Review granted in People v. Buza – Whether California's DNA collection law violates the U.S. or Cal. Constitution

On February 18, the California Supreme Court granted review in *People v. Buza,* in which the Court of Appeal held that a California law requiring the collection of DNA from every person arrested for a felony violates Article I, section 13 of the California Constitution. Already pending before SCOCA is *People v. Lowe*, in which another Court of Appeal decision reached the opposite conclusion: that California's DNA collection scheme did not violate the Fourth Amendment of the U.S. Constitution.

The opinions in *Lowe* and *Buza* were both issued after earlier California decisions were vacated in the wake of the U.S. Supreme Court's decision in *Maryland v. King*, in which a five-Justice majority upheld a Maryland law allowing for the collection of DNA from certain felony arrestees. The Court's central disagreement in *King* concerned the purpose for which Maryland was collecting arrestees' DNA. The majority viewed the collection as being primarily motivated by a desire to accurately identify arrestees, making it analogous to the uncontroversial practice of taking fingerprints during booking. To the dissenting justices this justification "strained credulity," and the dissenters argued that the statute's purpose and practical effect was to potentially implicate arrestees in past or future crimes, rendering the DNA collection an unconstitutional suspicionless search.

In *Lowe*, the court found that, like Maryland, California collects DNA primarily to identify arrestees, though it also uses it as an investigative tool. In contrast, the *Buza* court found that the primary purpose and effect of the DNA collection is investigation, not identification.

The issue in *Lowe* is whether, for Fourth Amendment purposes, California's DNA collection law is materially distinguishable from Maryland's. Unlike Maryland's law, California's law provides that: (1) DNA must be collected from all felony arrestees,

not just those arrested for certain "serious" crimes; (2) the collected DNA may be analyzed before a judicial officer has determined there is probable cause to believe the arrestee has committed a crime; (3) it is neither automatic nor guaranteed that an arrestee will have his DNA profile removed from the database if the arrestee is ultimately not convicted of a crime; and (4) arrestees' DNA may be used for "familial DNA searches," a technique which may implicate a close biological relative of a donor. The *Lowe* court found that these differences were not enough to change the Fourth Amendment analysis, a view shared by a unanimous Ninth Circuit *en banc* panel in *Haskell v. Harris*.

The *Buza* court disagreed, though it based its holding on the California Constitution, not the Fourth Amendment. Because *Buza* invalidated California's DNA collection law for violating the California Constitution, it presents the separate issue of whether the California Constitution provides broader protection than the Fourth Amendment in this area. The text of Article I, section 13 is materially identical to that of the Fourth Amendment, a circumstance that usually leads courts to refuse to read the former more broadly than the latter. The *Buza* court, however, believed that there were several compelling reasons to diverge from the general rule in this instance. The court found it significant that: (1) California has a historical tradition of imposing a more exacting standard than the Fourth Amendment with regard to searches of arrestees; (2) the *King* majority "deviated sharply" from prior Fourth Amendment decisions restricting suspicionless searches of arrestees; (3) *King* drew support from only five justices; and (4) following *King* would run counter to SCOCA decisions applying a "higher standard of reasonableness" under Article I, section 13.

Because review in *Lowe* is limited to whether California's DNA law violates the Fourth Amendment, an issue which would require the court to apply *King*, granting review in *Buza* has given SCOCA additional flexibility in assessing the DNA law's legality. If the court is inclined to invalidate the law, *Buza* gives it a vehicle to do so without having to decide whether California's DNA collection law is distinguishable from the one at issue in *King*. Striking down the law under the California Constitution rather than the Fourth Amendment would also preclude U.S. Supreme Court review, ensuring the California Supreme Court gets the final word on the matter

The timing of the two cases may ultimately play the most important role in determining whether the state law question will be litigated, however. Since briefing in *Lowe* is nearly complete, unless the court holds off on resolving that case until *Buza* is also ready to be argued, the Fourth Amendment issue will likely be decided first. If the court does distinguish *King* and invalidates California's DNA collection law on Fourth Amendment grounds, the state constitutional issue presented in *Buza* will presumably be moot. That is, it will be moot unless the U.S. Supreme Court takes up *Lowe* to explore the limits of its reasoning in *King*.

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David Andreasen
David Andreasen is an appellate attorney who represents criminal defendants throughout the State of California. His office is in Santa Barbara and he can be reached at goletada@gmail.com.

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