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In the

Supreme Court

of the

State of California

SUPREME COURT
FILED

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PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

v.

MARK BUZA,

Defendant/Appellant.

First Appellate District, Division Two, Case No. A125542
San Francisco County Superior Court, Case No. 207818

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION AND THE CALIFORNIA PEACE OFFICERS' ASSOCIATION IN SUPPORT OF PLAINTIFF/RESPONDENT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The California State Sheriffs' Association, California Police Chiefs' Association and the California Peace Officers' Association respectively request leave to file the attached brief of Amici Curiae in support of Respondents, et al., in order to assist this Court in resolving the important issue of law presented in this matter.

Amici endeavor to provide this Court with the perspective of similarly situated law enforcement agencies throughout the State regarding the important legal issues raised in this matter, specifically: Whether the collection and analysis of forensic identification DNA database samples from all adult felony arrestees, as required by Proposition 69 [DNA and Forensic Identification Data Base and Data Bank Act of 1998, as amended (Pen. Code, § 295 et seq.) (the "DNA Act")], violates Article I, Section 13 of the California Constitution or the Fourth Amendment of the United States Constitution?

Amici believe that they can provide additional perspective to this Court that will be helpful in its decision.

I.

AMICI CURIAE INTEREST AND BENEFIT OF *AMICI CURIAE* BRIEF TO THE COURT:

Amici Curiae are the following associations: the California State Sheriffs' Association ("CSSA"), the California Police Chiefs' Association ("CPCA"), and the California Peace Officers' Association ("CPOA"). Each of their memberships and interests are discussed below.

The California State Sheriffs' Association ("CSSA") is a non-profit professional organization that represents each of the 58 California Sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel in order to allow for the general improvement of law enforcement throughout the State of California.

The California Police Chiefs' Association ("CPCA") represents virtually all of the more than 400 municipal chiefs of police in California. CPCA seeks to promote and advance the science and art of police administration and crime prevention, by developing and disseminating professional administrative practices for use in the police profession. It also furthers police cooperation and the exchange of information and experience throughout California.

The California Peace Officers' Association ("CPOA") represents more than 2,000 peace officers, of all ranks, throughout the State of California. CPOA provides professional development and training for

peace officers, and reviews and comments on legislation and other matters impacting law enforcement.

The issues in this case are of paramount importance to the parties, Amici, to law enforcement generally and to all of the People of the State of California.

Amici have identified this matter as one of statewide significance in which their expertise may be of assistance to the Court. The attached brief offers a broad perspective of Amici as to the issues on appeal, namely the resounding effect of the Court's decision on local law enforcement agencies throughout the State and the, potentially, detrimental impact on the public's safety.

The value of DNA collection and testing to law enforcement and to the public safety in general has grown exponentially with the rapid evolution of this technology. Information collected from DNA accelerates the identification process and gathering of information associated with crimes in progress, recent crimes, crime prevention and enforcement. Thus the collection of DNA from felony arrestees is a critical and effective tool that assists law enforcement in positively identifying those arrested for felonies, solving past crimes, identifying perpetrators and protecting the innocent.

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 setback posed by the potential determination of the unconstitutionality of the DNA Act to derail the expeditious leaps in solving and preventing crime that this technology has afforded law enforcement cannot be understated. As such, the Court's decision to uphold the constitutionality of the DNA Act is crucial for effective law enforcement in California.

Therefore, based upon all of the foregoing, Applicants respectfully request leave from the Chief Justice to file the attached brief of Amici Curiae addressing the above issues, in order to aid this Court in its consideration and determination of the critical issues before it in this matter.

There is good cause for permitting the filing of the brief, as stated above, and this Court may grant the filing of the brief pursuant to Calif. Rules of Ct., Rule 8.520.

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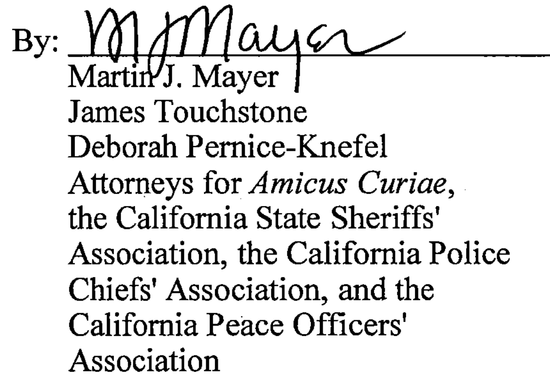
The undersigned have been given specific authority to make this Application on behalf of Amici.

Dated: November 13, 2015

Respectfully submitted,

JONES & MAYER



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STATEMENT OF FACTS AND PROCEDURAL HISTORY.

Amici accept the procedural history and pertinent facts as set forth in the briefs of the parties.

I.

INTRODUCTION

The DNA and Forensic Identification Data Base and Data Bank Act of 1998, as amended (Pen. Code, § 295 et seq.) (the "DNA Act"), requires that a DNA sample be taken from all adults arrested for or charged with any felony offense "immediately following arrest, or during the booking ... process or as soon as administratively practicable after arrest...." (§§ 296.1, subd. (a)(1)(A); 296, subd. (a)(2)(C).

The compulsory collection of DNA from felony arrestees pursuant to the DNA Act facilitates effective law enforcement and crime prevention in identifying an arrestee not only so that the proper name can be attached to the charges but also so that the criminal justice system can make informed decisions concerning pretrial custody.

For example, an arrestee's involvement in other felonies, crimes of sex or violence may indicate a need for heightened security in the jail for the safety of other inmates, as well as officer safety. The background information obtained at booking may also assist in making decisions at arraignment in assessing bail or reducing bail where there is otherwise an absence of prior criminal history.

Appellant Buza was arrested for arson and refused to comply with this minimally invasive procedure authorized by the DNA Act. He portends, under the auspices of the Fourth Amendment, to reverse the evolution of law enforcement's deployment of this 21st century crime fighting technology in felony arrests, despite the express recognition of its reasonableness in the recent U.S. Supreme Court precedent in *Maryland v. King* (2013) 133 S.Ct. 1958, 1974-76 [186 L.Ed.2d 1] and *Haskell v. Harris* (9th Cir. 2014) 745 F.3d 1269, 1272.

The Court of Appeal upheld Buza's challenge on the purported premise that felony arrestees have an augmented right to privacy under the California Constitution and State precedent and thus should be distinguished from the U.S. Supreme Court and federal precedent. The Appellate decision ignores the clear history of widespread law enforcement use of evolving forensic technologies in booking procedures in this state and focuses instead on the false notion that the purpose and effect of the DNA Act is investigatory, as opposed to an enhanced form of identification in order to reach their determination that it is unconstitutional.

The gravamen of Appellant Buza's challenge also lies in his threefold claim that the DNA Act is unconstitutionally broader than the Maryland statute and thus distinguishable from *Maryland v. King* because:

> (1) California allows compulsory collection for all felony arrestees in contrast with the Maryland statute that targets only arrestees for felonies of a sexual or violent nature (2) California test results are

entered into the database sooner than Maryland, which delays database entry until after arraignment and/or prosecution of charges; (3) California's expungement process is less convenient in contrast with Maryland's "automatic expungement" upon release/dismissal.

Notably, Appellant Buza's arrest and conviction for arson renders these distinctions of no moment for him, as he would be subject to the DNA collection and thus ineligible for any expungement process.

Moreover, none of these distinctions conjured by Appellant Buza were the subject of deliberations in *Maryland v. King*, which upheld the corresponding Maryland compulsory DNA collection statute as constitutional.

Appellant Buza 's "tripartite" contention therefore sets forth a flawed and illusory distinction.

The strong public interest in accurately identifying and profiling felony arrestees served by the DNA Act overrides the intricate distinctions upon which Appellant Buza urges this Court to depart from federally established constitutional precedent.

II.

ARGUMENT

A. THE DNA ACT IS CONSTITUTIONAL AS A MATTER OF LAW.

Felony arrestees have a diminished expectation of privacy that allows for the minor invasion of the cheek swab for DNA during the booking process when balanced against the state interest in securing

accuracy of identification and other overriding legitimate government interests.

In *Maryland v. King*, the Supreme Court expressly found a Maryland compulsory DNA collection statute, that is strikingly similar to the DNA Act, to be a constitutionally "legitimate and routine police booking procedure" that is reasonable under the Fourth Amendment. *Ibid.*

According to Buza, "California precedent" dictates a different interpretation than the *Maryland v. King* precedent:

> "The question here is not whether an illegal search and seizure requires suppression of evidence at trial but whether the state can criminalize the refusal to comply with a search that would violate the state's proscription against unreasonable searches. We are free to determine this issue on the basis of California precedent."
>
> *People v. Buza* (2014) 231 Cal.App.4th 1446 [180 Cal.Rptr.3d 753, 785] review granted and opinion superseded, (Cal. 2015) 183 Cal.Rptr.3d 515 [342 P.3d 415].

The miniscule basis offered by Appellant Buza to depart from the well established federal precedent is eclipsed by the contrary precedent holding this routine practice constitutional and reasonable under the Fourth Amendment, including an abundance of authority that supports "deference to the high court's constitutional interpretations in the absence of very strong countervailing circumstances . . . a general principle or policy of deference to United States Supreme Court decisions, a policy applicable in the absence of good cause for departure or deviation therefrom" *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 353 [276 Cal.Rptr. 326, 801 P.2d 1077]

B. WHILE THE APPELLATE COURT'S DECISION IN BUZA PURPORTS TO BE BASED "SOLELY" ON ARTICLE I, SECTION 13 OF THE CALIFORNIA CONSTITUTION, IT OFFERS NO TEXTUAL SUBSTANCE OR PRECEDENT FOR ITS ETHEREAL DISTINCTION

The Court in Buza asserts its challenge of the DNA Act is strictly under the California Constitution, but cites to no significant textual difference whatsoever between the pertinent sections of the California and U.S. Constitution.

The language is virtually identical:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."
>
> *Cal. Const.*, art. I, § 13
>
> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> *U.S. Const.* amend. IV

Buza concedes as much in his brief (ABOM p.36) and, by the same token, claims that California case precedent offers a different and augmented interpretation of the protections derived from the California Constitution. However, the California precedent lends more support to the

contrary.

Indeed, as the People have well demonstrated in their Opening and Reply briefs, *Buza* principally relies upon minority holding, dissenting opinion, and academic commentary with scant, if any, support for the notion of any textual difference in *Calif. Const. Article* I, § 13, citing *People v. Crowson* (1983) 33 Cal.3d 623, 629, *Hill v. Nat. Collegiate Athletic Assn.* (1994) 7 Cal. 4th 1, 30, fn.9, *People v. Teresinski* (1982) 30 Cal.3d 822, 835 (RBOM p. 12-16, 20). In fact, the California Supreme Court has stated that there is no meaningful distinction between the provisions of the California Constitution and federal Constitution in this context:

"We also observe that, "[i]n the search and seizure context, the article I, section 1 'privacy' clause [of the California Constitution] has never been held to establish a broader protection than that provided by the Fourth Amendment of the United States Constitution or article I, section 13 of the California Constitution." *In re York* (1995) 9 Cal.4th 1133, 1149.

The essence of Buza's challenge poses a tripartite distinction between the Maryland statute and the DNA Act that: (1) the DNA Act tests all felony arrestees and the Maryland statute tests only arrestees for felonies of a "sexual" or "violent "nature; (2) Maryland's DNA testing is post arraignment and California's arrestees are tested during booking; and (3) Maryland's "automatic expungement" upon release/dismissal is more

convenient than California's expungement process which requires filing a separate request for expungement.

Buza's purported contrast of the DNA Act from the Maryland Statute is a faulty distinction at best.

> "At issue is a standard, expanding technology already in widespread use throughout the Nation." *Id.* at 1968. Despite the clarity of the Supreme Court's holding, Plaintiffs argue that *King* does not apply to California's DNA collection law. But the purported distinctions that Plaintiffs identify are illusory."
>
> *Haskell v. Harris* (9th Cir. 2014) 745 F.3d 1269, 1271-1272.

The Maryland court did not deliberate or rely on any of these distinctions in reaching its ruling. While the Supreme Court in *Maryland v. King* was addressing a statute that specified DNA samples could be processed only after an arrestee had been arraigned[1], and the court found this statutory procedure constitutional, the court did not state that the collection and processing of DNA samples is unconstitutional in all other contexts.

There is no substantive textual difference between the California and U.S. Constitution law and no meaningful distinction has been made that is compelling enough to warrant this Court's departure from its longstanding

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[1] Even this distinction is somewhat of an artifice, as elucidated in the People's briefing. Although the Maryland law requires DNA samples collected from arrestees who are "charged with" certain enumerated crimes, the police officer who makes a warrantless arrest must "cause a statement of charges to be filed" Md. Pub. Saf. Code Ann., Sec. 2-504, sub d.(a)(3)(i).(see People's Reply p.3-4).

precedent of adherence to such federally settled constitutional law as established by the Supreme Court in *Maryland v. King* and followed in *Haskell v. Harris.*

C. FELONIES PRESENT UNIQUE RISKS TO POLICE OFFICERS AND TO THE PUBLIC SAFETY WHICH SUPPORT THE USE OF UNIQUE PROCEDURES

Significantly, Buza 's challenge to the DNA Act 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 the Appellate Court in *Buza ("Buza").* 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). A primary factor is "the severity of the crime at issue" *Gonzalez v. City of Anaheim*, 715 F.3d 789, 793-794 (9th Cir. 2014).

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

The U.S. Supreme Court and this Court have permitted these intrusions on a suspect's liberty interests during a stop in order to foster

officer safety. These same courts have also held that these procedures do not convert the stop into an arrest if the procedure 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].

Moreover, the presumption of unreasonableness that attaches to a warrantless entry into the home can be overcome by a showing of one of the few specifically established and well-delineated exceptions to the warrant requirement, such as hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling. The act of driving under the influence contains the very serious additional risk to the safety of others and the public at large. *People v. Schofield* (2001) 90 Cal.App.4th 968, 973; *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 899. Thus, exigent circumstances justified a warrantless entry into DUI defendant's residence to effect a felony arrest. *People v. Thompson* (2006) 38 Cal.4th 811, 817-18.

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 summary, a suspected felon presents a unique set of dangers to peace officers and to the public safety in general. Accordingly, as set forth above, suspected felons are treated differently in a number of different ways. Contrary to the position in *Buza*, there are solid legal and practical reasons for this differential treatment. California's DNA collection law presents no exception.

D. DNA TECHNOLOGY IS WIDELY RECOGNIZED AS AN ESTABLISHED, RELIABLE AND VALUABLE FORENSIC TECHNIQUE FOR ENHANCED IDENTIFICATION USED BY LAW ENFORCEMENT

Courts have quickly recognized the valuable governmental interests in crime prevention served by the advent of DNA technology. "At issue is

a standard, expanding technology already in widespread use throughout the Nation." *Maryland v. King,* supra, at p.1968. It has proved integral to solving crimes and bringing perpetrators to justice as well as in preventing, or at least discouraging them from committing additional crimes.

Law enforcement also has a significant interest in ensuring that innocent persons are not unduly subjected to investigation or convicted of crimes they did not commit. The ability to match DNA profiles derived from crime scene evidence to DNA profiles in an existing data bank enables law enforcement personnel to solve crimes expeditiously and prevent needless interference into the privacy interests of innocent persons.

Optimally, DNA profiling serves as a deterrent to future criminal activity. However, many offenders commit more than one crime, and recidivism is, regretfully, quite common. Thus, speedy identification and apprehension of an offender can prevent specific crimes, even where DNA testing has not successfully deterred criminal activity in general.

In *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1149-50, the defendant on trial for forcible oral copulation and forcible rape sought suppression of DNA evidence (obtained during his incarceration for a prior crime) where his genetic profile matched that of the perpetrator. The court offered this historical perspective:

> "The use of database searches as a means of identifying potential suspects is not new or novel. "DNA database and data bank acts have been enacted in all 50 states as well as by the federal

government. [Citations.]" (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505, 120 Cal.Rptr.2d 197.)13 "[California's] DNA and Forensic Identification Data Base and Data Bank program had its genesis in former section 290.2, enacted in 1983. [Citation.]" (*Alfaro*, at p. 497, 120 Cal.Rptr.2d 197.) Although the statute originally referred to blood grouping analysis, explicit provisions for DNA and other genetic typing analysis, as well as maintenance of a computerized database, were added by the 1989 amendment to the statute. (See Stats.1989, ch. 1304, § 1.5, pp. 5176–5178.) Congress authorized the FBI to establish an index of DNA identification records in 1994 (42 U.S.C. § 14132; Pub.L. No. 103–322 (Sept. 13, 1994) 108 Stat.2069) and, in 2000, authorized grants to states to carry out DNA analyses for inclusion in CODIS (42 U.S.C. § 14135; Pub.L. No. 106–546 (Dec. 19, 2000) 114 Stat. 2726)."

People v. Johnson, supra, at pp. 1149-50.

Law enforcement forensics must be sophisticated enough to keep up with criminals, such as cyber predators and identity thieves, that are perpetually innovating new ways to break and evade the law. "A suspect who has changed his facial features to evade photographic identification or even one who has undertaken the more arduous task of altering his fingerprints cannot escape the revealing power of his DNA." *Maryland v. King* (2013) 133 S.Ct. 1958, 1974-76 [186 L.Ed.2d 1] The use of DNA technology is therefore crucial for effective 21st century law enforcement.

E. IDENTIFICATION IS A VITAL PART OF THE BOOKING PROCEDURE THAT JUSTIFIES THE MINOR INTRUSION OF A DNA CHEEK SWAB INTO A FELONY ARRESTEE'S PRIVACY

Booking procedures for arrestees routinely include obtaining biographical information, photographing ("mugshot"), fingerprinting,

inventory of personal belongings, search of belongings and body search, health screening as well as DNA testing if appropriate under the DNA Act. It is not even uncommon for sheriffs or jail officials to ask arrestees about gang affiliations, former gang affiliations, and other outside relationships. Depending on the answers, an inmate may have to be placed in protective custody or housed in one section of a jail rather than another. Routine questions to secure the "biographical data necessary to complete booking or pretrial services" are typically exempt from *Miranda* warnings to achieve the administrative interests of the jail, even when such questions have elicited self-incriminating statements. *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601-02.

> "(I)t is permissible to ask arrestees questions about gang affiliation during the booking process. Jail officials have an important institutional interest in minimizing the potential for violence within the jail population and particularly among rival gangs, which "'spawn a climate of tension, violence and coercion.' To that end, they retain substantial discretion to devise reasonable solutions to the security problems they face.
>
> *People v. Elizalde* (2015) 61 Cal.4th 523, 541.

It is well-established law that individuals in lawful custody cannot assert a privacy interest in their identity or identifying information. *People v. Robinson* (2010) 47 Cal.4th 1104, 1120-21.

Even once the charges have been dismissed, the accused is not entitled to the return or destruction of the information gathered. *Sterling v. City of Oakland* (1962) 208 Cal.App.2d 1, 4. "In general, fingerprinting

and photographing of accused persons, even before conviction, has been held valid in the absence of statute, upon the grounds of a means of identifying the accused and of assisting in the recapture in event he escapes or flees before trial." *Ibid.*

This information is collected at booking and it is routinely entered into law enforcement databases. It has long been an accepted practice to allow law enforcement to access the database for investigations related to other offenses:

> "A mug shot is used by the police not only to identify the person arrested, but to determine if he or she is wanted on any other charge. Mug shots from earlier arrests may be used during subsequent investigations to identify individuals suspected of committing criminal offenses. (See, e.g., *People v. James* (1977) 19 Cal.3d 99, 105; *People v. Cavanaugh* (1968) 69 Cal.2d 262, 264; *People v. Griffin* (1976) 59 Cal.App.3d 532, 535.)"
>
> 86 *Ops. Cal. Atty. Gen.* 132. [See also: *People v. Thierry* (1998) 64 Cal.App.4th 176, 179.]

Information gathered from fingerprinting at booking has historically facilitated law enforcement identification of arrestees' involvement in other crimes. *See Virgle v. Superior Court* (2002) 100 C.A.4th 572 (prints were on a print card and matched a latent print found at the crime scene); *People v. Rivas* (2015) 238 Cal.App.4th 967, 981; *People v. Navarette* (2003) 30 Cal.4th 458, 498 (Prints matched with crime scene); *U.S. v. Decoud* (9th Cir. 2006) 456 F.3d 996, 1010 (fingerprints taken upon defendant's arrest with fingerprints on another document involving an arrest was admissible in defendant's drug-trafficking prosecution); *U.S. v. Calderon-Segura* (9th

Cir. 2008) 512 F.3d 1104, 1109-10 (inked thumb-print from defendant alien, a native and citizen of Mexico, matched the inked thumb-print appearing on defendant's prior warrant of removal), More recently, this has been accomplished through the computerized government database, "AFIS".[2]

Moreover, the courts have long recognized that there is no infringement of privacy rights in these records becoming public:

> "In addition, the suspect's right of privacy is not violated by prompt and accurate public reporting of the facts and circumstances of his arrest: 'It is also generally in the social interest to identify adults currently charged with the commission of a crime. While such an identification may not presume guilt, it may legitimately put others on notice that the named individual is suspected of having committed a crime. Naming the suspect may also persuade eyewitnesses and character witnesses to testify. For these reasons, while the suspect or offender obviously does not consent to public exposure, his right to privacy must give way to the overriding social interest."

Loder v. Municipal Court (1976) 17 Cal.3d 859, 865-66

In *Loder v. Municipal Court,* supra, the court recognized the legitimate and compelling state interest in information derived from the

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[2] "AFIS, in a nutshell, is a cognitive technology system that compares the similarity across fingerprints. The FBI's IAFIS, one of the largest fingerprint databases, contains the prints of more than 60 million individuals (and over 600 million separate prints). These systems are extremely powerful and impressive as they can compare millions of prints in a very short time (although their performance capabilities are, like virtually all forensic sciences, rather dramatically exaggerated by CSI's glossy depiction of fingerprint matching). Over time, their capacities have grown, their speed has increased and they have been widely recognized as an extremely helpful crime-fighting technology." *Law Probability and Risk* (2010) 9 (1): 47,

arrest and booking procedures, even where such information was ultimately derived from an illegal arrest:

> "Even if no such direct connection with the later offense can be made, an arrest record may under appropriate conditions be a valuable investigative tool for the discovery of further evidence. Often the prior arrest is not an isolated event but one of a series of arrests of the same individual on the same or related charges. This is especially true when the crime in question is typically subject to recidivism, such as the use of addictive drugs, child molesting, indecent exposure, gambling, bookmaking, passing bad checks, confidence frauds, petty theft, receiving stolen goods, and even some forms of burglary and robbery. In these circumstances a pattern may emerge—for example, a distinctive modus operandi—which has independent significance as a basis for suspecting the arrestee if the crime is committed again."
>
> *Ibid.*

Although the advent of facial recognition software and other digital media enhancements might also render photographs or "mug shots" more intrusive or subject to misuse than previously considered, the technological evolution of this software does not vitiate the need or the legal justification for this form of identification and subsequent use.

Similarly, the expansion of DNA technology, its capacity for accessing more intricate information and exaggerated speculations on the potential misuse of this valuable forensic tool do not justify disallowing this valuable form of identification. The collection of DNA has been and is still recognized as an advanced and more reliable technique for identification.

> "The Ninth Circuit has unequivocally held that what DNA evidence does is identify. See *Rise*, 59 F.3d at 1559 ("the information derived from the blood sample is ... an identifying marker unique to the individual from whom the information is derived"); *Kincade*, 379 F.3d at 837 ("the DNA profile derived from

> the defendant's blood sample establishes only a record of the defendant's identity"); *Kriesel*, 508 F.3d at 947 ("tracking ... identity is the primary consequence of DNA collection"). See also § 295.1(a) ("The Department of Justice shall perform DNA analysis ... pursuant to this chapter only for identification purposes"). This court has no illusions—nor does it believe that the Ninth Circuit *in Rise, Kincade*, and *Kriesel* was either confused or disingenuous—about what "identification" means in this context.
>
> *Haskell v. Brown* (N.D. Cal. 2009) 677 F.Supp.2d 1187, 1198-200.

The Ninth Circuit expounded on the valuable state interests served by identifying information obtained through DNA collection:

> "Put simply: identification means both 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.). Who the person is can often be checked using fingerprints, but that does not preclude the government from also checking that individual's identity in other ways. An individual might wear gloves at some point, thwarting fingerprint identification, or wear a mask, thwarting the use of photographs. The more ways the government has to identify who someone is, the better chance it has of doing so accurately. See Proposition 69, Dec. of Purpose, § II(e) ("The state has a compelling interest in the accurate identification of criminal offenders, and DNA testing at the earliest stages of criminal proceedings for felony offenses will help thwart criminal perpetrators from concealing their identities"); see also *Amerson,* 483 F.3d at 87 (discussing "the potentially greater precision of DNA sampling and matching methods") and *Banks*, 490 F.3d at 1192 (DNA "more advanced and accurate"). The second component of identity, what the person has done, is no less important. Nor is it new. Plaintiffs could point the Court to no case holding that once an individual has been identified through his fingerprints, the government was barred from running those same fingerprints against crime scene samples for investigative purposes (or from showing individuals' photographs to victims or witnesses).
>
> *Haskell v. Brown*, supra. at pp. 1198-200.

State and federal courts consistently recognize that, despite the speculations on potential misuse, the use of current technologies such as

those in issue here are a huge benefit to powerful and compelling government interests in preserving the security and safety of the community that greatly outweigh the narrow and speculative concerns posed by Buza.

Law enforcement should not be deprived of the ability to use the sophisticated forensic tools that are rapidly evolving through technology for crime fighting and crime prevention. These same rapidly evolving technologies are also available to sophisticated criminals, who use them to break and to evade the law.[3]

The collection of DNA from felony arrestees under the DNA Act is a logical technological extension of fingerprinting, photographing and other identifying information such as scars, tattoos and gang affiliations gathered in the course of routine booking practices that serve the myriad of overriding government interests articulated here and by the People.

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[3] Indeed, one of the first murder convictions based on DNA profiling came about when the culprit tried to evade police by asking a friend to take the test for him. http://www.exploreforensics.co.uk/forenisc-cases-colin-pitchfork-first-exoneration-through-dna.html

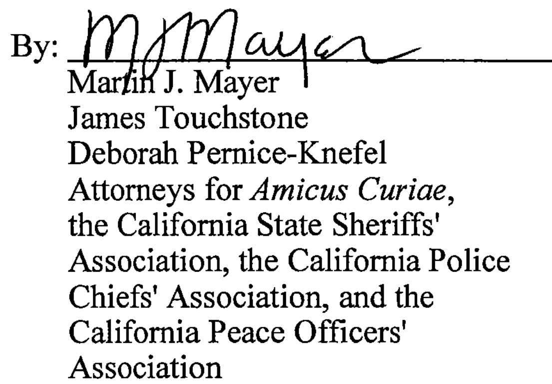
III.

CONCLUSION

For all of the foregoing reasons, Amici respectfully urge this court to reverse the judgment of the Court of Appeal.

Dated: November 13, 2015   Respectfully submitted,

JONES & MAYER

By: 

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(l) or 8.504(d)(l) of the California Rules of Court, the attached Amicus Curiae Brief is produced using 13-point or greater Roman type, including footnotes, and contains 5,442 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: November 13, 2015 By: M J Mayer
Martin J. Mayer

PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF ORANGE) ss.

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 3777 North Harbor Blvd. Fullerton, Ca 92835.

On November 13, 2015, I served the foregoing document described as **APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION AND THE CALIFORNIA PEACE OFFICERS' ASSOCIATION IN SUPPORT OF PLAINTIFF/RESPONDENT** on each interested party listed on the **attached service list**.

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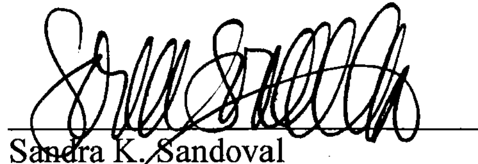

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