



LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
BUREAU OF PROSECUTION SUPPORT OPERATIONS•APPELLATE DIVISION

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September 16, 2011

The Honorable Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

RE: *People v. Mark Buza*

California Supreme Court, Case No. S196200
First Appellate District, Division Two Case No. A125542
San Francisco Superior Court, Case No. 207818

To The Honorable Chief Justice Tani Cantil-Sakauye and the Honorable Associate Justices of the California Supreme Court:

The District Attorney of Los Angeles County respectfully submits this amicus curiae letter in support of the petition for review filed by the Attorney General in the above-entitled case. (Cal.Rules of Court, rule 8.500.) The District Attorney, representing the most populous county in the state and the largest prosecution office in California, is aware that this erroneous decision has had a detrimental effect on the collection of samples from arrestees and could invalidate those samples as being the product of an unlawful search.¹ The Court of Appeal decision in this matter, which conflicts with decisions in Federal and other state courts, merits immediate consideration by this Court.

¹ The most recent statistics published by the California Department of Justice indicates that 112,264 adults were arrested for felonies in Los Angeles County in 2009. The decision below places into doubt the ongoing collection of thousands of samples and challenges the validity of hundreds of thousands of investigations and potential prosecutions. (http://stats.doj.ca.gov/cjsc_stats/prof09/19/3B.htm, [as of September 12, 2011].)

As demonstrated below, the DNA collected from the person arrested for a felony is merely another biometric identifier, like a photographic mugshot, fingerprint, height, weight, eye color, hair color, or a photograph of tattoos, that is collected as part of an arrestee's booking process. Other biometric identifiers, especially photographs and prints, have been incorporated for years into a collection or databases. Mugshots 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* (Ind. 1900) 57 N.E. 541.) 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, and was done in this case, he could lawfully do so.

(*Id.* at 542.)

Even mug shots 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* (1972) 6 Cal.3d 821, 825-826.) For years, fingerprints have been gathered to identify an arrested suspect but the ability to identify an unknown perpetrator of a crime by comparing a latent print lifted from a crime scene to a collection of fingerprints only became possible with the creation of the California Identification System ("Cal ID") in the 1980s. Courts have held that fingerprints taken at booking after a felony arrest which are later challenged as illegally seized can still be used to connect defendants to other offenses. (*People v. Clark* (1973) 30 Cal App 3d 549, 558-559.) [An exception to this rule is found in a 'dragnet' case where all young African-American young men were detained and printed in Meridian, Mississippi in a clearly illegal sweep conducted just to obtain fingerprints. (*Davis v. Mississippi* (1969) 394 U.S. 721, 727-728 [89 S Ct 1394, 22 L Ed 2d 676].)]

As discussed below, courts have traditionally recognized the need to ascertain the true identity of an arrestee. While not specifically establishing a "true identity" exception, 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* (1983) 462 U.S. 640, 647 [103 S.Ct. 2605, 77 L.Ed 2d 65].) The "true identity" exception applies to DNA genotyping as much as it does to fingerprinting or photographs. The Fourth Amendment did not create a constitutional straightjacket that allows two biometric identifiers but rejects the most reliable.

A Felony Arrestee's Reduced Expectation of Privacy

The reduced expectation of privacy upon being arrested for a felony has been noted by numerous courts including *Jones v. Murray* (4th Cir. 1992) 962 F.2d 302, 306 which specifically addressed the reduced expectation of privacy by arrestees.

United States v. Kincade (9th Cir. 2004) 379 F.3d 813, 837 and *Groceman v. United States DOJ* (5th Cir. 2004) 354 F.3d 411, 413 addressed DNA sampling upon conviction and included arrestees in their discussion.

The Fourth Circuit maintains, as we did in *Velasquez*, that inmates do not have a reasonable expectation of privacy against DNA collections similar to those described in the DNA Act. *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992) ("While we do not accept even this small level of intrusion for free persons without Fourth Amendment constraint . . . the same protections do not hold true for those lawfully confined to the custody of the state. As with fingerprinting, therefore, we find that the Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken from incarcerated felons for the purpose of identifying them.") (Citations omitted.).

(*Groceman v. United States DOJ* (5th Cir. 2004) 354 F.3d411, 413.)

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

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." (*Groceman v. U.S. Dept. of Justice* (5th Cir. 2004) 354 F.3d 411, 413-414.) 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.’ 59 F.3d at 1560; see also *Groceman* [*supra*,] 354 F.3d at 413-4]14; *Jones* [*v. Murray* (4th Cir. 1992) 962 F.2d [302,] 306-[3]07.” (*Kincade*, *supra*, 379 F.3d at p. 837, italics omitted.)

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

In *People v. Travis* (2006) 139 Cal. App. 4th 1271, 1284, the Court of Appeal’s discussion of the reduced expectation of privacy in collecting DNA samples from convicted persons recognized the extent normal booking procedures for every felony arrest results in obtaining from arrestees necessarily intrusive identifying information.

“...The nature of confinement necessarily results in a significant reduction in the expectation of privacy.” (Citation.) “The reduction in a convicted person’s reasonable expectation of privacy specifically extends to that person’s identity. Indeed, not only persons convicted of crimes, but also those merely suspected of crimes, routinely are required to undergo fingerprinting for identification purposes. As to convicted persons, there is no question but that the state’s interest extends to maintaining a permanent record of identity to be used as an aid in solving past and future crimes, and this interest overcomes any privacy rights the individual might retain. ‘This becomes readily apparent when we consider the universal approbation of “booking” procedures that are followed for every suspect arrested for a felony, whether or not the proof of a particular suspect’s crime will involve the use of fingerprint identification. ...’ [Citation.]” (*Ibid.*) We concluded: “‘The Fourth Amendment does not protect all subjective expectation of privacy, but only those that society recognizes as “legitimate.”’ [Citation.]

(*Ibid*)

It is clearly reasonable for the government to ascertain 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 rape and has a DNA sample matched to the profile of an unknown murder suspect from 2002 may find his eligibility for release cancelled. This was recently recognized by the court in *United States v. Mitchell* (3d Cir. July 25, 2011, No. 09-4718) 2011 U.S. App. LEXIS 15272, which upheld the gathering of DNA samples from federal arrestees.

Moreover, there 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.)."

Haskell v. Brown, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009). 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").

(*Id.* at p. *79.)

The Court below clearly erred in rejecting a minimally intrusive method for obtaining biometric data of arrested felons. The Court below phrased the question of DNA sampling as follows:

Under the applicable totality of the circumstances test of reasonableness, we must balance the invasion of appellant's interest in privacy against the government's interest in seizing biometric material from his body without a warrant supported by probable cause and based solely upon appellant's status as a mere arrestee.

(*People v. Buza* (2011) 197 Cal App.4th 1424, 1459.)

The felony arrestee can be photographed, printed, asked to remove clothing for examination and photography of tattoos, scars and marks. His height, weight and hair color are recorded along with his name, address, social security number, driver's license information and employment data. Clearly, any lingering expectations of privacy he may harbor would not be reasonable and requesting a cheek swab adds a significant biometric factor to be recorded.

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

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technology converts a fingerprint into a highly detailed and exact electronic image that a computer can interpret and compare to other images.

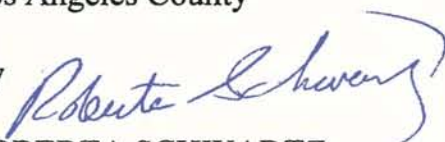
(Note, Finger Imaging: A 21st Century Solution to Welfare Fraud at our Fingertips (1995)
22 Fordham Urb. L.J., 1333-1334.)

Since 1900 when the Sheriff's Rogues Gallery was first accepted as a database of biometric data (the book of arrestees' photos), the courts have harmonized technology and the needs of law enforcement to identify those arrested with the protections of the Fourth Amendment. The decision below rejects a balanced approach out of fear of possible and highly speculative potential future abuses that are clearly prohibited by both state and federal law.

Respectfully submitted,

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By



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C: Declaration of Service attached

DECLARATION OF SERVICE BY MAIL

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the **Letter** by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed as follows:

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San Francisco, CA 94103

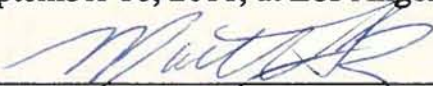
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Executed on September 16, 2011, at Los Angeles California



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