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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. 09-CV-04779-CRB

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

MYTHILI RAMAN
Acting Assistant Attorney General
Criminal Division

DENIS J. MCINERNEY
Deputy Assistant Attorney General
Criminal Division

CHRISTOPHER J. SMITH
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530
(202) 532-4154
Christopher.J.Smith@usdoj.gov

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INTEREST OF THE UNITED STATES

This case presents the question whether the collection and analysis of an arrestee's DNA to produce an identification profile (commonly referred to as "DNA fingerprinting") is reasonable under the Fourth Amendment. Like twenty-seven other states, California collects DNA samples from arrestees, analyzes the samples to obtain limited identifying information, and submits those identifiers to the Combined DNA Index System (CODIS), a statutorily authorized national system of "DNA identification records." 42 U.S.C. § 14132(a). The United States also "collect[s] DNA samples from individuals who are arrested, facing charges, or convicted" of federal crimes to create an identification record for inclusion in CODIS. 42 U.S.C.

§ 14135a(a)(1)(A); 28 C.F.R. § 28.12(b). Accordingly, the United States has a substantial interest in the resolution of this case.[1]

ARGUMENT

THE COLLECTION AND ANALYSIS OF AN ARRESTEE'S DNA TO GENERATE AN IDENTIFICATION PROFILE IS REASONABLE UNDER THE FOURTH AMENDMENT

In *Maryland v. King*, 133 S. Ct. 1958 (2013), the Supreme Court upheld the constitutionality of Maryland's DNA Collection Act and squarely rejected the key arguments plaintiffs had advanced in this case. Plaintiffs had argued (Supp. Br. 5-8[2]) that California's DNA Act, Cal. Penal Code § 296(a)(2)(C), violated the Fourth Amendment because DNA fingerprinting is *per se* unreasonable without a warrant; *King* rejected the same argument and held that the constitutionality of DNA fingerprinting turns not on a warrant or individualized suspicion, but on the application of "traditional standards of reasonableness" that were satisfied by the Maryland Act. 133 S. Ct. at 1970 (quotation omitted). Plaintiffs argued (Supp. Br. 10) that the State had "no actual interest in using DNA to identify who it arrests," but *King* held that "DNA identification plays a critical role" in furthering the government's legitimate interest in identifying an arrestee and determining his criminal history. *Id.* at 1971. And plaintiffs contended (Br. 6, 18) that California's law was facially invalid as

[1] The government files this brief pursuant to Fed. R. App. P. 29(a) and this Court's August 14, 2013 order.

[2] Plaintiffs' Opening Brief is cited as "Br." Their first Supplemental Brief is cited as "Supp. Br.," and their Supplemental Brief regarding *King* is cited as "2d Supp. Br."

applied to all arrestees, an argument that is clearly untrue after *King*. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (to succeed on facial challenge, plaintiffs must "establish that no set of circumstances exists under which the Act would be valid").

King leaves little, if any, of plaintiffs' case intact. Consequently, plaintiffs now argue that *King* upheld DNA fingerprinting only of those arrested for "serious" offenses, a class of arrestees purportedly narrower than the California DNA Act's application to all felony arrestees. Irrespective of plaintiffs' characterization of their own arrests as non-"serious,"[3] their arguments are still foreclosed by *King*. While plaintiffs attempt to confine *King* to the exact contours of the Maryland statute at issue in that case, the Court made clear that its decision was not so limited. Noting that "[t]wenty-eight States and the Federal Government have adopted laws similar to the Maryland Act," the Court explained that "[a]lthough those statutes vary in their particulars, such as what charges require a DNA sample, their similarity means that *this case implicates more than the specific Maryland law*." *King*, 133 S. Ct. at 1968 (emphasis added). And the substance of the Court's analysis in *King* confirms that its holding applies equally to the California law at issue here. This Court should affirm the district court's decision on that basis.

[3] Plaintiffs were arrested for felonies, which by definition are "serious crime[s] usu[ally] punishable by imprisonment for more than one year or by death." Black's Law Dictionary (9th ed. 2009). Moreover, even if non-"serious" felonies actually existed, it is far from clear that plaintiffs would fall within this class. Plaintiff Aakash Desai, for example, was arrested for felony burglary, *see* Br. 11, a crime that few would consider to be categorically non-"serious."

A. The Interests That The Supreme Court Balanced In *King* Apply Equally To The California DNA Act

In *King*, the Court upheld the Maryland DNA Collection Act by applying "'traditional standards of reasonableness,'" balancing "'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'" *King*, 133 S. Ct. at 1970 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). In the context of DNA fingerprinting, the Court held that the legitimate governmental interest "is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody." *Id.*

DNA fingerprinting "plays a critical role" in advancing this interest by: (1) identifying who has been arrested, including the individual's criminal history; (2) "ensuring that the custody of an arrestee does not create inordinate risks for facility staff, for the existing detainee population, and for a new detainee"; (3) "ensuring that persons accused of crimes are available for trials"; (4) informing a bail determination based on "an assessment of the danger he poses to the public"; and (5) identifying the perpetrator of a past crime and "freeing a person wrongfully imprisoned for the same offense." *Id.* at 1971-74 (quotations omitted). Each of these interests focuses on the need for law enforcement to accurately identify and assess an arrestee's past criminal conduct, and none is tethered to the specific contours of the Maryland law at issue in *King*.

After analyzing these five governmental interests, the Court held they outweigh an arrestee's privacy interest against the "minimal" intrusion of the cheek swab used to collect a DNA sample and the subsequent analysis of that sample to obtain limited identifying information. *Id.* at 1977. The Court focused on an arrestee's diminished expectation of privacy, as well as two facts common to DNA fingerprinting nationally: DNA fingerprinting analyzes only "parts of the DNA that do not reveal the genetic traits of the arrestee," and there are stringent "statutory protections that guard against further invasions of privacy." *Id.* at 1979. Because of these limitations—found in both Maryland and California law—the Court held that the analysis of DNA for identification purposes does "not amount to a significant invasion of privacy that would render DNA identification impermissible under the Fourth Amendment." *Id.* at 1980.

In constitutional terms, then, the California DNA Act is identical to Maryland's statute. Each of the interests that informed the Court's holding that the Maryland law was reasonable under the Fourth Amendment similarly applies to California's law. Consequently, it too is reasonable under the Fourth Amendment.

B. The Differences Between The Maryland Law In *King* And The California DNA Act Are Not Constitutionally Significant

Following the Supreme Court's rejection of their initial arguments, plaintiffs now argue (2d Supp. Br. 1-2) that certain differences between the Maryland law at issue in *King* and the California law here bear constitutional significance. Specifically, plaintiffs

note that the Maryland law applies only to a subset of felonies, whereas California's law applies to all felonies, Cal. Penal Code § 296(a)(2)(C); and that Maryland does not analyze DNA samples until after arraignment and automatically expunges all samples and records from defendants who are not convicted, whereas California may analyze the samples upon arrest and expunges samples and profiles at the request of an arrestee who is not charged or is acquitted, *id.* § 299(b). These arguments are without merit: Other than recounting the facts of the Maryland law, the Court in *King* did not mention, let alone rely, on any of these features of the Maryland law in its analysis.

1. *King* Is Not Limited To Offenses Plaintiffs Would Classify As "Serious"

In *King*, the Court held 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*, 133 S. Ct. at 1980. Plaintiffs seize on the Court's use of the term "serious offense" and argue (2d Supp. Br. 3-4) that the Court meant to limit the constitutionality of DNA fingerprinting to such offenses. Reading a serious/non-"serious" distinction into *King*, however, is at odds with the Court's constitutional analysis, which broadly applies to all arrestees. *See supra* at 4-5. Rather, it is more likely that the Court used the term "serious" not to cabin DNA fingerprinting to certain offenses, but simply because King himself had been arrested

"for menacing a group of people with a shotgun." *King*, 133 S. Ct. at 1966. That the Court did not expressly define a "serious offense" further suggests that it used this language to refer to King's offense, and not because the Court's constitutional holding hinged on this amorphous distinction.

Such a distinction is also inconsistent with the Supreme Court's observation that "[i]t is a common occurrence that '[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals.'" *Id.* at 1971 (quoting *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510, 1521 (2012)); *see also id.* (noting, as examples, Oklahoma City bomber Timothy McVeigh, serial killer Joel Rifken, and one of the September 11 hijackers). While it is true that not all individuals detained for minor offenses are arrested and booked into custody (as opposed to receiving a citation, for example), plaintiffs are simply incorrect in suggesting (2d Supp. Br. 3) that when individuals *are* arrested and booked for non-"serious" offenses, the use of DNA fingerprinting in the booking process does not serve the government's interest in solving "serious crimes."

If the term "serious offense" did carry any meaning in *King*, however, it is evident from the Court's analysis that a "serious offense" includes any crime for which an individual is arrested and booked in police custody.[4] This meaning is logical, not only

[4] This distinction is reflected in federal law. For example, a DNA fingerprint is taken at booking from "individuals who are arrested [or] facing charges," 42 U.S.C. § 14135a(a)(1)(A), but not from individuals who are not booked and hence not fingerprinted. *See* 28 C.F.R. § 28.12(b); 73 Fed. Reg. 74934.

because the Court analyzed DNA fingerprinting as a "booking procedure," but also because it analogized DNA fingerprinting to traditional "fingerprinting and photographing." *Id.* at 1980. These procedures, too, apply to all persons taken into custody and booked, but not to individuals cited for minor offenses who are not booked.

This conclusion is consistent with an arrestee's privacy interests, which do not meaningfully vary based solely on the offense of arrest. As the Court held in *King*, "[t]he expectations of privacy of an individual taken into police custody necessarily [are] of a diminished scope." *Id.* at 1978 (quotation omitted); *see also id.* (noting that "a detainee has a reduced expectation of privacy"). This is because, by definition, no arrestee "enjoy[s] the 'absolute liberty to which every citizen is entitled.'" *United States v. Knights*, 534 U.S. 112, 119 (2001) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). "An arrest is the initial stage of a criminal prosecution" and is "inevitably accompanied by future interference with the individual's freedom of movement." *Terry v. Ohio*, 392 U.S. 1, 26 (1968).

This diminished expectation of privacy is manifested in the serious restrictions that may be imposed on an arrestee. Law enforcement officers may search an arrestee's person and belongings in his immediate possession, *see United States v. Robinson*, 414 U.S. 218, 235 (1973); they may confine him, pending his appearance before a judicial officer, in conditions not conducive to personal privacy, *see generally County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); and, before confining him in a jail's general

population, they may subject him to a strip search, *see Florence*, 132 S. Ct. at 1520. DNA fingerprinting pales in comparison to these restrictions and subjects arrestees to only a "brief and still minimal intrusion," consisting of "[a] gentle rub along the inside of the cheek [that] does not break the skin," which involves "virtually no risk, trauma, or pain." *King*, 133 S. Ct. at 1979 (quotation omitted). And "[i]n light of the scientific and statutory safeguards," the analysis of an arrestee's sample "pursuant to CODIS procedures [does] not amount to a significant invasion of privacy." *Id.* at 1980.

The substance of the *King* opinion therefore does not support a serious/non-"serious" distinction, as none of the interests implicated by DNA fingerprinting is tethered to the specific offense of arrest. These interests are instead tethered to the fact of arrest itself because "DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure." *Id.*

2. Other Differences Between The Maryland And California Laws Had No Bearing On The Court's Decision In *King*

Plaintiffs also attempt to distinguish the California DNA Act from the Maryland statute by focusing on the fact that Maryland does not analyze DNA fingerprints until a defendant is charged and arraigned and automatically expunges the samples and records of defendants it fails to convict. Far from relying on these distinctions in upholding the Maryland Act, however, the Supreme Court emphasized the similarity between Maryland's law and those in other states. *See id.* at 1968. In its constitutional

analysis, the Court detailed each of the factors it considered relevant, and included none of the distinctions plaintiffs emphasize in their argument.

Moreover, the Court analogized DNA fingerprinting to traditional fingerprinting, explaining that "[f]rom the advent of this technique, courts had no trouble determining that fingerprinting was a natural part of the administrative steps incident to arrest." *Id.* at 1976 (quotation omitted). Police are not required to wait until formal charges are filed, or an individual is arraigned, to take and analyze traditional fingerprints. And an arrestee certainly does not have the right to expunge his fingerprints if he is not charged or ultimately convicted. Nonetheless, it has long been considered "'elementary that a person in lawful custody may be required to submit to photographing and fingerprinting as part of routine identification processes.'" *Id.* at 1976 (quotation omitted).

Because "[t]he additional intrusion [of DNA fingerprinting] upon the arrestee's privacy beyond that associated with [traditional] fingerprinting is not significant," law enforcement may similarly require a person in lawful custody to provide a DNA fingerprint sample as part of routine identification procedures. *Id.* "DNA is a markedly more accurate form of identifying arrestees," "so much so that to insist on fingerprints as the norm would make little sense to either the forensic expert or a layperson." *Id.* Plaintiffs therefore identify distinctions without a constitutional difference, and the Court should hold based on *King* that California's DNA Act passes Fourth Amendment scrutiny.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Respectfully submitted,

MYTHILI RAMAN
Acting Assistant Attorney General
Criminal Division

DENIS J. MCINERNEY
Deputy Assistant Attorney General
Criminal Division

CHRISTOPHER J. SMITH
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 1264
Washington, DC 20530
(202) 532-4154
Christopher.J.Smith@usdoj.gov

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d), 9th Cir. R 32-1, and this Court's August 14, 2013 order, I certify that the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 2,473 words. This certification is based on the word count of the word-processing system used in preparing the government's brief: Microsoft Word for Windows.

DATED: OCTOBER 28, 2013

s/ Christopher J Smith
CHRISTOPHER J. SMITH
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 1264
Washington, DC 20530
(202) 532-4154
Christopher.J.Smith@usdoj.gov

CERTIFICATE OF SERVICE

I certify that on October 28, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit 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 CM/ECF system.

DATED: OCTOBER 28, 2013

s/ Christopher J Smith
CHRISTOPHER J. SMITH
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Room 1264
Washington, DC 20530
(202) 532-4154
Christopher.J.Smith@usdoj.gov