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)

SUPPLEMENTAL BRIEF FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

DOCKETED CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

I. Introduction

This appeal is currently set for en banc rehearing and oral argument the week of September 19, 2011. Supplemental briefing was granted. This brief will note further legal developments, respond to arguments raised in amici briefs, and address issues raised by the panel judges.

II. Intervening Supreme Court Decisions Confirm that the "Totality of Circumstances Test" Does Not Replace Traditional Fourth Amendment Analysis, But Rather Informs That Analysis

The majority panel opinion in this case implies that the "totality of circumstances" test is an established and well-defined exception to the Fourth Amendment's search warrant requirement. That assertion is incorrect.

In *Kentucky v. King*, 131 S. Ct. 1849 (May 16, 2011), Justice Alito's opinion, joined by seven other members of the Court, reaffirmed the test to use in evaluating searches and seizures under the Fourth Amendment:

> The text of the Amendment thus expressly imposes two requirements. First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity.
>
> Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured. "It is a 'basic principle of Fourth Amendment law,'" we have often said, "'that searches and seizures inside a home without a warrant are presumptively unreasonable.'" But we have also recognized that this presumption may be overcome in some circumstances because "[t]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" Accordingly, the warrant requirement is subject to certain reasonable exceptions.

Id. at 1856 (citations omitted).

Similar views were expressed by the Supreme Court in the other Fourth Amendment opinions issued after the *Pool* case was initially briefed in this Court. *See Michigan v. Fisher*, 130 S. Ct. 546 (Dec. 7, 2009)(searches and seizures inside a

home without a warrant are presumptively unreasonable, but that presumption overcome by emergency aid exception); *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (May 31, 2011)(seizure valid because it was based upon judicial warrant based on individualized suspicion); *Davis v. United States*, 180 L. Ed. 2d 285 (June 16, 2011)(evidence obtained during warrantless search conducted in reasonable reliance on exception recognized by binding precedent); *City of Ontario v. Quon*, 130 S. Ct. 2619 (June 17, 2011)(although as a general matter, warrantless searches are per se unreasonable under the Fourth Amendment, there are a few specifically established and well-delineated exceptions to that general rule.) Notably, the Court has not cited the totality of the circumstances reasoning of *Samson v. California*, 547 U.S. 843 (2006) in any subsequent case.

The majority panel opinion in *Pool* errs, therefore, in suggesting that the "totality of circumstances" is an exception to the Fourth Amendment warrant requirement. The totality of circumstances test is applied only after an exception to the general warrant requirement is identified; otherwise, the totality of circumstances test would essentially nullify the Fourth Amendment's warrant requirement. For example, in *Ohio v. Robinette,* 519 U.S. 33, 39 (1996), the Court analyzed the parameters of the recognized consent exception to the Fourth Amendment's warrant requirement and stated that the "touchstone of the Fourth Amendment is reasonableness." It posited that "[r]easonableness, in turn, is measured in objective terms by examining the totality of the circumstances."

Similarly, in a series of cases beginning with *Griffin v. Wisconsin*, 483 U.S. 868 (1987) and continuing through *United States v. Knights*, 534 U.S. 112 (2001) and *Samson v. California*, 547 U.S. 843 (2006), the Court applied the totality of circumstances test either to previously-recognized or newly-created exceptions to

the Fourth Amendment's warrant requirement. In *Griffin*, the court used the totality of circumstances test to validate a probation search under the recognized "special needs" exception to the search warrant requirement. In *Knights*, the Court declined to rely upon the established special needs exception and, instead, applied the totality of circumstances test to a newly delineated exception to the warrant requirement: searches of probationers based upon reasonable suspicion and authorized by a probation condition. Finally, in *Samson*, the Court applied the totality of circumstances test to another newly delineated exception to the warrant requirement: searches of parolees subject to suspicionless searches as an explicit condition of their parole and state law.

The majority opinion in *Pool* implicitly acknowledges that the search in this case does not fall within any recognized exceptions to the Fourth Amendment's warrant requirement. The Supreme Court, in fact, has never recognized an exception to the Fourth Amendment's warrant requirement under facts like Mr. Pool's. In light of that, before any totality of circumstances test can be applied, this Court must create and define an exception to the Fourth Amendment's warrant requirement.

The *Pool* majority opinion states that its holding is limited to circumstances where there has been a determination of probable cause by a judge or grand jury.[1] The exception to the Fourth Amendment warrant requirement that the *Pool* majority opinion creates, therefore, involves persons who retain a presumption of innocence on the pending charges. *See* 18 U.S.C. § 3142(j)("Nothing in this section shall be construed as modifying or limiting the presumption of innocence"). Curiously, the

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[1] The DNA search and seizure laws at issue in this appeal contain no such language or limitation. 18 U.S.C. § 3142(c); 42 U.S.C. § 14135a(a)(1)(A).

Pool majority fails to mention this statutory provision and, instead, relies upon *Bell v. Wolfish*, 441 U.S. 520, 533 (1979), an opinion issued before the enactment of section 3142(j). In *Bell*, Chief Justice Rehnquist notes that the presumption of innocence has no application to the rights of pretrial detainees regarding the terms of incarceration because it serves only to allocate the burden of proof in criminal trials and admonish the jury to determine guilt on the evidence at trial. Section 3142, however, concerns release or detention of defendants pending trial. Thus, after enactment of section 3142(j), it can no longer be said that the presumption of innocence has no application to pretrial releasees. *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) (pretrial releasee constitutionally presumed to be innocent pending trial.)

III. DNA Databanking is a Fishing Expedition into the DNA Profiles of Arrestees and Defendants to Attempt to Solve Crimes

A. Claims About Identification Really Focus on Investigation Rather Than Verification of Identity

In its initial brief to this Court, the United States stated in part that the collection of DNA "may also provide an alternative means of directly ascertaining or verifying an arrestee's identity, where fingerprint records are unavailable, incomplete, or inconclusive." Gov't Ans. Brief at 36. The majority opinion in *Pool* justifies the collection of DNA from arrested persons as a "compelling" means of identification. Both of these contentions are incomplete and inaccurate. As the amicus briefs make clear, unlike other established procedures such as fingerprints or photographs, the taking of DNA prior to release does not assist in identifying the person being released.

When defendants are arrested pursuant to an arrest warrant, the affidavit in support of that warrant must provide probable cause that the person being arrested

is the person who committed the alleged crimes. This information, therefore, directly helps identify the defendant appearing before the court at arraignment. Persons charged with felony offenses or certain misdemeanors are processed by the United States Marshal's Service; they are fingerprinted and photographed. By running the fingerprints through a database, this process also directly helps identify the person under arrest. Before being released, virtually all arrested defendants are interviewed by a representative of Pretrial Services, and the interviewing officer attempts to verify information about the defendant's identity, background, employment, and family. *See generally* 18 U.S.C. § 3154. This process also directly identifies the person under arrest. When a defendant appears in a district other than where the alleged offense was committed, the court is empowered to conduct an "identity hearing" under Federal Rule of Criminal Procedure 5(c)(3)(D)(ii). This too proves the arrestee's identity.

All of these processes – arrest affidavits, fingerprints, photographs, pretrial service interviews and investigation, and identity hearings – occur prior to and independently of any DNA sampling. DNA sampling in Mr. Pool's case would have occurred only after the magistrate judge issued a release order. *See* 18 U.S.C. § 3142(b) & (c)(A). The government's interest in further identifying the person charged with a crime is significantly reduced by the use and timing of these other established methods of proving identity.

When the police arrest someone, take that person's fingerprints, and submit these prints to verify the arrestee's identity, the prints are run against the database of offenders and the result contains the name of the person whose fingerprints were submitted. Not so with the Combined DNA Index System (CODIS), which does not check offender profiles against each other, but rather checks offender profiles

against forensic profiles from open cases. FBI, "Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System" *available at* http://www.fbi.gov/ about-us/lab/codis/codis-and-ndis-fact-sheet (last checked July 22, 2011)(hereinafter "CODIS FAQs".) As discussed by this Court in *Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011), "The FBI uses a computer program to identify forensic unknowns (*e.g.* crime scene samples) with reference to a felony offender's known sample that was previously obtained, analyzed, and stored in accordance with state or federal law." Moreover, if the arrestee's DNA is already in CODIS, the regulations state it need not be taken again. 28 C.F.R. § 28.12(e).

The government's prior briefing has obfuscated this fact, claiming that Mr. Pool's DNA can be used to "immediate[ly] and accurate[ly] verify" an arrestee's identity. Gov't Ans. Brief at 13. All the briefing makes it clear that the DNA sought by the government cannot verify an arrestee's identity. DNA Saves' brief is refreshingly honest about the crime-solving reason behind the database.

In discussing the CODIS database, amicus DNA Saves states, "Matches between forensic and offender profiles can provide the *identity* of a suspect." DNA Saves Brief, p. 9 (emphasis added). The only way in which identity is relevant for CODIS is when a match is made. Because of this, the profiles in CODIS do *not* actually identify arrestees. DNA Saves concedes that an individual profile in the database is only matched to a name "after there is a 'cold hit' matching DNA from a crime scene to a DNA profile in the database." DNA Saves Brief, p. 11. Accordingly, DNA Saves' brief makes it clear that the offender samples taken from arrestees and defendants are *never* used to determine an arrestee's identity, except if that person matches a forensic sample. This is not identification; this is investigation.

As the amicus briefs show, and as the government's initial brief to this Court showed, the government's interest in DNA sampling of federal arrestee is in investigating other crimes. The Supreme Court, however, has spoken on the issue of warrantless searches pursuant to a generalized law enforcement scheme without individualized suspicion. In *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000), the Court held that highway checkpoints whose primary purpose was the detection of evidence of other criminal wrongdoing violated the Fourth Amendment. One year later, in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the Court invalidated a procedure whereby the state performed warrantless, nonconsensual urine tests on patients to obtain evidence of criminal conduct. In that case, the Court noted that the general interest in crime control or the desire to generate evidence for law enforcement purposes is not a "special needs" exception to the Fourth Amendment's warrant requirement, and the "Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches" prohibits these searches.

The holdings of *Edmond* and *Ferguson* were reaffirmed this last term in *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2081 (May 31, 2011). This Court also reiterated this same principle in *Friedman v. Boucher*, 580 F. 3d 847 (9th Cir. 2009):

> The warrantless, suspicionless, forcible extraction of a DNA sample from a private citizen violates the Fourth Amendment. The actions of the officers were not justified under the "special needs" exception, reliance on an extraterritorial statute, or on general Fourth Amendment principles. The search and seizure of Friedman's DNA violated the Constitution.

The majority opinion in *Pool* attempts to distinguish *Friedman* by stating that it did not involve a judicial determination of probable cause. Yet, when the government's interest is properly identified -- the general crime control interest in solving or preventing *other* crimes -- a judicial determination of probable cause to arrest in *this*

case is irrelevant and does not alter the analysis applied by the Supreme Court in *Edmond* and *Ferguson*.

If the Court had any doubt that the government seeks Mr. Pool's DNA only to investigate whether he has committed any other crimes, the amicus briefs of DNA Saves and the State of California make it clear. Both amicus briefs disclaim any motivation for DNA databanking other than solving crimes. In doing so, both continue to conflate an arrestee's identity with an investigation into other crimes in which he or she may become a suspect.

B. The Government Has Not Proven that Seizing and Searching DNA at the Time of Arrest or Charge is An Effective Means of Solving Crime

To further support the crime-solving rationale behind CODIS, DNA Saves goes on at length attempting to demonstrate that DNA testing results in crime reduction and increased public safety. Putting aside for a moment the dubious proposition that searches and seizures become constitutional if they are successful in fighting crime, the statistics cited by DNA Saves fail to even support their premise. DNA Saves concedes that arrestees are much more likely to have been previously *convicted*. DNA Saves Brief, p. 13 (stating that 61% of arrestees have at least one prior felony conviction). That 61% of arrestees will therefore *already* be in the database. Similarly, DNA Saves claims that 56% of violent offenders had prior convictions. Brief, p. 12. Those offenders will already be in CODIS pursuant to their prior convictions. Even under DNA Saves' arguments, there are diminishing returns in compelling DNA from persons, like Mr. Pool, who have never previously been arrested or convicted of anything. As DNA Saves notes, only about 6.5% of the U.S. population has ever had a felony conviction. DNA Saves Brief, p. 13. Even if that statistic is correct (as of 2002), it does not include

Mr. Pool, who is presumed as innocent as the rest of the populace.

Both amicus briefs present a few instances where DNA databases have reportedly matched offenders to unsolved crimes. They use these anecdotes to support a generalized argument that if DNA databases offer any law enforcement advantage than privacy expectations must bend to them. Anecdotal evidence is so susceptible to biased selection that courts have refused to accept it. *See Jinro America, Inc. v. Secure Investments*, Inc., 266 F.3d 993, 1005-06 (9th Cir. 2001) (refusing to accept anecdotal evidence derived from a "skewed sample"). This Court should refuse to consider the selected anecdotes presented by amici, in large part because they factually do not bear weight.

For example, DNA Saves discusses the notorious Chester Turner case, and claims that an arrestee databank would have stopped Turner's offenses. DNA Saves, Brief p. 14. As discussed in the district court briefing in *Haskell v. Brown*, this claim was repudiated by DNA Saves' founder's own website, which showed that Turner was convicted of a felony no later than 1991 or 1992. See *Haskell*, 677 F.Supp.2d 1187, Civ. No. 09-04779-CRB (N.D. Cal. 2009), Supp. Risher Decl. ¶ 9, *appeal pending* C.A. No. 10-15152 (submission withdrawn June 2, 2011). That website has since been taken down. If Turner had been required to provide DNA upon conviction, he would have done so before he committed the majority of his crimes.

Likewise, the Christopher Dye case does not support arrestee testing. DNA Saves argues that if Christopher Dye had been DNA tested at his arrest in 1993, he would have been caught as a serial rapist much earlier and crime would have been prevented. However, Texas did not even *have* a forensic DNA databanking law until September 1, 1995. Texas Acts 1995, 74th Leg., ch. 595 (H.B. 40), § 1. The

only two cases that DNA Saves cites to support arrestee testing, fail to do so.[2]

These examples simply do not prove what they claim. Accordingly, the validity of these examples was roundly disputed in *Haskell*, and the district court gave "little weight" to them and found that the "prevention of future crimes" was not a strong government interest in arrestee DNA. *Haskell*, 677 F.Supp. at 1201. The district court also gave little weight to the studies in Denver, Chicago, and Maryland cited by DNA Saves at page 14 of its brief. *Id*. Finally, the district court found that the interest in exonerating the innocent was "not very strong" as the government had not "introduced any evidence that the taking of arrestees' DNA has led to either an increase in exonerations or a decrease in false accusations/convictions." *Id*. at n. 12.

Rather than accept dubious anecdotes, the Court can look at the FBI's own CODIS statistics on the rate of investigations aided to total offender samples. *See* FBI, CODIS-NDIS Statistics *available* at http://www.fbi.gov/about-us/lab/codis/ndis-statistics (last checked July 22, 2011). Those statistics show that for an astounding 9,878,811 offender profiles (as of June 2011), CODIS has produced over 147,200 hits. Given the huge number of profiles, that results in a hit rate of only 1.5% percent, assuming that each hit was to a different offender. Moreover, a recent article by a former California prosecutor who has been

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[2] Both DNA Saves and the State of California cite the Chester Turner case to purportedly show that DNA databanking exonerates the innocent. Both amici fail to indicate that the wrongfully charged person would have been cleared had the government compared his DNA to forensic samples. The same flaw infected the New Mexico exoneration of Robert Gonzales. As noted in the news report cited by DNA Saves, it was a DNA result that "didn't match" that exonerated Gonzales, despite his confession. Further, the news report indicates that the prosecuting agency continued to believe Gonzales was involved, despite the DNA evidence.

instrumental in promoting DNA databanks states that in a state study known as the Cold Hit Outcome Project only 13.5 percent of hits resulted in a suspect being convicted. Rockne P. Harmon, *Familial DNA Testing: A Proactive Approach to Unsolved Cases,* S.F. Daily J., Sept. 24, 2010.

Of course, the government and amici may argue that even solving one offense makes the entire privacy violation worthwhile. However, given that the government seeks DNA without any form of individualized suspicion, the DNA databank is a giant fishing expedition in the hope that among almost ten million (and counting) profiles, some might match up to open cases. Although this calculus has been held to weigh in favor of the government post-conviction, it weighs in favor of the presumed innocent in this case.[3]

C. Arguments About Lack of Privacy Interest in DNA Ignore the Reality of Forensic DNA Profiling

DNA Saves (but not the federal government or the State of California) argues that because persons leave DNA lying around, no one has a reasonable expectation of privacy in it. Such an argument would allow the warrantless suspicionless search of DNA from every person, regardless of whether he or she has been arrested or charged with a crime.

Amicus' argument winds up undercutting its interest in compelling DNA from arrestees. If the government can just use the "abandoned" DNA to investigate

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[3] The government and amici claim that taking a DNA sample may provide a deterrent value for those charged with or arrested for crimes. However, statistical research has demonstrated that the deterrent value of having one's DNA profile in the database is small, estimated at 2 to 3 percent for burglary and robbery and insignificant for other types of offenses. Avinash Singh Bhati, *Quantifying the Specific Deterrent Effects of DNA Databases*, Washington, D.C.: Justice Policy Center, Urban Institute, 2010 *available* at http://www.urban.org/publications/412058.html.

crimes, then the government does not need to compel it at risk of force or criminal prosecution. However, it is clear that the DNA that is "exposed to the public and abandoned every time we move" is degraded and contaminated, and therefore of little use for the type of crime-solving DNA Saves promotes. *See* DNA Saves Brief, p. 30; *compare* E. Lander, "DNA Fingerprinting: Science, Law, and the Ultimate Identifier" in *The Code of Codes: Social Issues in the Human Genome Project* (D.J. Kelves & L. Hood eds.1992) at 191-120 (noting that errors can occur much more frequently in forensic DNA analysis because artifacts might be degraded, highly contaminated, or even mixtures of samples from different individuals); *see also* FBI, CODIS FAQs (acknowledging that DNA obtained from scenes "often may be partially degraded and/or contain DNA from more than one contributor").

It may be that the government is allowed to use subterfuge, snooping, and stealth to obtain DNA from suspects or, frankly, from the general public. However, DNA Saves' argument takes those cases to an illogical extreme, which conflicts with Congress's views on genetic privacy and general Fourth Amendment law. The fact that people throw away garbage from their homes has never been used to undercut the privacy of items in the home against unwarranted search. Similarly, the fact that we lose skin cells and hair cannot undercut our privacy rights in our bodies and our genes. The Fourth Amendment prohibits the forcible taking of the DNA.

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D. DNA Databanking is Far From Perfect: Profiles in the Databank are Subject to Coincidental Matches and Human Error that Falsely Implicate Persons in Unsolved Crimes

The arguments of the government and amici are that generalized law enforcement concerns about solving crime are enough to override the privacy interests in this case. They seek to have the Court weigh society-wide interests in solving crime against Mr. Pool's individual interest in being free from search and seizure, and to have the Court find that society's interests outweigh Mr. Pool's. Of course, the Court need not define the issue in this way. It could consider the interests of every person in Mr. Pool's position – ordinary people who have been charged or arrested by the government – in determining the balance.

Professor William C. Thompson has written extensively on the potential for error in DNA testing and databanking, and has set forth a number of examples where errors, both implicit to the database (coincidental matches) and due to human error led to innocent people being charged with crimes, or the guilty not being charged. William C. Thompson, *The Potential for Error in Forensic DNA Testing (and How That Complicates the Use of DNA Databases for Criminal Identification)*, *available at* www.councilforresponsiblegenetics.org/pageDocuments/H4T5EOYUZI.pdf.

Professor Thompson details the ways in which the expansion of DNA databanks with arrestee samples actually increases the potential for false matches. *See also* FBI, CODIS FAQs ("As offender databases get large, the number of unrelated people that do share at least one allele at all loci increases very rapidly.") This exponentially increases the chance of a person being falsely implicated in an offense. In another article, Professor Thompson explains in detail how human error and examiner bias can lead to false matches. William C. Thompson, *A Sociological*

Perspective on the Science of Forensic DNA Testing, 30 U.C. Davis L. Rev. 1113 (Summer 1997). Expanding the databank to include the presumed innocent only increases the danger of false incrimination.

IV. Arrestees and Criminal Defendants May Not Be Constitutionally DNA Profiled Until After Felony Conviction

In the Genetic Information Nondiscrimination Act of 2008, Congress made findings of fact regarding the public's genetic privacy and the risk of discrimination based on genetic information. Pub. Law 110-233, § 2 Findings. As discussed in the Senate Report on the bill, "polls indicate that the public at-large desires to keep genetic information private." Senate Report 110-48, S. 358 110th Congress, 1st Session, p. 7; see also David J. Kaufman et al. *Public Opinion about the Importance of Privacy in Biobank Research* 85 Am. J. Hum Genetics 5 (Nov. 13, 2009) *available* at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2775831/ (regarding proposed biobank by the National Institutes of Health).

The survey detailed in the NIH article revealed that 90% of respondents were concerned about genetic privacy, 75% were concerned about the government having their samples and information, and 84% thought it would be important to protect the information from law enforcement. Because of this widespread concern about genetic privacy, many states have also passed genetic privacy laws. See e.g. Haw. Rev. Stat. § 431:10A-118 (2011); 410 Ill. Comp. Stat. 513/10 (2011); Mo. Rev. Stat. § 375.1309 (2011); Nev. Rev. Stat. Ann. § 629.101 (2011); N.M. Stat. Ann. § 24-21-1 (2011); Or. Rev. Stat. § 192.533 (2009); S.C. Code Ann. § 38-93-10 (2010); S.D. Cod. Laws § 34-14-22 (2011); Vt. Stat. Ann. tit. 18, § 9331 (2011); Va. Code Ann. § 38.2-508.4 (2011).

Regardless of the subjective views of law enforcement, the Supreme Court continues to give considerable weight to Mr. Pool's privacy. As the Supreme

Court reiterated last term *City of Ontario v. Quon*, 130 S. Ct. 2619, 2627 (June 17, 2011), the Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government, without regard to whether the government actor is investigating crime or performing another function." *Citing Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 613-614 (1989)(internal citation marks omitted).

Mr. Pool challenges the DNA collection statutes because the magistrate judge sought to compel his DNA as a condition of his pretrial release. Because the government has never raised a fact- or offense-specific argument for DNA testing Mr. Pool, his challenge necessarily implicates a challenge to the statute as it applies to all pretrial criminal defendants and arrestees.[4] Arrestees and criminal defendants still have substantial interest in the privacy of their DNA and their bodies. The line should be drawn at the point of felony conviction, which has a clear connection with a defendant's lifelong loss of rights. This protects the presumed and actually innocent, and is easy to administer.

Several intervening Ninth Circuit cases have explained that DNA can be compelled from convicted felons who are in custody as long as there is a valid law

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[4] The facial/as-applied distinction appears to have bedeviled commenters, law professors, and the courts. *See* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill of Rts. J. 657, 659 (March 2010)(calling the categorization of constitutional cases into facial and as-applied challenges "inherently flawed and fundamentally incoherent"); David H. Gans *Strategic Facial Challenges,* 85 Boston U. L.Rev. 1333 (Dec. 2005); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 236 (1994)(noting facial and as-applied concepts confuse more than they illuminate); Richard H. Fallon Jr. *As-Applied and Facial Challenges and Third-Party Standing,* 113 Harv. L. Rev. 1321, 1321 (2000)(all challenges are as-applied and many require broader analysis of whether the entire statute is valid).

authorizing the search. Thus recently in *Koch v. Lockyer*, this Court found no justification for the taking of Koch's DNA absent probable cause, individualized suspicion, or "special needs." 340 Fed. Appx. 372 (2009)(unpublished), *cert denied*, 130 S.Ct. 1570 (2010). This Court found that even though Koch was an incarcerated felon and had diminished privacy rights, the interest in his privacy outweighed that of the government interest in obtaining his DNA. *Id*. at 374. All information relating to or obtained from Koch's DNA was ordered to be destroyed or relinquished. *Id*. at 376.

In contrast, in *Hamilton v. Brown*, 630 F.3d 889 (9th Cir. 2011), DNA could be compelled because the plaintiff was a convicted felon subject to a relevant statute, like the defendants in *United States v. Kincade*, 379 F.3d 813, 818-820 (9th Cir. 2004)(en banc)(plurality) and *United States v. Kriesel*. 508 F.3d 941, 946 (9th Cir. 2007).

The *Pool* panel drew the line permitting compelled DNA testing at the point of a judicial finding of probable cause. In the federal system, this would permit DNA testing for persons who are arrested pursuant to a warrant, but who are never subsequently charged with a crime. It would leave an open issue regarding persons arrested by law enforcement on the scene who are never subsequently charged. This is closely related to the issue pending in *Haskell v. Brown*, which challenges California's law compelling felony arrestees to provide DNA for databanking. 677 F. Supp. 2d 1187 (N.D. Cal. 2009), *appeal at* C.A. No. 10-15152, *argued and submitted*, July 13, 2010, *submission withdrawn*, June 2, 2011.

Permitting DNA testing after felony conviction, while requiring a warrant and individualized suspicion prior to conviction would also protect the presumed innocent no matter their custody status. Although, the privacy rights of pretrial

detainees are reduced in the interest of "institutional security goals" (*Bull v. San Francisco*, 595 F.3d 964, 971 (9th Cir. 2010)(en banc)), those goals have absolutely nothing to do with compelling a DNA profile for entry in CODIS. With regard to institutional security goals, the Court has treated pretrial detainees and felony convicts the same. *Id.*, at 971 (noting that institutional security is not dependent on the "happenstance" of whether the inmates are pretrial detainees or convicted prisoners") *citing Bell*, 441 U.S. 520; *see also Hudson v. Palmer*, 468 U.S. 517 (1984).

Even regarding pretrial detainees, compelled DNA profiling constitutes an impermissible search because it does not relate to institutional needs. *See e.g. United States v. Loughner*, No. 11-10039, July 12, 2011 Order at 2-3 (9th Cir.)(unpublished) ("[b]ecause Loughner has not been convicted of a crime, he is presumptively innocent and is therefore entitled to greater constitutional protections than a convicted inmate" to avoid forced medication); *contra United States v. Mitchell*, __ F.3d __ (3d Cir. July 25, 2011)(en banc)(using totality of the circumstances analysis).[5]

Finally, permitting suspicionless compelled DNA testing only after felony conviction would protect those who are charged with offenses but never arrested or otherwise placed in custody. It is unclear whether Congress even intended 42 U.S.C. § 14135a(a)(1) and (2) to apply to a person who has never been in custody.

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[5] This morning a sharply divided en banc Third Circuit Court of Appeals issued its opinions in *Mitchell*. Eight judges joined the majority's determination that DNA could constitutionally be compelled from a pretrial detainee. Six judges strongly disagreed and would have held that the Fourth Amendment prohibits the compulsion of DNA pre-conviction. Mr. Pool will discuss the opinions in his reply brief.

The heading of 42 U.S.C. § 14135a(a)(1) states "From individuals in custody." This Court has held that the statute only applies to those in custody unless their offense otherwise qualifies them for testing under section 14135a(d). *United States v. Diamond*, No. 10-50611 (June 20, 2011)(unpublished); *see also Hamilton*, 630 F.3d at 894, n.7(stating that the DNA databanking act only applies "to individuals in custody, or on probation, parole or supervised release."). In *Diamond*, a federal misdemeanor probationer argued that he could not be order to provide DNA as a condition of probation because he had never been in custody for that offense. The panel found that his misdemeanor conviction was not a qualifying offense under 42 U.S.C. §§ 14135a(a)(1)(B) and (a)(2), and that therefore he was not required to provide DNA under the Act. Without analysis, the panel found the government's argument that "custody" was not required under 42 U.S.C. § 14135a(a)(1)(A) "unpersuasive." *Id.*, at 3. The same issue was argued on July 14, 2011 in *United States v. Baker*, No. 10-10223, before a panel of this Court and is pending decision. This statutory and constitutional issue is critical given the proliferation of federal criminal law. *See* Gary Fields and John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, Wall Street Journal(July 23, 2011).

This Court is presented with the question of where to draw the line now that Congress has again increased the scope of compelled DNA testing. That line should be drawn at the point of felony conviction. Any expansion of police power will solve some crimes – the general warrants that were so offensive to those who wrote our Constitution were used because they led to the discovery of evidence. *See generally Chimel v. California*, 395 U.S. 752, 761 (1969) ("The Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence.").

The State of California admits this in its amicus brief at page 10: "California's statutory framework, like that of the United States, essentially acts as a programmatic warrant. . . ." The arguments of the government, DNA Saves, and the State of California all seek to outweigh privacy rights because of the slight chance incriminating evidence will be found. This upends the Fourth Amendment.

Every time a court suppresses incriminating evidence under the Fourth Amendment, there is a chance a criminal may go free. This is the cost of liberty and the very goal of the Fourth Amendment. It is to secure the rights of many, even if it undermines the government's interest in law enforcement in particular cases.

V. Conclusion

For the foregoing reasons, Mr. Pool respectfully requests that the Court reverse the district court and hold that the imposition of the DNA testing condition is unconstitutional.

Dated: July 25, 2011

Respectfully Submitted,

/s/ Daniel J. Broderick

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Daniel J. Broderick
Federal Defender

/s/ Rachelle Barbour

_____

Rachelle Barbour
Research and Writing Attorney
Attorneys for JERRY ARBERT POOL

CERTIFICATION OF COMPLIANCE REGARDING

WORD LIMIT IN JULY 8, 2011 ORDER

FOR CASE NO. 09-10303

This brief complies with the word limit set forth in the Court's July 8, 2011 order. The brief contains no more than 7,000 words.

Dated: July 25, 2011

Respectfully submitted,

DANIEL J. BRODERICK
Federal Defender

/s/ Rachelle Barbour

_____

RACHELLE BARBOUR
Research and Writing Attorney

Attorneys for Defendant-Appellant
JERRY ARBERT POOL

STATEMENT OF RELATED CASES

Counsel is aware of the following related cases pending in this Court within the meaning of Circuit Rule 28-2.6:

1. Haskell v. Brown, No. 10-15152 (submission withdrawn June 2, 2011)
2. United States v. Baker, No. 10-10223 (argued July 14, 2011)

Dated: July 25, 2011

DANIEL J. BRODERICK
Federal Defender

/s/ Rachelle Barbour

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JERRY ARBERT POOL

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 July 25, 2011, I electronically filed the foregoing ***SUPPLEMENTAL BRIEF FOR REHEARING EN BANC*** 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 all amicus counsel will be accomplished by the appellate CM/ECF system.

Dated: July 25, 2011

/s/ Rachelle Barbour