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May 10, 2012

Molly Dwyer
Clerk of the Court
Ninth Circuit Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

RE: *Elizabeth Aida Haskell, et al. v. Kamala Harris, et al.*
Ninth Circuit Case No. 10-15152

Dear Ms. Dwyer:

Contrary to appellants' letter submitted on May 1, 2012, the decision of the Maryland Court of Appeals in *King v. State*, 2012 WL 1392636 does not support appellants' petition for rehearing en banc. The decision in *King* is inconsistent with this Court's caselaw and the virtually unanimous view of the federal courts.

In concluding that the collection of a forensic DNA sample at the time of felony arrest was unreasonable for purposes of the Fourth Amendment, the Maryland Court of Appeal relied on what this Court has concluded are "Hollywood fantasies" in exaggerating the arrestee's interest in the privacy of his identity. *Compare King*, 2012 WL 1392636 at *21 *with United States v. Kincade*, 379 F.3d 813, 838 (9th Cir. 2004); *see also United States v. Mitchell*, 652 F.3d 387, 408 (3rd Cir. 2011) (en banc). Rejecting this Court's conclusion that "the information derived from the [DNA] sample is substantially the same as that derived from fingerprinting," *Rise v. Oregon,* 59 F.3d 1556, 1559 (9th Cir. 1995), the Maryland Court of Appeals instead concluded that because DNA contains a "vast genetic treasure map," 2012 WL 1392636 at *21, the arrestee's interest is significant. That conclusion ignores the significant statutory restrictions on the use of a DNA sample, restrictions that this Court has found dispositive in numerous cases. *See*, *e.g.*, *Kincade*, 379 F.3d at 837 (9th Cir. 2004)

Meanwhile, the *King* Court dramatically understates the interests of the Government. It rejects the view of numerous courts that have concluded that law enforcement's interest in identifying an arrestee properly includes knowing what other crimes that individual has committed. *Mitchell*, 652 F.3d at 412; *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 186 (2004); *Loder v. Municipal Court*, 17 Cal.3d 859, 864-866 (1976). The opinion dismisses the interest in solving past crime, when in California alone thousands of investigations have been aided. And the court completely ignores the State's interest in preventing future

crimes and in exonerating the innocent. Its cursory – and incorrect – analysis provides no basis for granting rehearing en banc.

Sincerely,

s/ Daniel J. Powell

DANIEL J. POWELL
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For KAMALA D. HARRIS
Attorney General

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# CERTIFICATE OF SERVICE

Case Name: **Elizabeth Aida Haskell, et al. v. Edmund G. Brown Jr., et al.** No. **10-15152**

I hereby certify that on May 10, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**28(j) LETTER**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 10, 2012, at San Francisco, California.

| Susan Chiang | s/ Susan Chiang |
|---|---|
| Declarant | Signature |

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