No. 10-15152

IN THE

United States Court of Appeals for the Ninth Circuit

ELIZABETH AIDA HASKELL, et al.,

Appellants,

v.

KAMALA D. HARRIS, et al.,

Appellees.

Appeal from the United States District Court
for the Northern District of California
in Case No. C 09-04779 CRB
Judge Charles R. Breyer

EN BANC BRIEF FOR AMICUS CURIAE DNA SAVES IN SUPPORT OF APPELLEE AND AFFIRMANCE

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STATEMENTS PURSUANT TO FED. R. APP. P. 29

Pursuant to Fed. R. App. P. 29(a) and 9th Cir. R. 29-2(a), DNA Saves states that all parties have consented to the filing of this brief.

Pursuant to Fed. R. App. P. 29(c)(5), DNA Saves states that no party's counsel authored the brief in whole or in part or contributed money intended to fund preparing or submitting the brief and that the following persons contributed money that was intended to fun preparing or submitting the brief: Lisa Adair, Mike Antiporda, BES Rental & Sales, Jesus Becarra, Francis Beeman, Deborah Benjamin, John Benjamin, Dale Bowman II, Dan Boyd, Joe Brininstool, Cathrynn Novich Brown, Greg Brown, Carole Bryant, Charles Burton, Terry Burton, Marinda Calderon, John Caraway, Suzanne Carlsen, Staci Carrell, Tricia Chace, Carol Chelkowski, Cielo Vista Apartments, Mike Cleary, T. Arlene Cooper, Danny Cross, Mike Currier, Linnie Davis, Samuel Denman, Christy Dickerson, Tommy and Sheryl Dugger, Kathy Elmore, Diane Esquibel, Laura Florez, Jeffrey Foote, Jeri Forsha, David Fritschy, Myrtle Fritschy, Patty Fugate, Danielle Galloway, Deanna Garringer, Mike Garringer, Jeanne Hall, Chad Hewitt, Todd Hyden, Matthew John, Chris Jones, Kathy M. Jones, Davis W. Kayser, Erin Kennedy, Debra Kimbley, Cindy Klein, Jeff Knox, Jody Knox, Gary Lanier, Jan Lemons, Janice Leons, Life Technologies, Matt Leroch, Tracy Leroch, Rita London, Sam Mendez, Gabriel Lujan, Carlsbad Mall, Charles and Phyllis McEndree, Justin

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INTEREST OF AMICUS CURIAE

DNA Saves is a 501(c)(4) non-profit association that educates policy-makers and the public about the value of forensic DNA. It files this brief pursuant to 9th Cir. R. 29-2(e)(2) to supplement the brief it filed before the three-judge panel in 2010, in light of new developments since that time.

DNA Saves was formed by Jayann and David Sepich in late 2008, marking the five year anniversary of the vicious murder of their daughter, Katie. Had a

DNA sample been taken from Katie's murderer, Gabriel Avilla, upon arrest for an unrelated crime, the Sepichs would have discovered who killed their daughter only three months after her death. *See* Decl. of Jayann Sepich ¶¶ 9-10 (SER2-3). Instead, Avilla remained free for over three years to victimize more daughters, while the Sepichs waited for answers. The Sepichs hope that by advocating for better DNA testing laws they can prevent other parents from asking "why?"

DNA Saves is committed to working with every state and the federal government to pass laws allowing DNA to be taken upon arrest, and to provide meaningful funding for DNA programs. In January 2007, New Mexico implemented "Katie's Law," which requires DNA profiles for most felony arrestees to be included in the database. New Mexico's DNA database program has already registered at least 344 matches of unsolved crimes to 307 individual arrestee DNA profiles. Twenty-five of those matches identified suspects in unsolved murders, and 50 identified suspects in unsolved sex-related crimes. The very first arrestee sample was matched to a double homicide case, leading to a conviction.

DNA Saves is also vitally committed to ensuring that courts correctly apply the Constitution and allow legislatures to enact these sensible and effective laws. The resolution of this issue will have a direct and profound effect on DNA Saves'

efforts to expand the use of DNA identification of arrestees throughout the country so that more recidivist crime can be prevented.

SUMMARY OF ARGUMENT

This brief will not repeat the arguments made in the brief filed by DNA Saves before the three-judge panel, which has been resubmitted for consideration by the en banc Court. Instead, this brief will address key authorities issued after that brief was filed in 2010, including *People v. Buza*, 197 Cal. App. 4th 1424 (2011), *review granted*, 132 Cal. Rptr. 3d 616 (2012), *King v. State*, 425 Md. 550 (2012), *stay granted*, __ S. Ct. ___, 2012 WL 3064878 (U.S. July 30, 2012), *pet. for certiorari filed*, No. 12-207 (U.S. Aug. 14, 2012), and *Mario W. v. Kaipio*, 281 P.3d 476 (Ariz. 2012).[1] In particular, DNA Saves wishes to focus on two fundamental errors in the reasoning of those decisions.

First, these courts have relied on a mistaken understanding of what it means to "identify" an arrestee and have failed to comprehend why the collection and cataloguing of such identifying information raises no constitutional concerns. Identification means more than just knowing a person's name. Names are simply one form of identification among many. Just like fingerprinting, DNA identification invades no protected privacy interest regardless of whether the

[1] The California Court of Appeal's decision in *Buza* is no longer operative given the grant of review by the California Supreme Court, but its flawed reasoning has been followed in cases such as *King* and *Mario W.*

arrestee's name is already known. Law enforcement routinely subjects arrestees to ordinary fingerprinting even when their names are already known, and DNA fingerprinting is no different. Arrestees have no legitimate interest in concealing any of their identifying characteristics, whether names, photographs, fingerprints or the thirteen so-called "junk" DNA markers that are the only information ever obtained or used in DNA identification. And they have no right to conceal that identity so that nobody will know what other crimes they may have committed or will commit. Nor are law enforcement personnel forbidden to utilize that identifying information for investigative purposes. Once lawfully obtained, identifying information—whether fingerprints, names, photographs or DNA profiles—can be and is legitimately used to match that information with other information voluntarily left at a crime scene.

Likewise, courts finding that arrestees have a right to withhold their identifying DNA information have also mistakenly relied on the hypothetical possibility that other information, beyond the identifying markers used in DNA profiling, could theoretically be discerned through further testing and analysis of a sample—notwithstanding the lack of any documented instance of such misuse in the more than 20 years that DNA identification has been used. The panel majority cogently explained why courts cannot rely on such "'dramatic Hollywood fantasies.'" *Haskell v. Harris*, 669 F.3d 1049, 1062 (9th Cir. 2012) (citation

omitted). This brief adds to that analysis by noting the reasons why such abuse is extraordinarily unlikely to ever occur and why it is not implicated by the statute at issue. As courts have noted, the only relevant "search" that occurs in DNA identification (other than the *de minimis* inconvenience of a buccal swab) is the analyzing of the sample to determine the thirteen markers used in DNA profiling. That limited search implicates no legitimate constitutional privacy interest. Should there be another analysis in the future that gleans additional information—and there is no reason to think one ever will occur—a future court could address the implications at that time.

The concerns that DNA Saves raises are not abstract, as the *King* case amply demonstrates. In that case, police apprehended a man who had invaded the home of a 53-year-old woman and brutally raped her, based on a match with a DNA profile collected upon the man's arrest for an unrelated crime more than five years later. Yet the Maryland Court of Appeals reversed the conviction and ordered that this recidivist criminal be set free to potentially terrorize future victims, based on his purported constitutional right to hide his identifying information. Until its order was stayed by Chief Justice Roberts, the court also provided comfort for all other recidivists by preventing law enforcement in Maryland from employing this state-of-the-art identification technique in the future. This Court should not follow that lead. Future victims and their loved ones should not have to suffer and grieve

because arrestees want to hide their identities. Arrestees' illegitimate interest in withholding their identifying information pales in comparison with the vital interests of these countless unknown future victims.

ARGUMENT

I. IDENTIFICATION IS NOT JUST KNOWING A PERSON'S NAME.

The majority decisions in *Buza*, *King*, and *Mario W.* all proceed from the flawed premise that the government's legitimate interest in knowing an arrestee's identity is limited to knowing that person's name. In their view, if law enforcement is able to discern an arrestee's name through other means, such as traditional fingerprinting, it has no need to employ DNA identification and the Fourth Amendment prohibits it from doing so. And because the government's interest stops at learning the person's name, law enforcement personnel have no ability to use DNA profiling for "investigative" purposes such as matching it to crime scene evidence.[2]

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[2] *See Buza*, 197 Cal. App. 4th at 1452 ("The value and primary use of DNA is investigatory; the DNA may be useful for determining who a person is, but this is not the use to which it is put at the time of arrest and it is not necessary for that purpose."); *King*, 425 Md. at 600 ("We simply will not allow warrantless, suspicionless searches of biological materials without a showing that accurate identification was not possible using 'traditional' methods."); *Mario W.*, 281 P.3d at 479 ("the State does not seek a profile simply to ***identify*** any juvenile in the normally accepted use of that term" because "it is plain that the legislature intended the profile to be used for purposes other than simply confirming the name of the person charged with the current crime").

That reasoning is deeply flawed. As the panel majority noted in this case, "identity" is simply "'the condition of being the same with something described, claimed, or asserted. . . .'" *Haskell*, 669 F.3d at 1063 (quoting Webster's Third New International Dictionary 1123 (2002)). Names are one kind of identifying information, but they are far from the only kind. Fingerprints are another kind: they verify that an arrestee is the person with a particular set of unique fingerprints. Thus, the government always takes fingerprints from arrestees even when it already knows their names through other means. Indeed, fingerprinting does not reveal a name; at most, it associates a name learned through other means if a person was ever fingerprinted before. Fingerprinting is instead used largely to ascertain if identifying information is connected with other records, and the fingerprint record is placed in a database to enable future comparisons. This process invades no legitimate privacy interests because only identifying information is obtained, which no arrestee ever has a legitimate right to conceal, regardless of whether the government already has other such information.

The analysis is no different with DNA identification. "The collection and use of DNA for identification purposes is substantially identical to a law enforcement officer obtaining an arrestee's fingerprints to determine whether he is implicated in another crime." *Haskell*, 663 F.3d at 1063. Traditional fingerprinting identifies a person by a particular set of lines on his fingers. Photography

identifies a person by a particular set of facial characteristics. Production of a driver's license identifies a person by the license information. Likewise, DNA profiling identifies a person by a particular set of otherwise meaningless DNA markers. The markers themselves ***are*** the person's identity, just as much as a name and birthday or other physical characteristics like facial features and fingerprints. This serves the same purposes as regular fingerprint identification. The only difference is that DNA identification can often do the job better. The *King* case is a good example. Mr. King wore a mask during the rape and there was no fingerprint evidence. But he left his DNA, which could not be concealed.

If accepted, the flawed dichotomy between identification and investigative uses of identifying information would drastically disrupt law enforcement and endanger public safety. Having determined that the government's interest in identifying arrestees begins and ends with knowing their names, the *Buza* court concluded that DNA profiling is a prohibited "investigative" rather than "identification" tool. *See*, *e.g.*, *Buza*, 197 Cal. App. 4th at 1450 ("There can be no doubt that this use of DNA samples is for purposes of criminal investigation rather than simple identification."). Similarly, the *Mario W.* court prohibited law enforcement from analyzing samples from juvenile suspects to determine DNA profiles unless and until the suspect absconded and needed to be tracked down. *Mario W.*, 281 P.3d at 483. And the *King* court held Maryland's statute

unconstitutional except to the extent DNA profiles were necessary to discern an arrestee's name where other traditional means had failed. *King*, 425 Md. at 601.

The supposed dichotomy between "investigatory" and other uses of identifying information is a false one. DNA profiles are used for investigatory purposes. But so are fingerprints and other forms of identification. As the panel noted in this case, if the *Buza* reasoning were correct, "our entire criminal justice system would be upended." *Haskell*, 669 F.3d at 1061. The entire system of fingerprinting would be invalid, because law enforcement could not require an arrestee to submit to fingerprinting if the records were ever to be used to link the person to a prior crime. *See id.* (if DNA profiles and fingerprint records "may only be used in connection with the crime for which probable cause was found," law enforcement "would be prevented from using basic investigative tools" and "could never be allowed to match crime scene fingerprints to data-bases of prints collected from past arrestees").

If a person is ***illegally*** arrested for the ***sole*** purpose of collecting his fingerprints to implicate him in an earlier crime, the fingerprints might be excludable in a later prosecution as "fruit of the poisonous tree." *See, e.g.*, *Davis v. Mississippi*, 394 U.S. 721 (1969); *United States v. Garcia-Beltran*, 389 F.3d 864 (9th Cir. 2004). But where a defendant has been properly arrested upon suspicion he has committed a crime, his fingerprints may be used for investigative

comparisons. *See United States v. Oscar-Torres*, 507 F.3d 224 (4th Cir. 2007). And even if an arrest is overturned for other reasons, "when fingerprints are 'administratively taken . . . for the purpose of simply ascertaining . . . the identity' or immigration status of the person arrested, they are 'sufficiently unrelated to the unlawful arrest that they are not suppressible.'" *Id*. (quoting *United States v. Olivares-Rangel*, 458 F.3d 1104, 1112-13 (10th Cir. 2006)).

In sum, no arrestees ever have a legitimate interest in withholding their identifying information, whether fingerprints, names, birth dates, photographs or DNA profiles. Because they have been arrested upon an officer's determination of probable cause, they have a diminished expectation of privacy that does not extend to identifying information. *See United States v. Mitchell*, 652 F.3d 387, 412 (3d Cir. 2011) (en banc). Once that information is provided, it can be—and routinely is—used for other legitimate governmental interests, most notably to link the person to a prior crime. The actual evidence of criminal activity is not the subject of any search; it was voluntarily left by the perpetrator at the crime scene in the form of fingerprints or discarded bodily fluids. The identifying fingerprint or DNA profile obtained upon the earlier or later arrest is simply used to identify the arrestee as that perpetrator. The government has a compelling interest in making that identification and thereby protecting the public from criminal activity.

II. THE LIMITED ANALYSIS PERFORMED FOR DNA IDENTIFICATION IMPLICATES NO BROADER PRIVACY CONCERNS.

The second basic error made by the *Buza* and *King* courts is their reliance on the fact that DNA samples could, in theory, be re-analyzed to reveal information beyond the thirteen so-called "junk" markers used in DNA identification, even though such analysis is strictly forbidden by law and does not in fact occur. For example, the *King* court held that an arrestee "ha[s] an expectation of privacy to be free from warrantless searches of his biological material and all of the information contained within that material" and that even though only the junk markers are employed in DNA testing "we can not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State." 425 Md. at 595-96. *See also Buza*, 197 Cal. App. 4th at 1443-44 ("DNA profiles are derived from blood specimens, buccal swab samples and other biological samples containing the entire human genome" and "it is reasonable to expect they will be preserved long into the future, when it may be possible to extract even more personal and private information than is now the case").

This Court has already explained why it is error to base a decision on such "dramatic Hollywood fantasies" rather than "concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record." *United States v. Kincade*, 379 F.3d 813, 837-38 (9th Cir. 2004). *Accord*,

Haskell, 669 F.3d at 1062. But it is also important to understand just how far-fetched these fantasies really are. The only information stored in CODIS consists of the thirteen junk markers, which are not associated with a name. Thus, even if someone illegally gained access to CODIS, the ***only*** way to learn any genetic information about a specific arrestee would be to risk criminal penalties by (1) finding out where that person was arrested; (2) conspiring with the arresting agency to gain access to the physical sample taken at arrest; and (3) surreptitiously performing additional laboratory tests on that sample to generate additional data. There is no apparent reason why anyone would be motivated to obtain such information in the first place. And it is entirely unreasonable to think that someone would risk criminal sanctions to carry out such an elaborate plot, which would be revealed as soon as the information were used. If someone truly had a nefarious reason to learn a person's genetic information, it would be far easier to test a strand of hair or another discarded sample. All of us leave our DNA everywhere we go. It is not surprising, then, that there has never been one documented instance of an unauthorized disclosure of DNA information in the more than 20 years since DNA identification has been used. *See* 155 Cong. Rec. S12905 (Dec. 10, 2009).

As a matter of law, it is irrelevant that the arresting agency retains the physical sample, which hypothetically may be re-analyzed to extract private information beyond the identifying markers. Because the physical inconvenience

of a buccal swab is *de minimis*, the only relevant "search" that even potentially implicates legitimate privacy interests is the analysis of the information contained in the sample obtained. *Cf. Mitchell*, 652 F.3d at 406 (holding that DNA identification "entails two separate searches": the physical collection of the sample and the analysis of the information). That search is plainly reasonable because the sample is analyzed only to determine the thirteen markers that are used and useful only for identification. If, hypothetically, the government were to perform yet another analysis to discover additional information that it does not yet have, additional privacy concerns might be implicated by that analysis. But such actions are strictly prohibited under pain of criminal penalty, have never occurred in this or any other case, and can be addressed on their own facts if they ever do occur. The government's continued retention of the sample is thus irrelevant where that access has yielded nothing other than purely identifying information.

Moreover, courts uniformly hold that no new search occurs when information in CODIS is compared against crime scene evidence. "[T]he retention and matching of [a] lawfully obtained [DNA] profile against other profiles in the government database does not constitute a search within the meaning of the Fourth Amendment." *Boroian v. Mueller*, 616 F.3d 60, 60 (1st Cir. 2010). *Accord Wilson v. Collins*, 517 F.3d 421, 428 (6th Cir. 2008); *United States v. Amerson*, 483 F.3d 73, 86 (2d Cir. 2007); *Johnson v. Quander*, 440 F.3d 489, 499 (D.C. Cir.

2006); *Smith v. Indiana*, 744 N.E.2d 437, 440 (Ind. 2001). As with all other issues in this case, there is no difference between ongoing CODIS comparisons and ongoing comparisons of other previously-obtained identifying information, such as fingerprints, against other databases. "DNA profiles currently function as identification records not unlike fingerprints, photographs, or social security numbers." *Boroian*, 616 F.3d at 65. Thus, "the fact that the government may lawfully retain and access these more traditional means of identifying [a person] only emphasizes that the government's retention and matching of his DNA profile does not intrude on [his] legitimate expectation of privacy. . . . [A] DNA profile simply functions as an additional, albeit more technologically advanced, means of identification." *Id*. at 67.

Just as with fingerprints, DNA identification is ***not*** a search of private information for evidence of a crime. The physical evidence against which the comparison is made is not obtained through any new search but rather was abandoned at a crime scene, and an arrestee has no legitimate interest in concealing that he is the person who has those identifying characteristics. No one can assert a Fourth Amendment right to the privacy of his past criminal endeavors. *See United States v. Cardoza-Hinojosa*, 140 F.3d 610, 616 (5th Cir. 1998) ("the 'subjective expectation of not being discovered' conducting criminal activities is insufficient to create a legitimate expectation of privacy") (citation omitted). As with

fingerprints, photographs, handwriting samples, and other forms of identification, using DNA identification to link a person with another event does not involve or justify any additional, more intrusive searches for evidence of wrongdoing.

It is therefore irrelevant whether the government offers released individuals a way to expunge their DNA records, or how easy any such process is. *Cf*. *Buza*, 197 Cal. App. 4th at 1460. Although California offers a relatively simple expungement procedure, that mechanism is immaterial to the constitutionality of the Act. Just as there is no constitutional right to expungement of fingerprint records lawfully obtained, there is no constitutional right to expungement of DNA profiles. Once identifying information has been lawfully obtained, the Constitution does not place further restrictions on the government's legitimate use of that information. The fact that California, by establishing an expungement procedure, has been ***more*** generous to arrestees than the Constitution requires casts no doubt on the validity of the initial collection of identifying information.

Finally, there is no merit whatsoever to the *Buza* court's view that identifying DNA information is different from fingerprints because "DNA testing is viewed by society as a process reserved exclusively for criminals" and "society views DNA sampling not just as a badge of crime, but as a badge of the most dangerous crimes." *Id*. at 1444. DNA identification is simply the most state-of-the-art identification technology available today and by itself says nothing about

whether anyone is a criminal, much less the most dangerous kind. Indeed, DNA identification is commonly used to ***exonerate*** people as innocent rather than label them as heinous criminals. DNA identification reveals nothing other than a person's identifying information. Only if that person also voluntarily left that identifying information at the scene of a crime will that person be linked to any criminal activity. Thus, as with fingerprinting, DNA identification itself says nothing about one's guilt.

As Chief Justice Roberts noted in staying the effect of the *King* decision, "there is a fair prospect that [the Supreme Court] will reverse" that decision. *King*, 2012 WL 3064878, at *1. As he further concluded, arrestee DNA identification "provides a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population. Crimes for which DNA evidence is implicated tend to be serious, and serious crimes cause serious injuries." *Id*. at *2.

This Court should not make the same mistake as the Maryland Court of Appeals. As the facts of the *King* case demonstrate, people will be unnecessarily killed or injured if law enforcement is disabled from using this powerful technology to catalog arrestees' identifying information and use that information to solve and prevent crime. Mr. King was a recidivist criminal and violent rapist who was identified as such by a DNA profiled obtained upon an unrelated arrest. That

is not at all unusual, as arrestees are far more likely than the general public to be recidivists.[3] Yet the Maryland court ordered Mr. King back on the streets and, until its order was stayed by Chief Justice Roberts, disabled Maryland from catching more criminals like him.

Simply put, if this Court prohibits DNA testing of arrestees, innocent people will die who would otherwise be saved, and preventable harm will befall many others. We will never know the exact number, but if even a single life is lost by not allowing the government to employ this simple tool to identify recidivists before they strike again, that is one life too many. If there were real privacy interests at stake, perhaps these dire consequences would have to be tolerated. But there are no such interests. Just as with traditional fingerprinting and other forms of identification, no arrestee has a protected interest in concealing his identity so that nobody can ever link him to crime scene evidence.

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[3] Approximately 77% of arrestees have prior arrests, 69% have multiple prior arrests and 61% have at least one prior felony conviction. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Violent Felons In Large Urban Counties* 4, 5 (2006) (bjs.ojp.usdoj.gov/content/pub/pdf/vfluc.pdf). By contrast, only about 6.5% of the U.S. population has ever had a felony conviction. *See* Joan Petersilia, *When Prisoners Come Home* 215 (2003) (data as of 2002).

CONCLUSION

For the foregoing reasons and those set forth in DNA Saves' earlier brief, the Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)(B)

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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