of the story—the vehicle's speed, the time elapsed and the distance traveled—were not physically reconcilable. The fact that the vehicle was a 1991 Mazda MPV van made claims about rapid acceleration within five seconds highly suspect.

He felt strongly that this record clearly called out for more analysis by a jury and that summary judgment for defendants was completely unwarranted.

Gonzalez v. City of Anaheim, No. 11-56360 (9th Cir. May 13, 2013).

Student Apartments Are Not "Lodging Houses" In Worcester, Massachusetts

In Worcester, Massachusetts, like many municipalities across the country, local residents own multi-bedroom units they rent to college students. In common parlance these units – multiple bedrooms with a common kitchen, living area, bathroom, and, potentially, a dining room – are called apartments. In 2009 the City of Worcester determined the defendants, who rented out such multi-bedroom units to students, were operating "lodging houses" in violation of Massachusetts' WWI-era Lodging House Act. The City issued citations ordering the owners to reduce the number of occupants from four unrelated adults (the college students) to no more than three unrelated adults in any one unit to comply with the Act.

The district judge agreed with the City that the units were "lodgings" as defined in the Act and issued preliminary injunctions. When the defendants did not comply with the injunctions, the district judge issued civil contempt orders. While the case was playing out in court, the student-tenants were in the midst of final exams and refused to leave voluntarily.

The Appeals Court affirmed the district court judgment, and denied the defendants subsequent petition for rehearing.

The Massachusetts Supreme Court reversed, holding the units are not "lodgings."

The City argued the buildings at issue were lodging houses, defined in the Act as "a house where lodgings are let to four or more persons not within second degree of kindred to the person conducting it, " and that the dwelling units were "lodgings," not apartments. The property owners countered that the City's view essentially ignored the common understanding of "apartment buildings" and the historical and legal difference between lodging houses and apartment buildings.

The Massachusetts Supreme Court wholeheartedly agreed with the property owners that there is a difference between a lodging house and an apartment. First, the interests of tenants and of lodgers are different: tenants have exclusive control and the right to occupy an apartment, thereby acquiring a property interest; while lodge owners retain legal possession and lodgers acquire only a contractual interest. Second, both the Massachusetts sanitary code and fire safety code demonstrate the legislature's intent to distinguish between the two in the statutory scheme. And the licensing requirements for lodging house owners do not apply to apartment building owners.

Finally, the court determined that, to construe lodgings as the City suggested would lead to absurd results and foster selective enforcement. For example, under Worcester's interpretation, a rental unit would change regulatory category depending solely on the relationship of the occupants to one another . The possibility of selective enforcement was evident in that the City "acknowledged that, under its interpretation of 'lodgings,' the Lodging House Act . . . would apply if a new baby were added to a family of three, but asserted [it] would not enforce the statutory provisions in those circumstances."

In the end, the Massachusetts Supreme Court appreciated that the City wanted to protect student safety, but said "such concerns are better addressed through enforcement of applicable zoning ordinances and provisions of the sanitary and fire safety codes" rather than trying to apply such an arcane law.

City of Worcester v. College Hill Properties, SJC-11166 (Mass. May 15, 2013). **ML**

Supreme Court *Cont'd from page 31*

DNA Samples May Be Taken From An Arrestee Without A Warrant or Probable Cause

In 2009 Alonzo King was arrested in Wicomico County, Maryland on first-and second-degree assault charges for menacing a group of people with a shotgun. On the authority of the Maryland DNA Collection Act (Act), police took a swab of saliva from King's cheek and ran a DNA test. It showed that King had committed a rape in Salisbury Maryland in 2003. He was convicted and sentenced to life without parole.

The Court of Appeals of Maryland reversed the rape conviction on the grounds that the cheek swab constituted an unlawful search. Because various federal and state courts had reached differing conclusions about the constitutionality of taking DNA samples from people arrested for felonies but not yet convicted, the Supreme Court granted certiorari.

On June 3, 2013 the Court reversed by a narrow 5-4 margin, with Justice Kennedy writing an opinion upholding the search and the conviction.

The majority acknowledged that swabbing the inside of an arrestee's mouth clearly constitutes a "search." The relevant Fourth Amendment question was whether such a search was "reasonable," based upon balancing governmental interests against the individual's privacy rights.

Justice Kennedy produced an expansive list of factors weighing in favor of the government. The legitimacy of searching arrestees for weapons and contraband was already beyond question; it served obvious safety imperatives. Here, the taking and analysis of DNA further served the legitimate governmental interest in making safe and effective arrests. First, it clearly identified the person in custody. Second, it linked to databases documenting the arrestee's prior criminal behavior, revealing dangers to the arresting authorities. Third, the prior criminal record provided insights about the arrestee's flight risk. Fourth, it might predict further violent behavior, including retaliation, which endangered other members of the public and should inform incarceration decisions.

Finally, by using DNA to apprehend actual offenders, wrongly-arrested suspects would be freed.

In contrast, the privacy expectations of the individual who had been arrested for a felony based on probable cause were significantly reduced. Touching the inside of the arrestee's cheek with a buccal swab was not excessively intrusive under those circumstances. The majority traced the use by police of technology over the years, including photographs and fingerprints of wanted criminals; DNA was

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