

No. 09-10303

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY ARBERT POOL,

Defendant-Appellant.

On Appeal From The United States District Court For The
Eastern District of California (Garcia, J.)
No. 2:09-cr-15

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

STATEMENT	1
ARGUMENT	4
I. THE “TOTALITY OF THE CIRCUMSTANCES TEST” APPLIES IN THIS CASE.	4
II. INDIVIDUALS ARRESTED ON A FINDING OF PROBABLE CAUSE TO BELIEVE THEY HAVE COMMITTED A CRIME MAY BE REQUIRED TO COMPLY WITH STANDARD, UNIVERSAL IDENTIFICATION PROCEDURES.	9
A. An Arrestee Lacks A Legitimate Expectation Of Privacy In His Identifying Information, Including His DNA Fingerprint.	9
B. The Government Has Legitimate And Compelling Interests In Identifying Arrestees.	12
C. The Contrary Arguments Raised By Pool And His Supporting Amici Are Not Persuasive.	16
1. DNA Fingerprinting Of Arrestees Does Not Offend The Presumption Of Innocence.	16
2. The 13 CODIS Loci Are Used Solely For Purposes Of Identification.	20
3. The “Parade Of Horribles” Should Be Rejected.	21
CONCLUSION	27

TABLE OF AUTHORITIES

CASES

Albright v. Oliver
 510 U.S. 266 (1994) 17

Ashcroft v. Al-Kidd
 131 S. Ct. 2074 (2011) 5, 7

Banks v. United States
 490 F.3d 1178 (10th Cir. 2007) 16

Bell v. Wolfish
 441 U.S. 520 (1979) 8, 17

Boroian v. Mueller
 616 F.3d 60 (1st Cir. 2010) 10, 20

Campodonico v. United States
 222 F.2d 310 (9th Cir. 1955) 23

City of Indianapolis v. Edmond
 531 U.S. 32 (2000) 5, 6

City of Ontario v. Quon
 130 S. Ct. 2619 (2010) 5, 7

Davis v. United States
 131 S. Ct. 2419 (2011) 7

Hamilton v. Brown
 630 F.3d 889 (9th Cir. 2011) 3, 7

Haskell v. Brown
 677 F. Supp. 2d 1187 (N.D. Cal. 2009) 12

Hayes v. Florida
 470 U.S. 811 (1985) 10

Johnson v. Quander
 440 F.3d 489 (D.C. Cir. 2006) 10

Jones v. Murray
 962 F.2d 302 (4th Cir. 1992) 9, 11, 13, 16

Kentucky v. King
 131 S. Ct. 1849 (2011) 5, 6, 7

Michigan v. Fisher
 130 S. Ct. 546 (2009) 6, 7

New Jersey v. T.L.O.
 469 U.S. 325 (1985) 11

Rakas v. Illinois
 439 U.S. 128 (1978) 23

Rise v. Oregon
 59 F.3d 1556 (9th Cir. 1995) 7, 10, 11

Samson v. California
 547 U.S. 843 (2006) 6, 7

Skinner v. Railway Labor Executives' Association
 489 U.S. 602 (1989) 22

Tennessee v. Garner
 471 U.S. 1 (1985) 8

Terry v. Ohio
 392 U.S. 1 (1968) 17

United States v. Dillard
 214 F.3d 88 (2d Cir. 2000) 18

United States v. Kelly
 55 F.2d 67 (2d Cir. 1932) 10, 16

United States v. Kincade
 379 F.3d 813 (9th Cir. 2004) (en banc) *passim*

United States v. Knights
 534 U.S. 112 (2001) 5, 6, 7

United States v. Kriesel
 508 F.3d 941 (9th Cir. 2007) 7, 16

United States v. Mitchell
 --- F.3d ---, 2011 WL 3086952 (3d Cir. July 25, 2011) (en banc) *passim*

United States v. Pool
 621 F.3d 1213 (9th Cir. 2010) *passim*

United States v. Robinson
 414 U.S. 218 (1973) 17

United States v. Salerno
 481 U.S. 739 (1987) 4, 17

United States v. Scott
 450 F.3d 863 (9th Cir. 2006) 8, 9, 18, 19

Veronia School District 47J v. Acton
 515 U.S. 646 (1995) 5

Whren v. United States
 517 U.S. 806 (1996) 5

Wyoming v. Houghton
 526 U.S. 295 (1999) 5

STATUTES

18 U.S.C. § 3142 4, 18

42 U.S.C. § 14132 1, 3, 26

42 U.S.C. § 14133 3, 26

42 U.S.C. § 14135a 1, 3, 4

42 U.S.C. § 14135e 3, 26

Adam Walsh Child Protection and Safety Act of 2006
 Pub. L. No. 109-248, tit. I, 120 Stat. 587 4

DNA Fingerprint Act of 2005
 Pub. L. No. 109-162, tit. X, 119 Stat. 2960 4

Genetic Information Nondiscrimination Act of 2008
 Pub. L. No. 110-233, 122 Stat. 881 11

RULES AND REGULATIONS

28 C.F.R. § 28.12 1, 9, 11

DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction
 73 Fed. Reg. 74,932 (Dec. 10, 2008) *passim*

Privacy Act of 1974-New System of Records
 61 Fed. Reg. 37,495 (July 18, 1996) 13

Federal Rule of Criminal Procedure 11(d)(2)(B) 3

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reprinted in 2000 U.S.C.C.A.N. 2323 1, 2

Wayne R. LaFave, *Search & Seizure* (4th ed. 2004) 16

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<http://www.itdashboard.gov/?q=investment/exhibit300/pdf/011-10-01-03-01-2501-00> 24

DHS, *Privacy Impact Assessment for the Enforcement Integrated Database* (2010) 25

FBI, *CODIS Brochure*
http://www.fbi.gov/about-us/lab/codis/codis_brochure 12, 24

FBI, *CODIS and NDIS Fact Sheet*
<http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet> *passim*

FBI, *CODIS–The Future*
http://www.fbi.gov/about-us/lab/codis/codis_future 24

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 3 European Molecular Biology Organization Reports 498 (2002) 20

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USA Today (Nov. 6, 2007) 13

Jim Patten, *Savvy Criminals Obliterating Fingerprints to Avoid Detection*
Eagle-Tribune (Mar. 2, 2008) 13

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STATEMENT

For over a century, individuals arrested upon a finding of probable cause to believe they have committed a crime have been required to submit to routine “booking” procedures designed to create a record of their identity. Fingerprinting is the most obvious example of this, and although it is a search, courts have never required that it be supported by a warrant or by individualized suspicion beyond probable cause to arrest. *See United States v. Mitchell*, --- F.3d ---, 2011 WL 3086952, at *21-22 (3d Cir. July 25, 2011) (en banc) (citing cases).

Identification is not a static science, however, and “DNA identification technology is one of the most important advances in criminal identification methods in decades.” H.R. Rep. 106-900(I), at 9 (2000). In 1994, Congress authorized the creation of the Combined DNA Index System (“CODIS”), a federal database for “DNA identification records” in criminal cases that operates much like the longstanding electronic index system for fingerprints. *See* 42 U.S.C. § 14132(a). Congress further authorized the Attorney General to obtain DNA samples from individuals arrested, charged, or convicted of a federal crime for the limited purpose of creating a “DNA fingerprint” for inclusion in CODIS. *See* 42 U.S.C. 14135a(a)(1)(A); 28 C.F.R. § 28.12(b). This information “is used solely as an accurate, unique, identifying marker—in other words, as fingerprints for the twenty-first century.” *Mitchell*, 2011 WL 3086952, at *20.

Congress has gone to great lengths to ensure that this system is accurate, effective, and protects individual privacy. A DNA fingerprint is simply a record of the number of copies of specific sequences of “base pairs” at 13 locations on the DNA molecule known as short-tandem-repeat loci (“STR loci”). *Mitchell*, 2011 WL 3086952, at *11-12. This information is useful for identification because of the “infinitesimal” likelihood that two individuals will share the same number of copies of the same base pairs at all 13 loci. *United States v. Kincade*, 379 F.3d 813, 818-819 (9th Cir. 2004) (en banc).¹

A DNA fingerprint is not, however, useful for any other purpose. The approved loci are from “non-genic stretches of DNA” that “were purposely selected because they are not associated with any known physical or medical characteristics.” *Kincade*, 379 F.3d at 818 (quoting H.R. Rep. No. 106-900(I), at 27); *Mitchell*, 2011 WL 3086952, at *12 (repetitions of base pairs at 13 STR loci are “useful as ‘markers’” that provide a record of identity, but they “have no function[;] [t]hey do not code for RNA, and they do not seem to be responsible for any difference in the structure or functioning of the people who carry them” (quotation marks omitted)); *DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction*, 73 Fed. Reg. 74,932, 74,937-38 (Dec. 10, 2008) (same).

¹ The likelihood that two individuals will share the same DNA fingerprint “is less than 1 in 10 billion in all populations, and usually the estimates are substantially more rare.” Bruce Budowle et al., *Population Data on the Thirteen CODIS Core Short Tandem Repeat Loci in African Americans, U.S. Caucasians, Hispanics, Bahamians, Jamaicans, and Trinidadians*, 44 J. Forensic Sci. 1277, 1284 (1999).

Congress requires that information in CODIS only be used for “law enforcement identification purposes,” in judicial proceedings if admissible, for criminal defense purposes, or for limited statistical or quality control purposes if all personally identifiable information is removed. 42 U.S.C. § 14132(b)(3). It is illegal to use CODIS or a DNA sample for any other purpose, and doing so may result in cancellation of access to CODIS, fines, and imprisonment. 42 U.S.C. §§ 14132(c), 14133(c), 14135e(c). If a defendant is acquitted, the charges against him are dropped or dismissed, or his conviction is overturned, he may have his DNA fingerprint expunged from CODIS. 42 U.S.C. § 14132(d)(1)(A). *See Mitchell*, 2011 WL 3086952, at *10.

As the en banc Third Circuit recently held in *Mitchell*, this system fully complies with the Fourth Amendment: an individual who is arrested on a finding of probable cause lacks a privacy interest in his identity and is subject to routine, universal “booking” procedures, including DNA fingerprinting, in order to obtain an accurate record of who he is and what he may have done. The district court and panel reached the same conclusion in this case. That judgment is correct and should be affirmed.²

² Pool pleaded guilty to possession of child pornography on July 29, 2011, and there is no dispute that DNA fingerprinting of convicted offenders is constitutional. *See, e.g., Hamilton v. Brown*, 630 F.3d 889, 894-896 (9th Cir. 2011). Nonetheless, we do not believe that Pool’s appeal is moot. Sentencing is not scheduled until November 18, 2011 (and may be continued beyond that date), and thus a judgment of conviction is not imminent. In the meantime, Pool could still seek to withdraw his plea under limited circumstances. *See Fed. R. Crim. P. 11(d)(2)(B)*. The government therefore believes that consideration of mootness is premature.

ARGUMENT

Prior to 2005, federal law required DNA fingerprinting of individuals convicted of a federal felony or other “qualifying federal offenses.” *See* 42 U.S.C. § 14135a(d). In the DNA Fingerprint Act of 2005, Congress expanded DNA fingerprinting to include federal arrestees and pretrial defendants. *See* Pub. L. No. 109-162, tit. X, § 1004, 119 Stat. 2960, 3085 (amended by Pub. L. No. 109-248, tit. I, § 155, 120 Stat. 587, 611 (2006)). Congress also amended the Bail Reform Act to make DNA fingerprinting a mandatory condition of pretrial release. *See* 18 U.S.C. § 3142(b), (c)(1)(A).

Pool admits that “his challenge necessarily implicates a challenge to the statute as it applies to all pretrial criminal defendants and arrestees,” Def.’s Supp. Br. 15, and thus he is bringing a facial challenge to the DNA Fingerprint Act and corresponding provisions of the Bail Reform Act. This is “the most difficult challenge to mount successfully,” and Pool has “failed to shoulder [his] heavy burden” of demonstrating that the statutes are facially unconstitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987).³

I. THE “TOTALITY OF THE CIRCUMSTANCES TEST” APPLIES IN THIS CASE.

To determine whether a warrantless search is reasonable, the “general Fourth Amendment approach” is to “examin[e] the totality of the circumstances,” balancing ““on

³ While the government must establish that a warrantless search is reasonable, because Pool is bringing a facial challenge, he bears the additional burden of proving that “the statute is unconstitutional in all of its applications.” *Mitchell*, 2011 WL 3086952, at *16 (quotation marks and alteration omitted).

the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *United States v. Knights*, 534 U.S. 112, 118-119 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). In his supplemental brief (at 1-4), Pool argues for the first time that this Court cannot consider the totality of the circumstances unless it first finds that an independent exception to the warrant requirement applies. This argument is incorrect.

The Supreme Court has explained, recently and repeatedly, that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’” and thus “warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement.” *Kentucky v. King*, 131 S. Ct. 1849, 1856, 1858 (2011) (quotation marks and alteration omitted); *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (same); *Whren v. United States*, 517 U.S. 806, 817 (1996) (“every Fourth Amendment case, since it turns upon a ‘reasonableness’ determination, involves a balancing of all relevant factors”).

Some exceptions to the warrant requirement have already been established as reasonable. Examples include searches of members of the general public in furtherance of “special needs” beyond the desire to find evidence of criminal wrongdoing, *see City of Ontario v. Quon*, 130 S. Ct. 2619, 2630-2633 (2010) (employees); *Veronia School Dist. 47J v. Acton*, 515 U.S. 646, 653-665 (1995) (student athletes); *City of Indianapolis v. Edmond*, 531

U.S. 32, 37-40 (2000) (motorists); searches to prevent the destruction of evidence, *King*, 131 S. Ct. at 1862; and rendering emergency aid, *Michigan v. Fisher*, 130 S. Ct. 546, 548-549 (2009). See *Kincade*, 379 F.3d at 822 (warrantless searches permitted “[u]nder a variety of conditions,” and citing cases).

This does not mean that all warrantless searches must fit into a pre-approved mold. The Supreme Court has expressly rejected the “dubious logic *** that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it,” and has instructed courts to determine the reasonableness of each search by applying the “general Fourth Amendment approach of ‘examining the totality of the circumstances.’” *Knights*, 534 U.S. at 117-118 (search that does not satisfy “special needs” may still be “otherwise reasonable within the meaning of the Fourth Amendment”); *Samson v. California*, 547 U.S. 843, 848, 855 n.4 (2006) (same; although Court previously approved suspicionless “programmatically and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be ‘reasonable’ under the Fourth Amendment”); *Kincade*, 379 F.3d at 832 (balancing totality of circumstances to find that DNA fingerprinting of conditional releasees was reasonable notwithstanding “the possibility that the federal DNA Act could [also] satisfy a special needs analysis”).

There is thus no merit to Pool’s claim that the “totality of the circumstances” can only be considered when a search comes within an existing exception to the warrant

requirement. Indeed, when a search clearly comes within a recognized exception, there is usually no need to explicitly balance competing interests, as is clear from the very cases Pool cites. *See, e.g., King*, 131 S. Ct. at 1856-1863 (preventing destruction of evidence is within “well-recognized exception” for exigent circumstances, without balancing totality of circumstances); *Fisher*, 130 S. Ct. at 548-549 (same for “straightforward application of the emergency aid exception”); *Quon*, 130 S. Ct. at 2630-2633 (even if employee had reasonable expectation of privacy, search served “special need” and was lawful); *cf. Davis v. United States*, 131 S. Ct. 2419, 2428-2429 (2011) (exclusionary rule does not apply to search authorized under prior precedent; no balancing); *Al-Kidd*, 131 S. Ct. at 2083-2085 (seizure supported by valid material witness warrant; no balancing).

Nor must a court “create and define” a “newly delineated exception to the warrant requirement” before considering the totality of the circumstances. Def.’s Supp. Br. 3. Rather, the balancing of circumstances is what determines whether a warrantless search is reasonable and thus constitutional. *See Samson*, 547 U.S. at 851-857; *Knights*, 534 U.S. at 118-121. This Court has consistently applied the same approach to DNA fingerprinting, irrespective of whether the precise circumstances fit a particular warrant exception. *See Kincade*, 379 F.3d at 832 (affirming DNA fingerprinting of conditional releasees); *United States v. Kriesel*, 508 F.3d 941, 946-947 (9th Cir. 2007) (same for supervised releasees); *Hamilton*, 630 F.3d at 894-896 (same for prisoners); *Rise v. Oregon*, 59 F.3d 1556, 1560-1562 (9th Cir. 1995) (same).

The fact that Pool has been arrested and indicted but not yet convicted of a crime is immaterial. As *Mitchell* explains, “the balancing of competing interests [is] the key principle of the Fourth Amendment,” and “[t]he totality of the circumstances approach * * * applies to circumstances beyond the supervised release setting” at issue in *Samson* and *Knights*. 2011 WL 3086952, at *14 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). The Supreme Court and this Court have applied totality of the circumstances balancing to warrantless searches of pretrial defendants. See *Bell v. Wolfish*, 441 U.S. 520, 559-560 (1979) (search of pretrial detainee); *United States v. Scott*, 450 F.3d 863, 872-874 (9th Cir. 2006) (search of pretrial releasee’s home, after rejecting special needs doctrine). There is no reason to adopt a different approach here.

In any event, even if this Court were inclined to accept Pool’s argument, his claim would fail. *Mitchell* expressly recognizes a warrant exception for DNA fingerprinting of arrestees and, more broadly, a warrant exception for routine “booking” procedures that has long been recognized as legitimate. See *Mitchell*, 2011 WL 3086952, at *15-25 (citing cases). And although we do not believe that it is necessary or appropriate to apply the “special needs” doctrine in this case, DNA fingerprinting of arrestees serves a number of interests beyond finding evidence of criminal wrongdoing, as explained in our opening brief and in further detail below. See Gov’t Br. 40-43.

II. INDIVIDUALS ARRESTED ON A FINDING OF PROBABLE CAUSE TO BELIEVE THEY HAVE COMMITTED A CRIME MAY BE REQUIRED TO COMPLY WITH STANDARD, UNIVERSAL IDENTIFICATION PROCEDURES.

A. An Arrestee Lacks A Legitimate Expectation Of Privacy In His Identifying Information, Including His DNA Fingerprint.

There is no dispute in this case that arrestees do not entirely forfeit all of their privacy rights. A person who is arrested and charged with a crime may not, for example, be subjected to random searches of his home and body at any time of the day or night. *See Scott*, 450 F.3d at 871-874. But an arrestee *does* lose one particular privacy interest that is of signal importance here: “when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it.” *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992); *Mitchell*, 2011 WL 3086952, at *21-22 (same).

Obtaining an identity record through DNA fingerprinting involves a limited search with two components. First, the initial act of collecting an arrestee’s DNA—using a buccal swab to obtain a sample of the arrestee’s saliva, *see* 28 C.F.R. § 28.12(f)(1); *DNA-Sample Collection*, 73 Fed. Reg. at 74,935—is a “minimal” intrusion that does not infringe a significant privacy interest. *Mitchell*, 2011 WL 3086952, at *17; *Kincade*, 379 F.3d at 836-837 (citing cases). Second, the DNA fingerprint derived from the saliva 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).” *Kincade*, 379 F.3d at 837; *Mitchell*, 2011 WL 3086952, at *17-20, 23; accord *United States v. Pool*, 621 F.3d 1213, 1220-1222 (9th Cir. 2010).⁴

This conclusion is well supported by the traditional and universal acceptance of booking procedures for those arrested upon a finding of probable cause. Traditional fingerprinting, like the collection and analysis of DNA, is a “search” that would violate the Fourth Amendment if conducted on all citizens without warrant or suspicion. *See Hayes v. Florida*, 470 U.S. 811, 813-817 (1985); *Mitchell*, 2011 WL 3086952, at *21. “Nevertheless, everyday ‘booking’ procedures routinely require even the merely accused to provide fingerprint identification, regardless of whether investigation of the crime involves fingerprint evidence.” *Kincade*, 379 F.3d at 836 n.31 (quoting *Rise*, 59 F.3d at 1559-1560); see also *Mitchell*, 2011 WL 3086952, at *21-22 & n.20 (citing cases); *United States v. Kelly*, 55 F.2d 67, 69-70 (2d Cir. 1932) (Augustus Hand, J.) (“Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws,” and is “an appropriate means to identify criminals and detect crime.”).

⁴ No court has accepted the argument that the government also “engages in a search *each time* it searches CODIS for a match.” EFF Amicus Br. 9. *See Mitchell*, 2011 WL 3086952, at *21 n.21 (“Accessing [CODIS] does not independently implicate the Fourth Amendment.”); *Boroian v. Mueller*, 616 F.3d 60, 67-68 (1st Cir. 2010) (same, citing cases); *Johnson v. Quander*, 440 F.3d 489, 498-499 (D.C. Cir. 2006) (same, and noting that “the consequences of the contrary conclusion would be staggering”).

Every court of appeals to have considered the question, including this one, has concluded that “DNA profiling is simply a more precise method of ascertaining identity and is thus akin to fingerprinting, which has long been accepted as part of routine booking procedures.” *Mitchell*, 2011 WL at 3086952, at *19-20, 23 (citing cases); *Rise*, 59 F.3d at 1559; *Jones*, 962 F.2d at 307; *accord Pool*, 621 F.3d at 1230 (Lucero, J., concurring) (“the near universal acceptance of [fingerprinting] casts a long shadow over this case”). Indeed, with rare exceptions not relevant here, arrestees are only required to submit to DNA fingerprinting if they are also required to provide traditional fingerprints, and the standards governing the two procedures are consistent. *See* 28 C.F.R. § 28.12(b); *DNA-Sample Collection*, 73 Fed. Reg. at 74,934-36.

“To receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is ‘prepared to recognize as legitimate.’” *New Jersey v. T.L.O.*, 469 U.S. 325, 338 (1985). An individual arrested upon a finding of probable cause has long been understood to lack any legitimate privacy interest in information necessary to create an accurate record of his identity. This includes DNA fingerprinting.⁵

⁵ Pool argues (Supp. Br. 14) that the Genetic Information Nondiscrimination Act of 2008 and similar state laws show that society wants arrestees’ DNA fingerprints to remain private. These laws prevent the use of “genetic screening” by employers and insurance companies to discriminate against individuals based on “genetic conditions and disorders.” Pub. L. No. 110-233, § 2, 122 Stat. 881, 882. That has nothing to do with DNA fingerprinting for identification; indeed, the United States and several of the states Pool identifies also have laws requiring arrestees to provide DNA fingerprints.

B. The Government Has Legitimate And Compelling Interests In Identifying Arrestees.

As explained in *Mitchell*, “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.).” 2011 WL 3086952, at *24 (quoting *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1199 (N.D. Cal. 2009)); accord *Pool*, 621 F.3d at 1222-1223. *Pool* contends that DNA fingerprinting does not serve the first interest, and that the second is illegitimate. He is wrong on both counts.

1. Like a traditional fingerprint, a DNA fingerprint is an identifying marker that, along with other information like a name and a photograph, provides a record of who a person is. An arrestee’s DNA fingerprint is loaded into a CODIS index that is then searched against CODIS indices containing DNA information from crime scenes, unidentified persons, and unidentified human remains. *See* FBI, *CODIS Brochure* (available at http://www.fbi.gov/about-us/lab/codis/codis_brochure).

If an arrestee absconds from pretrial release or detention, or is arrested for another offense, a first attempt to identify him is usually made using traditional fingerprints. It is, however, “a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity”—including by using disguises, “changed names, and even changed physical features”—and while “[t]raditional

methods of identification by photographs, historical records, and fingerprints often prove inadequate” to deal with such subterfuge, DNA fingerprints are “unique to each individual and cannot, within current scientific knowledge, be altered.” *Mitchell*, 2011 WL 3086952, at *23; *Jones*, 962 F.2d at 307 (same).

When a person cannot be conclusively identified by other means, he is classified as an “unidentified person” and his DNA fingerprint is compared to those from arrestees. *See, e.g., Privacy Act of 1974—New System of Records*, 61 Fed. Reg. 37,495, 37,496 (July 18, 1996); FBI, *CODIS and NDIS Fact Sheet* (available at <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet>). Thus, a person who submits a DNA fingerprint upon arrest cannot hope to elude future identification by changing his name, altering his appearance, or concealing or obliterating his fingerprints. *Mitchell*, 2011 WL 3086952, at *24; *DNA-Sample Collection*, 73 Fed. Reg. at 74,934 (DNA fingerprinting provides “an alternative means of directly ascertaining or verifying an arrestee’s identity, where fingerprint records are unavailable, incomplete, or inconclusive”).⁶ Similarly, an arrestee who dies can be conclusively identified using his DNA fingerprint even when other methods of identification would be futile, such as if the body is burned, decomposed, or incomplete.

⁶ These are not idle concerns. *See, e.g.,* Jim Patten, *Savvy Criminals Obliterating Fingerprints to Avoid Detection*, Eagle-Tribune (Mar. 2, 2008); Mimi Hall, *Criminals Go to Extremes to Hide Identities*, USA Today (Nov. 6, 2007).

2. Likewise, the government has a substantial interest in determining whether an arrestee has been convicted of other crimes or is identified as a suspect in other criminal activity. *See Mitchell*, 2011 WL 3086952, at *24. DNA fingerprinting serves this interest in several ways.

First, when an individual is convicted of an offense for which DNA evidence was loaded into CODIS, a DNA fingerprint collected upon a future arrest will result in a match against the crime scene profile from his earlier offense, providing conclusive proof of his criminal history whether or not his fingerprints or other identification records would lead to that information. *See CODIS and NDIS Fact Sheet, supra*.

Second, a DNA fingerprint may match DNA evidence collected from scenes of unsolved crimes. This is important for a number of reasons. Such information is “critical” to determining whether the arrestee may safely be released pending trial, what restrictions are necessary if he is released, and what precautions should be taken if he is placed in pretrial detention. *Mitchell*, 2011 WL 3086952, at *24; *DNA-Sample Collection*, 73 Fed. Reg. at 74,934; *accord Pool*, 621 F.3d at 1223. DNA fingerprinting thus directly furthers the goals of the Bail Reform Act by helping to assure that decisions concerning pretrial placement are appropriate and align with the public interest.⁷ DNA fingerprinting

⁷ Pool and his amici contend that the government cannot achieve these objectives due to a significant backlog in processing DNA samples, but all of the evidence they cite relates to *state* laboratories. No evidence “point[s] to any backlog in the federal system.” *Mitchell*, 2011 WL 3086952, at *24.

also increases the likelihood that, if an arrestee absconds or otherwise violates the terms of his release by committing a crime, he will be found or the violation will be detected. *See DNA-Sample Collection*, 73 Fed. Reg. at 74,934; *Pool*, 621 F.3d at 1223; *cf. Kincade*, 379 F.3d at 838 (same for conditional releasees).

The government has equally compelling interests in identifying perpetrators of crimes and exonerating those who are innocent—interests that exist at every stage of the criminal justice process and have long been recognized as legitimate. *See DNA-Sample Collection*, 73 Fed. Reg. at 74,933-34; *Mitchell*, 2011 WL 3086952, at *24; *Kincade*, 379 F.3d at 839 & n. 38. As with convicted offenders, DNA fingerprinting of arrestees “assists the Government in accurate criminal investigations and prosecutions (both of which are dependent on accurately identifying the suspect),” and “promptly clears thousands of potential suspects—thereby preventing them from ever being in that position, and advancing the overwhelming public interest in prosecuting crimes *accurately*.” *Mitchell*, 2011 WL 3086952, at *24 (quoting *Kincade*, 379 F.3d at 839 n.38).

Pool’s assertion that “[t]his is not identification; this is investigation,” Def.’s Supp. Br. 6, is a false dichotomy that has been soundly rejected. Arrestees’ identifying information is routinely compared to evidence left behind at other crime scenes. Police may, for example, comb case files to see whether an arrestee’s photograph, scars, or tattoos match descriptions or images of suspects in other cases. Similarly, “[w]hen fingerprints are taken from an arrestee, they are run against a database to search for

matches to other unsolved crimes.” *Mitchell*, 2011 WL 3086952, at *21 n.21. This is, in fact, one of the principal purposes of identifying arrestees, and it has long been considered legitimate. *See, e.g., id.* at *21-24.; *Jones*, 962 F.2d at 306 (“the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes”); *Kelly*, 55 F.2d at 70 (noting “the general right of the authorities * * * to employ finger printing as an appropriate means to identify criminals and detect crime”); 4 Wayne R. LaFave, *Search & Seizure* § 5.3(b), at 168 (4th ed. 2004) (“Fingerprinting, as a routine part of the booking process, is justified by the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution.”). It is thus unsurprising that courts have repeatedly upheld the use of DNA fingerprinting precisely because it helps reveal “what that person has done.” *See, e.g., Mitchell*, 2011 WL 3086952, at *24; *Kincade*, 379 F.3d at 839; *Kriesel*, 508 F.3d at 950; *Banks v. United States*, 490 F.3d 1178, 1188 (10th Cir. 2007); *accord Pool*, 621 F.3d at 1222-1223.

C. The Contrary Arguments Raised By Pool And His Supporting Amici Are Not Persuasive.

1. DNA Fingerprinting Of Arrestees Does Not Offend The Presumption Of Innocence.

A person who is arrested upon a finding of probable cause will be presumed innocent at trial, but that does not mean that he must be treated as if he were a free

citizen in every respect. *See Bell*, 441 U.S. at 533 (“The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials,” but “it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”); *Terry v. Ohio*, 392 U.S. 1, 26 (1968) (“An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society’s interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual’s freedom of movement, whether or not trial or conviction ultimately follows.”); *Albright v. Oliver*, 510 U.S. 266, 278-279 (1994) (Ginsburg, J., concurring) (“A person facing serious criminal charges is hardly freed from the state’s control upon his release from a police officer’s physical grip”; he is “scarcely at liberty” and remains “‘seized’ in the constitutionally relevant sense.”).

The police may, for example, search an arrestee for evidence without individualized suspicion to believe any will be found. *United States v. Robinson*, 414 U.S. 218, 235 (1973). The government may detain the arrestee pending arraignment and may incarcerate him longer if he is dangerous without ever establishing his guilt. *Salerno*, 481 U.S. at 749-750. If an arrestee is released on bail, he is subject to many restrictions under the Bail Reform Act that would never apply to ordinary citizens, including (as in this case) wearing a tracking device, abiding by a curfew, not possessing guns, not traveling or using computers without permission, and staying away from children. SER 2-3. He is also required to submit to traditional fingerprinting, DNA fingerprinting, and other

procedures that could not lawfully be required of ordinary citizens. *See supra* at 9-11; 18 U.S.C. § 3142(b), (c)(1)(A).

Congress has specifically provided that none of the Bail Reform Act’s restrictions on pretrial arrestees, including the requirement that they submit to DNA fingerprinting, “shall be construed as modifying or limiting the presumption of innocence.” 18 U.S.C. § 3142(j).⁸ As the panel in this case and the Third Circuit in *Mitchell* correctly found, DNA fingerprinting—just like traditional fingerprinting and the many other limitations imposed upon arrestees—in no way prejudices their guilt or affects the government’s burden at trial. *See Pool*, 621 F.3d at 1219; *Mitchell*, 2011 WL 3086952, at *22.

This Court’s decision in *Scott*, 450 F.3d 863, is not to the contrary. That case concerned random, warrantless drug testing and searches of a pretrial releasee’s home. *Id.* at 865. The Court concluded that there were “insufficient [grounds] to eliminate his expectation of privacy in his home,” though there would likely have been no violation had the search occurred elsewhere. *Id.* at 871-872 & n.10. This case, in contrast, involves a minimal intrusion to obtain identifying information in which an arrestee can claim no

⁸ *Pool* argues (Supp. Br. 3-4) that Section 3142(j) helps prove that DNA fingerprinting is unconstitutional, but that is incorrect. Congress clearly intended to foreclose challenges to the Bail Reform Act based on the presumption of innocence. *See United States v. Dillard*, 214 F.3d 88, 102-103 (2d Cir. 2000). Nor does Section 3142(j) presuppose that the presumption would otherwise affect pretrial rights; at most, it simply establishes that the decision to impose restrictive conditions on a defendant prior to trial creates no inference of guilt at trial.

privacy interest that is collected outside the home for purposes that have long been recognized as legitimate. *See Pool*, 621 F.3d at 1225 (distinguishing *Scott*).

Scott did say, in dictum, that the presumption of innocence would not permit “an inference that [a pretrial defendant] is more likely than any other citizen to commit a crime if he is released from custody,” 450 F.3d at 874, but even if this were a correct statement of the law, *see Scott*, 450 F.3d at 893-894 (Callahan, J., dissenting from denial of rehearing en banc), it would not affect the validity of routinely collecting identifying information, including DNA fingerprints, from arrestees. As explained (*supra* at 12-16), DNA fingerprinting entails no judgment that arrestees are more likely than other citizens to commit crimes. Rather, it—like traditional fingerprinting—merely reflects society’s determination that (a) the police should obtain records that can be used to confirm an arrestee’s identity if he absconds, dies, or is rearrested; (b) if the arrestee *has* committed other crimes, knowing that information is vital to assuring that decisions concerning pretrial release or detention are fully informed and fair to the public and the defendant, and that the other crimes are resolved accurately and expeditiously; and (c) a record of identity will help ensure that any conditions of release are respected.⁹

⁹ *Scott* acknowledges that the government has a compelling interest in “ensur[ing] that the defendant not abscond” during pretrial release, 450 F.3d at 872 n.11, and the government has an equally compelling interest in assuring that other conditions (such as not possessing a gun and staying away from children) be respected as well. *Scott*’s conclusion that indiscriminate home searches may not be used for this purpose does not disable the government from obtaining identifying information that could be used to

2. The 13 CODIS Loci Are Used Solely For Purposes Of Identification.

EPIC contends (Br. 10-16) that the 13 CODIS loci may bear some statistical correlation to traits like ethnicity, and may “in the future * * * be found to reveal personal information.” These claims are not new, and courts have routinely found that research concerning possible functions of “junk DNA” does not undermine the constitutionality of DNA fingerprinting as it currently exists. *See, e.g., Mitchell*, 2011 WL 3086952, at *19 (citing cases); *Boroian*, 616 F.3d at 69; *Kincade*, 379 F.3d at 818 & n.6; *accord Pool*, 621 F.3d at 1221.

In any event, EPIC greatly overstates the implications of the research it cites. The Wein and Grimes studies do not rely upon the CODIS loci. *See* EPIC Br. 12-13. The Stead study merely suggests that particular alleles at one of the CODIS loci may—in connection with other information not analyzed in CODIS—correlate to a 0.12% greater chance that the person may develop Type 1 diabetes. *See* Mark Benecke, *Coding or Non-Coding, That is the Question*, 3 Eur. Molecular Biology Org. Reports 498, 500-501 (2002) (“Abuse of such information is impossible because it simply has no practical predictive value.”). A few studies have suggested that certain loci—often the 13 CODIS loci plus others that are not analyzed in CODIS—“could be used” to infer probable ethnicity with

detect and deter potential violations. On this limited issue, we respectfully disagree with *Mitchell*, 2011 WL 3086952, at *24 n.25 (citing *Scott*).

“varying degrees” of success because individuals of the same ethnicity may share similar identifying characteristics, but caution that this is “inevitably subject to uncertainty” and that “[f]urther research is required.” See Matthew Graydon et al., *Inferring Ethnicity Using 15 Autosomal STR Loci*, 3 Forensic Sci. Int’l: Genetics 251, 253 (2009).¹⁰

Nothing in this research undermines the uniform conclusion of Congress and the courts that DNA fingerprints are only useful for identification, nor does it distinguish DNA fingerprints from traditional ones. See *Pool*, 621 F.3d at 1230 (Lucero, J., concurring) (“Fingerprints, too, may correlate with certain traits.”). Indeed, as the panel found, even if the CODIS loci could reliably be used to discern genetic information, there is no basis on which the government “actually *could* do so * * * without further legislation.” *Pool*, 621 F.3d at 1221. Nor is there any apparent reason why the government would want to use a DNA fingerprint to make a probabilistic assessment of characteristics such as race and ethnicity, since a DNA fingerprint is only useful when paired with other information acquired at arrest that provides more direct evidence of those traits, such as a name and photograph. *Id.* at 1230 (Lucero, J., concurring).

3. The “Parade Of Horribles” Should Be Rejected.

Opponents of DNA fingerprinting have long relied on arguments that misrepresent what CODIS does and what governing law allows. Pool and his supporting

¹⁰ It should be noted that, although these researchers analyzed the same loci that CODIS uses, they did *not* use DNA samples or information derived from CODIS.

amici are no exception. These arguments have been rejected in other cases, and the same result is appropriate here.

a. EFF argues (Br. 9-11) that because saliva contains complete DNA strands that could hypothetically be analyzed to reveal all sorts of “sensitive, private data,” collecting it is highly intrusive. Courts have rejected this claim because the *only* information derived from an arrestee’s saliva sample is a record of the number of copies of base pairs at 13 specific core loci, and there are “numerous protections” (including criminal penalties) in place to assure that no other information is analyzed. *See Mitchell*, 2011 WL at 3086952, at *18 (citing cases); *Kincade*, 379 F.3d at 837-838.¹¹ Analyzing DNA is not like searching a home and inspecting all of its contents in an effort to find what one is looking for. Indeed, quite apart from the relevant legal prohibitions, “it would be practically impossible to divert the relevant DNA analysis laboratory processes for preparation of CODIS DNA profiles so as to extract and misuse genetically sensitive information.” *DNA-Sample Collection*, 73 Fed. Reg. at 74,940. As the district court and panel correctly held, there is no evidence that anything of this sort has happened or is likely to happen. *See Pool*, 621 F.3d at 1223; ER 16-17.¹²

¹¹ Indeed, if EFF were correct, it is difficult to see how drug testing could be constitutional, since it too requires the subject to submit a blood or urine sample that contains DNA. *See, e.g., Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989).

¹² EFF’s argument (Br. 11-12) that this improperly shifts the burden to Pool is incorrect. The district court and panel concluded that statutory and regulatory provisions amply demonstrate how DNA fingerprints are used. If Pool wishes to claim that the

b. EPIC claims (Br. 17-24) that collecting Pool's DNA fingerprint could affect the privacy interests of his relatives because they may have similar DNA fingerprints and thus their criminal activity might be discovered through "familial searches." This is irrelevant: Pool has no standing to assert the Fourth Amendment rights of others, *see Mitchell*, 2011 WL 3086952, at *19 n.19 (citing *Rakas v. Illinois*, 439 U.S. 128, 138-140 (1978)), and even if he did, there is no reason why the possibility of discovering a family resemblance between an arrestee and a criminal suspect would make DNA fingerprinting unconstitutional. *See Pool*, 621 F.3d at 1221.

In any event, the FBI does not perform familial searches. *See DNA-Sample Collection*, 73 Fed. Reg. at 74,938; *Mitchell*, 2011 WL at 3086952, at *19 n.19; *CODIS and NDIS Fact Sheet*, *supra*. What EPIC refers to as "familial searches" are actually incidental partial matches between CODIS indices, which are permitted because DNA from crime scenes and human remains may be incomplete or degraded. *See CODIS and NDIS Fact Sheet*, *supra*. Partial matches are rare and "have very low efficiency in locating true relatives in offender databases." *Ibid.*; *Mitchell*, 2011 WL 3086952, at *19 n.19. While some states perform deliberate familial searches in their own DNA databases, they do not do so in the national CODIS database. *See CODIS and NDIS Fact Sheet*, *supra*.

government is breaking the law, he needs to come forward with some evidence. *See, e.g., Campodonico v. United States*, 222 F.2d 310, 314 (9th Cir. 1955) (government "is not required to prove a negative or to refute all possible speculation").

c. EFF notes (Br. 26-28) that the FBI is planning to “re-architect” CODIS, but this relates to increasing the database’s storage capacity and streamlining the process of analyzing the 13 CODIS loci. See FBI, *CODIS–The Future* (available at http://www.fbi.gov/about-us/lab/codis/codis_future); *CODIS Brochure, supra*; *CODIS Capital Asset Plan and Business Case Summary* (available at <http://www.itdashboard.gov/?q=investment/exhibit300/pdf/011-10-01-03-01-2501-00>). None of these technical improvements will change the purposes or approved uses of CODIS, which are fixed by statute and regulation. EFF also refers to types of searches (such as “kinship searches” and analysis of mitochondrial DNA (“mtDNA”)) that are only used when analyzing DNA samples voluntarily provided by family members for inclusion in the missing persons index to help find their loved ones; this has no application to arrestees. See *CODIS–The Future, supra*; *CODIS Brochure, supra*.

d. Pool argues (Supp. Br. 13-14) that DNA fingerprinting falsely implicates individuals in crime, but that is incorrect. He relies on an unpublished article that cites two cases from the United Kingdom and Chicago (not involving CODIS) in which crime scene evidence matched six STR loci from innocent persons. See William C. Thompson, *The Potential for Error in Forensic DNA Testing* 8-10 (2008). CODIS analyzes 13 loci precisely to avoid this possibility. See *DNA-Sample Collection*, 73 Fed. Reg. at 74,937. As for potential false matches due to “human error,” Pool cites no instances of that

happening in CODIS,¹³ and even if it had, it would not make DNA fingerprinting unconstitutional.

e. EPIC's assertion (Br. 28-34) that information in CODIS is used for purposes unrelated to law enforcement is incorrect. It claims (Br. 29), for example, that DHS "has begun using CODIS DNA data to verify familial relationships for immigration purposes," but that is false: DHS performs voluntary paternity tests on immigrants wishing to bring their families to the United States to confirm a familial relationship, which has nothing to do with CODIS. *See* EPIC Br. 30-32. Nor does DHS's "Enforcement Integrated Database" "use[] information from CODIS." *Id.* at 32. This database merely tracks case information for individuals arrested by DHS, including (among other things) the date and time of DNA collection (if performed) and confirmation that the sample was properly received by the FBI; it "does *not* contain any actual DNA samples or sequences" and derives none of its information from CODIS. *See* DHS, *Privacy Impact Assessment for the Enforcement Integrated Database* 7-11 (2010). In fact, although DHS is permitted to submit samples for inclusion in CODIS, it does not have an accredited DNA Crime Lab and thus is *not* authorized to access CODIS.

¹³ Indeed, CODIS contains numerous safeguards against human error. Any match between an arrestee's DNA fingerprint and crime scene evidence must be verified by cross-checking the original sample, and may then only be used in support of probable cause to obtain a warrant for another sample of the arrestee's DNA, which would then be analyzed for evidentiary purposes. *See CODIS and NDIS Fact Sheet, supra; Mitchell*, 2011 WL 3086952, at *7.

EPIC also cites (Br. 33-34) several state laws that, like federal law, permit the use of DNA fingerprint information for statistical or quality control purposes if all personally identifying information is removed. *See* 42 U.S.C. § 14132(b)(3). This is not a “non-law enforcement purpose”: access to CODIS such purposes is strictly limited to approved criminal justice agencies for forensic uses such as validating methods of forensic searching. *See, e.g., CODIS and NDIS Fact Sheet, supra.* CODIS is not available, for any purpose, to private researchers, academics, or the general public, and if a state laboratory were to transgress these limits, its access to CODIS would be cancelled and it would face criminal penalties. *See* 42 U.S.C. §§ 14132(c), 14133(c), 14135e(c).

f. Finally, EFF contends that this case “presages a future in which every person’s DNA is sampled and profiled,” leading to “dragnet surveillance by tracking our DNA,” and refers to several applications for DNA that have absolutely nothing to do with CODIS. EFF Amicus Br. 6, 21, 28-32 (discussing DNA collection from soldiers by the military, genetic screening of newborns, and personal genetic testing kits sold by drugstores).¹⁴ The district court rejected this “parade of ‘what ifs,’” ER 17, as has this Court. *See Kincade*, 379 F.3d at 837-838. The same result is appropriate here.

¹⁴ EFF’s reliance on an incident in which Texas authorities improperly shared newborn blood samples with the Defense Department for a research project is particularly misleading. This had nothing to do with CODIS or with DNA fingerprinting of arrestees; indeed, including such information in CODIS would be flatly illegal. The fact that a bad actor once did something wrong with DNA does not mean that the Fourth Amendment prohibits DNA fingerprinting.

CONCLUSION

For the foregoing reasons, the judgment of the district court and the decision of the panel should be affirmed.

Respectfully submitted,

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August 15, 2011

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared in a proportionally spaced, 14-point typeface using WordPerfect X4, and contains 6,991 words as permitted by this Court's July 8, 2011 order, not including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Also pursuant to this Court's July 8, 2011 order, I hereby certify that the paper copies of this brief are identical to the version submitted electronically via the Court's CM/ECF system on August 15, 2011.

s/ Robert A. Parker
Robert A. Parker

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2011, I filed the foregoing Supplemental Brief of the United States with the Clerk of the Court using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and will receive a Notice of Electronic Filing.

s/ Robert A. Parker
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