C.A. No. 09-10303

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JERRY ARBERT POOL,
Defendant-Appellant.

On Appeal from The United States District Court
for The Eastern District of California
The Honorable Edward J. Garcia
Senior United States District Judge
U.S.D.C. No. Cr. S. 09-0015-EJG
(Sacramento Division)

Brief of American Civil Liberties Union of Northern California as *AMICUS CURIAE* in Support of APPELLANT POOL'S PETITION FOR REHEARING EN BANC

Michael Risher, State Bar No. 191627
ACLU Foundation of Northern California
39 Drumm St.
San Francisco, CA 94111
(415) 621-2493

mrisher@aclunc.org

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS (Fed. R. App. P. 32(a)(7)(C))

This brief complies with the 4,200-word limit of Ninth Circuit Rule 29-2(c)(2) because this brief contains 3,819 words according to the word count program of Microsoft Word, including the statement of interest and all footnotes and headings but excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman, Microsoft Word 2007, in 14 point Regular type.

Dated: November 5, 2010

s/ Michael T. Risher

Michael T. Risher
Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT (Fed. R. App. P. 26.1)

I certify that the American Civil Liberties Union of Northern California does not have a parent corporation and that no publicly held corporation owns 10 percent or more of any stake or stock in it.

Dated: November 5, 2010

s/ Michael T. Risher

Michael T. Risher
Counsel for Amicus Curiae

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

RULES, STATUTES AND REGULATIONS

LEGISLATION

OTHER AUTHORITIES

I. INTERESTS OF AMICUS

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with over 550,000 members, dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the state and federal constitutions. The American Civil Liberties Union of Northern California (ACLU-NC) is the largest ACLU affiliate.

The national ACLU and the ACLU-NC have been active participants in the debate over the expansion of DNA databanks. Most relevant to this matter, the ACLU-NC submitted an amicus brief to the panel and, in addition, is currently involved in a class-action challenge to California's requirement that every person arrested for a felony provide a DNA sample. *See Haskell v. Brown*, 677 F.Supp.2d 1187 (N.D. Cal. 2009). Plaintiff's appeal of the district court's refusal to grant a preliminary injunction in that matter was submitted to this Court following the July 13, 2010 oral argument, and is currently awaiting decision. *Haskell v. Brown*, 9th Cir. No. 10-15152. Although the panel opinion in the case at bar does not decide the constitutionality of seizing DNA from mere arrestees, its mode of analysis necessarily affects the way in which the *Haskell* panel will approach that issue. Also, this Court's resolution of the case at bar will likely affect the rights of many of the *Haskell* class members, because if this Court holds in that case that requiring

mere arrestees to provide DNA samples does violate the Fourth Amendment, then the government could simply respond by moving the time of testing back until after a probable cause hearing, a hearing that will often occur in California before any charging decision has been made or arraignment.

The United States and Defendant Pool have both, through counsel, consented to the filing of this amicus brief. [1]

II. INTRODUCTION

The panel's fractured opinion in this matter has confused an area of the law that needs clarity and bright-line rules. Three states in this Circuit, as well as the federal government, currently require some sort of warrantless DNA collection from people who have not been convicted of any crime; three other states within this Court's jurisdiction are considering such laws. These laws affect a huge number of people – in California alone, some 100,000 people a year are arrested on suspicion of a felony but then not convicted of any crime. Nevertheless, every one of these persons is now required to provide a DNA sample for analysis and inclusion in the national criminal DNA database. These programs have continued even after 2009, when this Court held that the warrantless collection of DNA from an arrestee violates the Fourth Amendment. *See Friedman v. Boucher*, 580 F.3d

[1] *See* 9th Cir. R. 29-2(a).

847 (9th Cir. 2009). Apparently, some state officials simply disagree with *Freidman's* holding and therefore do not feel that they must abide by it.[2] The panel's opinion in this case can only add to that impression, because the two opinions cannot be reconciled. This Court should grant rehearing to resolve this conflict and provide clear rules in an exceptionally important area of the law that affects the constitutional rights of many tens of thousands of Americans throughout this Circuit.

III. STANDARDS FOR REHEARING EN BANC

This Court will rehear a case en banc in two circumstances: First, "the appropriate mechanism for resolving an irreconcilable conflict [between two of this Court's published opinions] is an en banc decision." *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (citation omitted). An irreconcilable conflict can exist when the reasoning of two opinions cannot be squared, even if the two cases can be distinguished on factual or procedural grounds. *Barapind v. Enomoto*, 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (per curiam); *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). The

[2] For example, the California Attorney General has argued in this Court that "*Friedman* did not apply the balancing test that is required," and therefore that the police can lawfully seize DNA from mere arrestees without violating the Fourth Amendment. Appellee's Br. in *Haskell v. Brown*, No. 10-15152, at 52.

panel majority's opinion conflicts irreconcilably with this Court's decision and reasoning in *Friedman* and in other Fourth Amendment cases.

En banc review is also appropriate to address "a question of exceptional importance." Fed. R. App. P. 35(a)(2). The important question presented here is whether the Fourth Amendment allows the government, without a warrant or exigent circumstances, to seize and then search the DNA of the tens of thousands of people arrested for crimes but never convicted in the states within this Circuit's jurisdiction, simply because a magistrate reviewing the police reports has found probable cause to detain them.

IV. THE PANEL OPINION CONFLICTS WITH *FRIEDMAN*

The panel opinion, after admitting that "there is language in *Friedman* … which may appear to be inconsistent with our decision," went on to uphold the type of search and seizure of DNA that *Friedman* held violates the Fourth Amendment. *See United States v. Pool*, 621 F.3d 1213, slip op. 14013, 14038 (9th Cir. Sept. 14 2010). The panel majority claims to distinguish the two cases on three grounds:

1. It asserts (incorrectly as it turns out) that "unlike the situation in *Friedman*, there has been a judicial determination of probable cause" in this matter;
2. The government in *Friedman* failed to present some of the arguments that the government now presents;

3. No specific statute authorized the seizure in *Friedman*, whereas here a federal statute authorizes the seizure of Pool's DNA.

Id. at 14036.

None of these factors can distinguish the two cases.

A. Judicial Determination of Probable Cause

The first factor is legally irrelevant. As Judge Schroeder's dissent and Pool's petition for rehearing amply demonstrate, it is a conviction, not a probable cause hearing, that reduces a person's privacy rights so as to allow the government to search him for evidence of a crime without a warrant. *Compare United States v. Scott*, 450 F.3d 863, 873-74 (9th Cir. 2006) (persons awaiting trial have enforceable Fourth Amendment rights) *with Samson v. California*, 547 U.S. 843 (2006) (convicted felons have virtually no such rights). It is also factually incorrect, because Mr. Friedman, like Mr. Pool, had necessarily already received a judicial finding of probable cause at the time he was required to provide a DNA sample. Friedman was arrested on February 10, 2003, and was then charged and remained in custody until his DNA was taken in March of that year. *Friedman*, 580 F.3d at 861 (Callahan, J., dissenting). The Fourth Amendment prohibits the government from holding a person in custody for more than 48 hours without a judicial finding of probable cause. *County of Riverside v. McLaughlin*, 500 U.S.

44 (1991).[3] Thus, even if a judicial finding of probable cause were a "watershed event" that allows the government to seize DNA from a defendant without a warrant, Friedman had crossed that bridge long before the government seized his DNA.

The only factual distinctions between the two cases are that Friedman was in custody, while Mr. Pool is not, and that Friedman was a convicted sex offender, while Mr. Pool has never been convicted of anything. If anything, Pool's Fourth Amendment rights were *stronger* than Friedman's for the precise reasons that Judge Callahan discussed in her dissenting opinion in *Freidman*. *See Friedman*, 580 F.3d at 864-65 (Callahan, J., dissenting) (stating that Friedman's status as a convicted sex offender and jail security concerns both justified taking his DNA.)

B. The Government's New Arguments

Of course, the *Friedman* panel did not address the argument that that the judicial finding of probable cause made the seizure of Friedman's DNA constitutional. Nor, according to the panel in this matter, did it address other important arguments that provided additional grounds for the majority to

[3] State law, too, would have required that Friedman be taken before a magistrate without delay. N.R.S. 171.178(a).

distinguish *Friedman*. *Pool*, slip op. at 14036.[4] But *stare decisis* prohibits one panel from distinguishing or ignoring a prior opinion simply because the parties in the earlier case failed to present the best arguments in support of their positions, or the court failed to address those arguments. This Court recently reaffirmed this principle in *United States v. Contreras*, a case involving federal sentencing guidelines. 593 F.3d 1135, 1136 (9th Cir. 2010) (en banc) (per curiam), *superseding* 581 F.3d 1163 (9th Cir. 2009). For well over a decade, numerous Ninth Circuit panels followed a 1990 panel opinion, without acknowledging or even realizing that it had been abrogated by a 1993 amendment to the sentencing guidelines. *See Contreras*, 581 F.3d at 1165-67. When this was finally brought to

[4] Notably, the type of testing here at issue does nothing to further the primary interest that the panel identifies as supporting taking DNA from Pool – determining whether a person to be released poses a danger to society. As *amici* discuss in their original brief in this matter, the time involved in analyzing DNA and the huge backlogs in the system mean that the government will not get the results of any tests until after a detainee has been released. Moreover, even after analysis, further investigation of any "cold hits" would be needed to evaluate their meaning, since it appears that only 13.5% of cold hits actually result in a culprit being apprehended and convicted. Harmon, *Familial DNA Testing: A Proactive Approach to Unsolved Cases*, S.F. Daily Journal Sept. 24, 2010. Nothing in the record in this matter suggests otherwise or shows that DNA testing furthers any governmental interest. As this indicates, part of the problem with the panel majority opinion is that it fails to hold the government to its burden of proof to show that this type of warrantless DNA testing comports with the Fourth Amendment. *See United States v. Davis*, 332 F.3d 1163, 1168 n.3 (9th Cir. 2003); *see also Chandler*, *infra*, 520 U.S. at 318-19 (government must show need for new exception to warrant requirement).

this Court's attention, a three-judge panel attempted to correct this obvious error and overrule the prior caselaw on the grounds that those prior panels had "simply failed to recognize or address the change in the law." *Id*. at 1167. Sitting en banc, this Court agreed with the panel on the merits but did "not agree that the three-judge panel had authority to overrule cases decided after the 1993 amendment to the Guidelines," even though those cases had utterly failed to address or even to notice what would have been a dispositive argument. 593 F.3d at 1136. Thus, even if a panel believes that a circuit opinion is wrong because it failed to consider the proper factors or arguments, it is nevertheless bound by the prior panel's holding, and by its "explications of the governing rules of law." *Miller*, 335 F.3d at 900. *Friedman* squarely held that the Fourth Amendment prohibits the government from seizing DNA from a pre-trial detainee without a warrant. That the government failed to make all the arguments it might have made does not justify the panel's refusal to follow the earlier holding.

C. The Existence of Statutory Authorization

The third reason the panel gives for failing to follow *Friedman* -- that no statute specifically authorized the DNA collection in that case -- is irrelevant. Even if one assumes that the lack of specific statutory authorization to seize Friedman's DNA means that the search violated state law (and there is nothing to

suggest that this is the case[5]), "[w]hether or not a search is reasonable within the meaning of the Fourth Amendment … has never depended on the law of the particular State in which the search occurs." *Virginia v. Moore*, 128 S. Ct. 1604, 1607 (2008) (citation and changes omitted); *see Cooper v. California*, 386 U.S. 58, 61 (1967) ("a search authorized by state law may be an unreasonable one"); *United States v. Guzman-Padilla*, 573 F.3d 865, 890 (9th Cir. 2009).[6]

The Fourth Amendment applies uniformly throughout our nation, regardless of what searches are authorized or forbidden by state laws, and applies at least as strictly to federal as to state officials. *Moore*, 128 S. Ct. at 176. Congress cannot legislate away the protections of the Fourth Amendment; to the contrary, "a legislative act contrary to the constitution is not law." *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *see Chandler v. Miller*, 520 U.S. 305 (1997) (striking down statute as facially unconstitutional under Fourth Amendment); *Illinois v. Krull*, 480 U.S. 340, 354 (1987) ("a person subject to a statute authorizing searches without a warrant or probable cause may bring an action seeking a declaration that the statute is unconstitutional and an injunction barring its implementation.").

---

[5] State and local law-enforcement officials generally have broad authority to search for and seize evidence – or to search prisoners -- regardless of any specific statute authorizing each search and seizure. *See, e.g., Ingersoll v. Palmer*, 43 Cal.3d 1321,1347-48 (1987).

[6] As the panel recognized, this is not an administrative or special-needs search where state law might have some relevance. *See Pool*, slip op. at 14024.

When Congress passes a law that purports to authorize what the Fourth Amendment forbids, the constitutional protection must prevail over the statute.

Because none of its attempts to distinguish *Friedman* are valid, the panel majority opinion in this matter conflicts irreconcilably with *Friedman*, and should be reheard en banc.

V. THE PANEL OPINION CONFLICTS WITH ESTABLISHED, BINDING FOURTH AMENDMENT JURISPRUDENCE

The panel, unable to find an established exception to the warrant requirement that can justify the search, posits that a general balancing test is itself such an exception, citing *United States v. Kreisel*, 508 F.3d 941, 947 (9th Cir. 2007). In doing so, the panel opinion misreads *Kreisel* and ignores prior Fourth Amendment jurisprudence from this Court and from the Supreme Court.

The *Kreisel* court did not suggest that a general-balancing test could itself constitute an exception to the warrant requirement. Rather, *Kreisel* relied on the same well-established exception that *Samson* did: no warrant is required to search convicted felons while they are on parole or supervised release. *United States v. Knights*, 534 U.S. 112, 121-22 (2001); *Toomey v. Bunnell*, 898 F.2d 741, 744 (9th Cir. 1990) ("parole searches may be conducted without a warrant under a reasonableness standard"); *see Samson*, 547 U.S. at 847 (question before Court was scope of exception identified in *Knights*). The general balancing test is not

itself an exception to the warrant requirement, and Supreme Court has made it clear that such a test cannot itself be used to justify searches unless some established exception applies. *See Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21(2001) (refusing to apply general balancing test absent special-needs and holding that drug testing of pregnant women by urinalysis for law-enforcement purposes violates Fourth Amendment). To the contrary, the courts only employ a balancing test after they have already identified an established exception to the warrant requirement, for example, that the search falls within the special-needs exception.[7] *See Chandler*, 520 U.S. at 314 ("When such 'special needs'-concerns other than crime detection are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests."). As this Court recently made clear, this is a "two-step analysis," and the court cannot employ the balancing step unless it first shows that the special-needs exception applies. *United States v. Fraire*, 575 F.3d 929, 931-32 (9th Cir. 2009). Even then, it is only the government's special interests – not its law-enforcement interests – that are balanced against individual privacy. *See Ferguson*, 532 U.S. at 77-78. In violation of these established principles, the panel opinion upholds the seizure and search of DNA by balancing

[7] Similarly, *Samson* and *Kreisel* employed a general-balancing test only because the sentenced-felon exception applied.

the government's interests, *including* its general law-enforcement interests, against Pool's privacy interests, and it does so without identifying any applicable exception to the warrant requirement. This analysis cannot be reconciled with *Chandler*, *Ferguson*, or *Fraire*.

VI. THIS CASE INVOLVES AN ISSUE OF EXCEPTIONAL IMPORTANCE THAT WILL AFFECT THE FOURTH AMENDMENT RIGHTS OF TENS OF THOUSANDS OF INNOCENT AMERICANS IN THIS CIRCUIT

Although the case at bar involves a federal criminal defendant who was ordered to provide a DNA sample as a condition of pretrial release, it will necessarily have a broader influence on future decisions relating to the constitutionality of state and federal laws requiring those who are presumed innocent to provide a DNA sample without a warrant. These laws affect tens of thousands of people every year in this Circuit alone. For example, as of January 1, 2009 every person arrested in California for any felony -- including crimes such as writing a bad check, simple drug possession, or second-time shoplifting[8] -- must have his DNA taken, analyzed, and put into CODIS. CAL. PENAL CODE § 296(a)(2)(C). The California Department of Justice reports that, in 2009 alone, California authorities arrested 306,000 people on suspicion of a felony, of whom

[8] CAL. PENAL CODE §§ 476, 484/666; CAL. HEALTH & SAFETY CODE §§ 11350, 11377.

nearly 100,000 were not ultimately convicted of any crime.[9] There is no provision for automatic expungement; persons who are arrested but acquitted or not charged must go through a long process of trying to expunge the sample by filing a motion in court. CAL. PENAL CODE § 299(c). Few of the tens of thousands of people who are arrested but not charged or convicted every year will be able to navigate this process. As a result, their DNA will remain in the database forever.

Two other states in this Circuit -- Alaska and Arizona -- also require at least some persons arrested on suspicion of a felony to provide DNA samples. *See* ALASKA STAT. § 44.41.035 (West 2010), ARIZ. REV. STAT. § 13-610 (West 2010). The Washington and Hawaii legislatures are currently considering similar legislation. *See* H.B. 1382, 61st Leg., Reg. Sess. (Wash. 2009); H.B. 336, 25th Leg., Reg. Sess. (Haw. 2009). Nevada is considering a bill that would require a sample from any person convicted of a felony following a judicial finding of probable cause. A.B. 234 § 1, 75th Leg., Reg. Sess. (Nev. 2009).

Finally, as of January 2009, federal law requires that all persons arrested for, or charged with, any federal crime -- including misdemeanors and assimilated

---

[9] California Department of Justice, Crime in California 2009 at p. 5 (advance release), available at http://ag.ca.gov/cjsc/publications/advrelease/ad/ad09/ad09.pdf (306,170 felony arrests resulted in 207,959 convictions of any type, including convictions for misdemeanors sentenced to county jail or a fine).

crimes that might be treated as infractions under state law -- provide a DNA sample.[10] This law, like California's, contains no provision for automatic expungement if the arrestee is never convicted.[11] Thus, this Court's holding regarding the constitutionality of compulsory DNA sampling for persons not convicted of any crime will affect many more people than just those who are eligible for federal pre-trial release.

Although the panel opinion states that it applies only after a judicial finding of probable cause, rather than after mere arrest, that distinction is of little practical importance. Although this limitation will exclude some of the most egregiously wrongful arrests, it does little to protect most arrestees against the suspicionless search of their DNA and it does not justify such searches. As an initial matter, probable cause to arrest or detain for trial does not imply probable cause to conduct a search. A magistrate's decision to hold a person means only that there is a reason to think the person has committed a crime; in contrast, probable cause to search requires evidence that the search will yield evidence of a crime. *Compare County of Riverside*, 500 U.S. 44, *with Zurcher v. Stanford Daily*, 436 U.S. 547, 556-57

---

[10] 28 C.F.R. § 28.12(b); *see id.* § 28.12(c) (deadline), (f)(2) (inclusion of samples in CODIS); *see also* 42 U.S.C. § 14135A(a)(1)(A) (authorizing arrestee testing).
[11] See 42 U.S.C. § 14132(d)(1)(A).
The FBI instructions for applying for expungement are posted at http://www.fbi.gov/about-us/lab/codis/codis_expungement (visited 10/29/2010).

(1978). The panel's opinion effectively transforms a finding of probable cause to detain (or, presumably, issuance of an arrest warrant) into a search warrant to seize a person's DNA for inclusion in the national criminal database.

Just last year, though, the U.S. Supreme Court rejected this proposition that probable cause to arrest or detain could substitute for probable cause to search. *See Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (probable cause to arrest the driver of a car does not authorize search of that car). In so holding, the Court recognized the danger of allowing the government to conduct broad searches based simply upon probable cause to take a person into custody. This, the Court said, may cause the police to make custodial arrests they otherwise would not have made in order to search for evidence for which they have no probable cause. *Id*. at 1720 n.5. Furthermore, the idea that a lawful arrest creates a "police entitlement" to search for evidence of a crime is "anathema to the Fourth Amendment." *Gant*, 129 S. Ct. 1720 n.5, 1721. The panel majority opinion, by allowing a seizure and search of a person's DNA simply based on a judicial finding that the person has committed some crime, regardless of whether DNA could possibly be relevant to that offense, would create just this type of entitlement and incentive for police officers to make pretextual arrests.

Finally, it is not difficult for the police to find probable cause for a minor offense that can justify an arrest and, if the panel is correct, seizure, analysis, and databanking of a person's DNA:

> Given the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone, the probable cause requirement is so diluted it ceases to matter, for there exists a power that places the liberty of every man in the hands of every petty officer, precisely the kind of arbitrary authority which gave rise to the Fourth Amendment.[12]

An *ex parte* probable cause hearing, based as it is on the arrest report, cannot filter-out these pretextual arrests. Allowing the government to seize the genetic blueprint of any American simply based on a judicial finding that the person has committed even a minor traffic offense puts the Fourth Amendment rights and genetic privacy of every American at risk. This is certainly an issue of exceptional importance that merits en banc review.

VII. CONCLUSION

Because the panel majority opinion conflicts with *Friedman* and threatens the Fourth Amendment rights of so many people who live in this Circuit, this Court should grant rehearing.

---

[12] *People v. McKay*, 27 Cal.4th 601, 633 (2002) (Brown, J., dissenting) (citations and internal punctuation omitted); *see id.* at 631-33 (discussing pretextual stops).

Dated: November 5, 2010

Respectfully submitted,

s/ Michael Risher

Michael Risher, State Bar No. 191627
ACLU Foundation of Northern California
39 Drumm St.
San Francisco, CA 94111
(415) 621-2493
mrisher@aclunc.org

Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system in No. 09-10303 on November 5, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

By: s/ Michael Risher
Michael Risher
ACLU Foundation of Northern California

Counsel for *Amicus Curiae*