

PAUL HASTINGS

1(415) 856-7030
petermeier@paulhastings.com

December 5, 2013

VIA ECF

Molly C. Dwyer, Circuit Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Elizabeth Aida Haskell, et al. v. Kamala D. Harris, et al.*, Case No. 10-15152
Response to Appellees' Citation of Supplemental Authorities Pursuant to Fed. R. App. P. 28(j)

Dear Ms. Dwyer:

Yesterday's opinion in *People v. Lowe*, --- Cal. App. 4th ---- (Dec. 4, 2013), has no bearing on the question of whether California's law is constitutional as applied to arrestees who are not formally charged with, or prosecuted for, serious crimes, with a judicial finding of probable cause.

Lowe was arrested for, charged with, and convicted of serious crimes – forced oral copulation, robbery, and kidnapping.¹ Under *McLaughlin*, a judge necessarily found probable cause within 48 hours of the arrest, long before the sample could have been analyzed. Nothing in *Lowe*'s holding suggests that the government can seize and analyze the DNA of people who are never charged with a crime or who are discharged for lack of probable cause.

Moreover, the *Lowe* opinion is wrong when it states that simply solving past crimes is a legitimate justification for the government to seize and analyze an arrestee's DNA. Slip Op. at 27-28. The opinion does not cite *King* for this proposition, and understandably so: although this was the primary governmental interest that Maryland asserted in *King*, and the one that formed the basis of Chief Justice Robert's grant of a stay, the *King* majority never cited it as a reason to uphold Maryland's law. As the dissent points out, this is because a majority of the Court rejects the proposition that merely solving cold cases is a legitimate justification to allow the police to take and analyze DNA before conviction. *King*, 133 S. Ct. at 1983 (Scalia, J., dissenting). Under *King*, the legitimate government interests in taking DNA from people before conviction, without a warrant, all relate to officer and jail security, granting or revocation of pre-trial release, and ensuring the defendant's availability at trial. See *id.* at 1971-74.

Sincerely,

/s/ Peter C. Meier

Peter C. Meier
of PAUL HASTINGS LLP

¹ His DNA was taken after his arrest for these crimes against his fifth victim. Slip. Op. at 3, 11-12, 14-16. California classifies all of these offenses as violent felonies. Ca. Penal Code § 667.5(c)(3), (5), (14).

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 December 5, 2013.

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/ Doreen Bordessa

DOREEN BORDESSA