UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANGELA SHAVLOVSKY and VITALY TUZMAN,

Defendants.

NO. CR. S-11-427 LKK

O R D E R

I. INTRODUCTION

On September 28, 2011, defendant Tuzman was indicted for a mortgage fraud. An arrest warrant was issued on September 29, 2011, but Tuzman voluntarily surrendered, apparently to the U.S. Marshals Service, on or about September 30, 2011. In the early morning hours before Tuzman's arraignment, a Deputy U.S. Marshal took a swab of Tuzman's DNA from inside his cheek, "in compliance with processing procedures." See Garcia Decl. (Dkt. No. 76) ¶ 2

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EXHIBIT

(Tuzman's DNA swab was taken at 8:00 am on September 30, 2011).[1]

As discussed further below, an Attorney General's regulation required the U.S. Marshals Service (or whichever agency arrested or detained Tuzman), to take the DNA sample while it had Tuzman in custody. 28 C.F.R. § 28.12(b). The regulation does not require that the agency: seek a warrant for the seizure of the sample; have any reason for dispensing with a search warrant; suspect that the arrestee might flee and subsequently disguise his identity (by burning off his fingerprints, to use an example tendered by the government); suspect that the arrestee may be implicated in any other crime where his DNA may have been collected; or have any other reason for seizing the DNA sample, other than the mandate of the regulation itself.

Tuzman has moved for the return of his DNA sample pursuant to Fed. R. Crim. P. 41(g) and U.S. v. Comprehensive Drug Testing, Inc., 621 F.3d 1162 (9th Cir. 2010) (*en banc*) (per curiam), arguing that it was taken pursuant to an unlawful search and seizure. Specifically, he asserts that the entire "DNA profiling regime" – the statute and the implementing regulations – are unconstitutional facially and as applied.[2]

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[1] Because there was some uncertainty about whether the sample was actually taken or not, the court ordered the government to clarify the situation. The government has now filed a sworn declaration confirming that a Deputy U.S. Marshal collected a DNA sample from Tuzman. Dkt. No. 76 ¶ 2. According to the declaration, the sample is in a "locked cabinet," and "has not been submitted to the FBI or a database." Dkt. No. 76 ¶ 3.

[2] Tuzman also challenges the constitutionality of 18 U.S.C. § 3142(b), that requires him to "cooperate in the collection of a

For the reasons set forth below, the court will order the government to return Tuzman's DNA sample to him. As explained below, the compelled, warrantless, suspicionless taking of DNA from Tuzman's body, based solely upon the mandate of the Attorney General's regulation violated Tuzman's Fourth Amendment rights. Specifically, the extraction of Tuzman's DNA was not "reasonable" under the "totality of the circumstances" test – the government's sole basis for dispensing with the warrant requirement.

II. DNA TESTING REQUIREMENT

On December 10, 2008, the U.S. Attorney General promulgated a regulation that mandated the collection of a DNA sample from every person arrested under federal authority:

> Any agency of the United States that arrests or detains individuals or supervises individuals facing charges shall collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States.

28 C.F.R. § 28.12(b).[3] The regulation provides for certain limitations on the collection of DNA samples, namely that collection may be limited "to individuals from whom the agency

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DNA sample ... if the collection of such a sample is authorized pursuant to ... 42 U.S.C. § 14135A," as a condition of releasing him on an unsecured appearance bond. In a prior order, this court deleted that condition of Tuzman's release (and that of his co-defendant, Shavlovsky), without reaching the constitutional issue. See U.S. v. Tuzman, Dkt. No. 73, 11-Cr-1427-LKK (E.D. Cal. November 10, 2011).

[3] See 73 Fed. Reg. 74932 (December 10, 2008) (adopting the regulation).

collects fingerprints," and is "subject to other limitations or exceptions approved by the Attorney General." Id. However, as the government and defendant agree, none of the Attorney General's limitations or exceptions, nor any adopted by the U.S. Marshals Service, have any relevance to this case.[4]

The regulation was promulgated pursuant to 42 U.S.C. § 14135a(a)(1)(A), which authorizes, but does not require, the Attorney General to promulgate regulations for the collection of DNA samples from arrestees:

The Attorney General [or his delegate] may, as prescribed by

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[4] It appears that the U.S. Marshals Service, the agency that took Tuzman's DNA sample, will not take the DNA of: (i) "individuals apprehended in conjunction with state and local arrests who will not be prosecuted in United States District Court;" (ii) federal prisoners "received from the custody of the United States Federal Bureau of Prisons (BOP), and considered to be in the temporary custody of the USMS;" (iii) criminal defendants in the District of Columbia Superior Court; and (iv) juveniles, except "in those cases where fingerprints are taken." See USMS Directives § 9.1(E)(1)(a), (E)(2), (E)(4) & (E)(5) (September 29, 2009, effective date), retrieved from: justice.gov/marshals/foia/Directives-Policy/prisoner_ops/dna.pdf (dated June 1, 2010, and last viewed by the court on February 17, 2012).

The absence of applicable limitations or exceptions by the Attorney General leads to the interesting circumstance that only some convicted criminals will have their DNA taken – namely, those who were convicted of "qualifying" federal or military offenses, 42 U.S.C. § 14135a(a)(1)(B) & (a)(2) – but nearly every single person arrested under federal authority is supposed to have his DNA taken. See U.S. v. Baker, 658 F.3d 1050, 1057 (9th Cir. 2011) (DNA testing applies to persons arrested by "[a]ny agency of the United States," under any charge, "without qualification"). In Baker, the defendant challenged the government's statutory authority to require his cooperation in the taking of a DNA sample as a condition of bail, given that he was no longer in custody. The Ninth Circuit agreed with defendant, and deleted the requirement from his release conditions. The case did not address the constitutionality of the compelled collection of the DNA samples.

> the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States.

42 U.S.C. § 14135a(a)(1) & (a)(1)(A).[5]

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[5] The statute originally called for DNA collection only from convicted offenders. Over the years (see below), Congress added additional categories of persons to those whose DNA would be collected, added authority to use force, and added penalties for failing to cooperate in the DNA collection, as follows:

In 1994 Congress established an index (now known as "CODIS") of: "(1) DNA identification records of persons convicted of crimes; (2) analyses of DNA samples recovered from crime scenes; and (3) analyses of DNA samples recovered from unidentified human remains." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (September 13, 1994).

In 2000, Congress required the FBI Director to collect DNA samples from every person convicted of a "qualifying federal offense," authorized the use of force to collect the sample, if necessary, and made it a misdemeanor to fail to cooperate in the collection. DNA Analysis Backlog Elimination Act of 2000 (the "2000 DNA Act"), Pub. L. 106-546, 114 Stat. 2726 (December 19, 2000).

After September 11, 2001, Congress added certain terrorist and violent crimes to the list of "qualifying federal offenses." USA Patriot Act of 2001, Pub. L. 107-56, 115 Stat. 272 (October 26, 2001).

In 2004, Congress expanded the definition of "qualifying federal offense" to include "any felony," and "any crime of violence." Justice for All Act of 2004, Pub. L. 108-405, 118 Stat. 2260 (October 30, 2004).

In 2006, Congress authorized the Attorney General to promulgate regulations for the collection of DNA samples from all persons arrested under federal authority. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162, 119 Stat. 2960 (January 5, 2006).

Also in 2006, Congress authorized the Attorney General to collect DNA samples from all persons "facing charges," in addition to those "arrested" under federal authority. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 587 (July 27,

The DNA sample may be taken by force if necessary.[6] Failure to cooperate in the collection of the DNA sample is a "class A misdemeanor," punishable by up to one year in prison.[7]

III. THE ARGUMENTS

Defendant challenges the warrantless, compelled, suspicionless, taking of DNA from his body, by force if necessary, as mandated by 28 C.F.R. § 28.12(b).[8] He asserts that the

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2006). This amendment brought the statute to the form it was in when Tuzman's DNA sample was collected.

[6] 42 U.S.C. § 14135a(a)(4)(A) ("The Attorney General ... may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample"); 28 C.F.R. § 28.12(d) ("Agencies required to collect DNA samples under this section may use ... such means as are reasonably necessary to detain, restrain and collect a DNA sample from an individual described in paragraph ... (b) of this section who refuses to cooperate in the collection of the sample"); USMS Directives § 9.1(E)(7)(b) (pursuant to the USMS policy directive on the "Use of Nonlethal Force," USMS personnel "are authorized ... to use such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who is unwilling to submit to DNA collection").

[7] 42 U.S.C. § 14135a(a)(5) & (a)(5)(A) (failure to cooperate in DNA collection is a class A misdemeanor); 18 U.S.C. § 3559(a)(6) (class A misdemeanors are punishable by six months to one year in prison).

[8] This court does not reach the constitutionality of 42 U.S.C. § 14135a itself, as nothing in Tuzman's papers leads this court to conclude that the statute could not be implemented constitutionally. See U.S. v. Salerno, 481 U.S. 739 (1987). It is true that the statute entrusts to the Executive Branch the determination of who will be searched, and when. However, it is not the statute itself that compels the warrantless, suspicionless taking of DNA samples of every arrestee, which is the conduct that Tuzman challenges. Only the Attorney General's regulation does this. Nothing in the statute prohibits the Attorney General from, for example, declining to authorize the seizure of DNA samples from arrestees at all. Nor does it prevent him from allowing such seizures only after procurement of a search warrant, or only from

government has not met its burden to show that this search may constitutionally be conducted without the warrant and probable cause required by the Fourth Amendment to the U.S. Constitution, and that in fact it constitutes an unreasonable search and seizure under the Fourth Amendment. He cites, among others, Schmerber v. California:

> [s]earch warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.

384 U.S. 757 (1966). He also cites Friedman v. Boucher:

> [t]he warrantless, suspicionless, forcible extraction of a DNA sample from a private citizen violates the Fourth Amendment.

580 F.3d 847, 858 (9th Cir. 2009) (invalidating the warrantless, forcible taking of a DNA sample from a pre-trial detainee).

The government concedes that the extraction of Tuzman's DNA was a "search" under the Fourth Amendment. It argues that the search was "reasonable under the totality of the circumstances

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consenting arrestees, or only when exigent circumstances warranted the seizure. Nothing in defendant's arguments indicates that any of these possibilities would be contrary to the intent of Congress or render the statute unconstitutional. See generally, Edward J. DeBartolo Corp. v. Fla. Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1998) (courts construe statutes to avoid constitutional infirmity so long as such construction is not "plainly contrary" to the intent of the legislature); U.S. v. Peeples, 630 F.3d 1136, 1138-39 (9th Cir. 2010) (statute's mandatory release provisions not subject to facial attack where it provided for judicial discretion in its application).

test," Dkt. No. 46 at 4, citing U.S. v. Knights:

> The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search 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 it is needed for the promotion of legitimate governmental interests."

534 U.S. 112, 119-20 (2001), quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999).[9]

Applying this justification to arrestees, the government argues that Tuzman has no reasonable expectation of privacy in his identifying information.[10] Even if he does, it argues, that

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[9] In U.S. v. Knights, 534 U.S. 112 (2001), the Court acknowledged that the Constitution requires "probable cause," before searching a person's home, but found an exception to that requirement where the authorities had "reasonable suspicion" to believe that criminal activity was occurring in the home of a probationer.

[10] The "totality of the circumstances" test may now be an "exception" to the Warrant requirement, at least when convicted offenders are concerned, Samson v. California, 547 U.S. 843 (2006), even though Samson did not expressly state that it was an "exception." See, e.g., U.S. v. Warren, 566 F.3d 1211, 1216 (10th Cir. 2009) ("The second exception to the warrant and probable-cause requirements authorizes warrantless searches without probable cause (or even reasonable suspicion) by police officers with no responsibility for parolees or probationers when the totality of the circumstances renders the search reasonable"), citing Samson and Knights. But See, Al Haramain Islamic Fndn., Inc. V. U.S. Dept. Of Treasury, 660 F.3d 1019, 1047 (9th Cir. 2011) (The government "has directed us to a few cases, however, in which the Supreme Court has analyzed whether a warrantless search was reasonable in the totality of the circumstances - without reference to any specific exception"). To avoid confusing it with established exceptions, the court refers to it as a "justification" for dispensing with the warrant requirement.

expectation is not compromised by DNA extraction any more than it would be by fingerprinting. Finally, the government argues that it has a compelling interest in identifying Tuzman.

IV. STANDARDS

The government must, "whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." Terry v. Ohio, 392 U.S. 1, 20 (1968). It is "a 'cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions."'" California v. Acevedo, 500 U.S. 565 (1991), quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978).

Accordingly, the government has the burden to establish that it was justified in conducting this search, in the absence of probable cause, and without obtaining the warrant required by the Fourth Amendment. See U.S. v. Jeffers, 342 U.S. 48, 51 (1951) ("the burden is on those seeking the exemption [from the Warrant requirement] to show the need for it").

V. ANALYSIS

The Fourth Amendment ensures that:

> "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

> particularly describing the place to be searched, and the persons or things to be seized."

Kentucky v. King, 563 U.S. ___, ___, 131 S. Ct. 1849, 1856 (2011), quoting U.S. Const. Amend. IV; U.S. v. SDI Future Health, Inc., 568 F.3d 684, 694-95 (9th Cir. 2009) (same). This Amendment

> was primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies, Stanford v. Texas, 379 U.S. 476, 481-485 (1965); Frank v. Maryland, 359 U.S. 360, 363-365 (1959), and was intended to protect the "sanctity of a man's home and the privacies of life," Boyd v. United States, 116 U.S. 616, 630 (1886), from searches under unchecked general authority.

Stone v. Powell, 428 U.S. 465, 482 (1976).

It is clear that compulsory DNA testing by the government – whether accomplished by a "buccal swab" as here, or by blood testing – is a "search" within the meaning of the search and seizure clause of the Fourth Amendment to the U.S. Constitution. Friedman v Boucher, 580 F.3d 847, 852 (9th Cir. 2009) ("[t]here is no question that the buccal swab constituted a search under the Fourth Amendment"); Schmerber v. California, 384 U.S. 757 (1966) (taking blood for alcohol testing was a Fourth Amendment "search," and was dependent antecedently upon a Fourth Amendment "seizure"). Indeed, the government concedes that it is a search. Dkt. No. 46 at 4.

Because the search at issue here was conducted without a

warrant, the court first considers certain guideposts that govern warrantless searches, and specifically, those governing warrantless searches of arrestees. First, as the Ninth Circuit has noted: "neither the Supreme Court" nor the Ninth Circuit "has ever ruled that law enforcement officers may conduct suspicionless searches on pretrial detainees for reasons other than prison security." Friedman, 580 F.3d at 856-57 (invalidating the forcible taking of a DNA sample from a pre-trial detainee).[11] To the contrary:

> The warrantless, suspicionless, forcible extraction of a DNA sample from a private citizen violates the Fourth Amendment.

Friedman, 580 F.3d at 858.[12]

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[11] See, e.g., Bell v. Wolfish, 441 U.S. 520, 559 (1979) (upholding against a Fourth Amendment challenge, the body-cavity searches of pretrial detainees, conducted for reasons of prison security); Block v. Rutherford, 468 U.S. 576 (1984) (denying pretrial detainees' Fourth Amendment challenge to un-observed "shakedown" searches of their prison cells, conducted for reasons of prison security); Bull v. City and County of San Francisco, 595 F.3d 964 (9th Cir. 2010) (en banc) (upholding against a Fourth Amendment challenge, body-cavity searches of pre-arraignment detainees conducted to ensure the security of the booking facility). There is no assertion in this case that prison security is at issue.

[12] The Supreme Court has never ruled on the constitutionality of any statute or regulation providing for the compelled extraction of DNA samples. In Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1 (2003), the Court addressed the requirement that convicted sex offenders provide a DNA sample, among other requirements. However, the constitutionality of the DNA sample requirement was not addressed. The Ninth Circuit has not ruled on the constitutionality of 42 U.S.C. § 14135a or its implementing regulation, 28 C.F.R. § 28.12. In Baker, 658 F.3d 1050, as discussed above, the defendant challenged only the statutory authority of the court to make his cooperation in DNA collection a condition of his bail.

Second, the expectation of privacy enjoyed by arrestees is "far greater" than that of a convicted offender. U.S. v. Scott, 450 F.3d 863, 873-74 (9th Cir. 2006).[13]

This court is of course aware that the warrant requirement has constrained fewer and fewer searches over the years.[14]

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[13] Accordingly, the court will approach with care those authorities that are dependent upon the status of the person searched as a convicted offender – probationer, parolee or person released under supervision.

[14] See, e.g., Kentucky v. King, 563 U.S. ___, 131 S. Ct. 1849 (2011) (no warrant needed to enter into the home, where "exigent circumstances rule" permits warrantless entry to prevent the destruction of evidence); Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) (no warrant needed to enter into the home, under the "emergency aid exception"); Maryland v. Dyson, 527 U.S. 465 (1999) (per curiam) (no warrant needed, nor any exigent circumstances needed, to search a car when the police have probable cause to believe the car contained contraband); Horton v. California, 496 U.S. 128 (1990) (no warrant required to seize evidence "in plain view"); Illinois v. Rodriguez, 497 U.S. 177 (1990) (no warrant needed to enter into the home, if police reasonably – although mistakenly – believe that third party has authority to consent to entry); U.S. v. Leon, 468 U.S. 897 (1984) (an invalid search warrant – one not supported by the probable cause required by the Fourth Amendment – is good enough to satisfy the Fourth Amendment so long as the officers executing the search relied upon the warrant in good faith); Donovan v. Dewey, 452 U.S. 594 (1981) (no warrant needed to conduct administrative search of a business in a regulated industry); U.S. v. Edwards, 415 U.S. 800 (1974) (no warrant needed to search arrestee's clothes 10 hours after his arrest, where police had probable cause to believe the clothes contained evidence of a crime, because an arrest does "for at least a reasonable time and to a reasonable extent – take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence"); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (no warrant needed if police obtain consent); U.S. v. Robinson, 414 U.S. 218 (1973) (no warrant needed in a search incidental to a lawful arrest, because "The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial"); Terry v. Ohio, 392 U.S. 1 (1968) (even absent probable cause to arrest, the police may conduct a warrantless "frisk" for weapons, as a protective measure);

Nevertheless, once it is established that the government has conducted a search without a warrant, it is still necessary for the government to identify some justification for dispensing with the warrant requirement – an exception, exigent circumstances, something – that renders the search "reasonable." See Kentucky v. King, 563 U.S. at ___, 131 S. Ct. at 1856 ("[t]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'"), citing Brigham City, Utah v. Stuart, 547 U.S. at 503.[15]

The "something" at issue in this case is "the totality of the circumstances." The government argues that it may dispense with the warrant requirement (and probable cause and individualized suspicion) here because the "totality of the circumstances" renders the search "reasonable."

A. Applicability of the "Totality of the Circumstances" Test.

The government argues that the extraction of Tuzman's DNA was reasonable under "the totality of the circumstances" test of U.S.

Schmerber v. California, 384 U.S. 757 (1966)(no warrant needed to take blood from drunk-driving suspect where police had probable cause to believe the blood contained evidence of a crime, and delay in getting a warrant would allow the evidence to disappear). It may be that the Supreme Court's recent ruling in U.S. v. Jones, 132 S. Ct. 945 (2012) marks a turning point in the depreciation of the Fourth Amendment recorded in the line of cases cited above.

[15] The problem with amorphous standards like "reasonableness" is that what is reasonable varies with whether that judgment is made in the chambers of one unlikely to be searched or out on the street by one likely to be the subject of the random exercise of power.

v. Knights, 534 U.S. 112 (2001),[16] in which the intrusion on a person's privacy is balanced against the government's need to conduct the warrantless search. See Samson v. California, 547 U.S. 843 (2006). The "totality of the circumstances test" was developed to address the government's asserted need to dispense with the warrant requirement when conducting suspicion-based searches of convicted offenders, and was expanded by Samson to dispense with the warrant requirement entirely (by removing even the "suspicion" requirement) when searching convicted offenders.

This court is very dubious about the merits of applying the "totality of the circumstances" test, standing alone, to the warrantless, suspicionless search of a person who is not a convicted felon. It seems clear that the considerations involved in Knights and Samson have nothing whatever to do with arrestees like Tuzman.[17] As the Supreme Court balanced the interests

[16] The government does not explain whether it views the "totality of the circumstances" test as an exception to the warrant requirement, or as something else. In any event, the government does not assert that any other exception to the warrant requirement applies here, and none appears to. The U.S. Marshals Service was not looking for evidence of the crime for which Tuzman was arrested, nor for weapons in his DNA that he might use to avoid arrest or to put fellow detainees at risk. The government does not assert that an emergency or other "exigent circumstances" or other exception existed which prevented the government from requesting a search warrant, it does not claim to have probable cause or any suspicion to conduct the search, there is no claim that Tuzman's DNA would degrade if not taken quickly, that the search was necessary to keep the detention facility safe, that it was an administrative search of a regulated business, or that Tuzman consented to the search. The government does not assert a "special need" to conduct the search.

[17] Moreover, after issuing its decision in Samson, the Supreme Court has never mentioned the decision again. Instead, it has

involved – parolee versus the state – it reasoned that a parolee is under state punishment, and that as a result, he has "fewer expectations of privacy than probationers." In addition, the parolee was aware of his susceptibility to warrantless, suspicionless searches as a condition of his parole, because he signed parole papers informing him of the searches. Thus his expectation of privacy was lowered even further. On the other side of the scale, the Court reasoned that California had an "overwhelming interest" in supervising parolees, reducing recidivism, and promoting reintegration and positive citizenship among parolees (and probationers). The Court found that suspicionless searches served those interests.

Tuzman, on the other hand, is not a convicted offender standing on the "continuum" of state-imposed punishments. He has not signed anything permitting the U.S. Marshals Service, or anyone else, to search him, or acknowledging that they will do so. The government is not attempting to rehabilitate him, reduce his rate

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returned to its normal Fourth Amendment jurisprudence. See, e.g., Ryburn v. Huff, 565 U.S. ___, 132 S. Ct. 987 (2012) (addressing exigent circumstances exception to the warrant requirement); Kentucky v. King, 563 U.S. ___, 131 S. Ct. 1849 (2011) (same). And the Court has returned the "totality of the circumstances" to its place in determining whether there is a reasonable basis for conducting a search or obtaining a search warrant, or a reasonable basis for applying an exception to the warrant requirement. See, e.g., Safford Unified School Dist. No. 1 v. Redding, 557 U.S. 364, ___, 129 S. Ct. 2633, 2647 (2009) (post-Samson) (examining the "totality of the circumstances" to determine whether school officials had reasonable suspicion for a search); Ohio v. Robinette, 519 U.S. 33 (1996) (pre-Samson) (examining the "totality of the circumstances" to determine whether the consent exception to the Warrant requirement was satisfied).

of recidivism, reintegrate him into society, or improve his citizenship qualities. At the time of the search, Tuzman was a pre-trial detainee, not even arraigned, who was presumed to be innocent.

Nevertheless, the Ninth Circuit in Friedman, 580 F.3d at 858 (invalidating the forcible extraction of a DNA sample from a pre-trial detainee), stated:

> In order to assess whether a search is reasonable absent individualized suspicion, we apply the "general Fourth Amendment approach" and examine the totality of the circumstances in objective terms "'by assessing, on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"

Friedman, 580 F.3d at 862, quoting Samson, 547 U.S. at 848. Accordingly, this court will apply the "totality of the circumstances" test of Knights and Samson.

B. Application of the "Totality of the Circumstances" Test.

Even assuming that the "totality of the circumstances" is now its own stand-alone justification for dispensing with the warrant requirement, the court finds that it does not justify the extraction of Tuzman's DNA in this case. Under the "totality of the circumstances" test:

> 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 it is needed for the promotion of legitimate governmental interests."

Samson, 547 U.S. at 848 (approving the suspicionless, warrantless search of parolees), quoting Knights, 534 U.S. at 118-19. Because it is the government's burden to justify this search, the court will consider its asserted interests first.[18]

1. The Government's Interest in Extracting Tuzman's DNA.

The government's sole interest in taking the DNA from Tuzman, it asserts, is to "create an accurate record of his identity." Dkt. No. 46 at 7.[19] This identification, according to the

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[18] At the hearing on this motion, the government correctly pointed out that the DNA testing was carried out pursuant to a federal statute and implementing regulations. However, the mere existence of a statute or regulation permitting the search – with no independent determination that the statute or regulation complies with the Fourth Amendment – does not render the search "reasonable." If it did, the Attorney General could constitutionally promulgate a regulation permitting general, warrantless, suspicionless searches of homes in the middle of the night, even though the Fourth Amendment was adopted to prevent just such searches. See Welsh v. Wisconsin, 466 U.S. 740, 748 (1984) ("It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed'"), quoting U.S. v. U.S. District Court, 407 U.S. 297, 313 (1972). Clearly that is not permitted. See Payton v. New York, 445 U.S. 573 (1980) (absent consent, a warrant is required to arrest a person in his own home, despite state statutes authorizing police officers "to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest").

[19] The government does not direct the court's attention to any Supreme Court or Ninth Circuit authority stating that "identification" is an exception to the warrant requirement. Nor does it explain how "identification" fits into any of the other classes of exceptions already created by the Supreme Court.

government, serves two purposes: (i) to identify absconded detainees who have taken "unusual steps" to conceal their identities, and where fingerprint identifications "'prove inadequate'" (Dkt. No. 46 at 7-8); and (ii) finding out whether the arrestee's DNA was collected from some other crime scene (Dkt. No. 46 at 8-9).

The court will assume, without deciding, that the government has a compelling interest in ascertaining the identity of arrestees like Tuzman. However, given that it is undisputed that the government has already ascertained Tuzman's identity, the question is whether it has a compelling interest in taking the DNA to further identify him, or perhaps, to gain further "markers" of his identity, is an interest that overrides the requirement to request a warrant.

a. To Locate Absconders

The government asserts that DNA will add additional information to its identity markers so that Tuzman can be identified in the event he absconds and alters his appearance and obliterates his fingerprints.[20] This assertion is belied by the

[20] The government bases its concern on newspaper reports from the Eagle-Tribune, a newspaper published in North Anddover, Massachusetts, and USA Today, identifying three people who allegedly altered their fingerprints to avoid identification. See Dkt. No. 46 at 8. The court questions the probative value of these articles because, apart from identifying only three such people, the article does not claim that the government then took the DNA of these three people so that it could be compared with the DNA of arrestees. As such, the articles do not support the government's argument, even if it were taken at face value.

government's own, non-litigation, account of how it will use Tuzman's DNA sample.

According to the government's litigation position, in the event Tuzman absconded, and the government later arrested a person with altered or obliterated fingerprints (or found a corpse in this condition), the government would take the DNA of the obliterated fingerprint person and compare it with Tuzman's DNA to see if he was their man. The problem with this explanation is that there is no showing that it has a basis in reality.

In fact, the uses to which the extracted DNA samples are put, are set forth in the rules and regulations governing their use. According to the regulations, DNA collected from arrestees: (i) "facilitates the solution of crimes" by permitting the authorities to "match crime scene evidence to the biometric information that has been collected from individuals; (ii) will help to "prevent and deter subsequent criminal conduct" by identifying arrestees who have committed other crimes, before releasing them on bail; (iii) may help to detect violations of pretrial release conditions and deter such violations; and (iv) may provide an alternative means of identification where fingerprint records are unavailable. 73 Fed. Reg. 74933-34. The only practical application for achieving these goals, however, is through the matching of arrestee fingerprints with fingerprints taken from crime scenes. 73 Fed. Reg. 74933-34 (emphasis added).[21]

[21] "Positive biometric identification, whether by means of fingerprints or by means of DNA profiles, facilitates the solution

The Attorney General's Final Rule that adopted 28 C.F.R. § 28.12 contains no mention of comparing the DNA of an arrestee against the DNA of any other arrestee, as the government claims in litigation. The regulation contains no reference to the use of DNA samples to identify absconders. Most tellingly, the government does not even assert that it will compare Tuzman's DNA against that of any arrestee who has absconded, to find out if Tuzman is that person.[22] In short, the government says it "may" use DNA collected from arrestees for the purpose of identifying absconders. But the government makes no showing that it has used any arrestee's DNA for this purpose, that it plans to do so in this case, or that it has any plan to ever do so.

The government has directed the court's attention to the FBI's website,[23] where it claims that an FBI "brochure" explains its process for comparing the DNA of unidentified persons against arrestees. Dkt. No. 46 at 8. In fact, the brochure contains no

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of crimes through database searches that match crime scene evidence to the biometric information that has been collected from individuals." 73 Fed. Reg. 74,933.

"As with fingerprints, the collection of DNA samples at or near the time of arrest also can serve purposes relating directly to the arrest and ensuing proceedings. For example, analysis and database matching of a DNA sample collected from an arrestee may show that the arrestee's DNA matches DNA found in crime scene evidence from a murder, rape, or other serious crime." 73 Fed. Reg. 74,934.

[22] Quite possibly, there is no need to compare Tuzman's DNA against the DNA of absconders, because the government has already identified Tuzman and the absconders using their fingerprints.

[23] Specifically, fbi.gov/about-us/lab/codis/codies-and-ndis-fact-sheet.

such information. The brochure only lists categories of DNA profiles entered into CODIS, and highlights the Missing Persons category.[24] It does not state that anyone's DNA – unidentified persons, missing persons or anyone else – is, in the government's words, "compared to those from arrestees."[25]

Accordingly, even assuming the government has a compelling interest in identifying Tuzman to find out if he is an absconder, it has made no showing that it will use his DNA to further that purpose, that it has ever used anyone's DNA sample to further that purpose, or that it ever will do so. The government has already met its interest in identifying Tuzman, for "absconder" purposes, by taking his fingerprints, conducting an pretrial services interview, and through all the other means it has available to identify him.

There is a further difficulty with accepting the "absconder" justification. The government is arguing that it is justified in conducting a warrantless search so that it can use Tuzman's DNA in the event he (i) absconds and (ii) obliterates his fingerprints. Both possibilities are remote. The government conceded the

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[24] The others are Convicted Offender, Arrestees, Forensic (profiles developed from crime scene evidence), Unidentified Humans (Remains), and Biological Relatives of Missing Persons.

[25] Similarly, a recent audit of the CODIS database makes no mention of comparing arrestees' DNA against that of other arrestees. See justice.gov/oig/reports/FBI/index.htm ("Audit of the Federal Bureau of Investigation's Convicted Offender, Arrestee, and Detainee DNA Backlog, Audit Report 11-39, September 2011"). According to the audit, the DNA is matched against evidence from crime scenes. Audit at 11.

remoteness of the possibility of Tuzman's absconding by not seeking bail. He was released on an unsecured appearance bond. Apart from the three persons identified in newspaper articles as trying to avoid deportation, the government has not shown that fingerprint obliteration is particularly common, and indeed the government acknowledges that such a practice is "unusual." If the government has actual suspicion that Tuzman will abscond, or that he would obliterate his fingerprints, it can request a warrant to take his DNA.[26] There simply is no exception to the Warrant requirement that permits the government to conduct a suspicionless search on an arrestee (or anyone else) on the off chance that they might someday abscond, commit a crime or burn off their own fingerprints. The protections afforded by the warrant requirement of the U.S.

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[26] At the hearing on the this motion, the government was not able to identify a single instance in which the government used an arrestee's DNA sample to identify or even to attempt to identify him once he or she had fled prosecution. The government's only known non-litigation reference to ordinary identification of the arrestee, is that the "DNA sample may also provide an alternative means of directly ascertaining or verifying an arrestee's identify, where fingerprint records are unavailable, incomplete, or inconclusive." 73 Fed. Reg. 74932-01 at 5 (December 10, 2008). The government offers no estimate of how often this circumstance occurs. Nor has it identified a single instance in which an arrestee's DNA was needed because of this circumstance. In short, this circumstance appears to be entirely hypothetical, with no real connection to the real world, or to the real intrusion into the pre-arraignment detainee's reasonable expectation of privacy. The government's only reference to the possibility of an arrestee fleeing is the Attorney General's inclusion of a quote from a Virginia case, Anderson v. Virginia, 650 S.E.2d 701 (Va. 2006), that dealt with the justification for taking DNA samples pursuant to a Virginia law. But the court has been directed to no instance where the Attorney General himself – outside of his litigation position – has asserted that a fleeing arrestee has anything to do with the collection of DNA samples.

Constitution should not be discarded so easily.

b. To Solve Crimes

The only remaining reason the government asserts for taking Tuzman's DNA sample is to "solve crimes." When the government is speaking outside the litigation context, it becomes clear that this is the actual reason for extracting the DNA sample. The promulgating regulations make clear that the purpose of the DNA swab taken from arrestees was "the solution of crimes," deterrence of "subsequent criminal conduct," as well as determination of whether the individual "may be released safely to the public pending trial and to establish appropriate conditions for his release, or to ensure proper security measures in case he is detained."[27]

The question then, is whether the government may enter Tuzman's body and extract his DNA for the sole purpose of solving

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[27] The government argues that Tuzman's DNA can help it to determine whether he can safely be released on bail. In the context of this case, the argument borders on the bizarre. First, the government does not assert that it has ever used the DNA sample for this purpose, only that it could. Second, at Tuzman's arraignment, the government never mentioned Tuzman's embargoed DNA sample, and never complained that it was hobbled in its bail recommendation by not being able to search the DNA database to see if Tuzman could safely be released. Instead, without any aid of the DNA sample, the government determined that Tuzman could be released on an unsecured appearance bond, and he was so released, without objection from the government. Meanwhile, Tuzman's co-defendant, Shavlovsky, did not have her DNA sample taken until after the bail determination had already been made (Dkt. No. 40 at 22). The government determined without aid of her DNA sample that she was not a flight risk and therefore requested no bail for her, whereupon she was released on an unsecured appearance bond. This conduct makes it difficult to take the government's argument seriously.

an imagined crime which he is not suspected of, and which may not even have occurred.

The government has identified no "crime solving" exception to the warrant requirement. Such an exception would completely eviscerate the Fourth Amendment, since whenever law enforcement officers conduct a search – with or without a warrant – they are presumed to be attempting to solve crimes. To the contrary, in City of Indianapolis v. Edmond, 531 U.S. 32 (2000), the Supreme Court invalidated a checkpoint program whose goal was to detect evidence of ordinary criminal wrongdoing. Otherwise, a regulation mandating a warrantless, suspicionless search of the home of a U.S. citizen in the middle of the night – the quintessential search prohibited by the Fourth Amendment – could also be justified on the basis that it might "solve crimes."[28]

Accordingly, the government may do so only if it has a warrant or can fit the search into one of the exceptions to the warrant

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[28] The government may have laudable law enforcement goals in desiring to extract Tuzman's DNA, but those goals cannot rescue an otherwise unconstitutional search. See Friedman, 853 F.3d at 858 (the defendant's purpose in Friedman was "simply to gather human tissue for a law enforcement databank, an objective that does not cleanse an otherwise unconstitutional search").

The government also confuses the "probable cause" needed to issue an arrest warrant with the "probable cause" identified by the U.S. Constitution that must support a search warrant. The mere fact that a judicial officer has issued an arrest warrant does not give the government license to then burst into that person's home and search it without a separate warrant, especially after the person has already voluntarily surrendered himself at the courthouse, as in this case. U.S. v. Rodgers, 656 F.3d 1023 (9th Cir. 2011) (police may not search arrestee's car just because they had probable cause to arrest him). Neither does it give the government license to invade the arrestee's body in search of DNA.

requirement. It is conceded that there is no warrant, the government does not argue that this search fits an exception to the warrant requirement and in fact, it does not fit any of those exceptions. In short, the government has not met its burden to identify a sufficient justification for its warrantless, suspicionless extraction of Tuzman's DNA.

Even if the government has a compelling identification interest that would be furthered by the DNA extraction, the question still remains whether the extraction without a warrant outweighs Tuzman's privacy interest. It does not.

2. The Warrant Requirement.

Even assuming the government's compelling interest in identifying Tuzman, and assuming further that a DNA extraction will further that interest, the question still remains whether it is "reasonable" to dispense with the warrant required by the Constitution. In Knights, upon which the government relies, part of the "totality of the circumstances" that led the Supreme Court to dispense with the warrant requirement in that case was that the search was supported by reasonable suspicion that the police would find evidence of criminal activity:

> The District Court found and Knights concedes, that the search in this case was supported by reasonable suspicion. We therefore hold that the warrantless search of Knights, supported by reasonable suspicion and authoritzed by a condition of probation, was reasonable within the meaning of the Fourth Amendment.

Knights, 534 U.S. at 122. The government here does not assert that it has any reasonable suspicion relating to Tuzman's DNA: it does not suspect that he was involved in some other crime where he left his DNA behind, it does not suspect that he will flee, it does not suspect that he will burn off his fingertips if he does flee.

In Samson, the Court also addressed the "totality of the circumstances" that specifically justified dispensing with the warrant requirement:

> while this Court's jurisprudence has often recognized that "to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," we have also recognized that the "Fourth Amendment imposes no irreducible requirement of such suspicion." Therefore, although this Court has only sanctioned suspicionless searches in limited circumstances, namely, programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be "reasonable" under the Fourth Amendment. In light of California's earnest concerns respecting recidivism, public safety, and reintegration of parolees into productive society, and because the object of the Fourth Amendment is reasonableness, our decision today is far from remarkable.

Samson, 547 U.S. at 855 n.4 (citations omitted). Thus, the

concerns related to convicted offenders – "recidivism, public safety and reintegration" back into society – were ingredients of the "totality of the circumstances" that justified dispensing with the warrant requirement.

The government here has not explained how Tuzman's status as an arrestee is part of the "totality of the circumstances" justifying the extraction of his DNA without a warrant. In other searches relating to arrests, the search is anchored in the arrest itself, that is, it is a search for weapons that could be used against the arresting officers or in the detention facility, or for evidence of the crime for which the person is arrested. See, e.g., Knowles v. Iowa, 525 U.S. 113, 116 (1998) (the two "historical rationales for the 'search incident to arrest exception'" to the warrant requirement are "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial");[29] U.S. v. Rodgers, 656 F.3d 1023 (9th Cir. 2011) (police may not conduct an unrelated search of arrestee's car just because they had probable cause to arrest him).

That is not the case here. The government here asserts the right to conduct a wholly separate search of Tuzman that has nothing to do with the arrest itself. The government does not, for example, claim that Tuzman's DNA contains a weapon or evidence of mortgage fraud, the crime for which he was arrested. Rather, he is being searched on the off chance that he might have committed

[29] Citing, U.S. v. Robinson, 414 U.S. 218 (1973).

some other crime which the authorities know nothing about, or that he might flee, or that he might burn off his fingertips.

Another circumstance to be considered here is that Tuzman was on his way to be arraigned by the Magistrate Judge when his DNA was taken. Thus, there is no basis for claiming that the government could not have requested a search warrant from a Magistrate Judge.

Accordingly, the "totality of the circumstances" – Tuzman's status as an arrestee in the custody of the U.S. Marshals service – do not justify dispensing with the warrant requirement.

3. Tuzman's Privacy Interest.

The government divides Tuzman's privacy interest into two components. The first is the "initial act of collecting" his DNA. The government argues that the act of collecting Tuzman's DNA was a "'minimal' intrusion that does not affect a significant privacy interest." The second is Tuzman's expectation of privacy in his identifying information. The government argues that Tuzman "lacks a legitimate expectation of privacy" in his "identifying information," including his "DNA fingerprint." Dkt. No. 46 at 4.

The court disagrees with the government on both counts. First, the government is wrong to cast Tuzman's expectation of privacy in the same lot as convicted offenders. In fact, he has a far greater expectation of privacy in his bodily security. In any event, the act of a government agent reaching inside Tuzman's body to extract DNA is a serious affront to his physical security. Second, the government unfairly characterizes what it retrieved when it extracted Tuzman's DNA. It took much more than simply a

record of his identity.

a. The "Initial Act of Collecting"

The government asserts that "pretrial defendants" have "no justifiable privacy interest in their identity." Dkt. No. 46 at 5.[30] That is not the law in the Ninth Circuit, and the government cites no Ninth Circuit authority for this proposition.[31] To the contrary, every Ninth Circuit case that has addressed the privacy rights of persons in the federal criminal justice system who are subject to compelled DNA testing, has made clear that the diminished expectation of privacy that the case applied existed because the person was a convicted offender. See Hamilton v. Brown, 630 F.3d 889, 894 (9th Cir. 2011) ("Having been convicted and incarcerated, Hamilton has no legitimate expectation of privacy in the identifying information derived from his DNA"); U.S. v.

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[30] It may be tempting to view arrestees as a section of society entirely separate from the law-abiding section of society, whose constitutional rights perhaps need not be guarded quite as closely. The court notes, however, that according to an NPR and ABC News story brought to the court's attention by defendant's counsel, as much as 41.4 percent of Americans have been arrested by the time they turned 23 years old. If that statistic is correct, and if that trend continues, then quite a large proportion of the population will have its DNA stored forever in a government database, available for whatever purpose the Executive Branch decides to put it, free from any check or balance from any other Branch. Government searches of its citizens are of sufficient concern that the Fourth Amendment requires that the check or balance on that power – the warrant requirement – must normally be exercised before the search occurs. Under the procedure created by the government for extracting DNA from its citizens, there is no check on the Executive's power at any time.

[31] The government cites Footnote 31 of the plurality opinion in Kincade, which in any event, dealt with convicted offenders, not pre-trial detainees.

Kriesel, 508 F.3d 941, 947 (9th Cir. 2007) ("As a direct consequence of Kriesel's status as a supervised releasee, he has a diminished expectation of privacy in his own identity specifically, and tracking his identity is the primary consequence of DNA collection"); Rise v. State of Oregon, 59 F.3d 1556, 1560 (9th Cir. 1995) (noting that the DNA collection statute at issue in the case "authorizes DOC to acquire blood samples not from free persons or even mere arrestees, but only from certain classes of convicted felons").[32] The government's assertion of "no privacy interest" thus applies only to convicted offenders, not to pre-trial detainees.[33]

The government's argument fails to take this critical distinction into account. Indeed, the Ninth Circuit noted in

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[32] See also, U.S. v. Kincade, 379 F.3d 813 (9th Cir. 2004) (en banc) (Plurality Opinion of O'Scannlain, J. [for five Judges]) ("Those who have suffered a lawful conviction lose an interest in their identity to a degree well-recognized as sufficient to entitle the government permanently to maintain a verifiable record of their identity"); U.S. v. Kincade, 379 F.3d 813, 837 (9th Cir. 2004) (en banc) (Concurring Opinion of Gould, J.) (emphasizing that the decision only addresses the rights of persons currently on "supervised release"); U.S. v. Kincade, 379 F.3d 813, 837 (9th Cir. 2004) (en banc) (Dissenting Opinion of Reinhardt, J. [for 5 judges]) ("conditional releasees do retain privacy expectations," even though "probationers' and parolees' expectations of privacy are curtailed").

[33] The Supreme Court also has held that convicted offenders may be subject to warrantless, suspicionless searches because of their status as convicted offenders, and because of the government's "overwhelming interest" in supervising parolees and probationers. Privacy intrusions "that would not otherwise be tolerated under the Fourth Amendment" have been permitted based upon the government's interest in reducing recidivism among convicted offenders – parolees, probationers, those on supervised release. See Samson, 547 U.S. at 853.

Friedman that although the government had cited numerous cases for its "reasonableness" argument, "[n]ot one of those cases involved a search of a pretrial detainee – as opposed to a convicted prisoner – or a state law that mandated searches of pretrial detainees." The Friedman court finally noted that U.S. v. Kincade, 379 F.3d 813 (9th Cir. 2004) (en banc), and Kriesel upheld the DNA law, "but both of those cases concerned extracting DNA from convicted felons still under state supervision."

Indeed, Ninth Circuit cases have consistently rejected Fourth Amendment challenges to the DNA Act and a comparable state (California) statute, but only as it applied to convicted offenders.[34] Each case depended upon the government's interest in

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[34] See Hamilton v. Brown, 630 F.3d 889 (9th Cir. 2011) (upholding California's comparable statute that provided for the compulsory, forced DNA testing of convicted inmates); U.S. v. Zimmerman, 514 F.3d 851 (9th Cir. 2007) (per curiam) (rejecting the Fourth Amendment and Fifth Amendment self-incrimination challenges to compulsory DNA testing of persons convicted of certain non-violent crimes); U.S. v. Kriesel, 508 F.3d 941 (9th Cir. 2007) (rejecting Fourth Amendment challenge to compulsory DNA testing of "a convicted felon on supervised release"); U.S. v. Lujan, 504 F.3d 1003 (9th Cir. 2007) (rejecting Fourth Amendment challenge to compulsory DNA testing by a convicted felon on supervised release, and rejecting a Separation of Powers argument); U.S. v. Reynard, 473 F.3d 1008 (9th Cir.) (rejecting Fourth Amendment challenge of retroactive compulsory DNA testing by convicted felon whose release was revoked because he refused to submit to DNA testing, and rejecting Fifth Amendment self-incrimination challenge; and including history of the act), cert. denied, 552 U.S. 1043 (2007); U.S. v. Hugs, 384 F.3d 762 (9th Cir. 2004) (rejecting convicted felon's Fourth Amendment challenge to DNA testing as a condition of supervised release) cert. denied, 544 U.S. 933 (2005); U.S. v. Kincade, 379 F.3d 813 (9th Cir. 2004) (en banc) (upholding, without a majority opinion, the compulsory DNA testing of "conditionally-released federal offenders"); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995) (upholding Oregon's comparable statute that provided for the compulsory DNA testing of persons convicted of sexual offenses and certain other offenses).

supervising convicted offenders. There is no extant Ninth Circuit case that addresses the constitutionality of the DNA Act as applied to arrestees. However, the only Ninth Circuit case to address warrantless, suspicionless, compelled DNA extraction from an arrestee, Friedman v. Boucher, found it to be a violation of the Fourth Amendment.

Indeed, it appears to this court that Friedman is one of two cases that bear directly on the Fourth Amendment issue here, as they determine the rights of arrestees. From these cases, Friedman and Scott, the Ninth Circuit's view of arrestee's privacy interests can be determined directly, rather than by trying to reason around cases that only deal with convicted offenders. Two other cases, relied upon heavily by the government, U.S. v. Kincade, 379 F.3d 813 (9th Cir. 2004) (en banc), which deals with convicted offenders and has no opinion of the court, and U.S. v. Mitchell, 652 F.3d 387 (3rd Cir. 2011) (en banc), an out-of-circuit case, do not appear to be very helpful in determining this issue. All are discussed below.

(1) Friedman v. Boucher

In Friedman v. Boucher, 580 F.3d 847 (9th Cir. 2009), the Ninth Circuit invalidated, on Fourth Amendment grounds, "the warrantless, suspicionless, forcible taking of a buccal swa[b]" from an arrestee. Id., 580 F.3d at 853. The facts of the case were extreme, but the court's analysis of the "reasonableness" of

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the search did not depend upon the extreme facts of that case.[35] While Friedman was incarcerated in a county jail in Nevada, Boucher, a Las Vegas police officer, demanded that he submit to DNA testing. "Boucher had no warrant, no court order, no individualized suspicion, [and] had not articulated an offense for which a DNA sample was required or justified .... He simply wanted the sample as an aid to solve cold cases." Id. 580 F.3d at 851. Friedman had previously been convicted of a sexual offense on a Montana charge, but at the time of his Nevada incarceration, and the demand for DNA testing, "he was not a parolee, probationer, or otherwise under the supervision of the State of Montana." Id., 580 F.3d at 851.

Friedman repeatedly refused. Thereupon, Boucher forced open Friedman's mouth and took a buccal swab. Friedman sued under Section 1983 for violation of his Fourth Amendment rights.

The Ninth Circuit held first that "the buccal swab constituted a search under the Fourth Amendment." Id., 580 F.3d at 852. There being no warrant, the Court held next, that "'[a] warrantless search is unconstitutional unless the government demonstrates that

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[35] Some of the facts of this case are arguably extreme, as well. In Friedman, the police took the DNA by force, holding the arrestee's mouth open against his will. The regulation at issue here authorizes the use of force (there has been no showing that force was actually used, however). Also, the regulation at issue here makes non-cooperation in the collection of the DNA a federal crime. Certainly, though, there is no allegation that the truly shocking facts of Friedman were present here. In Friedman, the police refused to let Friedman talk to a lawyer, and let Friedman know that if he resisted the DNA extraction, he could "'get hurt pretty bad.'" Friedman, 580 F.3d at 851.

it "fall[s] within certain established and well-defined exceptions to the warrant clause."'" Id., 580 F.3d at 853. The one exception identified by the government in Friedman, and that the government also uses in this case, is that "the search was 'reasonable.'" Id., 580 F.3d at 853; U.S. Opposition to Defendant Shavlovsky's Appeal at 4 (Dkt. No. 46) ("[t]he collection of DNA for identification purposes, though a 'minimal' intrusion, is nonetheless a 'search' that must be reasonable under the totality of the circumstances test adopted in U.S. v. Knights, 534 U.S. 112 (2001)").[36]

The Ninth Circuit expressly rejected that assertion in Friedman. "Neither the Supreme Court nor our court has permitted general suspicionless, warrantless searches of pre-trial detainees for grounds other than institutional security or other legitimate penological interests. Thus, there is no support for the government's contention that Friedman's status as a pre-trial detainee justifies forcible extraction of his DNA." Friedman, 580 F.3d at 857. The court also rejected the government's reliance on cases addressing DNA extraction from convicted offenders, noting that "[n]ot one of those cases involved a search of a pretrial detainee - as opposed to a convicted prisoner - or a state law that mandated searches of pretrial detainees." Friedman, 580 F.3d at

[36] The Ninth Circuit rejected the government's other arguments in Friedman. The government there argued that "special needs" justified the swab, an argument it does not raise here. The government there also argued that a Montana statute authorized the local Nevada cops to take the swab of a Nevada arrestee in Nevada incarceration.

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(2) U.S. v. Scott

In U.S. v. Scott, 450 F.3d 863, 864 (9th Cir. 2006), a non-DNA testing case, the Ninth Circuit found that the state cannot subject an arrestee to warrantless, suspicionless searches (or compel him to "consent" to such searches), as a condition of pre-trial release.

The Ninth Circuit considered "whether police may conduct a search based on less than probable cause of an individual released while awaiting trial."[38] Defendant was released on his own recognizance, subject to the condition that he "consent to 'random' drug testing 'anytime of the day or night by any peace officer without a warrant,' and to having his home searched for drugs 'by any peace officer anytime[,] day or night[,] without a warrant.'" Scott, 450 F.3d at 865.

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[37] The U.S. dismisses Friedman in a "Sur-Reply," arguing that it is distinguished from the current situation because in Friedman, "No statute permitted the officers' actions, they obtained no court order, and their sole reason for wanting the sample was to 'solve cold cases'" (Dkt. No. 64 at 2). The government's observation is correct, but Friedman goes on to address the government's "reasonableness" argument, see Friedman, 580 F.3d at 856-58, which is not related to those distinguishing characteristics. It is the reasonableness discussion that pertains to this case, not the prior "special needs" discussion which is dependent upon the distinguishing features identified by the government, see Friedman, 580 F.3d at 853-56.

[38] In Scott, the police had a tip that defendant was using drugs, in violation of his pre-trial release. The police administered a urine test which came up positive for methamphetamines. Thereupon, police searched defendant's house, found a gun, and charged him with gun possession. So as applied, this was not a "suspicionless" search, although the suspicion of drug use did not rise to the level of "probable cause."

The Court answered that the Fourth Amendment prohibited such searches, whether analyzed under the "special needs doctrine," or using the "'totality of the circumstances' approach." Id., 450 F.3d at 872. The Court acknowledged that pre-trial detainees "must suffer certain burdens that ordinary citizens do not," but those burdens are designed "to ensure that the defendant not abscond" before trial. Scott, 450 F.3d at 872 n.11 (rejecting the "special needs" argument).

The Ninth Circuit addressed the defendant's privacy interests head-on. The Court concluded that for Fourth Amendment purposes, "[p]robationers are different." Here, the defendant,

> far from being a post-conviction conditional releasee, was out on his own recognizance before trial. His privacy and liberty interests were far greater than a probationer's. Moreover, the assumption that Scott was more likely to commit crimes than other members of the public [applicable to probationers and parolees], without an individualized determination to the effect, is contradicted by the presumption of innocence."

Scott, 450 F.3d at 873-74.[39]

Meanwhile, Scott found that the government's interest in

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[39] But see, Bell v. Wolfish, 441 U.S. 520, 533 (1979) ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial").

imposing such conditions on arrestees was underwhelming. While the government had an interest in preventing the crimes of convicted criminals who are out on probation or parole, it had no such interest regarding someone who was merely arrested, beyond the interest it had in preventing crime by any member of the public:

> That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody. Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence, not of guilt.

Scott, 450 F.3d at 874.

There does not appear to be any difference of constitutional dimension between Scott and this case. First, they both involved searches. There does not seem to be a difference that makes a difference in the fact that one was a drug test in which defendant's urine is analyzed, and this case involves a DNA test in which defendant's saliva would be analyzed. Second, they both involved compelled, warrantless searches, with no probable cause to justify them. In fact, in Scott, there was at least a suspicion that underlay the initial drug test. Here, there is no individualized suspicion of any kind required before defendant must submit to the DNA test. Third, the fact that Scott was released on his own recognizance does not seem to make any difference, because here defendant was later released on an unsecured

appearance bond.

(3) U.S. v. Kincade

U.S. v. Kincade, 379 F.3d 813 (9th Cir. 2004) (*en banc*), was an *en banc* decision that failed to garner a majority opinion. It involved the compelled DNA testing of a convicted offender on pretrial supervision. The Ninth Circuit affirmed the district court, which had revoked defendant's supervised release because he refused to cooperate with the collection of his DNA. However, no part of Judge O'Scannlain's plurality opinion (or Judge Gould's concurring opinion, or Judge Rheinhardt's dissenting opinion, or Judge Kozinki's or Judge Hawkins's,) garnered a majority of the *en banc* panel.

The government first cites Judge O'Scannlain's plurality opinion for the proposition that only "non-genic" portions of the DNA will be tested. This does not appear to be relevant to the constitutional issues involved in this case.[40] The government then relies on the plurality opinion for its assertions that defendant's interests here are minimal in the "totality of the circumstances" analysis: defendant "lack[s] any justifiable privacy interest" in her identity; the DNA collection "is a 'minimal' intrusion that

[40] The government claims that the DNA tested is from "non-genic stretches of DNA." But the government does not dispute that whatever stretch of DNA is tested, its seizure from the body of an arrestee must be reasonable under the Fourth Amendment. See Government Opposition at 4. Also, even assuming the government is correct that genic information is not uploaded to CODIS, the DNA sample is kept forever. The government does not dispute that the sample contains a mountain of genetic information about the arrestee, notwithstanding the government's assertion that it will never look at it.

does not infringe a significant privacy interest," and the arrestee "can claim no right of privacy" in his otherwise personal information "once lawfully convicted ... [or] lawfully arrested and booked into state custody.'" U.S. Opposition at 5. And, the government relies on Judge O'Scannlain's plurality opinion for the proposition that DNA testing is just like regular fingerprinting, an un-objectionable part of the booking process. U.S. Opposition at 6.

The problem with the government's reliance on these views is that they are the views of individual judges, and not the opinion of the Ninth Circuit. Accordingly, the court cannot rely on the above views as the law of the Circuit.

(4) U.S. v. Mitchell

The government relies upon U.S. v. Mitchell, 652 F.3d 387, (3rd Cir. 2011) for the proposition that the DNA law is constitutional as applied to arrestees. Mitchell also asserts that DNA testing is just the same as fingerprinting, which it says, requires no warrant nor individualized suspicion beyond probable cause to arrest. See Mitchell, 652 F.3d at 412-13.

But the reasoning of Mitchell on the critical issue of the defendant's privacy interest – Mitchell says it is minimal – is directly contrary to the Ninth Circuit's in Scott, which says that the defendant's interest was much broader than that of a probationer or parolee. Moreover, Mitchell specifically "declined to follow" the Ninth Circuit's reasoning in Friedman. Mitchell, 652 F.3d at 413 n.23. Of course this court is bound by the Ninth

Circuit, not the Third.

Mitchell begins with an analysis of the arrestee's expectation of privacy. It examines first, the intrusion into the arrestee's bodily privacy, and concludes that "the intrusion occasioned by the act of collecting the DNA sample is minimal." 652 F.3d at 404. In reaching this conclusion, the Third Circuit says that it is bound by Supreme Court precedent holding that "the 'intrusion occasioned by a blood test is not significant.'" 652 F.3d at 406, quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 625 (1989), and citing Schmerber v. California, 384 U.S. 757 (1968)). The Third Circuit's reliance on Skinner for this proposition is problematic. First, Skinner involved a urine test which involved no invasion of the body, whereas the buccal swab required for a DNA test does involve an invasion of the body. Second, Skinner was analyzed under the "special need" doctrine. Accordingly, its view of whether a bodily invasion is significant or not cannot simply be imported into the entirely different analysis required for the "totality of the circumstances" test applicable here.

In Schmerber, the Court reviewed a blood extraction from a person arrested for drunk driving, conducted soon after his arrest. The Court made clear however, that searches "involving intrusions beyond the body's surface" are different. See Schmerber, 384 U.S. at 770. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." Schmerber, 384

U.S. at 770. The Court further opined that "[s]earch warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. Schmerber, 384 U.S. at 770 (emphasis added). Ultimately, the Court permitted the search because "[t]he officer in the present case ... might reasonably have believed that he was confronted with an emergency," because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops," and "there was no time to seek out a magistrate and secure a warrant." Schmerber, 384 U.S. at 770-71 (emphasis added).

It was under these "special facts" that the Court permitted the blood extraction. Schmerber, 384 U.S. at 771. In Schmerber, Justice Brennan never declared that the intrusion into the body was "minimal," only that it was reasonable under the extraordinary circumstances presented. Of course, nothing remotely resembling the Schmerber circumstances are presented here. The government does not assert that the percentage of DNA in a persona's buccal swab diminishes after arrest, there was no emergency requiring that it be taken immediately, and there were no time constraints preventing the government from seeking a search warrant for the swab. To the contrary, defendant was about to be taken to the courtroom for an arraignment before the Magistrate Judge when the swab was taken. There is no suggestion that the few hours delay in seeking a warrant would have caused any difficulties for the government or the administration of justice.

Finally, Mitchell cites Winston v. Lee, 470 U.S. 753 (1985)

as the final case in the trio that it believes binds its determination that a buccal swab is a "minimal" intrusion of bodily integrity. In Winston, Justice Brennan found that the Fourth Amendment forbade the government from forcing an arrestee to undergo surgery to remove a bullet which the government planned to use as evidence. The Winston Court does note that Schmerber, under the extraordinary circumstances presented in that case, found that a blood test was not "an unduly extensive imposition on an individual's personal privacy and bodily integrity." Winston, 470 U.S. at 762. But the Third Circuit uses that language to conclude that defendant is therefore precluded from arguing that the collection of the DNA sample is a "significant invasion" of the person's bodily integrity and privacy.

This court respectfully disagrees that any of these three cases preclude such an argument where the government seeks to collect DNA evidence from inside the body of an arrestee in the absence of an emergency, time constraint, danger, or any other exigent circumstance. In addition, Mitchell does not acknowledge other Supreme Court authority that addresses, not simply the magnitude of the physical intrusion, but the intrusion on the personal security of the person being searched. In Terry v. Ohio, the Supreme Court acknowledged that:

> as this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all

> restraint or interference of others, unless by clear and unquestionable authority of law."

Terry v. Ohio, 392 U.S. 1 (1968), quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

Although the government and the Mitchell court think nothing of having a law enforcement officer reach inside a citizen's mouth, using force if necessary, to extract a swab of DNA, the Supreme Court has taken a different view. In considering the "mere" frisk of a person, involving no invasion of the body, the Court stated that it was incorrect to call such a procedure a "petty indignity." Terry, 392 U.S. at 16-17. Rather, "It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not be undertaken lightly." Id., 392 U.S. at 17.

b. Identity: The Fingerprinting Analogy

The government argues that there is no substantive difference between taking an arrestee's fingerprints and taking an arrestee's DNA.[41] The government then asserts that fingerprinting is a "search" that does not require a warrant or individualized suspicion (beyond probable cause to arrest). The only authority the government cites for these propositions is U.S. v. Mitchell, 652 F.3d 387 (3rd Cir. 2011).

The government's assertions are incorrect, and its reliance on the Third Circuit decision in Mitchell is misplaced. Quite

[41] To reinforce this argument, it tends to refer to the DNA process as "DNA fingerprinting."

apart from the technical question of whether taking fingerprints as part of regular booking procedures is a "search" at all, the Supreme Court has made clear that fingerprinting is very different from searches that implicate the Fourth Amendment.[42] The Court has recognized that "[f]ingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." Davis v. Mississippi, 394 U.S. 721, 727 (1969). The DNA sample on the other hand, "often reveals more than identity," and "with advances in technology, junk DNA may reveal far more extensive genetic information." U.S. v. Kriesel, 508 F.3d 941, 947 (9th Cir. 2007).

Indeed, the Supreme Court has recognized that "neither reasonable suspicion nor probable cause would suffice to permit [the police] to make a warrantless entry into a person's house for the purpose of obtaining fingerprint identification." Hayes v. Florida, 470 U.S. 811, 817 (1985), citing Payton v. New York, 445 U.S. 573 (1980). The government fails to explain why then, it may make a warrantless entry into a person's body for the purpose of obtaining DNA identification.

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[42] Mitchell cites Hayes v. Florida, 470 U.S. 811 (1985), and Davis v. Mississippi, 394 U.S. 721 (1969), for the proposition that "[s]uspicionless fingerprinting of all citizens would violate the Fourth Amendment." But that is because such conduct would require the government to conduct a mass detention of all citizens in order to take their fingerprints. It is the unlawfulness of the suspicionless detentions that the Court addressed in Hayes and Davis, not the suspicionless fingerprinting.

c. Identity: What the Government Took When it Extracted Tuzman's DNA.

In any event, notwithstanding the government's argument, the government has not only recorded Tuzman's "identity," it has taken his DNA, containing a mountain of information beyond identity:

> Judge Gould observed in his concurrence in Kincade, "unlike fingerprints, DNA stores and reveals massive amounts of personal, private data about that individual, and the advance of science promises to make stored DNA only more revealing over time. Like DNA, a fingerprint identifies a person, but unlike DNA, a fingerprint says nothing about the person's health, their propensity for particular disease, their race and gender characteristics, and perhaps even their propensity for certain conduct." See also U.S. v. Amerson, 483 F.3d 73, 85 (2nd Cir. 2007) (recognizing "the vast amount of sensitive information that can be mined from a person's DNA and the very strong privacy interests that all individuals have in this information") (citing U.S. v. Kincade, 379 F.3d 813, 843 (9th Cir. 2004) (en banc) (Reinhardt, J., dissenting)).

U.S. v. Kriesel, 508 F.3d 941, 947-48 (9th Cir. 2007).

In addition, in the case of DNA testing, defendant's DNA will be kept forever.[43] It will remain there even if Tuzman is

[43] Federal law does mandate the expungement of the DNA profile when the FBI receives a certified copy of a court order showing that a conviction is overturned or when, if the sample is taken following an arrest, no charge is filed, the charge is dismissed, or results in an acquittal. 42 U.S.C. § 14132(d)(1)(A). However, the sample itself is maintained in perpetuity.

acquitted or the government drops all the charges. Moreover, Tuzman was not only a pre-trial detainee when his DNA was taken. He was a pre-arraignment detainee. It is not unheard of for such persons to be released without any charges being filed.[44] Yet, pursuant to the AG's regulations, DNA must be taken, and kept forever, even from such persons.

III. CONCLUSION.

The warrantless, suspicionless, compelled extraction of the DNA sample from Tuzman, a mere arrestee, was mandated by 28 C.F.R. § 28.12(b). However, the extraction violated Tuzman's rights under the Fourth Amendment to the U.S. Constitution. The government's interests in obtaining the sample, as set forth in this case, do not outweigh Tuzman's reasonable expectation of privacy in his own DNA and in the mountain of personal information it contains.[45] In short, the government's interest in ascertaining Tuzman's identity

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[44] See, e.g., Agriesti v. MGM Grand Hotels, Inc., 53 F.3d 1000, 1001 (9th Cir. 1995) ("Plaintiffs were arrested, handcuffed, taken to jail, and booked. They were released the same day and never brought before a magistrate"); Lu Huang v. County of Alameda, 2011 WL 5024641 (N.D. Cal. October 20, 2011) (civil rights suit involving person who was arrested, kept in jail for three days, not given a probable cause determination hearing, and "not taken before any judicial officer"); Lopez v. City of Oxnard, 207 Cal. App.3d 1 (2nd Dist. 1989) (multiple mistaken identity arrests of person with same name, address, birthdate and description of person in arrest warrant); Deadman v. Valley National Bank, 154 Ariz. 452 (1st Div. 1987) (innocent bank customer arrested, detained and released without charges).

[45] Tuzman also argues that the DNA sample provision as a condition of his bail is unconstitutional under the Fifth and Eight Amendments, and violates the separation of powers doctrine. Those arguments are tied to 18 U.S.C. § 3142(b), which provisions are no longer before the court. Accordingly, the court does not address these arguments.

does not justify the warrantless extraction of his DNA, as that procedure goes far beyond the need for identification.

IV. REMEDY

Tuzman seeks the return of his DNA sample pursuant to Fed. R. Crim. P. 41(g) and U.S. v. Comprehensive Drug Testing, Inc., 621 F.3d 1162 (9th Cir. 2010) (*en banc*) (per curiam). Rule 41(g) appears to provide for this remedy in this circumstance, and accordingly Tuzman's request will be granted.

The court does not understand the government's argument that it promises not to misuse his DNA sample even though it will hold on to it forever. If it was improperly seized, it must be returned, regardless of the government's benevolent intentions. And, the government has offered no explanation for why, if it has no use for the DNA sample after it has uploaded the information to CODIS, it nevertheless holds on to the sample forever.[46]

Accordingly,

1. The government shall **RETURN** Tuzman's DNA sample to him, or his counsel, within 60 days of the date of this order; and

2. Any data or information from Tuzman's DNA sample that has been uploaded to the CODIS database shall be **EXPUNGED** from that database within 60 days of the date of this order, without further action being required of Tuzman.

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[46] Even where a search is allowed, the government does not retain access to the premises forever. Once the search of person's home is completed, the police do not retain the right to search it again at any time in the future, whenever they would like.

IT IS SO ORDERED.

DATED: February 22, 2012.