

Case No. 10-15152

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Before the En Banc Panel
(Opinion filed February 23, 2012)

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

**PLAINTIFFS-APPELLANTS' REPLY IN SUPPORT OF
MOTION FOR JUDICIAL NOTICE**

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

Peter C. Meier
Eric A. Long
Jamie L. Williams
PAUL HASTINGS LLP
55 Second Street
Twenty-Fourth Floor
San Francisco, CA 94105
Telephone: (415) 856-7000
Facsimile: (415) 856-7100

Michael T. Risher
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN
CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437

Attorneys for Plaintiffs-Appellants
ELIZABETH AIDA HASKELL, REGINALD ENTO, JEFFREY PATRICK LYONS, JR., and AAKASH DESAI, on behalf of themselves and others similarly situated

The government does not object to this Court taking judicial notice of the documents submitted by Appellants.¹ A close examination of all of these data shows that they do not in any way suggest that taking samples from those individuals who are arrested but not ever convicted generates database hits or does anything to solve crime. The government's argument that arrestee testing is a valuable tool for law enforcement suffers from four major flaws.

The Proper Metrics

The government argues that what matters most is not monthly statistics, but the total number of samples in the database, faulting the RAND report for suggesting otherwise. Resp. at 5-6. But focusing on the total number of samples in the databases tells us nothing about the utility of arrestee testing, in large part because the total number of hits – 22,843 as of July 2012 – is only about 1.2% of the 1.9 million known (convicted offender or arrestee) samples in the database. There is simply no way to know from looking at these aggregate numbers whether *any hits* come from the 33% of arrestees who are not subsequently convicted, or, as seems more likely, virtually all of them relate to samples taken after conviction or from the 66% of arrestees who would soon have been convicted (*i.e.*, arrestees who

¹The government also requests judicial notice of additional records. Appellants have no objection to this Court's taking judicial notice of the new data that the government presents, but they disagree with the government's interpretation of the data included in its Response. Dkt. 103-1 ("Resp.").

are proven guilty) or are hits from one crime-scene sample to another.² Because the government has access to all the data, it cannot rely on meaningless generalities to satisfy its burden to show that arrestee testing is so important that it justifies a new exception not just to the warrant requirement but also to the bedrock principle that searches for law-enforcement purposes must be supported by probable cause.

The Effect of Arrestee Testing in 2009

The government's argument that arrestee testing caused the increase in hits from 2008 to 2009 conflicts with the evidence it supported below and fails to account for a key effect of the change from testing at conviction to testing at arrest: during this transition, the government was taking samples not only from new arrestees, but also from individuals who had been arrested before January 1, 2009 (and therefore before samples were collected), who continued to be convicted and

²The state's most recent available statistics show that 67.6% – almost exactly 2/3 – of those arrested on suspicion of a felony are eventually convicted of some crime; of the other 1/3, 18.7% are not even charged (they are released by the police or the government refuses to prosecute), and 12.2% are charged but have their cases dismissed without any sort of conviction. Cal. Dep't of Justice, Crime in California 2010 at 50 (Table 38A, Dispositions of Adult Felony Arrests 2005-2010), available at <http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/candd/cd10/preface.pdf>. Although the report does not make this clear, the percentage of persons convicted necessarily includes persons convicted of a misdemeanor or an infraction, because it includes persons who received only a fine or county jail time without probation, which would not have been an authorized sentence for a felony in 2010. *Id.*; see Cal. Penal Code § 17 (2010); *People v. Cruz*, 207 Cal. App. 4th 664, 668-72 (2012) (discussing recent legislation that allows some felons to serve sentence in county jail rather than state prison if they were sentenced on or after October 1, 2011).

to provide samples in 2009. Thus, the number of new samples added to the database soared from approximately 10,000 per month for the last several months of 2008 to 18,587 in January 2009 and then to 28,000 in February 2009. The average number of new samples uploaded into database over the two years reflects this: in 2008 the average new uploads per month was 12,401, while in 2009 that figure doubled to 24,140 per month, before falling to 20,931 per month in 2010 (because few people arrested before 2009 were still being convicted).

Thus, what explains the rise in hits in 2009 is not the inclusion of samples from people who were arrested but not subsequently convicted; rather, it is that the government was simultaneously taking samples both from those who were actually convicted during that year (but had not given samples at arrest), *plus* the two-thirds of arrestees who would later be convicted *combined with* the most important factor: the steady increase in the forensic-unknown (*i.e.*, crime-scene DNA) database, from 21,341 in December 2008 to 29,371 in December 2009.³

The data that the government submitted to the district court confirm this analysis. The government now claims that testing at arrest increased monthly hits from 183 hits in 2008 to 278 in 2009, an additional 95 hits per month. Resp. at 3.

³This is further confirmed by the fact that in 2010 the average number of new monthly uploads dropped, but the number of hits continued to increase, from 2009's average of 277 to 361 per month in 2010. And, as discussed in Appellants' supplemental brief, the number of hits (as well as the hit rate) has continued to rise even as the number of new samples from arrestees dropped, a rise attributable to the increase in the number of forensic-unknown profiles.

But, as the court below found, as of October 31, 2009 there had been a total of only 291 hits to California's arrestee database, which includes samples taken from persons who were later convicted.⁴ ER0017-18 (Dist. Ct. Opn.); *see* ER0484-85. The government's numbers therefore indicate that there were some 950 more hits over the first 10 months of 2009 as compared to the same period in 2008, but that at most 291 of those hits involved samples taken from arrestees, including arrestees who were later convicted; the other 659 of them were hits to samples taken after conviction or hits between crime-scene samples. Thus, the government's own evidence shows that well over two-thirds of the increase in hits from 2008-2009 was caused by something other than arrestee testing. (The increase is almost certainly related to the corresponding increase in the size of the forensic-unknown database.) As with all the hits to the arrestee database, there is no evidence to connect any of these 291 samples to innocent-arrestee samples (*i.e.*, those who were not later convicted). The increased number of hits in 2009 alone cannot justify testing upon the accusation of a single police officer that there is probable cause to arrest.

⁴The government does not – and cannot – automatically move samples from the arrestee database to the convicted-offender database after a conviction. *See* Appellees' Opening Br. (Dkt. 13-1) at 28 n.6; ER0493 ¶ 34.

The Buza effect

If the government is correct that some police departments were not taking samples while the California Court of Appeal opinion in *Buza* was in effect, that would mean that those jurisdictions were not taking samples from arrestees *or* from newly convicted persons, because the vast majority of people convicted during this time would already have had their samples taken upon arrest. The halt of new samples from both convicted offenders *and* the two-thirds of arrestees who will be convicted should have resulted in a steep drop in hits, regardless of whether taking samples from arrestees who are not subsequently convicted leads to any hits.

This commonsense explanation more than accounts for the drop in hits, particularly because that decrease was much less than the government suggests. The Court of Appeal issued its opinion in *Buza* on August 4, 2011. The California Supreme Court granted review on October 19, 2011, which automatically depublished the opinion.⁵ But after a decrease to 283 in September 2011, the number of hits immediately rebounded to previous levels: the 351 hits in October and 428 hits in November were more than the 349 and 348 hits in July and August 2011, respectively. Thus, in the months that would have been most affected by a reduction in new samples (because it takes about a month to process and upload

⁵*People v. Buza*, 129 Cal. Rptr. 3d 753, review granted 262 P.3d 854 (2011).

DNA profiles, ER0018), the government actually obtained *more hits* than it had just before *Buza* held that DNA collection from arrestees without probable cause violates the Fourth Amendment.

Moreover, the government's statement that there were 490 hits in May 2012, "after collections returned to pre-*Buza* levels," ignores both the fact that the highest number of new samples added in 2012 occurred in March, not May (17,171 vs. 14,828) and also that the number of hits in May 2012 was an anomaly, much higher than the number of hits obtained in the months that followed (378 in June, 403 in July), after the time at which the government acknowledges any "*Buza* effect" had ended. As Appellants discuss in their supplemental briefing, the number of hits continues to rise in California along with the size of the forensic-unknown database, regardless of how many samples are being taken at arrest.

The Government's Other Arguments

The government makes two other claims in its response that merit a reply. First, it claims it has eliminated its forensic DNA backlog, citing a January 2012 newspaper article. Resp. at 7. The media reported that the California Department of Justice had claimed to have eliminated all of its DNA backlogs that month.⁶ But

⁶*California attorney general says DNA backlog is gone*, Los Angeles Times (Jan. 25, 2012), <http://latimesblogs.latimes.com/california-politics/2012/01/california-dna-evidence-attorney-general.html> (reporting that California Department of Justice claimed to have eliminated both the forensic-unknown and the arrestee backlogs).

this suggests that the government has an unduly restricted definition of what constitutes a backlog, because the government's data continue to list *a backlog of more than 43,000 samples in July 2012*.⁷ Furthermore, the government is processing and uploading profiles into CODIS at a rate of less than 16,000 per month (the July 2012 number). The 2012 average is under 12,000 per month. At a rate of 16,000 per month, it would take almost three months for a sample to make it through what certainly appears to be a backlog of 43,000 samples.

Finally, the government claims that the Fourth Amendment does not require the state to “prefer” data relating to crime-scenes over data relating to “offender” samples. Resp. at 6. But the Fourth Amendment does mandate a preference: the police can seize and analyze DNA from crimes scenes with few limits, but they cannot seize and analyze DNA from an individual without complying with the Constitution, any more than they can use other new technologies that infringe on privacy without complying with the Fourth Amendment.⁸ The government is free to fill its databases with crime-scene samples, but it cannot fill it with samples taken from individuals in violation of the constitutional prohibition on unreasonable searches and seizures.

⁷In January 2012, the backlog was smaller – 27,512 samples – but still significant.

⁸See *United States v. Jones*, 132 S. Ct. 945 (2012) (warrantless GPS tracking violated Fourth Amendment); *Kyllo v. United States*, 533 U.S. 27 (2001) (warrantless thermal imaging violated Fourth Amendment); *Katz v. United States*, 389 U.S. 347 (1967) (warrantless wiretapping violated Fourth Amendment).

Respectfully submitted,

Dated: September 13, 2012

PAUL HASTINGS LLP

By: /s/ Eric A. Long
Eric A. Long

Dated: September 13, 2012

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FOUNDATION OF NORTHERN
CALIFORNIA, INC.

By: /s/ Michael T. Risher
Michael T. Risher

Attorneys for Plaintiffs-Appellants
Elizabeth Aida Haskell, Reginald Ento, Jeffrey
Patrick Lyons, Jr., and Aakash Desai, on behalf
of themselves and others similarly situated

CERTIFICATE OF SERVICE

I hereby certify that 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 on September 13, 2012.

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.

/s/ Joyce M. Kernan

JOYCE M. KERNAN

LEGAL_US_W # 72674675