

No. 12-207

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,
Petitioner,

v.

ALONZO JAY KING, JR.,
Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF
PETITIONER, THE STATE OF MARYLAND, BY THE
LOS ANGELES COUNTY DISTRICT ATTORNEY
ON BEHALF OF LOS ANGELES COUNTY

JACKIE LACEY

District Attorney of Los Angeles County

IRENE WAKABAYASHI

Head Deputy, Appellate Division

PHYLLIS ASAYAMA

Deputy District Attorney

ROBERTA SCHWARTZ

Deputy District Attorney *Counsel of Record*

Appellate Division

320 West Temple Street, Suite 540

Los Angeles, California 90012

Telephone: (213) 974-1616

Attorneys for Amicus Curiae

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THE LOS ANGELES COUNTY
DISTRICT ATTORNEY
ON BEHALF OF LOS ANGELES COUNTY

Amicus curiae, Jackie Lacey, District Attorney for the County of Los Angeles, State of California, submits this brief for filing in support of the petitioner as the authorized law officer of the county, pursuant to Supreme Court Rule 37.2(a) and 37.4.¹

1. Los Angeles County Charter section 25 (1995) states:

Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board of Commission.

(Footnote omitted.) It is provided in the California general law that:

The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct

(continued...)

INTEREST OF AMICUS CURIAE

Amicus curiae, as the executive officer charged with the prosecution of crime in the most populous county in California, has a strong interest in the effective enforcement of the laws of the state.

SUMMARY OF ARGUMENT

California is one of the 28 states participating in the Combined DNA Index System [hereinafter CODIS] by submitting DNA samples obtained from felony arrestees. Requiring a person who is arrested for a felony, based on probable cause, to submit a DNA sample during the booking process is not an impermissible search. It is a minimal intrusion which establishes with absolute certainty the identification of the arrestee. This data, along with his booking photograph, fingerprints, photographs of tattoos, height and weight measurements, address, hair and eye color descriptions, and other driver's license information, are incorporated into a database which may be accessed at a later time for comparison to data from other crimes. Resolution of open cases, reopening cases of convicted persons, and protection of society outweigh the minimal intrusion of an arrestee's reduced expectation of privacy.

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(...continued)

on behalf of the people all prosecutions for the
public offenses.

CAL. GOV'T CODE § 26500 (West 1998).

ARGUMENT**I****AN ARRESTEE HAS A SIGNIFICANTLY REDUCED EXPECTATION OF PRIVACY**

The Court below clearly erred in rejecting a minimally intrusive method of obtaining biometric data from arrested felons.

The felony arrestee can be photographed, fingerprinted, and even asked to remove clothing for examination and photographing of tattoos, scars and marks. He or she can be subjected to an intrusive body cavity search. *Florence v. Bd. of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510, 1523, 182 L. Ed. 2d 566 (2012).

The arrestee's height, weight and hair color are recorded along with his or her name, address, social security number, driver's license information and employment data. Clearly, a DNA profile adds a significant biometric measure of identity without devaluing or compromising lingering expectations of privacy by the arrestee. Obtaining a DNA sample by swabbing the cheek is minimally intrusive and likely to be the least memorable event of the booking process. Indeed, some may consider the physical manipulation by the custodial officer of the arrestee's hands and fingers more intrusive and demeaning than the simple swabbing of a cheek.

The dissent suggests that our comparison to traditional fingerprinting is inapt because fingerprints "are personal attributes that are routinely exposed to the public at large in daily life" and, accordingly, the gathering of fingerprints,

unlike the drawing of blood, implicates "a categorically different and lesser expectation of privacy." Dissenting Op. at 29. However, the fingerprints gathered by law enforcement officials and included in fingerprint identification data banks are not ones that have been left behind voluntarily on doorknobs and water glasses. They are the ones gathered by holding the person's hand firmly and taking the prints. Much like the process of providing a blood sample, providing one's fingerprints can be quick and simple if one submits voluntarily, but has the potential for the use of force if resisted. It is for this reason that, outside the "booking" process to which we analogize, courts do generally require some level of individualized suspicion to support the seizure necessary to gather a person's fingerprints.

Rise v. Oregon, 59 F.3d 1556, 1560 n.2 (9th Cir. 1995) (citing *Hayes v. Florida*, 470 U.S. 811, 813-18, 105 S. Ct. 1643, 1645, 84 L. Ed. 2d 705 (1985); *Davis v. Mississippi*, 394 U.S. 721, 726-28, 89 S. Ct. 1394, 1397, 22 L. Ed. 2d 676 (1969) *overruled on other grounds by City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000)).

The reduced expectation of privacy of felony arrestees has been recognized by federal circuit courts. *See, Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992), *United States v. Mitchell*, 652 F.3d 387, 410-12 (3rd Cir. 2011).

The presumption of innocence does not alter the expectation of privacy of arrestees or defendants in custody awaiting trial.

Without question, the presumption of innocence plays an important role in our criminal justice system. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.

Bell v. Wolfish, 441 U.S. 520, 533 (1979).

The observation that arrestees have a reduced expectation of privacy was noted in *United States v. Kincade*, 379 F.3d 813, 837 (9th Cir. 2004) and recently cited with approval by the California Supreme Court in *People v. Robinson* 47 Cal. 4th 1104, 1121 (2010).

With regard to any privacy interest in identifying information, it is established that individuals in lawful custody cannot claim privacy in their identification. "Though, like fingerprinting, collection of a DNA sample for purposes of identification implicates the Fourth Amendment, persons incarcerated after conviction retain no constitutional privacy interest against their correct identification." [*Groce* *v. U.S. Dept. of Justice*, 354

F.3d 411, 413–414 (5th Cir. 2004)]. In *Kincade*, the court explained that “the DNA profile derived from the defendant's blood sample establishes only a record of the defendant's identity—otherwise personal information in which the qualified offender can claim no right of privacy once lawfully convicted of a qualifying offense (**indeed, once lawfully arrested and booked into state custody**). For, as we recognized in *Rise* “[o]nce a person is convicted of one of the felonies included as predicate offenses under [the Act], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling.” [*Rise*, 59 F.3d 1556 (9th Cir. 1995)].

People v. Robinson, 47 Cal. 4th 1104, 1121 (2010) (emphasis added) (citations omitted).

The absence of a legitimate expectation of privacy at booking is well established.

Boroian suggests that the government does not need his DNA profile for “identification” purposes because it already has other means of identification, such as his fingerprints and social security number. However, the fact that the government may lawfully retain and access these more traditional means of identifying Boroian only emphasizes that the government's retention and matching of his DNA

profile does not intrude on Boroian's legitimate expectation of privacy. At present, Boroian's DNA profile simply functions as an additional, albeit more technologically advanced, means of identification.

Boroian v. Mueller, 616 F.3d 60, 67 (1st Cir. 2010).

Obviously government has a strong interest in ascertaining with certainty the identity of those who are arrested for felonies. That identification is clearly enhanced if DNA is sampled and included in CODIS. A suspect who is arrested for theft and has a DNA sample matched to the profile of an unknown murder suspect from 2002 should not be eligible for own recognizance release. An arrestee's potential involvement in other unsolved crimes is a factor in determining pretrial release. This was recently recognized by the court in *Mitchell*, 652 F.3d 387, which upheld the gathering of DNA samples from federal arrestees.

[T]here are two components to a person's identity: "who that person is (the person's name, date of birth, etc.) and what that person has done (whether the individual has a criminal record, whether he is the same person who committed an as-yet unsolved crime across town, etc.)." The second component—what a person has done—has important pretrial ramifications. Running an arrestee's DNA profile through CODIS could reveal matches to crime-scene DNA samples from unsolved cases. Whether an arrestee is possibly implicated in other crimes is

critical to the determination of whether or not to order detention pending trial. *See* 18 U.S.C. § 3142(g)(3)(A) (stating that factors to be considered in the bail determination include a person's "past conduct" and "criminal history"). To the extent that DNA profiling assists the Government in accurate criminal investigations and prosecutions (both of which are dependent on accurately identifying the suspect), it is in the Government's interest to have this information as soon as possible. Collecting DNA samples from arrestees can speed both the investigation of the crime of arrest and the solution of any past crime for which there is a match in CODIS. Moreover, "use of CODIS promptly clears thousands of potential suspects—thereby preventing them from ever being put in that position, and advancing the overwhelming public interest in prosecuting crimes accurately." The assistance provided by CODIS is not hypothetical: as of May 2011, CODIS "ha[d] produced over 144,400 hits assisting in more than 138,100 investigations." FBI, CODIS-NDIS Statistics, available at <http://www.fbi.gov/about-us/lab/codis/ndis-statistics> (last visited July 8, 2011).

Id. at 414-15 (citations omitted).

As will be discussed below, this interest in correctly identifying the arrestee weighs heavily in

favor of DNA collection against the reduced expectation of privacy by a felony arrestee.

Reasonableness ... is measured in objective terms by examining the totality of the circumstances, and whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

Robinson, 47 Cal. 4th at 1120 (internal quotations and citations omitted).

The Maryland Appellate Court's flawed analysis that imagines a "second search" when investigators accessed the DNA database leads to absurd results. JA 140.

That is, there is no constitutional basis for complaint when the police properly obtain information located in a driver's license or state ID card, and then use it to access additional non-private (but inculpatory) information about the document's owner.

United States v. Diaz-Castaneda, 494 F.3d 1146, 1153 (9th Cir. 2007).

Just as accessing a fingerprint or photographic database is not a "second search," accessing the DNA database is not a "second search."

Other precedents hold that the government's matching of a lawfully obtained identification record against other records in its lawful possession does

not infringe on an individual's legitimate expectation of privacy.

Boroian v. Mueller, 616 F.3d at 67.

II

EXPANSION OF THE DNA DATABASE TO INCLUDE FELONY ARRESTEES AIDS IN THE PURSUIT OF JUSTICE AND EXONERATION OF THOSE WRONGFULLY ACCUSED OF CRIMES WHILE PROTECTING THE PUBLIC

The premise that DNA technology is unnecessary for identification given the existence of fingerprints is in error. JA 148. Fingerprint comparison is subject to human interpretation and has resulted in errors. One documented case resulted in an innocent man freed by a DNA comparison after a conviction was secured based upon a fingerprint comparison.

In May 1997, a Boston Police Officer was shot with his own gun after a struggle with his assailant. *DNA's Accuracy Puts Traditional Forensics on Trial*, POPULAR MECHANICS <<http://www.popularmechanics.com/science/health/forensics/3010536>> (last visited December 22, 2012). Stephan Cowans was later identified by the officer and another witness as the assailant. A key piece of evidence was a fingerprint left behind by the assailant while running from the officer. The fingerprint was identified as belonging to Cowans. *Id.* After serving over five years of a 35-to 50-year sentence, DNA evidence from a cap and sweatshirt left behind by the assailant was analyzed and found not to match Cowans's DNA. A new comparison of the fingerprints was done by an independent

examiner who determined that the original print comparison was in error. *Id.* Cowans was exonerated and freed in 2004. *Id.*

As noted in the dissent in the opinion below, speculation over elaborate fantasies about potential abuse of information stored in the “junk” DNA² being stored in CODIS is not well-taken. JA 160-161.

[B]eyond the fact that the DNA Act itself provides protections against such misuse, our job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented. In our system of government, courts base decisions not on dramatic Hollywood fantasies, *cf. post* at 11493, but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record. If, as *Kincade's* aligned amici and Judge Reinhardt's dissent insist, and when, some future program permits the parade of horrors the DNA Act's opponents

2. Through the use of short tandem repeat technology (“STR”), the Bureau analyzes the presence of various alleles located at 13 markers (or loci) on DNA present in the specimen. These STR loci are each found on so-called “junk DNA”—that is, non-genic stretches of DNA not presently recognized as being responsible for trait coding --and “were purposely selected because they are not associated with any known physical or medical characteristics.” H.R. Rep. No. 106-900(I) at 27.

Kincade, 379 F.3d at 818.

fear--unregulated disclosure of CODIS profiles to private parties, genetic discrimination, state-sponsored eugenics, and (whatever it means) the use of CODIS somehow "quite literally, to eliminate political opposition," *post* at 11487--we have every confidence that courts will respond appropriately. As currently structured and implemented, however, the DNA Act's compulsory profiling of qualified federal offenders can only be described as minimally invasive--both in terms of the bodily intrusion it occasions, and the information it lawfully produces.

Kincade, 379 F.3d at 837-38.

A Chicago study which advocated sampling felony arrestees cited a number of cases and statistics in support of DNA collection. *See, Chicago's Study on Preventative Crime*, CITY OF CHICAGO (2005), available at <http://www.dnaresource.com/documents/ChicagoPreventableCrimes-Final.pdf> (last visited December 22, 2012). One case cited in the study is illustrative. Geoffrey Griffin was arrested for felony possession of drugs on August 26, 1995. No DNA sample was taken at the time of his arrest and he was not convicted. In July of 1998, a woman was raped and killed by Griffin and DNA evidence was recovered from the crime scene. Griffin was not immediately connected to the crime because there was no DNA sample taken during the initial felony arrest. Between July 1998 and June 2000, eight more women were murdered and one was raped, but

survived. Griffin was finally arrested in June of 2000 and charged with eight murders and one sexual assault. If a DNA sample had been taken and placed with CODIS in 1995, Griffin could have been identified and arrested after the July 1998 murder, and the subsequent eight murders could have been prevented. That was one example illustrating how a DNA sample collected after a felony arrest could have prevented future violent crimes while solving past crimes.

Another example of the importance of arrestee DNA sampling is provided in the case of Anthony Dias.

Anthony Dias is the poster boy for why police and prosecutors hope Washington will join a growing number of states that require people to give DNA samples as soon as they're arrested in a serious crime, rather than when they're convicted.

In 2005, Dias was released on bail while facing a felony hit-and-run charge in Pierce County. Before the year was up, he went on to commit crimes—including half a dozen rapes—against 19 more people. If he had given a DNA sample after his hit-and-run arrest, detectives could have caught him after the first rape—not the last.

"By the time he committed his next rape crime, he could have been identified, arrested, and taken off the streets," Charisa Nicholas, who was tied up and forced to watch as her roommate was

raped, told lawmakers recently. "My case would have been the first case prevented."

Washington Considers Collecting DNA upon Arrest, FORENSIC MAGAZINE (Feb. 7, 2012), <http://www.forensicmag.com/print/5522> (last visited December 22, 2012).

While many of the examples theorize future crime prevention, there is also a compelling case for how a rational expansion of the DNA database unlocks prison doors for the innocent.

DNA databases have proven remarkably effective in exonerating the innocent. According to the Innocence Project, there have been 273 post-conviction DNA exonerations in the United States since 1989. In 123 of the cases, the true suspects or perpetrators were also identified. The case of David Allen Jones is a powerful illustration of the benefits of arrestee DNA sampling. Jones, a mentally disabled janitor, was wrongly convicted in 1995 for three murders in the Los Angeles area. See Andrew Blankstein, et al., *DNA Analysis Links Inmate to 12 Slayings*, L.A. Times, Oct. 23, 2004, at A1. Jones spent nearly nine years in prison. He was released in 2004, after DNA collected at two of the murder scenes was linked to the DNA profile of Chester Dwayne Turner. Although Turner had been arrested 20 times between 1987 and 2002, his DNA sample was not collected until after he was convicted of rape in 2002. *Id.* Had the 2004 Amendment been in effect in 1995, it is

likely that Jones never would have been imprisoned because police would have had access to Turner's DNA profile. There are few greater injustices than the wrongful imprisonment of an innocent person. The privacy intrusion caused by a buccal swab of a felony arrestee is minor compared to society's compelling goal of ensuring that innocent people are exonerated.

Haskell v. Harris, 669 F.3d 1049, 1064-65 *reh'g en banc granted*, 686 F.3d 1121 (9th Cir. 2012).³

Expansion of the DNA databases to include arrestees can only help further the efforts of groups such as Project Innocence to exonerate the wrongfully convicted.

Showing that DNA evidence does not match a convicted offender is often not enough to exonerate him. In an interview with the Council for Responsible Genetics, Peter Neufeld, co-founder of the Innocence Project, described how DNA databases help exonerate wrongly-convicted individuals: "There are occasions where we get a DNA test result on a material piece of evidence from a crime scene which would exclude our client, but prosecutors still resist motions to vacate the conviction. In some of those cases, what then tipped the balance in our favor was that the profile of the unknown individual

3. *Haskell v. Harris* is referenced only for its recitation of factual scenarios in which DNA played a role, and not for any legal precedent.

[whose DNA was found at the crime scene] was run through a convicted offender database and a hit was secured. Once we were able to identify the source of the semen or blood... we were then able to secure the vacation of the conviction for our client." He went on to add, "There's no question that there would be fewer wrongful convictions if there was a universal DNA databank." (CRG Staff, 2011) In 2007, Barry Scheck, the other co-founder of the Innocence Project, told the New York Times that "many of the people his organization had helped exonerate would have been freed much sooner, or would not have been convicted at all" if state databases included profiles from all convicted offenders.

Jennifer L. Doleac, *The Effects of DNA Databases on Crime*, at 9 n.8 (Nov. 2011), available at http://siepr.stanford.edu/?q=/system/files/shared/pubs/papers/Doleac_DNADatabases_0.pdf (last visited December 22, 2012) (citations omitted). While Mr. Scheck's comments related directly to profiles of convicted offenders, expanding the databases to include persons arrested for felonies could only assist efforts to determine the truth. The compelling state interest in preventing rapes, solving murders and freeing the wrongfully imprisoned offsets any privacy interest in a simple swab of the cheek during the booking process.

A dramatic illustration of this state interest is provided by Robert Gonzales in New Mexico. Victoria Sandoval, 11 years old, was raped and murdered during a burglary in 2005. Gonzales, who

had a history of mental health issues, confessed to the crime although the hair and semen samples did not implicate him. Gonzales spent nearly three years in custody facing murder/rape charges before the DNA taken from the murder scene matched an arrestee, Israel Diaz in 2008. Diaz had been arrested for burglary in New Mexico, which provided for DNA to be taken from arrestees. As an illegal alien, Diaz may never have been convicted, only deported and his DNA would never have been obtained if arrestees were not included in the database. Gonzales was finally freed and Diaz was convicted because of the DNA taken from a felony arrestee. The Police Chief, available at

http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1982&issue_id=12010, (last visited December 22, 2012.); The Innocence Project, available at http://www.innocenceproject.org/Content/Another_false_confession_revealed.php, (last visited December 22, 2012.)

Jerry Hobbs spent five years in jail in Illinois for the 2005 murder of his 8-year-old daughter and her 9-year-old friend. His charges were based on a confession he later retracted, claiming his confession had been coerced. One of the girls had semen on her body that did not match Hobbs. Another man in Virginia, Jorge Torres, was arrested for the murder of a woman. His DNA was entered into the database after his arrest and matched the semen on the dead girl. Torres was an acquaintance of the murdered 9-year-old girl's brother. Hobbs was freed and Torres was convicted of the murders of the two children. In one respect Hobbs was fortunate. Torres was arrested in

Virginia, which tested arrestees' DNA unlike Illinois which did not at that time. *Hobbs v. Cappelluti*, 2012 U.S. Dist. LEXIS 139895 (N.D. Ill. Sept. 28, 2012).

A study by the Rand Corporation criticized the economics of including arrestee DNA profiles in the DNA databases. Rand Center on Quality Policing *Toward a Comparison of DNA Profiling and Databases in the United States and England*, 2010 http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR918.pdf, (last visited on December 23, 2012,) [hereafter "Rand"]. The suggestion based on admittedly incomplete data, was that the backlog of crime scene samples would be better cleared before gathering DNA from arrestees. Rand at p. 20. The study was also somewhat cavalier in discussing the possibility of exonerations.

A DNA database is not necessary for exonerating the innocent unless an individual is being prosecuted or imprisoned despite weak or exculpatory DNA evidence, and the database helps identify the actual perpetrator.

Rand at p.14.

The observations, based on a cost/benefit analysis, offer little consolation to defendants spending years in custody for crimes committed by others. Opponents of DNA testing for arrestees have attempted to bolster their arguments against arrestee testing by pointing to the Rand study. This argument ignores the human cost and the requirement that the Legislature and the electorate determine the wisdom of the policy. The courts evaluate the constitutionality of the laws.

State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.

Whalen v. Roe 429 U.S. 589, 597, fn. omitted. (1977)

III

POLICE SHOULD NOT BE BLOCKED FROM LAWFULLY OBTAINING THE MOST RELIABLE MEANS OF IDENTIFICATION

Irrational fears derived from science fiction fantasies should not be relied upon to deny law enforcement the “gold standard” of identification methods. The influence of such Hollywood created scenarios are clear in the case below, exemplified by a footnote referencing a John Travolta movie “Face Off” to explain that there may be cases where advanced face transplants require the police to obtain the face transplantee’s DNA profile to ascertain his or her identity. JA 151 n.35.

The United States Military has adopted DNA technology as the most reliable means of identification. Every member of the United States military, from sailors to the Chairman of the Joint Chiefs of Staff, and every new recruit, is required to submit a DNA sample for the military database, also known as a Repository. This is done for two purposes, the identification of remains and for criminal investigations.

The Department of Defense (DOD) began to use DNA samples to identify the remains of service members during the first Gulf War in 1991. "Because of problems with obtaining reliable DNA samples during the Gulf War, the DOD began a program to collect and store reference specimens of DNA from members of the active duty and reserve forces." What was then called the "DOD DNA Registry," program within the Armed Forces Institute of Pathology, was established pursuant to a December 16, 1991 memorandum of the Deputy Secretary of Defense. Under this program, DNA specimens are collected from active duty and reserve military personnel upon their enlistment, reenlistment, or preparation for operational deployment.

As of December 2002, the Repository, now known as the "Armed Forces Repository of Specimen Samples for the Identification of Remains," contained the DNA of approximately 3.2 million service members. According to a recent DOD directive, the "provision of specimen samples by military members shall be mandatory." The direction to a soldier, sailor, airman, or marine to contribute a DNA sample is a lawful order which, if disobeyed, subjects the service member to prosecution under the Uniform Code of Military Justice (UCMJ). If convicted at court-martial for the offense of violating a lawful general order, the service member

carries the lifelong stigma of a federal felony conviction, and faces a maximum punishment of a dishonorable discharge, confinement for two years, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.

As its name suggests, the DNA Repository was initially conceived solely to identify the remains of service members. However, a small entry in the huge 2003 National Defense Authorization Act, "signed by President Bush on December 2, 2002, overrides Pentagon policy that the DNA samples be used almost solely to identify troops killed in combat," and allows access to the Repository for law enforcement purposes. The provision reads: § 1565a. DNA samples maintained for identification of human remains: use for law enforcement purposes

(a) Compliance with a court order.⁴

2003 Army Law. 48, fn. omitted.

DNA technology has become so commonplace that for a fee, consumers wishing to trace their family tree now can provide their own buccal swabs for testing. *See*, GENETIC GENEALOGY, http://www.dnaancestryproject.com/ydna_intro_howto.php (last visited December 22, 2012). Even pet owners can use buccal swabs to test their dog's DNA for breed ancestry. *See*, DOG-DNA,

4. In 2003, National Defense Authorization Act expanded the Repository uses to include criminal prosecutions.

<http://www.wisdompanel.com/> (last visited December 22, 2012).

It is well known that in the aftermath of disasters such as Hurricane Katrina, the 9-11 attacks and the Tsunami in Japan, DNA is widely used to identify the victims by comparing recovered remains to relatives' toothbrushes and personal effects. Bartha Maria Knoppers, *et al.*, *Ethical Issues in Secondary Uses of Human Biological Materials from Mass Disasters*, 34 J.L. MED. & ETHICS 352, 352. Such access, affordability and routine use of DNA tests have enhanced the reputation for accuracy and reliability of DNA testing. Its availability to the everyday consumer reduces, if not completely eliminates, any sense of embarrassment or stigma attached to the swabbing of the cheek.

In 1932, Mortimer Kelly was arrested for selling gin and was fingerprinted. He complained that he suffered indignity at being fingerprinted. Judge Learned Hand wrote:

Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.

United States v. Kelly, 55 F.2d 67, 69 (2nd Cir. 1932).

Judge Hand went on to note that fingerprinting was becoming widespread in 1932.

Finger printing is used in numerous branches of business and of civil service, and is not in itself a badge of crime. As a physical invasion it amounts to almost nothing, and as a humiliation it can never amount to as much as that caused by the publicity attending a sensational indictment to which innocent men may have to submit.

Id. at 70. The same can be said for the use of DNA today. The police could have adequately identified Mortimer with a photograph and he may have been well-known in his community. However, they did not have to reject a more accurate means of identification just because it was not necessary to identify Mortimer Kelly in 1932 with a new technological tool of fingerprints. Here too, as in 1932, DNA identification, should not be prohibited just because other methods of identification are available.

IV

DNA SAMPLING DURING BOOKING OF A FELONY ARRESTEE IS ANOTHER BIOMETRIC MEASURE OF IDENTITY TO BE INCLUDED IN A DATABASE

The DNA sampled from a swab of the cheek obtained during booking is merely another biometric identifier, like a booking photo, fingerprint, height or weight measurement, eye or hair color description, or

a photograph of tattoos, that is collected as part of an arrestee's booking process.

Biometrics involves the scanning or recording of some unique personal characteristic, such as a fingerprint, a retinal print or voice pattern and the comparison of the digitized image or recording against a verified database for positive identification. Digital imaging, the technology involved in finger imaging, is already a basic component of a myriad of applications ranging from document management to medical radiology to videoconferencing, and its contribution to the field of biometrics makes the current technology of finger imaging possible. In finger imaging, the technology converts a fingerprint into a highly detailed and exact electronic image that a computer can interpret and compare to other images.

James J. Killerlane III, *Finger Imaging: A 21st Century Solution to Welfare Fraud at our Fingertips*, 22 FORDHAM URB. L.J. 1327, 1333-34 (1994).

Other biometric identifiers, especially photographs and prints, have been incorporated for years into a collection or databases. These databases have been used for authenticating the identity of the person in custody and for intelligence in crime solving. When an unknown sample is recovered from a crime scene (fingerprint, hair, blood, video capture, etc.), that sample can be compared to known exemplars by sifting through available databases.

Booking photos were incorporated into “mug books” long before computers were available to digitize the photographs. In 1900, a defendant challenged the taking of his photograph upon arrest and inclusion of that photo in the “Sheriff’s Rogues Gallery.” *State ex rel. Bruns v. Clausmeier*, 154 Ind. 599, 57 N.E. 541 (1900). The Indiana Supreme Court refused to reject the use of a relatively new invention and held that the sheriff was acting within his lawful authority:

It would seem, therefore, if, in the discretion of the sheriff, he should deem it necessary to the safe-keeping of a prisoner and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation and the color of his eyes, hair, and beard, as was done in this case, he could lawfully do so.

Id. at 542.

Even booking photos from an illegal arrest were allowed to remain in the “database” or mug book and could result in a subsequent prosecution if that photograph was selected by another witness in an unrelated crime. *People v. McInnis*, 6 Cal. 3d 821, 825-26 (1972).

For years, fingerprints have been gathered to identify an arrested suspect. Courts have held that fingerprints taken at booking after a felony arrest that are later challenged as illegally seized can still be used to connect defendants to other offenses. There is no requirement that they be purged later if

the arrest is invalidated. *People v. Clark*, 30 Cal. App.3d 549, 558-59 (1973). An exception to this rule is found in a ‘dragnet’ case where all young African-American men were detained and printed in Meridian, Mississippi in a clearly illegal sweep conducted just to obtain fingerprints; there was no evidence that the young men who were detained were ever in lawful custody. *Davis v. Mississippi*, 394 U.S. 721, 727-28.(1969).⁵

The Court below suggests DNA is impermissible because it is used solely for investigation, i.e., whether arrestees have committed other unsolved crimes. JA 146-147. However, photo recognition software may allow the use of a booking photo of an identified arrestee to be compared to countless unknown faces represented in video captures of unsolved crimes. The ability to access the database of photographs for intelligence from past crimes does not bar the taking of the arrestee’s photo at booking as an unconstitutional search.⁶

5. This distinction was also later noted by the Supreme Court .

The respondent in this case, like *Davis*, was briefly detained at the station house. Yet here, there was, as three courts have found, probable cause to believe that the respondent had committed the murder. The vice of the detention in *Davis* is therefore absent in the case before us.

Cupp v Murphy 412 U.S. 291, 294-295 (1973).

6. The potential photo recognition software searching a DMV photo database was discussed as a potential example similar to DNA database searches in *People v. Johnson* 139 Cal.App.4th 1135, 1150-1151(2006).

In California, it was not until the initiation of the California Identification System (“Cal ID”) in 1985, that latent prints of an unknown suspect lifted from crime scenes could be compared to a collection of fingerprints.⁷ CAL ID enables law enforcement to use a known exemplar from an arrestee and compare it to unsolved crimes. The technological leap that allowed searching a database with an arrestee’s fingerprints in order to determine what, if any, other offenses he or she committed, did not convert the rolling of the arrestee’s fingerprints at booking into an unconstitutional search.

These biometric identifiers discussed above are all part of the need to identify the arrestee, which includes what he or she has done. The courts have traditionally recognized the need to ascertain the true identity of an arrestee, which is relevant not only to solving the current crime but to solve past and future crimes as well. *See supra*, pp. 6-7; *Jones v. Murray*, 962 F.2d at 306-07.

While not specifically recognizing what can be termed a “true identity” exception authorizing searches, the United States Supreme Court has recognized, in a plurality decision, the need for an inventory search, which may assist in ascertaining or verifying the arrestee’s identity. *Illinois v. Lafayette*, 462 U.S. 640, 647(1983). The “true identity” exception applies to DNA genotyping as much as it does to fingerprinting or photographs. All these biometric identifiers can be included in a database, accessible for intelligence as to other crimes, and should be covered under the true identity exception.

7. See Cal. Pen. Code sec. 11112.1 et. seq.

“[T]he use of database searches as a means of identifying potential suspects is not new or novel.” *Johnson*, 139 Cal.App.4th at 1149.

The specter of hypothetical misuse of DNA samples should not distort Fourth Amendment analysis here. The court below acknowledged that there are built-in safeguards against misuse of information but argued that it “could not turn a blind eye to the vast genetic treasure map that remains in the DNA sample retained by the State. JA 143.

To be sure, it created a potential for an invasion of privacy, but we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment. A holding to that effect would mean that a policeman walking down the street carrying a parabolic microphone capable of picking up conversations in nearby homes would be engaging in a search even if the microphone were not turned on. It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence.

United States v. Karo, 468 U.S. 705, 712 (1984).

Misuse of the information contained in the DNA sample retained by the police is highly speculative and completely illegal. Any incentive for a potential violation depends to some extent on an imagined demand for a costly intrusion into the specific DNA samples. Other information gleaned from arrestee booking, such as social security numbers, date of birth, home addresses would provide a treasure trove for identity thieves and anyone wishing to learn

about the credit history, spending practices and employment history of an arrestee. That potential exists now and is not a futuristic fantasy. The potential intrusion does not proscribe law enforcement from gathering the arrestees' identifiers within the shield of existing safeguards.

DNA identification is still the most reliable, immutable identifier that may take as few as two or as long as thirty days to compare to the database.⁸ As a biometric identifier, a DNA profile is one more method to establish who has been arrested for the felony. The Fourth Amendment did not create a constitutional straightjacket that allows two biometric identifiers (photos and fingerprints) but excludes the most reliable.

CONCLUSION

It would be a mistake to discard a scientifically proven, minimally invasive technology which has the potential to save lives, protect potential victims, and free the wrongfully convicted due to fears of a futuristic imagined tyranny. The Constitution does not require our society to cower in fear of the future.

8. We can expect the time required for comparison to CODIS to be shortened to one to two hours in the very near future. A number of machines are being successfully tested. Science Daily <http://www.sciencedaily.com/releases/2010/08/100804122715.htm>, last viewed December 23, 2012; Integenx <http://integenx.com/products/rapid-dna/>, (last visited December 23, 2012); Forensic Magazine Rapid DNA Analysis <http://www.forensicmag.com/print/6882>, (last viisited December 23, 2012).

Respectfully submitted,

JACKIE LACEY

District Attorney of
Los Angeles County

By

IRENE WAKABAYASHI

Head Deputy District Attorney
Appellate Division

PHYLLIS ASAYAMA

Deputy District Attorney

ROBERTA SCHWARTZ

Deputy District Attorney (*Counsel
of Record*)

Attorneys for Amicus Curiae in
Support of Petitioner