IN THE ARIZONA SUPREME COURT

MARIO W. et al., Petitioners, v. HON. THOMAS KAIPIO et al., Respondents, and STATE OF ARIZONA, Real Party in Interest.	Supreme Court No. CV-11-0344-PR Court of Appeals No. 1 CA-SA 11-0016 consolidated with 1 CA-SA 11-0020 1 CA-SA 11-0025 1 CA-SA 11-0031 1 CA-SA 11-0032 1 CA-SA 11-0042 1 CA-SA 11-0043 Department D

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

¶1 *Amicus curiae* Arizona Attorneys for Criminal Justice ("AACJ") offers this brief in support of the juveniles' petition for review, and AACJ respectfully urges the Court to grant the petition because it raises an important state and federal constitutional question of personal privacy in one's own deoxyribonucleic acid (DNA). This case involves relatively new statutes, A.R.S. §§8-238 and 13-610(K)-(L) (Rev. 2011),[1] adopted in 2008, affecting all juveniles and adults charged with – but not convicted of – certain enumerated crimes. Collection of DNA by the government affects one of the most fundamental rights of an ordered society: the right to privacy of one's genetic makeup. The majority and concurring opinions of Judges Gemmill and Orozco ("the majority") abandoned long-standing, entrenched search law, invalidating the presumption of innocence that everyone charged with a crime maintains until conviction. AACJ urges this Court to reject the ill-conceived decision below and affirm that an independent magistrate must find probable cause for a search warrant before a suspect's privacy may be invaded.

¶2 Prior to conviction or adjudication, police have always been able to collect DNA from suspects with a properly-obtained search warrant. §§8-238 and

[1] These provisions of §13-610 have not been changed substantially since 2008. All statutory references are to the most current version of the statute.

13-610(K)-(L),[2] however, no longer require search warrants before collecting arrestees' DNA and adding their genetic profiles to the state and federal databases, and therefore police need not demonstrate any legitimate or compelling purpose for obtaining those DNA samples in the first place. This is nothing short of a legislative scheme for issuing general warrants, the principal evil that the Fourth Amendment was designed to repel. That this right to be free from such general searches and seizures is fundamental to the fabric of the American sense of liberty cannot be questioned; John Adams, listening to the speech of James Otis denouncing the Writs of Assistance in 1761, later wrote that the renewal of the Writs of Assistance under newly-crowned King George III was "the spark in which originated the American Revolution."[3] This Court should strike down this legislative encroachment against basic American freedoms.

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[2] Although the petition for review in this case challenges only the juvenile statute, §13-610(K)-(L) similarly govern those charged as adults, and therefore AACJ urges this Court to address both statutes' constitutionality. This Court adopted Rules 7.3 and 7.5, Ariz.R.Crim.P., and Rules 23(B)(7) and (G) and 28(C)(8), Ariz.R.P.Juv.Ct., to effectuate the statutes; AACJ asks that those Rules be held unconstitutional.

[3] Charles Francis Adams and John Adams, *The Works of John Adams, Second President of the United States: With a Life of the Author*. Volume 1. Little, Brown (1856), p.59. *See also* http://en.wikipedia.org/wiki/Fourth_Amendment_to_the_United_States_Constitution#cite_ref-8 (last accessed December 13, 2011).

REASONS THE COURT SHOULD GRANT THE PETITION

A. This Court Should Find that A.R.S. §§8-238 and 13-610(K)-(L) unconstitutionally infringe both on the right to be free from unreasonable searches and seizures under the Fourth Amendment and on the right to privacy under the United States and Arizona Constitutions

¶3 The Fourth Amendment to the United States Constitution is unambiguous:

> 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 person or things to be seized.

The Arizona Constitution provides that "no person shall be disturbed in his private affairs or his home invaded, without authority of the law." Ariz. Const. art. II, §8. In general, searches and seizures conducted without a search warrant are *per se* unreasonable, subject to a few well-established, "carefully drawn" exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). Obtaining and analyzing DNA is a search and seizure under the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 618 (1989) ("the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches").

¶4 The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, §8 of the Arizona Constitution

provide a substantive right to privacy.[4] Since A.R.S. §§8-238 and 13-610(K)-(L) involve government intrusion into private and personal genetic information of arrestees by acquiring, analyzing, and storing their biological samples and DNA information, the intrusion must be supported by a legitimate governmental objective that outweighs the arrestees' privacy interests and the intrusion must be narrowly tailored to meet that legitimate objective.

¶5 §13-610(I) allows these DNA samples to be taken for the following purposes: (1) law enforcement identification purposes; (2) proceedings in criminal prosecutions or juvenile adjudications; and (3) proceedings under title 36, chapter 37. None of these objectives is sufficient to defeat arrestees' privacy interests. The majority, however, focused entirely on the benefits claimed (but not proven) by the government in collecting DNA samples and wholly disregards Fourth Amendment jurisprudence concerning what showing the government must make before it is permitted to make an intrusive bodily search for evidence.

¶6 First, regarding identification[5] purposes, the State raised no issue

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[4] Since *Griswold v. Connecticut*, 381 U.S. 479 (1965), this has been recognized as a penumbral right, often referenced as substantive due process analysis.

[5] "Identification" has specific meaning in case law. It does not mean "to solve a mystery about who perpetrated a crime," rather it specifically pertains to management of jail populations and allowing authorities to identify who is in their custody. That the government can keep the fingerprints and later use them in crime-solving is an incidental benefit to the government. *See, e.g., United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932). *But see People v. Buza*, 129 Cal.Rptr.3d 753 (Cal.App. 2011) (review granted), discussed *infra* at ¶18 (fingerprint law preceded, not tested under, Fourth Amendment case law).

about needing DNA to identify the juveniles in this or any other case. *Mario W.*, at ¶76 (Norris, J., dissenting). Taking DNA for identification purposes is entirely impractical because DNA samples take several days to analyze (if prioritized and rushed). DNA analysis must be done in a sterile laboratory and is prohibitively expensive compared to photographing and fingerprinting. The significant backlog of DNA samples to process is well-documented in Arizona, however, and juvenile delinquency petitions are tried within 45 or 60 days. Ariz.R.P.Juv.Ct. 29(b)(1)-(2). Thus, DNA is of no functional assistance in distinguishing between persons in custody. Further, where arrestees are not held in custody, there is no need to distinguish them for purposes of managing the detention population. Moreover, case law has recognized that DNA samples are not similar to fingerprints for purposes of constitutional analysis. *Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005).

¶7 Regarding the second purpose related to "a criminal prosecution," DNA has unquestionably become a very useful tool not only for identifying culprits of crime but also for exonerating the wrongfully convicted. Countless criminal acts, particularly homicide, rape, and burglary, go unpunished because the only evidence that connects a particular person to the commission of the crime is a biological sample (such as blood) that is left behind at the crime scene. If every citizen's DNA was collected and entered into databases, then police could identify

the perpetrators more readily. If there truly was no privacy interest in one's DNA, then there would be no reason to restrict DNA collection to arrestees for certain offenses; rather, the State would be able to catalog DNA profiles for all Americans. For good reason, however, society considers suspicionless collection of biological samples as an invasion of personal privacy. Therefore, police must seek a search warrant from a neutral magistrate if they wish to collect DNA from a particular person.[6]

¶8 Particularity for obtaining a warrant requires that several pieces of information be provided to the magistrate. First, police must have collected a biological sample from the crime scene that provided sufficient DNA for creating a genetic profile for the culprit. Second, there must be a reasonable probability that the sample was left by the culprit (and not innocent persons who touched the same objects). Finally, the issuing magistrate must find probable cause connecting a particular person to the crime.

¶9 Police require probable cause to obtain both a search warrant and an arrest warrant, and probable cause is determined by the totality of the circumstances with regard to each. In order to obtain an arrest warrant, police may rely on the information they already have about a suspect. But a search warrant is inherently different from an arrest warrant in that an arrest warrant permits only a

[6] The police cannot conduct warrantless general searches of entire classes of people for investigative purposes. *E.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

seizure (and limited search incident to arrest) whereas obtaining a search warrant requires police to seek permission to intrude upon a person's body, abode, personal property, or other areas that society has determined are private.

¶10 Abundant limitations exist on searches of persons or property based solely on an arrest. For example, police can search an automobile occupant when arresting him on a warrant, but cannot search his entire vehicle as a search incident to arrest. *Arizona v. Gant*, 556 U.S. 332 (2009). If police arrest a suspect outside of his residence, they cannot enter his home to conduct a protective sweep. *State v. Fisher*, 226 Ariz. 563 (2011). Allowing police to collect DNA from arrestees merely because there is probable cause to believe that person committed a particular offense is no less forbidden.

¶11 All 50 states and the federal government currently authorize DNA profiling of convicted offenders. Arizona's policy of collecting DNA from adjudicated juveniles was challenged in *Maricopa County Juvenile Action Numbers, JV-512600 and JV-512797*, 187 Ariz. 419 (App. 1996). Recognizing that a compelled intrusion into the body is a Fourth Amendment search, that normally is unreasonable unless accompanied by a judicial warrant issued only after finding of probable cause, the court distinguished a post-adjudication DNA search as different because a higher standard than probable cause is already met:

> the procedural safeguards required by [these statutes] are more stringent than those required for the issuance of a warrant based upon

> a finding of probable cause. Here, the order to draw blood follows either an adjudication of delinquency, which is based on a determination beyond a reasonable doubt, or a constitutionally safeguarded admission by a juvenile that an enumerated sexual offense was committed. Further, it applies **only after** the juvenile is incarcerated, committed to a secure facility, or placed on probation. **In effect, the standard required by the statutes is beyond a reasonable doubt, which is a substantially greater burden than the finding of probable cause required for a search warrant.**

187 Ariz. at 423 (emphasis added).

¶12 §§8-238 and 13-610(K)-(L) are targeted solely at arrestees, not at persons who have been convicted or adjudicated beyond a reasonable doubt of any offense. None of the procedural safeguards identified in *JV-512600* exist when a mere arrestee is required to give a DNA sample without a search warrant or any other individualized showing. Without these procedural safeguards, a search compelled by these statutes unconstitutionally violates the right to be free from unreasonable searches and seizures as well as the state constitutional right to privacy.

¶13 "Reasonableness" of the search is determined by weighing the governmental interest against a person's right to privacy. Statutes compelling persons convicted or adjudicated of felonies to provide a DNA sample without a probable cause warrant have been upheld only because convicts have a reduced expectation of privacy. "Once a person is convicted of certain felonies his identity has become a matter of state interest and he has lost any legitimate expectation of

privacy in the identifying information derived from the blood sampling." *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995). The government purposes that outweigh the privacy interests of convicted felons that have been upheld as constitutional include: deterring recidivism, *Roe v. Marcotte*, 193 F.3d 72, 78-79 (2d Cir. 1999); the "public's interest in effective law enforcement, crime prevention, and the identification and apprehension of those who commit [certain] offenses," *JV-512600*, 187 Ariz. at 424; and "the goals of rehabilitation and protection of society," *United States v. Knights*, 534 U.S. 112, 115-16 (2001). All of these decisions relied on the status of the offenders as convicted felons, parolees or probationers to find the DNA search constitutional.

¶14 Arrestees, however, do not have the reduced status of convicted felons. *Rise*, 59 F.3d at 1560 (noting that convicted felons "do not have the same expectation of privacy in their identifying genetic material that free persons and mere arrestees have"). The Ninth Circuit has recently upheld the distinction between detainees pre-trial and post-conviction pertaining to searches for DNA. *Friedman v. Boucher*, 580 F.3d 847, 856-58 (9th Cir. 2009).

¶15 The Minnesota Court of Appeals found that a statute very similar to §8-238 was unconstitutional primarily because "probable cause to support a criminal charge is not the same thing as probable cause to issue a search warrant." *In re Welfare of C.T.L.*, 722 N.W.2d 484, 490 (Minn.App. 2006). The court

focused on the fact that the statute allowed DNA searches without "even consider[ing] whether the biological specimen to be taken is related in any way to the charged crime or to any other criminal activity." *Id.* at 491. Yet, the court concluded that because the statute calls for automatic destruction of a biological specimen and removal of the DNA information from the state index system, plainly even the legislature had recognized that the privacy interests of someone not convicted outweigh the state's interest in gathering and storing DNA samples. *Id.* at 491-92.

¶16 The same argument pertains to the Arizona statutes at issue. §13-610(M) allows a person subject to this statute to petition the superior court to order his DNA profile and sample be expunged from the Arizona DNA identification system[7] if (1) the criminal charges are not filed within the statute of limitations, (2) the criminal charges are dismissed, or (3) the person is acquitted at trial. This section suggests that the legislature decided that the privacy interests of a person who is arrested for or charged with certain crimes, but later exonerated, outweighs the state's interest in having such biological information. Consequently, as in *C.T.L.*, there is no foundation to presume that the privacy interests of arrestees charged with particular offenses who are awaiting trial are

[7] Unlike the Minnesota statute, §13-610(M) does not provide for automatic expungement, rather, the burden is on the acquitted person to apply. Furthermore, Arizona cannot expunge the profile from the federal database.

any less substantial than those of persons who are charged but are later acquitted or have their charges dismissed.

¶17 Recently, in *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (en banc), the Third Circuit decided by a vote of eight to six that the federal statute permitting DNA collection from arrestees is constitutionally permissible. The majority reasoned that the government's use of the DNA sample was merely to create a profile, akin to a genetic fingerprint, and that the reduced privacy interests for arrestees is no different than that for those convicted of crimes or on supervised release after convictions. *Id.* at 409-12. Judge Rendell's dissent points out that the majority – as did the *Mario W.* majority – neglects the rights of arrestees to the presumption of innocence and that the event that properly results in the loss of this particular privacy right is conviction. *Id.* at 421-22 (Rendell, J., dissenting). Moreover, the identification that the government seeks with the DNA profile is not to ascertain the identity of the arrestee, but to ascertain the identity of culprits of other unsolved crimes. *Id.* at 422-24. Judge Rendell drives home the fact that "a finding of probable cause for one crime [is not] sufficient justification to engage in warrantless searches of arrestees' or pretrial detainees' homes for evidence of other crimes." *Id.* at 427. The dissent concludes that the government's crime-solving interest, while great, is not so great as to deprive arrestees of their reasonable expectation of privacy. *Id.* at 429.

¶18 The California Court of Appeal found the majority opinion in *Mitchell* unpersuasive in *People v. Buza*, 129 Cal.Rptr.3d 753 (Cal.App. 2011) (review granted). *Buza* notes the essential legal distinction between fingerprints and DNA is that "'the great expansion in fingerprinting came before the modern area of Fourth Amendment jurisprudence ushered in by *Katz v. United States* [citation omitted], it proceeded unchecked by any judicial balancing against the personal right to privacy.'" 129 Cal.Rptr.3d at 770 (quoting *United States v. Kincade*, 379 F.3d 813, 874 (9th Cir. 2004) (Kozinski, J., dissenting)); *see also Mario W.*, ¶72 (Norris, J., dissenting). Because courts universally agree that people have a reasonable expectation of privacy in their DNA, "the fact that fingerprinting became routine without being subjected to analysis under the Fourth Amendment is no reason to use it as the basis of a conclusion that DNA testing survives that analysis." *Id.* The court also pointed out, as did Judge Rendell in *Mitchell*, that courts which have upheld the search as part of standard identification procedures "utterly conflate the concepts of identity verification and criminal investigation." *Id.* at 767. Responding to the claim that DNA is an effective crime-solving tool, the court concluded that "the effectiveness of a crime fighting technology does not render it constitutional." *Id.* at 783. *Buza*'s reasoning is the most compelling.

¶19 Arizona's right to privacy additionally protects against suspicionless

DNA searches. "Arizona's protection of privacy is ... substantially different in wording from the counterpart federal fourth amendment to the U.S. Constitution." John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz.St.L.J. 1, 82 (1988). Indeed, rather than adopt the Fourth Amendment, the citizens of Arizona adopted Washington's constitutional privacy provision. *See Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 277 (App. 1997) ("Arizona's right to privacy was taken verbatim from the Washington constitution...."). Thus, Washington cases interpreting their privacy provision are persuasive authority here. *Schultz v. City of Phoenix*, 18 Ariz. 35, 42 (1916) (When clauses in the Washington Constitution are "very much like the same provisions" in our constitution, "we think the law announced by [the Washington Supreme Court] is very persuasive."); *Hart*, 190 Ariz. at 277-78. Article II, §8 is "specific in preserving the sanctity of homes *and in creating a right to privacy*." *State v. Bolt*, 142 Ariz. 260, 264-65 (1984) (emphasis added). In contrast, the Fourth Amendment does not include a specific "right to privacy" or specific protection of a person's "private affairs." Last year, the Washington Supreme Court held that a court order to swab a defendant for DNA, absent probable cause for a search warrant, violates both the Fourth Amendment and article I, §7 of the Washington Constitution. In *State v. Garcia-Salgado*, 240 P.3d 153 (Wash. 2010), the court did not differentiate between the Fourth Amendment and article I, §7 in ruling that the DNA swab squarely violated

the probable cause requirement for searches and seizures; but it is implicit in the opinion that the court independently found the search to violate the state constitutional right to privacy. This Court should likewise find the state right to privacy in Article II, §8 separately protects arrestees from this kind of search for arrestees' DNA.

¶20 In *Mario W.*, at ¶¶22-23, Judge Gemmill explicitly relied upon the flawed reasoning in *United States v. Pool*, 645 F.Supp.2d 903 (E.D. Cal. 2009), where the court determined that collection of DNA is no different than various other conditions of pre-trial release. This reasoning is mistaken because release conditions must be reasonably related to "1. Assuring the appearance of the accused; 2. Protecting against the intimidation of witnesses; 3. Protecting the safety of the victim, any other person or the community." A.R.S. §13-3961(B). As shown by the release conditions and their purposes listed in A.R.S. §13-3967; providing a DNA sample does not address the same concerns as conditions of release.

¶21 As Judge Norris pointed out in her dissent, A.R.S. §§8-238 and 13-610(K)(L) serve only one purpose: to "contribute to the downward ratchet of privacy expectations." *Mario W.*, at ¶81. The issue of identification "ignores what is really going on here;" *Id.* ¶73; this statute is an end-run around the requirement that police may conduct searches only after a magistrate finds probable cause to issue a search warrant. Judge Norris correctly placed the burden on the State "to

justify why it is entitled to invade the reasonable expectation of privacy the juveniles have in their DNA." *Id.* ¶57. This Court should accept review of the juveniles' petition to affirm that the "watershed event" is conviction or adjudication, not mere arrest. *See id.* ¶64. In reversing the Court of Appeals' erroneous holding, this Court should protect the right of privacy against general rummaging for evidence.

CONCLUSION

¶22 AACJ respectfully requests this Court to grant the juveniles' petition for review and find that A.R.S. §§ 8-238 and 13-610(K)-(L), as well as the rules implementing the statutes, violate the United States and Arizona Constitutions.

DATED: December 13, 2011.

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CERTIFICATE OF SERVICE

The undersigned has filed and served Brief of *Amicus Curiae* Arizona Attorneys for Criminal Justice in Support of Petition for Review this 13th day of December, 2011, as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Criminal Procedure 31.25(b)(1) and 31.19(c), I certify that the foregoing Brief of *Amicus Curiae* Arizona Attorneys for Criminal Justice in Support of Petition for Review uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains 3,496 words.

Dated this 13th day of December, 2011.

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