Case No. 10-15152

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELIZABETH AIDA HASKELL, et al.,
Plaintiffs-Appellants,

v.

KAMALA D. HARRIS, Attorney General of California, et al.,
Defendants-Appellees.

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

SUPPLEMENTAL BRIEF OF AMICI CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AND CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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STATEMENTS OF FILING, INTEREST, and COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 29(c)(5)

The National District Attorneys Association (NDAA) and the California District Attorneys Association (CDAA), amici curiae, present this brief for filing under leave granted by Court order of August 14, 2013 in this case.

NDAA, a nonprofit corporation, is the oldest, largest professional organization representing criminal prosecutors. CDAA, a nonprofit corporation, is the statewide organization of California prosecutors. Both present prosecutors' views as amicus curiae in appellate cases regarding issues significantly affecting the administration of criminal justice.

This case presents issues of concern to prosecutors, specifically, the collection of DNA samples from arrested felons. Amici are familiar with these issues, and believe further briefing will be of benefit to the Court.

No party nor party's counsel authored this brief in whole or in part, nor contributed money intended to fund preparing or submitting this brief. No person (other than amici, their members, or counsel) contributed money intended to fund preparing or submitting this brief. FRAP 29(c)(5).

ARGUMENT

I. CALIFORNIA ARRESTEE DNA IS FOR SERIOUS CRIMES WITHIN THE MEANING OF *MARYLAND v. KING*

Appellants' Supplemental Brief filed 7/1/23 (ASB) claims the DNA collection approved in *Maryland v. King*, 133 S.Ct. 1958 (2013) involves "a small number of very 'serious' crimes such as 'murder, rape, first-degree assault, kidnaping, arson, [and] sexual assault.'" ASB, p. 3. In fact, the Maryland framework *King* approved includes misdemeanors under Maryland law, and Maryland felonies that could only be misdemeanors in California.

As the Supreme Court recognized, Maryland DNA arrestee sampling includes burglary of the first, second or third degree. *King*, supra, 133 S.Ct. at 1967; Md. Pub.Saf.Code Ann. §§ 2-501(b), 2-504(a)(3)(i). Third degree burglary includes breaking and entering the dwelling of another with intent to commit *any* crime. Md. Crim.Law Code Ann. § 6-204.[1]

The breaking requirement in one sense makes Maryland burglary narrower than California (where breaking is not required). Yet "breaking" can be minimal – lifting a latch, turning a knob, pushing open a door, or

[1] Maryland first degree burglary is breaking and entering a dwelling with intent to commit theft or a crime of violence; second degree is breaking and entering a storehouse with intent to commit theft, a crime of violence, arson, or taking a firearm. Md. Code Ann. Crim. Law §§ 6-202, 6-203.

raising an unfastened window. *Reagan v. State*, 2 Md.App. 262, 234 A.2d 278 (1967). And in another respect Maryland law is broader. California residential burglary requires the perpetrator intend to commit theft or any *felony*. California Penal Code § 459.[2] The Maryland statute is violated if the perpetrator intends to commit *any* crime, not limited to felonies. Md. Code Ann. Crim.Law § 6-204(a).

This puts perspective on *King*'s discussion of "serious crimes." An offender who opens a door and enters to commit misdemeanor destruction of property (vandalism) or simple assault, common scenarios, would commit felony third degree burglary under Maryland law. In California, he would only be guilty of misdemeanor trespass under Penal Code § 602.5(a) or (b).

It is also noteworthy that "attempts" are common law misdemeanors in Maryland. *Wyatt v. State*, 901 A.2d 271, 274 (Md. Ct. Sp. App. 2006); *State v. North*, 739 A.2d 33, 35 (Md. 1999). Since "attempt" to commit a Maryland "violent felony" is also a listed violent crime, such "attempt" misdemeanors qualify a Maryland arrestee for DNA collection. Md. Pub.Saf.Code Ann. §2-504(a)(3)(i); Md. Code Ann. Crim.Law. § 14-101(a)(17).

[2] California Penal Code § 459 states: "Every person who enters any house… with intent to commit grand or petit larceny or any felony is guilty of burglary." Section 460 specifies burglaries of an inhabited dwelling are first degree; others are second degree.

It is important not to be misled (as appellant seems to be) by California statutes listing certain felonies as "serious" or "violent." (Appellants' Reply Supplemental Brief filed 7/29/2013, p. 3, and fn. 2; p. 4, and fn. 4.) Those categories are for sentencing enhancements for certain prior convictions. California Penal Code §§ 667.5(c), 667(a), 1192.7(c). The fact some prior convictions are sentencing enhancements does not mean other crimes are not "serious," under *King*. *King* in fact speaks of serious *crimes* (not felonies).

What is serious for *King*/DNA purposes should be viewed in light of the authority *King* cited. *King* relied on factors weighed in *Florence v. Board of Chosen Freeholders*, 556 U.S. __, 132 S.Ct. 1510 (2012). *Florence* approved procedures requiring persons arrested and booked for failure to pay a fine to submit to a strip search and "close visual inspection," including moving or spreading genitals, and coughing in a squatting position. The fact *Florence* approved these invasive intrusions for a booked suspect for even minor offenses undercuts appellants' argument that for the lesser intrusion of a DNA cheek swab, *King* only permits the procedure for a short, restrictive list of felonies. See *King*, supra, 133 S.Ct. at 1964 – 1978.

II. ANALYSIS OF ARRESTEE DNA SAMPLES BEFORE FILING CHARGES IN COURT HAS NO CONSTITUTIONAL SIGNIFICANCE

Appellant asserts a key part of the Maryland framework *King* upheld relates to the fact that Maryland defendants are charged in court before the booking sample can be analyzed, while California allows analysis of DNA sample from arrestees not yet charged. ASB, p. 4.

King stated, "Although the DNA swab procedure used here presents a question the Court has not yet addressed, the framework for deciding the issue is well established." 133 S.Ct. at 1968. The Court's analysis proceeded under Fourth Amendment standards. The line between jail booking and filing a complaint in court has not been significant in Fourth Amendment analysis. Nothing in *King* makes it a key point.

King focused on steps taken when someone is booked into jail, not whether the prosecutor has filed a complaint in court. The Court noted the routine administrative and identification procedures for booking, stating "DNA identification plays a critical role in serving those interests" (133 S.Ct. at 1970); that a suspect's criminal history is important for jailing purposes, analogizing DNA to fingerprinting, but noting DNA's unparalleled accuracy (Id., at 1971); and that to ensure the safety of jail staff

and other inmates, DNA allows officers to "know the type of person they are detaining … to make critical choices about how to proceed" (Id., at 1972).

Analogizing DNA swabbing to routine booking fingerprinting (133 S.Ct. at 1971-1972, 1976-1977) nothing in *King* suggested a constitutional requirement to delay taking or examining fingerprints of a booked suspect to confirm identity until the prosecutor files charges in court. If fingerprint comparison and DNA analysis are comparable (as *King* said) there is no reason to conclude one (DNA) must await the filing of a complaint, while the other (fingerprinting) does not.

In any event, filing of a complaint is not a reliable measure of probable cause to arrest. It is legally and ethically permissible to file a complaint on probable cause, but prosecutors may decline to do so if probable cause is all a particular case has. The ultimate, higher burden at trial – proof beyond a reasonable doubt – casts its shadow over any filing decision a prosecutor makes. Even with adequate trial proof, for suspects already on probation prosecutors have the option of filing a violation of probation (VOP) based on the new crime, taking advantage of streamlined VOP procedures rather than starting an entirely new case. This may occur even when the probation offense is for a misdemeanor and the new crime is a felony.

Prosecutors can and do delay filing a complaint for many reasons – for further investigation by the police, or to seek information on other crimes that may be joined for filing purposes, or may impact the strength of the case. Also, without having any court appearance, a defendant may be released on bail (in an amount set by a uniform bail schedule) with a date for the first court appearance weeks later. California Penal Code § 1269b. In such cases, the filing decision may be delayed for weeks. If a complaint is never filed, or is later dismissed, the defendant can easily have his/her DNA expunged. See directions and forms at: http://oag.ca.gov/bfs/prop69/faqs [3]; http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/expungement_app.pdf

The analysis in *King* did not depend on the prosecutor filing charges in court. The high court concluded quite plainly, "When 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." 133 S.Ct. at 1980.

Under *King*, the Maryland requirement for filing a complaint in court before analysis is a distinction without a difference.

[3] This and all web pages herein last viewed 10/25/13.

III. A JUDICIAL FINDING OF PROBABLE CAUSE IS NOT A PREREQUISITE TO ARRESTEE DNA SAMPLING AND ANALYSIS UNDER *KING*

Appellant argues judicial oversight through a finding of probable cause is necessary before DNA can be analyzed. ASB p. 5-8.

Every point in the preceding section of this brief applies to this issue. In particular, *King*'s equating DNA sampling to fingerprinting takes DNA swabbing out of the realm of something requiring a judicial determination before it takes place:

> Perhaps the most direct historical analogue to the DNA technology used to identify respondent is the familiar practice of fingerprinting arrestees. From the advent of this technique, courts had no trouble determining that fingerprinting was a natural part of "the administrative steps incident to arrest." … DNA identification is an advanced technique superior to fingerprinting in many ways, so much so that to insist on fingerprints as the norm would make little sense to either the forensic expert or a layperson. The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant, *King*, 133 S.Ct. at 1976.

King pointed out technological advances (like Rapid DNA analysis, taking only 90 minutes) will make DNA checks faster, yet in no way indicated judicial oversight would be required before a Rapid DNA check could occur. Rather, the Court accepted the natural evolution of techniques that will put DNA checks on par with computerized fingerprint checks, done in advance of any judicial evaluation of probable cause. 133 S.Ct. at 1976-1977.

In its concluding paragraph, *King* stated arrestee DNA sampling can be considered part of routine booking procedures:

> In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that *DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When 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.* 133 S.Ct. at 1980 (emphasis added).

King makes it clear appellants' notion that a judicial finding of probable cause is a constitutional prerequisite for taking an arrestee DNA sample is simply incorrect.

IV. THE GOVERNMENT INTERESTS IN ARRESTEE DNA ARE OF SUBSTANTIAL CONSTITUTIONAL WEIGHT WHEN BALANCED AGAINST THE MINIMAL INTRUSION OF A CHEEK SWAB

Considering the government interest in DNA sampling, *King* gave significant weight to a factor appellant ignores – knowing a defendant is wanted for a violent crime is especially probative in determining whether he/she should be released on bail. 133 S.Ct. at 1973. The Court noted, "government agencies around the Nation found evidence of numerous cases

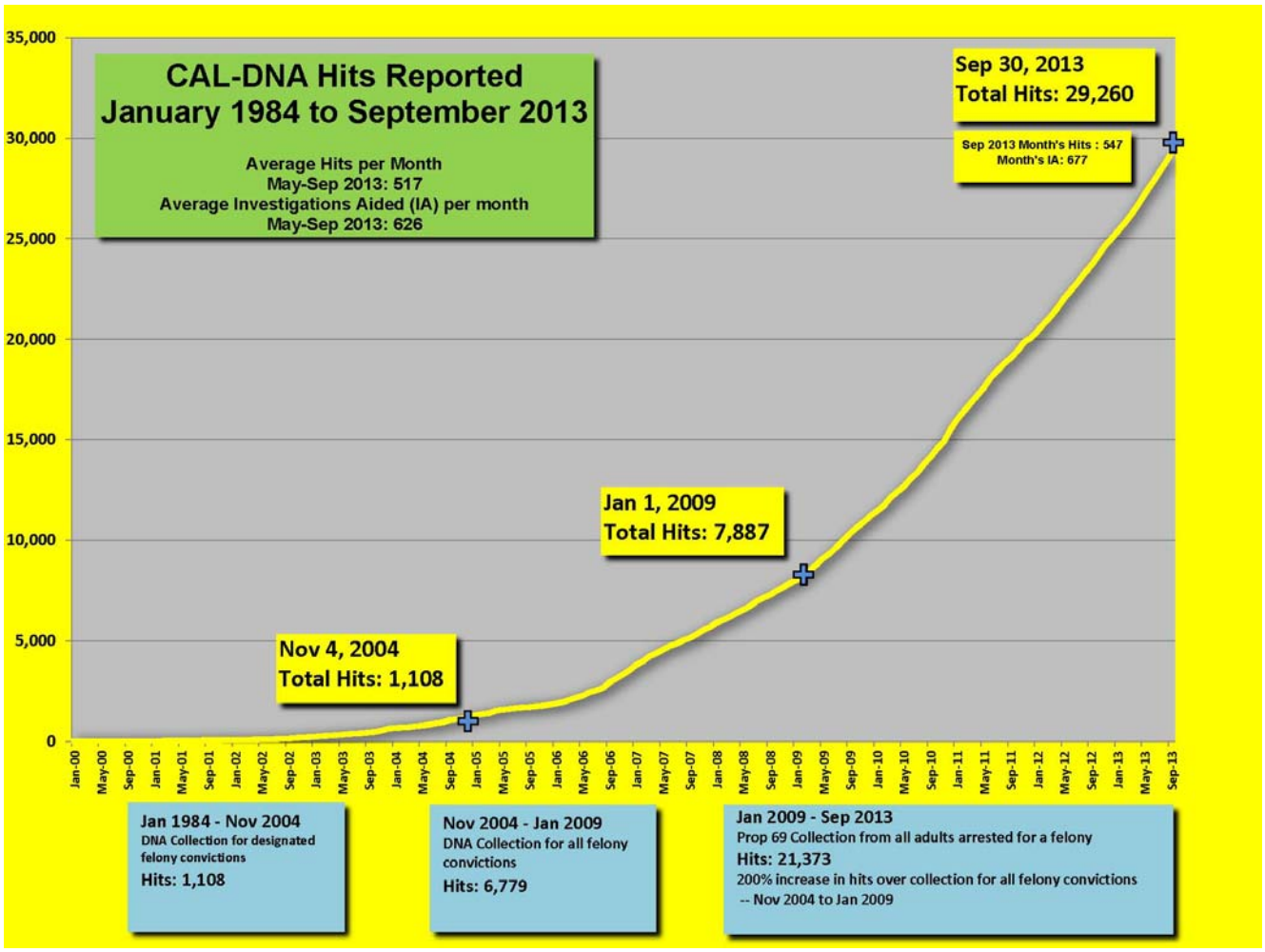
in which felony arrestees would have been identified as violent through DNA identification matching them to previous crimes but who later committed additional crimes because such identification was not used to detain them." Id.

Since *King*, evidence of the value of arrestee DNA has increased. The latest report from the Bureau of Forensic Services, California Department of Justice (operator of the state's DNA database) indicates since January 2009 (when California began arrestee DNA collection), hits identifying suspects to crimes increased 200% over hits made when the sampling was just from felony convicts – from fewer than 200 per month, to an average now of over 500 per month. In total, 20,000 of the 29,260 hits made to crimes have occurred after California began collecting and analyzing arrestee DNA. See statistics and chart posted on the Department of Justice website, "BFS-DNA Frequently Asked Questions – Effects of All Adult Arrestee Provision," at:

http://oag.ca.gov/bfs/prop69/faqs

http://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/cal_dna_hit_trends_10_22_13.pdf

A copy of the chart is included here:



One crime recently solved by arrestee DNA was the murder of 13-year-old Jessica Funk-Haslam, found dead in a Sacramento park March 6, 2012. Despite exhaustive police work, investigation was at a dead-end until August 2013. Then, the DNA database produced a hit with the arrestee DNA of Ryan Roberts. Roberts was not a suspect before the DNA hit, which became possible after his arrest for domestic violence offenses in May 2013. Charges had not been filed in that case when the DNA hit was made. See:

http://www.sacsheriff.com/media/0808_cold_case.cfm

http://sacramento.cbslocal.com/2013/08/09/jessica-funk-haslam-ryan-roberts-first-court/

The identification and capture of this murderer of a 13-year-old girl was due entirely to arrestee DNA sampling. Appellants' rule would set this murderer free.

V. CONCLUSION

For the reasons above, amici curiae respectfully submit the District Court order denying the motion for preliminary injunction should be affirmed.

DATED: October 28, 2013

Respectfully submitted,

/s/ ALBERT C. LOCHER

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CERTIFICATE OF COMPLIANCE
WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

I certify that pursuant to Federal Rules of Appellate Procedure 29(b)(5) and 32(a)(7)(C)(i) the attached Amicus Curiae Brief is proportionately spaced, has a typeface of 14 points or more and contains fewer than 2500 words (pursuant to the Court's order of August 14, 2013), and specifically that this brief contains 2295 words, as determined by the word-count feature of the word processing system (2449 words if also counting the words on the copy of the website chart included on page 11), and excluding the tables of contents and authorities, this certificate of compliance, the corporate disclosure statement, and the declaration of service.

DATED: October 28, 2013

Respectfully submitted,

/s/Albert C. Locher

Albert C. Locher

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RULE 26.1

The National District Attorneys Association is a non-profit public corporation under the laws of the state of Illinois. There is no parent corporation and no publicly held corporation owning 10% or more of the stock of the National District Attorneys Association.

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Date: October 28, 2013

/s/ Albert C. Locher

Albert C. Locher
Attorney for the National District Attorneys Association and
the California District Attorneys Association

DECLARATION OF SERVICE

I, Albert C. Locher, declare:

I am 18 years of age or older and not a party to this matter. On October 28, 2013, I filed the following document with the clerk of the court using the CM/ECF system:

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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 October 28, 2013, at Sacramento, California.

Albert C. Locher	/s/ Albert C. Locher
Declarant	Signature