IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **MARK BUZA,** Defendant and Appellant.	S223698

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

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

and

BRIEF OF AMICUS CURIAE

LOS ANGELES COUNTY DISTRICT ATTORNEY
in support of RESPONDENT
The Attorney General of the State of California

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

The Los Angeles District Attorney hereby applies for permission to file a brief as amicus curiae in the above-entitled matter, pursuant to rule 8.520 of the California Rules of Court.

The underlying case revolves around the required collection of DNA samples from felony arrestees pursuant to Penal Code section 296, subdivision (a)(2). Defendant Buza refused to submit a sample upon his arrest for arson and was convicted of failure to provide a sample. The Court of Appeal erred in reversing his conviction and ruling that the requirement for all felony arrestees to provide a DNA sample upon booking was unconstitutional based on the California Constitution. The amicus curiae brief bound with this application argues:

> (1) Requiring an arrestee at booking to provide a DNA sample is not a prohibited search and is merely a measure of that person's identity, a biometric factor identical to fingerprints, height, weight, photograph of the face, and tattoos which are incorporated in databases.
> (2) As the United States Supreme Court has ruled in interpreting the Fourth Amendment, the arrestee has a severely reduced expectation of privacy and is expected to be searched,

photographed, and fingerprinted at booking.
(3) There is no stigma attached to DNA sampling. For example, every member of the United States military, including admirals and generals, is required to submit DNA samples for the military database.
(4) Any minimal privacy interest is far outweighed by society's need to accurately identify offenders, which is increased by including more profiles in DNA databases. The FBI's CODIS[1] database now includes California felony arrestees. The expansion approved by the voters with the passage of Proposition 69 provided for a more accurate identification of the arrestee that connects arrestees to unsolved crimes, prevents future crimes, and enhances the utility of DNA as a tool for exonerating the wrongfully convicted.

The Los Angeles County District Attorney has read the briefs previously filed by the parties and believes that a need exists for additional argument on the points specified above.

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1. The FBI Combined DNA Index System. (See <http://www.fbi.gov/about-us/lab/codis/codis_brochure/>, last viewed November 10, 2015.)

If the court grants this application, then the Los Angeles County District Attorney, as amicus curiae, requests that the court permit filing of the brief which is bound with this application.

Respectfully submitted

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ISSUE PRESENTED

Whether the collection of forensic DNA database samples from adult felony arrestees violates article I, section 13 of the California Constitution?

STATEMENT OF THE CASE

Amicus curiae (hereafter "amicus") relies upon the Statement of the Case presented by the Respondent in the Opening Brief on the Merits.

STATEMENT OF FACTS

Amicus relies upon the Statement of Facts presented by the Respondent in the Opening Brief on the Merits.

SUMMARY OF ARGUMENT

Requiring a person who is arrested for a felony, based on probable cause, to submit a DNA sample during the booking process is not an impermissible search. It is a minimal physical intrusion which discloses nothing more than a person's identity, and establishes with absolute certainty the identification of the arrestee.

First, collecting DNA information does not reveal anything private about a person. Identifying data such as this has always been collected during an arrest, and includes other biometrics such as a booking photograph, fingerprints, photographs of tattoos, height and weight measurements, address, hair and eye color descriptions, and other driver's license information. This kind of information has long been incorporated into a database which may be accessed at a later time for comparison to data from other unsolved crimes. DNA is no different than those other identifiers, other

than being more easily compared by computer, more objective, and immutable. Clearly, a DNA profile adds a significant biometric measure of identity without devaluing or compromising lingering expectations of privacy by the arrestee.

Second, the manner of collection does not violate any recognized privacy interest because arrestees have a diminished expectation of privacy. Obtaining a DNA sample by swabbing the cheek is minimally intrusive and likely to be the least memorable event of the booking process. Indeed, some may consider the physical manipulation by the custodial officer of the arrestee's hands and fingers more intrusive and demeaning than the simple swabbing of a cheek. As one federal circuit court has pointed out:

> The dissent suggests that our comparison to traditional fingerprinting is inapt because fingerprints "are personal attributes that are routinely exposed to the public at large in daily life" and, accordingly, the gathering of fingerprints, unlike the drawing of blood, implicates "a categorically different and lesser expectation of privacy." Dissenting Op. at 29. However, the fingerprints gathered by law enforcement officials and included in fingerprint identification data banks are not ones that have been left behind voluntarily on doorknobs and water glasses. They are the ones gathered by holding the person's hand firmly and taking the prints. Much like the process of providing a blood sample, providing one's fingerprints can be quick and simple if one submits voluntarily, but has the potential for the use of force if resisted. It is for this reason that, outside the "booking" process to which we analogize, courts do generally require some level of individualized suspicion to support the seizure necessary to gather a person's fingerprints. [*Hayes v. Florida* (1985) 470 U.S. 811, 813-18 [105 S.Ct. 1643, 84 L.Ed.2d 705]; *Davis v. Mississippi* (1969) 394 U.S. 721, 726-28 [89 S.Ct. 1394, 22 L.Ed.2d 676].]

(*Rise v. Oregon* (9th Cir. 1995) 59 F.3d 1556, 1560, fn. 2.)

Third, there is no stigma attached to DNA collection, any more than stigma might attach to fingerprinting or a "mug shot." In particular, members of the United States military have long been required to give DNA samples for possible later identification. The fact that DNA has not been used

in place of fingerprints or other biometrics is simply because technology has limited its use, which is a limitation that is rapidly fading. There is no reason to believe that DNA collection and retention is any more stigmatizing than any other aspect of the arrest process.

Finally, any minimal privacy interest is dwarfed by the need to quickly and accurately identify criminals. Increasing the number of samples in government databases increases the usefulness of DNA identification as a whole. With added pressures placed on the criminal justice system by Public Safety Realignment and the consequent rush to release felons into community supervision programs, it is even more critical to accurately determine who merits release and who is a suspect of a violent offense. The societal interest in determining the identity of persons arrested for felonies is resoundingly clear. The resolution of open cases, reopening closed cases of incarcerated convicts, and the protection of society outweigh the minimal intrusion for an arrestee with a reduced expectation of privacy who is being booked for a felony.

For all of these reasons, California's DNA collection scheme is constitutional. The Court of Appeal erred by holding otherwise.

ARGUMENT

I

DNA SAMPLING DURING BOOKING OF A FELONY ARRESTEE IS ANOTHER BIOMETRIC MEASURE OF IDENTITY TO BE INCLUDED IN A DATABASE

The DNA sampled from a swab of the cheek obtained during booking is merely another biometric identifier, like a booking photo, fingerprint, height or weight measurement, eye or hair color description, or a photograph of tattoos that is collected as part of an arrestee's booking process.

> Biometrics involves the scanning or recording of some unique personal characteristic, such as a fingerprint, a retinal print or voice pattern and the comparison of the digitized image or

> recording against a verified database for positive identification. Digital imaging, the technology involved in finger imaging, is already a basic component of a myriad of applications ranging from document management to medical radiology to videoconferencing, and its contribution to the field of biometrics makes the current technology of finger imaging possible. In finger imaging, the technology converts a fingerprint into a highly detailed and exact electronic image that a computer can interpret and compare to other images.

(Note, *Finger Imaging: A 21st Century Solution to Welfare Fraud at our Fingertips* (1995) 22 Fordham Urb. L.J. 1327, 1333-1334.)

This identifying information can first be used to identify the arrestee, which has never run afoul of any constitutional right. While not specifically recognizing what can be termed a "true identity" exception authorizing searches, the United States Supreme Court has recognized, in a plurality decision, the need for an inventory search, which may assist in ascertaining or verifying the arrestee's identity. (*Illinois v. Lafayette* (1983) 462 U.S. 640, 647 [103 S.Ct. 2605, 77 L.Ed 2d 65].) The "true identity" exception applies to DNA genotyping as much as it does to fingerprinting or photographs. All these biometric identifiers can be included in a database, accessible for intelligence as to other crimes, and should be covered under the true identity exception. "However, the use of database searches as a means of identifying potential suspects is not new or novel." (*People v. Johnson, supra*, 139 Cal.App.4th at 1149.) The majority opinion in *Maryland v. King* addressed this point succinctly.

> They [law enforcement] already seek identity information through routine and accepted means: comparing booking photographs to sketch artists' depictions, showing mugshots to potential witnesses, and comparing fingerprints against electronic databases of known criminals and unsolved crimes. The only difference between DNA analysis and fingerprint databases is the unparalleled accuracy DNA provides. DNA is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police.

(*Maryland v. King* (2013) ___U.S.___ [133 S.Ct. 1958, 1963-1964, 186

L.Ed.2d 1, 14].) But this identifying information has never been limited to simply identifying the arrestee. Other biometric identifiers, especially photographs and fingerprints, have been incorporated for years into a collection of databases. These databases have been used for authenticating the identity of the person in custody and for solving other crimes. When an unknown sample is recovered from a crime scene (fingerprint, hair, blood, video capture, etc.), that sample can be compared to known exemplars by sifting through available databases.

The ability to collect identifying information has never depended on the available technology, or how feasible it would be to match that information to other crimes. For example, booking photos were incorporated into "mug books" long before computers were available to digitize the photographs. In 1900, a defendant challenged the taking of his photograph upon arrest and inclusion of that photo in the "Sheriff's Rogues Gallery." (*State ex rel.Bruns v. Clausmeier* (Ind. 1900) 57 N.E. 541.) The Indiana Supreme Court declined to reject the use of a relatively new invention and held that the sheriff was acting within his lawful authority:

> It would seem, therefore, if, in the discretion of the sheriff, he should deem it necessary to the safe-keeping of a prisoner and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation and the color of his eyes, hair, and beard, as was done in this case, he could lawfully do so.

(*Id.* at p. 542.)

The fact of arrest itself has been enough to allow the government to collect this biometric information, and use it to solve other crimes as well. Courts have held that fingerprints taken at booking after a felony arrest that are later challenged as illegally seized can still be used to connect defendants to other offenses. (*People v. Clark* (1973) 30 Cal.App.3d 549, 558-559.) Even booking photos from an illegal arrest were allowed to remain in the "database" or mug book and could result in a subsequent prosecution if that photograph was selected by another witness in an

unrelated crime. (*People v. McInnis* (1972) 6 Cal.3d 821, 825-826.) This Court has previously held that this does not violate the privacy rights of the arrested person:

> In addition, the suspect's right of privacy is not violated by prompt and accurate public reporting of the facts and circumstances of his arrest: "It is also generally in the social interest to identify adults currently charged with the commission of a crime. While such an identification may not presume guilt, it may legitimately put others on notice that the named individual is suspected of having committed a crime. Naming the suspect may also persuade eyewitnesses and character witnesses to testify. For these reasons, while the suspect or offender obviously does not consent to public exposure, his right to privacy must give way to the overriding social interest." [Citations] [¶] Next, the information derived from the arrest may be used by the police in several ways for the important purpose of investigating and solving similar crimes in the future. We have held, for example, that a photograph taken pursuant to even an illegal arrest may be included among those shown to a witness who is asked to identify the perpetrator of a subsequent crime. [Citation.] This is a fortiori permissible in the case of a lawful arrest; and the same identification function is served, of course, by the arrestee's fingerprints and other recorded physical description.

(*Loder v. Municipal Court for San Diego Judicial Dist.* (1976) 17 Cal.3d 859, 865.)[2]

Appellant's Answer Brief on the Merits (hereafter ABM) at page 51 suggests DNA is impermissible because it is used solely for investigation, i.e. whether arrestees have committed other unsolved crimes. This is immaterial, and does not persuasively distinguish DNA from other biometric identifiers. For example, photo recognition software may allow the use of a booking photo of an identified arrestee to be compared to countless unknown faces represented in video captures of unsolved crimes. The ability

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2. While expungement of arrest records including fingerprints, is not constitutionally required if there has been no conviction, the Legislature has provided mechanisms to expunge arrest records since *Loder*. (Pen. Code, § 851.8.)

to access the database of photographs for intelligence from past crimes does not morph the taking of the arrestee's photo at booking into an unconstitutional search.[3] Moreover, fingerprints have been routinely collected from arrestees since the 1930's. Until the 1980's, fingerprints were of limited use, since there was no way to access the data in the national database. Automated access to the stored fingerprints where identification could be established independent of the name provided by the arrestee was only possible once the Automated Fingerprint Identification System and Cal-ID came into existence in the 1980's. Concurrently, cold cases were being solved by comparing the arrestee exemplars to samples obtained from crime scenes. Every arrestee who is fingerprinted now has his prints automatically compared to samples from crime scenes. (Logan, *Policing Identity* (2012) 92 B.U.L. Rev. 1561, 1574-1575.) The investigative use for fingerprints, in a nationwide database, does not render the collection of fingerprints at arrest, unconstitutional. Likewise, their universal collection decades before their usefulness as an instant cross-check on identity, did not render their collection unconstitutional.

In California, it was not until the initiation of the California Identification System (Cal ID) in 1985, that latent prints of an unknown suspect lifted from crime scenes could be compared to a collection of fingerprints.[4] Cal ID provides law enforcement with the ability to use a known exemplar from an arrestee and compare it to unsolved crimes. The technological leap that allowed searching a database with an arrestee's fingerprints in order to determine what, if any, other offenses he or she committed, did not convert the acquisition of the arrestee's fingerprints at booking into an unconstitutional search. Thus, the ultimate use of the identifying information is beside the point.

Justice Scalia dismissively claims that fingerprints are only "sometimes" compared to latents to solve crimes.

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3. The potential photo recognition software searching a DMV photo database was discussed as a potential example similar to DNA database searches in *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1150-1151.

4. See Pen. Code, §§ 11112.1 et. seq.

> It is on the fingerprinting of arrestees, however, that the Court relies most heavily. *Ante,* at ___ - ___, 186 L. Ed. 2d, at 27-29. The Court does not actually say whether it believes that taking a person's fingerprints is a Fourth Amendment search, and our cases provide no ready answer to that question. Even assuming so, however, law enforcement's post-arrest use of fingerprints could not be more different from its post-arrest use of DNA. Fingerprints of arrestees are taken primarily to identify them (though that process sometimes solves crimes); the DNA of arrestees is taken to solve crimes (and nothing else). Contrast CODIS, the FBI's nationwide DNA database, with IAFIS, the FBI's Integrated Automated Fingerprint Identification System. See FBI, Integrated Automated Fingerprint Identification System.

(*Maryland v. King* (2013) ___U.S.___ [133 S.Ct. 1958, 1987, 186 L.Ed.2d 1, 39] (dis. opn. of Scalia, J.).)

Minimizing the comparison of fingerprints from known arrestees to latents from crime scenes is misguided. This comparison is routinely done to the extent the quality of the latent print is sufficient to enable making the comparisons. (See Integrated Automated Fingerprint Identification System, Federal Bureau of Investigation, at <https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis>, as of Nov. 17, 2015.)

> Specialists in the Identification Bureau Latent Print Section compare latent prints (from crime scenes and from evidence) to file or exemplar prints. Highly trained and experienced examiners conduct these examinations.
>
> In addition to "manual" comparisons, the AFIS (Automated Fingerprint Identification System) computer is used to query latent prints in local, state and federal databases. Examiners also review latent print evidence from unsolved major crimes and reenter them into the AFIS which often results in additional identifications.

(Latent Print Comparison, Orange County Crime Lab, at <http://www.occl.ocgov.com/Sections/LatentComparison.aspx>, as of Nov. 17, 2015.)

These biometric identifiers discussed above are all part of the

need to identify the arrestee, which includes what he/she has done. The courts have traditionally recognized the need to ascertain the true identity of an arrestee.

> Similarly, when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it. We accept this proposition because the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes. This becomes readily apparent when we consider the universal approbation of "booking" procedures that are followed for every suspect arrested for a felony, whether or not the proof of a particular suspect's crime will involve the use of fingerprint identification. Thus a tax evader is fingerprinted just the same as is a burglar. While we do not accept even this small level of intrusion for free persons without Fourth Amendment constraint, see *Davis v. Mississippi*, 394 U.S. 721, 727, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969), the same protections do not hold true for those lawfully confined to the custody of the state. As with fingerprinting, therefore, we find that the Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken from incarcerated felons for the purpose of identifying them.

(*Jones v. Murray* (4th Cir. 1992) 962 F.2d 302, 306-307.)

DNA is the most reliable, immutable identifier that may take as few as two, or as long as thirty, days to compare to the samples in the database. As a biometric identifier, DNA is one more method to establish who has been arrested for the felony. Neither the Fourth Amendment nor the identically worded article I, section 13 of the California Constitution creates a constitutional straightjacket that allows two traditional biometric identifiers (photos and fingerprints) but excludes the most reliable.

II

AN ARRESTEE HAS A SIGNIFICANTLY REDUCED EXPECTATION OF PRIVACY

The Court below clearly erred in rejecting a minimally intrusive method for obtaining biometric data of arrested felons. It phrased

the question of DNA sampling as follows:

> Under the applicable totality of the circumstances test of reasonableness, we must balance the invasion of appellant's interest in privacy against the government's interest in seizing biometric material from his body without a warrant supported by probable cause and based solely upon appellant's status as a mere arrestee.

(Slip Opn., p. 42.) But the physical intrusion of DNA collection is trivial in the context of an arrest, and is no more intrusive than any other biometric taken at booking.

The felony arrestee can be photographed, printed, and even asked to remove clothing for examination and photographing of tattoos, scars and marks. He or she can be subjected to an intrusive body cavity search. (*Florence v. Bd. of Chosen Freeholders* (2012) ___ U.S. ___ [132 S. Ct. 1510, 182 L.Ed.2d 566].). The arrestee's height, weight and hair color are recorded along with his name, address, social security number, driver's license information and employment data. Clearly, a DNA profile adds a significant biometric measure of identity and any lingering expectations of privacy he or she may harbor from providing a cheek swab would not be reasonable. Compared to these other processes, obtaining the DNA sample by swabbing the cheek is minimally intrusive and likely to be the least memorable event of the booking process.

Arrestees must undergo these physical intrusions because they have a reduced expectation of privacy. The reduced expectation of privacy of felony arrestees has been noted by numerous courts including *Jones v. Murray, supra,* 962 F.2d at pp. 306-307, as discussed above. (See also *People v. Travis* (2006) 139 Cal.App.4th 1271, 1284.) The observation that arrestees have a reduced expectation of privacy was noted in *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 837, and recently cited with approval by this Court in *People v. Robinson* (2010) 47 Cal.4th 1104, 1121:

> With regard to any privacy interest in identifying information, it is established that individuals in lawful custody cannot claim privacy in their identification. "Though, like fingerprinting, collection of a DNA sample for purposes of identification

> implicates the Fourth Amendment, persons incarcerated after conviction retain no constitutional privacy interest against their correct identification." (*Groceman v. U.S. Dept. of Justice* (5th Cir. 2004) 354 F.3d 411, 413–414.) In *Kincade*, the court explained that "the DNA profile derived from the defendant's blood sample establishes only a record of the defendant's identity-otherwise personal information in which the qualified offender can claim no right of privacy once lawfully convicted of a qualifying offense *(indeed, once lawfully arrested and booked into state custody)*. For, as we recognized in *Rise*, '[o]nce a person is convicted of one of the felonies included as predicate offenses under [the Act], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling.' 59 F.3d at 1560; see also *Groceman, supra*, 354 F.3d at 413–[4]14; *Jones v. Murray* (4th Cir. 1992) 962 F.2d [302,] 306-[3]07." (*Kincade, supra,* 379 F.3d at p. 837, italics omitted.)

(*Ibid.*, italics added.) The Ninth Circuit in *Haskell v. Harris* (9th Cir. 2012) 669 F.3d 1049, 1187, upheld the collection of DNA, largely prefaced on the reduced expectation of privacy of felony arrestees. While ruling that the DNA sample was a product of a search, the Court looked at the routine sampling of felony arrestees and correctly applied a "totality of circumstances" test in ruling the searches constitutional.

> The 2004 Amendment does not provide the Government carte blanche to take buccal swabs from anyone and everyone. It applies only to persons arrested on suspicion of having committed a felony. Before individuals can be required to give a buccal swab DNA sample under the 2004 Amendment, a law enforcement officer must determine that there is probable cause to suspect that person of having committed a felony. Even critics of mandatory DNA sampling concede that a felony arrestee has a significantly diminished expectation of privacy. See *Kincade*, 379 F.3d at 864 (Reinhardt, J., dissenting) ("Arrestees' privacy interests, too, appear to be significantly reduced.") Upon arrest, individuals are often booked and placed in a jail cell pending arraignment or bail, and at that point they are typically subjected to numerous degrading physical and emotional intrusions. They may be subjected to visual body cavity searches, *Bell,* 441 U.S. at 558 & n.39

> (upholding searches where male inmates "must lift [their] genitals and bend over to spread [their] buttocks for visual inspection" and "[t]he vaginal and anal cavities of female inmates also are visually inspected"); *Bull v. City & County of San Francisco*, 595 F.3d 964, 974-75 (9th Cir. 2010) (en banc) (same); be monitored by guards of the opposite sex while they shower and use the toilet, *Johnson v. Phelan*, 69 F.3d 144, 145 (7th Cir.1995); be restrained and pepper-sprayed, *Garrett v. Athens-Clarke Cnty., Ga.*, 378 F. 3d 1274, 1278 (11th Cir. 2004); have their telephone access restricted, *Valdez v. Rosenbaum,* 302 F.3d 1039, 1048-49 (9th Cir. 2002); occasionally be housed with violent detainees who leave them "with facial injuries that require[ ] surgery, *Schoelch v. Mitchell*, 625 F.3d 1041, 1043 (8th Cir. 2010); [26] and be "in lockdown for as much as 231/2 hours a day, always shackled in chains, even when taking a shower or making a phone call, and rarely being allowed to see daylight and breathe fresh air." Jeff German, Conditions at jail 'harsh' but court can't change them, Las Vegas Sun (Oct. 28, 2008). The dissent suggests, without any authority for his claim, that security interests and other exigent circumstances allow these privacy intrusions, but not DNA sampling. Just as such intrusive jail-related conditions could not lawfully be imposed on ordinary citizens, neither does the 2004 Amendment impose the taking of buccal DNA swabs from ordinary citizens.

(*Haskell v. Harris*, *supra*, 669 F.3d at p. 1058.) In short, collecting DNA from arrestees is minimally intrusive, and passes constitutional muster.

Appellant attempts to cloud the issue by implying that collecting arrestee DNA only serves to ensnare innocent defendants. For example, the Appellant cites to Justice Scalia's mischaracterization of the DNA law that the only people affected by the decision in *Maryland v. King* are the arrestees who have been acquitted of the crime of arrest (so that their DNA could never have been taken upon conviction). (ABM, p.14.) This argument is really a non sequitur. Regardless of the ultimate result, the government has a legitimate interest in identifying the arrestee. It is this authority, not the possibility of eventually being found guilty, that allows the minimally intrusive cheek swab (or fingerprinting, or other search).

Moreover, Justice Scalia oversimplified the issue. The real

world consists of more than just the convicted and the innocent. Many of those arrested for felonies flee the jurisdiction and are never convicted. Thousands of undocumented aliens who are arrested, are simply deported without processing criminal charges.[5] As demonstrated in the examples below, the impact on future victims and the falsely accused who could be exonerated by arrestee DNA is not trivial. Thus, collecting arrestee DNA is not simply a ruse to snare the innocent.

In *People v. Travis, supra,* 139 Cal.App.4th at p. 1284, the Court of Appeal's discussion of the reduced expectation of privacy in collecting DNA samples from convicted persons recognized the extent normal booking procedures for every felony arrest results in obtaining, from arrestees, necessarily intrusive identifying information.

> "...The nature of confinement necessarily results in a significant reduction in the expectation of privacy." [Citation.] "The reduction in a convicted person's reasonable expectation of privacy specifically extends to that person's identity. Indeed, not only persons convicted of crimes, but also those merely suspected of crimes, routinely are required to undergo fingerprinting for identification purposes. As to convicted persons, there is no question but that the state's interest extends to maintaining a permanent record of identity to be used as an aid in solving past and future crimes, and this interest overcomes any privacy rights the individual might retain. 'This becomes readily apparent when we consider the universal approbation of "booking" procedures that are followed for every suspect arrested for a felony, whether or not the proof of a particular suspect's crime will involve the use of fingerprint identification. ...'[Citation.]" (*Ibid.*) We concluded: " 'The Fourth Amendment does not protect all subjective expectation of privacy, but only those that society recognizes as "legitimate." [Citation.]"

(*Ibid.*)

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5. "Immigration enforcement officials use arrests as a screening tool - as a way of winnowing down a population of eleven million unauthorized immigrants and selecting approximately 400,000 for deportation in any given year." (Jain, *Arrests as Regulation* (2015) 67 Stan. L.Rev. 809, 810.)

Obviously government has a strong interest in ascertaining with certainty the identity of those who are arrested for felonies, not just those convicted. That identification is clearly enhanced if DNA is sampled and included in CODIS. A suspect who is arrested for rape and has a DNA sample matched to the profile of an unknown murder suspect from 2002 may find his eligibility for release cancelled. This was recently recognized by the court in *United States v. Mitchell* (3d Cir. 2011) 652 F.3d 387, which upheld the gathering of DNA samples from federal arrestees.

> Moreover, there are two components to a person's identity: "who that person is (the person's name, date of birth, etc.) and what that person has done (whether the individual has a criminal record, whether he is the same person who committed an as-yet unsolved crime across town, etc.)." *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009). The second component—what a person has done—has important pretrial ramifications. Running an arrestee's DNA profile through CODIS could reveal matches to crime-scene DNA samples from unsolved cases. Whether an arrestee is possibly implicated in other crimes is critical to the determination of whether or not to order detention pending trial. See 18 U.S.C. § 3142(g)(3)(A) (stating that factors to be considered in the bail determination include a person's "past conduct" and "criminal history"). To the extent that DNA profiling assists the Government in accurate criminal investigations and prosecutions (both of which are dependent on accurately identifying the suspect), it is in the Government's interest to have this information as soon as possible. Collecting DNA samples from arrestees can speed both the investigation of the crime of arrest and the solution of any past crime for which there is a match in CODIS. Moreover, "use of CODIS promptly clears thousands of potential suspects—thereby preventing them from ever being put in that position, and advancing the overwhelming public interest in prosecuting crimes accurately." Kincade, 379 F.3d at 839 n.38 (plurality op.) (internal quotation marks & citation omitted). The assistance provided by CODIS is not hypothetical: as of May 2011, CODIS "ha[d] produced over 144,400 hits assisting in more than 138,100 investigations." FBI, CODIS-NDIS Statistics, available at http://www.fbi.gov/about-us/lab/codis/ndis-

statistics (last visited July 8, 2011).

(*United States v. Mitchell*, *supra*, 652 F.3d at pp. 414-415.)

As will be discussed below, this interest in correctly identifying the arrestee weighs heavily against the reduced expectation of privacy by a felony arrestee.

> "Reasonableness ... is measured in objective terms by examining the totality of the circumstances" (*Ohio v. Robinette* (1996) 519 U.S. 33, 39 [136 L. Ed. 2d 347, 117 S. Ct. 417]), and "whether a particular search meets the reasonableness standard ' "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ' "(*Vernonia School Dist. 47J v. Acton*, *supra*, 515 U.S. at pp. 652–653; see also *Samson v. California* (2006) 547 U.S. 843, 848 [165 L. Ed. 2d 250, 126 S. Ct. 2193] (*Samson*).)

(*People v. Robinson*, *supra*, 47 Cal.4th at p. 1120.)

The opinion of the Court of Appeal below also attempts to cloud the issues before this Court with a discussion of "familial searches." (Slip Opinion, pp. 24, 34-25, 44.) The familial search begins, for example, with the profile of a convicted offender who is excluded from suspicion since he is eliminated as a match to the evidence. However, his profile is close enough to suggest that the offender is a male relative. This provides only an investigative lead which points investigators at male relatives. Investigators then follow through on their investigation. Let's assume that a woman was raped by a male in his 20s and she knew he lived in Hollywood and his last name was Karda. The authorities have previously arrested a suspect named Alex Karda. His photo is shown to the victim who says that was not him. Karda is an unusual name so the investigator looks up public information that establishes there is another male named Ben Karda who lives in Hollywood with Alex and is in his 20s according to the Department of Motor Vehicles. Investigators take his photo from the DMV and include it in a mug run for the victim who identifies Ben as the rapist. Ben has no standing to complain about a violation of his rights because the police followed through on a logical lead connecting him to Alex and hence to the evidence. (*In re Lance W.* (1985) 37 Cal.3d 873, 879.) The criminal suspect cannot vicariously

claim privacy rights in his relative's DNA. Detectives are not required to ignore obvious leads just because they are based on family relationships.

Of course, the manner of DNA collection is not entirely free from constitutional scrutiny. For example, the government could not single out a particular race for inclusion in crime databases. The United States Supreme Court so held for fingerprints taken in a 'dragnet' case where all young African-American men were detained and printed in Meridian, Mississippi in a clearly illegal sweep conducted just to obtain fingerprints. (*Davis v. Mississippi* (1969) 394 U.S. 721, 727-728 [89 S.Ct. 1394, 22 L.Ed.2d 676].) It should be noted that, there was no evidence that the young men who were detained were ever in lawful custody. (*Ibid.*) This distinction was also later noted by the Supreme Court: "The respondent in this case, like *Davis*, was briefly detained at the station house. Yet here, there was, as three courts have found, probable cause to believe that the respondent had committed the murder. The vice of the detention in *Davis* is therefore absent in the case before us." (*Cupp v. Murphy* (1973) 412 U.S. 291, 294-295 [93 S.Ct. 2000, 36 L.Ed.2d 900].) Based on the foregoing, the felony arrestee has no legitimate expectation of privacy in his or her own identity, or that he or she should be free from the minimally intrusive cheek swab during the booking process. Nothing about the manner of DNA collection here violates the constitution.

III

THERE IS NO STIGMA ATTACHED TO DNA COLLECTION

The claim on p. 24 footnote 11 of the Slip Opinion that DNA collection is tainted by stigma are misguided and wholly inaccurate.

> Another distinction significant in considering the privacy interests at stake is that DNA testing is viewed by society as a process reserved exclusively for criminals. Because many professions and branches of civil service require fingerprinting, the practice is "not in itself a badge of crime." (*U.S. v. Kelly* (1932) 55 F.2d 67, 70; see *Thom v. New York Stock Exchange* (S.D.N.Y. 1969) 306 F.Supp. 1002, 1007 ["The day is long past when fingerprinting carried with it a

> stigma or any implication of criminality."].) In contrast, society views DNA sampling not just as a badge of crime, but as a badge of the most dangerous crimes: "DNA is used most commonly, both in the public perception and in reality, to detect more heinous crimes such as rape and murder ... ." (Note, *Faulty Foundations: How the False Analogy to Routine Fingerprinting Undermines the Argument for Arrestee DNA Sampling* (2010) 19 Wm. & Mary Bill Rts. J. 475, 496 (*Faulty Foundations*).)

(Slip Opn. p.24, fn. 11.)

Every member of the United States military, from sailors to the Chairman of the Joint Chiefs of Staff, and every new recruit is required to submit a DNA sample for the military database, also known as a Repository. This is done for two purposes, the identification of remains and criminal investigations.

> The Department of Defense (DOD) began to use DNA samples to identify the remains of service members during the first Gulf War in 1991. "Because of problems with obtaining reliable DNA samples during the Gulf War, the DOD began a program to collect and store reference specimens of DNA from members of the active duty and reserve forces." What was then called the "DOD DNA Registry," program within the Armed Forces Institute of pathology, was established pursuant to a December 16, 1991 memorandum of the Deputy Secretary of Defense. Under this program, DNA specimens are collected from active duty and reserve military personnel upon their enlistment, reenlistment, or preparation for operational deployment. As of December 2002, the Repository, now known as the "Armed Forces Repository of Specimen Samples for the Identification of Remains," contained the DNA of approximately 3.2 million service members. According to a recent DOD directive, the "provision of specimen samples by military members shall be mandatory." The direction to a soldier, sailor, airman, or marine to contribute a DNA sample is a lawful order which, if disobeyed, subjects the service member to prosecution under the Uniform Code of Military Justice (UCMJ). If convicted at court-martial for the offense of violating a lawful general order, the service member carries the lifelong stigma of a federal felony conviction, and faces a maximum punishment of a dishonorable discharge,

> confinement for two years, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. (10 § 1565a. DNA samples maintained for identification of human remains: use for law enforcement purposes (a) Compliance with a court order).[6]

(Ham, *An Army of Suspects: The History and Constitutionality of the U.S. Military's Dna Repository and Its Access for Law Enforcement Purposes* (2003) 2003 Army Law. 48.) Submitting to the same sampling and analysis procedures to which millions of service men and women are required to participate cannot be considered stigmatizing.

It is well-known that in the aftermath of disasters such as Hurricane Katrina, the 9-11 attacks and the tsunami in Japan, DNA is widely used to identify the victims by comparing recovered remains to relatives' toothbrushes and personal effects. (Knoppers et al., *Symposium Article—Part I: Ethical Issues in Secondary Uses of Human Biological Materials from Mass Disasters* (2005) 34 J.L. Med. & Ethics 352, 352.) Such access, affordability and routine use of DNA tests have removed any imagined stigma.

Technology is also moving DNA analysis into everyday applications. Consumers wishing to trace their family tree now can provide their own buccal swabs for testing for a fee. (Genetic Geneology: the DNA Ancestry Project, at <http://www.dnaancestryproject.com/>, last viewed November 10, 2015.) Pet owners can use buccal swabs to test their dog's DNA for breed ancestry. (Dog-DNA, at <http://www.dog-dna.com/>, last viewed November 10, 2015.)

The alleged "indignity" of arrest and identification did not originate with modern DNA collection. In 1932, Mortimer Kelly was arrested for selling gin and was fingerprinted. He complained that he suffered indignity at being fingerprinted. Judge Learned Hand wrote:

> Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal

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6. In 2003, National Defense Authorization Act expanded the Repository uses to include criminal prosecutions.

> laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.

(*United States v. Kelly* (2d Cir. 1932) 55 F.2d 67, 69.) Judge Hand went on to note that fingerprinting was becoming widespread in 1932.

> Finger printing is used in numerous branches of business and of civil service, and is not in itself a badge of crime. As a physical invasion it amounts to almost nothing, and as a humiliation it can never amount to as much as that caused by the publicity attending a sensational indictment to which innocent men may have to submit.

(*Id* at p. 70.) The same can be said for the use of DNA today. The collection by buccal swab in the police station is a minimal intrusion, very private and attaches no stigma.

IV

EXPANSION OF THE DNA DATABASE AS PROVIDED FOR IN PROPOSITION 69 AIDS IN THE PURSUIT OF JUSTICE AND EXONERATION OF THOSE WRONGFULLY ACCUSED OF CRIMES WHILE PROTECTING THE PUBLIC

The Slip Opinion argues that DNA is not necessary for identification since fingerprints are available. (Slip Opn., p. 26.) This is akin to saying that fingerprints are not necessary because photographs are available. "Nothing in the Constitution compels us to adopt a Luddite approach that would prevent the Government from using this new and highly effective tool to replace (or supplement) older ones." (*Haskell v. Harris, supra,* 669 F.3d at p. 1063.)

Moreover, as accurate as fingerprinting can be, it is susceptible to human error. Fingerprint comparison is subject to human interpretation and has resulted in errors; one documented case resulted in an innocent man freed by a DNA comparison after a conviction was secured based on a

fingerprint comparison.

> In January, Stephan Cowans was freed after serving six and a half years of a 30-to-45 year sentence for shooting and wounding a police officer. Cowans had been convicted solely on fingerprint and eyewitness evidence, but post-conviction DNA testing showed that Cowans was not the perpetrator. The Boston Police Department then admitted that the fingerprint evidence was erroneous, making Cowans the first person to be convicted by fingerprint evidence and exonerated by DNA evidence. As with the Mayfield case, the Cowans misattribution involved multiple experts, including defense experts.

(Cole, *More than Zero: Accounting for Error in Latent Fingerprint Identification* (2005) 95 J. Crim. L. & Criminology 985, 986-987.) DNA comparison, by contrast, offers a more objective alternative to fingerprinting, which might become the new standard for identification in the future.

Speculation over elaborate fantasies about potential abuse of information contained in the samples being retained by law enforcement are not well-taken. (ABM, pp. 42-43, 47.)

> The concerns raised by amici and by Judge Reinhardt in his dissent are indeed weighty ones, and we do not dismiss them lightly. But beyond the fact that the DNA Act itself provides protections against such misuse, our job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented. In our system of government, courts base decisions not on dramatic Hollywood fantasies, *cf.* post at 11493, but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record. If, as Kincade's aligned amici and Judge Reinhardt's dissent insist, and when, some future program permits the parade of horribles the DNA Act's opponents fear--unregulated disclosure of CODIS profiles to private parties, genetic discrimination, state-sponsored eugenics, and (whatever it means) the use of CODIS somehow "quite literally, to eliminate political opposition," *post* at 11487--we have every confidence that courts will respond appropriately. As currently structured and implemented, however, the DNA Act's compulsory profiling of qualified federal offenders can only be described as minimally invasive--both in terms of the

> bodily intrusion it occasions, and the information it lawfully produces.

(*United States v. Kincade*, *supra*, 379 F.3d at pp. 837-838.)

Existing law instructs authorities to use and keep only those 13 specific markers for identification and it provides criminal penalties, including up to one year in prison, for misuse of collected information. (Pen. Code, § 299.5, subd. (i); 42 U.S.C. § 14133 [federal penalties for misuse of CODIS information].) It is thus highly doubtful that a rogue governmental employee would risk a career and criminal penalties in order to disclose confidential DNA information. Doing so poses such significant technical hurdles that it is unlikely such futuristic testing and disclosure could be accomplished and it would be impossible for such a breach to be undetected. (Remarks of Sen. Kyl, DNA Sampling, 155 Cong. Rec. S. 12904, 12904-12905.) Senator Jon Kyl addressed some of these concerns in hearings on this issue.

> Suffice to say that although the NDIS [National DNA Index System] database has existed for 10 years and nearly 6 million offender profiles have been added to that database, and although the lab has been conducting analysis of DNA from criminal suspects and victims for 20 years, there has never been one noted case in which a lab employee has ever made an unauthorized disclosure of DNA information. The risk that lab employees will undertake such acts is not substantial enough to merit consideration in a reasoned analysis of the privacy risks posed by the operation of NDIS.

(Remarks of Sen. Kyl, DNA Sampling, 155 Cong. Rec. S. 12904, 12905.) Misuse of the information contained in the DNA sample retained by the police is highly speculative and completely illegal. Any incentive for a potential violation depends on an imagined demand for a costly intrusion into specific DNA samples. A clerk in the Department of Justice is a civil servant, not a scientist bent on exploiting DNA profiles for an imagined nefarious goal.

Furthermore, the government is already trusted with identifying information that could be dangerous in the wrong hands, yet this does not raise constitutional problems. Other information gleaned from

arrestee booking such as employers, dates of birth, home addresses, driver's license numbers would provide a treasure trove for identity thieves and anyone wishing to learn about the credit history, spending practices and employment history of an arrestee. That potential exists now and is not a futuristic fantasy depending on future advances in technology. The potential intrusion does not proscribe law enforcement from gathering the arrestees' identifiers with the shield of existing safeguards.

Whereas these fantasies about abuse are purely speculative, the benefits of DNA identification are concrete, and expanding every day. Appellant incorrectly trivializes the efficacy of DNA samples to identify the arrestees. (ABM, pp. 53-54,59.) Case law already recognizes advances in technology have made DNA much more useful than in the past, and will likely continue to improve:

> Plaintiffs also assert that the Government takes "months" to analyze DNA samples, the effect of which is to show that DNA analysis does not advance the Government's interest in identifying arrestees. This argument exaggerates the facts: on average, Government analysis of DNA takes 31 days, but some samples have been processed in as few as five days. Although only of persuasive value, Plaintiffs also ignore the high likelihood that DNA technology will improve and substantially reduce processing times. Moreover, even at current processing rates, DNA analysis can be highly effective. For example, California's Criminal Justice Realignment legislation, Assembly Bill 109, Stats. 2011, Ch. 15, which went into effect on October 1, 2011, requires the transfer of many State prisoners to county jails. To reduce overcrowding in county jails, the statute allows prisoners to be released on their own recognizance sixty days after their arrest, subject to a discretionary review by the county. Collecting DNA at the time of arrest will help the county determine whether a prisoner is linked to other crimes before deciding whether to release the prisoner. Because release cannot occur before sixty days after arrest, the 31-day average processing time will give counties adequate time to compare arrestees' DNA with current and past crime data before they are released.

(*Haskell v. Harris, supra*, 669 F.3d at p. 1063.)

Also, the added challenges posed by Public Safety Realignment make it increasingly more important to ascertain the identification of felony arrestees and determine if he or she is connected to any violent felonies through evidence samples. Appellant further challenges the utility of obtaining DNA samples from felony arrestees since many felony arrests being sampled now are for non-violent ones. A Chicago study which advocated sampling felony arrestees cited a number of cases and statistics. (City of Chicago, *Chicago's Study on Preventable Crimes*, available at <http://www.dnaresource.com/documents/ChicagoPreventableCrimes-Final.pdf>, last viewed November 10, 2015 (hereafter Chicago Study.) One case cited in the study is illustrative. Geoffrey Griffin was arrested for felony possession of drugs on August 26, 1995. No DNA was taken at the time of his arrest and he was not convicted. In July of 1998, a woman was raped and killed by Griffin and DNA was recovered from the crime scene. Griffin was not immediately connected to the crime because there was no DNA taken from the initial felony arrest. Between July 1998 and June 2000, eight more women were murdered and one was raped but survived. Griffin was finally arrested in June of 2000 and charged with eight murders and one sexual assault. If he had been arrested after the July 1998 murder, subsequent murders could have been prevented. That was one example with a timeline illustrating how a DNA sample collected from a felony arrest could have prevented future violent crimes while solving past crimes.

Another poignant example of lives that could have been saved had there been DNA testing for all felony arrests is the case of Ronald Macon. He was first arrested for a felony theft in January of 1998. In July of 1998, he was arrested for felony vandalism. In September of 1998, he was arrested again for felony theft. In February of 1999, a woman was murdered and DNA evidence was recovered. In April and June of 1999, two more women were murdered. In August of 1999, a 65-year old woman was raped. When Macon was arrested, DNA linked him to three murders and a rape. He was sentenced to life in prison and 30 years for the rape. If he had submitted a DNA sample on any of his non-violent felony arrests, he would have been linked to the first murder in 1999, arrested and two women would have been spared and a

rape prevented. (Inmate Is Charged In 3 Chicago Killings, N.Y. Times (Oct. 12, 1999) available at <http://www.nytimes.com/ 1999/10/12/us/inmate-is-charged-in-3-chicago-killings.html>; see also Chicago Study, *supra.*)

While many of the examples theorize future crime prevention, there is also a compelling case for how a rational expansion of the DNA database unlocks prison doors for the innocent.

> DNA databases have proven remarkably effective in exonerating the innocent. According to the Innocence Project, there have been 273 post-conviction DNA exonerations in the United States since 1989. In 123 of the cases, the true suspects or perpetrators were also identified. The case of David Allen Jones is a powerful illustration of the benefits of arrestee DNA sampling. Jones, a mentally disabled janitor, was wrongly convicted in 1995 for three murders in the Los Angeles area. See Andrew Blankstein, et al., DNA Analysis Links Inmate to 12 Slayings, L.A. Times, Oct. 23, 2004, at A1. Jones spent nearly nine years in prison. He was released in 2004, after DNA collected at two of the murder scenes was linked to the DNA profile of Chester Dwayne Turner. Although Turner had been arrested 20 times between 1987 and 2002, his DNA sample was not collected until after he was convicted of rape in 2002. *Id.* Had the 2004 Amendment been in effect in 1995, it is likely that Jones never would have been imprisoned because police would have had access to Turner's DNA profile. There are few greater injustices than the wrongful imprisonment of an innocent person. The privacy intrusion caused by a buccal swab of a felony arrestee is minor compared to society's compelling goal of ensuring that innocent people are exonerated.

(*Haskell v. Harris, supra*, 669 F.3d at pp.1064-1065.)

The Los Angeles case of Chester Turner is a tragic example of 11 victims needlessly sacrificed while another man was falsely imprisoned for 11 years. Chester Turner was arrested 21 times over the period of 15 years without ever being convicted of a crime that would have allowed his DNA profile to be uploaded into the DNA database. When he was finally convicted of rape and his DNA profile was uploaded into CODIS, it matched

to the crime scene DNA found on 12 raped and murdered women. The first of these women was murdered *less than two months after his first felony arrest*. Her name was Diane Johnson. He subsequently murdered 11 more women. Had Turner's DNA been taken upon his first felony arrest, crime scene evidence from Diane Johnson could have matched Turner's CODIS profile and 11 women might have been saved. To compound this tragedy, a man name David Jones was wrongfully convicted and spent 11 years in prison. One cheek swab could have saved 11 lives and kept an innocent man from spending 11 years in prison. Turner was sentenced to death in 2007 and Jones was released after the DNA from two of the murders he was convicted of came back to Turner. (Blankstein & Winton, *Serial-Murder Trial Hinges on DNA Evidence*, L.A. Times (Oct. 31, 2005), available at <http://articles.latimes.com/2005/oct/31/local/me-turner31>; see also DNA Saves, Why Pass This Law?, at <http://www.dnasaves.org/dna_law.php#chester>.)

Expansion of the DNA databases to include arrestees can only help further the efforts of groups such as Project Innocence to exonerate the wrongfully convicted.

> Showing that DNA evidence does not match a convicted offender is often not enough to exonerate him. In an interview with the Council for Responsible Genetics, Peter Neufeld, co-founder of the Innocence Project, described how DNA databases help exonerate wrongly-convicted individuals: "There are occasions where we get a DNA test result on a material piece of evidence from a crime scene which would exclude our client, but prosecutors still resist motions to vacate the conviction. In some of those cases, what then tipped the balance in our favor was that the profile of the unknown individual [whose DNA was found at the crime scene] was run through a convicted offender database and a hit was secured. Once we were able to identify the source of the semen or blood... we were then able to secure the vacation of the conviction for our client." He went on to add, "There's no question that there would be fewer wrongful convictions if there was a universal DNA databank." (CRG Staff, 2011) In 2007, Barry Scheck, the other co-founder of the Innocence

> Project, told the New York Times that "many of the people his organization had helped exonerate would have been freed much sooner, or would not have been convicted at all" if state databases included profiles from all convicted offenders. (McGeehan, 2007)

(Doleac, *The Effects of DNA Databases on Crime* (Stanford Institute for Economic Policy Research, Discussion Paper No. 12-002, 2012) p. 9, fn. 8, available at <https://siepr.stanford.edu/?q=/system/files/shared/pubs/papers/Doleac_DNADatabases_0.pdf>, last viewed November 10, 2015.) While Mr. Scheck's comments related directly to profiles of convicted offenders, expanding the databases to include persons arrested for felonies could only assist efforts to determine the truth.

A dramatic illustration of this state interest is provided by Robert Gonzales case in New Mexico. Victoria Sandoval, 11 years old, was raped and murdered during a burglary in 2005. Gonzales, who had a history of mental health issues, confessed to the crime although the hair and semen samples did not implicate him. Gonzales spent nearly 3 years in custody facing murder and rape charges before the DNA taken from the murder scene matched an arrestee, Israel Diaz, in 2008. Diaz had been arrested for burglary in New Mexico, which provided for DNA to be taken from arrestees. As an undocumented alien, Diaz may never have been convicted, only deported and his DNA would never have been obtained if arrestees were not included in the database. Gonzales was finally freed and Diaz was convicted because of the DNA taken from a felony arrestee. (Wallentine, *Chief's Counsel: Collection of DNA Upon Arrest: Expanding Investigative Frontiers* (The Police Chief, vol. 77, no. 1, 2010)[7]; The Innocence Project, *Another False Confession Revealed* (July 1, 2008), at <http://www.innocenceproject.org/Content/Another_false_confession_revealed.php>, last viewed November 10, 2015.)

Jerry Hobbs spent five years in jail in Illinois for the 2005 murder of his 8-year-old daughter and her 9-year-old friend. His charges

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7. Available at <http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1982&issue_id=12010>, last viewed November 12, 2015.

were based on a confession he later retracted, claiming his confession had been coerced. One of the girls had semen on her body that did not match Hobbs. Another man in Virginia, Jorge Torres, was arrested for the murder of a woman. His DNA was entered into the database after his arrest and matched the semen on the dead girl. Torres was an acquaintance of the murdered 9-year-old girl's brother. Hobbs was freed and Torres was convicted of the murders of the two children. In one respect Hobbs was fortunate. Torres was arrested in Virginia, which tested arrestees' DNA unlike Illinois which did not at that time. (*Hobbs v. Cappelluti* (N.D. Ill. 2012) 899 F.Supp.2d 738, 750-752.)

Justice Scalia, in his dissent on *Maryland v. King* at footnote 2, dismisses the possibility of arrestee DNA being used to exonerate those wrongfully convicted despite the fact that the examples above were thoroughly briefed and included in the briefs before the Court. A study by the Rand Corporation criticized the economics of including arrestee DNA profiles in the DNA databases. (Goulka et al., *Toward a Comparison of DNA Profiling and Databases in the United States and England* (Rand Center on Quality Policing, 2010), available at <http://www.rand.org/pubs/technical reports/TR918.html>, last viewed on November 9, 2010 (hereafter "Rand").) The suggestion, based on admittedly incomplete data, was that the backlog of crime scene samples would be better cleared before gathering DNA from arrestees. (*Id.* at p. 20.) The study was also somewhat cavalier in discussing the possibility of exonerations.

> A DNA database is not necessary for exonerating the innocent unless an individual is being prosecuted or imprisoned despite weak or exculpatory DNA evidence, and the database helps identify the actual perpetrator.

(Rand, *supra*, at p. 14.)

The Rand observations, based on a cost/benefit analysis, offer little consolation to defendants spending years in custody for crimes committed by others. Opponents of DNA testing for arrestees have attempted to bolster their arguments against arrestee testing by pointing to the Rand study. This argument ignores the human cost and the requirement that the

legislature and the electorate determine the wisdom of the policy. The courts evaluate the constitutionality of the laws.

> State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern

(*Whalen v. Roe* (1977) 429 U.S. 589, 597 [97 S.Ct. 869, 51 L.Ed.2d 64], fn. omitted.)

In sum, the end result of increasing DNA databases is more truth and accuracy in the criminal justice system, not a parade of horribles. Whether California should invest the time and resources in this technology are for the Legislature and the voters. As to the constitutional question, this Court should uphold the scheme already in place.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court reverse the Court of Appeal's judgment, and affirm the judgment of conviction.

Respectfully submitted

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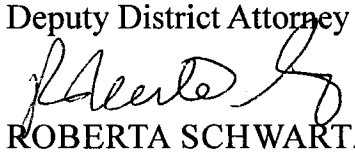

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Brief** uses a 13 point Times New Roman font and contains 10137 words.

Dated:

ROBERTA SCHWARTZ
Deputy District Attorney

DECLARATION OF SERVICE BY MAIL

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the **Brief** by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed as follows:

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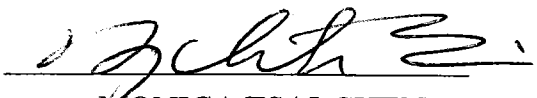

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