

No. 09-10303

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

En Banc Panel

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

Honorable Edward J. Garcia
Senior United States District Judge

U.S.D.C. No. Cr. S. 09-0015-EJG
(Sacramento Division)

SUPPLEMENTAL REPLY BRIEF
FOR REHEARING EN BANC

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TABLE OF CONTENTS

I.	The Government Misidentifies Its Interest	1
II.	DNA Profiling of Pretrial Releasees Does Not Protect the Public or Inform the Release Decision	3
A.	DNA Profiling Cannot be Accomplished Prior to the Release Decision	3
B.	Public Safety Can Be Fully Addressed Using the Bail Reform Act's Procedures	3
III.	Any Totality of Circumstances Analysis Must Consider the Absence of a Judicial Decision and the Absence of Probable Cause	5
IV.	Fingerprinting and Photographing Arrestees Do Not Implicate the Fourth Amendment in the Same Manner as DNA Profiling	6
V.	The Government Undervalues Arrestees' Privacy Interests	8
VI.	Mr. Pool's Challenge is Both Facial and As Applied	9
VII.	Conclusion	10

TABLE OF AUTHORITIES

FEDERAL CASES

Camreta v. Greene,
131 S.Ct. 2020 (2011) 1

Chimel v. California,
395 U.S. 752 (1969) 6

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

Davis v. Mississippi,
394 U.S. 721 (1969) 7

Hayes v. Florida,
470 U.S. 811 (1985) 7

Hiibel v. Sixth Judicial District Court,
542 U.S. 177 (2004) 1

Katz v. United States,
389 U.S. 347 (1967) 7

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

Samson v. California,
547 U.S. 843 (2006) 4

Schmerber v. California,
384 U.S. 757 (1966) 6

Terry v. Ohio,
392 U.S. 1 (1968) 2, 5

United States v. Dionisio,
410 U.S. 1 (1973) 7

United States v. Kelly,
55 F. 2d 67 (2d Cir. 1932) 7

United States v. Kincade,
379 F. 3d 813 (9th Cir. 2004)(en banc) 1, 8

United States v. Mara,
410 U.S. 19 (1973) 7

United States v. Mitchell,
 __F.3d__, 2011 U.S. App. LEXIS 15272 (3d Cir. 2011) 2, 4

United States v. Salerno,
 481 U.S. 739 (1987) 3, 9

United States v. Scott,
 450 F. 3d 863 (9th Cir. 2006) 4

Weeks v. United States,
 232 U.S. 383 (1914) 6

STATE CASES

People v. Buza,
 Cal. App. 4th, 2011 Cal. App. LEXIS 1006
 (Cal. Ct. App. Aug. 4, 2011) 1, 3, 8

FEDERAL STATUTES

18 U.S.C. §3142 3, 4, 9

42 U.S.C. §14135a 9

Fed. R. Crim. Pro. 11 1

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 Table 4.2 (Nov. 2010) 4

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 of DNA Backlogs, 2010 - Myths vs. Reality* (Feb. 2011) 3

I. The Government Misidentifies Its Interest in Mr. Pool's DNA¹

There is no dispute that, like the vast majority of criminal defendants, Mr. Pool has conclusively been identified. In *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177, 186 (2004), the Supreme Court narrowly construed the government's interest in identity to the acquisition of a person's name. That name alone, without any more proof or information, provides "knowledge of identity" that the government can use to investigate. *Id.* The government not only has Mr. Pool's name, it has his fingerprints, address, family information, and all the evidence in his case. *Hiibel* undermines the government's argument that identity encompasses everything that a person has ever done. Such an unwarranted expansion would undermine the protections of the Fourth Amendment.

The government's repeated arguments that it needs Mr. Pool's DNA to identify him are belied by the facts of this case and undermined by the workings of CODIS. DNA profiles are logged into CODIS based upon *prior* verification of identity. *See People v. Buza*, __ Cal. App. 4th __, 2011 Cal. App. LEXIS 1006, at *57-59 (Cal. Ct. App. Aug. 4, 2011)(invalidating California arrestee DNA testing law). As the government admits at page 12 of its supplemental brief, CODIS is an

¹ Mr. Pool agrees his guilty plea does not moot this appeal. Mr. Pool's plea agreement allows him to withdraw his plea if he does not receive the stipulated sentence. Fed. R. Crim. Pro. 11(c)(1)(C); Dist. Ct. Docket No. 87. The district court deferred accepting the plea until sentencing. Mr. Pool remains out of custody on the same pretrial conditions originally set, with the stayed DNA testing condition. Mr. Pool retains a present stake in the outcome of this litigation. *See Camreta v. Greene*, 131 S.Ct. 2020, 2033 (2011); *see also United States v. Kincade*, 379 F.3d 813, 821 (2004)(en banc)(deciding supervised releasee's challenge to DNA profiling law even though defendant had been remanded into custody and compelled to submit a sample).

investigatory tool that compares crime scene profiles against arrestees. It is *not* used as an identification tool.

Because it has no concerns about Mr. Pool's identity, the government speculates about extreme cases where DNA profiles could potentially be used to identify. It states that if an arrestee absconds and changes his name, appearance, and fingerprints, DNA could identify him. It suggests that if an arrestee dies and is cremated, a DNA profile might be helpful. It claims that if an arrestee refuses to identify himself, he would be classified as an "unidentified person" and only then would his DNA be compared in CODIS to those from arrestees. Govt. Supp. Brief, at 13. The government concedes that – except in these extreme examples – in CODIS an arrestee's DNA will only be compared to crime scene samples in an attempt to match him to an open crime.² The government has not pointed to any instance where DNA has been or would have been used to identify a pretrial releasee for whom identity could not be established by other means.

Given the lack of any concerns about identification in this case or any other, the government's opposition brief makes it clear that its only interest is to investigate Mr. Pool to determine whether his DNA can be matched to any unsolved crimes. The requirement of government specificity "is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968). The government has failed to support the real reason for this search.

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² The Third Circuit erred in *Mitchell* when it claims that CODIS is used to identify arrestees. *United States v. Mitchell*, __ F.3d __, 2011 U.S. App. LEXIS 15272, * 78-79 (3d Cir. 2011)(en banc)

II. DNA Profiling of Pretrial Releasees Does Not Protect the Public or Inform the Release Decision

A. DNA Profiling Cannot Be Accomplished Prior to the Release Decision

The release statute does not delay release while a DNA sample is profiled or set a time frame for profile completion. At oral argument, the government conceded DNA profiling could not be accomplished in the three- to five-day window for a detention hearing. *See* 18 U.S.C. § 3142(f)(2). The Department of Justice only considers a sample “backlogged” if it “has not been tested 30 days after submission to the crime laboratory.” United States Department of Justice, Office of Justice Programs, National Institute of Justice, *NIJ Special Report: Making Sense of DNA Backlogs, 2010 – Myths vs. Reality* at iii (Feb. 2011) available at www.ojp.usdoj.gov/nij. Results from CODIS will never be available before the release decision. *Buza*, 2011 Cal. App. LEXIS at * 55-56. The Bail Reform Act itself recognizes this, making DNA collection mandatory as a condition of *release*, not prior to release. 18 U.S.C. § 3142(b)&(c)(1).

B. Public Safety Can Be Fully Addressed Using the Bail Reform Act’s Detention Procedures

The government argues the compelled DNA profiling informs the pretrial dangerousness determination in two ways: (1) the court will know whether the person it is releasing has any possibly unsolved prior offenses; and (2) the existence of a DNA profile will deter or help to solve crimes on pretrial release. Because the presumption of innocence means that the government cannot assume that arrestees have or will commit other crimes, these public safety concerns can amply be addressed using the standards in the Bail Reform Act.

The Bail Reform Act allows a federal court to detain a defendant if she poses a danger to the community. *United States v. Salerno*, 481 U.S. 739 (1987). If the

government has any argument that a particular defendant may pose a danger to the community, it can raise that to the court, in an adversarial hearing. To support pretrial DNA testing, the government argues that every pretrial defendant is inherently suspected of other crimes, unless a DNA sample exonerates him. To use the mere fact of an arrest to argue that all federal arrestees have committed unsolved crimes or will commit other crimes while on release directly violates the presumption of innocence in the Bail Reform Act. 18 U.S.C. § 3142(j); *United States v. Scott*, 450 F. 3d 863, 874 (9th Cir. 2006); *see also United States v. Mitchell*, ___ F.3d ___, 2011 U.S. App. LEXIS 15272, * 80, n. 25 (3d Cir. 2011)(en banc).

The presumption of innocence for pretrial defendants is not an empty exercise. For the most recent year of statistics available, out of 91,728 cases filed in the federal system, 9.7% or 8,905 cases, resulted in dismissal or acquittal. United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Federal Justice Statistics 2008*, Table 4.2 (Nov. 2010) *available at* <http://bjs.ojp.usdoj.gov>. Similarly, the federal courts have very low rates of pretrial release revocation: only 9.2% of pretrial releasees had their release revoked, and only 2.2% failed to appear. *Id.*, Table 3.3 (Nov. 2010); *cf. Samson v. California*, 547 U.S. 843 (2006)(detailing empirical evidence in support of search condition to reduce parolee recidivism). This low revocation rate – amply addressed by the current procedures – and the high dismissal/acquittal rate – involving thousands of defendants each year – further undermine the government’s public safety arguments.³

³ Ever more pervasive DNA databanking is not only a privacy issue, it is big business. The expansion of DNA collection laws has been promoted by a lobbying

III. Any Totality of Circumstances Analysis Must Consider the Absence of a Judicial Decision and the Absence of Probable Cause.

Warrantless searches are presumptively invalid. *See, e.g., Terry*, 392 U.S. at 20 (and authorities cited therein). The government must justify the absence of a warrant. Similarly, the government must show why individualized suspicion of wrongdoing is unnecessary for this search. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

If the government had any doubt about Mr. Pool's identity that could be resolved by taking his DNA, it could present these facts to the court and ask for a court-ordered DNA sample to resolve that issue prior to release. If the government identified facts to suggest Mr. Pool committed some unsolved crime, it could present these reasons to the court for a probable cause-based search order for Mr. Pool's DNA.

The government argues that probable cause to arrest for one crime reduces or eliminates Mr. Pool's privacy interest in an unrelated Fourth Amendment search. A search incident to an arrest must relate in some manner to the circumstances of the arrest. In *Terry*, 392 U.S. 1, the Court approved a limited, warrantless pat down search for weapons, pursuant to an investigative detention.

firm representing companies that profit directly from increased DNA profiling. The National Institute of Justice has repeatedly awarded this lobbying firm no-bid grants to conduct DNA-related research that has been used to support expansion of the database. Ben Protess, *The DNA Debacle: How the Federal Government Botched the DNA Backlog Crisis*, Pro Publica (May 5, 2009) available at www.propublica.org. Sen. Richard Shelby (R-Ala.), member of the Senate's justice appropriations subcommittee, has questioned the involvement of "private companies who incite victims and victims groups and mislead law enforcement agencies, for the sake of a profit." Statement on DOJ Fiscal Year 2011 Budget Request (May 6, 2010) available at <http://shelby.senate.gov/>.

The Court emphasized that the search was limited and specifically related to the personal security of the detaining officer. *Id.* at 23. The Court applied similar analysis in *Chimel v. California*, 395 U.S. 752, 762 (1969).

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape...In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

An arrest reduces the arrestee's privacy interests in connection with a governmental search, but only to the extent the search is linked to specific circumstances surrounding the arrest. Neither an arrest, nor the existence of probable cause to arrest, reduces an arrestee's *privacy* interests in any other way. *See, e.g., Weeks v. United States*, 232 U.S. 383 (1914)(fact of arrest does not reduce arrestee's privacy interests in home or personal correspondence).

Probable cause to arrest is not probable cause to search for evidence unconnected to the arrest. Mr. Pool's arrest warrant did not suggest there was probable cause to believe his DNA would provide any evidence related to that crime. Nor was the court's DNA release condition premised upon any probable cause to believe his DNA would be evidence of any other crime. *See Schmerber v. California*, 384 U.S. 757, 770 (1966) (intrusions into the human body may be undertaken only upon a clear indication that evidence will be found).

IV. Fingerprinting and Photographing Arrestees Do Not Implicate the Fourth Amendment in the Same Manner as DNA Profiling

The government argues when a suspect is arrested upon probable cause, he cannot claim a privacy interest in his identity and because arrestees are booked, an arrestee has no privacy interest in his DNA. Routine booking procedures involve photographing and fingerprinting. Photographing does not involve a Fourth

Amendment search. It records an arrestee's face, something knowingly exposed to the public. No person has a reasonable expectation of privacy in his face, the sound of his voice, or his handwriting. *United States v. Dionisio*, 410 U.S. 1, 14 (1973); *United States v. Mara*, 410 U.S. 19, 22 (1973).

Virtually all of the cases relied upon by the government, including *United States v. Kelly*, 55 F. 2d 67 (2d Cir. 1932), and the cases cited therein, concern booking procedures that included the taking of photographs and lump the taking of photographs with the taking of fingerprints. None support the argument that the Fourth Amendment counsels a search inside a person's body to reveal evidence that is not exposed to the public.

As for the relationship of fingerprinting to the Fourth Amendment, this issue is not as clear as the government posits. Neither *Hayes v. Florida*, 470 U.S. 811 (1985), nor *Davis v. Mississippi*, 394 U.S. 721 (1969) specifically holds that taking fingerprints during routine booking involves a Fourth Amendment search. *See Rise v. Oregon*, 59 F. 3d 1556, 1559 (9th Cir. 1995)(relying upon *Hayes* and *Davis*). Both cases hold that the temporary detention to fingerprint without probable cause or judicial authorization violates the Fourth Amendment as an illegal seizure. These cases do not hold that taking fingerprints is, by itself, a Fourth Amendment search. Similarly, none of the pre-*Katz* federal court opinions analyze the taking of fingerprints under the current Fourth Amendment reasonable expectation of privacy standard. *Katz v. United States*, 389 U.S. 347 (1967).

Mr. Pool agrees with the government that a citizen can reasonably expect his fingerprints to be private and not entered into a government database, absent some job where he voluntarily consents to the taking of fingerprints or an arrest where fingerprints will be taken during booking. *See* Govt. Supp. Brief, p. 10. Similarly,

a full custodial arrestee would also be unreasonable not to expect his clothes and belongings to be searched prior to custody, his photograph taken and identified by name, and his fingerprints to be taken and identified by name. To the extent these acts constitute searches, they are linked to and incident to the full custodial arrest.

Not so with DNA. Mr. Pool was not ordered to cooperate with a booking search inside his body. He was ordered to do so in connection with his release from custody. He has a reasonable expectation of privacy in his DNA.

V. The Government Undervalues Arrestees' Privacy Interests

By focusing upon the *procedure* involved in the taking of a DNA sample, the government ignores privacy concerns related to the *nature* of the government's search. By permitting the taking and retention of a presumed innocent person's DNA, the statute gives the government the ability to do many things it could not otherwise do. An individual's privacy concern may be diminished by the fact the government has not yet exercised its power to fully examine the DNA samples it has, but the privacy concern is not eliminated and cannot be eliminated as long as the government retains the DNA sample. *See Buza*, 2011 Cal. App. LEXIS 1006, *43-50.

The plurality in *United States v. Kincade*, 379 F. 3d 813, 837 (9th Cir. 2004)(en banc) determined that the individual privacy interests of a conditional releasee defendant are substantially diminished. This same reasoning does not apply in this case. The government is not taking Mr. Pool's DNA to demonstrate his identity on the charged offenses; it is taking his DNA to solve other crimes. Further, it is doing it solely because he is being *released* from custody. Release from custody does not change a person's privacy interest as to matters unrelated to the underlying charges. Nor does the mere fact of release change a person's

privacy interest in placing his DNA sample into a national database that can be accessed by all federal, state, and local law enforcement agencies.

VI. Mr. Pool's Challenge is Both Facial and As Applied

Mr. Pool challenges the DNA testing provisions both on their face and as applied to him. Before the magistrate judge, Mr. Pool argued: (1) the court had engaged in no fact-specific inquiry regarding whether the DNA condition was required to further the purposes of the Bail Reform Act (18 U.S.C. § 3142(b) and (c)(1)(A)); and (2) the mandatory imposition of the condition (42 U.S.C. § 14135a(b)) violated the Fourth Amendment and other constitutional provisions.

The government ignores Mr. Pool's "as applied" challenge. It has disclaimed any fact-specific argument that adding Mr. Pool's DNA to CODIS generally deters crime, exonerates the innocent, or prevents crime. It invokes *Salerno's* standard, but ignores that those defendants had already had a hearing, where the court found clear and convincing evidence that both defendants posed a danger to the community. *Id.* at 744. The defendants did not challenge this factual finding by the district court, or raise an "as applied" challenge based on the "particular facts of their case." *Id.*, at 745, n. 3. The Court rejected the facial challenge in large part because the Act required the government to "convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any other person." *Salerno*, 481 U.S. at 750.

In contrast to *Salerno*, the DNA provisions challenged in this case lack any fact-specific inquiry by the court. Thus, unlike in *Salerno*, the court never made a judicial finding regarding the search of Mr. Pool's body and his DNA. Mr. Pool reiterates his as-applied and facial challenges in this Court

VII. Conclusion

For the reasons set forth above, Mr. Pools asks this Court to find the mandatory DNA testing condition unconstitutional.

Dated: August 22, 2011

Respectfully Submitted,

/s/ Daniel J. Broderick

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/s/ Rachelle Barbour

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**CERTIFICATION OF COMPLIANCE REGARDING
WORD LIMIT IN JULY 8, 2011 ORDER
FOR CASE NO. 09-10303**

This brief complies with the word limit set forth in the Court's July 8, 2011 order. The brief contains no more than 3,500 words.

Dated: August 22, 2011

Respectfully submitted,

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JERRY ARBERT POOL

STATEMENT OF RELATED CASES

Counsel is aware of the following related cases pending in this Court within the meaning of Circuit Rule 28-2.6:

1. Haskell v. Brown, No. 10-15152 (submission withdrawn June 2, 2011)
2. United States v. Baker, No. 10-10223 (argued July 14, 2011)

Dated: August 22, 2011

DANIEL J. BRODERICK
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/s/ Rachelle Barbour

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JERRY ARBERT POOL

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)	
Defendant-Appellant.)	

I hereby certify that on August 22, 2011, I electronically filed the foregoing ***SUPPLEMENTAL REPLY BRIEF FOR REHEARING EN BANC*** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Service on the government and all amicus counsel will be accomplished by the appellate CM/ECF system.

Dated: August 22, 2011

/s/ Rachelle Barbour