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)

REPLY BRIEF OF APPELLANT

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DISCUSSION

I. The Background and History of the Fourth Amendment Weigh Strongly on Behalf of the Privacy Interests of the Innocent Against Compelled DNA Extraction and Profiling

Although the framers of the Constitution could never have foreseen the advent of a mandatory DNA testing regime, they would have greeted the prospect of massive government databases filled with private genetic information with deep suspicion. The text of the Fourth Amendment makes it clear that the framers were not only worried about infringement of the home, but of the body: "The right of the people to be secure in their *persons* . . . against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV; see Safford Unified Sch. Dist. #1 v. Redding, 129 S.Ct. 2633, 2639 (2009).

The Fourth Amendment was born out of the arbitrary use of English power, which "inaugurated the resistance of the colonies to the oppressions of the mother country." Boyd v. United States, 116 U.S. 616, 625 (1886).[1] These abuses of power "were fresh in the memories of those who achieved our independence and established our form of government." Id.

The constitutional principals at stake in the Fourth Amendment "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." Id. As the Supreme Court recognized, the "essence" of the government intrusion that the Fourth Amendment prohibits is "the invasion of [a person's] indefeasible right of personal security, personal liberty and

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[1] In Olmstead v. United States, 277 U.S. 438 (1928), Justice Brandeis called Boyd "a case that will be remembered as long as civil liberty lives in the United States." Id. at 473 (Brandeis, J., dissenting). The Supreme Court recently cited Boyd's historical analysis approvingly in Arizona v. Gant, 129 S.Ct. 1710, 1720 n. 5 (2009) and Virginia v. Moore, 128 S.Ct. 1598, 1603 (2009).

privacy property, where that right has never been forfeited by his conviction of some public offense. . . ." Id., 116 U.S. at 630 (emphasis added).

The history of the Fourth Amendment strongly weighs against the wholesale right to search asserted by the government here. As Justice Bradley stated in Boyd, "The struggles against arbitrary power in which [the framers] had been engaged for more than twenty years, would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred." Id., 116 U.S. at 630.

In other words, the framers of the Constitution were distrustful of government surveillance and intrusion, and the inclusion of the Fourth Amendment was intended to protect the individual against the power of the state. In contrast, the government's response to Mr. Pool's arguments is simply to say, "Trust us." It downplays legitimate concerns about the security, accuracy, and reliability of its procedures.[2] The framers have much to say about the perils of unquestioned government intrusion.

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[2] No less an authority than the Office of the Inspector General has found repeatedly significant vulnerabilities in CODIS. U.S. Department of Justice, Office of the Inspector General, Audit Division, Combined DNA Index System Operational and Laboratory Vulnerabilities, Audit Report 06-32, May 2006 (www.justice.gov/oig/reports/FBI/a0632/final.pdf). Further, there is no reason to expect that the government, which has steadily expanded its claim to broader and broader classes of DNA profiles, will always follow the procedures currently in place. It has already indicated its intent to use "additional DNA technologies." FBI, CODIS – The Future (available at www.fbi.gov/hq/lab/html/codis4.htm). Interestingly, while the government asserts broad authority to compile DNA profiles of the presumed innocent, the Genetic Information Nondiscrimination Act takes effect this week to prohibit misuse of genetic data in employment or insurance. 42 U.S.C. § 2000ff et seq.; Steven Greenhouse, Law Seeks to Ban Misuse of Genetic Testing, N.Y. Times, November 16, 2009, at B5.

Despite the government's assurances, DNA samples will be held in perpetuity, subject to being retested and reanalyzed as new technologies or new government needs surface. Limitations on the current DNA database do nothing to safeguard those samples in the future, and a person has no recourse against ongoing testing and profiling of the sample in the future. As Thomas Jefferson wrote, "The time to guard against corruption and tyranny is before they shall have gotten hold of us." Thomas Jefferson, Notes on Virginia viii (Ford ed. iii 225) (1782).

The framers recognized that the Fourth Amendment would need to provide for continuing protection against changing intrusions by the state. As the Supreme Court has previously noted, "Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth." Weems v. United States, 217 U.S. 349, 373 (1910). This is especially true for constitutional protections: "The future is their care and provision for events of good and bad tendencies of which no prophecy can be made." Id. Otherwise, "Rights declared in words might be lost in reality." Id.

Central to liberty and the pursuit of happiness, the framers "conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting); see also Gouled v. United States, 255 U.S. 298, 303-304 (1921) (describing the Fourth and Fifth Amendments as indispensable to the "full enjoyment of personal security, personal liberty and private property" and the very essence of constitutional liberty). These rights are eternal:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appeal unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In

> times not altogether unlike our own they won – by legal and constitutional means in England, and by revolution on this continent – a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). As the Court held in Boyd, the government's assertion of a general power to search "may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." Id., 116 U.S. at 632.

The values inherent in the Fourth Amendment prohibit the arbitrary search regime imposed here.

II. The Asserted Governmental Interests All Amount to the Same Thing: Obtaining DNA Samples To Solve Cases

The government appears to cite a myriad of interests that support the wholesale collection of DNA from innocent people. It concedes, however, that the "primary importance" is the "increased accuracy in the investigation and prosecution of criminal cases." Gov't Brief at 32. All of the government's other reasons add up to the same thing: the use of DNA to solve crimes. In United States v. Mitchell, 2009 U.S. Dist. LEXIS 103575 (Nov. 6, 2009), District Judge Cercone of the Western District of Pennsylvania emphatically found the challenged law unconstitutional. In doing so, he soundly rejected every argument the government makes here.

In Mitchell, the district court held, "A DNA profile generates investigatory evidence that is primarily used by law enforcement officials for general law enforcement purposes." Id., 2009 U.S. Dist. LEXIS 103575, at *20. Whether couched as the exculpation or deterrence, the government's rationales do not

amount to the type of compelling interest necessary to justify this broad-ranging intrusion.

A. The Government's Assertion that it Seeks to Exculpate the Innocent is Disingenuous

The government flatly states that "including the DNA samples of those arrested upon probable cause will necessarily further help to exculpate suspects of crimes they did not commit." Gov't Brief at 33. This assertion does not stand up to scrutiny.

The government expects this Court to believe that it seeks DNA samples from arrested individuals in order to exonerate the innocent from suspicion for open offenses. First, if the crime is the sort of offense with DNA evidence, the innocent suspect can easily be exonerated by offering his or her DNA to compare with the evidence. The government can also seek a search warrant to obtain DNA from suspects for whom they have probable cause. There is no need to obtain millions of samples in the interest of exonerating the few.

Second, by making this argument, the government acknowledges in a deep and troubling way its own fallibility in investigating and prosecuting crime. The argument that the government must compile vast DNA databases to avoid condemning the innocent implicitly admits that it investigates, arrests, charges, and convicts innocent people for crimes that they did not commit. In acknowledging this fact, it thereby gives this Court proof why the presumption of innocence is central to our criminal justice system. Because not every charge leads to a conviction, an arrest upon probable cause is not a watershed moment in our system

for the purpose of undermining Fourth Amendment protections.[3] Accordingly, the government's argument acknowledges policy reasons why the DNA of the presumed innocent should not be collected as a matter of course.

Third, the government's assertion is not believable on its face. This is the same government that in District Attorney's Office for the Third Judicial District v. Osborne, 129 S.Ct. 2308 (2009), strongly supported the State of Alaska's refusal to turn DNA evidence over to a condemned prisoner who asserted actual innocence of the crime and sought DNA testing at his own expense. In its amicus brief in that case, the government approvingly cited the federal statute providing for post-conviction DNA testing. That statute puts a falsely-convicted defendant through a wringer of substantive and procedural factors before he or she can obtain a DNA test for purposes of exoneration. 18 U.S.C. § 3600. The federal government's stinginess in providing DNA testing for the purpose of exonerating the innocent undermines its claim to be protecting innocent defendants through the compilation of a massive DNA database.

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[3] The statistics of the Administrative Office of the Courts bear this out. Of 91, 390 federal defendants charged with crimes in 2008, 8.939 were not convicted. Administrative Office of the United States Courts, Judicial Facts and Figures: 2008, Table 5.5, "U.S. District Courts – Criminal Defendants Disposed of, by Method of Disposition" (available at www.uscourts.gov/judicialfactsfigures/2008/Table505.pdf). Accordingly, 10% of federal defendants are exonerated. The statistics are even more stark when the type of offense is considered. For example, for traffic offenses for the year ending in March 2008, there were 3,719 defendants, and 1,199 of them were not convicted. Administrative Office of the United States Courts, Federal Judicial Caseload Statistics: March 31, 2008, Table D-4, "U.S. District Courts – Criminal Defendants Disposed of, by Type of Disposition and Major Offense, During the 12-Month Period Ending March 31, 2008" (available at www.uscourts.gov/caseload2008/tables/D04Mar08.pdf).

Fourth, the very rationale of exonerating the innocent requires that the DNA database provide a match to another suspect. The exoneration of the innocent in this context necessarily requires the investigation and solving of cases, clearly a law enforcement purpose. The government acknowledges this in its brief when it moves quickly from the exoneration discussion into a discussion of solving crimes "when no other evidence points to a particular suspect." Gov't Brief at 33. It then discusses at length the help that DNA can give in cases where only DNA evidence has been recovered. This has nothing to do with exonerating the innocent and everything to do with attempting to solve crimes. This is a general law enforcement purpose.

B. There is No Practical Use of DNA Evidence at the Detention Hearing or During Pretrial Release

The government claims that it could use the DNA profile of an arrestee in court early in the case prior to conviction. This claim ignores the practicalities inherent in this scheme.

The decision whether to detain or release a defendant is often made at the time of the initial appearance. As this is usually the day of the arrest and charge, the earliest the DNA sample could be taken in these cases is the day of the initial appearance. See Fed. R. Crim. Pro. 5(a)(1)(A) (requiring presentation before judge "without unnecessary delay"); 18 U.S.C. § 3142(f) (requiring that detention hearing take place within five days of first appearance). The government wants this Court to believe that a DNA sample taken that day could be profiled, entered in the database, and compared to all open crimes prior to the defendant's initial appearance or detention hearing. This is simply not possible.

The website of the DNA Initiative, which is run by the Department of Justice, Office of Justice Programs, states that in 2003 there were between 200,000

and 300,000 collected, untested convicted offender samples. U.S. Dept. of Justice, DNA Initiative, Backlog of Samples from Convicted Offenders (available at www.dna.gov/backlog-reduction/convicted (last checked Nov. 13, 2009)). Of course, this was before several substantial increases in the range of persons subject to compelled DNA testing. See also Solomon Moore, F.B.I. and States Vastly Expanding Databases of DNA, N.Y. Times, Apr. 19, 2008, at A1 (stating backlog was more than 500,000 cases). In March 2009, the DOJ's Office of the Inspector General found that the "increased demand for DNA analyses, without a corresponding growth in forensic laboratory capacity, has caused a large backlog of unanalyzed DNA samples from convicted offenders and crime scenes, and this backlog can significantly delay criminal investigations." U.S. Department of Justice, Office of the Inspector General, Audit Division, U.S. Department of Justice Audit of the Convicted Offender DNA Backlog Reduction Program, Audit Report 09-23, March 2009 (www.justice.gov/oig/reports/OJP/a0923/final.pdf). Given the amount of time it takes to obtain a profile from a DNA sample, and the projected 1.2 million new samples expected to be taken each year under this expansive law[4], it is unbelievable to expect that any use can be made of arrestee DNA testing in the pretrial phase of a case.

Furthermore, even if the government could get instant DNA profiling on a new arrestee, this asserted goal again relies on the crime-solving aspect of this technology. If the government has probable cause to believe that a new arrestee has committed another crime, it is welcome to seek a warrant and obtain a DNA

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[4] Ellen Nakashima and Spencer Hsu, U.S. to Expand Collection of Crime Suspects' DNA; Policy Adds People Arrested but Not Convicted, Wash. Post, Apr. 17, 2008, at A1; Solomon Moore, F.B.I. and States Vastly Expanding Databases of DNA, N.Y. Times, Apr. 19, 2008, at A1.

sample to try to connect the arrestee to another crime. It should not undermine the privacy interests of millions of arrestees to find a needle in a haystack.

C. The DNA Sample Does Not Serve to Ascertain or Verify an Arrestee's Identity

The government argues that a DNA sample taken at the time of arrest could be used to ascertain or verify the identity of the arrestee "where fingerprint records are unavailable, incomplete, or inconclusive." However, that issue is not presented by this case (and probably, by very few if any federal cases). The claim is without merit.

Further, it is impossible to use DNA testing to verify an arrestee's identity in the way the government claims. The backlogs in the system mean that DNA analysis would be unavailable at the time of arrest to verify one's identity. Further, the government asserts that the arrest of the proper suspect gives them the authority to obtain a DNA sample. Accordingly, the suspect is identified prior to arrest and before any DNA sample is taken.

An analysis of the current case points out the logical fallacy in the government's argument. Mr. Pool has no prior criminal history. Accordingly, his arrest was presumably made based on basic identifying criteria (age, height, weight, and photographs in government identification documents) as well as prior investigative contact with the agents. The agents already believed that Mr. Pool had committed a crime and based on this they sought an indictment. They then arrested Mr. Pool on the indictment based on their identification of him as the person they believed had committed a crime. Once he was arrested, there was no need to obtain his DNA at the time of arrest to further identify him. He was necessarily identified prior to arrest. In fact, this identification is what the agents used to arrest him.

Moreover, a post-arrest DNA sample could not possibly identify Mr. Pool as himself: even if the DNA sample could be immediately analyzed and compared to another sample, there is no prior DNA profile of Mr. Pool to compare that sample against to ensure that this Mr. Pool is the correct Mr. Pool. The DNA profile sought here has no value in ensuring that the government is prosecuting the correct person, the only value is in determining whether Mr. Pool has committed another crime. To the extent that this involves identity, it is purely the identification of a suspect in an open case. This is an investigatory purpose, not for the purpose of establishing identity.

III. DNA Samples and Profiles Are Not Fingerprints: The Government Seeks to Collect and Analyze Private Genetic Information To Solve Open Crimes, Not to Identify an Arrestee

Over and over in its brief, the government refers to DNA collection, testing, and compilation as DNA "fingerprinting" because it wants to convince this Court to rubberstamp this significant intrusion on constitutional rights. The government has to rely on this tidy bit of sophistry because it is constitutionally allowed to fingerprint arrestees. Accordingly, it seems to think that calling a DNA sample and profile a "fingerprint" makes the connection clear for constitutional purposes. One wonders if the government could call a house search a "residential fingerprint" in order to justify it on the same basis. Although the government goes to great effort to analogize the mandatory collection of genetic material to fingerprinting, saying it doesn't make it so.

As the district court stated in Mitchell, "[T]o compare the fingerprinting process and the resulting identification information obtained there from with DNA profiling is pure folly." 2009 U.S. Dist. LEXIS 103575, *28 (emphasis added). "Such oversimplification ignores the complex, comprehensive, inherently private

information contained in a DNA sample." Id.; see also Patterson v. State, 742 N.E.2d 4, 10 n.3 (Ind. Ct. App. 2000) ("The view that DNA analysis is no different than traditional fingerprinting is becoming less palatable. DNA analysis provides unprecedented access into an individual's future physical and psychological health, the health of close relatives, and insight into paternity issues.") The term "DNA fingerprinting" is an oxymoron: fingerprinting is fingerprinting, and the compelled extraction of private genetic material for analysis, testing, and profiling is another thing entirely.

The court in Mitchell noted that for the purpose of true identification of an individual, "Fingerprints . . . only identify the person who left them. Therefore, fingerprints already provide an unequivocal, and in some respects, a better record of personal identity than forensic DNA typing." Id. at *29. The court noted that the extraction of DNA "is much more than a mere progression to taking fingerprints and photographs, it represents a quantum leap that is entirely unnecessary for identification purposes." Id.

The identification the government advances as its goal is analogous with the investigative goal it disclaims: it seeks to identify Mr. Pool as the perpetrator of other cases.[5] This is the only goal of DNA testing, and it is absolutely disingenuous of the government to claim otherwise. In Mitchell, the court held that the purpose of collecting DNA under this law "is solely for criminal investigative

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[5] The government cites Mr. Pool's conditions of release in support of its desire to DNA test him on pretrial release. Before the lower court, the government disclaimed any intent to have Mr. Pool tested based on the type of charge, or the extent of his release conditions. The lower court expressly held that its determination was not a fact-specific one. (ER 9.) The government should not resurrect this argument now, where no evidentiary hearing was ever held on this issue.

purposes." 2009 U.S. Dist. LEXIS 103575, *32. "The only reasonable use of DNA is investigative, it is not an identification science it is an information science." Id. "The identification issue in this instance is a red herring, as there is no compelling reason to require a DNA sample in order to 'identify' an arrestee." Id.

The Mitchell court further noted that "there is no exigency that supports the collection of DNA from an arrestee or pretrial detainee. An individual is obviously unable to conceal or change the comprehensive information contained in his or her DNA, therefore there is no need for an expeditious search made in order to prevent the concealment of past criminality." Id. at 33. "If a law enforcement officer has probable cause to believe that an arrestee has involvement in either past or ongoing criminal activity, then it is not unreasonable to require such official to adhere to the requirements of the Fourth Amendment and secure a proper warrant for the collection of the suspect's DNA." Id.

The government argues that the structure and current application of the DNA profiling regime should undermine the constitutional protections here. However, as the court held in Mitchell, "No amount of statutory protection of the sample or the information contained therein will undo the taint of an unconstitutional search to obtain such information." Id. at 34.

A genetic profile is much more complex and private than a fingerprint. As there is no compelling government purpose to obtain this material prior to conviction, the challenged condition must be struck.

IV. The Proposition that An Arrest is a Watershed Moment Will Undermine Settled Fourth Amendment Law

The lower court in this case determined that DNA testing was constitutional because Mr. Pool was arrested on an indictment. It set great store on a judicial or

grand jury finding of probable cause, finding that it was a watershed moment.[6] This would seem to set a new bright line rule about privacy expectations at the time of arrest. This new bright line rule if extended would undermine settled Fourth Amendment law.

Neither the lower court, nor the government cites any law for the premise that the filing of an indictment or signing of a complaint is a watershed moment

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[6] The DNA testing regime applies to all arrestees: those arrested prior to any finding of probable cause, as well as those (such as misdemeanor defendants) for whom no judicial or grand jury finding of probable cause need be made. 42 U.S.C. § 14135a(a)(1)(A). The regime also applies to everyone "facing charges," without limitation to the seriousness of the charges or their classification as felony, misdemeanor, or infraction. Id. The lower court's attempt to limit the ambit of this law to only those persons arrested upon a finding of probable cause by a judge or a grand jury has no support in case law or in the statutory language. "To give [the words of a statute] a different meaning for each category [of persons ostensibly subject to the statute] would be to invent a statute rather than interpret one." Clark v. Martinez, 543 U.S. 371, 378 (2005).

Of course, not all arrests are based upon findings of probable cause by a grand jury or a judge. Notably, in federal court, misdemeanor cases are prosecuted on the basis of an information signed by a prosecutor, or a complaint (often in the form of a ticket or citation) written by an agent. Fed. R. Crim. Pro. 58(b)(1). In the Eastern District of California, the government has sought and obtained DNA testing conditions in misdemeanor cases charged by information. See United States v. Michael T. Anderson, Cr. S. 09-264-KJM; United States v. David Kershaw, Cr. S. 09-493-DAD (E.D. Cal.); United States v. Alberto Aguilar, Cr. S. 09-490-DAD (E.D. Cal.); United States v. Ryan Heal, Cr. S. 09-492-DAD (E.D. Cal.). Such conditions do not even comply with the scope of DNA testing found constitutional by the district court in this case.

Further, in federal felony cases a defendant may be arrested without a prior finding of probable cause. See Fed. R. Crim. Pro. 5(b) (arrest without a warrant requires that a complaint be promptly filed). In these cases, DNA testing would proceed prior to any finding of probable cause by a judge.

under the Fourth Amendment. This assertion contravenes the presumption of innocence, which places the watershed moment at the time of judicial or jury finding of guilt beyond a reasonable doubt. See Osborne, 129 S. Ct. at 2320 ("A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man.")(emphasis added).

The history of compulsory DNA testing is a good example of how the government's attempts to assert its power has become more and more invasive. The Supreme Court has previously recognized the ominous creep of government interference. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Boyd, 116 U.S. at 635; cited with approval in Arizona v. Gant, 129 S.Ct. 1710, 1720, n. 5 (2009); Coolidge, 403 U.S. at 453-54.

In his dissent in United States v. Kincade, 379 F.3d 813, 873 (9th Cir. 2004), now-Chief Judge Kozinski predicted exactly what has come to pass, "Later, when further expansions of CODIS are proposed, information from the database will have been credited with solving hundred or thousands of crimes, and we will have become inured to the idea that the government is entitled to hold large databases of DNA fingerprints." (Kozinski, J. dissenting).

Not only is the current testing regime itself an example of this type of stealthy expansion of government power and intrusion, but a determination that an arrest upon probable cause allows for this type of unmitigated search will undermine an entire line of search and seizure precedents. In Chimel v. California,

395 U.S. 752, 763 (1969), the Supreme Court recognized only a narrow scope of search-incident-to-arrest: police could only search the space within an arrestee's "immediate control," which meant "the area from within he might gain possession of a weapon or destructible evidence." As recently as Arizona v. Gant, 129 S.Ct. 1710 (2009), the Court affirmed the narrow scope of that search exception.

In Gant, the Supreme Court refused to countenance the government's assertion of a broad authority to search a vehicle after an arrest. In Gant, the defendant was arrested for a traffic offense. His car was searched after the arrest, when he had already been handcuffed and placed in the back of a patrol car. The Supreme Court found the search unconstitutional, noting that even thought Gant had been arrested, "A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals." 129 S.Ct. at 1720. In that case, the Supreme Court also acknowledged the risk that police would make custodial arrests that they otherwise would not make "as a cover for a search which the Fourth Amendment otherwise prohibits." Id., n. 5, citing 3 LaFave § 7.1(c), at 527.

This concerns apply equally here. An arrest, whether made on a judicial or grand jury finding of probable cause or not, does not extinguish Fourth Amendment rights. Defendants can be arrested for petty offenses. See Virginia v. Moore, 128 S.Ct. 1598 (2008) (warrantless arrest valid, even if not allowed under state law, for driving on a suspended license); Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (valid arrest of mother on seatbelt offense only punishable by a fine). In the federal system, virtually every petty offense that can be committed on

federal land is punishable as a misdemeanor. See e.g. 36 C.F.R. § 261.1 (punishing a variety of petty offenses on National Forest land as Class B misdemeanors); 38 C.F.R. § 1.218(b) (punishing a variety of petty offenses on VA property as Class B misdemeanors).[7]

Because the federal DNA profiling scheme applies broadly to all "individuals who are arrested, facing charges, or convicted" (42 U.S.C. § 14135a(a)(1)), it sweeps in huge numbers of people, some who are charged with nothing more serious than parking in the wrong spot at the VA, fishing with two poles instead of one, or leaving their dog in the car for a moment. At a recent petty offense calendar, the magistrate judge imposed a DNA testing condition on several misdemeanor defendants charged by information, even though there is no judicial or grand jury finding of probable cause in their cases. See United States v. David Kershaw, Cr. S. 09-493-DAD (E.D. Cal.); United States v. Alberto Aguilar, Cr. S. 09-490-DAD (E.D. Cal.); United States v. Ryan Heal, Cr. S. 09-492-DAD (E.D. Cal.). Even limiting the scope of the scheme to those charged upon a finding of probable cause by a judge will likely include many people suspected of only petty

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[7] Lest the Court think that these provisions are rarely enforced, here is a small sample of misdemeanor offenses from the July 2009 magistrate judge's calendar in the Eastern District of California: 36 C.F.R. § 261.13 (vehicle off route); 36 C.F.R. § 261.16(c) (bathing at a faucet not provided for that purpose); 36 C.F.R. § 261.58(bb) (possession of alcohol); 36 C.F.R. § 261.58(i) (possessing part of a tree);36 C.F.R. 261.8 (fishing with two poles); 36 C.F.R. § 261.8 (fishing without a license); 36 C.F.R. § 761.15(i) (no sticker on off-road vehicle); 38 C.F.R. § 1.218 (numerous parking violations); 38 C.F.R. 1.218(B)(6) (unattended dog in a car). All of these offenses are misdemeanors, and if a defendant fails to come to court on the ticket, a bench warrant is usually ordered. Under 42 U.S.C. § 14135a(a)(1)(A) and 28 C.F.R. § 28.12(b), all of these charged defendants are subject to DNA testing and inclusion in the database.

offenses in the DNA dragnet. See Fed. R. Crim. Pro. 58(d)(3) (providing for summons or warrant by court upon showing of probable cause).

Further, not only does the relevant law allow DNA testing of all arrestees, there is no requirement in the statute that the arrest be lawful or valid. See Gant, 129 S.Ct. at 1716; Weeks v. United States, 232 U.S. 383, 392 (1914) (authority to search the accused "when legally arrested"). The Supreme Court recently affirmed that "officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence." Moore, 128 S.Ct. at 1607 (emphasis added). Allowing such a wide-spread invasive search scheme without any requirement that the arrest be constitutional and valid, without an opportunity to test the constitutionality of the arrest prior to the extraction of a sample, and without automatic expungement of the sample and results in the event of an invalid arrest, undermines settled constitutional protections.

V. This Court's Decision in Friedman v. Boucher Resolves this Matter

In its opposition brief, the governments waits until page 37 to mention this Court's recent decision on compelled DNA testing, Friedman v. Boucher, 580 F.3d 847 (9th Cir. 2009). In discussing Friedman, the government fails to distinguish this Court's decision that the government could not constitutionally compel DNA testing from a convicted sex-offender in custody on new sex charges.

The government attempts to distinguish Friedman on the basis that the DNA was taken forcibly from the plaintiff. However, after noting that the extraction of the DNA was forceful, this Court did not rely on that fact in its discussion of whether the plaintiff was searched, nor did it base its special needs or reasonableness holdings on that fact. Friedman, 580 F.3d at 852-53, 857. Moreover, the statute here provides for the forcible taking of DNA from arrestees

like Mr. Pool. 42 U.S.C. § 14135a(a)(4) (authorization of any means necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample.) The government's argument would mean that a non-forcible mandatory extraction of DNA would be constitutional while a forcible extraction would not. This leads to an absurd result: a defendant or arrestee who refused to comply with DNA testing could never be constitutionally forced to comply under 42 U.S.C. § 14135a(a)(4). Friedman clearly applies to compelled DNA sampling of all kinds.

The government also attempts to distinguish Friedman by arguing that extraction of DNA from Mr. Pool would be pursuant to court order or statutory authority, while Friedman's was not. However, the government fails to acknowledge that the very basis for the authority it asserts is what Mr. Pool is challenging as unconstitutional. Such reasoning is therefore circular: the government asserts that Friedman does not apply, and that DNA testing of Mr. Pool would be constitutional because it would be acting pursuant to a statute and court order providing for DNA testing, but Mr. Pool is challenging that statute and court order as unconstitutional under Friedman.

If the law is unconstitutional, Mr. Pool cannot be DNA tested at this time. As the Supreme Court recently stated, "[F]ounding-era citizens were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness." Moore, 128 S.Ct. at 1603. In Moore, the Court held that the Fourth Amendment is not dependent on the contours of underlying law. Id., 128 S.Ct. at 571 ("state restrictions do not alter the Fourth Amendment's protections"). Accordingly, the constitutionality or unconstitutionality of a search does not depend on a legislative enactment.

Finally, the government again tries to argue that it has multiple reasons for seeking DNA from Mr. Pool not presented in the Friedman case: "protecting the innocent, increasing accuracy in criminal investigations and prosecutions, deterring and preventing future crimes and furthering pretrial identification, security and supervision objectives." Gov't Brief at 39. It claims that all of these objectives "go beyond the 'normal law enforcement function' of 'solving crimes.'" Id. However, one of these asserted interests – increasing accuracy in criminal investigations and prosecutions – is exactly the normal law enforcement function of solving crimes. See Gov't Brief at 32 (discussing how increasing accuracy will aid law enforcement in solving crimes). The other asserted interests – exculpating the innocent through convicting the guilty, deterring crime, identifying a pretrial detainee as a suspect in other crimes, thereby enhancing security – also all have to do with identifying suspects and solving crimes.

Contrary to the government's quick dismissal of Friedman as "limited by it[s] facts," the case squarely prohibits the DNA testing sought here. If a previously convicted sex offender, in custody on a new sex case cannot be compelled to give a DNA sample, then a presumed innocent, out-of-custody arrestee with no prior criminal history cannot. Friedman controls this case, and the DNA testing condition must be struck down.

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VI. Conclusion

Mr. Pool respectfully requests that this Court find the challenged DNA testing condition unconstitutional and order it stricken.

Dated: November 16, 2009

Respectfully Submitted,

Daniel J. Broderick
Federal Defender

/s/ Rachelle Barbour
_____
Rachelle Barbour
Research and Writing Attorney
Attorney for
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 7,000 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: November 16, 2009

Respectfully submitted,

DANIEL J. BRODERICK
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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 November 16, 2009, I electronically filed the foregoing ***Reply Brief of Appellant*** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

Dated: November 16, 2009

/s/ Katina Whalen