No. 10-15152
D.C. No. 3:09-cv-04779-CRB

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELIZABETH AIDA HASKELL; REGINALD ENTO; JEFFREY PATRICK LYONS, Jr; AAKASH DESAI, on behalf of themselves and others similarly situated,
Plaintiffs - Appellants,

v.

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

On Appeal from the United States District Court for the Northern District of California The Honorable Charles R. Breyer, Presiding

BRIEF OF AMICI CURIAE CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION, AND CALIFORNIA PEACE OFFICERS' ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES ON REHEARING *EN BANC*

Martin J. Mayer (SBN 73890)
James R. Touchstone (SBN 184584)
Denise L. Rocawich (SBN232792)
Law Offices of Jones & Mayer
3777 N. Harbor Blvd.
Fullerton, California 92835
Telephone: (714) 446-1400
Facsimile: (714) 446-1448

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BRIEF OF AMICI CURIAE

I. IDENTITY AND INTEREST OF AMICI

Amici are the California State Sheriffs' Association, an organization that represents the 58 elected Sheriffs in California, the California Police Chiefs' Association, an organization that represents virtually all of California's Municipal Chiefs of Police, and the California Peace Officers' Association, an organization that represents more than two thousand peace officers, of all ranks, throughout the State.[1]

Amici are interested in this matter because the issues presented will have a profound impact on the members of each Association, as well as on each and every peace officer in the State. Amici address the Court on behalf of the law enforcement community and urge that the opinion of the three-judge panel majority be affirmed. The three-judge panel majority recognized the immense value of DNA sampling of all adult felony arrestees. The collection of DNA from felony arrestees is a critical and effective tool that assists law enforcement in solving past crimes, identifying perpetrators and protecting the innocent.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amici affirm that no counsel for a party authored this Brief in whole or in part and that no person other than Amici, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

The United States Supreme Court has also recognized this immense value when it recently held, in *Maryland v. King*, that the collection of DNA samples at the time of arrest for "serious crimes" is constitutional under the Fourth Amendment. 133 S.Ct. 1958, 1980 (2013). The Supreme Court's repeated use of the phrase "serious crime" in *King* in no way calls California's law requiring DNA samples from all felony arrestees into question. Felonies are, by nature, "serious crimes." From a law enforcement perspective, it is nonsensical to argue otherwise.

Amici are familiar with the Briefs filed in this case and do not seek to duplicate arguments made therein. Amici, however, wish to emphasize the exceptional importance to public safety of collecting DNA samples from adult felony arrestees. The panel's decision is crucial for effective law enforcement in California and is wholly consistent with case law and law enforcement practices. Amici submit this Brief pursuant to the Order of the Court dated August 14, 2013.

II. INTRODUCTION

The three-judge panel majority's opinion was compelling when it stated that "[l]aw enforcement use of California's DNA database has proven remarkably effective." *Haskell v. Harris*, 669 F.3d 1049, 1051 (9th Cir. Cal. 2012). Indeed, DNA collection and analysis of felony arrestees is an invaluable tool for law

enforcement, as evidenced by the fact that thirteen states permit the taking of DNA samples from all felony arrestees, including California.[2] Similarly, 42 U.S.C. § 14135a, permits the taking of DNA samples from all federal felony arrestees.

While recognizing that *King* permits the taking of DNA samples from certain felony arrestees, Plaintiffs-Appellants make much of the fact that the Supreme Court used the phrase "serious offense" repeatedly in *King*, without definition, and ask the *en banc* panel to adopt the argument that certain felonies are not serious offenses. From a practical perspective, this argument simply does not comport with the day-to-day operations of law enforcement.

Felonies are, by definition, serious offenses, as evidenced by the fact that the conviction of a felony results in the loss of substantial state and federal rights. Further, felony suspects present unique risks to police officers, thus triggering the use of specific procedures. There is no reason to interpret the Supreme Court's choice of the phrase "serious offense" to mean something other than its recognition of the division that has always existed between petty crimes and felonies.

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[2] See CAL. PENAL CODE § 296.1; OHIO REV. CODE ANN. § 2901.07 (B)(1); ALA. CODE § 36-18-25; ALASKA STAT. § 44.41.035; COLO. REV. STAT. § 16-23-103; FLA. STAT. ANN. § 943.325; KAN. STAT. ANN. § 21-2511; LA. REV. STAT. ANN. § 15:609; N.M. STAT. ANN. § 29-3-10;N.D. CENT. CODE § 31-13-03; S.C. CODE ANN. § 23-3-620; S.D. CODIFIED LAWS § 23-5A-5 [stating "[a]ny person who is convicted or adjudicated delinquent for a qualifying offense," where all qualifying offenses are defined in § 23-5A-1]; V.T. STAT. ANN. TIT. 20 § 1933.

III. ALL FELONIES ARE SERIOUS OFFENSES

A. The Supreme Court Has Defined "Serious Offenses" to Mean All Felonies

The interpretation of *King* sought by Plaintiffs-Appellants, that serious offenses include only violent felonies, does not comport with established Supreme Court jurisprudence. With reference to the Sixth Amendment right to a jury trial, the Supreme Court in *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) noted, "our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes." *Codispoti*, supra, at 512 [emphasis added].

More specifically, in *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 130 S. Ct. 2577 (2010), the Court clearly addressed the difference between felonies and violent felonies finding the first to be "serious" and the latter to be "aggravated" by stating: "A 'felony'...is a 'serious crime...usu[ally] punishable by imprisonment for more than one year or by death.' [citation omitted]. An 'aggravated' offense is one 'made worse or more serious by circumstances such as violence, the presence of a

deadly weapon, or the intent to commit another crime.'" *Id.* at 2585 [emphasis added]. Thus, even if the Supreme Court did not specifically address the issue in *King*, the question of whether a felony is a "serious offense" has long since been decided.

Additionally, contrary to Plaintiffs-Appellants' assertion that only one case defines all felonies as serious offenses, numerous other courts have defined felonies in a like manner in addition to the Supreme Court cases cited above. *See e.g. United States v. Fife*, 81 F.3d 62, 64 (7th Cir. 1996) ["all felonies are serious offenses"]; *United States v. Mancuso*, 302 F. Supp. 2d 23, 26 (E.D.N.Y. 2004) ["Any felony charge is serious."]; *In re Gardner*, 625 A.2d 293, 296 (D.C. 1993) "[a]ll felonies are 'serious crimes'."]

In addition to being contrary to prior precedent, the interpretation of "serious offense" sought by Plaintiffs-Appellants makes little sense when *King* is read as a whole. In discussing the State's interest in DNA swabbing against an arrestees' expectation of privacy, the Court in *King* noted that the State's interest "is not speculative." *King*, supra, at 1973. In so noting, the Court discussed, "evidence of numerous cases in which felony arrestees would have been identified as violent through DNA identification matching them to previous crimes but who later

committed additional crimes because such identification was not used to detain them." *Id.*

The Supreme Court's recognition that DNA swabs should be taken because a felony arrestee could potentially be identified as a violent offender necessarily implies that DNA swabs should be taken from all felony arrestees. In other words, the Court specifically observed that a failure to swab all felony arrestees had caused violent felons to be released into society simply because the crime they had been arrested for most recently was a non-violent felony.

B. Conviction of a Felony Results in the Loss of Substantial State and Federal Rights

Plaintiffs-Appellants' assertion that labeling an offense a felony does not make it a serious crime also ignores the whole host of significant state and federal rights a person loses upon the conviction of any felony. More specifically, in California, a felony conviction disqualifies a person from jury service. CAL. CODE CIV. PROC. § 203(a)(5); the right to vote is suspended while a person is imprisoned or on parole for the conviction of a felony. CAL. CONST., ART. II § 4; *Flood v. Riggs*, 80 Cal. App. 3d 138 (Cal. App. 1st Dist. 1978); a felony conviction results in disqualification from employment as a peace officer. CAL. GOV. CODE §

1029(a); an individual convicted of a felony may not own, possess or have custody of any type of firearm. CAL. PENAL CODE § 12021(f); and the conviction of a felony may result in the denial, suspension, or revocation of a professional or business license. *See* CAL. BUS. & PROF. CODE § 6060(b) [license to practice law]; CAL. BUS. & PROF. CODE § 2236 [license to practice medicine]; CAL. BUS. & PROF. CODE § 2761(f) [nursing license]; CAL. EDUC. CODE § 44425, 44435 [teaching credentials].

In addition, the conviction of a felony results in the loss of substantial federal rights. Conviction in federal or state court of a felony results in disqualification from serving on a federal grand or petit jury. 28 U.S.C. § 1865(b)(5); an individual convicted of a felony is ineligible to enlist in any service of the armed forces. 10 U.S.C. § 504(a); an individual convicted of a felony may not ship, transport, possess or receive any firearm or ammunition. 18 U.S.C. § 922(g)(1); and, a felony conviction may result in the loss of a federal license. *See* 19 U.S.C. 5 1641(d)(l)(B) [customs broker's license]; 22 U.S.C. § 2778(g)(3)(A), (B) [license to export defense articles and services].

In sum, the law is replete with examples demonstrating that *all* felonies constitute serious offenses.

C. Felonies Present Unique Risks to Police Officers and Thus Trigger the use of Unique Procedures

Significantly, Plaintiffs-Appellants' challenge to the California law on the basis that judicial oversight is a necessary prerequisite to the collection of a DNA sample completely ignores the fact that a peace officer may generally make a warrantless arrest of a person only when the officer has probable cause to believe that person has committed a felony, even if the felony was not committed in the officer's presence. CAL. PENAL CODE § 836(a)(2). An officer does not have such broad powers to arrest when it comes to misdemeanors. CAL. PENAL CODE § 836(a)(1). A subsequent decision not to prosecute made by prosecutors does not vitiate an officer's determination of probable cause to arrest. *Johnson v. Lewis*, 120 Cal.App.4th 443, 456 (2004).

In *King*, the Supreme Court was not nearly as dismissive of a police officer's determination of probable cause as Plaintiffs-Appellants. The Court specifically found that "[w]hen officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and

photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." *King*, supra, at 1980. Though Plaintiffs-Appellants dismiss the standard for collection and processing of identification information articulated by the Supreme Court, this Court should not.

Indeed, police officers have multiple other situations in which they treat felons differently. A primary example would be when an officer determines whether or not to apply force in a given situation. The law requires that a number of factors must be taken into consideration in making the determination of whether the amount of force used during an arrest was reasonable. *Graham v. Connor*, 490 U.S. 386, 397 (1989). "The first factor looks to the severity of the crime." *Gonzalez v. City of Anaheim*, 715 F.3d 766, 770 (9th Cir. 2013). "Generally this factor weighs in favor of the officers if they have 'reason to believe' the suspect had committed a 'felony-grade offense.'" *Id.*

In the same vein, nearly all police departments in California have "felony stop" guidelines and procedures pursuant to which the department's officers initiate a traffic stop of a vehicle containing known or suspected felons. Generally, officers do not undertake a felony traffic stop without backup, ordering the occupants out of the vehicle, and often initiate the stop with their weapons drawn.

The Supreme Court and this Court have permitted these intrusions on a suspect's liberty interests during a stop in order to foster officer safety. Moreover, these same courts have held that these procedures do not convert the stop into an arrest if the use is justified by a concern for the officer's personal safety. *See United States v. Hensley*, 469 U.S. 221, 235-36, (1985); *Terry v. Ohio*, 392 U.S. 1, 24 (1968); *United States v. Buffington*, 815 F.2d 1292, 1300 (9th Cir. 1987) [finding a legitimate *Terry* stop where police officers forced suspects to exit car and lie down on pavement at gunpoint];*United States v. Alvarez*, 899 F.2d 833, 838 (9th Cir. 1990) [finding totality of circumstances justified a stop under *Terry* where police ordered suspect in car to keep hands in view, approached vehicle with their weapons drawn and ordered suspect out of car]. Consistently, the type of crime suspected to have been committed is first and foremost in a court's analysis in determining whether a particular use of force is appropriate.

The misdemeanor/felony dichotomy can also be seen in law enforcement vehicle pursuit policies, many of which contain provisions stating that pursuits should be terminated if reasonable suspicion of a felony violation is not established within a reasonable time after initiation of the pursuit. In other words, peace officers are permitted more leeway in continuing a vehicle pursuit of a felon, because he or she is considered a "serious offender."

In short, a suspected felon presents a unique set of dangers to peace officers. Accordingly, as set forth above, suspected felons are treated differently in a number of different ways. Contrary to Plaintiffs-Appellants' positions, there are solid legal and practical reasons for this differential treatment. California's DNA collection law presents no exception.

IV. CONCLUSION

For all the foregoing reasons, Amici respectfully request that the Court affirm the three-judge panel majority.

DATED: October 28, 2013

Respectfully submitted,
JONES & MAYER

By: /s Martin J. Mayer

Martin J. Mayer
James R. Touchstone
Denise L. Rocawich
Attorneys for Amici Curiae
California State Sheriffs' Association,
California Police Chiefs' Association, and
California Peace Officers' Association

CERTIFICATE OF COMPLIANCE

I, MARTIN J. MAYER, certify that the attached Brief consist of 2,248 words, including footnotes, in compliance with Federal Rule of Appellate Procedure 29-2(c)(2) **and the order dated** . I have relied on the word count of the computer program used to prepare the brief.

DATED: October 28, 2013

Respectfully submitted,
JONES & MAYER

By: /s Martin J. Mayer
Martin J. Mayer
Denise L. Rocawich
Attorneys for Amici Curiae
California Sheriffs' Association, California Police Chiefs' Association, and California Police Officers' Association

9th Circuit Case Number(s) 10-15152

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