C.A. NO. 09-10303

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	D.C. NO. CR. 09-0015-EJG
	)	(E.D. Calif., Sacramento)
JERRY ARBERT POOL,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court
for the Eastern District of California

BRIEF FOR APPELLEE

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JERRY ARBERT POOL,	)	BRIEF FOR APPELLEE
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Defendant-Appellant.	)	
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JURISDICTION

A federal grand jury returned a two-count indictment on January 8, 2009, charging defendant Jerry Arbert Pool with receipt and possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(a)(4)(B). E.R. 1; C.R. 1. The district court therefore had jurisdiction of this case pursuant to 18 U.S.C. § 3231.

This matter concerns the imposition of a pretrial release condition requiring the defendant to submit to the collection of his DNA. Through counsel, Pool challenged the constitutionality of the DNA testing condition, first before the magistrate court, and then before the district court. E.R. 34-37; C.R. 14, 36. The district court affirmed the magistrate court's decision upholding the constitutionality of the relevant statutory provisions, and ordering that Pool submit to DNA fingerprinting, on July 16, 2009. E.R. 26-29. Pool filed a timely notice of appeal on July 21, 2009. E.R. 30-31; C.R. 43; Fed. R. App. P. 4(b). Execution of the pretrial DNA testing condition has been stayed pending appeal to this Court. E.R. 37; C.R. 49. This Court has jurisdiction under 18 U.S.C. §§ 3731 and 3145(c).

ISSUES PRESENTED FOR REVIEW

1. Whether the collection of a DNA fingerprint as a mandatory condition of pretrial release from a defendant who has been arrested for a federal felony upon probable cause complies with the requirements of the Fourth Amendment.

2. Whether DNA fingerprinting of those arrested upon probable cause for the commission of a federal felony implicates the due process clause of the Fifth Amendment.

3. Whether DNA fingerprinting of those arrested upon probable cause for the commission of a federal felony, and released pending trial, is an "excessive" condition of release under the Eighth Amendment.

4. Whether the pretrial collection of DNA fingerprints violates the doctrine of Separation of Powers.

5. Whether the DNA fingerprinting of those arrested upon probable cause for the commission of a federal felony violates the Commerce Clause.

STATEMENT OF THE CASE

1. Nature of the Case

This case presents the first known challenge to the constitutionality of DNA sample collection in the federal jurisdiction as it has been recently modified by Section 1004 of the DNA Fingerprint Act of 2005 (hereinafter, "DNA Fingerprint Act") and Section 155 of the Adam Walsh Child Protection and Safety Act of 2006 (hereinafter, the "Adam Walsh Act"). That legislation changed the DNA Analysis Backlog Elimination Act of 2000 (hereinafter, the "Act") by authorizing the United States Attorney General to collect DNA samples in the federal jurisdiction from "individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States." 42 U.S.C. § 14135a(a)(1)(A). The amendments also modified the pretrial release provisions of the Bail Reform Act, making cooperation in DNA collection a mandatory condition of pretrial release for certain defendants. See 18 U.S.C. §§ 3142(b) and (c)(1)(A).

2. Statutory and Regulatory Background

DNA is a double-helix shaped nucleic acid held together by hydrogen bonds and composed of base pairings of Adenine and Thymine, and Cytosine and Guanine, which repeat along the double-

helix at different regions (referred to as short-tandem-repeat loci, or STR loci). See United States v. Kincade, 379 F.3d 813, 818-819 (9th Cir. 2004) (en banc); In re Fisher, 421 F.3d 1365, 1367 (Fed. Cir. 2005). When analyzed, these STR loci reveal the presence of various alleles, genic variants that represent themselves differently in virtually everyone (except identical twins, who share the same DNA). See Banks v. United States, 490 F.3d 1178, 1180 (10th Cir. 2007).

To obtain and profile this information, DNA is extracted from a cell, and the short tandem repeats are copied millions of times. After separating and marking the short-tandem-repeat sites, an analyst can determine the number of repeats at each of the loci. See Kincade, 379 F.3d at 818-819. Since there is an infinitesimal chance that two people's DNA will be identical in these variable regions, analysts can compare DNA profiles and exclude distinguishable individuals from suspicion. See Banks, 490 F.3d at 1180.

Given the power of DNA as an identification tool, Congress passed the DNA Analysis Backlog Elimination Act of 2000 requiring those convicted of a "qualifying Federal offense" to provide a "tissue, fluid, or other bodily sample . . . on which . . . [an analysis of that sample's] deoxyribonucleic acid" can be carried out. 42 U.S.C. § 14135a(c)(1)-(2) & (a)(1)-(2). The definition of "qualifying Federal offense" was progressively extended

through amendments to the Act and ultimately included "[a]ny felony," thereby permitting the collection of DNA samples from all convicted felons. 42 U.S.C. § 14135a(d)(1) (the Act as amended by 118 Stat. 2260).

Section 1004 of the DNA Fingerprint Act of 2005, Public Law 109-162, together with a related amendment in section 155 of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248, further broadened the categories of persons subject to DNA-sample collection, by providing that: "[t]he Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States." 42 U.S.C. § 14135a(a)(1)(A).[1] The DNA Fingerprint Act also made complementary changes to the Bail Reform Act, at issue herein, which make it a mandatory condition of pretrial release that a defendant cooperate in required DNA-sample collection.[2] See 18

[1] The statute also provides that the Attorney General may "direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any functions and exercise any power of the Attorney General under this section." 42 U.S.C. § 14135a(a)(1)(A).

[2] Refusal to submit a DNA sample as otherwise required by the Act is a class A misdemeanor. See 42 U.S.C. § 14135a(a)(5). Such refusal thus also violates a defendant's pretrial release condition requiring him to refrain from committing any crime.

U.S.C. §§ 3142(b) and (c)(1)(A).[3]

After an offender's DNA sample is collected pursuant to the Act, the collecting party provides the sample to the Director of the Federal Bureau of Investigation ("FBI"). See 42 U.S.C. § 14135a(b). The FBI Director then analyzes the DNA sample and includes the results in the Combined DNA Index System ("CODIS"). CODIS is a national database system, created by statute and administered by the FBI, that catalogues DNA fingerprints from numerous sources, including federal and state convicts and

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[3] Sections 3142(b) and (c)(1)(A) of Title 18, which are the operative provisions at issue in the instant litigation provide, in pertinent part:

> (b) Release on personal recognizance or unsecured appearance bond. (1) The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to . . . the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a) . . . .
>
> (c) Release on conditions. (1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person in the community, such judicial officer shall order the pretrial release of the person –
>
> (A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a) . . . .

arrestees[4], DNA samples recovered from crime scenes, unidentified remains, and relatives of missing persons. See 42 U.S.C. § 14132(a). CODIS "allows State and local forensics laboratories to exchange and compare DNA profiles electronically in an attempt to link evidence from crime scenes for which there are no suspects to DNA samples of those . . . on file in the system." H.R. Rep. 106900(I), at 8 (2000), 2000 U.S. Code Cong. & Admin. News at pp. 2323, 2324.

The DNA analyzed by the FBI in deriving the DNA fingerprints included in CODIS "consists primarily of junk DNA[,] non-genic stretches of DNA not presently recognized as being responsible for trait coding," which were purposefully selected because "they are not associated with any known physical or medical characteristics." United States v. Kriesel, 508 F.3d 941, 947 (9th Cir. 2007) (quoting Kincade, 379 F.3d at 818). See also H.R. Rep. No. 106-900(I) at 27, 2000 U.S. Code Cong. & Admin. News at p. 2323.

In addition to the limited nature of the DNA fingerprints collected pursuant to the statute, the Act imposes stringent conditions on the entire collection and DNA fingerprinting

[4] The states, like the federal government, require DNA fingerprinting from persons convicted of crimes, and have been moving rapidly towards extending DNA fingerprinting to arrestees. Almost all of the fifty states require DNA fingerprinting at least from all convicted felons, and 21 of the states have enacted authorizations to collect DNA samples from non-convicts as well. See http://www.dnaresource.com/domestic.html.

process. The Act and a regulation issued by the Attorney General pursuant to the Act define the classes of individuals from whom DNA samples are to be collected. See 42 U.S.C. § 14135a(a)(1)-(2); 28 C.F.R. § 28.12. The Act also expressly limits the government's right to use a DNA sample: it may be used only (1) for law enforcement identification purposes; (2) in judicial proceedings if otherwise admissible; (3) for criminal-defense purposes; (4) for a population-statistic database for identification research, or for quality control purposes if personally-identifiable information is removed. See 42 U.S.C. § 14135e(b) (stating that the DNA samples and profiles may be used only for specified purposes); Banks, 490 F.3d at 1191-1192. Violations of the limitations on the use of DNA samples and information may result in cancellation of access to CODIS and subject the violators to criminal sanctions. See 42 U.S.C. §§ 14132(c), 14133(c), 14135e(c).[5] The Act also provides for expungement of DNA information if the underlying criminal conviction is overturned or if the charges against an arrestee are dismissed or result in acquittal or no charges are filed within the applicable time period. See 42 U.S.C. §

[5] Section 14135e(c) of Title 42 provides that "[a] person who knowingly discloses a sample [collected pursuant to the Act] in any manner to any person not authorized to receive it, or obtains or uses, without authorization, such sample or result, shall be fined not more than $250,000 or imprisoned for a period of not more than one year. Each instance of disclosure, obtaining, or use shall constitute a separate offense under this subsection."

14132(d)(1)(A).

3. The Defendant and His Current Bail Conditions

A federal grand jury returned a two-count indictment on January 8, 2009, charging Pool with receipt and possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(a)(4)(B). E.R. 1; C.R. 1. The defendant was arraigned on the indictment on January 23, 2009. E.R. 33-34; C.R. 4. After being advised of his rights and of the potential penalties associated with the charged offenses, Pool was released on a bond and an extensive set of mandatory pretrial conditions, many of which are required by the Adam Walsh Act. S.E.R. 2-3; E.R. 33-34; C.R. 4.

While he is facing federal charges, Pool is subject to electronic monitoring by the Pretrial Services Agency twenty-four hours a day, seven days a week. S.E.R. 3; C.R. 4.[6]

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[6] Pool's Special Condition of Release number 13 reads:

> You shall, in accordance with this release order, have a home monitoring unit installed in your residence, a radio frequency transmitter device attached to your person, and shall comply with all instructions for the use and operation of said devices as given to you by the Pretrial Services Agency and employees of the monitoring company; and, you shall be subject to a curfew that will be determined by the pretrial services officer.

S.E.R. 3.

During the period between Pool's arraignment and when electronic monitoring was established at Pool's residence, the defendant was placed on house arrest by the magistrate court. E.R. 33-34; C.R. 4.

Additionally, as part of his pretrial release, Pool: (1) is required to abide by a mandatory curfew; (2) cannot have any communications with a minor without the child's parent or guardian being present; (3) cannot be found within 100 feet of a schoolyard, park, playground, or other place frequented by children; (4) cannot access the internet or possess a computer at his residence without prior approval; (5) must refrain from traveling outside the Eastern District of California without prior approval; (6) must not possess a firearm; and (7) must reside at a location that is reviewed and approved of by the Pretrial Services Officer. S.E.R. 2-3.

4. Proceedings in the Magistrate and District Courts

At Pool's arraignment, the magistrate court also attempted to impose the requirement that the defendant submit a DNA fingerprint, as mandated by 18 U.S.C. §§ 3142(b) and (c)(1)(A). E.R. 33-34; C.R. 4. Through counsel, Pool objected to the imposition of the DNA testing condition, raising the same constitutional arguments that he now brings before this Court. E.R. 33-34; C.R. 4. The magistrate court ordered briefing on the issue, and extensive written submissions were filed by each side. C.R. 4, 14, 27, 33. After consideration of those filings, the magistrate court upheld the constitutionality of mandatory pretrial DNA collection from federal arrestees, rejecting each of the defendant's proffered constitutional challenges. See United

States v. Pool, __ F. Supp. 2d __, 2009 WL 2152081 (E.D. Cal. May 27, 2009) (Hollows, M.J.); E.R. 6-25.[7] Specifically, the magistrate court held:

> [a]fter a judicial or grand jury determination of probable cause has been made for felony criminal charges against a defendant, no Fourth Amendment or other Constitutional violation is caused by a universal requirement that a charged defendant undergo a "swab test", or blood test when necessary for the purposes of DNA analysis to be used solely for criminal law enforcement identification purposes.

Magistrate Court Order, at 2, 13; E.R. 7, 18. In so holding, the magistrate court determined that the totality of the restrictions imposed on the collection and storage of DNA samples by the relevant statutes and regulations allow the government to use an offender's DNA fingerprint substantially in the same manner as it uses traditional fingerprint and photograph evidence – to identify offenders, to solve past and future crimes, and to deter future violations. See id. at 10-13; E.R. 15-18.

The defendant appealed the magistrate court's ruling on May 28, 2009, and the parties agreed to present the matter to the district court on the same briefs that were filed before the magistrate. E.R. 36; C.R. 36.[8] The district court affirmed the

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[7] For ease of reference, the magistrate court's 20-page opinion below will be referred to throughout this brief as "Magistrate Court Order," with citations to its location in the Excerpts of Record.

[8] After issuing its ruling, the magistrate court ordered the defendant to submit to DNA collection, but stayed the implementation of that decision pending appeal to the district

decision of the magistrate court on July 16, 2009, and adopted its holding that the mandatory extraction of a DNA fingerprint from a defendant who has been arrested upon probable cause complies with the Fourth Amendment, and the other assorted constitutional provisions raised by the defendant. See United States v. Pool, Cr. S. 09-0015-EJG, Order Denying Motion to Amend Release Order and Upholding DNA Testing Condition, 2009 WL 2152029 (E.D. Cal. July, 16, 2009) (Garcia, J.); E.R. 26-29.[9] The district court referred the matter back to the magistrate for the issuance of an order requiring the defendant to submit to DNA collection. District Court Order, at 4; E.R. 29.

The defendant filed his Notice of Appeal with this Court on July 21, 2009. E.R. 30-31; C.R. 43. While this appeal is proceeding, the parties have stipulated to a stay of the pretrial release condition requiring the defendant to provide a DNA fingerprint. E.R. 37; C.R. 49.

5. Bail Status

Defendant is not in custody, having been released on mandatory pretrial conditions, including electronic monitoring. S.E.R. 2-3.

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court. E.R. 36; C.R. 34, 37.

[9] For ease of reference, the district court's four-page opinion below will be referred to throughout as "District Court Order," with citations to its location in the Excerpts of Record.

SUMMARY OF ARGUMENT

The requirement that Pool, a federal arrestee, submit to the collection of a DNA fingerprint as a mandatory condition of his pretrial release is reasonable under the Fourth Amendment when considering the totality of the circumstances. As this Court and numerous other tribunals have recognized, the collection of a defendant's DNA fingerprint, whether through a mouth swab or by way of a blood draw, does not constitute more than a minimal intrusion. Rather, the collection of a defendant's DNA information is properly considered the technological progression of photographs and fingerprints, which have long been permitted to be kept on file for those arrested on probable cause. Furthermore, as a defendant who has been indicted by a grand jury and arrested upon probable cause, Pool has no more than a minimal privacy interest in his own identity, which is all that the Act, as it is written, is designed to glean.

The government has compelling interests in DNA fingerprinting under the Act, including the exoneration of the innocent, increased accuracy in criminal investigations, reduction in recidivism rates, the immediate and accurate verification of an offender's identity, and assistance to courts in making pretrial release and supervision decisions.

When defendant's reduced privacy interest and the insignificant intrusion occasioned upon it by the taking of a DNA

fingerprint are considered in light of the Act's compelling interests, the imposition of a DNA testing requirement on federal arrestees is "reasonable" under the Fourth Amendment.

Likewise, and as currently tailored, the recent amendments to the Act permitting the collection of DNA fingerprints from those arrested upon probable cause for the commission of a federal felony comply with the due process clause of the Fifth Amendment, and do not violate the Eighth Amendment, the Commerce Clause or the doctrine of Separation of Powers.

ARGUMENT

A. Standard of Review

A challenge to the constitutionality of a federal statute is a question of law that this Court reviews de novo. See United States v. Schales, 546 F.3d 965, 971 (9th Cir. 2008); United States v. Lujan, 504 F.3d 1003, 1006 (9th Cir. 2007). Whether a statute violates a defendant's due process rights is also subject to de novo review. See United States v. Hill, 279 F.3d 731, 736 (9th Cir. 2003).

B. The Magistrate and District Courts Correctly Recognized that the Collection of Defendant Pool's DNA Fingerprint as a Condition of His Pretrial Release Complies with the Requirements of the Fourth Amendment.

To this point, every circuit to consider the issue has uniformly determined that mandatory DNA fingerprinting of convicted felons pursuant to the DNA Analysis Backlog Elimination Act of 2000 and its prior amendments is constitutional under the

Fourth Amendment.[10] See, e.g., Kriesel, 508 F.3d 941; Kincade, 379 F.3d 813; Banks, 490 F.3d 1178; Johnson v. Quander, 440 F.3d 489 (D.C. Cir. 2006); United States v. Kraklio, 451 F.3d 922, 924-925 (8th Cir. 2006); United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005); Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005); Groceman v. U.S. Dep't of Justice, 354 F.3d 411 (5th Cir. 2004). Defendant here argues that the expansion of the Act's requirements to those arrested upon probable cause has rendered the statute unconstitutional. Defendant is mistaken. Requiring Pool to provide a DNA fingerprint by way of a buccal mouth swab[11] as a condition of his pretrial release is reasonable

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[10] The United States agrees with the defense that the taking of someone's DNA fingerprint constitutes a "search," triggering Fourth Amendment protections. See Appellant's Opening Brief ("AOB"), at 20-21; Kincade, 379 F.3d at 821 n.15; Kriesel, 508 F.3d at 946 n.6; Magistrate Court Order, at 5; E.R. 10. In fact, the Supreme Court has determined that even the collection of traditional fingerprints from persons implicates the Fourth Amendment. See Davis v. Mississippi, 394 U.S. 721, 727 (1969).

[11] Pursuant to 42 U.S.C. § 14135a(a)(1)(A) and its implementing rule, DNA fingerprints can be collected only by means authorized by the Attorney General. See 28 C.F.R. § 28.12(f)(1). The means of sample collection that have been authorized are blood sample collection (by finger prick) and buccal swab collection. DNA samples were initially collected from convicted federal offenders through venipuncture (blood drawn from the arm) in the early stages of the federal DNA sample collection program, but that practice was discontinued a number of years ago. DNA fingerprints are collected from non-convicts (arrestees and defendants) under the expanded sample collection program authorized by 42 U.S.C. § 14135a(a)(1)(A) and 28 C.F.R. § 28.12 by buccal swab, and the FBI provides buccal swab kits to the agencies responsible for sample collection for that purpose. See 73 FR 74932 at 74935.

under the Fourth Amendment's "totality of the circumstances test", which is the law to be applied in this Circuit. The judicial and grand jury findings of probable cause that Pool committed two felony offenses are each properly characterized as "watershed event[s]," which leave the defendant with a severely "diminished expectation of privacy in his own identity," and after which his "liberty may be greatly restricted – even denied." Magistrate Court Order, at 7, 8; E.R. 12, 13. When considered in conjunction with his significantly reduced expectation of privacy in his own identity as someone arrested upon probable cause for crimes involving the exploitation of children, and the weighty governmental interests served by the Act, the extraction of Pool's DNA fingerprint constitutes a minimal intrusion.

1. DNA Fingerprinting of Those Arrested Upon Probable Cause is Constitutionally Reasonable Under the Totality of the Circumstances.[12]

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[12] Defendant suggests that this Court should analyze the permissibility of DNA fingerprinting under the slightly more stringent "special needs" analysis, which the Second and Seventh Circuits have utilized in analyzing, and upholding, the constitutionality of DNA fingerprinting. See United States v. Amerson, 483 F.3d 73, 78 (2d Cir. 2007); United States v. Hook, 471 F.3d 766, 772-774 (7th Cir. 2006). However, the special needs test is not the law in any other circuit and it has not been applied in a precedential way by this Court to analyze the permissibility of DNA fingerprinting. See Kriesel, 508 F.3d at 947 (applying totality of circumstances approach); Kincade, 379 F.3d at 832 (same). Defendant's rationale for why it should be applied here is unavailing. That is because, as the magistrate and district courts correctly recognized, Pool suffered a constitutionally cognizable change in status when he was indicted

As the magistrate and district courts correctly recognized, when addressing Fourth Amendment challenges to the Act, this Court and the majority of other courts of appeals have adopted a reasonableness under the "totality of circumstances" approach. See Magistrate Court Order, at 5; E.R. 10; District Court Order, at 3-4; E.R. 28-29. Most recently, in Kriesel, this Court reaffirmed that the "touchstone of the Fourth Amendment is reasonableness," and adopted the "general Fourth Amendment approach," which "examin[es] the totality of the circumstances to

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by a federal grand jury and arrested upon probable cause. See, infra, section B.1.b(1). See also Anderson v. Commonwealth, 274 Va. 469, 476-477, 650 S.E.2d 702, 706 (2007) ("the taking of a DNA sample [of an arrestee] is permissible as part of the routine booking procedures. As such, no 'additional finding of reasonable suspicion' much less probable cause, must be established before the sample may be obtained.") (quoting Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992)).

Contrary to defendant's suggestion, United States v. Scott, 450 F.3d 863 (9th Cir. 2006) does not warrant a different result. Notwithstanding the fact that Scott is readily distinguishable in that it involved the search of an arrestee's house, a place in which (unlike Pool's identity) he still possessed a privacy interest, the fact remains that the Scott court applied both a totality of the circumstances test and a special needs test when evaluating the constitutionality of the search at issue. See id. At no point did the court state that the circumstances at issue required a special needs analysis. As the subsequent Kriesel decision makes clear, a totality of the circumstances analysis remains the preferred approach in this judicial circuit.

Regardless, and as is discussed more fully below, the result would be the same in this instance under either legal approach.

determine whether a search is reasonable." Id. at 947 (quoting Samson v. California, 547 U.S. 843 (2006) and United States v. Knights, 534 U.S. 112 (2001)). "Whether a search is reasonable 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" Kriesel, 508 F.3d at 947 (quoting Knights, 534 U.S. at 118-119).

a. The Collection of a DNA Fingerprint – Whether Through Mouth Swab or Blood Draw – Constitutes an Insignificant Intrusion.

The gathering of genetic information for identification purposes does not constitute more than a minimal intrusion upon the defendant. The Supreme Court has repeatedly recognized that the physical intrusion worked by a blood draw (or a mouth swab for that matter) does not "infringe significant privacy interests." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 625 (1989). See also Schmerber v. California, 384 U.S. 757, 771 (1966) (observing that blood testing is "commonplace" and "for most people . . . involves no risk, trauma or pain"); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) (blood testing constitutes a "slight . . . intrusion . . . to which millions of Americans submit as a matter of course nearly every day."). This Court has echoed that sentiment. See, e.g., Kriesel, 508 F.3d at 948; Kincade, 379 F.3d at 836-837.

The implementing regulations here envision DNA fingerprinting being conducted by way of a mouth swab, a procedure that is even less intrusive than a routine blood draw. See supra, note 11. See also Skinner, 489 U.S. at 625 (noting breath tests are even less intrusive than blood tests because they do not require piercing of the skin or medical expertise to administer – points applicable to buccal swabs as well); Kriesel, 508 F.3d at 948 (noting lesser privacy implications of cheek swabs).[13]

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[13] In his brief before this Court, Pool attacks the use of buccal swabs to collect DNA fingerprints from arrestees and defendants as "sacrific[ing] . . . reliability and accuracy in favor of expediency," AOB, at 8, n.5, perhaps implying that the use of buccal swabs risks implicating persons, like himself, in offenses they did not commit. This claim is groundless. The DNA profiles that are derived from buccal swab samples are the same 13-core loci DNA profiles that are derived from blood samples and have the same reliability and accuracy in uniquely identifying individuals.

Defendant's argument on this point appears to emanate from language in Kincade, 379 F.3d at 817, noting a preference for blood samples as more "reliable." The reliability underlying the government's preference at the time was the consistent amenability of blood samples to analysis, which minimizes the risk that taking another sample from the same individual will be needed to derive a DNA fingerprint. The method of sample collection was considered further in connection with implementing DNA fingerprint collection from arrestees and defendants pursuant to 28 CFR § 28.12 (as amended). The reasons for the decision to utilize buccal swabs for this purpose include that: (1) buccal swabs are amenable to analysis with sufficient reliability under the current development of sample collection technology and DNA analysis; (2) states that collect DNA samples from arrestees typically do so by buccal swab; and (3) buccal swabs generally appear more suitable for use in the booking contexts in which DNA fingerprints are collected from arrestees and defendants. See generally 73 FR at 74934-35. Defendant's insinuation that the

In fact, in rendering their respective decisions below, the magistrate and district courts joined the bulk of tribunals that have addressed the issue in determining the extraction of an individual's DNA simply to be the "technological progression of photographs and fingerprints," which have long been permitted to be kept on file for those arrested upon probable cause. Magistrate Court Order, at 8; E.R. 13; District Court Order, at 2-4; E.R. 27-29. As this Court has held:

> That the gathering of DNA information requires the drawing of blood rather than inking and rolling a person's fingertips does not elevate the intrusion upon the plaintiffs' Fourth Amendment interests to a level beyond minimal.

Rise v. Oregon, 59 F.3d 1556, 1560 (9th Cir. 1995). See also Nicholas v. Goord, 430 F.3d 652, 671 (2d Cir. 2005) ("[t]he collection and maintenance of DNA information, while effected through relatively more intrusive procedures such as blood draws or buccal cheek swabs, in our view plays the same role as fingerprinting"); Banks, 490 F.3d at 1193 ("CODIS operates much like an old-fashioned fingerprint database (albeit more efficiently.")); Johnson v. Ogershok. No. 4:02-CV-1525, 2004 WL 3622383, at *7 (M.D. Pa. Aug. 17, 2004) ("We find that the ability of law enforcement to now collect and keep DNA samples is simply a technological progression of photographs and

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choice of this method reflected a decision to endanger the innocent for unspecified reasons of "expediency" is, as noted, groundless.

fingerprints . . . ."); State v. O'Hagen, 189 N.J. 140 (2007) ("We harbor no doubt that the taking of a buccal cheek swab is a very minor physical intrusion upon the person . . . . [T]hat intrusion is no more intrusive than the fingerprint procedure and the taking of one's photograph that a person must already undergo as part of the normal arrest process."); State v. Brown, 212 Or. App. 164 (2007) ("Because [using a swab to take a DNA sample from the mucous membrane of an arrestee's cheek] is akin to the fingerprinting of a person in custody, we conclude today that the seizure of defendant's DNA [does] not constitute an unreasonable seizure . . . .").

In fact, in upholding its state's DNA fingerprint statute, which permits the taking of a defendant's DNA upon arrest, the Supreme Court of Virginia found compelling that the sample taken, while more revealing, "is no different in character than acquiring fingerprints upon arrest." Anderson, 274 Va. at 474, 650 S.E.2d at 705.[14]

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[14] Defendant raises the specter of a DNA fingerprint being taken from him by force. See AOB, at 7-8. Title 42, United States Code, Section 14135a(a)(4)(A) allows force to be used, if necessary, to collect a DNA sample, just as force may be utilized or directed by the court if necessary to obtain other required forms of booking information from a recalcitrant arrestee, such as fingerprints or a photograph. There is no such issue in the present case, since the magistrate and district courts have ordered the defendant to cooperate in the collection of a DNA fingerprint as required by 18 U.S.C. § 3142, and Pool has not asserted that he will refuse to abide by the district court's order if it is upheld by this Court. No possible issue regarding the use of force could arise unless defendant

b. Defendant's Privacy Interests in This Instance are No More Than Minor.

Beyond the minimal intrusion occasioned by a buccal mouth swab of the defendant to collect DNA, other features of the defendant's situation and the legal regime governing DNA fingerprinting strongly support the conclusion that there is no infringement of a constitutionally protected privacy interest in this instance.

(1) Because Pool Has Been Indicted by a Grand Jury and Arrested Upon Probable Cause, His Privacy Interest in His Own Identity is No More Than Minor.

In conducting a totality of the circumstances analysis here, this Court must assess the degree of intrusion to Pool in light of his substantially diminished expectation of privacy in his own identity. Pool contends that as a defendant who has not yet suffered a conviction, he enjoys the same panoply of rights enjoyed by every other American citizen. This simply is not the case. It has long been recognized that when a suspect is arrested upon probable cause, any right he may have in keeping his identity a secret is extinguished:

> [W]hen a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it. We accept this proposition because the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining

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unlawfully and violently resists compliance with the court's order, which the government trusts will not occur.

> a permanent record to solve other past and future crimes. This becomes readily apparent when we consider the universal approbation of "booking" procedures that are followed for every suspect arrested for a felony, whether or not the proof of a particular suspect's crime will involve the use of fingerprint identification.

Jones, 962 F.2d at 306 (emphasis added). In Kincade, the Ninth Circuit reiterated this basic principle – that a defendant arrested upon probable cause cannot reasonably contend that he has a right to keep indicia of his identity under seal from the government, whose paramount responsibility is to protect public safety:

> [T]he DNA profile derived from [a] defendant's blood 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 (emphasis added). See also Boling v. Romer, 101 F.3d 1336, 1339 (10th Cir. 1996) (quoting Jones).

The magistrate and district courts correctly recognized this fundamental maxim in upholding the constitutionality of the Act's most recent amendments: "[a]n arrestee has a diminished expectation of privacy in his own identity. Probable cause has long been the standard which allowed an arrestee to be photographed, fingerprinted and otherwise compelled to give information which can later be used for identification purposes." Magistrate Court Order, at 8 (citing Napolitano v. United States, 340 F.2d 313, 314 (1st Cir. 1965)); E.R. 13. See also Rise, 59

F.3d at 1559-1560 ("[E]veryday 'booking' procedures routinely require even the merely accused to provide fingerprint identification, regardless of whether investigation of the crime involves fingerprint evidence."); Banks, 490 F.3d at 1186; Smith v. United States, 324 F.2d 879, 882 (D.C. Cir. 1963) (Burger, J.) ("it is elementary that a person in lawful custody may be required to submit to . . . fingerprinting . . . as part of the routine identification process").

United States v. Scott, cited repeatedly by the defendant, does not compel a different result. Scott involved the warrantless search of a pretrial releasee's home – an area in which the defendant still possessed a monumental privacy interest after his arrest. See Scott, 450 F.3d at 864-865. In contrast, and as discussed more fully above, upon his indictment and arrest in this matter Pool lost any privacy interest he might have in his own identity. Contrary to the defendant's assertions, this Court did not say in Scott that non-convicted arrestees possess the same rights as every other citizen. Rather, the majority explicitly recognized that a "pretrial releasee must suffer certain burdens that ordinary citizens do not, such as the requirement that they 'seek formal permission from the court . . . before . . . traveling outside the jurisdiction.'" Id. at 872 n.11. Submitting biometric information to the state to be used for identification purposes is another such "burden." Indeed, in

Scott, this Court admitted that "the balance will be struck differently in cases where the defendant is required to report for drug-testing at a location away from his home." Id. at 872 n.10.

(2) The Act and its Implementing Regulations Are Structured so as to Glean a Defendant's Unique Identity – Nothing More.

Defendant and amicus curiae would have this Court believe that the Act and its implementing regulations are designed to obtain and catalogue far more than just Pool's identity. See AOB, at 11-16; Brief of American Civil Liberties Union ("ACLU"), at 11-18. Indeed, defendant devotes a fair portion of his brief to describing a theoretical Orwellian state, in which the DNA extracted from defendants will ultimately be used to determine a breathtaking amount of information, including an individual's "health, propensity for particular diseases, race and gender characteristics, and perhaps even propensity for future conduct." AOB, at 13. Defendant's contentions in this vein are incorrect and disregard the provisions of the statutory scheme actually at issue. To be sure, these types of hypothetical arguments have been raised and rejected numerous times with respect to the Act. See, e.g, Kriesel, 508 F.3d at 947; Banks, 490 F.3d at 1191-1192; Nicholas, 430 F.3d at 670-671.

As an initial matter, defendant's submission cites to the preamble of the implementing DNA rule and claims that the

government has agreed that DNA sample collection from individuals in the justice system reveals sensitive genetic information to a greater extent than simply taking fingerprints. See AOB, at 13. However, the rule's preamble unequivocally states the opposite:

> [T]he DNA profiles retained in the system are sanitized 'genetic fingerprints' that can be used to identify an individual uniquely, but do not disclose an individual's traits, disorders, or dispositions. The rules governing the operation of CODIS reflect its function as a tool for law enforcement identification, and do not allow DNA information within the scope of the system to be used to derive information concerning sensitive genetic matters.

73 FR at 74937-38.[15]

The statement quoted in defendant's brief has nothing to do with the disclosure of sensitive genetic information. It is part of a discussion in the rule noting that DNA sample collection has added value because it provides additional identification to solve crimes in many instances where perpetrators leave no recoverable fingerprints but do leave biological residues identifiable by DNA matching. See 73 FR at 74933-34.

Defendant and amicus curiae point also to the possibility of partial or "familial" DNA matches as supporting defendant's claims. See AOB, at 14; ACLU Brief, at 15-16. Partial matching

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[15] See also Kriesel, 508 F.3d at 947 ("[t]he DNA analyzed by the FBI consists primarily of junk DNA[,] non-genic stretches of DNA not presently recognized as being responsible for trait coding that were purposefully selected because they are not associated with any known physical or medical characteristics.") (internal quotations omitted).

refers to finding DNA profiles of individuals in the database that do not match precisely to crime scene DNA from a perpetrator, but are close enough to create a probability that the perpetrator is a close relative of the identified individual. The design of the DNA identification system does not encompass searches for partial matches against the national DNA index maintained by the FBI – the database in which the defendant's DNA profile will be included – but occasionally partial matches appear incidentally as a result of ordinary searches seeking exact matches, and, if so, they may be used as investigative leads. See 73 FR at 74938.[16] Two points are important to note.

[16] In a related argument, defendant contends that his privacy concerns are enhanced here by alleged flaws in the security and operation of the DNA fingerprint system. See AOB, at 16-19. First, Pool claims that use of DNA information has in some instances resulted in innocent persons being temporarily suspected of crimes they did not commit, or might have had such an effect if laboratory mistakes were not caught in time. Examples of isolated instances in which DNA identification methods may result in suspicion that an innocent person committed a crime certainly do not outweigh the many thousands of cases in which the use of these methods clears innocent persons of crimes they did not commit. See, infra, section B.1.c.

Regardless, defendant's assertions in this regard establish no difference from other means of forensic identification whose constitutionality is unquestioned. Immediate and invariable infallibility in inculpating or exonerating individuals as perpetrators of crimes is not a standard to which fingerprinting, photography or any other form of law enforcement identification is held. Defendant has provided no reason why DNA fingerprinting should be held to such a standard.

Second, defendant urges that government databases may not be secure, but he has established no insecurity of the FBI database in which his DNA profile will be maintained. Vast amounts of

First, the occurrence of familial matching or even use of such matches for investigative needs does not implicate any protected Fourth Amendment privacy right of Pool (or any other similarly situated arrestee compelled to submit to DNA collection). If use of retained DNA information raised any privacy interest protected by the Fourth Amendment, the interest would be that of defendant's relatives who might theoretically become part of the potential suspect class in a crime because of a partial match. Defendant has no standing to assert such an interest here. See Rakas v. Illinois, 439 U.S. 128, 139-140 (1978) (holding that standing is not conferred vicariously, and that even if the Fourth Amendment rights of a third-party have been violated, defendant must show that the challenged search or seizure infringed his personal Fourth Amendment rights).

Second, it should be noted that use of partial DNA matches is no different in principle from using other equivocal crime scene evidence as an investigative lead, such as an eyewitness' report of a partial license plate number, and partial DNA matches

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information on individuals – much of it far more personal and private than the sanitized genetic footprints used for DNA identification – are maintained in government databases for a variety of reasons; a mere theoretical possibility of security breaches does not outweigh the important purposes served by DNA fingerprinting any more than it does in other contexts. See Magistrate Court Order, at 12 (recognizing that "[o]ur modern technological society cannot function in an atmosphere of privacy paralysis occasioned by a parade of 'what ifs.'"); E.R. 17.

are singularly nonthreatening to any innocent person, since even on the remote possibility that some innocent relative of the defendant might be implicated as a possible suspect in a crime because of a partial match, the relative could readily clear himself by providing a DNA sample, which would be found not to match the crime scene DNA profile. In any event, the partial match objection is much like arguing that arrestees should not be photographed because family resemblance to their mug shots may occasionally result in their relatives being identified as possible perpetrators of crimes, a claim that has no greater persuasiveness when transposed to the context of DNA.

Additionally, defendant contends that under the Act the alleged risks of privacy invasion are enhanced by retention of the DNA samples in CODIS, from which sensitive genetic information supposedly might be extracted at some unspecified time in the future. See AOB, at 15-16 n.12. This claim is of no moment, as it ignores the fact that DNA samples are subject to essentially the same use restrictions and privacy protections as DNA profiles. The samples cannot be used for purposes other than extracting the 13-core loci profiles which do not disclose sensitive genetic information. See 73 FR at 74938.[17]

[17] To the extent defendant's claim alleges a mere speculative possibility that the make-up of the current system might be changed in the future in a manner that would allow sensitive genetic information to be extracted from retained DNA samples, Pool has shown no reason to believe that this will occur.

In general, Pool's hypothetical arguments gloss over the myriad and stringent protections built into the Act, which are designed to prevent the sort of abuses defendant claims are inevitable. As this Court and other courts of appeals have previously recognized, the laws governing the DNA identification system provide that DNA samples and fingerprints may be used only for strictly defined purposes relating to the establishment of identity. See 42 U.S.C. §§ 14132(b)(3), (c), 14133(b)-(c), 14135a(c)(2), 14135e. Criminal penalties are provided for the misuse of DNA fingerprints. See 42 U.S.C. § 14135e(c).[18] Defendant's hypothetical arguments concerning potential future abuses should not factor into this Court's decision on the

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Furthermore, Congress has provided an additional safeguard on this point by prohibiting the alteration of the core loci without prior notice and explanation to the Senate and House Judiciary Committees. See P.L. 108-405 § 203(f).

[18] Pool's privacy interests are also protected, to a degree, by the Act's expungement provisions, which provide for the purging of DNA information if the underlying criminal conviction is overturned or if the charges against an arrestee are dismissed or result in acquittal or no charges are filed within the applicable time period. See 42 U.S.C. § 14132(d)(1)(A). Defendant complains that the relevant statutory language provides for the expungement of DNA fingerprints, but not the destruction of the DNA samples. See AOB, at 10. However, if the DNA fingerprint is expunged, the sample becomes useless for law enforcement identification purposes and its retention, though harmless, would be pointless. Hence, if the conditions for expungement are satisfied, the FBI disposes of the DNA sample and removes the profile from CODIS.

statutory scheme actually at issue.[19] See Kincade, 379 F.3d at 837-838 (recognizing that the court's job is to address the constitutionality of the program before it, as it is designed, and as it is implemented, and not to base its decision on "dramatic Hollywood fantasies"). See also Magistrate Court Order, at 12-13 (recognizing that the privacy protections and potential sanctions for DNA misuse that are built into the DNA Fingerprint Act are sufficient to allay the same fears of "Big Brother," which were expressed some seventy years ago with respect to traditional fingerprinting) (citing United States v. Kelly, 55 F.2d 67 (2d Cir. 1932)); E.R. 17-18.

By taking the DNA fingerprint of Pool, an individual for whom sufficient probable cause to warrant arrest has been determined, the government is gleaning the defendant's unique identity – nothing more. To be sure, upon arrest for receipt and possession of child pornography, Pool lost much more than simply his right to privacy in his own identity. As previously stated, Pool has already been ordered confined to his home during certain hours of the day, and is required to be tracked by means of

[19] Defendant asserts briefly that his privacy concerns are heightened in this instance by the Department's potential use of private contractors in administering the DNA identification system. AOB, at 16. Use of private contractors in administering federal programs is nothing new, and given that any private contractors involved in the DNA identification system are subject to the system's stringent privacy protections and security requirements, defendant's concerns here are without substance. See 73 FR at 74939-40.

electronic monitoring until the day of his trial in this matter. S.E.R. 2-3. Pool's enumerated release conditions make abundantly clear that while awaiting disposition of the charges in this case, his liberty has been severely curtailed, to the point that he cannot leave his own home without authorities knowing his whereabouts. S.E.R. 2-3. It is against this backdrop that this Court must analyze the constitutionality of the DNA Fingerprint Act's revisions to the Bail Reform Act. See 18 U.S.C. §§ 3142(b) and (c)(1)(A). Because Pool has no right to keep his identity veiled from the government, his Fourth Amendment interests here are minimal.

c. The Governmental Interests to Be Served By DNA Collection Are Substantial.

On the other side of the balance, the governmental interests served by DNA fingerprinting are compelling. The development of "DNA identification technology is one of the most important advances in criminal identification methods in decades." H.R. Rep. No. 900(I), supra, at 9. Of primary importance is the fact that the CODIS database "promotes increased accuracy in the investigation and prosecution of criminal cases." Sczubelek, 402 F.3d at 185. Indeed, by populating the CODIS database with the DNA fingerprints of those arrested upon probable cause, law enforcement will be able to draw on an increasingly accurate pool of information, which will aid law enforcement in a number of

respects.[20]

As an initial matter, including the DNA samples of those arrested upon probable cause will necessarily further help to exculpate suspects of crimes they did not commit, and will further help to eliminate individuals from suspect lists when crimes occur. See Sczubelek, 402 F.3d at 185; Kincade, 379 F.3d at 839 n.38 ("the CODIS database can help absolve the innocent just as easily as it can inculpate the guilty . . . use of CODIS promptly clears thousands of potential suspects-thereby preventing them from ever being put in that position, and advancing the overwhelming public interest of prosecuting crimes accurately") (emphasis in original).[21] DNA fingerprinting can also help to solve crimes when no other evidence points to a particular suspect. In fact, DNA analysis offers a critical complement to traditional fingerprint analysis in many cases where perpetrators of crimes leave no recoverable fingerprints,

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[20] Amicus curiae argues that DNA sample collection should be limited to cases involving a narrowly defined range of offenses and that broader collection is counterproductive. See ACLU Brief, at 21-26. However, the scope of the DNA statute and rule is based on overwhelming evidence that broader sample collection yields commensurate benefits. See 73 FR at 74937, 74939.

[21] The claim by amicus curiae that the collection of DNA from arrestees does not help to exonerate the innocent, see ACLU brief, at 26-27, strains credibility. This Court and other tribunals have regularly determined that the expansion of such collection increases the likelihood that innocent persons will be cleared – or will not be suspected to begin with – because of the identification of the actual perpetrator through DNA matching.

but leave biological residues at the crime scene. Hence, there is a vast class of crimes that can be solved through DNA matching that could not be solved in any comparable manner (or could not be solved at all) if the biometric identification information collected from individuals were solely limited to fingerprints. See Banks, 490 F.3d at 1188 (recognizing that numerous courts addressing DNA indexing statutes have explained that the identification of suspects is relevant not only for solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes); Kriesel, 508 F.3d at 949 (recognizing that populating the CODIS database contributes to the solution of past crimes).[22]

In addition to significantly aiding in the accuracy of investigation and prosecutions, collecting DNA fingerprints at the time of arrest or at another early stage in the criminal justice process can prevent and deter subsequent criminal conduct – a benefit that will not be realized to the same degree if law enforcement agencies wait until conviction to collect DNA. Indeed, a legitimate recognition of the added value of early DNA sample collection in solving and preventing murders, rapes and other crimes was a specific motivation for enacting the operative

[22] A necessary corollary to this is that populating the CODIS database with the DNA fingerprints of those arrested upon probable cause will help bring closure to additional victims of crimes who have suffered under the knowledge that the perpetrators remain at large.

legislation. See 151 Cong. Rec. S13756-58 (daily ed. Dec. 16, 2005) (remarks of Sen. Kyl, sponsor of the DNA Fingerprint Act) (explaining the value of including arrestees in the DNA database). Courts have frequently recognized that DNA fingerprinting of convicted felons furthers the weighty governmental interest of reducing recidivism among offenders. See, e.g., Kincade, 379 F.3d at 840. This same critical objective holds true with respect to individuals who, like Pool, are released on pretrial supervision.

To be sure, as with their metacarpal brethren, collecting DNA fingerprints at or near the time of arrest also serves important purposes relating directly to the defendant's arrest and the ensuing proceedings. For example, the analysis and database matching of a DNA sample collected from an arrestee may show that the arrestee's DNA matches DNA found in crime scene evidence from another crime. The magistrate and district courts correctly recognized that such information would undoubtedly help authorities to assess whether an individual may be released safely to the public pending trial and to establish appropriate conditions for that defendant's release, or to ensure proper security measures in case he is detained. Magistrate Court Order, at 10; E.R. 15. DNA fingerprinting of arrestees may also help detect violations of pretrial release conditions involving criminal conduct whose perpetrator can be identified through DNA

matching, and to deter such violations. See 73 FR at 74934.

Additionally, the collection of an arrestee's DNA fingerprint may also provide an alternative means of directly ascertaining or verifying an arrestee's identity, where fingerprint records are unavailable, incomplete, or inconclusive. Consequently, conducted incident to arrest, DNA fingerprinting offers a legitimate means to obtain valuable identification information regarding the arrestee. See Anderson, 274 Va. at 475-476, 650 S.E.2d at 706 (upholding state statute authorizing DNA sample collection from arrestees based on 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") (citation and quotation omitted). See also Jones, 962 F.2d at 307 (recognizing the government's weighty interest in preserving DNA fingerprints as a permanent identification record).[23]

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[23] Defendant characterizes the expungement provisions of the Act, 42 U.S.C. § 14132(d)(1)(A)(ii), as a blanket disclaimer of any legitimate interest by the government in having DNA information regarding "persons who are not subsequently convicted of a crime," and consequently as making DNA sample collection from non-convicts unconstitutional. AOB, at 35-37. Defendant's contention ignores the Act's immediate purposes, mentioned above, relating to identification, pretrial supervision, and security. See 73 FR at 74934. These purposes would be thwarted if DNA fingerprints were not taken until conviction.

Furthermore, defendant's argument ignores the fact that the timing of sample collection is not an inconsequential matter.

d. This Court's Recent Decision in Friedman v. Boucher is Inapplicable when Addressing the Constitutionality of the Recent Amendments to the Act.

Throughout his opening brief, Pool makes much of this Court's recent decision in Friedman v. Boucher, 580 F.3d 847 (9th Cir. 2009).[24] Defendant initially contends that Friedman militates in favor of this Court's application of the Fourth Amendment's "special needs" test, which is discussed more fully, infra. See AOB, at 28. Pool further argues that Friedman stands for the proposition that mandatory DNA collection of those arrested upon probable cause can never satisfy the totality of the circumstances test, or any other Fourth Amendment analysis. See AOB, at 32-37. As the district court correctly concluded below, however, Friedman is completely inapplicable to the situation at hand.

As an initial matter, and contrary to defendant's contention, the Friedman court in no way anointed the special needs test as the analysis to be employed in the DNA fingerprint

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The public has a compelling interest in solving crimes as promptly as possible. For example, in the case of a defendant who has committed a murder, rape, or other serious crime, and who would be identified as the perpetrator through DNA matching if a DNA fingerprint were collected and analyzed, until that fingerprint is obtained, law enforcement resources may be squandered in attempting to solve the crime by other means.

[24] Appellant's Opening Brief cites this Court's initial opinion in Friedman, located at 568 F.3d 1119. That decision has been amended and superseded at 580 F.3d 847.

arena. Indeed, there, this Court applied both the special needs test and the totality of the circumstances analysis in determining that law enforcement's actions ran afoul of the Fourth Amendment. Given the facts of Friedman, which differ markedly from those at issue in this case, such a result is not surprising.

Friedman involved the reversal of a grant of summary judgment to Nevada law enforcement officials on the basis of qualified immunity in which the court held that "[s]hackling a detainee, chaining him to a bench, and forcibly opening his jaw to extract a DNA sample without a warrant, court order [or] reasonable suspicion . . . is a violation of the detainee's clearly established rights under the Fourth Amendment." Friedman, 580 F.3d at 860 (emphasis added). Of primary importance to the Friedman court was the fact that law enforcement had violently extracted DNA from the plaintiff without any authority – statutory, judicial, or otherwise. See id. at 850, 853-858. Obviously, such is not the case here. See 18 U.S.C. §§ 3142(b) and (c)(1)(A); E.R. 6-25, 26-29; C.R. 34, 42; S.E.R. 2-3.

Furthermore, in addressing the "reasonableness" of law enforcement's actions under the totality of the circumstances, the Friedman panel's decision was premised on the assumption that the purpose of DNA collection from the plaintiff was solely to

"solve cold cases." Id. at 851, 853, 855, 859. Indeed, such was the only explanation offered by the civil defendants in that case. See id. As noted previously, DNA sample collection pursuant to 42 U.S.C. § 14135a(a)(1)(A) and 18 U.S.C. § 3142 serves a much broader range of purposes, including protecting the innocent, increasing accuracy in criminal investigations and prosecutions, deterring and preventing future crimes and furthering pretrial identification, security and supervision objectives – all of which go beyond the "normal law enforcement function" of "[s]olving crimes." Id. at 853. In short, Friedman is limited by it facts and adds nothing to the analysis of the constitutionality of DNA fingerprinting of those arrested upon probable cause for the commission of a federal felony, as permitted by the Act.[25]

[25] Similarly, defendant and amicus curiae ignore obvious distinctions in pointing to Schmerber v. California, 384 U.S. 757 (1966), as impugning the DNA statute and rule. The biological specimen collection at issue in Schmerber served none of the broader range of purposes served by DNA fingerprinting, and it concerned venipuncture, which involves inserting a needle into a vein to withdraw blood and requires the skills of medical personnel for proper administration. See id. at 758-59, 771-72. In contrast, DNA sample collection in the federal jurisdiction now involves, at most, blood sample collection by finger prick, and the normal method for defendants is buccal swab, which is even less intrusive. The trivial intrusion of DNA sample collection by this means implicates no Fourth Amendment interests that distinguish it from other accepted booking procedures. See Skinner, 489 U.S. at 625 (noting breath tests are less intrusive than blood tests because they do not require piercing the skin or medical administration, points equally applicable to buccal swabs); Kriesel, 508 F.3d at 948 (noting lesser privacy implications of cheek swabs); O'Hagen, 189 N.J. at 161-162 (no

Ultimately, in weighing the slight intrusion on the privacy interests of Pool – an individual who has been arrested upon probable cause – against the government's compelling interests in maintaining a database that will permit accurate identification of persons within the criminal justice system and serve other salutary purposes, it is readily apparent that the United States' interests far outweigh the minimal intrusion on the defendant. The limitations imposed on the use of Pool's DNA fingerprint further reduce that minimal intrusion. When considering the totality of the circumstances, as this Court is required to do, the collection of Pool's DNA fingerprint as a condition of his pretrial release pursuant to 18 U.S.C. § 3142(b) is both "clearly warranted" and "compelling," and ultimately withstands Fourth Amendment scrutiny. Magistrate Court Order, at 8; E.R. 13.

2. Even Under the Inapplicable Special Needs Test, the Act is Constitutional.

To the extent this Court were to apply the special needs analysis – and, indeed, it should not – the result would be the same. Under the special needs doctrine, special governmental

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constitutionally significant difference between buccal swab collection and fingerprinting); Brown, 212 Or. App. at 167 (same); Anderson, 274 Va. at 475-476 (same).

Schmerber accordingly does not impugn the validity of collecting a DNA sample from a defendant pursuant to court order by minimally intrusive means, any more than does Friedman's negative view of the violent intrusion unsupported by any legal authority that was assumed to be involved in that case.

interests "beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Skinner, 489 U.S. at 619. In "special needs" cases, courts "employ a balancing test that weigh[s] the intrusion on the individual's interest in privacy against the 'special needs' that support the program." Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001). The special needs cases do not foreclose reliance on law enforcement interests in all circumstances. Instead, they refer to special interests, "beyond the normal need for law enforcement," Skinner, 489 U.S. at 619, or the "general interest in crime control." City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000). See also Illinois v. Lidster, 540 U.S. 419, 424 (2004) (observing that some law enforcement objectives fall outside the "general interest in crime control").

As is detailed more fully above, collecting the DNA fingerprints of those arrested upon probable cause and storing those fingerprints in CODIS serves special law enforcement interests. The DNA Act and CODIS serve the special need to prevent innocent persons from being ensnared in the criminal justice system. Rapid identification of perpetrators through use of the DNA database will substantially reduce the likelihood that innocent persons will be wrongfully arrested, prosecuted, and convicted. See H.R. Rep. No. 900(I), supra, at 10; Sczubelek, 402 F.3d at 185 (exoneration of the innocent is a compelling

governmental interest).

Furthermore, and as courts analyzing similar DNA fingerprinting statutes under a special needs test have determined, the creation and population of the CODIS database in and of itself serves a "special need" that goes beyond ordinary law enforcement. See Nicholas, 430 F.3d at 669 ("Because the state's purpose in conducting DNA indexing is distinct from ordinary 'crime detection' activities associated with normal law enforcement concerns, it meets the special-needs threshold."). By populating the database with the DNA fingerprints of arrestees, it is increasingly more likely that law enforcement will be aided in solving future and past crimes (distinct from any crime necessarily being investigated at the time). See Roe v. Marcotte, 193 F.3d 72, 79 (2d Cir. 1999).

DNA fingerprinting of those arrested on probable cause serves the further special need of deterring the commission of crimes and violations of release conditions by those who are on pretrial release. See Kincade, 379 F.3d at 840 (Gould, J.) (concurring) (discussing the deterrent effect felt by a releasee when he or she is required to participate in the CODIS database); 73 FR at 74934.

Moreover, the DNA Act targets a discrete class of individuals – convicted offenders and those arrested upon probable cause – that present special risks, similar to other

special needs programs upheld by the Supreme Court. See, e.g., Bd. Of Educ. v. Earls, 536 U.S. 822 (2002) (upholding suspicionless drug testing of students participating in extracurricular activities); Veronica School Dist. 47J v. Acton, 515 U.S. 646 (1995) (approving random, suspicionless drug testing of high school athletes); Skinner, supra (approving suspicionless drug and alcohol testing of railroad employees). And unlike the programs struck down in Edmond and Ferguson, the searches authorized by the DNA Act are not for the purpose of uncovering evidence of crime, but rather for the purpose of obtaining identification information that can be used in the event independent evidence demonstrates that a crime has been committed.[26] See, e.g., State v. Martinez, 78 P.3d 769, 774 (Kan. 2003) ("Like fingerprint and photograph identification information, the DNA information does not, in and of itself, detect or implicate any criminal wrongdoing.").

In sum, collection of an arrestee's DNA fingerprint pursuant to the Act is constitutional under the Fourth Amendment's special needs analysis.

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[26] As the magistrate and district courts recognized below, the programs at issue in Edmond and Ferguson are also easily distinguishable because in those instances there had been "no judicial involvement in finding that each specific person to be tested had been involved in criminal wrongdoing." Magistrate Court Order, at 7; E.R. 12. In contrast, the case at bar involves a situation in which DNA collection is sought "after a judicial finding [and] grand jury determination of probable cause." Id. (emphasis in original).

C. DNA Fingerprinting of Defendants Arrested for Federal Criminal Violations Does Not Deny Due Process, Violate Separation of Powers, or Constitute "Excessive Bail."

The magistrate and district courts correctly found that DNA fingerprinting of arrestees does not deny due process, violate separation of powers or constitute excessive bail. See Magistrate Court Order, at 13-19, aff'd, 2009 WL 2152029; E.R. 18-24.

1. DNA Fingerprinting of Those Charged With Federal Violations Does Not Implicate the Due Process Clause of the Fifth Amendment.

Defendant argues that any mandatory pretrial release condition violates the procedural due process clause of the Fifth Amendment. AOB, at 37-40. According to Pool, courts must afford due process before requiring a DNA fingerprint, that is, courts must review the condition individually in the context of the personal characteristics of each defendant. See id. Defendant is mistaken for several reasons.

First, defendant's procedural due process claim fails because "due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme." Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 4 (2003) (upholding Connecticut's sex offender registration act because it applied to all offenders); see also Doe v. Tandeske, 361 F.3d 594 (9th Cir. 2004) (following Connecticut Dept. of Public Safety and holding that where the statute turns on the status of the

defendant there is no right to a hearing to contest factual issues like danger); United States v. Keleher, No. 07-CR-0332-OWW, 2008 WL 5054116, at *9 (E.D. Cal. Nov. 19, 2008) (same). Under the statute at issue, DNA fingerprinting applies equally to all persons arrested or charged under federal law, without any regard to individualized determinations of dangerousness or flight risk. See 18 U.S.C. §§ 3142(b) and (c)(1)(A). It follows that there can be no right to procedural due process because any such hearing would be "a bootless exercise." Connecticut Dept. of Public Safety, 538 U.S. at 7-8.[27]

Defendant's due process claim really is only cognizable as a substantive due process challenge. See Connecticut Dept. of Public Safety, 538 U.S. at 7-8 ("[u]nless respondent can show that that substantive rule of law is defective (by conflicting with a provision of the Constitution)" his challenge fails); Tandeske, 361 F.3d at 596 (same). Even though defendant has not framed his argument as a substantive due process challenge, the United States will address it here.

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[27] Several courts have rejected Fifth Amendment Due Process challenges to the DNA sampling of convicted felons. This Court held in Rise that "the extraction of blood from an individual in a simple, medically acceptable manner, despite the individual's lack of an opportunity to object to the procedure, does not implicate the Due Process Clause." Rise, 59 F.3d at 1563. See also United States v. Hugs, 384 F.3d 762, 768-769 (9th Cir. 2004) (holding the condition of supervised release that requires DNA testing under the Act is not unconstitutionally vague and therefore meets procedural due process requirements).

For the court to apply the strict "narrow tailoring" standard of review, defendant must show that persons on federal pretrial release have a "fundamental right" to be free from DNA fingerprinting. See Tandeske, 361 F.3d at 596-597. Rights are "fundamental" only if they are "so rooted in the traditions and conscience of our people to be ranked as fundamental" such that "neither liberty nor justice would exist if they were sacrificed." Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (no right to physician assisted suicide) (quotations omitted). If defendant cannot make such a showing, only the "highly deferential" rational basis review applies, and courts "only in rare or exceptional circumstances" strike down a law under that test. Doe v. Michigan Dept. of State Police, 490 F.3d 491, 501 (6th Cir. 2007) (even if overly broad, Michigan sex offender registry constitutional because rationally related to a legitimate state interest).

A defendant charged with commission of a federal crime has no "fundamental" or socially "protected" liberty, property or privacy interest in refusing to cooperate with DNA fingerprinting. As the Fourth Circuit put it:

> [W]hen a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it. We accept this proposition because 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.

Jones, 962 F.2d at 306. See also Rise, 59 F.3d at 1556; Boling, 101 F.3d at 1336. Although "the compulsory extraction of blood" implicates a "right to personal security," see Kincade, 379 F.3d at 821 n.15, such intrusion "is not significant" because "such tests are a commonplace." Kincade, 379 F.3d at 836 (quotations omitted, emphasis added).[28] That is because "the same protections [afforded to the general public] do not hold true for those lawfully confined to the custody of the state." Jones, 962 F.2d at 306. Such an insubstantial claim of personal security is not a "fundamental" right requiring individualized review under the Due Process Clause. Such an interest is indeed "too weak" to warrant a hearing on the matter. See United States v. Gardner, 523 F. Supp. 2d 1025, 1032 (N.D. Cal. 2007).

Translated from the Fourth Amendment to Due Process parlance, individualized review is unnecessary. See, e.g., Jones, 962 F.2d at 306-307 ("[a]s with fingerprinting, therefore, we find that the Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken" for identification purposes). As one district court put it after

[28] The procedure at issue here is even less intrusive than the extraction of blood that so many courts have found to be minimally intrusive. See, e.g., Kriesel, 508 F.3d at 948 (noting lesser privacy implications of cheek swabs). The mouth swab proposed under the current regime is about as intrusive as a toothbrush.

surveying the case law, "the overwhelming majority of courts have held that DNA collection and typing laws are constitutional" because "the bodily intrusion of taking blood or saliva is minimal." Padgett v. Ferrero, 294 F. Supp. 2d 1338, 1342 (N.D. Ga. 2003), aff'd sub nom Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005).

The statute certainly passes rational basis review. It is significant that the holdings of Jones, Rise, Boling and Kincade apply to an entire class of persons convicted of certain crimes. In each case, the courts held that the compelling need to identify defendants, to solve crimes, and to deter future conduct outweighed the right to personal security. DNA fingerprinting furthers the government's legitimate and compelling interests in preventing crime, properly identifying persons and "solving past crimes, bring[ing] closure to countless victims of crime who have languished in the knowledge that perpetrators remain at large." Kincade, 379 F.3d at 839. In the words of this Court, "the weight of these interests is monumental." Id (emphasis added).

Furthermore, any interest the defendant might assert in avoiding DNA fingerprinting is further reduced by the statutory provision that DNA fingerprints may be expunged if a defendant is later found not guilty or his case is dismissed. See 42 U.S.C. § 14132(d)(1)(A). Given that defendant's interests here are so minimal, obtaining a DNA fingerprint from him offends no

requirement of due process under the Fifth Amendment.

2. DNA Fingerprinting Is Not An "Excessive" Condition of Release Under the Eighth Amendment.

The defendant argues that the mandatory collection of DNA fingerprints from federal arrestees constitutes an excessive condition of release under the Eighth Amendment. Defendant's argument lacks merit. The Eighth Amendment requires only that bail conditions not be "excessive." U.S. Const. Amend. 8. It does not require that conditions of release be "the least restrictive." Defendant conflates the statutory language found in § 3142 with the constitution. In the view of this Court, however, the "least restrictive conditions" requirement is statutory in origin, and not constitutional. See United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985). Thus, "[n]either the plain language of the Eighth Amendment itself, nor the Excessive Bail Clause require that the conditions imposed on a defendant's release will be the 'least restrictive.'" Gardner, 523 F. Supp. 2d at 1031. Even "the right to bail . . . in the Eighth Amendment is not absolute . . . [the] only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release not be excessive in light of the perceived evil." United States v. Salerno, 481 U.S. 739, 753-754 (1987). The only question, then, is whether the condition is "excessive" in light of the perceived evil.

As discussed above, there are many evils that the CODIS

system ameliorates. Its purposes include exonerating the innocent; giving closure to victims of unsolved crimes; deterring the commission of future crimes; and avoiding the release of, or inadequate pretrial security for, an arrestee who may be linked to unsolved crimes through DNA matching. Indeed, DNA sample collection has been repeatedly held to be minimally intrusive compared to the "monumental" interests of the government in the CODIS system. Kincade, 379 F.3d at 839. As the magistrate and district courts below have correctly recognized, a condition simply requiring indicted felons on pretrial supervision not to frustrate DNA fingerprinting is hardly excessive. Magistrate Court Order, at 16-17; E.R. 21-22.

3. Pretrial's Collection of DNA Fingerprints Does Not Violate Separation of Powers.

Defendant cites an 1871 Supreme Court case, United States v. Klein, 80 U.S. 128, 146-147 (1871), for the proposition that any time Congress prescribes a general rule for Courts to follow, it is an unconstitutional infringement on the powers of the judiciary. AOB, at 40-41. Thus, Pool concludes, requiring cooperation with DNA fingerprinting as a condition of release is unconstitutional. But the Supreme Court long ago rejected such an expansive reading of Klein.

Even in areas of core judicial function, Congress may play a substantial role. For example, Congress may require courts to impose statutory mandatory minimum sentences. See Chapman v.

United States, 500 U.S. 453, 467 (1991) (rejecting separation of powers challenge to mandatory minimum sentences and noting that "[d]eterminate sentences were found in this country's penal codes from its inception"); United States v. Gagliardi, 506 F.3d 140, 148 (2d Cir. 2007) (same); United States v. Freemont, 513 F.3d 884, 890-891 (8th Cir. 2008) (noting that nothing in United States v. Booker, 543 U.S. 220 (2005) changed this long-standing rule with respect to mandatory minimums). Moreover, the Supreme Court has already blessed congressionally-imposed rules of decision on bail cases. Salerno, 481 U.S. at 755. So, the fact that the collection of DNA is mandatory under 18 U.S.C. §§ 3142(b) and (c)(1)(A) is of no significance from a separation of powers standpoint. As the Supreme Court itself put it, the three branches of government are not required to be "entirely separate and distinct." Mistretta v. United States, 488 U.S. 361, 380 (1989).

This Court has rejected defendant's argument in the context of DNA fingerprinting of those on supervised release following conviction. See United States v. Lujan, 504 F.3d at 1007. See also United States v. Stegman, 295 F. Supp. 2d 542, 551 (D. Md. 2003); accord United States v. Sczubelek, 255 F. Supp. 2d 315, 324 (D. Del. 2003). The expansion of the class of persons covered by DNA fingerprinting from those convicted of criminal offenses to those charged with criminal offenses affects no

qualitative change in the separation of powers. That is because of two factors. First, Pretrial Services' role is still "limited to the collection of the DNA sample. It has no role in analyzing that sample or in using the test results to detect, investigate, or prosecute other crimes-quintessential law enforcement functions vested in the executive branch." See Lujan, 504 F.3d at 1007. Second, "the purpose of the DNA Act is consistent with the mission of the judiciary . . . . [T]he statute seeks to deter recidivism by instilling in defendants a fear that future crimes of theirs will be readily identified." Id. (citing United States v. Reynard, 473 F.3d 1008, 1020 (9th Cir. 2007)). For similar reasons, defendant's separation of powers challenge has also been rejected in the context of the more restrictive conditions of electronic monitoring. Gardner, 523 F. Supp. 2d at 1034-1035. In short, defendant's separation of powers challenge fails.

4. Defendant's Facial Challenges Fail Because He Has Not Met His Burden.

In all events, defendant's claim that DNA fingerprinting is facially unconstitutional under due process, the excessive bail clause of the Eighth Amendment, and the doctrine of separation of powers, all fail for another reason. Defendant has not met his "heavy burden" of showing that "no set of circumstances exists under which the Act would be valid." Salerno, 481 U.S. at 745 (emphasis added). So long as the court finds that DNA

fingerprinting would be appropriate for some arrestees, then the statute cannot be invalidated based on a facial challenge. See, e.g., Gardner, 523 F. Supp. 2d at 1030 n.3 (rejecting excessive bail, due process and separation of powers challenges to the Adam Walsh Act in part on grounds that "there are circumstances where the Act can be applied constitutionally-such as where a court could determine that all the minimum conditions mandated by the Adam Walsh Act are in fact warranted.").

D. DNA Fingerprinting is A Constitutional Exercise of Federal Power and Does Not Violate the Commerce Clause.

Ignoring the plain language of the statute, Pool argues that the Act has no federal nexus, see AOB, at 41-42; that it extends to all arrestees "without regard to whether they fall within any federal criminal jurisdiction," AOB, at 42; and, most dramatically, that it "assert[s] general police power over all individuals suspected of criminal conduct." AOB, at 42. In other words, Pool argues that the statute applies to all arrestees, whether in federal, state, or local custody. Not so.

The plain text of the statute clearly limits its reach to persons arrested, detained, or charged "under the authority of the United States." 42 U.S.C. § 14135a(a)(1)(A). The statute, on its face, is limited to persons who have been lawfully arrested, charged or detained, under federal law. Moreover, the statute can only be enforced "as prescribed by the Attorney General in regulation." Id. Clearly, the Attorney General

cannot regulate state and local law enforcement. Finally, the Attorney General can only delegate his authority to "an agency of the United States that arrests or detains individuals or supervises individuals . . . ." Id. Again, this is another limitation of the statute to a federal nexus.

This Court has held that a nexus to federal criminal jurisdiction makes DNA fingerprinting constitutional under the Commerce Clause. See Reynard, 473 F.3d at 1021. Commerce Clause authority to impose conditions arises from the fact that Congress can "denominate [defendant's] conduct a federal offense." Reynard, 473 F.3d at 1022.[29]

Defendant would require this Court to analyze each release condition separately under the Commerce Clause. But this Court has already rejected that argument: "[t]he federal government is not required to demonstrate that it has independent authority to impose each individual condition . . . ." Reynard, 473 F.3d at 1021.

Even so, according to this Court, DNA fingerprinting, standing alone, is a valid exercise of Commerce Clause power. See id. at 1022. As Reynard held, personal identifying

[29] Even defendant concedes that "the laundry list of qualifying [federal] offenses" in the 2000 version of the statute was an important "limiting principle" that made the statute constitutional. See AOB, at 42. But Pool fails to recognize that same "limiting principle" is present in the amended statute because it applies only to persons arrested, charged, or convicted for federal crimes.

information, such as DNA information, is a "thing in commerce" subject to federal regulation. Id. at 1023.

This Court also made short shrift of the same argument resurrected here in defendant's brief: that only strictly economic activity can be regulated under the Commerce Clause. See Reynard, 473 F.3d at 1023 ("non commercial activities involving nothing 'more tangible than the flow of . . . information can constitute commerce'") (quoting United States v. South-Eastern Underwriters Ass'n, 322 U.S. 53, 549-550 (1944) (superseded by statute on other grounds)).

Like the 2000 version, the revised statute limits its reach to individuals charged with a federal offense or detained under federal law. Thus, Pool's faulty conclusion, that the statute violates the Commerce Clause because it is divorced from a federal nexus, must be rejected. Defendant's entire analysis of Commerce Clause case law is fundamentally marred by the premise that the statute applies in an Orwellian fashion without any limits to all arrestees and suspects in state and local cases.

And for the same reason, defendant is incorrect when he argues that the Act violates principles of federalism: "[t]he DNA Act does not intrude upon areas of traditional state or local authority. The Act regulates only federal offenders." Reynard, 413 F.3d at 1023. Contrary to defendant's argument, taking DNA fingerprints of persons arrested under federal authority has no

impact on federal-state relations.[30] Moreover, DNA fingerprinting by the federal government, far from being at odds with the policies and practices of the states, is complementary with the other states' schemes. All fifty states have enacted legislation that places DNA fingerprints of state law violators into the same national CODIS system that defendant now claims offends federal-state relations. Reynard, 413 F.3d at 1023.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court upholding the constitutionality of DNA collection from those arrested upon probable cause for the commission of a federal felony, and ordering that the defendant provide a DNA fingerprint as a mandatory condition of his pretrial release pursuant to 18 U.S.C. §§ 3142(b) and (c)(1)(A).

DATED: November 4, 2009

LAWRENCE G. BROWN
United States Attorney

By: /s/ Sean C. Flynn
SEAN C. FLYNN
Assistant U.S. Attorney

[30] Even where FBI or the U.S. Marshals Service arrests a fugitive from justice for an underlying state law violation, federal authority would still provide the limiting principle authorizing the DNA fingerprint. See 18 U.S.C. § 1073. In any event, that person would not end up on federal pretrial supervision.

STATEMENT OF RELATED CASES

The United States is not aware of any cases pending in this Court within the meaning of Circuit Rule 28-2.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Brief for Appellee is monospaced, has 10.5 or less characters per inch, and contains 13,933 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

DATED: November 4, 2009

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CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the
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U.S. Court of Appeals Docket Number(s): 09-10303

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 4, 2009.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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