No. 12-207

In The Supreme Court of the United States

MARYLAND,

Petitioner,

v.

ALONZO JAY KING, JR.,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF OF AMICUS CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

SCOTT BURNS
NATIONAL DISTRICT ATTORNEYS ASSOCIATION
ALBERT C. LOCHER
Counsel of Record
Assistant District Attorney
COUNTY OF SACRAMENTO, CALIFORNIA
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
Phone: (703) 549-9222
lochera@sacda.org
Attorneys for Amicus Curiae National District Attorneys Association

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the state may, consistent with the Fourth Amendment, take a buccal (cheek) swab for DNA testing from a person who has been arrested for a felony offense, test the resulting sample, and enter the test results into a DNA database.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

STATEMENT OF INTEREST[1]

This brief is submitted by the National District Attorneys Association (NDAA), as amicus curiae in support of petitioner the state of Maryland.

The NDAA is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows and addresses public policy issues involving criminal justice and law enforcement.

This case raises matters of concern to prosecutors and law enforcement professionals nationwide. The decision by this Court whether to grant certiorari concerns a point of law where lower courts have reached

[1] Pursuant to Supreme Court Rule 37.2(a), amicus gave counsel of record for each party written notice of the intention of amicus to file this brief at least 10 days in advance, and all parties have consented in writing to the filing of this brief. Pursuant to Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amicus, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

conflicting rulings, affecting how arrested subjects are processed, what biological or biometric samples may be taken from those subjects, and what investigative use may be made of those samples. A decision by this Court will provide a uniform rule affecting whether arrested subjects can be identified through DNA samples taken at arrest, including their identification as perpetrators of crimes, and whether subjects so identified may be brought to justice for past crimes, and prevented from committing future crimes.

Amicus has expertise in the matters pending before the Court in this case, and believes that this brief will be helpful to this Court in its consideration of these matters.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, a stranger wearing a hat and a scarf over his face broke into the home of Vonette W. and raped her. She promptly reported the assault, and submitted to a rape exam. A semen sample was collected and subjected to DNA analysis, which led to a DNA profile of the rapist. The profile was entered into the Maryland state DNA database, at first without result.

In 2009, respondent Alonzo King was arrested on unrelated assault charges. Pursuant to Maryland law, a DNA sample was taken by means of a cheek, or buccal swab. The analysis of that sample produced a DNA profile that was also entered into the Maryland

DNA database, and was found to match the sample from the rape of Vonette W. Charged with the crime, King moved to suppress the results of the arrest DNA sampling. The motion was denied. King submitted his trial to a judge on an agreed statement of facts, and was convicted.

On appeal, the Maryland Court of Appeals ruled that the arrest DNA sampling of King violated the Fourth Amendment, and reversed the rape conviction. That ruling is now before this Court on petition for writ of certiorari.

SUMMARY OF ARGUMENT

The issue presented by this case is whether a subject who has been arrested for a felony offense, but not convicted, may be subject to the taking of a DNA sample from his person without a search warrant, in the same manner that arrested persons are photographed and fingerprinted. Lower courts have split on this question, making the matter appropriate for review by this Court to resolve the issue. Nationwide, law enforcement officials and crime lab personnel devote resources to obtaining arrestee DNA samples, analyzing them, entering the results into a nationwide databank called the "Combined DNA Index System," or CODIS. Forensic samples from unsolved crimes are then entered into CODIS to search for whether there is a match to a known offender who has been entered into the system. Law enforcement,

crime lab, and prosecution officials should be given guidance whether, and under what circumstances, this work to identify and bring justice to guilty perpetrators may continue. The Maryland Court of Appeals erred when it ruled that taking the arrest DNA sample violated the Fourth Amendment. Taking a DNA sample at arrest is minimally intrusive, comparable to other accepted arrest procedures such as fingerprinting and photographing, and serves an important public and governmental interest. Therefore it is reasonable under the Fourth Amendment.

ARGUMENT

I. THE LOWER COURTS HAVE SPLIT ON THE ISSUE OF WHETHER TAKING A DNA SAMPLE FROM AN ARRESTEE VIOLATES THE FOURTH AMENDMENT.

Putting aside rulings at the trial court level, there are currently published appellate rulings from United States Circuit Courts of Appeals, from the highest court in different states, and from intermediate state appellate courts, that conflict on the constitutional rule at issue in this case.

Cases Ruling Seizure Legal – The following cases have held that it is not a search and seizure violation under the Fourth Amendment for a DNA sample to be taken upon arrest:

- *Anderson v. Commonwealth*, 274 Va. 469, 650 S.E.2d 702 (Va. 2007), *cert. denied*,

553 U.S. 1054 (2008). The Virginia Supreme Court unanimously affirmed the ruling of the Virginia Court of Appeals, which was reported at 48 Va.App. 704, 634 S.E.2d 372 (Va. 2006).

- *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (en banc), *cert. denied*, 132 S.Ct. 1741 (2012). The Third Circuit, sitting en banc, ruled by a vote of 8-6 that arrestee DNA sampling did not violate the Fourth Amendment.

Cases Ruling Seizure Illegal – The following cases have held that taking a DNA sample upon arrest is a search and seizure violation under the Fourth Amendment:

- *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006). The Minnesota Court of Appeals unanimously (3-0) held that requiring an arrestee to provide a DNA sample before conviction and without a search warrant violated the Fourth Amendment.
- *King v. State*, 425 Md. 550, 42 A.3d 549 (Md. 2012). This is the case at bar, in which the Maryland Court of Appeals (the highest court in that state) ruled (5-2) that taking an arrestee DNA sample violated the Fourth Amendment.
- *Mario W. v. Kaipo*, 637 Ariz. Adv. Rep. 22, 281 P.3d 476 (Ariz. 2012). The Arizona Supreme Court ruled (5-2) that arrest DNA of a juvenile violates the Fourth

Amendment. This case reversed the Arizona Court of Appeals, which had upheld taking the sample in a split ruling (2-1). See 265 P.3d 389 (Ariz. App. 2011).

In addition to the above cases, the following three cases have addressed the matter in reported appellate opinions, which for the reasons described have not become or did not become final:

- *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010). A three judge panel of the Ninth Circuit held (2-1) that an arrestee DNA sample ordered as condition of pretrial release did not violate the Fourth Amendment. The Ninth Circuit then granted a rehearing en banc, at 646 F.3d 659. Before the en banc hearing, the prosecution and the defendant reached a plea disposition in the District Court, after which the appeal was dismissed as moot. See 659 F.3d 761 (2011).

- *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012). A three judge panel of the Ninth Circuit upheld (2-1) arrestee DNA sampling as lawful under the Fourth Amendment. The Ninth Circuit granted a rehearing en banc at 686 F.3d 1121. At this writing, oral argument is scheduled for September 19, 2012.

- *People v. Buza*, 197 Cal.App.4th 1424, 129 Cal.Rptr.3d 753 (2011). The California Court of Appeal for the First Appellate District, Division Two, ruled (3-0)

> that requiring a felony arrest subject to provide a DNA sample before conviction violated the Fourth Amendment. On October 19, 2011, the California Supreme Court unanimously voted to grant review. 262 P.2d 854, 132 Cal.Rptr. 616 (2011). That action effectively vacates and depublishes the Court of Appeal opinion, rendering it of no precedential value. California Rule of Court 8.1105(e). At this writing, the case has been fully briefed in the California Supreme Court, but is not yet set for oral argument.

As the foregoing clearly demonstrates, the issue here represents a classic circumstance of a split in rulings by the lower courts. No matter what result the en banc panel of the Ninth Circuit reaches in *Haskell*, or the California Supreme Court reaches in *Buza*, the final decisions in those cases will only add to the already existing split.

The disagreement in the existing, final appellate opinions, and the split within those courts which have considered the issue, all indicate that the matter is not likely to be resolved by the lower courts reaching a consensus. The point is ripe for consideration and resolution by this Court.

II. FEDERAL AND STATE LAW ENFORCEMENT OFFICIALS WHO RELY ON ARRESTEE DNA SAMPLING SHOULD BE GIVEN THE BENEFIT OF A RULING WHETHER, AND UNDER WHAT CIRCUMSTANCES, THE PRACTICE IS LAWFUL UNDER THE FOURTH AMENDMENT.

DNA analysis was first used in a forensic setting in Great Britain in 1986-87, in the same case exonerating an innocent suspect and identifying the guilty one.[2] In November 1987, Tommie Lee Andrews became the first person in the United States convicted of a crime (rape) based on DNA evidence.[3] In the quarter century since, DNA analysis has become one of the most important crime investigation tools ever developed. As this Court has since recognized, "DNA testing has an unparalleled ability both to exonerate the [innocent] and to identify the guilty." *District Attorney's Office v. Osborne*, 557 U.S. ___, 129 S.Ct. 2308, at 2310 (2009). Arrestee DNA has become a valuable application for this technology.

---

[2] The rape murders in 1983 and 1986 of 15-year-old Lynda Mann and 15-year-old Dawn Ashworth in Leicestershire County, England; the exoneration of suspect Richard Buckland; and the identification and conviction of Collin Pitchfork in 1987. For a general account of the investigation, see Wambaugh, *The Blooding* (Random House 1989; Bantam Books 1995).

[3] Bertino, Anthony, *Forensic Science: Fundamentals & Investigations* (2009 Cengage Learning), p. 170; Moss, "DNA – The New Fingerprints," *ABA Journal*, May 1988 issue, p. 66.

The DNA Identification Act of 1994 (42 U.S.C. § 14132) authorized the FBI to operate the Combined DNA Index System, or CODIS, accepting DNA profiles from federal, state and local laboratories meeting certain qualifications. In its early stages, DNA samples only came from persons convicted. The first state to authorize the taking of arrestee DNA samples was Louisiana in 1997. LA Rev. Stat. § 15.609. A 2005 amendment to the federal law (P.L. 109-162, amending 42 U.S.C. § 14132, 14135a), allowed CODIS to accept arrestee DNA profiles from those states which collect and analyze it. Now, at least 27 states and the federal government have adopted arrestee DNA sampling. As of July 2012, CODIS contained nearly 1.2 million arrestee DNA samples, along with 9.8 million offender DNA profiles. See FBI website, CODIS, NDIS Statistics, http://www.fbi.gov/about-us/lab/codis/ndis-statistics.[4]

CODIS also accepts DNA profiles developed from forensic samples (i.e., crime scene evidence, rape exam evidence, etc.), with the purpose of attempting to identify perpetrators of unsolved crimes, with over 441,200 forensic samples as of July 2012, which come from 24 different states, plus from federal sources. Id. Due to the nationwide nature of the system, a state or local agency will often rely on the DNA profiles provided from agencies all over the country. Arrestee

[4] This website citation, and all website citations following, were last viewed on September 11, 2012.

DNA samples have proved their value in solving cases across state lines. The CODIS system has produced over 185,000 hits, assisting in more than 177,500 investigations. Id.

One real life example is the case of *People v. Billy Jene Wilson*, Denver District Court No. 11 CR 20001. On August 21, 2004, the body of Gina Gruenwald was found in Denver, where she had been stabbed twice in the neck. Following investigation no immediate arrest was made, but a DNA sample recovered from her body was analyzed for a profile, and entered into CODIS. In February 2011, Billy Jene Wilson was arrested for felony grand theft in San Francisco. Under California law, an arrestee DNA sample was taken, analyzed, and entered into CODIS. Wilson's DNA profile matched the DNA sample from Gina Gruenwald's body. He was arrested in San Francisco and extradited to Colorado, where he was tried and convicted of felony murder, second degree murder, and attempted sexual assault. See Steffen and Mitchell, "Suspect in 2004 Slaying in Colorado Arrested in California," *Denver Post*, 8/3/2011; Denver District Attorney News Release, "Man Found Guilty in '04 Cold Homicide Case," available online at http://www.denverda.org/News_Release/Releases/2012%20Release/Wilson%20Conviction.pdf.

Law enforcement and crime lab personnel from around the country expend time and resources collecting and analyzing arrestee DNA, then solving crimes like the murder of Gina Gruenwald. The entire basis of that work is challenged by the claim

respondent makes here, and by rulings such as the one made by the Maryland Court of Appeals in this case. The case at bar provides the appropriate vehicle for this Court to provide guidance for law enforcement, crime labs and prosecutors nationwide as to whether this work can continue bringing criminals to justice and safety to the public.

III. THE MARYLAND COURT OF APPEALS RULING THAT ARRESTEE DNA SAMPLING VIOLATES THE FOURTH AMENDMENT IS INCORRECT, AND SHOULD BE REVERSED.

In the case at bar, the Maryland Court of Appeals reviewed the published case law on the topic (see *King*, supra, 425 Md. at 573-593, 42 A.3d at 563-575). It then ruled under the "totality of the circumstances" test, balancing the intrusion on respondent's privacy against the government interests served. The court concluded that the governmental interest of identifying arrested persons, both in terms of who the person is, and also the person's criminal conduct, did not outweigh the intrusion on the privacy interest of the individual occasioned by the warrantless seizure of his DNA by taking a cheek swab sample. *King*, supra, 425 Md. at 594-603, 42 A.3d at 576-581. With all due respect to the majority justices on the Maryland court, this ruling does not properly balance the interests at issue, and should be reversed.

The touchstone of Fourth Amendment search and seizure analysis, which finds its source in the constitutional language, is the reasonableness of the search. Citing the reasonableness of minimally intrusive procedures, courts have permitted a wide variety of routine measurements, observations, and minimal searches respecting persons who are booked as part of a custodial arrest. An arrested subject has a reduced expectation of privacy which permits him or her being photographed, as well as the taking of other identifying measures such as the observation and recording of height, weight, hair color, eye color, and fingerprinting, and disrobing to disclose scars or tattoos. See e.g. *United States v. Robinson*, 414 U.S. 218 (1973) (search of the person incident to custodial arrest); *United States v. Edwards*, 415 U.S. 800 (1974) (same); *United States v. Weir*, 657 F.2d 1005 (8th Cir. 1981) (hair sample on arrest); *Ward v. State*, 903 N.E.2d 946 (Ind. 2009) (same); *People v. Rankins*, 265 N.W.2d 792 (Mich. App. 1978) (same); *People v. McInnis*, 6 Cal.3d 821, at 825-826 (1972) (booking photo); *Schmidt v. City of Bella Villa*, 557 F.3d 564, at 572-574 (8th Cir. 2009) (photograph of tattoo under clothing during booking).

The procedure at issue here should be analyzed in comparison to those traditionally allowed with respect to arrested subjects. The modern buccal swab process for taking a DNA sample represents a minimal intrusion. It involves the collection of epithelial cells from the inner surface of the cheek. The cells are captured with a collection device, which may be a

simple cotton swab, or a plastic device, similar in size and shape to a popsicle stick, which has one surface with specialized paper, fabric, or foam rubber. The collection device is rubbed several times against the inner surface of the cheek. It is no more intrusive and takes less time than brushing one's teeth, or taking a full set of fingerprints. Written instructions from three different agencies (California State Department of Justice, Ohio Department of Rehabilitation and Correction, and the FBI) describing the process can be found on-line:

> http://ag.ca.gov/bfs/pdf/collection_kit.pdf (California Department of Justice, Buccal DNA Collection Kit Instructions)
>
> http://www.drc.ohio.gov/web/drc_policies/documents/52-RCP-05.pdf (Ohio Department of Rehabilitation and Correction, DNA Sample, Instructions for Using Buccal Collection Kit)
>
> http://www.fbi.gov/about-us/lab/dna-nuclear/image/high-resolution-buccal-collection-procedure-poster/view (FBI, High Resolution Buccal Collection Procedure Poster)

Two training videos demonstrating the taking of a buccal swab for a DNA sample (with the collection device in the mouth for less than 10 seconds) can be found online at:

> http://www.youtube.com/watch?v=tFQKYzQZ0yE&feature=related
>
> http://www.youtube.com/watch?v=R4FCz7pQexA&feature=related

Reviewing these materials, it is not surprising that buccal swab DNA sampling has been called "perhaps the least intrusive of all seizures." Epstein, *"Genetic Surveillance" – The Bogeyman Response to Familial DNA Investigations*, 2009 U.Ill. J.L. Tech. & Pol'y 141, at 152 (2009). The Arizona Supreme Court, in *Mario W.*, supra, while ultimately ruling that arrestee DNA samples could not be analyzed and uploaded into a database, conceded that, "The intrusion on an arrestee's privacy interests in the swiping of a swab to obtain buccal cells is not significantly greater than fingerprinting." 281 P.3d at 481. When evaluating the de minimis nature of this procedure, it is not facetious to compare it to a real world, every day example – dental health professionals recommend brushing teeth two or more times per day, for at least two minutes each session.[5]

The procedure at issue here does not even approach the outrageous bodily intrusions prohibited under such cases as *Rochin v. California*, 342 U.S. 165 (1952) (forcible administration of an emetic by way of a stomach tube, to induce vomiting in order to recover narcotics evidence), or *People v. Scott*, 21 Cal.3d 284 (1978) (forcible manipulation of the prostate by digital rectal means to obtain sample for STD testing). The minimal intrusion of a buccal swab – taking less time than fingerprinting or brushing the

[5] See "The Truth About Healthy Teeth: Your Guide to at-home Dental Care," published at http://www.webmd.com/oral-health/healthy-teeth-10/brushing-teeth-mistakes.

teeth, and no more intrusive than the latter – can hardly be considered unreasonable, especially when measured against the significant interests at stake.

The Maryland Court of Appeals majority considered and rejected the analogy between taking a DNA sample and taking fingerprints, in part based on the claim that while the DNA loci used for identification purposes, which under current scientific knowledge have no known biological purpose, the DNA buccal swab "contains within it unarguably much more than a person's identity. . . . [but also] a vast genetic treasure map. . . . " *King v. State*, supra, 425 Md. at 596, 45 A.3d at 577. But the DNA sample is not analyzed for this supposed treasure map, or in any manner that will uncover the "treasure." Rather, forensic DNA analysis looks only at genetic loci (genes) that have no known biological purpose. It is the profile derived from the analysis of these genes that is entered into the CODIS database.

The Maryland statute, like other DNA arrestee sampling statutes, provides strict prohibitions against use of the arrestee's DNA for any purpose other than identification. The Maryland court majority acknowledged, but then discounted, that fact. See 425 Md. at 596, 45 A.3d at 577. It also failed to recognize a simple judicial solution to the use of the DNA sample for purposes other than identification – prohibit other uses if they are improper, but do not prohibit the use of the DNA for identification. The overreaching and unnecessary solution proposed by respondent and the Court of Appeals majority is to prohibit the taking of

the DNA altogether so that it cannot be used for any purpose, throwing out the baby with the bath water.

While the Maryland court majority discounted the analogy between taking a buccal swab and taking fingerprints, their analysis ignores the reality of both items (fingerprints and cheek swabbing) and the processes used to sample each. The majority observed, correctly, that fingerprints are physical sets of ridges on the skin of a person's fingers. 425 Md. at 595, 42 A.3d at 576. However, fingerprints cannot be used for identification purposes simply by looking at a person's fingers.

The traditional method of taking a fingerprint sample involves the examiner inking the tips of each of the subject's fingers, then holding each finger, one at a time, and rolling it across the surface of a white card, to leave an ink image of the finger ridge impressions. Videos showing how fingerprints are rolled for ink prints can be viewed online at:

http://www.youtube.com/watch?v=d7N-4UNAzsw

http://www.youtube.com/watch?v=Yh8hXrPO0k4&feature=related

Modern technology, adopted by some agencies, allows the examiner to forego the use of ink when using an electronic device with a glass surface, from which the fingerprints are scanned electronically. Even this technology, however, requires the examiner to hold and manipulate the subject's hands and

fingers in the same manner as the taking of inked prints:

> http://www.youtube.com/watch?v=YX68sxEyjYc&feature=related

Even with the inkless, electronic scan method, the subject's hands and each finger are handled, controlled and manipulated by the officer taking the prints, taking approximately one minute – more time than taking a buccal swab (as illustrated by the websites referenced above). Using ink to roll fingerprints onto a white fingerprint card, the process takes even longer.

In short, the Maryland court majority ignored the reality that fingerprinting involves an equal or greater intrusion on the person, in terms of time, and handling or controlling parts of the body of the subject, than does taking a buccal swab. And it conflated the invasion of privacy into a vast treasure hunt into all of the subject's DNA, a treasure hunt that does not take place.

The Maryland court majority also relied heavily on the point that a DNA sample may be used for crime investigation purposes (and indeed was so used in respondent's case). 425 Md. at 595, 598-599; 42 A.3d at 576, 578-579. But the same is true for fingerprint cards. The FBI operates the Integrated Automated Fingerprint Identification System, or IAFIS, which stores not only inked or electronically recorded fingerprints from known subjects, but also is used for the search and comparison of latent (i.e., crime scene)

fingerprints to the repository of known fingerprints. The FBI plainly states that part of the function of IAFIS is to "solve and prevent crime." See FBI website, CJIS, Fingerprints & Other Biometrics, IAFIS, available online at: http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis. Latent crime scene prints entered into IAFIS are subject to further analysis and pattern matching, via computer, just as CODIS does for DNA. See Kaye, "A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases," 15 U.PA.J.Const.L. ___, at ___ (2012), also published as Penn State Univ. Law School, Legal Studies Research Paper No. 7-2012, at p. 6. Hits of crime scene prints matching known subject prints in IAFIS come to approximately 50,000 per year. Id.

The Maryland court's distinction between the taking and analysis of fingerprints on the one hand, and DNA samples on the other, is not convincing. Indeed, the Maryland majority recognized the conflict between allowing fingerprinting at booking, and disallowing DNA sampling at booking, when it noted that "neither of these techniques [photographing and fingerprinting at booking] has undergone definitive Fourth Amendment scrutiny." 425 Md. at 596, 42 A.3d at 577. The fact that the Maryland court majority cannot convincingly articulate a theoretical underpinning for prohibiting DNA arrestee sampling (and its use in a searchable database) that distinguishes the practice from taking photographs and fingerprints at booking (which are also used for investigation purposes), demonstrates that the Maryland

Court of Appeals has strayed off course in assigning the weight to be given to Fourth Amendment privacy concerns with respect to DNA sampling. Following the path taken by the Maryland court would logically lead to disallowing booking photographs and fingerprints for investigation purposes.[6]

Weighed against the slight intrusion of a cheek swab on the arrested subject's privacy interest, the government's interest is substantial. As noted above, the CODIS system has produced over 185,000 hits, assisting in more than 177,500 investigations. Turning that bare statistic into real cases with real victims, we find such cases as the Denver murder of Gina Gruenwald by Billy Jene Wilson, solved by the arrest DNA sample taken in San Francisco years later, as described in section II above. We also find many other cases, including:

- *People v. Donald Carter*, Sacramento Superior Court No. 09F05363 – In May 1989, 80 year old Sophia McAllister was found murdered in her Sacramento home. A DNA sample from the crime was entered into CODIS, without immediate results. In 2009, Donald Carter was arrested on felony drug charges, and a DNA sample was taken. When entered into CODIS, Carter's DNA matched the

[6] The California Court of Appeal in *People v. Buza*, supra, spent even more time questioning the basis for allowing routine fingerprinting at arrest. See 197 Cal.App.4th at 1445.

forensic sample from the McAllister murder. The case proceeded to trial, and Carter was convicted of rape and murder. See *Haskell v. Harris*, supra, 669 F.3d at 1064; *Sacramento Bee 911 Blog*, "Man Convicted of 1989 Rape-Murder of Sacramento Woman," (9/27/2010); Attorney General Press Release, "Brown Releases Study Showing DNA Collected at Arrests Helps Solve Murders, Rapes and Other Violent Crimes," (6/16/2010), published online at http://oag.ca.gov/news/press_release?id=1936;

- *People v. Rogelio Zaragoza*, Sonoma Superior Court Nos. SCR 572377 and SCR 565937 – In 2006, Rogelio Zaragoza and two other men picked up a woman in Santa Rosa, took her to a vineyard area, and raped her. There was no immediate arrest, but a forensic DNA sample was recovered from the victim, and uploaded into CODIS. In 2009, Rogelio Zaragoza and his brother kidnapped a woman from a Santa Rosa street at knife point, and drove her away, leading to a high speed pursuit by California Highway Patrol officers. The brothers got out of the car and fled on foot, but were apprehended. A DNA sample taken from Rogelio Zaragoza after the 2009 arrest was entered into the CODIS database, and matched the 2006 assault. He was convicted of the 2006 rape at jury trial, and has been sentenced. See *Santa Rosa Press Democrat*, "Brothers Face Trial in Santa Rosa

Abduction, Rape Case," (1/8/2010), published online at http://www.pressdemocrat.com/article/20100108/ARTICLES/100109559?p=1&tc=pg; *Santa Rosa Press Democrat*, "Santa Rosa Man Gets Life for Series of Rapes," (9/29/2010), published online at http://www.pressdemocrat.com/article/20100929/ARTICLES/100929399

Of course, also included among the cases solved by arrestee DNA samples, we find the respondent, a rapist caught when his DNA sample was taken after his unrelated arrest for another assault.

These are but a few of the cases where arrestee DNA sampling, and CODIS, have brought offenders to justice, brought closure to victims and their families, and protected the public by preventing future crimes.

Weighed in the balance against the slight intrusion involved in the simple taking of a cheek swab, this governmental interest is weighty and substantial. Like photography and fingerprinting before it, DNA sampling at arrest has taken its place as a brief and minor imposition on the arrested subject that provides significant benefits to society. With no more invasion of the person than is involved with brushing the teeth, murderers, serial rapists and other criminals are brought to justice. The Maryland Court of

Appeals, in ruling for respondent, erroneously balanced the constitutional interests at stake.

CONCLUSION

Based on the foregoing, as well as the reasons put forth in the petition for certiorari, amicus curiae respectfully requests that this Court grant certiorari, and reverse the decision of the Maryland Court of Appeals.

DATED: September 17, 2012

Respectfully submitted,

ALBERT C. LOCHER
Counsel of Record
Attorney for Amicus Curiae
National District
Attorneys Association