09-10303

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

v.

JERRY ARBERT POOL,

Defendant and Appellant.

On Appeal from the United States District Court
for the Eastern District of California
No. Cr. S. 09-0015-EJG
The Honorable Edward J. Garcia, Judge

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF THE UNITED STATES

KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DOUGLAS J. WOODS
Acting Senior Assistant Attorney General
CONSTANCE L. LELOUIS
Supervising Deputy Attorney General
ENID A. CAMPS
Deputy Attorney General

DANIEL J. POWELL
Deputy Attorney General
State Bar No. 230304
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5830
Fax: (415) 703-1234
Email: Daniel.Powell@doj.ca.gov
Attorneys for Amicus Curiae State of California

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae the State of California has a vital interest in the outcome of this case, which implicates the constitutionality of its programmatic collection of DNA from adult felony arrestees. The collection of DNA from adult felony arrestees is required by California's Proposition 69, which the California electorate overwhelmingly passed in 2004 as the cornerstone of an effort to provide the State with the best technology available for accurately and expeditiously identifying criminal offenders and exonerating the innocent. Proposition 69 is the subject of a separate challenge in *Haskell v. Brown*, No. 10-15152.

Not only does California have an interest in defending the constitutionality of its laws generally, but the specific provision implicated here and in *Haskell*—the collection of DNA samples at felony arrest—is a vital tool for crime-solving in California. Since California began collecting DNA samples from all adult felony arrestees, California's DNA database program has doubled the number of "hits" to its DNA database. California's experience is that Proposition 69 has allowed it to solve many crimes that otherwise would remain unsolved, as well as to solve crimes more quickly,

[1] The State of California files this brief pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-2.

thus taking violent offenders off the street. California thus has an important interest in ensuring its continued collection of DNA samples for forensic identification, and urges this Court to affirm the constitutionality of federal DNA collection efforts as did the three-judge panel and the district court judge in this case.

SUMMARY OF ARGUMENT

On three separate occasions, this Court has applied the totality of the circumstances test in finding that collection of DNA samples for purposes of forensic identification is reasonable under the Fourth Amendment. *United States v. Kriesel*, 508 F.3d 941, 947 (9th Cir. 2007) (quoting *Samson v. California*, 547 U.S. 843, 848); *see also United States v. Kincade*, 379 F.3d 813, 842 (9th Cir. 2004) (en banc); *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995). Application of that standard compels the conclusion that the practice of California—and twenty-two other states and the federal government—is consistent with the requirements of the Fourth Amendment. Finding that "the degree to which [the search or seizure] intrudes upon an individual's privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests" weighed strongly in favor of the government, the district court and a majority of the three-judge panel correctly concluded that the federal government's statutory framework of

collecting DNA from adult felony arrestees, with its myriad protections of that information, is reasonable.

As this Court has noted numerous times, the sole purpose of collecting DNA is to identify the arrestee. *Kincade*, 379 F.3d at 837. As a result, the collection of DNA is no different from the taking of a fingerprint: both reveal an individual's identity, and nothing more. *Rise*, 59 F.3d at 1559. And because an arrestee "has lost any legitimate expectation of privacy in the identifying information" derived from biological samples , *id*. at 1560, the arrestee's privacy interest in this case is minimal.

Weighed against an arrestee's minimal interests are the important interests advanced by the collection of DNA at the time of felony arrest. While law enforcement officials identify arrestees through fingerprints, photographs, and other means, DNA is an important method of identification as well, one that is more accurate than any other. The government's interest in identification includes determining what other crimes the individual has committed. Collection of DNA samples from arrestees also help law enforcement officials in solving crimes and preventing future criminal activity. California's data shows that collecting DNA at the time of felony arrest significantly aids law enforcement in these efforts, which translates into violent criminals being removed from California's streets. Moreover,

by focusing on the correct suspect, DNA collection prevents law enforcement from wasting scarce resources in investigating the wrong individual, and saves innocent individuals from the time, expense, and embarrassment of being investigated for a crime they did not commit. These interests strongly outweigh those of the arrestee, such that the seizure of DNA from adults at the time of felony arrest is reasonable under the Fourth Amendment.

ARGUMENT

I. THE TOTALITY OF THE CIRCUMSTANCES TEST IS THE APPROPRIATE MEANS TO DETERMINE THE CONSTITUTIONALITY OF DNA COLLECTION AT THE TIME OF FELONY ARREST

A. This Court Has Consistently Employed the Totality of the Circumstances Test to other DNA Collection Statutes

The seizure of DNA from adults arrested for a felony is entirely consistent with Fourth Amendment guarantees. The Fourth Amendment has two clauses: one that guarantees that individuals will not be subject to "unreasonable" searches and seizures, and one that "describes the procedures that must be followed in obtaining a warrant." *See United States v. Barona*, 56 F.3d 1087, 1092, n. 1 (9th Cir. 1995). While a search or seizure often requires a warrant and probable cause based on individualized suspicion, there are numerous instances in which a warrant is not required.

Ibid. (citing instances in which a warrant is not required). Rather, the touchstone of the Fourth Amendment is "the reasonableness…of the particular governmental invasion of a citizen's personal security." *Kincade*, 379 F.3d at 821. As the Supreme Court has stated:

> Under our general Fourth Amendment approach, we examine the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment. Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and on the other, the degree to which is needed for the promotion of legitimate governmental interests.

Samson, 547 U.S. at 848 (citations and internal quotations omitted).

As the federal government argues in its brief, this Court has routinely applied the totality of the circumstances test to programs mandating the warrantless collection of DNA samples without probable cause, in each case finding that such collection was reasonable. *See Rise*, 59 F.3d at 1562; *Kincade*, 379 F.3d at 839–40; *Kriesel*, 508 F.3d at 947. This approach is the same one taken by the majority of the circuits. *United States v. Weikert*, 504 F.3d 1, 11–14 (1st Cir. 2007); *Banks v. United States*, 490 F.3d 1178, 1183 (10th Cir. 2007); *United States v. Kraklio*, 451 F.3d 922, 924-25 (8th Cir. 2006); *Johnson v. Quander*, 440 F.3d 489, 496 (D.C. Cir. 2006); *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005); *Padgett v. Donald*,

401 F.3d 1273, 1280 (11th Cir. 2005); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004); *Groceman v. U.S. Dep't of Justice*, 354 F.3d 411 (5th Cir. 2004); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992). Thus, the question before this Court is whether an arrestee's privacy interests in his identity and bodily integrity outweigh the "monumental" interests of the government in identifying arrestees, solving past crimes and preventing future ones, and ensuring that innocent people are not charged with crimes they did not commit. *Rise*, 59 F.3d at 1559. As California explains below, they do not.

B. Law Enforcement Purposes Are Properly Considered in Balancing Competing Interests

Appellant's and the ACLU's argument that the law enforcement uses of arrestee DNA samples renders the totality of the circumstances test inapplicable ignores developments in the Supreme Court's and this Court's Fourth Amendment jurisprudence. As this Court recognized in *Kincade*, a totality of the circumstances analysis can be applied in situations involving law enforcement. 379 F.3d at 826–32 (noting that *United States v. Knights*, 534 U.S. 112 (2001) permitted a law enforcement rationale in the totality of the circumstances analysis); *see also Illinois v. McArthur,* 531 U.S. 326, 330-331 (2001) ("When faced with special law enforcement needs,

diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable. . . . [W]e balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.")

Samson rejected the notion advanced by appellant that search of arrestees cannot be reasonable if supported by neither special needs nor individualized suspicion. *Samson*, 547 U.S. at 855 n.4. In *Samson*, the Court affirmed the warrantless, suspicionless search of a parolee by employing the totality of the circumstances test. In doing so, the Court specifically relied on law enforcement purposes, such as the prevention of future criminal activity. *Id* at 853. *Cf. New Jersey v. T.L.O.*, 469 U.S. 325, 351–52 (1985) (Blackmun J. concurring) (recognizing application of balancing test is in public interest when there is "a special law enforcement need for greater flexibility"); *Illinois v. Lidster,* 540 U.S. 419, 424 (2004); *Brown v. Texas* 443 U.S. 47, 50-52 (1979). While the presence of law enforcement interests can defeat a claim that a warrantless search is not justified by special needs, the presence of such interests does not preclude application of the totality of the circumstances standard. *Compare Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (government could not justify

testing pregnant women for cocaine use under special needs approach when test results were used for law enforcement purposes).

C. This Court's Decision in *Friedman* Does Not Control The Outcome of this Case

Nor does this Court's decision in *Friedman v. Boucher* preclude application of the totality of the circumstances test. 580 F.3d 847 (9th Cir. 2009). In *Friedman*, Nevada authorities forcibly obtained a buccal swab of an arrestee in order to compare his DNA against "cold cases." *Id*. at 851. Importantly, no statute authorized the Nevada authorities' actions. *Id*. at 853–54. Rather, the prosecutor, acting alone, ordered a detective to forcibly take the arrestee's DNA sample. This Court was thus faced with a case vastly different from that presented here: a rogue prosecutor collecting DNA through the use of force outside of any statutory scheme ensuring the kinds of confidentially and use restrictions present under federal and state law, and without the many interests present in maintaining a DNA database like that of California and the United States. *Kincade*, 379 F.3d at 838.

The fact that DNA collection is performed systematically without any discretion on the part of law enforcement distinguishes this case from *Friedman*. Indeed, many circuits that have examined the issue have relied on the fact that all individuals are treated identically in concluding that DNA

testing is reasonable considering the totality of the circumstances. As the First Circuit noted, "the DNA Act includes no discretionary component. Courts have acknowledged that the presence of such discretion affects the balancing of interests. . . ." *United States v. Weikert*, 504 F.3d 1, 14 (1st Cir. 2007) (quoting *Samson*, 126 S.Ct. at 2202.)

In concluding the search in *Friedman* was not reasonable, this Court relied on the admonition in *Schmerber v. California* that the warrant requirement was designed to ensure "informed, detached, and deliberate determinations of the issue of whether or not to invade another's body in search of evidence of guilt. . . ." *Friedman*, 580 F.3d at 857 (quoting 384 U.S. 757, 770 (1966)). As *Schmerber* went on to note, obtaining a warrant from a detached magistrate avoids a situation of "being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id*. at 771 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). Indeed, "[a]n essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents." *Skinner*, 489 U.S. at 621–22. In *Friedman*, of course, this is precisely the problem: a law enforcement official made an arbitrary decision about a specific individual to determine if he was involved in other crimes. The

situation the *Friedman* Court faced thus implicated the very abuses that the warrant clause and the Fourth Amendment generally were designed to protect against.

In stark contrast to the facts of *Friedman*, California's statutory framework, like that of the United States, essentially acts as a programmatic warrant in which the voters have made a determination that in *all* cases where an adult is arrested for a felony, the value of collecting DNA far outweighs the minimal privacy interests of an arrestee in his identity. Law enforcement officials have no discretion whatsoever in determining whose DNA to collect. *People v. King*, 82 Cal.App.4th 1363, 1373 (2000). For that reason, a warrant is not required to ensure the "informed, detached, and deliberate determinations" that the warrant clause is typically designed to protect. Indeed, in concluding that Oregon's DNA collection program was valid despite the fact that there was no warrant or particularized suspicion, this Court concluded:

> Chapter 669 is evenhanded. Every person convicted of one of the predicate offenses listed in O.R.S. § 137.076(1) is required to submit a blood sample for analysis . . . . Prison officials retain no discretion to choose which persons must submit blood samples. By ensuring that blood extractions will not be ordered randomly or for illegitimate purposes, Chapter 669 fulfills a principal purpose of the warrant requirement.

Rise, 59 F.3d at 1562; *King*, 82 Cal.App.4th at 1378 ("the reasons for requiring a warrant do not exist [in collecting DNA pursuant to California law] because there is no discretion on the part of the officials who take the samples, and little or no potential for surprise on the part of those required to provide samples.") Accordingly, both factually and legally, California's and the United States' statutory framework governing the non-discretionary collection of DNA is entirely distinguishable from *Friedman*.

II. APPLICATION OF THE TOTALITY OF THE CIRCUMSTANCES TEST SHOWS THAT THE COLLECTION OF DNA FROM ADULT FELONY ARRESTEES IS CONSISTENT WITH THE FOURTH AMENDMENT

A. Arrestees Have a Minimal Interest in the Privacy of Their Identity

Applying *Rise, Kincade*, and *Kriesel*, the collection of DNA from adult felony arrestees is reasonable when considering the totality of the circumstances. Collection and forensic testing of DNA pursuant to a comprehensive statute is justified because it does not intrude on an expectation of privacy "society is prepared to recognize as legitimate." *New Jersey v. T.L.O.*, 496 U.S. 325, 338 (1985); *Rakas v. Illinois*, 429 U.S. 128, 143–44, n. 12 (1978).[2] As with parolees and probationers, arrestees—who

[2] In passing Proposition 69, the California electorate concluded that "it is reasonable to expect qualifying offenders to provide forensic DNA (continued…)

are in police custody because there is probable cause that they have committed a felony—have a diminished expectation of privacy compared to private citizens.

1. Arrestees do not stand in the same position as private citizens

Because law enforcement has probable cause to believe they have committed a crime, arrestees stand in a very different position with respect to the government than do individuals not implicated in criminal activity. Most importantly, arrestees can be incarcerated. They can be fingerprinted, photographed, and their identifying information collected. *See e.g., Atwater v. City of Largo Vista*, 533 U.S. 318 (2000) (following warrantless arrest for misdemeanor failure to wear a seat belt and failure to produce a driver's license, arrestee was placed in squad car, driven to police station, booked, and placed in a jail cell). Arrestees can be interrogated, their liberties restricted, and their rights curtailed in numerous ways while they are

---

(…continued)
samples for the limited identification purposes set forth in this chapter." Prop. 69, Findings, subsec. (f). In addition, 23 states and the federal government authorize the collection of DNA at felony arrest, suggesting that society does *not* recognize a privacy interest in an arrestee's identity. *See* State Laws for Arrestee DNA Databases (August 10, 2010), available at http://www.dnaresource.com/documents/ArresteeDNALaws-2010.pdf (last visited June 28, 2011.)

released on bail. Arrest constitutes "a most extreme interference with the 'right to be left alone'. . . ." *People v. Crowson*, 33 Cal.3d 623, 629–30 (1983); *see also e.g., United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J. concurring) (arrest is a "serious personal intrusion regardless of whether the person seized is guilty or innocent"); *People v. Diaz*, 51 Cal.4th 84, 93 (recognizing "reduced expectation of privacy caused by arrest); *Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring) (noting that an individual who has been arrested and faces criminal charges is seized for purposes of the Fourth Amendment and is "scarcely at liberty"); *United States v. Scott*, 450 F.3d 863, 882–83 (Bybee, J., dissenting).

The fact that arrestees—unlike convicted criminals—are presumed innocent has absolutely no relevance for purposes of the Fourth Amendment's search and seizure clause. In *Bell v. Wolfish*, the Supreme Court overruled a Fourth Amendment challenge to a prison's practice of conducting visual body-cavity searches of inmates who had not yet been convicted of any crime following contact visits. 441 U.S. 520, 560 (1979). The Court rejected an argument that an arrestee had a right to be free from conditions of confinement that are not justified by compelling necessity based on the "presumption of innocence." The presumption of innocence, the Court concluded, only serves to allocate the burden of proof in criminal

trials. It "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." *Id*. at 533. Thus, as with the conditional releasees at issue in *Kincade*, arrestees "are not entitled to the full panoply of rights and protections possessed by the general public," and "are properly subject to a broad range of [restrictions] that might infringe constitutional rights in a free society." *Kincade*, 379 F.3d at 813.

Because of the change in an individual's status occasioned by their arrest, as this Court has recognized in the fingerprinting context, "there exists a constitutionally significant distinction between the gathering of fingerprints from free persons to determine their guilt of an unsolved criminal offense and the gathering of fingerprints for identification purposes from persons within the lawful custody of the state." *Rise*, 59 F.3d at 1559–60, cited in *Kincade*, 379 F.3d at 836 n. 31. The same is true of a DNA profile, which derives information "substantially the same as fingerprinting." *Id*. at 1559. Indeed, if law enforcement were required to obtain a warrant prior to collecting an adult's DNA sample at the time of booking, it is difficult to see how law enforcement could collect a fingerprint sample without a warrant. Because both fingerprinting and DNA collection

represent minimal intrusions on an arrestee's privacy interest, both are reasonable under the Fourth Amendment.

2. Arrestees have no privacy interest in hiding their identity from law enforcement

That arrestees stand in a different position from private citizens is particularly true with respect to any potential interest in the privacy of their identity. The booking process is designed to ensure that the state accurately verifies the identity of the arrestee: he or she is photographed, fingerprinted, and detailed identifying characteristics are recorded. "It is elementary that a person in lawful custody may be required to submit to . . . fingerprinting . . . as part of the routine identification process." *Rise*, 59 F.3d at 1560 (quoting *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) (Berger, J.)). Once "a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it." *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992). *See also Kincade*, 279 F.3d at 837 (observing that "one lawfully arrested and booked into state custody" can claim "no right of privacy" in their identity).

There is no legal difference between obtaining DNA for identification purposes and obtaining fingerprints at booking. The portion of an arrestee's DNA that is tested does not code for any medical characteristics. Rather, the

only information that can be obtained from the tests performed on an arrestee's DNA is his or her identity, and any other use of the DNA sample is a crime. Cal. Penal Code §§ 295.1; 299.5(i)(1)(A). "[A]t least in the current state of scientific knowledge, the DNA profile derived from the offender's blood sample establishes only a record of the offender's identity." *United States v. Amerson*, 483 F.3d 73, 85 (2d Cir. 2007); *see also Kincade*, 379 F.3d at 837.[3]

Thus, "[g]iven the limits imposed on the collection, analysis, and use of DNA information by the statute . . . the intrusion on privacy effected by the statute [is] similar to the intrusion wrought by the maintenance of fingerprint records." *Nicholas v. Goord*, 430 F.3d 652, 670 (2d Cir. 2005). As this Court has observed, "[t]he information derived from the blood sample [and the subsequent testing of DNA] is substantially the same as that derived from fingerprinting—an identifying marker unique to the individual from whom the information is derived." *Rise*, 59 F.3d at 1559. *See also Banks v. United States*, 490 F.3d 1178, 1185–86 (10th Cir. 2007); *Jones v. Murray*,

[3] The fact that California engages in extremely limited familial analysis of *convicted offender* profiles is irrelevant. First, there is no allegation that the federal government has engaged in familial testing with Pool's sample. Second, despite the ACLU's suggestion otherwise, in California arrestee samples are excluded from any familial search: only convicted offender samples are tested.

962 F.2d 302, 306–07 (4th Cir. 1992). Just as fingerprinting an arrestee does not implicate any constitutionally protected interest in his identity, *United States v. Kraph*, 285 F.2d 647, 650 (3d Cir. 1961), neither does the collection of DNA solely for identification purposes.

3. Speculation of possible future abuses is not part of the Fourth Amendment inquiry

Appellants attempt to distract the Court from how the federal government and California *actually* uses DNA—to identify—with suggestions that DNA "can provide insights into disease predisposition, physical attributes, race, and ancestry" and suggestions that it might be used to test for aggression, substance addiction, criminal tendency, and other physical and character traits. (Br. at 15.) Such speculation is not part of the Fourth Amendment inquiry. *Skinner*, 489 U.S. at 626-27 n. 7; *Veronia Sch. Dist. v. Acton*, 515 U.S. 616, 652 (1995). Rather, the potential for misuse of arrestees' DNA is insufficient to alter their privacy interest in the collection of their DNA, and does not justify wholesale invalidation of government efforts to collect DNA samples from arrestees for purposes of identification. "The hypothetical possibility of some future abuse does not substantiate a justiciable controversy." *Wilson v. Collins*, 517 F.3d 421, 430 (6th Cir. 2008); *see also Amerson*, 483 F.3d at 86-87.

This Court has explicitly rejected this precise argument. In *Kincade*, the parties and *amici* argued that because DNA samples "conceivably could be mined for more private information or otherwise misused in the future," the future invasion of personal privacy outweighed the government's interests. 379 F.3d at 837–38. In rejecting this argument, the Ninth Circuit refused to speculate about hypothetical future acts, reasoning that future suits could address such behavior.

> [B]eyond the fact that the DNA Act itself provides protections against such misuse, our job is limited to resolving the constitutionality of the program before us, as it is designed and as it has been implemented. In our system of government, courts base decisions not on dramatic Hollywood fantasies, but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record. If . . . some future program permits the parade of horribles the DNA Act's opponents fear . . . we have every confidence that courts will respond appropriately.

Id. Rather than being judged for its hypothetical uses that are expressly outlawed, the collection of DNA must be judged for its actual use: to identify.

Such speculation is particularly inappropriate in light of the statutory protections afforded to arrestees whose DNA is collected. In its brief, the United States explains the strict limitations on the use of a DNA sample and the information obtained from it. (U.S. Br. at 8.) Similarly, California law

requires that the buccal swab be tested only to reveal an individual's identity; under no circumstances may the sample be tested to reveal anything else. Penal Code § 295.1; *cf. Alfaro v. Terhune*, 98 Cal. App.4th 492, 508 (2002). California law also limits disclosure of the sample and results of the testing to law enforcement personnel. Cal. Penal Code § 299.5(f). Like federal law, California law provides for civil and criminal penalties for violating Proposition 69's significant protections. *Id.* §§ 299.5(i)(1)(A); (i)(2)(A). Given these protections, the collection of DNA must be judged not for hypothetical uses that are expressly prohibited by law and have not come to pass,[4] but rather for its actual use: to accurately identify criminal offenders. *Cf. NASA v. Nelson,* 131 S. Ct. 746, 750, 761-763 (2011) (observing a "statutory or regulatory duty to avoid unwarranted disclosures" generally allays privacy concerns created by government "accumulation" of "personal information" for "public purposes"); *Whalen v. Roe,* 429 U.S. 589, 599-600 (1977) (upholding law permitting the collection of names and addresses of persons prescribed dangerous drugs, and finding that the statute's 'security

[4] Indeed, the district court in *Haskell* found that "to date, there has not been one instance in which charges were brought that an employee of the [California] DOJ for violating the DNA Act" and that "no audit has ever cited a California CODIS lab for any violation of confidentiality or use restrictions." 677 F. Supp.2d at 1191.

provisions' which protected against public disclosure of patient information were sufficient to protect a privacy interest "arguably ...root[ed] in the Constitution").

B. The Government has a Compelling Interest in Collecting Samples for its DNA Database at the Time of Arrest

In contrast with the minimal impact on an arrestee's interests, the government's interests in the collection of arrestee DNA samples for its DNA database are compelling. Such collection serves several vital governmental interests: the accurate identification of arrestees, solving and preventing crimes, and ensuring arrestees comply with the conditions of their release pending trial.

1. The collection of DNA at the time of felony arrest assists the Government in accurately identifying arrestees

Like the federal government, California has a compelling interest in the accurate identification of arrestees. As this Court has noted time and again, the sole purpose of collecting DNA is to identify. *See Rise*, 59 F.3d at 1559; *Kincade*, 379 F.3d 837; *Kriesel*, 508 F.3d at 947. While it is true that state and federal government officials employ other methods of identification when arresting an individual, that fact should not prohibit them from using a method of identification that is far superior to other methods. *People v.*

Robinson, 47 Cal.4th 1104, 1141 (2010) ("for purposes of identifying 'a particular person' as the defendant, a DNA profile is arguably the most discrete, exclusive means of personal identification possible"). As the Fourth Circuit observed, DNA evidence cannot be altered:

> It is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity. Disguises used while committing a crime may be supplemented or replaced by changed names, and even changed physical features. Traditional methods of identification by photographs, historical records, and fingerprints often prove inadequate. The DNA, however, is claimed to be unique to each individual and cannot, within current scientific knowledge, be altered.

Jones, 962 F.2d at 307. Moreover, the accuracy of DNA justifies the maintenance of a DNA databases such as CODIS. "The governmental justification for this form of identification . . . relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods." *Amerson*, 483 F.3d at 87.

Further, the concept of identification is broad enough to include not just who an arrestee is, but also what past crimes an arrestee has committed. As the Supreme Court noted in *Hiibel v. Sixth Judicial Dist. Court of Nevada,*

Humboldt County, 542 U.S. 177, 186 (2004), "[k]nowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder."[5] Such a determination not only assists law enforcement's investigation of the crime for which the individual is arrested, it is also lawfully used to determine what level of security is appropriate in detaining the person, and whether the arrestee is properly held to answer for other charges. *See, e.g.,* Cal. Penal Code § 1275 (requiring a judge or magistrate to take into consideration the protection of the public and any previous criminal history); *Loder v. Municipal Court*, 17 Cal.3d 859, 867 (1976). Even if the individual has been released on bail before his DNA sample is tested against other crime scene profiles, law enforcement officials can re-arrest him if they subsequently determine that he may be implicated in a past crime such as murder or rape. *Cf. Kincade*, 379 F.3d at 838 ("compulsory DNA profiling serves society's overwhelming interest in ensuring that a parolee complies with the requirements of his release and is returned to prison if he fails to do so") (internal citations and quotations

[5] *See also United States v. Villagrana-Flores*, 467 F.3d 1269, 1277 (10th Cir. 2006) ("We hold that Mr. Villagrana-Flores's Fourth Amendment rights were neither violated when his identity was obtained during a valid *Terry* stop nor when his identity was shortly thereafter used to run a warrants check."); *Doe v. Sheriff of Dupage County*, 128 F.3d 586, 588 (7th Cir. 1997).

omitted). Thus, in addition to constituting a more accurate means of identification, collecting and testing, arrestee DNA assists law enforcement in gaining valuable information about arrestees.

2. The collection of DNA at the time of felony arrest assists the State in solving crimes.

a. California's data proves that DNA collection at arrest is effective in crime solving

As the federal government argues in its brief, the collection of DNA at the time of felony arrest furthers the important governmental interest in solving past crimes. California's data in this regard is compelling. In 2009, the first year that DNA samples were taken at booking, the average number of monthly hits between offender DNA profiles and DNA profiles from unsolved crime scene samples increased 51% from 183 per month in 2008 to about 280 in 2009. *See FAQ: Effects of the All Adult Arrestee Provision*, http://ag.ca.gov/bfs/prop69.php. The number of hits made per month in 2010-2011 continues to increase at an average of 360 per month, a 97% increase over the average number of hits made per month in 2008. In fact, in the last six months of 2010, the rate was 414 hits per month, an increase of over 125% over the monthly rate in 2008 (the year preceding full implementation of Proposition 69). *Id*. California has thus doubled the effectiveness of its DNA databank through collecting arrestee samples.

Several examples show how collecting DNA samples at the time of arrest assist law enforcement in solving crimes that may not have been solved but for Proposition 69. For instance, on February 15, 2011, Octavio Castillo was arrested for possession of stolen property, and submitted a DNA sample pursuant to Proposition 69.[6] While Castillo was released on bail, the State's DNA database program matched Castillo's arrestee DNA sample to a sample from a crime where the perpetrator kidnapped a woman and severely beat and sexually assaulted her before dumping her on the side of the road. Rather than being charged with a property crime and remaining in the community, Castillo is now standing trial on multiple felonies including sodomy, kidnapping and battery with serious bodily injury. The amicus curiae brief of the California District Attorneys Association in support of California in *Haskell* illustrates other cases in which the forensic identification sample taken from the felony arrestee played a crucial role in solving violent crime. *See* Docket 19-1, *Haskell v. Brown* (Case No. 10-15152). For example, "DNA collected from Donald Carter, 56, arrested in Sacramento in 2009 on a felony drug charge, was linked to the unsolved 20-

[6] White, *DNA hit leads police to Watsonville man arrested for kidnapping and assaulting woman in Santa Cruz*, Santa Cruz Sentinel , May 13, 2011, *available at* 2011 WLNR 9577577.

year-old murder of Sophie McAllister, 80. Although Carter's drug charge was dismissed, he was later charged with [Ms. McAllister's] murder." And "[i]n April 2009, Christopher Rogers, 34, was arrested in Sacramento for assault with a deadly weapon, which was ultimately reduced to a misdemeanor. But his DNA, collected at the time of arrest, was matched to DNA taken at the scene of a 2004 murder in Sacramento." (*Ibid.*) Had DNA not been collected from these individuals at the time of arrest, these cases (like many others) would have gone unsolved.

The United Kingdom Study relied upon by the ACLU in this case and in *Haskell* does not detract from California's compelling evidence that the collection of arrestee DNA assists law enforcement officials in solving past crimes. The ACLU argues that the UK study shows that including arrestees in the United Kingdom's DNA databank failed to increase the databank's effectiveness in solving crime. (ACLU Br. at 49.) Read as a whole, however, the UK report actually refutes the ACLU's theory that collecting DNA from felony arrestees will not assist the state in solving crime. For example, the study showed a 74% increase in DNA matches from 1999-2000 through 2004-2005 over the course of the UK's expanding DNA collection program, which included the period of the expansion to arrestee collections. In any event, the UK program collected DNA from a much

larger pool than does California, and would include individuals arrested for misdemeanors. Accordingly, any comparison between the UK and California is faulty.

b. It is essential that law enforcement collect DNA at the time of arrest rather than at conviction

Appellants' suggestion that the government wait until conviction to collect DNA would hamstring law enforcement's ability to solve crime. First, many felony arrestees will be released into the general population pending trial. It is likely that some of them will commit crimes while released on bail: crimes that the State can quickly and more easily solve if it already has the arrestee's DNA profile. Crimes will also be prevented where an arrestee has been implicated in a prior crime, because the State can then make a more informed decision regarding the question whether the felony arrestee should be released or held to answer for other charges. It is likely that some of these arrestees who would otherwise be released will commit crimes pending trial: crimes that could be prevented or solved by collecting DNA at the early stage in the criminal proceeding.

Moreover, by obtaining a DNA sample at the time of arrest, rather than after an individual is convicted, law enforcement officials will be more effective in solving past crimes. It can often take years for a person arrested

for a felony to be tried. *See, e.g., People v. Martinez*, 47 Cal.4th 399, 406, 415 (defendant arrested in 1990, jury trial commenced in 1997); *People v. Lewis*, 46 Cal.4th 1255, 1267, 1306, 1321 (defendant arrested in 1992, convicted in 1998). During that time, witnesses can become unavailable or their memories can fade, evidence can be lost, and the statute of limitations can run. The victim of the crime being solved through the use of the DNA profile obtained at the time of arrest would not be forced to wait the years between arrest and conviction of the person that committed the crime against them. Like its interest in solving crimes, the State's interest in bringing "closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large" are substantial. *Kincade*, 379 F.3d at 839. In short, the State's interest in solving past crimes will be better served by collecting DNA at the time of arrest rather than post-conviction.

3. The collection of DNA at the time of felony arrest furthers the State's interest in preventing future crime

The collection of DNA at the time of felony arrest also serves to prevent future crime by incarcerating criminals earlier, criminals who, given the high rate of recidivism, may well reoffend. As the Supreme Court has noted, "the government's interest in preventing crime by arrestees is both legitimate and compelling." *United States v. Solerno*, 481 U.S. 739, 749

(1987). By collecting DNA at the time of arrest, the State will already have an arrestee's DNA sample in its database should the arrestee reoffend, making it easier to determine if an arrestee has committed additional criminal acts. Moreover, as this Court has noted, collecting DNA has a deterrent effect on would-be criminals. *Kincade*, 379 F.3d at 839. By collecting DNA at the time of arrest, individuals know that they are more likely to be caught should they commit some other criminal activity in the future. *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999). Just as arrestees who are fingerprinted as part of the booking process understand that they will be caught if they leave their fingerprints at a future crime scene, so too do arrestees know that they will be apprehended if they leave their DNA at a future crime scene. As courts have recognized, while it is easy to wear gloves, it is not as simple to ensure that no DNA is left behind. *Jones*, 962 F.2d at 307.

4. Collection of arrestee DNA is an efficient use of California's resources

The ACLU's argument that California's collection of DNA from adult felony arrestees is inefficient ignores how many arrestees will ultimately be implicated in future crime and ignores the fact that it is up to the California Legislature, not this Court, to determine how to best use its resources. First,

a sizable number of arrestees are likely to commit crimes in the future. Of the 332,000 people arrested for felonies in California in 2007, 231,000 ultimately will be convicted of a crime.[7] And once convicted, the evidence shows that most felons will commit future crimes. In *Samson*, the Supreme Court noted that as of November 30, 2005, California had a recidivism rate between 68 and 70 percent. 547 U.S. at 853. Assuming that rate has remained relatively constant, of the 332,000 people arrested for felonies, approximately 157,000 of them will commit a crime in the future, some while they are released pending trial. Ultimately, 47 percent of individuals arrested for a felony offense will likely commit a crime in the future. And when they do, the State will already have their DNA and will be more likely to solve those crimes when they happen.

Even if there is some dispute as to the efficacy of the State's collection of DNA at the time of felony arrest, the Supreme Court has made clear that government officials are entitled to determine how best to allocate their resources. *See Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 453 (1990). In *Sitz*, the Court considered a highway sobriety checkpoint program,

[7] Importantly, those who are not convicted of the crime for which they are arrested can have their DNA profile expunged from California's database by filling out a simple two-page form available on the California DOJ's website. *See http://ag.ca.gov/bfs/pdf/expungement_app.pdf*.

balancing the interests of the motorists being stopped with the interests of the State. The Court noted that it had previously approved checkpoint programs aimed at catching illegal aliens where the stop revealed the presence of an illegal alien in only 0.12 percent of cases. The 1.5 percent success rate in Sitz was therefore more than sufficient to justify the intrusion on drivers. *Id*. at 454. The effectiveness of California's program is much greater.

More importantly, however, was the Court's observation that while "[e]xperts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal . . . for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Id*. at 453–54. Thus, law enforcement's decision to collect DNA at the time of arrest, with its clear benefits, is a reasonable one, and one that should not be overturned by this Court.

5. Collecting DNA at the time of arrest helps to focus investigations and exonerate the innocent

Finally, as many courts have recognized, DNA databases such as CODIS or California's databank promote the State's interest in exonerating

innocent individuals and in ensuring that law enforcement focus on the correct suspect. *Banks v. United States*, 490 F.3d 1178, 1188 (10th Cir. 2007); *United States v. Sczubelek*, 402 F.3d 175, 185 (3d Cir. 2005). By having additional DNA profiles in its database, the government will more likely be able to link an individual to DNA evidence left at a crime. While additional forensic evidence, eyewitness accounts and more traditional police work will be needed to determine if the individual is in fact the perpetrator of the crime, this additional piece of evidence will more often than not allow law enforcement to focus its scarce resources on the actual perpetrator. In addition to conserving investigative resources, it also can spare an innocent individual the time, expense, and embarrassment of being investigated for a crime he did not commit.

CONCLUSION

As this Court's precedents make clear, the federal government's collection of DNA from adult felony arrestees should be analyzed by considering the totality of the circumstances. Balancing the minimal interest of an arrestee in maintaining the confidentiality of his identity and the minor violation of his bodily integrity occasioned by a buccal swab against the substantial interests of the government, it is clear that the government's interests dominate such that the collection of DNA from adult felony

arrestees is reasonable for purpose of the Fourth Amendment. Accordingly, Amicus request that this Court affirm the decision of the district court.

Dated: July 7, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DOUGLAS J. WOODS
Acting Senior Assistant Attorney General
CONSTANCE L. LELOUIS
Supervising Deputy Attorney General
ENID A. CAMPS
Deputy Attorney General

S/ DANIEL J. POWLL

DANIEL J. POWELL
Deputy Attorney General
Attorneys for Amicus Curiae
State of California

SA2011101469
20484055.docx

09-10303

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

v.

JERRY ARBERT POOL,

Defendant and Appellant.

STATEMENT OF RELATED CASES

The following related case is pending: *Haskell v. Brown*, No. 10-15152

Dated: July 7, 2011

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California

S/ DANIEL J. POWELL

DANIEL J. POWELL
Deputy Attorney General
Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 09-10303

I certify that: (check (x) appropriate option(s))

☐ 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

☐ 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

☐ This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

☐ This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains __ pages or __ words or __ lines of text.

☐ 3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains __ words or __ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

[X] 4. **Amicus Briefs**.

[X] Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

[ ] Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

[ ] Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

July 07, 2011
Dated

s/ Daniel J. Powell
Daniel J. Powell
Deputy Attorney General