C.A. No. 09-10303

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY ARBERT POOL,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District of California

Honorable Edward J. Garcia
Senior United States District Judge

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

OPENING BRIEF OF APPELLANT

DANIEL J. BRODERICK, #89424
Federal Defender
RACHELLE BARBOUR, Bar #185395
Research and Writing Attorney
801 I Street, 3rd Floor
Sacramento, California 95814
Telephone: (916) 498-5700

Attorneys for Defendant-Appellant
JERRY ARBERT POOL

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STATEMENT OF JURISDICTION

On January 8, 2009, Mr. Pool was charged by indictment with possessing and receiving child pornography on January 12, 2007. (ER 1, CR 1.)[1] His conduct was alleged to have occurred in the Eastern District of California. The District Court has jurisdiction of this case pursuant to 18 U.S.C. § 3231.

This case concerns the imposition of a condition of pretrial release compelling DNA testing. Defense counsel objected before the magistrate judge, and then moved before the district judge to have the condition stricken after the magistrate judge imposed it. (CR 4, 36.) On July 16, 2009, the district judge imposed the condition by written order. (ER 26, CR 42.) The execution of the condition has been stayed pending appeal. (CR 49.) Defense counsel timely filed a notice of appeal on July 21, 2009. (ER 30, CR 43.) This appeal of the condition of pretrial release is pursuant to 18 U.S.C. § 3145(c) and Federal Rule of Appellate Procedure 9(a).

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether provisions of the Bail Reform Act and 42 U.S.C. § 14135a, which compel presumed-innocent criminal defendants to comply with law enforcement DNA testing and profiling, violate the Fourth Amendment?

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[1] "CR" refers to docket number in the District Court Record which begins on page 36 of the Excerpt of Record. "ER" refers to the page number of documents in the Excerpt of Record.

2. Whether these DNA profiling provisions are unconstitutional under the Eighth Amendment because they condition pretrial release on compelled submission to DNA testing?
3. Whether these provisions violate Due Process by removing the discretion of the district court to determine necessary conditions of release?
4. Whether these provisions violate the doctrine of Separation of Powers by depriving the court of its role in determining conditions of release?
5. Whether these provisions violate the Commerce Clause?

III.

BAIL STATUS

Mr. Pool is out of custody on an unsecured bond. He has not pled guilty or been convicted. He is in full compliance with the conditions of his pretrial release. The challenged DNA testing condition has been stayed pending this appeal. (CR 49.)

IV.

STATEMENT OF THE CASE

A. Nature of the Case

Mr. Pool appeals the imposition of a pretrial release condition compelling DNA testing.

B. Course of Proceedings and Statement of Facts

On January 8, 2009, Mr. Pool was charged by indictment with possessing and receiving child pornography on January 12, 2007. (ER 1, CR 1.) He has no previous criminal history of any kind.

Mr. Pool was arrested and brought to court for his arraignment on January 23, 2009. (CR 4.) At his initial appearance in custody, the magistrate judge

sought to impose a pretrial release condition requiring that Mr. Pool comply with DNA testing by the government. Id. Defense counsel objected and asked that the condition be stayed. Id. The magistrate judge ordered briefing on the matter. Mr. Pool was released on other pretrial conditions. (CR 8.) He is in full compliance with his conditions of release in this case.

After receiving briefing on the issue, the magistrate judge denied the parties' joint request for a hearing on the matter. (CR 30.) On May 27, 2009, the magistrate judge ordered Mr. Pool to submit to DNA collection. (ER 6, CR 34) In a written order, the magistrate judge held that after a judicial or grand jury determination of probable cause has been made for felony criminal charges against a defendant, there was no constitutional violation by a universal requirement that a charged defendant be tested "for the purposes of DNA analysis to be used solely for criminal law enforcement, identification purposes." (ER 24.)

The magistrate judge noted that this condition was not based on a "fact specific inquiry regarding if this condition was required to secure defendant's appearance in the future." (ER 9.) The magistrate judge determined that a "totality of the circumstances" test applied. (ER 13.) He based this on his determination that "[t]he judicial or grand jury finding of probable cause within a criminal proceeding is a watershed event which should be viewed differently from mere pre-judicial involvement gathering of evidence." (ER 12.) Using the totality of the circumstances test, the magistrate judge determined that "the decision to impose the DNA testing requirement on pre-trial detainees or releasees seems clearly warranted, if not compelling." (ER 13.) The magistrate judge held that "DNA sampling is analogous to taking fingerprints as part of the routine booking process upon arrest." (ER 15.) The magistrate judge made it clear that he was

not authorizing "DNA sampling after citation or arrest for infractions or misdemeanors, as in those cases there will be no *judicial* finding of probable cause soon after the arrest or citation, or no *grand jury* finding before or after the arrest." (ER 18 (emphasis in original).) Likewise, the judge did not "authorize police officials to perform DNA sampling prior to a judicial finding of probable cause which must be made within 48 hours after arrest and detention." Id.

The magistrate judge also rejected Mr. Pool's arguments under the Fifth Amendment, the Eighth Amendment, the Separation of Powers doctrine, and the Commerce Clause. (ER 18-24.) In rejecting the Commerce Clause challenge, the magistrate judge read the DNA testing provision "to apply to federal offenders only." (ER 24.) The magistrate judge ordered that Mr. Pool "submit to DNA collection." (ER 25.)

The defense moved for a stay of the condition pending appeal to the district court. (CR 35.) The defense also filed an appeal/motion to modify the condition to the district court on May 28, 2009. (CR 36.) In that filing, defense counsel submitted the matter on the briefs filed before the magistrate judge and requested oral argument. Id., p. 2. The matter was set for hearing. On June 1, 2009, the magistrate judge granted the motion for a stay of the condition pending the district judge's decision. (CR 37.)

On July 16, 2009, two weeks prior to the date set for the hearing on the condition, the district judge affirmed the magistrate judge's order without hearing from the parties. (ER 26, CR 42.) The court's short order presented no new analysis except to distinguish this Court's decision in Friedman v. Boucher, 568 F.3d 1119 (9th Cir. 2009), which had been filed in the interim. (ER 28, n. 3.) The district court lifted the stay and referred the matter back to the magistrate judge for

imposition of the condition. Id. The defense filed a timely notice of appeal to this Court on July 21, 2009. (ER 30, CR 43.)

On August 4, 2009, the magistrate judge granted a stay of the condition pending appeal. (CR 49.) Mr. Pool is out of custody and in full compliance with his conditions of release.

V.

SUMMARY OF THE ARGUMENT

In Friedman v. Boucher, 568 F.3d 1119 (2009), this Court recently held, "The warrantless, suspicionless, forcible extraction of a DNA sample from a private citizen violates the Fourth Amendment." 568 F.3d at 1130. Mr. Pool is a private citizen charged with a federal offense. He is out of custody and has no prior criminal history. He challenges two federal statutes that would force him to comply with DNA testing and profiling prior to conviction. The government has provided no reasonable suspicion or probable cause for the test, nor has it sought a warrant.

The challenged laws violate the Fourth Amendment because they compel DNA collection and profiling from arrestees and defendants who have not been convicted. Whether under the "special needs" test or the totality of the circumstances test, the laws fail because they compel private citizens, who are presumed innocent, to provide DNA samples and profiles that are to be used for law enforcement purposes.

Further, the statutes are unconstitutional under the Eighth Amendment and the Due Process Clause, and they violate the doctrine of Separation of Powers because they unreasonably condition release in a criminal case on compliance with DNA testing. Finally, the statutes are unconstitutional under the Commerce

Clause because they extend to all arrestees and criminal defendants, not only those charged with a federal crime. Because the challenged laws compel DNA from citizens who are presumed innocent, they violate the constitution and must be struck down.

VI.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law reviewed de novo. United States v. Huerta-Pimental, 445 F.3d 1220, 1222 (9th Cir. 2006). Whether a statute violates a defendant's right to due process is reviewed de novo. United States v. Hill, 279 F.3d 731, 736 (9th Cir. 2003).

VII.

ARGUMENT

A. The DNA Profiling Law

The Bail Reform Act, 18 U.S.C. § 3142(b), provides that if a federal defendant is released on personal recognizance, or upon execution of an unsecured appearance bond, that he or she be released "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). . . ." Similarly, 18 U.S.C. § 3142(c)(1)(A) provides that if the person is being released on conditions,

he or she is subject to the same mandatory DNA collection condition.[2] These are the statutory provisions being challenged in this case.

The statutory regime under which the government asserts the power to DNA test Mr. Pool mandates the collection, analysis, and storage of DNA samples from "individuals who are arrested, facing charges, or convicted. . . ."[3] See 42 U.S.C. §14135a.[4] This authority is given to the Attorney General, who may delegate this power to others within the Department of Justice or to any other agency of the United States "that arrests or detains individuals or supervises individuals facing charges. . . ." 42 U.S.C. § 14135a(a)(1)(A).

The proposed pretrial release condition would force Mr. Pool to comply with the government's attempt to collect the DNA sample. If Mr. Pool refused to comply with testing, the law provides for forcible testing: the government "may use or authorize the use of such means as are reasonably necessary to detain,

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[2] The DNA testing condition has been imposed in a variety of cases in the Eastern District of California, among them: mortgage fraud (United States v. Khalil, Cr. S. 09-00258-GEB [appeal to district court stayed pending Ninth Circuit decision in this case]); marijuana manufacture (United States v. Zhen Shu Pang, Cr. S. 08-543-GEB-5 [same]); and bank and mail fraud (United States v. Dandridge, Cr. S. 09-00196-GEB [stay of condition lifted by magistrate judge on August 11, 2009]).

[3] Pursuant to regulations issued by the Attorney General, the DNA profiling requirement was enforceable starting on January 9, 2009, although the Bail Reform Act amendment became effective in 2006. See 28 C.F.R. §28.12(b) & (c).

[4] The 2006 act, expanding DNA testing to anyone arrested, facing charges, or convicted is the most recent attempt by Congress to broaden the scope of mandatory DNA profiling. In 2000, Congress passed the DNA Analysis Backlog Elimination Act, which required collection of DNA samples from people convicted of very serious "qualifying federal offenses," who were also in custody, or on parole, probation, or supervised release. See 42 U.S.C. § 14135a (2000).

restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample." 42 U.S.C. § 14135a(a)(4)(A). Mr. Pool would also face revocation of his pretrial release and could be prosecuted and punished for a Class A misdemeanor for "failure to cooperate." 42 U.S.C. § 14135a(a)(5)(A).

Nothing about 42 U.S.C. § 14135a restricts the government to the least invasive method to obtain a DNA sample. DNA samples can be obtained by buccal swab, blood test, or any "such means as are reasonably necessary."[5] 42 U.S.C. § 14135a(a)(4)(A); see also 28 C.F.R. § 28.12(d)(mandating use of reasonably necessary means to obtain DNA sample) & (f)(discussing use of methods including blood draws or buccal swabs). The regulations define "DNA sample" as "a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out." 28 C.F.R. § 28.11.

Both the statute and its regulations allow federal agencies to "enter into agreements with units of State or local government or with private entities to

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[5] In 2004, the Ninth Circuit wrote, "Because the Federal Bureau of Investigation . . . considers DNA information derived from blood samples to be more reliable than that obtained from other sources (in part because blood is easier to test and to preserve than hair, saliva, or skin cells), Bureau guidelines require those in federal custody and subject to the DNA Act ('qualified federal offenders') to submit to compulsory blood sampling." Kincade, 379 F.3d at 817. It appears the Department of Justice has sacrificed this reliability and accuracy in favor of expediency. See DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932, 74935 (Dec. 10, 2008) (allowing buccal swab sampling). The FBI's procedure for buccal swabs is set forth at www.fbi.gov/hq/lab/html/instruction.htm. The sampling requires that law enforcement personnel, wearing gloves, swipe a foam-covered instrument inside the target's mouth, including the gum-line, the fold line in the cheek, the inside of the cheeks, and under the tongue, for more than 15 seconds. This must be repeated twice.

provide for the collection of the samples. . . ." 42 U.S.C. § 14135a(a)(4)(B); 28 C.F.R. § 28.12(e). The regulations require that all samples be furnished to the FBI (or to another agency authorized by the Attorney General) "for purposes or analysis and entry of the results of the analysis into the Combined DNA Index System." 28 C.F.R. § 28.12(f)(2).

Initially, the FBI[6] required DNA samples to be taken by intravenous blood draw, though recent DOJ statements indicate future samples may be taken through finger prick blood draws, or buccal cheek swabs. See United States v. Kincade, 379 F.3d 813, 846 n. 3 (9th Cir. 2004) (en banc) (plurality opinion)(Reinhardt, J., dissenting); 28 C.F.R. § 28.12(f)(1)(referring to "approved methods of blood draws or buccal swabs); DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932, 74935 (Dec. 10, 2008). After a sample is taken, it is analyzed, then the person's DNA profile is loaded into CODIS, a massive law enforcement database accessible by federal and state authorities; there the profile "will remain permanently and can be continually accessed and searched." Kriesel, 508 F.3d at 952 (Fletcher, J., dissenting); 42 U.S.C. §14132. Further, the sample itself is preserved and stored and may be disclosed to others. 42 U.S.C. § 14132(b)(3).

The statute permits DNA samples and analyses to be disclosed "(A) to criminal justice agencies for law enforcement identification purposes; (B) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules; (C) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such

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[6] The FBI runs the DNA database, which is called the Combined DNA Index System ("CODIS").

defendant is charged; or (D) if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes." 42 U.S.C. § 14132(b)(3).

The statute permits for the removal of a DNA profile from the database only in particular circumstances. 42 U.S.C. § 14132(d). If the sample was compelled on the basis of an arrest "under the authority of the United States," the Attorney General must receive "for each charge against the person on the basis of which the analysis was or could have been included in the index, a certified copy of a final court order establishing that such charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period." 42 U.S.C. § 14132(d)(1)(A)(ii). The burden is thus on the person who has been wrongly arrested or falsely accused to obtain a court order that meets the statutory definition. Although the law provides for expungement of the DNA analysis from the index, it does not provide for destruction or return of the DNA sample.

This Court has previously upheld the constitutionality of DNA profiling criminal defendants on supervised release following conviction for a narrow range of very serious "qualifying federal offenses." United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (en banc) (plurality opinion). It later upheld DNA profiling criminal defendants on supervised release following conviction for any felony. United States v. Kriesel, 508 F.3d 941 (9th Cir. 2007). This Court has made it clear in each case that it did not intend to address the constitutionality of the expansion of the DNA profiling "beyond convicted individuals." Kriesel, 508 F.3d at 943, n. 3.

B. The Privacy Issues At Stake

Before the district court, the government argued that compelled DNA collection and profiling from arrestees and criminal defendants is just like the collection of fingerprints. The magistrate and district judges accepted that argument and upheld the law. That argument flies in the face of Ninth Circuit law. Friedman v. Boucher, 568 F.3d 1119 (9th Cir. 2009)(holding that compelled DNA testing of detained sex offender charged with new offense violated Fourth Amendment).

The DNA profiling law authorizes law enforcement to take a full DNA sample from anyone arrested, charged with, or convicted of an offense. 42 U.S.C. § 14135a(a). That sample is provided to the FBI for DNA analysis. The sample itself is preserved by the government.

The government has previously argued that the DNA collection does not implicate privacy interests because the focus of the FBI analysis is on so-called "junk DNA." In Kincade, this Court looked at the issue of junk DNA, which it defined as "non-genic stretches of DNA *not presently* recognized as being responsible for trait coding. . . ." 379 F.3d at 818 (emphasis added). This Court acknowledged, however, that "[b]ecause there are observed group variances in the representation of various alleles at the STR [Short Tandem Repeat Technology] loci, however, DNA profiles derived by STR may yield probabilistic evidence of the contributor's race or sex." Id. This Court also noted that "[r]ecent studies have begun to question the notion that junk DNA does not contain useful genetic programming material." Id., n. 6.

Moreover, the DNA profiling law does not limit itself to "junk," rather it broadly sets forth that "DNA analysis means analysis of the deoxyribonucleic

(DNA) identification information in a bodily sample." 28 C.F.R. § 28.11. Below, even the government hedged the issue in its briefing, noting that the current FBI analysis consists "primarily" of junk DNA. (CR 27, p. 10.) A review of the FBI's own publically-available documents reveals that it intends to "re-architect" its CODIS software to "enable CODIS to include additional DNA technologies such [as] a Y Short Tandem Repeat (Y-STR) and a mini-Short Tandem Repeat (miniSTR)." CODIS Combined DNA Index System, www.fbi.gov/hq/lab/html/codisbrochure_text.htm.

While the genetic markers commonly used in law enforcement databases are often called "junk DNA," scientific studies have debunked the notion that these regions of the genetic code are devoid of any biological function.[7] Simon A. Cole, Is the 'Junk' DNA Designation Bunk? 102 Nw. U. L. Rev. Colloquy 54 (2007). Moreover, the specter of discrimination and stigma could arise where one or more STRs is found to correlate with another genetic marker whose function is known, so that the presence of the seemingly innocuous STR serves as a "flag" for that genetic predisposition or trait.[8]

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[7] See Clive Cookson, Regulatory Genes Found in "Junk DNA," Fin. Times, June 4, 2004; see also Justin Gillis, Genetic Code of Mouse Published: Comparison with Human Genome Indicates "Junk DNA" May Be Vital, Wash. Post, Dec. 5, 2002, at A1.

[8] A study in England from 2000 found that one of the markers used in DNA identification is closely related to the gene that codes for insulin, which itself relates to diabetes. See John D.H. Stead, Jerome Buard, John A. Todd and Alec J. Jeffreys, Influence of allele lineage on the role of the insulin minisatellite in susceptibility to type 1 diabetes, Human Molecular Genetics, Vol. 9, No. 20, 2000; D. Concar, Fingerprint fear, New Scientist Space, May 2, 2001.

In Kriesel, this Court acknowledged that "DNA often reveals more than identity, and that with advances in technology, junk DNA may reveal far more extensive genetic information." Kriesel, 508 F.3d at 947. "The concerns about DNA samples being used beyond identification purposes are real and legitimate." Id. at 948. Even the Department of Justice acknowledges that "the collection of DNA from individuals in the justice system offers important information that is not captured by taking fingerprints alone." DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932, 74933 (Dec. 10, 2008).

As Judge Gould noted in his important concurrence in the plurality opinion in Kincade, 379 F.3d at 842, "[U]nlike fingerprints, DNA stores and reveals massive amounts of personal, private data about that individual, and the advance of science promises to make stored DNA only more revealing over time." Anticipating the government's argument, Judge Gould wrote, "Like DNA, a fingerprint identifies a person, but unlike DNA, a fingerprint says nothing about the person's health, their propensity for particular disease, their race and gender characteristics, and perhaps even their propensity for certain conduct." Id., n. 3. As this Court has previously held, "One can think of few subjects more personal and more likely to implicate privacy interests than that of one's health or genetic make-up."[9] Norman-Bloodsaw v. Lawrence Berkeley Lab., 135 F.3d 1260, 1269

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[9] As Congress found when it passed the Genetic Information Nondiscrimination Act of 2008, many of our states have a history of misusing genetic information by enacting "laws that provided for the sterilization of persons having presumed genetic `defects' such as mental retardation, mental disease, epilepsy, blindness, and hearing loss, among other conditions," as well as laws that discriminated against African Americans on the basis of their DNA. Genetic

(9th Cir. 1998)(upholding due process and privacy violation cause of action against employer who DNA tested employees as part of their mandatory entrance examinations).

Unlike fingerprints, DNA can be used to investigate biological relationships between individuals. Jeffrey Rosen, Genetic Surveillance for All, Slate (www.slate.com) March 17, 2009. If a partial match is obtained, the regulations allow dissemination of the information to pursue leads to family members. In some states, law enforcement agencies have started to search DNA databases for partial matches between profiles, a process known as familial searching.[10] In July 2006, the FBI released an interim policy allowing states to release identifying information of individuals in their database in the event of a partial match. FBI, CODIS Bulletin: "Interim Plan for the Release of Information in the Event of a Partial Match at NDIS," July 20, 2006. Thus, rather than using the database to search for the culprit, it can be used to identify an individual who is demonstrably *innocent* of the crime – because the crime scene DNA does not match his DNA - in the hope that investigating this innocent person will provide a clue to the identity of the actual culprit. This recent shift in state and federal practice from using the databases to identify the perpetrator to using them to zero-in on innocent persons has occurred with little if any public debate and underscores the vast distinction between DNA and fingerprints.

Information Nondiscrimination Act of 2008, 110 P.L. 233, §2(2) & (3).

[10] See B. Tansey, State Widens DNA Scanning in Cold Cases, San Francisco Chronicle, April 26, 2008, A01; see also M. Dolan and J. Felch, California takes lead on DNA crime-fighting technique, Los Angeles Times, April 26, 2008.

Finally, any fingerprint analogy is misleading, because significant privacy concerns with DNA sampling and profiling are also associated with the original biological samples that are stored indefinitely by forensic laboratories.[11] Unlike fingerprints – two-dimensional representations of the physical attributes of our fingertips that can be used only for identification – DNA samples can provide insights into disease predisposition, physical attributes, race, and ancestry. Repeated claims that human behaviors such as aggression, substance addiction, criminal tendency, and sexual orientation can be explained by genetics render law enforcement databases especially prone to abuse.[12] See Lawrence O. Gostin and

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[11] This Court has recently expressed concern with allowing the government to turn a limited search for particular information into a general search and seizure of huge amounts of data. United States v. Comprehensive Drug Testing, Inc., No. 05-10067, 2009 U.S. App. LEXIS 19119, at *38 (9th Cir. Aug. 26, 2009) (en banc). The concerns expressed in Comprehensive Drug Testing are equally applicable here: that searches for specific data, even with probable cause and a warrant, not turn into a general search and seizure of all data "rendering the Fourth Amendment irrelevant." In Comprehensive Drug Data, this Court set forth a rule that would require the government to return or destroy non-responsive data. Id. at However, in the DNA context, the government seeks to obtain and keep a defendant's entire DNA sample in perpetuity, without probable cause.

[12] The plurality opinion in Kincade downplayed the privacy invasion inherent in DNA sampling, claiming the analysis done is only with respect to specific, "non-genic stretches of DNA," which amount to "junk DNA . . . not associated with any known physical or medical characteristics." 379 F.3d at 818. However, the plurality acknowledged this understanding of "junk DNA" is increasingly obsolete, due to technological advances. See id. at 818 n.6 ("Recent studies have begun to question the notion that junk DNA does not contain useful genetic programming material"); see also 379 F.3d at 850 ("[t]hat understanding of junk DNA has been disputed for some time") (Reinhardt, J., dissenting); see also United States v. Wiekert, 421 F. Supp. 2d 259, 269 (D. Mass. 2006) (recognizing scientific community's changing views about junk DNA); Kriesel, 508 F.3d at

James G. Hodge, Jr., Genetic Privacy and the Law: An End To Genetics Exceptionalism, 40 Jurimetrics J. 21, 33 (Fall 1999) ("Genetic information is like a diary of potential future medical problems"). "Genetic information pertains not only to the individual whose DNA is sampled, but also to anyone who shares that bloodline." H.R. Rep. 106-900(I) at 52 (Sept. 26, 2001). Accordingly, the privacy intrusion is significant.

Moreover, "[t]he problem with allowing the government to collect and maintain private information about the intimate details of our lives is that the bureaucracy most often in charge of the information is poorly regulated and susceptible to abuse." Kincaid, 379 F.3d at 843 (Reinhardt, J., dissenting) (quotation omitted); United States v. Wiekert, 421 F. Supp. 2d 259, 269 (D. Mass. 2006) (observing "the dangers of government-controlled centralized databases have shown themselves to be quite real throughout recent history").

This concern is heightened because the Department of Justice has indicated it intends to allow private contractors to take, test, and store DNA samples. See DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932, 74939 (Dec. 10, 2008); 42 U.S.C. § 14135a(a)(4)(B) (allowing officials to enter into agreements with units of State or local government or with private entities to provide for the collection of the samples.)

947-48 (same). Moreover, the entire DNA samples are retained, allowing more sophisticated and wide-ranging analyses in the future. See Kincade, 379 F.3d at 842 (Gould, J., concurring); see also H.R. Rep. 106-900(I) at 9 (2000) ("new developments in DNA analysis technology has required that many samples, especially those taken from convicted offenders and catalogued in the CODIS database, be reanalyzed using new technology").

The government databases themselves are not immune to privacy intrusions. See e.g., Robert E. Kessler, Policing the Internet's Streets, Newsday, Jan. 13, 2009 at A24 (16-year-old Swedish hacker broke into and "rummage[d] through the files in hundreds of U.S. computer systems, including sensitive ones involved in industrial secrets, nuclear power-plant operation, and the military."); Eric M. Weiss, Consultant Breached FBI's Computers, Wash. Post, July 6, 2006 at A5 (consultant cracked FBI's classified computer system).

The concerns are even graver in the particular context of DNA laboratories. Christine Rosen, Liberty, Privacy, and DNA Databases, The New Atlantis (Spring 2003), available at http://www.thenewatlantis.com/archive/ 1/rosenprint.htm (noting "the lack of consistent privacy protections for criminal databases and their samples.") Scandals have also revealed systemic problems in a number of DNA laboratories and horrific tales of false-positive DNA matches. William C. Thompson, Tarnish on the "Gold Standard": Understanding Recent Problems in Forensic DNA Testing, The Champion, Jan./Feb. 2006, at 10-12 (listing scandals); see also, e.g., Jennifer L. Mnookin, Fingerprint Evidence in an Age of DNA Profiling, 67 Brook. L. Rev. 13, 49-50 (2001) (suspect was arrested and charged after cold hit at six loci, but released after it was revealed that illness prevented him from having committed the crime); Maryann Spoto, Murder, Rape Charges Dropped Due to Botched DNA Evidence, Star-Ledger (Newark), Feb. 7, 2006, at 28; Annie Sweeney & Frank Main, Botched DNA Report Falsely Implicates Woman, Chi. Sun-Times, Nov. 8, 2004, at 18 (partial match was erroneous, woman was incarcerated at time of offense).

DNA databases are also prone to errors. Keith Paul, Audit Calls for Changes in Police DNA Lab, Las Vegas Sun, May, 23, 2002, at 1 (defense expert

caught a forensic lab mistakenly labeling DNA results with the name of an innocent man.); Teresa Mask, How Jurors See DNA Evidence May Decide Unsolved Killing: 1969 Slaying Trial Continues Today, Detroit Free Press, July 19, 2005 (likely case of cross-contamination at laboratory: suspect was only four years old at time of unsolved murder and lived 100 miles away); Erin Murphy, The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence, 95 Calif. L. Rev. 721, 755 n.155 (2007).

Undersigned counsel has personally represented a client who was falsely implicated in two armed bank robberies in Southern California after DNA obtained from a hat recovered at the scene was wrongly matched to his DNA profile. United States v. Ponce, Mag. No. 07-00215-DAD (E.D. Cal.) (arrest and detention in Sacramento), SW 07-200-KJM (E.D. Cal.) (application for search warrant), Mag. No. 07-0199 (C.D. Cal.)(complaint and dismissal). Mr. Ponce was charged in the case and arrested, and the FBI obtained a search warrant for a new DNA sample. Mr. Ponce presented evidence that he was at work in Sacramento on the dates of the bank robberies, but nonetheless was detained in custody for five days before the government agreed to his release on bond pending the DNA retest. The retest cleared Mr. Ponce and the case was subsequently dismissed.

In recent years, problems ranging from negligence to outright deception have been uncovered at DNA crime labs in at least 17 states. Maurice Possley, Steve Mills & Flynn McRoberts, Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S., Chi. Trib., Oct. 21, 2004, at C1; see also Ralph Blumenthal, In Texas, Oversight for Crime Labs is Urged, N.Y. Times, Jan. 5, 2005, at A18 (Houston DNA lab); Richard Willing, Mueller Defends Crime Lab After Questionable DNA Tests, USA Today, May 1, 2003, at 3A (technician failed

to run negative controls in 100 DNA cases, caught only when coworker revealed the problem); Vic Ryckaert, Judge Asked to Halt DNA Retests: Crime Lab Less Than Candid About Cases Under Review, Attorney Says, The Indianapolis Star, Aug. 13, 2003, at 1B; Keith Matheny, Supervisor Accused of Passing Off DNA Test, Traverse City Record-Eagle, Dec. 19, 2004 (Michigan State Police Crime Lab DNA unit); Glenn Puit, Police Forensics: DNA Mix-up Prompts Audit at Lab, Las Vegas Review-J., Apr. 19, 2002, at 1B (discussing audit at Las Vegas laboratory after switched names on DNA profiles led to imprisonment); DNA Testing Mistakes at the State Patrol Crime Labs, Seattle Post-Intelligencer, July 22, 2004 (cross-contamination of samples and other errors). Nor have private laboratories proven exempt from such corruption. See, e.g., Rick Orlov, Lab Used by LAPD Falsified DNA Data, L.A. Daily News, Nov. 19, 2004, at N1 (allegations that technician at private lab manipulated DNA data); Jeff Coen & Carlos Sadovi, Crime Lab Botched DNA Tests, State Says, Chi. Trib., Aug. 19, 2005, at C1 (numerous errors in results from independent lab).

The privacy interests at stake are compelling. The government has no constitutional basis for compelling DNA samples from innocent citizens.

C. DNA Profiling of Arrestees Violates the Fourth Amendment

1. Introduction

It is undisputed that Mr. Pool is not in custody. He is neither a current federal probationer, parolee, nor supervised releasee, and that he has not been convicted of any current or prior federal or state crime. For the purpose of the Bail Reform Act as well as this federal case in general –- Mr. Pool is presumed innocent under the law. See Coffin v. United States, 156 U.S. 432, 453 (1895) (presumption

of innocence is "the undoubted law, axiomatic and elementary"); 18 U.S.C. § 3142(j) (Bail Reform Act does not modify or limit the presumption of innocence).

At the detention hearing in this case, the government presented no evidence that DNA testing was necessary to avoid risk of flight or for protection of the public. Further the government did not request a warrant to DNA test Mr. Pool, nor did it provide any reasonable suspicion or probable cause for such a search under the Fourth Amendment. The magistrate judge's opinion makes it clear that this condition was not imposed in response to any specific facts regarding Mr. Pool or any factual issues under the Bail Reform Act: "the court sought to impose the DNA testing without engaging in a fact specific inquiry regarding if this condition was required to secure defendant's appearance in the future." (ER 9.)

The Fourth Amendment guarantees the "right of the people to be secure in their persons . . . against unreasonable searches and seizures." "Ordinarily, the reasonableness of a search depends on governmental compliance with the warrant clause, which requires authorities to demonstrate probable cause to a neutral magistrate . . . ." Kincade, 379 F.3d at 822; United States v. Place, 462 U.S. 696, 701 (1983).

2. DNA Profiling Amounts To A Fourth Amendment Search and Seizure

DNA profiling amounts to a Fourth Amendment search and seizure in several respects.[13] First, taking the sample is a search. Friedman, 568 F.3d at 1124 ("There is no question that the buccal swab constituted a search under the Fourth Amendment); Kincade, 379 F.3d at 821 n.15 (citing cases to support that blood extraction is a search); Kriesel, 508 F.3d at 948 (holding that whether DNA is

[13] The government conceded this issue in its brief below (CR 27, p. 11, n. 12.). It is not expected to contest this issue before the Court.

taken through blood draw or cheek swab does "not significantly alter our analysis").

Second, analyzing the DNA sample -- which may be done repeatedly -- is a search. See, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-17 (1989) (holding chemical analysis of blood sample "to obtain physiological data" is Fourth Amendment search, because such a test could "reveal a host of private medical facts about an employee"); Banks v. United States, 490 F.3d 1178, 1183 (10th Cir. 2007) (analyzing DNA sample is a search).

Third, maintaining the blood sample and including the profile in a database is a seizure. Kincade, 379 F.3d at 873 ("It is important to recognize that the Fourth Amendment intrusion here is not primarily the taking of the blood, but seizure of the DNA fingerprint and its inclusion in a searchable database") (Kozinski, C.J., dissenting).

3. Whether Under the Special Needs Test or the Totality of the Circumstances Test, the Condition is Unconstitutional

Given that the government has neither sought a warrant, nor made a showing of probable cause to conduct DNA profiling in this case, it must rely on a Fourth Amendment exception to support the searches it seeks to undertake. Courts assessing the legality of suspicionless and warrantless DNA profiling of conditional releasees[14] have found two potential Fourth Amendment exceptions.

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[14] "Conditional releasees" refers to convicted offenders who are on parole, probation, or supervised release. This Court has held there is no distinction among such people for purposes of Fourth Amendment analysis in the context of DNA profiling. Kriesel, 508 F.3d at 946-47 & n.9. It is clear that this Court does not intend this term to apply to defendants who have been arrested or charged, but not convicted. Kriesel, 508 F.3d at 943, n.3. Further, this Court has based its analysis on the fact that the conditional releasees before it are still actually on

As recognized by the magistrate judge on pages five and six of his opinion, some courts have applied the "special needs" test, which permits suspicionless and warrantless "searches conducted for important non-law enforcement purposes in contexts where adherence to the warrant-and-probable cause requirement would be impracticable." Kincade, 379 F.3d at 823 (plurality opinion). Other courts have applied a "totality of the circumstances test -- balancing the invasion of [a person's] interest in privacy against the State's interest." Id. at 827, 830-31; see also Nicholas v. Goord, 430 F.3d 652, 658-59 (2d Cir. 2005) (collecting cases).

The magistrate judge decided to apply the "totality of the circumstances test," based on his determination that "[t]he judicial or grand jury finding of probable cause within a criminal proceeding is a watershed event which should be viewed differently from mere pre-judicial involvement gathering of evidence." (ER 12.) The magistrate judge cited no authority for this assertion.[15] This decision was affirmed by the district judge. (ER 28.)

The magistrate judge's finding of a watershed event at the time of a probable cause finding conflicts with this Court's precedent. In Scott, 450 F.3d 863, this

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supervised release or probation at the time of DNA profiling. Parolees and other condition releasees "are not entitled to the full panoply or rights and protections possessed by the general public" and enjoy a "diminished expectation of privacy." Kincade, 379 F.3d at 833 (plurality opinion); Kriesel, 508 F.3d at 948.

[15] Interestingly, even in his order the magistrate judge seemed confused about the stage of the case. In the first sentence of the order, he wrote"Defendant on or about January 12, 2007, in Shasta County, in the Eastern District of California, *received and possessed on his computer* visual depictions of minors engaged in sexually explicit conduct. . . ." (ER 6.) Clearly, the magistrate judge should have recognized that Mr. Pool is only accused of such conduct, but has not been convicted. The district judge appears to have caught this error. (ER 27.)

Court strongly repudiated that argument that a pretrial releasee is no different from a probationer or parolee: "Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence, not of guilt." Id. at 874. Similarly, in In the Matter of the Welfare of C.T.L., 722 N.W.2d 484, 492 (Ct. App. Minn. 2006), the Minnesota Court of Appeals noted that probable cause to arrest a person is not a substitute for probable cause to obtain a search warrant for specific evidence: "The fact that a judge has determined that the evidence in a case brings a charge against the defendant within a reasonable probability does not mean that the judge has also determined that there is a fair probability that contraband or evidence of a crime will be found in a biological specimen taken from the defendant." Id. at 490.

It is not clear from this Court's cases whether the special needs test or the totality of the circumstances test applies. Several of the Court's cases have analyzed the issue under both tests. Kincade, 379 F.3d 813 (en banc)(plurality opinion)(five judges used the totality of the circumstances test and the critical sixth judge used the special needs test); Scott, 450 F.3d 863, 869 (special needs), 872 (totality of the circumstances). As discussed below, the special needs test conforms with Ninth Circuit precedent on similar issues and honors the important distinction between a person who has been convicted and one who is presumed innocent. However, whichever test is applied, the condition is unconstitutional.

a. The Special Needs Test is the Correct Test to Apply

This Court should apply the special needs test in analyzing this issue, because Mr. Pool has merely been arrested, not convicted. See United States v. Scott, 450 F.3d 863, 873 (9th Cir. 2006) (emphasizing constitutional distinction between persons convicted of crime and those who are charged). This distinction

was a very significant one for Senator Harry Reid, who stated the following reservations regarding the 2006 amendment:

> I must, however, make clear my dismay at the last-minute inclusion of a controversial and ill-advised amendment to this legislation allowing for the collection of DNA evidence from people who are arrested or detained. I believe authorizing the collection of DNA evidence without probable cause is an invitation to racial profiling, infringes on privacy rights, and may well be unconstitutional. This provision has no place in this important legislation and I would urge in the strongest terms that it be removed in conference.

Violence Against Women Act of 2005: Senate Hearing on S. 1197, 109th Cong. S11054-55 (Oct. 4, 2005).

The magistrate judge did not cite any case law for his proposition that the finding of probable cause by a judge or grand jury for one criminal proceeding is a watershed event that changes the constitutional status of the defendant. (ER 12.) In fact, as he recognized, there is substantial authority to the contrary. Notably, in United States v. Scott, 450 F.3d 863 (9th Cir. 2006), the Ninth Circuit struck down a Nevada state law that conditioned pretrial release on a defendant's consent to a warrantless search of his or her home. This condition passed neither a special needs or a totality of the circumstances test. In Scott, this Court firmly held that the "constitutionally relevant distinction" for the purposes of search is "between someone who has been convicted of a crime and someone who has been merely accused of a crime but is still presumed innocent." 450 F.3d at 873.

The magistrate judge attempted to distinguish Scott on the ground that it dealt with the expectation of privacy in one's home, which he elevated above the expectation of privacy in one's body. (ER 13, n. 6.) He thus held that for a search of the home the "constitutionally relevant distinction" is between the accused and the convicted, while for a search of the home the "constitutionally relevant

distinction" occurs when a judge or grand jury finds probable cause. There is absolutely no support for this new bright line rule.

Furthermore, the magistrate judge (and the district judge by extension) ignored the Supreme Court's clear statement in Schmerber v. California, 384 U.S. 757, 769-880 (1966): "Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned." (Emphasis added.) Accordingly, our bodies are protected under the Fourth Amendment to the same extent that our homes are, and Scott and Schmerber prohibit the condition in this case.

A review of the special needs test indicates that it should apply to warrantless searches of private citizens. The term "special needs" stems from Justice Blackmun's concurrence in New Jersey v. T.L.O., 469 U.S. 325 (1985), and refers to cases in which the primary purpose of a search is not related to law enforcement and is therefore permissible under the Fourth Amendment. Relying on that reasoning, the Supreme Court has held, in a variety of contexts, that the government need not comply with the probable cause and warrant requirements of the Fourth Amendment when it is addressing non-law-enforcement goals. See, e.g., Board of Education v. Earls, 536 U.S. 822 (2002) (drug testing of students); Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) (drug testing of students); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (drug testing of Customs employees with access to large quantities of drugs); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (drug testing of railroad employees).

The Supreme Court has applied the totality of the circumstances test instead of the special needs test with regard to those on parole or probation. United States

v. Knights, 534 U.S. 112, 118-121 (2001); Samson v. California, 547 U.S. 843, 848 (2006).

This Court's en banc opinion in Kincade was filed in the interim between Knights and Sampson. While the court in Kincade was somewhat fractured in its reasoning,[16] the plurality recognized the significance of the two potentially applicable tests: given that the DNA profiling was being undertaken for general law enforcement purposes, it would not survive the "special needs" test. See 379 F.3d at 827-30 (plurality opinion). However, accurately foreseeing the Supreme Court's subsequent holding in Samson, the plurality held that it need not apply the "special needs" test, given the degraded constitutional status of the conditional releasee in that case. See Kincade, 379 F.3d at 828-29, 832 & n.26. Specifically, the plurality concluded that there was no meaningful distinction between probationers (as in Knights) and supervised releasees (Mr. Kincade), and the Supreme Court's case law indicated a totality of circumstances test should be applied to assess the reasonableness of the suspicionless and warrantless searches of both types of conditional releasees. See Kincade, 379 F.3d at 832 ("reliance on the totality of the circumstances analysis to uphold compulsory DNA profiling of convicted offenders both comports with the Supreme Court's recent precedents and resolves this appeal in concert with the requirements of the Fourth Amendment") (emphasis added); see also United States v. Scott, 450 F.3d 863, 873 (9th Cir.

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[16] The court found, 6-5, that the DNA profiling at issue was constitutional. However, the split was also 6-5 in favor of applying the "special needs" test. Judge Gould was the swing vote: he applied the "special needs" test (as the dissent would have) and found the DNA profiling at issue to be constitutional (concurring with the five judges who upheld profiling under the totality of the circumstances test). See 379 F.3d at 840-41.

2006) (stating that Kincade plurality "stressed the 'transformative changes wrought by a lawful conviction and accompanying term of supervised release'") (quoting Kincade, 379 F.3d at 834).

The application of the special needs test with respect to arrestees is buttressed by this Court's opinion in Scott, 450 F.3d at 872. There, the defendant was subject to mandatory drug testing as a condition of pre-trial release, was arrested after submitting a dirty test, and an unregistered shotgun was found during a search incident to arrest. See id. at 865. This Court applied the "special needs" test and held the drug test to be an unlawful search.[17] See id. at 868-72. In choosing that test, the court relied on the fact that "[p]eople released pending trial . . . have suffered no judicial abridgment of their constitutional rights." Id. at 872. This Court also noted that "common sense and [Ninth Circuit] caselaw" make clear the "constitutionally relevant distinction . . . between someone who has been convicted of a crime and someone who has been merely accused of a crime but is still presumed innocent . . . " Id. at 873 (quotation and citation omitted); see also Kincade, 379 F.3d at 836 (noting "obvious and significant distinction between the DNA profiling of law-abiding citizens . . . and lawfully adjudicated criminals whose proven conduct substantially heightens the government's interest in

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[17] For good measure, the court in Scott also held the drug testing condition was unreasonable based on the totality of circumstances test. 450 F.3d 872-74. However, the reasoning in that portion of the Scott opinion, particularly when coupled with the Kincade plurality, adds to the conclusion that the "special needs" test is the applicable test here. The contrary conclusion (*i.e.*, that the Court should apply both tests) would allow the government to end-run the warrant and probable cause requirements in every case. That is, with respect to every search, the government could claim a special need, and if that argument failed then claim the search was reasonable under the totality of circumstances test.

monitoring them") (plurality opinion); see also 379 F.3d at 859 n. 20 (Reinhardt, J., dissenting) (noting plurality's reason for applying totality of circumstances test).

This Court's recent opinion in Friedman v. Boucher, 568 F.3d 1119 (9th Cir. 2009) further supports the application of the special needs test. In that case, this Court considered whether the special needs exception applied to the forcible taking of a DNA via buccal swab from the defendant, who was incarcerated. It found that the asserted reasons (to help solve "cold" cases) did not satisfy the special needs exception. As discussed above, it also rejected the government's argument that the search could be upheld as "reasonable." This Court should apply the special needs test in analyzing this issue.

b. The Government Cannot Meet The "Special Needs" Test Because It Is Seeking To Conduct DNA Profiling For General Law Enforcement Purposes

In assessing whether the government has met the "special needs" test, the Court must first assess whether there is a non-law enforcement purpose for the DNA profiling at issue. If so, the Court then assesses whether the search is reasonable by balancing Mr. Pool's privacy interest against the government's "special need." Compare Ferguson v. City of Charleston, 532 U.S. 67, 84 & n.21 (2001) (refusing to apply "a balancing test to determine Fourth Amendment reasonableness" because the search was undertaken to generate evidence for use by the police in enforcing general criminal laws); with Illinois v. Lidster, 540 U.S. 419, 423-27 (2004) (considering the balance of privacy interests versus governmental needs only after determining that the traffic stop in question "was not to determine whether [the individuals searched] were committing a crime, but to ask vehicle occupants, as members of the public, for their help"). Because the

government's purpose here is related to general law enforcement, the Court need not even address the balancing issue.

The special needs exception does not apply to gathering of evidence primarily for criminal investigatory purposes. See generally Ferguson, 532 U.S. at 84 (where the primary purpose of a program authorizing a suspicionless Fourth Amendment intrusion is the "general crime control ends" of governmental authorities, the program "simply does not fit within the closely guarded category of 'special needs'"). The Supreme Court has made clear that "special needs" are "concerns other than crime detection," Chandler v. Miller, 520 U.S. 305, 314 (1997), and emphasized that point in holding the Fourth Amendment prohibits a public hospital from providing results of blood tests to police that showed expectant mothers had used drugs. See Ferguson, 532 U.S. 67. In doing so, the Court found such a statutorily required search regime did not fall within the "special needs" exception, even though the ultimate goal of the program was to get the women off drugs:

> Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate purpose. Such an approach is inconsistent with the Fourth Amendment.

Id. at 84 (footnote omitted).

Ferguson emphasized the special needs exception is narrow, and only applies when the "justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement." Id. at 79; see also id. at 74 n.7, 77. Thus, "[t]he fact that positive tests results were turned over to the police does not merely provide a basis for distinguishing [Supreme Court] prior cases applying the 'special needs' balancing approach to the determination of

drug use. It also provides an affirmative reason for enforcing the strictures of the Fourth Amendment." Id. at 84.

Here, "[t]he unequivocal purpose of the searches performed pursuant to the DNA Act is to generate the sort of ordinary investigatory evidence used by law enforcement officials for everyday law enforcement purposes." Kincade, 379 F.3d at 855 (Reinhardt, J., dissenting). This is apparent for numerous reasons. First, with respect to the statute itself: (1) Congress ordered the database be administered by the FBI, see 42 U.S.C. § 14132(a); (2) Congress ordered the information stored be available to "criminal justice agencies," 42 U.S.C. § 14132(b)(3)(A); and (3) the title of §14132 is, "Index to facilitate law enforcement exchange of DNA identification information." See Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) ("the title of a statute and the heading of a section are tools available for resolution of a doubt about the meaning of a statute") (quotation omitted).

The Department of Justice's remarks with respect to the regulations related to DNA profiling are also telling:

> Solving crimes by this means furthers the fundamental objectives of the criminal justice system, helping to bring the guilty to justice and protect the innocent, who might otherwise be wrongly suspected or accused, through the prompt and certain identification of the actual perpetrators. DNA analysis offers a critical complement to fingerprint analysis in the many cases in which perpetrators of crimes leave no recoverable fingerprint but leave biological residue at the crime scene.
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> [A]nalysis 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 a murder, rape, or other serious crime.
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> By expanding CODIS pursuant to statutory authority to include persons arrested, facing charges, or convicted, and non-United States

> persons detained, this rule will enhance the accuracy and efficacy of the United States criminal justice system.

DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932, 74933-34 (Dec. 10, 2008). Relatedly, the FBI describes the CODIS database as "blend[ing] forensic science and computer technology into an effective tool for solving crime." See FBI CODIS Brochure (www.fbi.gov/hq/html/codisbrochure_text.htm). The FBI goes on to write:

> CODIS generates investigative leads in cases where biological evidence is recovered from the crime scene. Matches made among profiles in the forensic index can link crime scenes together; possibly identifying serial offenders. Based upon a match, police from multiple jurisdictions can coordinate their respective investigations and share the leads they developed independently.

Id. Given the obvious general law enforcement purposes of DNA profiling of arrestees identified by Congress, DOJ, and the FBI, such profiling cannot satisfy the "special needs" test. See cf. Tracey Maclin, DNA Fingerprinting and Civil Liberty, 34 J.L. Med. & Ethics 165, 181 (2006); Tenn. Op. Atty. Gen. No. 07-45, 2007 WL 1451632 (2007) (finding "constitutionally suspect" the DNA profiling of "persons arrested, but not yet convicted of violent felonies.")

The primary purpose of the DNA Act at issue "is to obtain a reliable record of an offender's identity that can then be used to help solve crimes." United States v. Amerson, 483 F.3d 73, 81 (2nd Cir. 2007); see Cong. Rec. S13756, S.1197 (Dec. 16, 2005) (statement of Sen. Kyl). Although DNA profiling could theoretically be done merely to provide verification of a defendant's or arrestee's identification, this rationalization could not apply to the subsequent multiple searches of the resultant data with the expressed purpose of solving criminal cases. The magistrate judge did not limit the government to only using the DNA in the event that Mr. Pool flees. Rather, he and the district judge authorized DNA collection for

criminal law enforcement identification purposes, which would include repeated searches against cold-case DNA profiles. This has nothing to do with Mr. Pool's pretrial release.

The government disingenuously claimed below that it merely sought a DNA fingerprint, but failed to explain why the actual fingerprints taken at the time of arrest or booking are insufficient to verify identity. Clearly, if this DNA profiling scheme was only to verify the identity of pretrial defendants it would be limited only to that purpose. The scheme is clearly set in place to obtain evidence for use in unsolved cases, and the government's attempt to minimize that often-expressed and openly accepted goal is implausible. Importantly, the government never disclaimed its intention to put Mr. Pool's DNA profile in CODIS and run it against unsolved cases.

Accordingly, the Court may not order that Mr. Pool comply with DNA testing as a condition of his pretrial release. Mr. Pool is merely an arrestee, and an arrest may "happen[] to the innocent as well as to the guilty." Michelson v. United States, 335 U.S. 469, 482 (1948). Because DNA profiling in this situation is unconstitutional, the Court cannot impose it, and the Bail Reform Act is unconstitutional with respect to this mandatory condition.

c. The DNA Testing Condition Fails the Totality of the Circumstances Test

In Friedman v. Boucher, 568 F.3d 1119 (9th Cir. 2009), this Court considered and rejected the government's argument that the totality of the circumstances test (which it calls the reasonableness test in that case) allowed the DNA test by buccal swap of a previously convicted sex offender who was in custody facing a new sex offense charge. See Kincade, 379 F.3d at 831 (referring to the totality of the circumstances test as the "traditional assessment of reasonableness"). If this Court

determines that the totality of the circumstances test applies in this case, the condition is still unconstitutional.

In Friedman, this Court considered the government's argument that the search was "reasonable" or in other words, "that pre-trial detainees have limited privacy rights that must yield to the desires of law enforcement to collect DNA samples for use in law enforcement databases." 568 F.3d at 1128. This Court strongly rejected this argument, holding: "The warrantless, suspicionless, forcible extraction of a DNA sample from a private citizen violates the Fourth Amendment." 568 F.3d at 1130.

This Court recognized that pre-trial detainees "retain greater privacy interests" than do persons who are incarcerated pursuant to a valid conviction. Id. It also noted that it had previously "confined administrative searches at detention facilities to those reasonably related to security concerns." Id. This Court emphasized the Supreme Court's holding in Schmerber v. California, 384 U.S. 757, 769-880 (1966), that the "importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." Id. It rejected the government's position, "which would endorse routine, forcible DNA extraction."

In Friedman, this Court noted that plaintiff Friedman "was not on parole," and "had completed his term of supervised release successfully and was no longer under considerations of any authority." Id. at 1129-30. This Court gave no importance to the fact that Mr. Friedman had been arrested on a new charge. In Friedman, this Court balanced the interest of a previously-convicted, detained sex offender against the same societal interest advanced by the government in this case. This Court held that the search was invalid under the Fourth Amendment.

If forcible DNA profiling is unreasonable for a previously convicted sex offender who is in custody for a new sex offense, it cannot be reasonable for a pre-trial releasee with no criminal history who is presumed innocent of any offense. Friedman v. Boucher makes it clear that this condition fails the totality of the circumstances test.

The government may argue that this Court's analysis of a Montana statute, which it held not to permit DNA testing of Mr. Friedman, suggests that a proper statute would permit DNA testing in such a circumstance. This appears to be the basis under which the district judge in this case distinguished Friedman. (ER 28, n.3 ["The DNA sample was sought by Nevada Authorities absent any judicial justification and only 'as an aid to solve cold cases.' In contrast, the DNA test in the instant case was authorized by court order based on a federal statute mandating extraction as a condition of pre-trial release, and its use is limited by the magistrate judge's holding, adopted in full by this court, to 'criminal law enforcement identification purposes.'"]) This analysis is unavailing.

First, this Court noted that "adherence to a state statute does not guarantee compliance with the Fourth Amendment." Friedman, 568 F.3d at 1125. In In the Matter of the Welfare of C.T.L., 722 N.W.2d 484, 492 (Ct. App. Minn. 2006), the Minnesota Court of Appeals held that laws "that direct law-enforcement personnel to take a biological specimen from a person who has been charged but not convicted violate the Fourth Amendment to the United States Constitution." The court invalidated the Minnesota DNA testing statute even though that law, unlike the proposed rule, applied only to serious, violent felonies and even though it authorized the police to take DNA samples only after a judge had found probable cause that the arrestee had committed a crime.

In Friedman, there was no need to determine whether the statute itself violated the Fourth Amendment, because the government actions were not within the scope of the statute. Here, because the government seeks to obtain Mr. Pool's DNA pursuant to an applicable statute, the constitutionality of the statute is the critical issue raised by this case. The district court was wrong to duck that issue by relying on the statute itself to establish constitutionality.

Second, Friedman was a civil case. Accordingly, not only did this Court have to determine whether the government violated Mr. Friedman's constitutional rights, but it had to determine (for the purpose of deciding qualified immunity) whether "the rights were clearly established at the time of the violation." Id. at 1124. The analysis of whether a state statute applied to the case was relevant to the determination of immunity as well as to the substantive question of whether Mr. Friedman's rights were violated. Id. at 1131 ("No reasonable police detective or prosecutor could have believed that the Montana Statute authorized a forcible taking of a DNA sample from a Nevada citizen for Nevada law enforcement purposes.")

This Court has previously recognized that a person's legitimate expectation of privacy cannot be undermined by a broad governmental claim of authority to search. Scott, 450 F.3d at 867; see also Smith v. Maryland, 442 U.S. 735, 740 n. 5 (1979). The governmental power to impose a search condition "is not unlimited" and in Scott this Court found that the government did not have the unilateral power to "short-circuit the process by claiming that the arrest itself is sufficient to establish that the conditions are required." Scott, 450 F.3d at 874.

Finally, the government's interest in having Mr. Pool tested now, prior to any conviction, is minimal. Although the government may have a generalized law

enforcement interest in obtaining DNA profiles and running them against open cases, there is no compelling interest in obtaining those profiles prior to conviction. The provision in the statutes for expungement of profiles from the database in the event a case is dismissed or never filed indicates that the government disclaims any legitimate interest in the DNA of persons who are not subsequently convicted of a crime. 42 U.S.C. § 14132(d)(1)(A)(ii). Since the government is not interested in continuing to profile and test persons who were never charged or not convicted, it cannot assert a strong interest in profiling and testing such persons prior to conviction.

Mr. Pool's case may end in a number of ways: 1) he may be convicted, and incarcerated or placed on probation, in which case the government may DNA test him (Kincade, 379 F.3d 813; Kriesel, 508 F.3d 941); or 2) the case may be dismissed or he may be acquitted, in which case the government has disclaimed any interest in having his DNA in the index. 42 U.S.C. § 14132(d)(1)(A)(ii). Accordingly, the government's burden is not simply to trot out the standard justifications for why general DNA profiling is good law enforcement. Rather, the government must explain why it needs DNA from an innocent man now.

In In the Matter of the Welfare of C.T.L., 722 N.W.2d 484, 492 (Ct. App. Minn. 2006), the Minnesota Court of Appeals specifically looked at this issue, noting that the DNA testing provisions provided for destruction of samples and removal of the DNA profile in the event the person was found not guilty or the charge was dismissed. Id. at 491. "This requirement suggests that the legislature has determined that the state's interest in collecting and storing DNA samples is outweighed by the privacy interest of a person who has not been convicted." Id. The court noted that the privacy expectation of a person who was found not guilty

are no different that those of a person who is presumed innocent but is facing charges. Therefore, the state's interest in taking a sample from a presumed innocent person did not outweigh the person's privacy interest. Id. This analysis applies equally regarding the federal legislation.

Friedman clearly outlaws the search sought by the government in this case. The statutes must be struck down as unconstitutional to the extent they provide for compulsory DNA testing of arrestees and pre-conviction criminal defendants.

B. The Mandatory DNA Profiling Condition in the Bail Reform Act Violates Due Process, Separation of Powers, and the Eighth Amendment

1. The Mandatory DNA Profiling Condition Violates Procedural Due Process Because it Eliminates An Independent Judicial Determination as to the Necessity of the Condition

By its very terms, the DNA profiling release condition at issue "shall" be imposed in every case where an arrestee is released, whether such release occurs on his or her personal recognizance, on unsecured bond, or with other conditions. 18 U.S.C. § 3142(b) and (c)(1)(A). Therefore it creates a mandatory condition in all pretrial release cases.

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. Const. Amend. V. This requirement has been referred to as procedural due process. United States v. Salerno, 481 U.S. 739, 745 (1987). The process due in a given situation is determined by "weighing the private interest that will be affected by the official action" against the Government's asserted interest in that action. Matthews v. Eldridge, 424 U.S. 319 (1976).

The cases discussed above implicate a significant liberty interest in remaining free of compelled DNA production and a lifetime of endless profiling

and searches. See Kriesel, 508 F.3d at 957-58 (Fletcher, B., dissenting). The mandatory condition applies to each person who has been arrested and is released by the Court. 18 U.S.C. § 3142(b) and (c)(1)(A). Given that such people are presumed innocent until proven guilty, and that there remains the possibility that each and any of these people may be exonerated, or that their cases may be dismissed, a condition that such an arrestee submit to DNA testing certainly runs the "risk of an erroneous deprivation of a liberty interest." United States v. Torres, 566 F.Supp.2d 591, 597 (W.D. TX 2008)(finding that mandatory Adam Walsh release conditions are unconstitutional as deprivation of due process.) This is especially true since a court is foreclosed from considering a defendant's specific circumstances in setting this condition of pretrial release.

"It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint . . . [T]he interest denominated as a 'liberty' [must not only] be 'fundamental' but also . . . an interest traditionally protected by our society." Michael H. v. Gerald D., 491 U.S. 110, 121-22 (1989) (internal quotations and citations omitted). The question of release or detention under the Bail Reform Act clearly implicates a fundamental liberty interest, as do Congressionally mandated conditions of release which grossly restrict the freedom of a person accused, but not convicted, of a crime within the community. See Reno v. Koray, 515 U.S. 50, 56 (1995)("the Bail Reform Act of 1984, 18 U.S.C. § 3141 *et. seq*., is the body of law that authorizes federal courts to place presentence restraints on a defendant's liberty . . .). From this country's inception, its citizenry has ranked as fundamental the right to be free from unwarranted conditions of release, as evidenced in the Excessive Bail Clause of the Eighth Amendment. U.S. CONST. amend. VIII.

In fact, this fundamental liberty interest was engrafted into the Bail Reform Act in the parsimony provision of the Act itself. 18 U.S.C. § 3142(c)(1)(B)(a defendant who is to be released is to be "subject to the least restrictive condition, or combination of conditions . . . "). The mandatory condition violates this principal in every case, as it deprives a court of the power and opportunity to determine whether the condition is appropriate. Therefore the provision violates the Due Process Clause of the Fifth Amendment.

2. The Mandatory Condition Violates A Defendant's Eighth Amendment Right to Be Released on Conditions that Are Not Excessive In Light of His Circumstances

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil." Salerno, 481 U.S. at 754. Moreover, the Clause mandates bail to be set on an individual basis by the courts and not by Congress: "[T]he fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." Stack v. Boyle, 342 U.S. 1, 4 (1951) (holding monetary bail set uniformly in a multi-defendant case without individualized consideration violated the Excessive Bail Clause).

In drafting the Bail Reform Act of 1984, Congress complied with the dictates of the Eighth Amendment. Congress expressly recognized that "excessive bail not be required" by including a crucial parsimony clause directing that the accused, when released, be "subject to the least restrictive further conditions, or combination of conditions, that such judicial officer determines will reasonably assure the

appearance of the person as required and the safety of any other person and the community . . . ." 18 U.S.C. § 3142(c)(1)(B). This clause is still a part of the bail statute, as amended, and stands in complete contrast to the mandatory provision.

DNA testing and profiling is simply not relevant to the two issues to be addressed by pretrial conditions of release: assuring the appearance of the defendant in the court case, and providing for the safety of the community. 18 U.S.C. § 3142(b), (c), (f). Further, the government has provided absolutely no factual justification for the testing condition.

3. The Mandatory DNA Testing and Profiling Condition Violates the Separation of Powers By Depriving the Court of its Role in Determining Release Conditions

The mandatory DNA testing and profiling release condition violates the constitutional doctrine of separation of powers. The Supreme Court has previously held that the "separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." Mistretta v. United States, 488 U.S. 361, 380 (1989). The Court has condemned any enactment that "impermissibly threatens the institutional integrity of the Judicial Branch." Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 851 (1986). Congress violates the doctrine when it prescribes a rule for courts to follow without allowing courts to exercise independent judicial power. See United States v. Klein, 80 U.S. 128, 146-147 (1871).

Congress has mandated that courts impose compliance with DNA profiling legislation as a condition of pretrial release. Such a mandatory condition, which proposes to strip the Court of its power to set conditions of release violates the doctrine of separation of powers. The setting of bail in federal criminal cases, with minor exceptions, has been recognized as representing the quintessential exercise

of judicial power. Stack v. Boyle, 342 U.S. 1, 4-5 (1951). The mandatory condition must be found unconstitutional.

4. The DNA Testing Condition is an Unconstitutional Extension of Federal Power

A specific enumerated power must support every statute enacted by Congress. United States v. Morrison, 529 U.S. 598, 607 (2000). Based on prior litigation, it is likely that the government will try to support the validity of 42 U.S.C. § 14135a, its attendant regulations, and the mandatory DNA profiling conditions in the Bail Reform Act by relying on the Commerce Clause.[18]

The Commerce Clause allows Congress "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl.3. In United States v. Lopez, 514 U.S. 549, 558-59 (1995), the Supreme Court identified three categories of activities that Congress may regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. Accord Morrison, 529 U.S. at 608-09. Mr. Pool contends that section 14135a is facially unconstitutional because the collection of DNA mandated by the statute does not fit into any one of these three categories of permissible legislation, nor into any other enumerated power.

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[18] It is possible that the government will try to argue that this exercise of power is justified under the Necessary and Proper Clause. However, the Necessary and Proper Clause may only effectuate powers specifically enumerated in the Constitution. McCulloh v. Maryland, 17 U.S. (4 Wheat.) 316, 414-21 (1819).

When originally enacted in 2000, Congress explicitly relied on the Commerce Clause as the basis for its DNA Backlog Elimination Act, which was limited to persons convicted of certain serious federal offenses.[19] While originally section 14135a limited its application to defendants convicted of at least one of the federal crimes set forth in a laundry list of qualifying offenses, the current version has strayed far from that limiting principle.

Because section 14135a authorizes the collection of a DNA sample from "individuals who are arrested, facing charges, or convicted," the activity mandated by section 14135a has no connection to interstate commerce, nor to the federal government's power to regulate federal criminal cases. The wording of this section, which was amended in 2006, extends broadly to all individuals who are arrested, facing charges, or convicted, without regard to whether they fall within any federal criminal jurisdiction.[20] This is an attempt to assert general police power over all individuals suspected of criminal conduct. See Morrison, 529 U.S. at 618 ("we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.")

In United States v. Reynard, 473 F.3d 1008 (9th Cir. 2007), this Court considered whether a previous, much narrower DNA fingerprinting law was valid

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[19] The House Report explains that the original provisions of the DNA Act (other than those applicable to the military and the District of Columbia) were authorized under the Commerce Clause. *See* H.R. Rep. No. 106-900, at 16, available at 2000 WL 1420163 (Leg. Hist.).

[20] The magistrate judge avoided this issue by construing the statute only to apply to federal arrestees, defendants, and convicts..

under the Commerce Clause.[21] In Reynard, this Court limited its holding to the jurisdictional basis for the prior narrower law: first it held that Congress could require a supervised releasee convicted of a federal crime to provide a DNA sample as a necessary extension of its Commerce Clause authority to classify the crime as a federal offense and to supervise federal offenders. Reynard, 473 F.3d at 1022. This rationale clearly does not apply to the far broader current version of the act, which does not limit itself to persons convicted of a federal offense.

In analyzing the issue under Supreme Court precedent, this Court explicitly rejected the contention that Congress could act under the first and third categories of Commerce Clause power articulated in United States v. Lopez, 514 U.S. 549, 558-59 (1995). Reynard, 473 F.3d at 1022. In other words, this Court held that the "extraction of DNA and the subsequent inclusion of DNA data in the CODIS system" do not affect the "channels of interstate commerce" (first Lopez category) nor are they "intrastate activities of an economic nature that 'substantially affect' interstate commerce." Id. at 1022-23. Accordingly, the only possible Lopez ground for supporting this broad expansion of DNA profiling authority could be the second category: whether Congress is asserting its power to regulate an "instrumentality of interstate commerce and the persons or things in interstate commerce." Id. at 1022, citing Lopez, 514 U.S. at 558-59.

In considering the issue under the second Lopez category, this Court confined itself to whether Congress could require testing by a convicted federal offender. Reynard, 473 F.3d at 1023 (A "DNA sample conveys information about

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[21] Reynard considered the much narrower 2000 version of the DNA Act which required the United States Probation Office to collect a DNA sample from any probationer, parolee, or supervised releasee "who is, or has been convicted of a qualifying [federal] offense." 42 U.S.C. § 14135a(a)(2).

a convicted federal offender's identity." (Emphasis added)) Finding that "identifying information [regarding Federal offenders] constitutes a thing in interstate commerce," the Reynard court held that Congress could require that a supervised releasee convicted of a federal offense submit a DNA sample.

The Reynard court was not confronted with the far broader statute before this Court, which purports to require all offenders (whether federal, state, or local; whether convicted or not) to submit DNA samples, and authorizes federal authorities to obtain such samples or authorize other state, local, or private agencies to do so. 42 U.S.C. § 14135a(a)(1)(A) & (a)(4)(B). The scope of the statute here is far broader than either statute struck down in Lopez and Morrison: it authorizes the collection of DNA samples from all "individuals who are arrested, facing charges, or convicted," without any nexus to interstate commerce.

It is clear that Lopez category two power can only be exercised in a commercial or economic setting. For instance, Morrison observed that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613. Similarly, Lopez characterized the statute at issue there as "a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561; accord Morrison, 529 U.S. at 610 ("a fair reading of Lopez shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case").

Finally, a recurring theme in Morrison and Lopez is the inability to articulate limits of Commerce Clause power when a more attenuated analysis is employed. See Morrison, 529 U.S. at 612-13; Lopez, 514 U.S. at 565-66. This concern clearly applies to the instant case. If Congress can mandate that every person arrested or

charged with a crime submit a DNA sample, and make it a federal crime not to do so, then what are the limits of Congress's power?

Because Congress has no authority to authorize DNA profiling of all arrestees and those charged with crimes, this Court must strike the release condition.

/ / /

VIII.

CONCLUSION

Because 42 U.S.C. § 14135a and the mandatory DNA testing provisions in the Bail Reform Act are unconstitutional, the district court erred in imposing a pretrial release condition compelling Mr. Pool to comply with DNA profiling. Mr. Pool asks that this case be reversed and remanded to the district court with instructions to strike the pretrial release condition.

Daniel J. Broderick
Federal Defender

/s/ Rachelle Barbour

Dated: October 5, 2009

Rachelle Barbour
Research and Writing Attorney
Attorney for
JERRY ARBERT POOL

STATEMENT OF RELATED CASES

Counsel is not aware of any related cases pending in this Court within the meaning of Circuit Rule 28-2.6.

Dated: October 5, 2009

DANIEL J. BRODERICK
Federal Defender

/s/ Rachelle Barbour

RACHELLE BARBOUR
Research and Writing Attorney

Attorneys for Defendant-Appellant
JERRY ARBERT POOL

CERTIFICATION OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NO. 09-10303

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type of style requirements of Fed. R. App. P. 32(a)(6).

Dated: October 5, 2009

Respectfully submitted,

DANIEL J. BRODERICK
Federal Defender

/s/ Rachelle Barbour

RACHELLE BARBOUR
Research and Writing Attorney

Attorneys for Defendant-Appellant
JERRY ARBERT POOL

C.A. No. 09-10303

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JERRY ARBERT POOL, Defendant-Appellant.	No. Cr. 09-0015-EJG CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2009, I electronically filed the foregoing ***Appellant's Opening Brief*** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 5, 2009

/s/ Katina Whalen