution. As discussed in Part V, the *King* majority's analysis is fatally flawed – even as to a more narrowly drawn regimen like Maryland's – because it rests upon conflation of an *investigation* into an arrestee's other possible criminal conduct with a mere "identification" of the person under arrest. This Court should certainly not *extend* that dubious rationale to California's materially different regimen. As discussed in Part VI: 1) the California statute sweeps in all felonies, not just a subset of especially violent ones; 2) it mandates a DNA search at the time of arrest, prior to any adjudication of probable cause or even a prosecutorial charging decision; and 3) it does not provide *automatic* expungement of the samples of arrestees who are never convicted, but places the onus on the individual to navigate a

complicated *discretionary* petition process. In all these respects, the governmental objectives are more attenuated, and the California DNA Act poses a much greater infringement of constitutionally protected privacy interests than a more limited statute such as Maryland's. These substantive differences decidedly tip the balance and compel the conclusion reached by the Court of Appeal that the DNA Act violates article I, section 13 (as also informed by article I, section 1).

IV. THE STATE'S COLLECTION AND LONG-TERM RETENTION OF DNA INVADES ARRESTEES' LEGITIMATE PRIVACY EXPECTATIONS IN THEIR SENSITIVE GENETIC DATA.

A. Arrestees Have Significant Reasonable Expectations of Privacy in the Genetic Data Contained in the DNA Samples That They Must Submit to the State.

The DNA sample analyzed and stored by the state contains the arrestee's entire genetic code, deeply personal information that surely falls within the "realm of guaranteed privacy." (Slip opn., p. 57, citing *Kyllo v. United States* (2001) 533 U.S. 27, 34; see also slip opn., pp. 23, 55.) The sample may reveal information regarding race, gender, ancestry, familial relationships, sexual orientation, current health, pre-disposition to genetic conditions and diseases (including mental illness and alcoholism), and behavioral traits including a propensity to violence. (*Kincade,* 379 F.3d at 842, fn. 3 (Gould, J, conc. opn.); *Mitchell,* 652 F.3d at 424 (Rendell, J.. dis. opn.); *United States v. Kriesel* (9th Cir. 2013) 720 F.3d 1137, 1149, 1157-1159 (Reinhardt, J., dis. opn.).) In the future,"the advance of science promises to make stored DNA only more revealing." (*Kincade* at 842, fn. 3 (Gould, J., conc. opn.); slip opn., p. 25.) For example, behavioral geneticists are researching a "purported 'crime gene'", indicating a pre-disposition to criminal behavior. (*Kriesel* at 1160, citing Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy* (2006) 100 Nw.U.L.Rev. 857, 877-78.)

Because there is a "vast amount of sensitive information that can be mined from a person's DNA," arrestees undoubtedly have "strong privacy interests" in this information. (*United States v. Amerson* (2d Cir. 2007) 483 F.3d 73, 85.) Irrespective of its use or misuse, "[i]t is the government's possession and control of [the arrestee's] most intimate genetic information

that invades his right to privacy." (*Kriesel,* 720 F.3d at 1158 (Reinhardt, J., dis. opn.); see also *Mitchell.* 652 F.3d 424 (Rendell J., dis. opn.).)

B. The *King* Majority Focused Only on the Physical Collection of the DNA Sample and Ignored the Nature of the Genetic Data Contained in That Sample.

The *King* majority recognized the physical collection of an arrestee's DNA by scraping the tissue on his cheek as an intrusion upon bodily integrity qualifying as a "search" under the Fourth Amendment. (*King*, 133 S.Ct. at 1968-1969.) But the majority dismissed the cheek swab as a minimal and brief intrusion and accorded it little weight when balanced against governmental interests served by DNA testing. (*King* at 1969, 1979, 1980.)

By focusing on the "minimally intrusive" physical collection, the majority ignored the highly sensitive nature of the genetic data contained in the collected DNA. It did not address what federal circuit courts have recognized as the more significant privacy implications posed by the state's subsequent analysis and retention of the sensitive information contained in DNA: "[T]he second search occurs when the DNA sample is analyzed and a profile created for use in state and federal DNA databases." (Slip opn., p. 10; see *Mitchell,* 652 F.3d at 407; *United States v. Amerson* (2nd Cir 2007) 483 F.3d 73, 85.) This second search implicates the arrestee's reasonable expectation of privacy in his genetic code (*id.*, at 85), and the appellate court here properly made it the "true focus" of its analysis (slip opn., p. 10).

C. Respondent Improperly Focuses Only on the Offender Profile and Disregards the Threat to Privacy Posed by the State's Long-Term Retention of the DNA Sample.

Respondent asserts that California's use of arrestees' DNA implicates only their privacy interests in their "identities" and that arrestees in state custody have no no right to privacy in their identification. (ROBM 31, 53-54.)

Like the *King* majority, respondent narrowly focuses on the state's use of the offender profile.[23] (ROBM 8, 15, 60; *King*, 133 S.Ct. at 1968, 1979.) This exclusive focus on the profile disregards the significance of the state's long-term possession of the arrestee's DNA sample, containing his entire genetic code. "[T]he far greater threat to privacy lies in the DNA samples from which the CODIS profiles are developed, which .... contain the entire genome." (Slip opn., pp. 24-25.)

D. Because Expungement Is Non-Automatic and Discretionary, the DNA of Former Arrestees Who Were Never Charged, Tried or Convicted Will Likely Remain in State Possession, Allowing Continuing Access to Sensitive Genetic Data.

California requires collection of a DNA sample "immediately following arrest" for any felony. (§ 296.1(a)(1).) Right after collection, state officials begin processing the sample to create the offender profile and upload it into DNA databases (*Haskell*, 677 F. Supp.2d at 1190), although this procedure takes an average of 30 days. (ROBM 41-42.) If the arrestee is never charged with a crime or his charges are dismissed at arraignment, he will be released within two-to-four days. Yet the state will still analyze his DNA sample and upload the resulting profile into the databases long after he is released. The state will store the sample indefinitely. As long as the arrestee profile remains in databases, being compared to DNA from unsolved crime scenes, the state will retain the sample for possible match confirmation. (*Kriesel*, 720 F.3d at

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[23] That profile is derived from 13 loci (junk DNA) that purportedly do not reveal genetic traits. "Questions about how much information may be derived from junk DNA now and in the future have been the subject of much debate in scientific and legal communities, and studies have begun to suggest links between CODIS loci and susceptibility to certain diseases, as well as family relationships and ancestry. [Citations.]" (Slip opn., pp. 24-25 fn. 9; *Kincade*, 379 F.3d at 818 fn. 6.)

1143-1144; *Haskell* at 1190.)

Most significantly, California does not mandate *automatic* expungement (destruction of the DNA sample and removal of the profile from the databases) if the former felony arrestee is released from custody because he is never charged, or because his charges are dismissed or result in acquittal. (Compare *King*, 133 S.Ct. at 1967 (Maryland's automatic expungement procedure).) Although a discharged arrestee is eligible to seek expungement (see § 299(a)-(b)), he must somehow discover, initiate and navigate a cumbersome procedure, without notice or an attorney. The trial court, the final arbiter of the expungement request, has the discretion to deny expungement, a non-reviewable order. (§ 299(c)(1).)[24] It is unlikely that the hundreds of thousands of former arrestees who are not convicted will even find out about the process or that they will successfully obtain expungement without assistance. Their DNA will likely remain indefinitely in state possession.

Because California's non-automatic, discretionary mechanism makes the prospect of expungement illusory for most former arrestees, the state's indefinite retention of their DNA represents the most significant privacy consequence of these time-of-arrest searches. "The absence of automatic expungement procedures increases the privacy intrusion because DNA profiles and samples are likely to remain available to the government for some period of time after the justification for their collection has disappeared, potentially indefinitely." (Slip opn., p. 45.) Respondent's focus on the profile, created from non-coding loci, ignores that the state has on-going access to the DNA contained in the stored sample, implicating the former arrestee's continuing

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[24] See Pt.VI-C for more detailed discussion of California's expungement procedures.

privacy interest in his genetic material. (*Kriesel*, 720 F.3d at 1157-1158 (Reinhardt, J., dis.opn.); *Mitchell*, 652 F.3d at 424 (Rendell, J., dis.opn.).)

E. Recent U.S. Supreme Court Decisions Explain the Threat to Privacy Posed by the Government's Access to Highly Sensitive Personal Information.

United States v. Jones (2012) __ U.S. __, 132 S.Ct. 945, held that the surreptitious attachment of a GPS device to a suspect's jeep and the resulting constant police surveillance of his movements for 28 days violated his reasonable expectation of privacy and thus constituted a search.

In her concurring opinion in *Jones*, Justice Sotomayor explained how long-term government access to private information may violate an individual's reasonable expectation of privacy, even if state officials use only a small portion of that data. (*Id.* at 954-957 (Sotomayor, J., conc. opn).) Justice Sotomayor emphasized that such continual "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations." (*Id.* at 955.) Even if the government uses only the GPS data establishing the suspect's involvement in criminal activity, the tracking device also records "trips of an undisputably private nature," including those to the psychiatrist, the plastic surgeon or the abortion clinic. The government "could store such records and effectively mine them for information years into the future." (*Id.* at 955-956.) It is the government's long-term access to this indisputably private information that violates the individual's privacy interests. Similarly, California's access to the stored DNA sample, which could potentially be mineed for personal information for years to come, implicates the former arrestee's reasonable privacy interests in his entire genetic blueprint.

In *Riley v. California* (2014) __ U.S. __, 134 S.Ct. 2473, a unanimous Supreme Court held that law enforcement officers need to obtain a warrant before searching the contents of a cell phone seized from an individual at the time of arrest. In *Riley*, decided one year after *King*, the Court showed greater concern with law enforcement's invasion into arrestees' reasonable expectations of privacy in highly personal information, particularly when the invasion is made possible by new technology.

Rather than confine the focus to the physical character of the search, *Riley* emphasized the enormous volume of private information that users store on these devices – months of text messages and e-mails, scores of photos, a thousand-entry phone book, calendar entries, financial statements, medical data, "apps" and a history of all internet searches. (*Riley* at 2489.) "With all that [modern cell phones] contain and all that they may reveal, they hold for many Americans 'the privacies of life.'" (*Riley* at 2494-2495, quoting *Boyd v. United States* (1886) 116 U.S. 616, 630.) The same could surely be said of an individual's DNA sample, containing his entire genetic blueprint.

The Supreme Court looked to the breadth of private information potentially accessible through a cell phone search, "a digital record of nearly every aspect of [arrestees'] lives," rather than only the specific data examined during the police search. (*Riley* at 2490; see slip opn., p.23, fn. 8.) Similarly the California DNA regimen enables the state's indefinite retention of DNA samples containing an individual's entire genetic code, notwithstanding the state's assertion that it looks only to certain "non-coding" loci for identification purposes. (ROBM 15, 60.)

F. The Use Restrictions in the California DNA Act Provide Little Protection Due to the Expansive Definition of Identification Set Forth in *King* and Urged by Respondent.

Respondent emphasizes that the California Act restricts the state's use of collected and stored DNA to "identification purposes" only (§ 295.1(a)) and imposes penalties for misuse.[25] (ROBM 10, 53, 58.) Nevertheless, under *King*'s expansive definition of "identification," authorized "identification purposes" could include re-analyzing the stored DNA sample for certain behavioral traits, including a pre-disposition to mental illness or a propensity for violence or anti-social behavior. (See *Kriesel*, 720 F.3d at 1159-1160 (Reinhardt, J., dis. opn.).) If "identification" includes a determination of whether the individual has committed previous unsolved crimes yielding DNA evidence (*King*, 133 S.Ct., at 1971-1972), it could also include an assessment of whether that individual's DNA shows a genetic tendency to criminal behavior. "After all, law enforcement needs to know just whom it is dealing with.'" (Slip opn., p 26 (citing Murphy, *License, Registration, Cheek Swab, etc.*, 127 Harv. L. Rev. at 180).) Such an assessment could justify crime control measures, such as preventative detention, to stop crime before it happens. (Slip opn., pp. 25-26; *Kriesel*, 720 F.3d at 1160 (Reinhardt, J., dis. opn.); Joh, *Reclaiming "Abandoned" DNA, etc.*, 100 Nw.U.L.Rev. at 876-877.)

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[25] A new provision, added to the DNA Act in 2014, forbids the use of the DNA sample "as a source of genetic material for testing, research, or experiments, by any person, agency, or entity seeking to find a causal link between genetics, behavior or health." (§ 295.2; ROBM 10.)

G. California's Practice of Familial Searches Aggravates the Privacy Consequents of DNA Collection By Infringing the Genetic Privacy of Offenders' Relatives, Including Relatives Who Have Never Been Arrested or Convicted.

One additional feature makes California's use of its DNA database especially troubling. Almost alone among the states, California deliberately conducts "familial" DNA searches (though its present policy uses only convicted felons' profiles). California deliberately runs searches for partial matches between offender and crime scene profiles, in hopes that a partial match may help implicate an offender's *relative* in an unsolved crime. "A partial match may instead inculpate the offender's close genetic relatives as possible perpetrators of a crime because they, like the crime scene sample, share some but not all of the examined loci with the individual whose CODIS profile provided the partial match." (Slip opn., p. 24 fn. 18.)

"California was the first state to permit deliberate familial DNA searches, intentionally using DNA profiles to investigate the donor's close relatives as possible perpetrators. [Fn.] .... While a number of states and the federal government permit use of partial matches discovered fortuitously in the course of routine database searches, California is one of the few that allow *deliberate* searches for this purpose." (Slip opn., pp. 34-35 (emphasis in original).)[26] Indeed, the California Department of Justice has developed a specific "software program to assist investigators in more effectively identifying familial relationships. [Citations.]" (*Id.*, pp. 36-37.)

California's enthusiastic embrace of familial searching has grave implications for the magnitude of the privacy consequences of its DNA

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[26] Citing Ram, *Fortuity and Forensic Familial Identification* (2011) 63 Stan. L.Rev. 751, 753, 764, 767-769.

regimen: *Inclusion of an offender's DNA in the database jeopardizes the genetic privacy of the individual's relatives*, as well. "[D]ue to California's policy of familial searching, the California DNA Act intrudes upon the privacy of individuals who have not themselves come into any contact with law enforcement." (Slip opn., p. 51 & fn. 31.)[27] Moreover, by effectively focusing investigation of cold cases on the relatives of those who have already been caught up in the criminal justice, this practice has the likely consequence of replicating and exacerbating the racial disparities that already plague that system. (*Id.*, pp. 52-53 & fns. 32-33 (and additional sources cited there).)

California's current practice uses only convicted offender profiles, not arrestee profiles, for deliberate familial searches. But that policy is reflected only in statements on the DOJ's web site.[28] There is no statutory prohibition on use of arrestee samples for familial searching, nor is the current practice even codified in a formally promulgated administrative regulation. There is nothing to stop the current Attorney General or one of her successors from changing that policy at any time, and "intru[ding] into the privacy interests of arrestees[']' biological relatives." (Slip opn, pp. 45, 52.)

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[27] See also Murphy, *Relative Doubt: Familial Searches of DNA Databases* (2010) 109 Mich. L.Rev. 291, 317.

[28] Cal. DOJ, FAQ's, "California's Familial Search Policy."

V. BECAUSE CALIFORNIA DOES NOT USE DNA TO DETERMINE THE IDENTITY OF AN ARRESTEE, BUT SOLELY FOR INVESTIGATION OF POSSIBLE OTHER CRIMES, THIS COURT SHOULD REJECT THE CONFLATION OF "IDENTIFICATION" WITH CRIMINAL INVESTIGATION.

A. The California Constitution Bars a Suspicionless, Warrantless Search of an Arrestee for Investigation of Possible Criminal Conduct Unrelated to the Crime of Arrest.

If one principle of search and seizure law is clear – or, at least, was clear until *Maryland v. King* – it is that neither the federal nor state Constitution allows a warrantless, suspicionless search *for criminal investigative purposes*. "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. [Citation.]" (*City of Indianapolis v. Edmond* (2000) 531 U.S. 32, 37.)

The courts have allowed certain categories of "administrative" or "special needs" searches, without the usual prerequisite of individualized suspicion, precisely because those regimens were properly tailored to serve important governmental interests, *distinct from criminal investigation.* These have included border searches and immigration checkpoints, drug tests of certain categories of governmental employees, and administrative inspections of closely regulated business, among others. (*Id.* at 37-39 (summarizing cases).) "[W]e have upheld certain regimens of suspicionless searches where the program was designed to serve 'special needs, *beyond the normal need for law enforcement.*' [Citations.]" (*Id.* at 37 (emphasis added).)[29]

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[29] As this Court elaborated in upholding a fish and game inspection, "Such administrative searches and seizures are permissible when [] the governmental action serves a special and important state need and interest *distinct from the state's ordinary interest in enforcing the criminal law*" and the regulations are narrowly tailored to limit "the impingement upon []

The courts have refused to countenance suspicionless searches "whose primary purpose was to detect evidence of criminal wrongdoing," such as Indianapolis's operation of "vehicle checkpoints ... in an effort to interedict unlawful drugs." (*City of Indianapolis*, 531 U.S. at 34, 38; see also, e.g., *Ferguson v. City of Charleston* (2001) 532 U.S. 67, 83-84 (state hospital's urine tests and drug screen of obstetrics patients did "not fit within the closely guarded category of 'special needs'" where "the immediate objective of the searches was to generate evidence *for law enforcement purposes*" (emphasis in original)).)

Numerous pre-*King* opinions of both the U.S. Supreme Court and this Court have addressed the permissible purposes and scope of a search of an arrestee. This Court has recognized that a custodial arrest gives rise to legitimate concerns of police safety, potential destruction of evidence, and institutional security. But this Court has been especially zealous in ensuring that arrestee searches are narrowly tailored to those legitimate security and institutional needs and do not serve as excuses for *criminal investigative searches* unrelated to the arrest offense.

As discussed in Part III, a remarkable number of this Court's opinions construing article I, section 13, independently have concerned the permissible bases and scope of arrestee searches. The Court has been particularly sensitive to the risk that a putative security or institutional purpose– such as an "ostensible weapon search" or "accelerated booking search" – may become a "facade" *for an essentially investigative search*, "in the hope of discovering evidence of a more serious crime," not supported by the requisite reasonable

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reasonable expectation[s] of privacy." (*People v. Maikhio* (2011) 51 Cal.4th 1074, 1080 (emphasis added).)

suspicion or probable cause. (*Brisendine*, 13 Cal.3d at 534-535; *Laiwa*, 34 Cal.3d at 727.) This Court has closely scrutinized whether the search is genuinely necessary to the asserted safety or institutional objective or instead represents an end-run around the prohibition on investigative searches not supported by probable cause or reasonable suspicion.

Here, much as in many of those prior cases, respondent has posited a superficially legitimate non-investigative objective – "identification" of the arrestee – and has attempted to cast DNA arrestee searches as serving the same function as the accepted practice of fingerprinting. The *King* majority did accept a similar "identification" rationale for the Maryland DNA search regimen, and that characterization represented the crux of the Court's holding. It has also proven to be the most hotly-disputed aspect of *King* – as reflected in Justice Scalia's dissent, in academic commentaries on *King*, and in judicial assessments, such as the Court of Appeal opinion here and the Vermont Supreme Court's similar state constitutional holding in *State v. Medina* (Vt. 2014) 102 A.3d 661. In evaluating whether to adopt *and extend King*'s "identification" rationale to the substantially different features of the California Act (discussed further in Pt. VI), this Court should first independently assess whether the *King* majority or the four dissenting justices had the better side of the "identification" debate.

B. This Court Should Refuse to Conflate "Identification" with Investigation into Other Possible Criminal Conduct.

In applying the California Constitution, this Court has been loathe to accept government rationalizations that rest on fictions or "half truths" about the challenged practice.

People v. Ramos (1984) 37 Cal.3d 136, is a good example. This Court's fidelity to accurate characterization was a principal reason it chose to

stand by its condemnation of the penalty phase "Briggs Instruction," even after a divided U.S. Supreme Court had found that instruction constitutionally permissible.[30] The vice of the Briggs Instruction was that it apprised jurors of the governor's authority to commute a life-without-parole sentence, but neglected to inform them that a governor had the same authority to commute a death sentence into one allowing for release. (*Id.* at 153-155.) The instruction was "a classic example of a misleading 'half truth.'" (*Id.* at 153.) It distorted the jurors' penalty assessment by encouraging "the mistaken belief that [death] is the only penalty that will avoid a possibility of a commutation." (*Id.* at 155.) Rather than adopt the U.S. Supreme Court majority's more benign but less "realistic[]" characterization, this Court found "that the misleading nature of the instruction alone is enough to condemn it as an unconstitutional denial of due process" under the California Constitution. (*Id.* at 153,155.)

This case concerns different state constitutional provisions (art. I, §§ 1, 13) and a different statutorily-prescribed practice. But, like *Ramos*, it requires a clear-eyed view of a procedure with broad systemic implications for California's criminal justice system. Because this Court must exercise its independent judgment in applying the California Constitution, the Court is not required to adopt the reasoning of a closely-divided U.S. Supreme Court decision if it finds its premises unrealistic and its rationale "misleading."

The lynchpin of respondent's defense of the California DNA Act and of the *King* majority's endorsement of the (more limited) Maryland statute is the characterization of DNA searches as a means of "identification." "The premises that arrestees' DNA is used for identification and that identification

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[30] *California v. Ramos* (1982) 463 U.S. 992.

includes criminal history permitted the *King* majority to view DNA testing of arrestees as falling within the established warrant exceptions for searches incident to arrest and booking." (Slip opn., p. 27.)

The *King* majority found a legitimate state interest in accurately identifying an arrestee and went on to describe a "suspect's criminal history" as "a critical part of his identity." (*King*, 133 S.Ct. at 1971.) But the majority used "identification" in a different and more expansive form than the customary function (amply served by fingerprints) of disclosing any documented history of prior criminal *convictions, pending charges or arrests*. Instead, the search is directed to "an arrestee's [unknown] past conduct" – including possible crimes for which, up to that moment, the individual had not been charged, arrested or even suspected. (*Id.* at 1973.)

For the reasons incisively presented in Justice Scalia's *King* dissent and in the subsequent judicial and academic critiques of *King*, the "identification" label is at best a "half truth" comparable to those this Court rejected in *Ramos*, if not an outright fiction.

> That seems to me quite wrong—unless what one means by "identifying" someone is "searching for evidence that he has committed crimes unrelated to the crime of his arrest." .... *If identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the ordinary law-enforcement aims* that have never been thought to justify a suspicionless search. (*King* at 1982-1983 (Scalia, J., dis. opn) (emphasis added).)

"No minimally competent speaker of English" would describe tying an arrestee to a crime for which he was not previously suspected as an identification *of the arrestee*. "It was the previously unidentified suspect who had been identified," not the arrestee whose identify was already known. (*Id.* at 1985.)

It now falls to this Court to assess which view of the putative identification rationale is more persuasive. We submit that the Court of Appeal got it right in joining Justice Scalia, his dissenting colleagues, and other judicial and academic commentators in debunking *King*'s expansion of "identification" far beyond its ordinary meaning of verifying the arrestee's true name and any prior documented history of arrests or convictions.

"By common understanding, 'identification' means verifying *who a person is*. The Oxford English Dictionary defines the term as the "action or process of determining what a thing is or who a person is." (Slip opn., p. 29 (quoting 5 Oxford English Dict. (2d ed. 1989) p. 619, col. 1) (emphasis added).) But, in practice, California uses fingerprints, not DNA, to verify the arrestee's true name, birthdate, etc., and to determine whether he has any documented history of prior arrests or convictions. (See Pt. V-D.)

The *King* majority replaced the customary identification inquiry into "who a person is" with a far-ranging exploration of "what he may have done." That expansion allowed the majority to sweep this suspicionless investigative search directed to possible unrelated criminal conduct into the seemingly unobjectionable category of booking procedures. "Because this definition of 'identity' folds investigation into identity verification, and because DNA testing at the time of arrest does not further actual identity verification, the court's analysis distorted the 'totality of the circumstances' required to be examined in measuring the reasonableness of the search at issue." (Slip opn., p. 27.)[31]

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[31] "The *King* majority's construction of a new governmental interest in 'identity' that includes not only verification of who an arrestee is but also what that person has done in the past allowed the court to elevate the 'governmental interest' side of the balance in weighing the law's promotion of 'legitimate

The appellate court in *Buza* was hardly alone in viewing the *King* majority's curious redefinition of "identification" as a transparent distortion of the actual purpose of arrestee DNA searches. No aspect of *King*'s analysis has drawn more intensive judicial and academic criticism than its characterization of "identification" of an arrestee as encompassing a search directed to any *uncharged and unsuspected* criminal conduct the arrestee may have committed in the past:

"That generous redefinition allowed the Court to rely upon analogizing DNA to 'routine booking' procedures like mug shots and fingerprints, which are generally exempt from constitutional scrutiny." (Murphy, *License, Registration, Cheek Swab, etc.*, 127 Harv.L.Rev. at 177.) Yet, "the facts belie any suggestion that Alonzo King's DNA was taken to verify his identity or to inform any decision with respect to bail." (Reimer, *The Scalia Dissent in Maryland v. King: Exposing a Contrived Rationale, etc.,* 14 Engage: J. Federalist Soc'y Prac. Groups at 34.) Another article put it less charitably: "[T]he majority parted company with reality in its portrayal of Maryland's regime as simply a means of ensuring the accurate identification of arrestees at the time of booking and bail decisions. On the contrary, the unmistakable purpose of the law is to facilitate crime-solving through 'cold hits' to unsolved cases." (Roth, *Maryland v. King and the Wonderful, Horrible DNA Revolution, etc.,* 11 Ohio St.J.Crim. at 298.)

The Vermont Supreme Court found that distortion of the "identification" concept intolerable in striking down that state's DNA arrestee statute under the Vermont Constitution. "The current system of photographs

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governmental interests' against its intrusion on arrestee's reasonable expectation of privacy." (Slip opn., p. 27.)

and fingerprints fully responds to the need for identification of the defendant," in the commonly understood sense of that term. (*State v. Medina*, 102 A.3d at 674.) Instead, " the real functionality, and statutory purpose [of the DNA search] is to solve open criminal cases or ones that may occur in the future." (*Id.* at 678.) But a quintessential investigative purpose such as this offends the longstanding restrictions on warrantless, suspicionless searches for ordinary law enforcement purposes. "The real expansion of the warrantless search power in *King* is 'its reimagination of the idea of "identity" to include criminal history and other information.'" (*Ibid.* (citing Murphy, *License, Registration, Cheek Swab, etc.*, 127 Harv.L.Rev. at 177).)

The notion that "identification" allows a search directed to other criminal conduct for which the arrestee has never been charged or even suspected is breathtaking in its implications. If assessment of an arrestee's potential dangerousness for pre-trial detention purposes allows a search for possible uncharged criminal conduct, that same rationale would invite other invasions of privacy interests far beyond those allowed under any of the currently-recognized categories of arrestee searches. By that reasoning, police could automatically search an arrestee's cell phone, his tablet, or even his home, because any of those might be a respository of evidence of previously-unsuspected gang affiliations, prior violence, drug dealing, or other matters arguably relevant to assessment of dangerousness for jail classification or bail. It is abundantly clear that an individual's custodial arrest does not authorize warrantless searches into any of these constitutionally protected areas. "*King*'s search for relevant information appears to have no boundaries in the determination of 'who the person really is,' thus stripping the charged individual of all privacy interests." (*Medina*, 102 A.3d at 675.)

C. The Ballot Arguments Supporting Proposition 69 Confirm that the True Purpose of Arrestee DNA Searches Is Investigation of Other Crimes, Not Verification of the Arrestee's Identity.

That conflation of "identification" of arrestees with investigation of "cold cases" pervades California's DNA Act. "The ballot arguments in favor of [Proposition 69] relied heavily on crime-solving processes and concerns, emphasizing the utility of DNA in investigating and solving crime. [Fn.]" (Slip opn., p. 32.) The supporting argument began with a series of anecdotal press accounts of DNA solving rapes and murders. The ballot argument's first sentence explicitly invoked that investigative function. "The DNA Fingerprint, Unsolved Crime and Innocence Protection Act *helps solve crime*, free those wrongfully accused, and stop serial killers." (Ballot Pamphlet, Gen. Election (Nov. 2, 2004), Argument in Favor of Proposition 69, p. 62 (emphasis added).)[32] "Taking DNA during the booking process at the same time as fingerprints is more efficient and *helps police conduct accurate investigations*. No wasting time chasing false leads; DNA can prove innocence or guilt." (*Ibid.* (emphasis added).)

Notwithstanding the initiative's putative purpose of "accurate identification of criminal offenders,"[33] there is no reference whatever in the ballot arguments to identification in the traditional sense of determining an arrestee's identity – who the person is. There are neither statistics nor even anecdotes on any use of DNA to clear up uncertainty regarding the true identity of an arrestee. Nor is there any explanation why fingerprints are not

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[32] <http://repository.uchastings.edu/ca_ballot_props/1237> {reviewed as of Aug. 4, 2015}.

[33] Ballot Pamphlet, text of Prop. 69, p. 135.

more than sufficient for that legitimate identification purpose.

The entire theme of the supporting ballot argument was that expansion of the DNA data base to arrestees "solves more crimes" and will "tak[e] dangerous criminals off the streets." (Ballot Pamphlet, p. 62.) Important though those objectives may be, they plainly represent ordinary law enforcement investigation, unrelated either to legitimate booking needs or the crime of arrest and *not* supported by any individualized suspicion (much less probable cause).

D. The Logistics of California's DNA Testing And Comparison Process, Including the Substantial Delay, Further Belie the Putative Identification Purpose.

The *King* dissenters recognized that "the actual workings of the DNA search" are entirely at odds with the putative "identification rationale." (*King*, 133 S.Ct. at 1983 (Scalia, J., dis. opn.).) In contrast to the mere minutes necessary to compare an arrestee's fingerprints with the relevant databases, submission of a sample for DNA testing and comparison takes weeks or months after an arrest, *an average of 30 days in California*. (ROBM 41-42.) Unlike the criminal history readily retrievable by running an arrestee's prints, DNA does not yield any usable information in time to facilitate "informed decisions concerning pretrial custody." (*Id.* at 1980 (maj. opn.); compare *id.* at 1983-1984 (Scalia, J., dis. opn.).)

The very database used for these comparisons is entirely inconsistent with the asserted "identification" purpose. Law enforcement officials do *not* run an arrestee's sample "against some master database of known DNA profiles, as is done for fingerprints." (*Id.* at 1983 (Scalia, J., dis. opn.).) Though a discrete section of the DNA database contains profiles of *known* convicts and arrestees, a new arrestee's sample is instead run against a distinct

section "consist[ing] of samples taken from crime scenes." (*Id.* at 1984.) That practice corresponds to the search's true purpose, which is "to solve these cold cases," rather than to the asserted interest in using DNA to verify the identity of the person in custody.

> If one wanted to identify someone in custody using his DNA, the logical thing to do would be to compare that DNA against the Convict and Arrestee Collection: to search, in other words, the collection that could be used (by checking back with the submitting state agency) to identify people, rather than the collection of evidence from unsolved crimes, whose perpetrators are by definition unknown. But that is not what was done. And that is because this search had nothing to do with identification. (*Id.* at 1984-1985 (Scalia, J., dis. opn.).)

The same is true in California. "California's protocol for DNA collection and analysis confirms that DNA is not used to verify who a person is." (Slip opn., p. 31.) California does not rely on DNA to determine the identity of an arrestee for booking purposes. Processing of a DNA sample through California's data base takes an average of 30 day. (ROBM 41-42; *King*, 113 S.Ct. at 1973), while jailers can determine an arrestee's identity through the FBI's *fingerprint* database in 27 minutes (slip opn., p. 30). Not surprisingly, due to the necessity for immediate verification of an arrestee's identity at booking, California relies on fingerprints for that purpose. The DNA Act itself requires collection of fingerprints. (§ 296(a)(2)(C).) As in Vermont, "[t]he current system of photographs and fingerprints fully responds to the need for identification of the defendant." (*Medina*, 102 A.3d at 674.)

The California Department of Justice's own protocols on "Collection Mechanics" demonstrate that the state does not use DNA to determine an arrestee's "identity." Officers decide whether to take a DNA sample *only after they have already determined the arrestee's identity through other means*

(presumably name and fingerprints). "The [DOJ] kit requires local agency personnel to: [¶] 1. *identify* the subject; [¶] 2. determine that a DNA sample needs to be collected....."[34]

Nor does California use DNA as a cross-check on identification. Jailers do *not* collect DNA from an arrestee if state records show that person "has already provided a sample." As soon as DOJ receives an arrestee DNA sample, it "flags" that person's name with a "do not collect" notation for purposes of any future arrests or convictions.[35] Thus, the police do not use DNA as an alternative or complementary means of identifying an arrestee who is already in the system.

> DNA samples are not taken from arrestees who have already had samples taken [citing Cal. DOJ, FAQ's], which shows that an arrestee's identify must be verified in some other fashion before a DNA sample can be collected. It also demonstrates that, as a practical matter, law enforcement agencies do not need or use the DNA taken at arrest for identification purposes. (Slip opn., p. 31.)

The district court decision in *Haskell v. Brown* (N.D. Cal. 2009) 677 F.Supp.2d 1187, provides a more fully-developed factual picture of the logistics of California's process.[36] Upon arrest, booking authorities take the arrestee's fingerprints and his California ID to verify his identity (his true name and birthdate). Based on that traditional identification process, police

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[34] Cal. DOJ, FAQ's, "Collection Mechanics" (emphasis added)

[35] Cal. DOJ, FAQ's, "Qualifying Offender Verification Criminal History Flags/Sample Taken" & "Rap Sheet 'Flags' and Offender Verification."

[36] As noted earlier, we refer to the superseded district court decision in *Haskell*, not for its legal analysis, but only for its description of the mechanics of California's DNA analysis procedures.

access the arrestee's criminal record (if any) to determine whether his DNA has ever been previously collected. The police take an arrestee's DNA only if he has never provided a DNA sample on a previous arrest or conviction. The sample is used to create an offender profile in CODIS, which will then be used solely for seeking "hits" in cold cases under investigation – that is, comparison with samples obtained from crime scenes (*Haskell* at 1191) – *not* for purposes of tracking the arrestee's subsequent movements through the criminal justice system. The protocols instruct that jailers must not take a new DNA sample if the arrestee's offender profile is already in the system, because the state does not want duplicate samples from the same individual. (*Haskell* at 1190.)

Rather than compare DNA taken at arrest to a database of known offenders (i.e., samples taken upon conviction or arrest), the entire purpose of the sample's inclusion in state and national databases is *comparison with unsolved crimes.* As the *Haskell* court put it, while fingerprints will generally verify "who the person is," California uses DNA to determine "whether he is the same person who committed an as-yet unsolved crime across town, etc." (*Haskell,* 677 F.Supp.2d at 1199.) While the state unabashedly describes that purpose as just another element of "identification," it plainly contravenes the longstanding proscription on using a booking or other arrest search as a pretext for investigation of other criminal conduct.

E. Because California Does Not Use DNA to Identify Who the Arrestee Is and Solving Cold Cases Is a Quintessential Investigative Purpose, this Court Should Reject the Misleading "Identification" Characterization Rather than Extend that Rationale to California's Regimen.

A bare majority of the United States Supreme Court may be willing to call suspicionless investigations of cold cases a form of "identifying" an arrestee. But the Vermont Supreme Court in *Medina* and the Court of Appeal

in *Buza II* each declined that invitation. This Court should do the same. Like those reviewing courts, this Court should recognize these searches for what they are – investigative "fishing expeditions" into possible criminal conduct unrelated to the arrest offense.

The Court of Appeal properly cut through the half truths of the "identification" label and recognized that the arrestee DNA search regimen is an *investigative* search into possible criminal conduct unrelated to the arrest offense and has nothing to do with the institutional functions that underlie fingerprinting and other booking procedures:

> DNA taken at the time of arrest is not intended to be used, and cannot usefully be employed, to verify the arrestee's identity; it is intended to be used and is in fact employed to investigate the arrestees' possible involvement in criminal conduct unrelated to the crime of arrest and to add to the DNA database for purposes of future crime-solving. .... Analysis of DNA collected from arrestees does not serve the asserted governmental purpose – identification – and the apparent actual purpose for taking DNA samples at this early stage – investigation – cannot be squared with established constitutional principles protecting against suspicionless searches. (Slip opn., pp. 37-38.)

The putative "identification" rationale for arrestee DNA searches is neither accurate nor persuasive *even as to a more narrowly-drawn regimen such as the Maryland statute*. Even if California's statutes mirrored Maryland's, the deficiencies and half-truths of the "identification" rationale would provide strong grounds for this Court to find such a regimen contrary to the more rigorous search limitations of article 1, section 13, and the enhanced privacy protections of article I, section 1. Moreover, as discussed in Part VI below, California's DNA Act diverges from Maryland's in multiple ways (scope, timing, expungement), all of which reduce the putative governmental interests and aggravate the resulting infringement of privacy.

Since the putative "identification" rationale is misleading in the first place, this Court should not *extend* that flawed reasoning to California's significantly more problematic and intrusive regimen.

VI. THE CALIFORNIA DNA ACT OFFENDS THE SEARCH AND PRIVACY CLAUSES: (1) BY SWEEPING IN ARRESTS FOR ALL FELONIES, (2) BY ADVANCING THE SEARCH TO THE TIME OF ARREST, AND (3) BY FAILING TO PROVIDE FOR AUTOMATIC NON-DISCRETIONARY EXPUNGEMENT FOR ARRESTS NOT RESULTING IN CONVICTIONS – ALL OF WHICH DISTINGUISH IT FROM THE MORE NARROWLY DRAWN MARYLAND LAW CONSIDERED IN *KING*.

Even aside from *King*'s problematic conflation of "identification" with investigation, the necessity for independent state constitutional scrutiny of the California DNA Act, rather than a rote *extension* of *King*, is still more compelling due to the material differences between the Maryland and California regimens. Those differences fall into three principal categories. "[T]he [California] DNA Act applies to persons arrested for any felony, requires immediate collection and analysis of arrestees' DNA even before a judicial determination of probable cause, and does not provide for automatic expungement of DNA data if an arrestee is not in fact convicted of a qualifying crime." (Slip opn., p. 15.) In all these respects, the governmental interest in testing and retention of DNA is substantially reduced, while the gratuitous invasion of arrestees' legitimate privacy expectations is dramatically increased.

A. California Collects DNA From Adults Arrested for Any Felony, Not Just Those Arrested for Violent and Serious Crimes Who Are More Likely to Have Previously Committed Violent Offenses Yielding DNA Evidence.

The Maryland DNA Act requires state officials to collect DNA only from those charged with designated "crimes of violence" or burglaries (including attempts). (*King,* 133 S.Ct. at 1967; Md. Pub. Saf. Code Ann., § 2-504(a)(3)(I).) The 24 qualifying"crimes of violence" include "murder, rape, first-degree assault, kidnaping, arson, sexual assault and a variety of other serious crimes." (*King* at 1967; Md. Crim. Law Code Ann., § 14-101.) The

King majority repeatedly emphasized that the Maryland law required DNA collection *only* from defendants charged with these "violent," "serious" and "dangerous" offenses. "[T]he necessary predicate of a valid arrest for a serious offense is fundamental." (*King* at 1978; see also *id.* at 1973 ("a suspect in a violent crime"); *id.* at 1974 ("a dangerous crime").)

Despite the Maryland statute's limitation to selected violent crimes, the *King* dissenters warned of the dangers of extension of such searches to arrests for less serious crimes. "As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason." (*King* at 1989 (Scalia, J., dis. opn.).)

California has already traveled farther than Maryland down the slippery scope described in the King dissent. California has already abandoned its former limitation (in effect from Nov. 2004 through Dec. 2008) to arrests for specific violent crimes - sexual offenses, murder and voluntary manslaughter. (§ 296(a)(2)(B)-(C).) In contrast to Maryland and many other states,[37] California does not limit arrestee DNA searches to sexual assaults or other violent felonies, even though it has well-established categories of "serious" and "violent" felonies which are used for "three strikes" and many other purposes. (See §§ 667.5(c)) [23 "violent felonies"] ; §1192.7(c)) [42 "serious felonies"].) The California DNA Act now covers arrests for *all felonies* – including scores of non-dangerous offenses. The regimen puts those

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[37] Fifteen of the 28 states that take DNA from arrestees "limit collection to violent crimes, including sexual assaults." (U.S. Dept. of Justice, National Institute of Justice, DNA Sample Collection from Arrestees (Dec. 7, 2012) ("NIJ, DNASample Collection").) <http://www.nij.gov/topics/forensics/evidence/ dna/pages/collection-from-arrestees.aspx> {as of Aug. 12, 2015}

arrested for welfare fraud, passing bad checks, tax violations, or auto theft, on par with those charged with rape or murder.

California's extension of DNA searches to all felony arrests (as opposed to selected violent felonies, as in Maryland) more than doubles the number of arrestees whose DNA will be taken. Most felony arrests in California are for offenses not classified as "serious" or "violent." The majority (about 60%) are for suspected offenses that would *not* trigger DNA collection in Maryland. (Compare Md. Code. Ann.Pub. Saf., § 2-504(a)(3)(I); Md. Code Ann. Crim. Law, § 14-101.)[38]

If the state's goal is to solve cold cases – or (as stated in *King*) to assess the dangerousness of pre-trial detainees – it makes no sense to collect DNA from every felony arrestee. Maryland plainly chose to collect DNA only from persons arrested for violent crimes for a reason: Those are the kinds of crimes that typically yield DNA evidence, especially and rapes. (See *Rise v. Oregon* (9th Cir. 1995) 59 F.3d 1556, 1561.)[39]

It is more likely that defendants charged with rape or other violent crimes may have previously committed similar offenses. In *Rise*, the Ninth Circuit upheld an Oregon statute requiring DNA collection from felons *convicted of murder or specific sexual offenses*. The state had "produced uncontroverted evidence documenting the high rates of recidivism among

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[38] In 2014, 24.2% of adult felony arrests were for violent crimes (including homicide, rape, robbery, assault and kidnaping); 9.4% were for burglary; 0.2% were for arson; 1.3 % were for sex offenses; and 4.0% were for weapons offenses. Thus, only 39.1 % of arrests were for the violent crimes subject to DNA collection in Maryland. (*Crime of California 2014*, Table 23.)

[39] "Most of DOJ's hits are to sexual assault cases and other violent crimes." Cal. DOJ, FAQ's, "Effects of All Adult Arrestee Provision," Q.2.

certain types of murderers and sexual offenders." Thus, Oregon demonstrated that the violent felons subject to mandatory DNA searches had a documented propensity for commission of similar crimes. (*Rise,* 59 F.3d at 1561.) Even cases upholding DNA searches of all convicted felons have acknowledged the lower recidivism rates of non-violent offenders. (*Kriesel*, 508 F.3d at 950-951 & fn. 11.)

California has not presented any comparable "uncontroverted evidence" documenting any high recidivism rates of *arrestees*, as compared to convicted offenders. (Compare *Kincade,* 379 F.3d at 833 ["extraordinary rate of recidivism" of convicted felons]; *Samson v. California* (2006) 547 U.S. 843, 853-54 [high recidivism rates of parolees].) The state has not shown that mere arrestees are more likely to commit multiple crimes than members of the general public. (See *Haskell,* 677 F.Supp. 2d at 1198; see also *United States v. Scott* (9th Cir. 2006) 450 F.3d 863, 873-874 [arrest does not give rise to a presumption of dangerousness or inference of recidivism].)

Most importantly, the state has not produced "uncontroverted evidence" establishing that those arrested for *non-violent or non-serious felonies* are likely to have committed the types of violent crimes that typically yield DNA evidence, particularly murders and sex offenses. For example, limitation of DNA collection to arrests for sexual assaults might rest on "propensity" and recidivism considerations uniquely associated with sexual offenders.[40] Similarly, the recent Three Strikes Reform Act (enacted by Prop. 36 in Nov. 2012) reflects a judgment that prior commission of an offense of extreme violence suggests a continuing likelihood of violence justifying potential life

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[40] See Evid. Code § 1108 (allowance of propensity evidence of prior sexual offenses); Welf. & Inst. Code §§ 6600 et seq. (commitment regimen for "sexually violent predators").

imprisonment.[41]

However, in the absence of any documented tendency of auto thieves, tax evaders, or welfare cheats to be rapists or murderers, the state has no tenable rationale for this sweeping extension of DNA searches to all felony arrests, most of which will involve non-violent offenses. There is a fatal disconnect between the state's asserted interest in discovering whether arrestees have committed unsolved rapes and murders and the huge group of arrestees who are mandatorily searched.

Respondent has seized upon the Supreme Court's comment that "even people 'detained for minor offenses can turn out to be the most devious and dangerous criminals.'" (ROBM 50-51, citing *Florence v. Bd. of Chose Freeholders of County of Burlington* (2012) __ U.S.__, 132 S. Ct. 1510, 1520; *King*, 133 S.Ct. at 1971.) Timothy McVeigh reportedly was pulled over for driving without a license plate hours after the Oklahoma City bombing, and one of the September 11th hijackers was ticketed for speeding two days before that attack. Respondent also cites a case in which someone arrested for a drug offense was linked, by DNA comparison, to an unsolved rape and murder three

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[41] Proposition 36 significantly revised the "three strikes" statutes to provide that, subject to limited exceptions, commission of a current offense not classified as "serious" or "violent" will generally support only a "second strike" sentence rather than an indeterminate "third strike" term of 25 years to life, even if the offender has two prior serious or violent felony convictions. (§§ 667(e)(2)(C); 1170.12(c)(2)(C).) However, the revised statutes provide that a current non-serious, non-violent felony will still be subject to a third-strike life term, if the defendant has any prior conviction for one of the selected crimes of extreme violence or dangerousness listed in sections 667(e)(2)(C)(iv) and 1170.12(c)(2)(C)(iv). These so-called "super strikes" include murder, sexual assaults, and a handful of other aggravated crimes, such as assault with a machine gun on a police officer or possession of a weapon of mass destruction.

decades earlier. (ROBM 51.)

These anecdotal examples do not change the fact that there is no documented correlation between an arrest for a minor offense and any propensity for rape, murder, or other violent offenses likely to yield DNA evidence. These examples only underscore the overbreadth of respondent's argument – for almost every adult has been cited, at one time or another, for traffic violations or other minor crimes. Yet no one could reasonably suggest that speeding or other vehicular offenses are indica of a possible terrorist. Nor does an arrest for theft, drugs, or another non-violent felony suggest a propensity for rape or other violent crimes.

Respondent's real argument is that adding DNA from hundreds of thousands of arrests each year will result in more "hits" to unsolved violent crimes. However, *any* substantial increase of submissions to the DNA database will almost certainly result in more hits. The state would no doubt reap a similar investigative windfall if it were to mandate DNA collection from all public employees, licensed contractors, or recipients of government benefits. As Justice Scalia presciently warned in *King*, if an "increase" in hits is enough to justify collection of DNA for all arrests, then surely expansion of DNA collection to other groups of ordinary citizens who interact with the state will likely follow.[42]

Collection of DNA from those arrested for non-violent felonies does not effectively serve the state's asserted interest in *expeditious* assessment of a pre-trial detainee's dangerousness. It makes no sense to dump tens or

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[42] Justice Scalia scoffed at the notion "that DNA testing, and entry into a national DNA registry, will not befall thee and me, dear reader, but only those arrested for 'serious offense[s].'" (*King*, 133 S.Ct. at 1989 (Scalia, J., dis. opn.).)

hundreds of thousands of arrestee DNA samples– many from people arrested for minor felonies – on an already overburdened system. This only adds to the backlog and slows the process from collection to match. (See *King* at 1988 (Scalia, J, dis. opn.).) At the same time, those thousands of people arrested for non-violent, non-serious felonies suffer a gratuitous invasion of their reasonable expectations of privacy in their sensitive genetic data.

B. By Advancing the DNA Search and Testing to the Time of Arrest, Prior to any Charging Decision or Adjudication of Probable Cause, the California DNA Act Gratuitously Invades the Privacy of Thousands of Californians.

Perhaps the most consequential of the several distinctions between the Maryland and California DNA statutes concerns the timing of the search and submission for testing.

In Maryland, a mere *arrest* for a qualifying felony does not trigger any DNA search. Maryland does not collect DNA sample until "the time the individual is *charged*" with a qualifying felony and, even then, does not submit it for testing and inclusion in the database until after *arraignment*. (Md. Code Ann. Pub. Saf. § 2.504(b)(1) & (d)(1) (emphasis added).) "[I]t is at this point that *a judicial officer ensures that there is probable cause* to detain the arrestee on a qualifying serious offense." (*King*, 133 S.Ct. at 1967 (emphasis added).) If there is no such judicial finding, that is the end of the matter. "If all qualifying charges are determined to be unsupported by probable cause ... *the DNA sample shall be immediately destroyed.*" (Md. Code Ann. Pub. Saf. § 2.504(d)(2(i) (emphasis added); *King* at 1967.)

Thus, in Maryland, there is no testing of DNA until the matter has cleared two thresholds beyond mere arrest: (1) A *prosecutor* has found sufficient grounds to charge a qualifying offense; and (2) a *judicial officer* has found probable cause, authorizing pre-trial detention.

As discussed in Part IV, it is the analysis and recording of the arrestee's genetic material that represents the far greater intrusion upon privacy. The constitutional implications of submission of an individual's genetic code to a governmental database are still greater in California, due to its enhanced protection for "informational privacy" under article I, section 1.

Yet, paradoxically, despite California's greater constitutional protection for arrestees' privacy, *its DNA regimen has neither of the statutory safeguards* that ensure that Maryland's procedures are narrowly tailored to the asserted governmental interests and affect only those detained for trial. California mandates collection of DNA "as soon as administratively practicable after arrest." (§ 296.1(a)(1)(A).) Unlike Maryland, California does not defer testing and recording of the DNA until after arraignment. The California law "permits processing of the sample to begin immediately." (Slip opn., p. 16.)

California's insistence on testing and retention of DNA immediately upon arrest, prior to either prosecutorial charging or judicial arraignment, does not serve any legitimate non-investigative purpose (such as jail classification) but has immense practical implications for the magnitude of the infringement of privacy interests: "This means that the arrestee's DNA may be processed on the basis of an arresting officer's designation of the alleged crime, even if he or she is never charged with a qualifying – or indeed any – crime, and despite the fact that, because of the length of time necessary for processing a DNA sample, the DNA information will not be available for any of the purposes discussed in *King* before the arrestee is either released or arraigned." (Slip opn., p. 16.)

1. Predicating DNA Submission on Charging and Arraignment, as in Maryland, Defers the Procedure Only Two to Four Days.

It is essential to recognize just how little benefit the government derives

from California's advancement of the search and submission to the time of arrest and booking.

Due to the interplay between state statutory law (§§ 825, 859) and the constitutional mandate of a prompt preliminary judicial determination of probable cause (*Gerstein v. Pugh* (1975) 420 U.S. 103; *County of Riverside v. McLaughlin* (1991) 500 U.S. 44; Cal. Const., Art. I, §14), a California felony arrestee must be arraigned within two to four days of arrest. An arrestee must be "taken before the magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays." (§ 825(a)(1); see also *People v. Powell* (1967) 67 Cal.2d 32, 58-59; *Dant v. Superior Court* (1998) 61 Cal. App.4th 380, 390.) Accounting for weekends and holidays, arraignment must usually be held within two to four days of arrest. (*County of Riverside* at 47, 56-59.)[43]

Arraignment serves a vital constitutional function. A neutral magistrate

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[43] "[A]s a general matter," the Fourth Amendment requires a "judicial determination[] of probable cause within 48 hours of arrest." (*County of Riverside*, 500 U.S. at 56.) In an individual case, "the existence of a bona fide emergency or other extraordinary circumstance" may justify a longer delay. (*Id* at 57.) In *County of Riverside*, the Supreme Court found that county's arraignment practices did "not comport fully with [these] principles," because, due to the exclusion of weekends and holidays, "the County's regular practice exceeds the 48-hour period we deem constitutionally permissible." (*Id.* at 58-59.) Out of an abundance of caution, we will describe the arrest-to-arraignment period as "two to four days," in view of the "extraordinary circumstance" allowance. However, pursuant to *County of Riverside*, the arraignment should *ordinarily* occur within two days. The widely-used CEB practice guide flatly states, "Probable cause determination must be made within 48 hours after arrest, *including* Sundays and holidays. [Citing *County of Riverside*.]" (CEB (2015) *California Criminal Law: Procedure and Practice*, § 4.2, p. 78 (emphasis in original).) Deferral of the DNA submission until arraignment should ordinarily delay that process by only two days.

must find probable cause to hold the charged defendant in prolonged pre-trial detention pending trial. (*Gerstein*, 420 U.S. at 105, 111-112, 114, 120; *County of Riverside*, 500 U.S. at 47, 52.) It is that adjudication of probable cause which serves as a prerequisite for testing of DNA in Maryland. (*King*, 133 S.Ct. at 1967.) The *King* majority referred repeatedly to probable cause in finding that the Maryland statute served legitimate interests for informed pretrial decisions.[44]

This initial judicial assessment of probable cause at arraignment is distinct from a preliminary hearing, where the prosecution must put on evidence to support taking the charges to trial. (*Gerstein*, 420 U.S. at 119-120.) Because a preliminary hearing is an adversary proceeding subject to the rules of evidence and other safeguards, it often occurs weeks or months after arrest. But, because the whole point of the *initial* judicial review of probable cause at arraignment is that it must occur promptly after arrest, that process is much less complex. (*Ibid.*) State statutes (e.g., § 825), as further honed through the *County of Riverside* opinion, ensure that this critical judicial screening occurs within two to four days of arrest – and ordinarily within 48 hours. (*County of Riverside*, 500 U.S. at 58-59.)

All that the state "gives up" by a deferral of DNA testing until arraignment, as in Maryland, is a two-to-four day head start on analysis of the sample. The incremental benefit of that advancement of the testing is negligible. California takes approximately one month after submission of a DNA sample to process it and return any results. (ROBM 41-42) Even where

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[44] E.g., "Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, ... his or her expectations of privacy and freedom from police scrutiny are reduced." (*King* at 1978.)

local officers submit the DNA sample immediately upon arrest, there is no possibility that jailers, prosecutors, or a court will have the results at the time of arraignment. Those results will not be available until weeks after any decisions on pre-trial detention or bail.

"[B]ecause of the length of time necessary for processing a DNA sample, the DNA information will not be available for any of the purposes discussed in *King* before the arrestee is either released or arraigned. For individuals who are formally charged with a qualifying offense, the information will rarely be available materially sooner as a result of collection immediately upon arrest than it would be if collected upon arraignment." (Slip opn., p. 16.)

Much of the asserted rationale for authorization of pre-conviction DNA searches is that waiting for *conviction* is likely to delay receipt of the results for months or longer, especially as to charges on violent offenses which may take longer to proceed to trial or other disposition. Whatever the merits of that argument, it has no relevance to California's submission of DNA for testing immediately upon arrest, rather than after charging and arraignment. That premature submission of the sample simply means that the local officials may receive the results on the 30th day, rather than the 32nd or 34th. "DNA testing as early as California permits – before arraignment – appears to be of incremental utility at best." (Slip opn., p. 58.)

2. The Absence of the Safeguards of Prosecutorial and Judicial Review Dramatically Increases the Invasion of Privacy, Resulting in DNA Collection and Testing for Thousands of Californians Who Are Not Charged or Detained.

By not awaiting arraignment or even a prosecutorial charging decision, law enforcement merely shaves two-to-four days off the time between arrest and receipt of DNA. But that very slight benefit comes at a huge cost to

constitutionally protected privacy interests, in both quantitative and qualitative terms.

The state's own arrest statistics reveal that, out of over 300,000, felony arrests in California in 2014, *only 68.9% resulted in convictions of any type.* (*Crime in California 2014*, Table 38-A.) By pegging DNA collection to the time of arrest, rather than conviction, the state effectively "overcollects" by almost one-third.[45]

But *California's advancement of DNA testing to the time of arrest and booking*, rather than charging and arraignment as in Maryland, *dramatically escalates that overcollection.* The breakdown of dispositions among the 31.1% of felony arrests not resulting in convictions is illuminating. Prosecutors elected not to file criminal charges ("complaint denied") on 15.3% of felony arrests. Those uncharged arrestees, in turn, represent almost half (49.2%) of the arrests which did not result in conviction. Moreover, courts dismissed charges on another 11.7% of the arrests. Although the state's statistics do not break out the nature of the dismissals, at least some of those dismissals presumably were for want of probable cause.

The Department of Justice states that its current practice is to require DNA searches of all felony arrestees who are booked into custody, but not those who are released without booking[46] (although that current practice is not

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[45] The overcollection rate is likely even greater than that, because some individuals arrested for felonies are ultimately convicted of misdemeanors. The state's statistics do not specifically break convictions down into felonies and misdemeanors, but they do reflect that the majority were non-prison dispositions: jail only, 8.3%; probation with jail, 38.4%; probation without jail 10.1%; fine only, 0.8%. Each of these categories likely includes a mix of felonies and misdemeanors.

[46] Cal. DOJ, FAQ's, "DNA Sample Collection: Who & When."

codified in any statute or formally promulgated administrative regulation). Even if one excludes "law enforcement releases" (3.2% of arrests), the overall picture remains the same. Prosecutorial non-charging decisions account for 15.7% of booked felony arrests and court dismissals another 12.1%.

These numbers underscore the crucial importance of prosecutorial charging as a preliminary screen. Prosecutorial non-charging decisions account for well over half (54.9%) of the 87,867, booked felony arrests that do not result in conviction. (See Cal. DOJ, *Crime in California 2014*, Table 38-A.) Since some substantial portion of the dismissals occur at arraignment, deferral of DNA testing until after an adjudication of probable cause, as in Maryland, would screen out a still greater proportion. That short two-to-four day pause would obviate DNA testing of tens of thousands of released arrestees who are not held for trial and therefore do not come within the institutional objectives asserted in *King*.

California's advancement of DNA submission and testing to the time of booking, rather than charging and arraignment, effectively doubles the number of arrestees whose DNA is taken and tested for no good reason.

3. Arrestees Who Are Never Charged or Prosecuted Have Substantially Greater Privacy Expectations Than Pre-Trial Detainees.

The qualitative implications of California's extension of DNA testing to pre-arraignment arrestees, including the thousands who aren't even charged, are equally compelling.

Throughout this litigation, the state's refrain has been that arrestees have lesser expectations of privacy than free citizens. That is correct, as far as it goes. While they are in custody, arrestees have lesser privacy than the general public, *but they have substantially greater legitimate expectations of*

privacy than convicted felons. (See, e.g., *Banks v. United States* (10th Cir. 2007) 490 F.3d 1178, 1186-1187.)

A convicted felon continues to have reduced expectations of privacy *throughout his life*, even after he is discharged from custody and from probation, parole or other supervision. For example, he is barred forever from possessing any firearm (§ 29800) and may also be subject to registration requirements and residency restrictions, depending on the nature of his convictions (e.g., § 290 (sex offender registration); Health & Saf. Code § 11590 (narcotics offenders)). But where an arrestee is discharged – either because the prosecutor declines to charge him or a judicial officer dismisses charges – he is not subject to any continuing restrictions or supervision. His status reverts to that of an ordinary free citizen.

Respondent's analysis fails to distinguish between the markedly different privacy expectations of two distinct groups of arrestees: arraigned arrestees facing charges that have survived an initial probable cause adjudication, as in Maryland, and those who have merely been arrested by police but whose potential cases have not yet been reviewed by any judicial officer or even by a prosecutor, as in California.

Where a prosecutor has *charged* an arrestee with a qualifying felony and there has been a preliminary *judicial determination of probable cause* allowing pretrial detention, the arrestee has a reduced expectation of privacy due to the countervailing governmental interest in jail security. The *King* majority found that security interest sufficient to allow DNA testing of charged arrestees whose cases have passed that threshold at arraignment. (*King*, 133 S.Ct.at 1978, 1980.) But that rationale has no application to individuals who are discharged within two to four days of arrest – either because the prosecutor declines to charge them or because a magistrate found probable cause wanting.

Because the DNA results will not become available until weeks after arraignment, submission of DNA immediately upon arrest does not serve any security or other supervisory interest during that short two-to-four day interval. California does *not* use that information for "informed decisions concerning pretrial custody." (*King*, 133 S.Ct. at 1980.) "As a practical matter, DNA collected from individuals who are arrested but not charged cannot be used either to verify the identity of the arrestee or to serve the interests discussed in *King*. The only possible use law enforcement agencies can make of these arrestees' DNA is in investigation of other crimes." (Slip opn., p. 47.) Yet, a search for that conventional law enforcement investigative purpose is the very thing for which the federal and state search clauses require an individualized suspicion.

The California Constitution does not permit lumping pre-arraignment arrestees together with those who have been charged by a prosecutor and held over by authority of a judicial officer's probable cause finding. California arrest statistics confirm that approximately 16% won't even be charged, and another 12% will have their charges dismissed sometime before trial, often at that initial judicial appearance, arraignment. (See Part V-B-2.)

Because the authority for detention during that short pre-charging, pre-arraignment period is much more tenuous and ephemeral and a substantial number of those arrestees will be discharged, they occupy a different constitutional position than post-arraignment defendants. "An arrestee whose arrest has not even been subjected to a judicial determination of probable cause falls closest on the spectrum of privacy rights to an ordinary citizen. [Fn.]" (Slip opn., p. 47.) "Within the category of arrestees, an individual such as appellant, who has not yet been the subject of a judicial determination of probable cause, falls closer to the ordinary citizen end of the continuum than

one as to whom probable cause has been found by a judicial officer or grand jury." (*Id.*, p. 57.)

Yet, California's DNA regimen is blind to that distinction.

4. The Taking and Submission of DNA Prior to Prosecutorial Charging or Preliminary Judicial Review Is an Invitation for Abuse.

"[T]he privacy expectations of a pre-arraignment arrestee are higher than those of an individual who has been subjected to a judicial determination of probable cause, and *permitting DNA collection on the basis of an arresting officer's determination of the crime increases the potential for abuse.*" (Slip opn., p. 16 (emphasis added).)

Because there has not yet been either prosecutorial or judicial screening, California's time-of-arrest mandate "effectively leaves the determination of who will be subjected to DNA testing entirely in the hands of arresting officers." (Slip opn., p. 48.) "[T]he sample and resulting profile will be retained unless and until the arrestee succeeds in the onerous and perhaps quixotic process of having them expunged – even if the arrest is subsequently determined by a judicial officer to have been without sufficient cause." (*Ibid.*)

The probable cause assessment at arraignment is vital to the constitutional mandate that any longer term intrusion on liberty and privacy interests requires *judicial* scrutiny, rather than a police decision alone. '[A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime and for *a brief period* of detention to take the administrative steps incident to arrest." (*Gerstein*, 358 U.S. at 113-114 (emphasis added).) But a "judicial determination of probable cause [is] a prerequisite to extended restraint of liberty following arrest." (*Id.* at 114.)

In California, arrest, rather than arraignment sets the testing and

database juggernaut in motion. Because there is no automatic expungement, the resulting privacy invasion is not "brief," but "extended" and possibly indefinite. DNA testing and retention must require the same constitutional safeguard – judicial review – as any restraint beyond the brief pre-arraignment period. "When the stakes are this high, the detached judgment of a neutral magistrate is essential...." (*Gerstein* at 114.)

The Maryland statute provides two levels of assurance – the prosecutor's charging decision and the magistrate's probable cause adjudication. California's provides neither. "[T]here is no check on the discretion of the officers who make the arrests that create the opportunity for DNA sampling until after the sample may have been used for investigative purposes." (Slip opn., p. 48-49.)

Scholarly analyses have sounded similar warnings. "The notion that arrestee testing invites no law enforcement discretion makes sense only if one believes the police lack discretion in making decisions about arrest. [Fn.] .... [¶] .... If anything, arrestee DNA sampling laws accord exceptional discretion to police." (Murphy, *License, Registration, Cheek Swab, etc*, 127 Harv.L.Rev. at 189.) "[T]he very existence of a DNA database gives the police incentives to turn every encounter into an arrest. [Fn.]" (Joh, *Maryland v. King: Policing and Genetic Privacy,* 11 Ohio St.J.Crim. at 285.)[47] Moreover, beyond the potential abuse of police discretion *whether* to arrest someone, the procedure also invites manipulation of the designation of an offense arrest as a felony or a misdemeanor. (See slip opn., p. 48.)

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[47] Predicating DNA testing on police arrest decisions may have still more insidious consequences. "[T]hese exercises of police discretion ... will almost certainly exacerbate the already racially disproportionate representation in our DNA databases. [Fn.]" (Joh at 286-287.)

"[T]he mere fact of an arrest does not render it lawful, a judgment that can be made only after a judicial determination of probable cause." (Slip opn., p. 48 fn. 26.) At least in *King*, Maryland's prerequisites of prosecutorial charging and judicial review of probable cause mitigated the dangers of allowing the recording of so many arrestees' genetic data to rest on police judgments alone.

Academic commentary on *King* has underscored the importance of the probable cause assessment and *the necessity that other states incorporate those safeguards*. "Before allowing police to take a DNA sample or to strip search, *states should require a hearing to determine if the pending charges are supported by probable cause.* This requirement would deter police from charging a person with a serious crime for the sole purpose of collecting his DNA." (Donahoe, *Fourth Amendment "Cheeks" and Balances, etc.*, 63 Cath. U. L. Rev. at 585 (emphasis added).) Although many states already require judicial review as a prerequisite to DNA testing,[48] sadly California's statutes do not. Without that essential judicial check on police overreaching, the California regimen plainly does not comport with the heightened protections of article I, sections 1 and 13.

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[48] Eleven of the 28 states that authorize post-arrest DNA collection require charging and arraignment or a judicial finding of probable cause before analysis of the sample (See U.S. Dept. of Justice, National Institute of Justice, *DNA Sample Collection from Arrestees* (Dec. 7, 2012).) <http://nij.gov/topic/forensics/evidence/dna/collection-from-arrestees.htm> {as of Aug. 13, 2015}.

C. California Does Not Provide for Automatic Expungement of DNA Taken From Arrestees Who Were Not Convicted, But Requires Former Arrestees to Initiate and Navigate a Cumbersome Application Process, Where a Prosecutor or Judge May Block or Deny Expungement.

Pursuant to the Maryland DNA Act upheld in *King*, for arrestees who are not tried or convicted of a qualifying offense, the law requires *immediate automatic non-discretionary expungment.* (*King*, 133 S.Ct. at 1967.) If there is no probable cause finding at arraignment, the DNA sample is destroyed. (Md. Code Ann. Pub. Saf., § 2-504 (d)(2).) Similarly, if the former arrestee is not ultimately convicted of a qualifying felony, the sample is destroyed and the offender profile "expunged from every data base." (Md. Code Ann. Pub. Saf., § 2-511.)

In California, *there is no automatic non-discretionary expungement.* Instead, "California puts the burden on the arrestee to seek expungement, and the outcome of the expungement process is not guaranteed." (Slip opn., p.16.) If the arrestee is released (because he is not charged, charges are dismissed, or he is acquitted), he may petition for expungement. (§ 299(a)(b).) But the former arrestee must initiate and navigate "an onerous and perhaps quixotic process," without legal assistance or even notice of the expungement procedure. (Slip opn., p. 48.) Moreover, the state has the discretion to deny expungement.[49]

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[49] In California, expungement is *both petitioner-initiated and discretionary*. Respondent emphasizes that the federal government and 17 other states do not have automatic state-initiated expungement and require the former arrestee to initiate expungement procedures. (ROBM 19-20, 65.) However, it is not clear that any of those jurisdictions give the prosecutor or the trial court discretion to deny expungement for a qualified applicant, as in in California. Indeed, the federal statute requires the FBI to "promptly" expunge an arrestee's DNA analysis from the national database upon receipt

Former arrestees who are not charged must wait until the statute of limitations has run – a minimum of least three years – before applying for expungement. Charged defendants must wait until dismissal of the charges or acquittal. (§ 299(b)(1); *Haskell,* 677 F.Supp. 2d at 1191.) In all instances, the burden is on the former arrestee to file a written expungement application and to notify the trial court, the prosecutor and the Department of Justice (DOJ) (§ 299(b)-(c)(1).) *The prosecutor or DOJ may block expungement by objecting*, even when the charges (if any) have proven baseless. (§ 299(c)(2)(D).) Moreover, the court "has the *discretion to grant or deny the request*," and *a denial of expungement is non-appealable* and "shall not be reviewed by petition or writ." (§ 299(c)(1).)

Although the DNA Act specifies that an eligible former arrestee *must* follow the statutory procedures (§ 299(a)), respondent notes that "California has an expedited and streamlined procedure for expunging samples and profiles," outlined on DOJ website. (ROBM 11-12, 64.) An eligible former arrestee who has been released without being charged, brought to trial or convicted, may apply directly to the DOJ, providing documentation of identity, legal status and criminal history. A DOJ official reviews the application and either grants or denies expungement. If expungement is denied, the individual may seek a court hearing. Yet, even under this "expedited" procedure, the court has the discretion to grant or deny expungement.[50]

Both the statutory and "expedited" procedures present substantial obstacles to former arrestees who qualify for expungement. It is unclear how

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of a court order reflecting a dismissal, acquittal, of failure-to-charge within the applicable period. (42 U.S.C. § 14132(d)(1)(A).)

[50] Cal. DOJ, FAQ's, "Getting Expunged or Removed from the CAL-DNA Data Bank," Q.1.

the state expects the nearly one-third of all arrestees who are not convicted – especially the 15% who aren't even charged -- to even learn of the existence of the expungement process. There is no statutory requirement that the state provide discharged arrestees with notice of the expungement procedures, nor is there any provision for legal assistance in that process. Even if the former arrestee somehow learns of expungement, he must gather the required documentation and navigate the process on his own. Finally, even if he submits an application, it must still surmount two hurdles: A prosecutor can object and effectively veto the application, and the trial judge has *non-reviewable* discretion to deny it. (§ 299(c)(1), (C)(2)(D); slip opn., pp. 49-50.)

If the trial court or DOJ official denies expungement, the former arrestee's profile will remain in CODIS indefinitely for continuing comparison with crime scene profiles. And the state also retains the entire DNA sample for possible match confirmation. (See *Haskell,* 677 F. Supp.2d at 1191; *Kriesel*, 720 F.3d 1137, 1143-44.; see also ROBM 57.)[51]

It is highly unlikely that the thousands of California arrestees who are not charged or convicted will learn about these procedures or apply to have their DNA expunged. Even if they do, success is not guaranteed. According to a 2012 study funded by the National Institute of Justice, in states like California where the responsibility for initiating expungement is placed upon the arrestee, very few people initiate the process. (Slip opn., p. 50, fn. 29, (citing NIJ, DNASample Collection, *supra*).)

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[51] When CODIS reports a match between an offender profile and an crime scene profile, the lab retrieves the arrestee's original DNA sample, re-extracts the "junk DNA" for analysis, and generates a new profile, which is then compared to the crime scene profile to confirm the match. (*Kriesel* at 1141-1145.)

The provisions of the California Act mandating analysis of DNA collected from all adult felony arrestees has been in effect for over six years, and in that time tens of thousands of former arrestees have qualified for expungement. Yet, despite the abundance of data the state presents (in its brief and the DOJ web site) on other aspects of California's DNA search practices, *the state offers no statistics on how many of these former arrestees have applied for expungement and how many have succeeded* on those applications.[52]

Due to the many obstacles to securing expungement – lack of notice, lack of legal assistance, prosecutorial veto, and unreviewable judicial discretion to deny – the DNA of most California arrestees never convicted will likely remain indefinitely in state possession, where it will be compared to crime scene DNA on a weekly basis. It is hard to imagine a more grievous continuing infringement of the genetic privacy of these thousands of discharged arrestees, who are entitled to the same privacy and liberty as any other free citizen.

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[52] Respondent asserts that, in DOJ's experience, "the vast majority of requests have resulted in expungement." (ROBM 64.) Respondent adds, "For a small fraction of [expungement] requests the state has confirmed that no DNA sample was ever submitted under the name provided," and that in "the remaining cases," the state has refused expungement "based on statutory standards that make it appropriate to retain a record of identification, such as when an offender has another qualifying offense." (ROBM 64 fn. 39.) This "vast majority" explanation is meaningless without any data on the numbers of former arrestees who have submitted applications and the number of expungements actually granted. Have there been 100, 1,000, 10,000 or 100,000?

D. Each of the Distinctions Between the California and Maryland Acts Further Skews the Balance Between Asserted Governmental Objectives and Protected Privacy Interests.

The California DNA Act isn't simply different from the Maryland statute. In each of the three respects addressed above – scope of arrest offenses, timing, and expungement provisions – the governmental interests served by California's expanded and accelerated DNA testing are substantially lesser and more attenuated, while the invasion of constitutionally-protected reasonable expectations of privacy is far greater:

- **Scope.** In light of the legislative judgments that commission of a sexual assault or other violent felony evinces a propensity to commit similar offenses, a regimen like Maryland's is more closely tailored to the asserted governmental interests by focusing only on arrests for the kinds of violent offenses, such as rape, likely to yield DNA evidence. But that connection disappears where the testing is extended to scores of non-violent offenses. It advances the state's investigative interests only to the extent that *any* large expansion of the DNA database – such as for all governmental workers, licensees, benefits recipients, etc. – would increase the number of hits. Individuals arrested for lower level non-violent offenses do not require the same close pretrial supervision as those charged with violent crimes and accordingly have greater privacy expectations. But the California statute extinguishes those interests by subjecting the suspected car thief or tax cheat to the same intrusion on genetic privacy as the charged rapist or murderer.
- **Timing.** The only practical benefit the state derives from taking and submission of DNA at the time of arrest is a two-to-four day headstart on the testing process. Because police won't receive any results for

approximately one month – weeks after any jail classification or bail-related decisions – the benefits of that earlier submission are negligible. But the adverse privacy consequences of that very modest timing advantage are immense. It results in gratuitous collection of the private genetic data of the tens of thousands of arrestees, who are not charged or whose cases are dismissed at arraignment. Moreover, because the submission occurs at the time of arrest, there has not yet been any judicial review of probable cause or even a prosecutorial charging decision. A police decision alone sets this highly consequential collection of private genetic data in motion.

- **Expungement.** California's taking and submission of DNA at the time of arrest – rather than a few days later at arraignment, as in Maryland – might be of less moment if, like Maryland, the state had a self-executing mechanism for *automatic* expungement of DNA of the thousands of arrestees who are never convicted. Approximately 31% of arrests do not result in convictions. (See Part VI-B.) Although California makes those not convicted *eligible* for expungement, it puts the onus entirely on the arrestee to initiate and navigate the state's expungement process. The effect of this far more cumbersome expungement process on the balance between governmental objectives and privacy interests is dramatic, because there is really nothing to balance. As reflected in the state's recognition of their eligibility for expungement, the state has *no legitimate governmental interest – zero* – in continued retention of the profiles and samples of non-convicted arrestees. But, on the other side of the ledger, arrestees who have been discharged *are restored to the status of free citizens* and accordingly have the identical rights to the privacy of their genetic data as if they

had never been arrested in the first place.

"[T]he differences we have identified between the California and Maryland DNA laws decrease the weight attributable to the governmental interest in DNA testing at this early stage and, correspondingly, increase the weight of the privacy interests at stake." (Slip opn., p. 22.) Any one of these three distinctions (scope, timing, and expungement) would provide compelling grounds to distinguish *King*. Taken together, they compel a finding that the California DNA Act offends both the constitutional proscription "against unreasonable seizures and searches" (art. I, § 13) and the "inalienable" right to "privacy," especially informational privacy (art. I, § 1).

E. This Court Should Decide the Constitutionality of the Arrestee Search Provisions Applied to Buza, Regardless of the Outcome of Proposed Amendments to the DNA Act.

A recently-introduced bill, if enacted, would bring the provisions of the California DNA Act closer to those of the Maryland law reviewed in *King*. But that proposed bill expressly makes the relevant amendments contingent upon this Court's disposition in *People v. Buza*. In any event, that proposed legislation, even if enacted, is not at issue in the present case.

Assembly Bill 1492[53] would amend the scope of arrests, timing, and expungement provisions of the California DNA statutes (§§ 296, 298, 299) in the following ways:

- It would limit searches to arrests for registerable sex offenses (under § 290), murder or voluntary manslaughter (including attempts), serious felonies (under § 1192.7(c)), and violent felonies (under § 667.5(c)). (AB 1492, § 4 (amending § 296(a)(2)).)

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[53] Assem. Bill 1492 (2015-2016 Reg. Sess.), as amended through July 16, 2015. <http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201520160AB1492> {as of Aug. 18, 2015}

- Although collection of the DNA sample would still occur upon arrest, submission of the sample to DOJ for testing and database inclusion would not occur until "after a judicial determination of probable cause." (AB 1492, § 6 (amending § 298(a)(1).)

- It would provide for automatic expungement of the DNA profile and destruction of the sample from any arrest that does not ultimately result in felony conviction (including arrestees not charged, dismissed charges, acquittals, etc.). (AB 1492, § 8 (amending § 299).)

The bill provides, however, that each of these amendments "shall only become operative if the California Supreme Court rules to uphold the Court of Appeal decision in *People v. Buza*" (citing the 2014 opinion, *Buza II*). (AB 1492, §§ 4, 6, 8 (amending §§ 296(g), 298(d), 299(g)).)

The Assembly passed AB 1492 on May 22, 2015. It has subsequently been amended in the Senate. As of this writing, it is currently before the Senate Appropriations Committee, which placed it "on suspense file" on August 17, 2015.

If enacted, AB 1492 could mitigate *some* of the constitutional defects in the current California DNA Act by narrowing the differences from the Maryland statue as to the scope of arrests covered, timing, and expungement.[54] But it would not resolve the constitutional problems altogether. Even as amended, the California DNA Act would still suffer from the deficiencies inherent in any regimen for *pre-conviction* DNA searches. As we have discussed, the Vermont Supreme Court struck down that state's DNA statues

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[54] Even with these amendments, California would still mandate DNA searches for a more expansive list of arrest offenses than in Maryland, by virtue of AB 1492's inclusion of all "serious felonies." (§ 1192.7(c).) That category includes several offenses which do not appear to come within the Maryland statute's category of "violent offenses," such as furnishing drugs to a minor (subd. (c)(24)), participation in a street gang (subd. (c)(28)), witness intimidation (subd. (c)(37)), and criminal threats (subd. (c)(38)).

under the Vermont Constitution on those grounds. The reasons addressed in Justice Scalia's *King* dissent and in the Vermont Supreme Court's *Medina* opinion would still provide compelling grounds for finding a violation of the California Constitution, even with the proposed revisions.

In any event, **this Court should not decide any such hypothetical issues in *Buza*, because they are not before the Court.** Even if the Legislature ultimately enacts AB 1492, any such amended version of the California DNA Act would be irrelevant to the disposition of Buza's case. This Court should decide the case before it, which concerns the constitutionality of the version of the DNA Act applied to Mark Buza – including the demand that he submit to a DNA search after arrest, but before charging or arraignment, and his resulting section 298.1 misdemeanor for refusing to accede to that search. This Court should not issue an advisory opinion on whether the AB 1492 amendments would be enough to cure all the constitutional deficiencies in the version of the DNA Act applied to Buza. Those issues should await another case in which they are properly presented.

F. This Court Should Find that the California DNA Act Violates Article I, sections 13 and 1, of the California Constitution.

As reflected in the four-justice dissent authored by Justice Scalia in *Maryland v. King*, in the opinion of the Vermont Supreme Court in *State v. Medina*, and in the many academic critiques of *King*, the reasoning of the *King* majority is highly questionable even as applied to a more narrowly tailored DNA testing regimen, such as Maryland's or Vermont's. The misleading "identification" label cannot change the fact that comparison of an arrestee's DNA with crime scene profiles – in hopes of linking him to other crimes unrelated to the arrest offense – is a purely investigative search, not a

verification of who the arrestee is. Because the "identification" fiction flouts the longstanding constitutional proscription on criminal investigative searches not supported by any individualized suspicion, it provides a very fragile foundation for such a far reaching intrusion into the legitimate privacy expectations of arrestees, many of whom will never be convicted or even charged.

That misleading "identification" label, as well as the *King* majority's diminution of the privacy interests threatened by collection of genetic data, persuaded the Vermont Supreme Court to strike down the Vermont DNA search statute under that state's constitution, which, like California's, has long provided heightened protections against unreasonable searches, especially in the arrestee search context. "The marginal weight of the State's interest in DNA collection at the point of arraignment, balanced against the weight of the privacy interest retained by arraignees prior to conviction persuades us to hold that [the Vermont DNA search statutes], which expand the DNA-sample requirement to defendants charged with qualifying crimes for which probable cause is found violate [the search-and-seizure clause] of the Vermont Constitution." (*Medina*, 102 A.3d at 683.)

The Vermont Supreme Court took that step, even though the Vermont statute provided crucial safeguards lacking in the California Act, including deferral of testing until after prosecutorial charging and judicial assessment of probable cause at arraignment (*id.* at 664-665 & fn. 7) and *automatic* expungement of the DNA of those not ultimately convicted (*id.* at 665-666).

This question before this Court is less difficult than the one which the Vermont Supreme Court confronted in *Medina*. The California DNA Act is more sweeping and lacks the procedural safeguards (such as probable cause adjudication and automatic expungement) of either the Maryland or Vermont

statutes.

"The California DNA Act intrudes too quickly and too deeply into the privacy interests of arrestees." (Slip opn., p. 45.) This Court too should hold that the DNA Act violates the search and privacy clauses of the California Constitution (art. I, §§ 13, 1). Because Mark Buza's misdemeanor conviction rests on his refusal to accede to an unconstitutional search – at a time when he had not even been charged by a prosecutor, much less ordered detained on a magistrate's finding of probable cause – this Court should reverse the section 298.1(a) conviction.

VIII. BECAUSE OF THE SIGNIFICANT DIFFERENCES BETWEEN THE MARYLAND DNA ACT UPHELD IN *KING* AND THE PROVISIONS OF THE CALIFORNIA ACT MANDATING TIME-OF ARREST DNA SEARCHES OF ADULTS ARRESTED FOR ANY FELONIES, THE CALIFORNIA ACT VIOLATES THE FOURTH AMENDMENT.

The Court of Appeal questioned whether *Maryland v. King* resolved the constitutionality of the California DNA Act under the Fourth Amendment, in light of the several significant differences between the Maryland and California regimens. The appellate court found it unnecessary to resolve the Fourth Amendment issues posed by those differences, because the California Constitution "undoubtedly prohibits the search and seizure at issue." (Slip opn., p. 2, see also pp. 15-18.)

This Court should do the same. The same federalism principles which undergird the independence of the California Constitution also caution that the Court should resolve a case, where possible, on state law grounds. Nonetheless, if the Court does elect to reach the federal question, it should find that the more sweeping and intrusive features of the California Act, which lack key safeguards essential to the Maryland law, take it outside the rationale of *King* and bring the California regimen into conflict with the Fourth Amendment. As discussed fully in Part VI, there are three crucial differences between the Maryland and California statutes – in scope, timing and expungement:

First, Maryland requires collection of DNA from arrestees charged with selected "crimes of violence" or burglary. (*King*, 133 S.Ct. at 1967.) But California Act mandates collection immediately following arrest for *any felony*, including non-violent and non-serious offenses. (§ 296.1(a)(1).)

Second, in Maryland, collection occurs only after the arrestee is *charged* with a qualifying crime, and there is no analysis or submission to a

database until after a probable cause finding at arraignment. (*King* at 1967.) But, in California, both collection and submission of the DNA occurs immediately following arrest, prior to any judicial review of probable cause and even prior to any prosecutorial charging decision. (§ 296.1(a)(1).) The consequence of California's immediate processing of the DNA is that it sweeps up the substantial portion of arrestees who will not be charged or whose cases will be dismissed within two-to-four days at arraignment.

Third, the Maryland law provides for *automatic expungement* of both the database profile and the DNA sample of any former arrestee who is not ultimately convicted of a qualifying felony. (*King* at 1967.) But there is no automatic expungement in California. A former arrestee – who is not charged or whose case does not result in conviction – must initiate an expungement petition proceeding on his own – without notice of its provisions or an attorney to assist him. Even if he files an expungement petition, a prosecutor can veto the request, and the trial court has discretion to deny it. To make matters worse, that discretionary denial cannot be reviewed by either appeal or writ.

The Supreme Court upheld the Maryland DNA statute only upon finding that the asserted governmental interests in pre-trial detention outweighed the arrestees' privacy expectations. But these three more sweeping and less protective features of the California Act "significantly alter the weight of the governmental interests and privacy considerations." (Slip opn., at 17.) These crucial differences decisively tip the balance and compel a finding that the California Act violates the Fourth Amendment.

The *King* majority emphasized the governmental security and supervisory interests in assessment of the dangerousness of arrestees *charged with violent crimes and held in prolonged pre-trial custody* following a judicial probable cause finding at arraignment. Comparison of those arrestees'

DNA with crime scene profiles facilitated assessment of their dangerousness and enabled jailers, prosecutors, and courts to "make informed decisions concerning pre-trial custody," including jail classification, admission to bail, and conditions of supervision. (*King* at 1970-1977, 1980.) Moreover, because a magistrate had found probable cause to hold them for trial on violent felony charges, those detained necessarily had reduced expectations of privacy due to the needs of jail security. (*Id.*, at 1978.)

But California collects and analyzes DNA from all felony arrestees – *included the tens of thousands who are not charged or who are released within two to four days at arraignment.* Because these former arrestees *are never held in extended pre-trial custody*, testing and indefinite retention of their DNA does not serve the governmental interest identified in *King*. Moreover, unlike arrestees detained for trial or released on bail supervision, these former arrestees do not have reduced expectations of privacy. Upon release, they have the same privacy expectations as members of the general public.

California does not provide for automatic non-discretionary expungement, but places the burden on the former arrestee to discover, initiate and navigate the challenging and uncertain process. Most former arrestees who are not charged, tried or convicted will likely never even learn of and initiate that process, much less succeed in obtaining expungement. Their DNA samples will remain permanently in government storage, with their profiles compared to crime scene DNA on a weekly basis. (Slip opn., p. 50 fn. 9.) Moreover, even eligible former arrestees who do file for expungement may still have their applications denied – either by prosecutorial veto or by a judge's unreviewable exercise of discretion. (See Part VI-C.)

The government has *no* legitimate interest in retention of the DNA of these tens of thousands of eligible former arrestees. They are not in custody

or under any form of supervised release, and, unlike convicted felons, they are not subject to any continuing restrictions or disabilities. They are free citizens and have entirely legitimate expectations of privacy in the sensitive genetic information to which the state, nonetheless, will have ongoing access.

Finally, the processing of DNA collected from Californians arrested for non-violent and non-serious crimes does not serve the governmental interest identified in *King*, because the state has not established a reasonable likelihood that these low-level offenders would have previously committed the types of violent crimes that yield DNA evidence.

Almost one-third of California arrestees required to submit their DNA to the state are not ultimately convicted, and about 15% of all arrestees -- over half of those not convicted -- are never even charged by the prosecutor.[55] The collection, processing and long-term retention of their DNA does not effectively serve the governmental purpose defined in *King*, and that interest is far outweighed by their substantial expectations of privacy. California's time-of-arrest DNA searches violate the Fourth Amendment.

Respondent insists that *King* governs this case. (ROBM 15-20.) Respondent maintains that the Supreme Court has not only upheld the Maryland DNA statute, but has also conclusively ratified the constitutionality of the California DNA Act (and apparently of every other DNA statute in the country). Specifically, respondent claims that the Supreme Court was "aware" of the three distinctions between the Maryland and California DNA Acts, because amicus briefing in *King* brought these differences to the Court's attention. (ROBM 17-19.) After acknowledging that 28 states and the federal government have adopted laws authorizing the collection of DNA from some

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[55] Cal. DOJ, *Crime in California 2014*, Tables 37 & 38A.

or all arrestees, the Supreme Court stated: "Although these statutes vary in their particulars, such as what charges require a DNA sample, their similarity means that this case *implicates* more than the specific Maryland law." (*King,* at 1968 (emphasis added).)

Of course, the *King* opinion "implicates" the review of other states' DNA laws. It is the Supreme Court's only opinion in the field. That does not mean that *King* resolves the constitutionality of every state's DNA law, without regard to their specific provisions. Because there are material differences – in scope, timing, and expungement – between the Maryland and California DNA regimens, *King* does not govern this case nor dictate the result.

King did not decide important Fourth Amendment questions that were not before it – i.e. whether it would be reasonable to collect and process DNA from an arrestee who is not charged with any felony nor held in pre-trial custody, or whether a program without automatic expungement of former arrestees' DNA adequately protects genetic privacy.

Like all Article III courts, the Supreme Court "sit[s] to decide concrete cases and not abstract propositions of law" that cannot affect the rights of the parties before it. (*Upjohn Co. v. United States* (1981) 449 U.S. 383, 386.) This principle applies with particular force when constitutional questions are involved. In Justice Brandeis's classic statement of the rule, the "Court will not anticipate a question of constitutional law in advance of deciding it." When it must decide such a question, it "will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." (*Ashwander v. Tennessee Valley Auth.* (1936) 297 U.S. 288, 346-347 (Brandeis, J., conc. opn).)

As this Court has similarly stated on countless occasions, "'cases are

not authority for propositions not considered.'" (E.g., *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1134.)

The significantly broader time-of arrest search provisions of the California DNA Act were not before the Court in *King*. The *King* decision should not be read as anticipating the questions presented by these distinct circumstances, or as formulating a rule more expansive than required by the facts of the Maryland Act. Different circumstances should lead to different results. (See *Georgia v. Randolph* (2006) 547 U.S. 103, 126 (Breyer, J., conc. opn.).) The distinct provisions of the California DNA Act should lead to a different result in this case.

King allowed DNA analysis for arrestees charged with violent qualifying felonies and detained for trial upon a magistrate's probable cause finding. Moreover, the Maryland statute provided for automatic expungement. Because California's DNA Act sweeps more broadly and lacks the safeguards of the Maryland Act, the government interests are substantially weaker and more attenuated, while the infringement of reasonable expectations of privacy is far greater. These material differences tip the balance and compel a finding that the California DNA Act violates the Fourth Amendment.

CONCLUSION

This Court should find that the California DNA Act offends the unreasonable search (art. I, § 13) and privacy (art. I, § 1) clauses of the California Constitution. Because this case does not implicate the exclusionary rule, the infirmity of the arrestee search regimen under the California Constitution is dispositive of this appeal, and there is no cause for the Court to reach the Fourth Amendment issue. Nonetheless, if the Court does address that issue, it should find a Fourth Amendment violation as well, due to the several material differences between the California DNA Act and the Maryland provisions upheld in *Maryland v. King*. Under either ground, Mark Buza's misdemeanor conviction for his refusal to accede to an unconstitutional search cannot stand.

Dated: August 25, 2015

Respectfully submitted

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CERTIFICATE OF WORD COUNT

Counsel for Mark Buza hereby certifies that this brief consists of **27,770** words (excluding tables, proof of service, and this certificate), according to the word count of the computer word-processing program. (California Rules of Court, rule 8.520(c)(1).)

Dated: August 25, 2015

J. BRADLEY O'CONNELL
Assistant Director

DECLARATION OF SERVICE BY MAIL AND ELECTRONIC SERVICE BY TRUEFILING

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

Court of Appeal 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 San Francisco, State of California. My business address is 730 Harrison Street, Suite 201, San Francisco, CA 94107. My electronic service address is eservice@fdap.org. On August 25, 2015, I served a true copy of the attached **Appellant's Answer Brief on the Merits** on each of the following, by placing same in an envelope(s) addressed as follows:

San Francisco County Superior Court
Attn: Hon. Carol Yaggy, Judge
Hall of Justice, 850 Bryant Street
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Mark Buza
(Appellant)

Each said envelope was sealed and the postage thereon fully prepaid. I am familiar with this office's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice each envelope would be deposited with the United States Postal Service in San Francisco, California, on that same day in the ordinary course of business.

On August 25, 2015, I transmitted a PDF version of this document by TrueFiling to the following:

Kamala D. Harris, Attorney General
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Court of Appeal, First Appellate District

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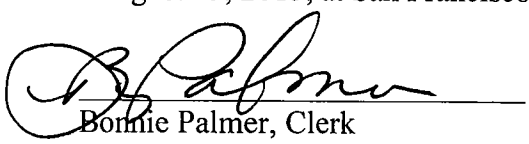
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 25, 2015, at San Francisco, California.



Bonnie Palmer, Clerk