No. 09-10303

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

En Banc Panel

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY ARBERT POOL,

Defendant-Appellant.

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

Honorable Edward J. Garcia
Senior United States District Judge

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

APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE

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I. Mr. Pool's Entry of a Guilty Plea Has Mooted the Constitutional Issue Briefed in this Case

This case is currently scheduled for en banc oral argument on September 20, 2011. The Court has issued an order for Mr. Pool to show cause why the appeal should not be dismissed as moot in light of Mr. Pool's previous guilty plea to a federal felony. Mr. Pool is scheduled to be sentenced on November 18, 2011. The terms of Mr. Pool's plea agreement provide that if the district court does not accept the agreement, the court shall give him the option of withdrawing his plea pursuant to Federal Rule of Criminal Procedure 11 subsections (c)(1)(C) and (3). (D.Ct. Docket, No. 09-Cr.-00015-EJG at 87 ["Docket"].)[1] This provision, as well as Mr. Pool's out-of-custody status subject to pretrial release conditions, caused the parties to suggest in supplemental briefing that this instant appeal was not moot.[2] However, fuller review of relevant caselaw from this Court and the Supreme Court has caused Mr. Pool's counsel to reach a contrary conclusion.[3]

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[1] For the Court's convenience, Mr. Pool attaches an updated copy of the district court docket as an exhibit.

[2] In *United States v. Hyde*, 520 U.S. 670 (1997) and *Ellison v. United States Dist. Ct.*, 356 F.3d 1198 (9th Cir. 2004)(en banc), the Supreme Court and this Court noted a distinction between a guilty plea and a plea agreement. *See also In re Morgan*, 506 F.3d 705, 709 (9th Cir. 2007)(reviewing Rule 11(c)(1)(C) plea procedure). Mr. Pool's change of plea has not been transcribed. Trial counsel contacted the court reporter who indicated that the district judge "tentatively" accepted the plea, but deferred acceptance of the plea agreement until after reviewing the presentence report.

[3] At the time of supplemental briefing, it was unclear whether this Court would continue to focus on Mr. Pool's status as a pretrial releasee. In *Kincade*, the Court addressed the application of the DNA profiling law to the defendant as a supervised releasee, even though by the time the case reached the en banc Court

A basic principle of Article III jurisdiction is that a justiciable case or controversy must remain "extant at all stages of review, not merely at the time the complaint is filed." *United States v. Juvenile Male*, 131 S. Ct. 2860, 2864 (2011), *quoting Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). This means that throughout the litigation, including on appeal, the party "must . . . be threatened with, an actual injury" and that the injury is "likely to be redressed by a favorable judicial decision." *Id.*; *Davis v. Federal Election Comm'n*, 554 U.S. 724, 733 (2008). Thus, litigation may become moot during the pendency of an appeal, even if it presented a justiciable question when the case commenced. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009) .

The issue raised below and fully briefed to this Court is whether a presumed-innocent pretrial releasee may constitutionally be compelled to provide a DNA sample under 18 U.S.C § 3142(c)(1)(A) and 42 U.S.C. § 14135a(a)(1). After his guilty plea, Mr. Pool remains out of custody pending sentencing pursuant to 18 U.S.C. §§ 3143(b) and 3145(c). Nevertheless, his status has changed since he challenged the DNA testing condition. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982); *see also United States v. Kills Enemy*, 3 F.3d 1201, 1203 (8th Cir. 1993)(holding that post-plea defendant pending sentence is no longer presumed innocent).

In *Murphy*, the Supreme Court held that a constitutional challenge to a statute denying pretrial bail was moot when the plaintiff had been convicted and was pending appeal: "The constitutionality [of the statute] as applied to a person

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Mr. Kincade had been remanded into custody and had his DNA taken as a prisoner pursuant to a different section of the statute. *United States v. Kincade*, 379 F.3d 813, 821 (2004)(en banc)(plurality).

awaiting trial is a question distinct from the constitutionality of that section as applied to a person who has been tried and convicted. . . . In short, the fact that Hunt may have a live claim for bail *pending appeal*, does not save from dismissal his now moot claim to *pretrial* bail." *Id.*, 481 n. 5 (emphasis in original). Although Mr. Pool has not yet been sentenced, his status has nonetheless shifted in constitutional terms, and he no longer has a live claim against DNA profiling prior to guilty plea.

The question whether a pretrial releasee may constitutionally be compelled to give DNA may be one that evades review, because the time period for compelling DNA from those defendants is necessarily limited and (as in this case) "too short to be fully litigated prior to cessation or expiration" of the issue. *Juvenile Male*, 131 S.Ct. at 2865. However, there is little "reasonable expectation that the same complaining party will be subject to the same action again." *Id.*; *see also Murphy*, 455 U.S. at 483-84 ("mere physical or theoretical possibility" of recurrence is insufficient); *cf. Lyons v. Los Angeles*, 615 F.2d 1243 (9th Cir. 1980)(finding continued threat of future injury).

II. Mr. Pool's Constitutional Challenge Will Clearly Be Moot When He Is Sentenced

Mr. Pool is currently scheduled for judgment and sentencing on November 18, 2011. In *Hamilton v. Brown*, 630 F.3d 889 (9th Cir. 2011), this Court found that DNA profiling of convicted felons was constitutional. *See also United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004)(en banc)(plurality); *United States v. Kriesel,* 508 F.3d 941 (9th Cir. 2007)(convicted felons on supervised release). Sentencing and a final judgment of conviction will again move Mr. Pool into a different position with respect to the challenged statutes. Should he go into Bureau

of Prisons' custody after sentencing, he will be tested under 42 U.S.C. § 14135a(1)(B) and the release condition will no longer apply. Any challenge to the convicted prisoner testing provision would be quite distinct from the pretrial releasee provision Mr. Pool has challenged. *See Murphy v. Hunt*, 455 U.S. at 481 n.5.

III. Vacatur is the Appropriate Procedure

Accordingly, Mr. Pool agrees that the matter has become moot and asks this Court to issue an order vacating the September 20, 2011 oral argument, dismissing this appeal as moot, vacating the opinions of the three-judge panel, and remanding the case to the district court with instructions to vacate the opinions of the magistrate and district judges. *See e.g., Braun v. Scott*, 938 F.2d 1032 (9th Cir. 1991)(en banc).

Vacatur is the appropriate remedy in this constitutional case. *See Camreta v. Greene*, 131 S.Ct. 2020 (2011); *Pub. Utilities Comm'n v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996)(Court's "established practice" is to vacate judgment). In *Camreta*, the Court discussed why vacatur was an especially appropriate course in a constitutional challenge. There the plaintiff prevailed on a Fourth Amendment challenge to state action, but lost on the ground of qualified immunity. The government appealed the constitutional ruling, and the Court held that the case had become moot pending appeal. Although the plaintiff argued that vacatur of this Court's Fourth Amendment opinion was inappropriate, the Court noted that the constitutional aspect of the ruling weighed in favor of vacatur: "The point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences,' so that no party is harmed by what we have called a 'preliminary' adjudication." *Camreta*, 131 S.Ct. at 2035, *citing United States v. Munsingwear,*

Inc., 340 U.S. 36, 40-41 (1950).

The Court noted that "a constitutional ruling" is a "legally consequential decision," and therefore that vacatur should apply to "strip[] the decision below of its binding effect." *Camreta*, 131 S.Ct. at 2035. This "clears the path for future relitigation." *Id*. With respect to compelled DNA searches of arrestees, one case is already pending in this Court and has been stayed pending resolution of the Pool case. *Haskell v. Brown*, No. 10-15152 (submission withdrawn from panel June 2, 2011). That case has a complete factual record that was litigated in the district court. Vacatur would permit that case to proceed on its merits.

The mootness in this case cannot be attributed to Mr. Pool's unilateral behavior. *Compare Cammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996)(declining to vacate lower court judgment because appeal became moot when defendant unilaterally rescinded challenged regulation pending appeal). Mr. Pool wanted to litigate this issue fully, but the district court sought to set a trial by mid-August 2011. Docket at 72, 79 (denying stipulated continuances); 81 (setting trial). Presented with this time limit, Mr. Pool and the government entered into a plea agreement in which the government made concessions, including dropping Count Two (which carried a five-year mandatory minimum sentence) and agreeing to a specific sentence. Docket at 87 (plea agreement). Both parties believed that the guilty plea would not moot this case. Nonetheless, as discussed above, the issue presented is moot.

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IV. Conclusion

Mr. Pool accordingly concurs that this appeal must be dismissed by the Court for mootness, and asks the Court to vacate the oral argument and the panel opinions, and remand with instructions to vacate the district court and magistrate court opinions.

Dated: September 16, 2011

Respectfully Submitted,

/s/ Daniel J. Broderick

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/s/ Rachelle Barbour

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