

10-15152

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**ELIZABETH AIDA HASKELL, REGINALD
ENTO, JEFFREY PATRICK LYONS, JR., and
AAKASH DESAI, on behalf of themselves and
others similarly situated,**

Plaintiffs and Appellants,

v.

**KAMALA D. HARRIS, Attorney General of
California; and EVA STEINBERGER,
Assistant Bureau Chief for DNA Programs,
California Department of Justice,**

Defendants and Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 09-cv-04779-CRB
The Honorable Charles R. Breyer, Judge

**MOTION TO STAY EN BANC PROCEEDINGS,
OR IN THE ALTERNATIVE MOTION FOR
SUPPLEMENTAL BRIEFING**

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACHTER
Supervising Deputy Attorney General
ENID A. CAMPS
Deputy Attorney General

DANIEL J. POWELL
Deputy Attorney General
State Bar No. 230304
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5830
Fax: (415) 703-1234
Email: Daniel.Powell@doj.ca.gov
Attorneys for Appellees

INTRODUCTION

In a Chambers Opinion authored by Chief Justice Roberts, the United States Supreme Court recently stayed a decision of the Maryland Supreme Court invalidating that state's forensic DNA collection statute, pending disposition of Maryland's petition for a writ of certiorari. *Maryland v. King*, 567 U.S. ___, 2012 WL 3064878 (Roberts, Circuit Justice 2012). In that opinion, Chief Justice Roberts concludes that there is a "reasonable probability" that the Supreme Court will grant a petition for a writ of certiorari in *King*. As a decision of the Supreme Court in that case would resolve most, if not all, of the claims presented in this case, Appellees respectfully request that this Court stay en banc proceedings pending the Supreme Court's resolution of *King*.

In the alternative, Appellees request that this Court permit simultaneous supplemental briefing in advance of rehearing en banc. As the numerous Rule 28(j) letters filed in this case indicate, there have been many intervening decisions since briefing was completed in this case, and Appellees believe that supplemental briefing would benefit the Court by allowing the parties to address these decisions in full.

ARGUMENT

I. JUDICIAL ECONOMY WOULD BE SERVED BY STAYING EN BANC PROCEEDINGS

In *King v. State*, the Maryland Supreme Court invalidated that State's DNA Collection Act, which much like California's Proposition 69 authorized law enforcement to collect a forensic DNA sample, for purposes of identification, from an individual arrested for specified crimes. 42 A.2d 549, 555 (Md. 2012). The Maryland Supreme Court considered the totality of the circumstances, and concluded that the arrestee's privacy interest outweighed the interest of the government, and that the collection of DNA from adult felony arrestees violated the Fourth Amendment. *Id.* at 566.

On July 30, 2012, Chief Justice John Roberts, acting in his capacity as Circuit Justice, issued a Chambers Opinion granting Maryland's application for a stay pending the Court's disposition of Maryland's petition for writ of certiorari. Applying the first of three factors in determining whether a stay was warranted, the Chief Justice concluded that there was a "reasonable probability" that the Court would grant certiorari because of the conflicting decisions in the state and federal courts, and because the split implicates "an important feature of the day-to-day law enforcement practice in approximately half the States and the Federal Government." 2012 WL

3064878 at *1. He further concluded that “given the considered analysis of the courts on the other side of the split” there is a fair prospect that the Court will reverse the Maryland Supreme Court’s decision invalidating Maryland’s DNA collection statute. *Id.*

Moreover, Chief Justice Roberts concluded that barring Maryland from collecting a forensic DNA sample at the time of felony arrest “subjects Maryland to ongoing irreparable harm.” *Id.* at *2. Citing the fact that the collection of DNA from felony arrestees resulted in 58 prosecutions over a two year period, Chief Justice Roberts concluded that “[c]ollecting DNA from individuals arrested for investigating unsolved crimes and thereby helping [sic] to remove violent offenders from the general population” *Id.* at 3. As each of these three factors weighed in favor of a stay, Chief Justice Roberts stayed the mandate of the Maryland Supreme Court pending resolution of the case at the Supreme Court.

As the Supreme Court is likely to grant certiorari in *King*, and as the Supreme Court’s decision in that case is likely to resolve the claims in this case, Appellees respectfully request that this Court stay en banc proceedings pending resolution of *King*. *Cf. Golinski v. U.S. Office Personnel Management*, Case No. 12-15388, Order (July 27, 2012) (staying further

proceedings pending resolution of petition for certiorari before judgment in that case). As Appellants themselves recognized by filing a Rule 28(j) letter citing the Maryland Supreme Court's analysis, the issues presented in that case are virtually identical to those at issue in this case.¹ The Maryland statute, like California's, authorizes the collection of DNA at the time of arrest, and the Maryland Supreme Court, like the panel here, analyzed the Fourth Amendment claim by evaluating the totality of the circumstances. *King v. State*, 42 A.2d at 555. Since the Supreme Court is now likely to review *King* and issue a decision that will be binding on this Court, it would conserve judicial economy to stay en banc proceedings pending the Supreme Court's resolution in that decision. Accordingly, Appellees request that this Court vacate the en banc hearing currently set for the week of September 17, 2012, and stay proceedings in this case until such time as the Supreme Court issues an opinion on the merits or denies certiorari in *King*.

¹ Of course, the analysis of the Maryland Supreme Court, unlike that of the United States Supreme Court, is not binding authority. As the Maryland Supreme Court's decision contains numerous analytical flaws as outlined in Appellees' response to Appellants' Rule 28(j) Letter, this Court should reject the Maryland Supreme Court's reasoning if it proceeds to the merits in an en banc proceeding.

II. IF THE COURT DOES NOT STAY EN BANC PROCEEDINGS, IT SHOULD PERMIT SUPPLEMENTAL BRIEFING

In the event the Court does not stay proceedings pending the Supreme Court's resolution of *King*, Appellees respectfully request the opportunity to file a supplemental brief addressing the numerous cases that have been decided since briefing was completed more than two years ago in April 2010.² Indeed, in addition to briefing the impact of the since-vacated decision in *Pool v. United States* (No. 09-10303), the parties have submitted Rule 28(j) letters addressing the decisions in *State v. King*, 42 A.2d 549, 555 (Md. 2012) (Docket # 64, 65) *Mario W. v. Kaipio*, __ P.3d __, 2012 WL 2401343, *7 (Ariz. June 27, 2012) (Docket # 65, 67), as well as a RAND Report: *Toward a Comparison of DNA Profiling and Databases in the United States and England* (2010) (Docket # 40, 41). Moreover, while the parties briefly discussed *United States v. Mitchell*, 652 F.3d 897 (3rd Cir. 2012) (en banc) in the context of Appellants' petition for rehearing, they did so primarily as it related to whether this Court should grant rehearing en banc, not on the basis of its legal analysis.

² This Court permitted supplemental briefing in *United States v. Pool*, No. 09-10303, in which a similar length of time had lapsed between briefing and en banc proceedings.

So that the parties have a full opportunity to address these decisions in a fuller manner than is permitted by the limited space of a Rue 28(j) letter, Appellants requests leave of this Court to file a supplemental brief, limited to 7,000 words, which would be filed on or before August 31, 2012.³

Dated: August 1, 2012

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACHTER
Supervising Deputy Attorney General
ENID A. CAMPS
Deputy Attorney General

s/ Daniel J. Powell

DANIEL J. POWELL
Deputy Attorney General
Attorneys for Appellees

SA2010100220
20629830.doc

³ Appellants have stated that they oppose the request for a stay of en banc proceedings. They have also stated that they do not believe supplemental briefing is necessary.

CERTIFICATE OF SERVICE

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

I hereby certify that on August 3, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**MOTION TO STAY EN BANC PROCEEDINGS, OR IN THE ALTERNATIVE
MOTION FOR SUPPLEMENTAL BRIEFING**

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 August 3, 2012, at San Francisco, California.

Susan Chiang

Declarant

s/Susan Chiang

Signature