

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 Foundation of Northern California as
AMICUS CURIAE in Support of DEFENDANT-APPELLANT POOL and
REVERSAL

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I certify that the American Civil Liberties Union Foundation 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.

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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, founded in 1934 and based in San Francisco, 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. The organizations submitted extensive comments when the United States Department of Justice promulgated regulations mandating the DNA testing of persons arrested by federal authorities.¹ The ACLU-NC has twice challenged the legality of taking DNA from persons arrested for but not convicted of crimes. In *Weber v. Lockyer*, 365 F. Supp. 2d 1119 (N.D. Cal. 2005), the ACLU-NC mounted a challenge to the arrestee-testing provisions of California's Proposition 69, a 2004 California ballot measure that vastly expanded that state's DNA databank program. The District Court held that the claims were not ripe for adjudication because those provisions were not to take effect until 2009. Thus, on October 7, 2009, the ACLU-NC filed a class-action lawsuit in the Federal District Court for the Northern District of California

¹ Available at <http://www.aclu.org/crimjustice/gen/35392leg20080519.html>.

challenging these same provisions. *Haskell v. Brown*, No. 09-cv-04779-CRB (N.D. Cal). The *Haskell* plaintiffs intend to move promptly for a preliminary injunction to stop the collection of DNA from arrestees in California.

The outcome of this appeal will doubtless affect the *Haskell* case. The ACLU's comments on the federal regulations, the two lawsuits, and this brief focus on the constitutional, scientific, policy, and privacy concerns that arise when the government requires that persons who have never been convicted of any crime are required to submit their DNA – their genetic blueprint – for analysis and inclusion in a criminal database, where it will be continually accessed and compared to crime-scene evidence throughout the nation.

The United States and Defendant Pool have both, through counsel, consented to the filing of this amicus brief.²

II. INTRODUCTION

Over the last 25 years, DNA evidence has revolutionized many aspects of the criminal justice system, helping to convict the guilty and free the innocent. Computerized DNA databanks too, have proved to be valuable weapons against

² See Fed.R.App.P 29(a). This brief is timely filed within 7 days of the Appellant's opening brief, excluding weekends and the intervening holiday. *Id.* 26(a)(2), 29(e).

crime. But as with any weapon, DNA databanks have the potential to cause harm if misused: the compulsory extraction of DNA for analysis and inclusion in a criminal database, particularly as applied to persons who have not been convicted of a criminal offense, implicates important concerns relating to privacy, the presumption of innocence, and the limits of police power. These concerns must be balanced against an accurate assessment of how useful the expansion of such databanks really is in solving and preventing crime and in exonerating the innocent.

As with many new law-enforcement technologies—ranging from wiretapping to electronic-tracking devices to thermal-imaging equipment—both legislatures and the courts will necessarily be involved in deciding whether these techniques comport with our nation’s commitment to privacy as reflected in the Fourth and Fourteenth Amendments. An examination of the nature, costs, and benefits of DNA sampling and DNA databanks shows that the expansion of compulsory DNA testing without a warrant to persons who have not been convicted of any crime and are therefore presumed innocent violates the Fourth Amendment.

Although the case at bar involves a federal criminal defendant who was ordered to provide a DNA sample as a condition of pretrial release, the Court’s decision in this case will necessarily have a broader influence on upcoming

decisions relating to the constitutionality of state and federal laws requiring that persons provide a DNA sample immediately after they are arrested. These laws affect tens of thousands of people every year. For example, as of January 2009 every person arrested in California for any felony – including crimes such as writing a bad check, simple drug possession, or second-time shoplifting³--must have his DNA taken, analyzed, and put into CODIS – the Combined DNA Index System-- a nationwide databank that is accessible to state and federal law enforcement. Cal. Penal Code § 296(a)(2)(C) (effective January 1, 2009). This will affect an enormous number of people: the California Department of Justice reports that, in 2007, 332,000 people were arrested in California on suspicion of a felony, of whom more than 101,000 were not ultimately convicted of any crime.⁴ Furthermore, the process for arrestees who are not charged or convicted to try to have their DNA profiles removed from California’s database is extremely cumbersome. Indeed, the wait time for removal is at least six months and often over three years, with no guarantee of success even if the person was found

³ Cal. Penal Code §§ 484/666, 476; Cal. Health and Safety Code §§ 11350, 11377.

⁴ California Department of Justice, Division of California Justice Information Services, Bureau of Criminal Information and Analysis, Crime in California 2007 Data Tables, Table 37, available at <http://ag.ca.gov/cjsc/publications/candd/cd07/preface.pdf> . 2007 is the most recent year for which complete data are currently available.

innocent of the crime for which he was arrested.⁵ While they wait, the arrestees' biological samples are in police custody, and their genetic profiles are subject to weekly search.⁶

Similarly, as of January 9, 2009, federal law requires that all persons arrested for, or charged with, any federal crime – including misdemeanors--provide a DNA sample.⁷ This law contains no provision for automatic expungement if the arrestee is never convicted.⁸ Thus, this Court's holding regarding the constitutionality of compulsory DNA sampling for persons not convicted of any

⁵ See Cal. Penal Code § 299. The barriers to removal from the California database are discussed in Michael Risher, *Racial Disparities in Databanking of DNA Profiles* at 3-4 (Council for Responsible Genetics 2009), available at: <http://www.councilforresponsiblegenetics.org/pageDocuments/BBIQ0EKC20.pdf>.

⁶ See *Birotte v. Superior Court*, 177 Cal. App. 4th 559, 565 (Cal.App. 2009) (describing weekly search); see generally *id.* at 563-66 (describing California databank system).

⁷ 28 C.F.R. § 28.12(b) (“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”); see *id.* § 28.12(c) (deadline), (f)(2) (inclusion of samples in CODIS). See also 42 U.S.C. § 14135A(a)(1)(A) (authorizing, but not requiring, regulation to mandate federal arrestee testing). Despite the regulation's mandatory language and January 9, 2009 deadline, as of this writing it appears that federal arrestee testing is not occurring in California.

⁸ The FBI was directed to publish instructions on how persons who are not convicted may apply for expungement. 73 Fed.Reg. 74932, 74940 (Dec. 10, 2008). The FBI instructions can be found at: <http://www.fbi.gov/hq/lab/html/expungement.htm>

crime will likely affect many more people than just those who are eligible for federal pre-trial release.

As discussed below, these laws mandating the warrantless⁹ seizure of DNA from persons awaiting trial, arrestees, or others who have not been convicted of a crime violates the Fourth Amendment.

III. DISCUSSION

The Supreme Court has repeatedly emphasized that warrantless searches “are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (citations omitted). The government therefore bears the burden of establishing that a warrantless search is reasonable and therefore constitutional. *United States v. Davis*, 332 F.3d 1163, 1168 n.3 (2003).

A. The Warrantless Compulsory Extraction of DNA Samples from Persons Not Convicted of any Crime Violates the Fourth Amendment Law under *Schmerber v. California*

This case can be decided under the bright-line rule that the Supreme Court established forty years ago in *Schmerber v. California*, 384 U.S. 757 (1967): law enforcement may not make a warrantless seizure of biological material from a

⁹ “Warrantless” is used throughout this brief to mean without a warrant, rather than unwarranted.

person they have lawfully arrested unless they have probable cause to believe that an examination of the sample will produce relevant evidence of a crime *and* exigent circumstances exist that make obtaining a warrant impracticable. 384 U.S. at 769-70; *see Ellis v. City of San Diego*, 176 F.3d 1183, 1191-92 (9th Cir. 1999) (“warrantless compulsory blood tests are unreasonable unless supported by both probable cause and exigent circumstances.”).

With blanket DNA testing of persons awaiting trial, or of arrestees, neither prerequisite is met. These statutes apply indiscriminately to all offenses, whether or not DNA evidence is relevant to the crime charged.¹⁰ And, even if probable cause were present, there is no exigency because DNA is immutable (which is what makes it valuable for identification purposes). *Barlow v. Ground*, 943 F.2d 1132, 1138 (9th Cir. 1991). Thus, unless DNA sampling is inherently less intrusive than the blood draw at issue in these prior cases, it is unconstitutional under *Schmerber*.

¹⁰ That a magistrate has found probable cause to believe that the person has committed some crime is irrelevant: probable cause to arrest or detain a person for trial does not imply probable cause that a search of that person will yield evidence. *Compare Illinois v. Gates*, 462 U.S. 213, 238 (1983) (standard for search) *with Gerstein v. Pugh*, 420 U.S. 103, 111-14 (1975) (standard for arrest and pretrial detention).

1. The *Schmerber* Rule Applies Because of the Physical Intrusiveness of DNA Testing Whether Performed by Blood Draw or Buccal Swab.

Government-compelled sampling of a person's bodily tissue--of whatever type and however performed--constitutes a search under the Fourth Amendment. *See e.g., Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (urine tests); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (breath test); *Cupp v. Murphy*, 412 U.S. 291 (1973) (fingernail scrapings); *Schmerber*, 384 U.S. at 769-70 & n.12 (1966) (blood sample following arrest for felony DUI). Thus, this Court recently held in a case involving DNA testing of an arrestee that "there is no question that the buccal swab constituted a search under the Fourth Amendment." *Friedman v. Boucher*, 568 F.3d 1119, 1124 (9th Cir. 2009); *accord United States v. Kincade*, 379 F.3d 813, 821 n.15 (2004) (*en banc* plurality opinion) ("The compulsory extraction of blood for DNA profiling unquestionably implicates the right to personal security embodied in the Fourth Amendment, and thus constitutes a 'search' within the meaning of the Constitution."); *United States v. Kriesel*, 508 F.3d 941, 946-47 (9th Cir. 2007) (collecting cases).

Moreover, DNA sampling is no ordinary search. On a purely physical level, the compulsory extraction of DNA by means of a blood draw or a buccal swab is more invasive than, for example, a search of a person's clothing or possessions,

and the government's burden of justifying it is therefore commensurately higher. The human body, like the home, is entitled to the strongest protections of the Fourth Amendment. *Schmerber*, 384 U.S. at 767-78; *cf. City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000) (Rhenquist, C.J., dissenting) (noting that a "person's body and home [are the] areas afforded the greatest Fourth Amendment protection."). The right to bodily privacy means that governmental interests that suffice to justify a search of a car, clothing, or even a person's private papers may nonetheless be insufficient to support a search of the skin. *See Safford Unified School Dist. No. 1 v. Redding*, 129 S.Ct. 2633, 2640-42 (2009) (governmental interest that justifies search of student's outer clothing does not justify search under clothing); *Way v. County of Ventura*, 445 F.3d 1157 (9th Cir. 2006) (blanket jail strip-search policy unconstitutional); *United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995) ("As the search becomes more intrusive, more suspicion is needed.").

Governmental intrusions *into* the body impinge even further into privacy and bodily integrity. Thus, although the police may conduct a complete search of an arrestee's clothing and possessions, including his private papers and electronic media, they may not draw his blood to analyze it without probable cause and exigency, or a warrant, even though the Supreme Court has characterized blood

draws as a minor intrusion. *Schmerber*, 384 U.S. at 769-70 (1966); *Ellis*, 176 F.3d at 1191-92; compare *United States v. Finley*, 477 F.3d 250, 260 (5th Cir. 2007) (allowing complete search of electronic device after arrest).

Like a routine blood draw, the insertion of a swab into an arrestee's mouth for over fifteen seconds¹¹ to scrape cells for DNA analysis is an intrusion into the body that requires a heightened justification. Many Americans approach a visit to the dentist with more dread than they do going to the doctor to give a blood sample. And a buccal swab, or any other procedure for taking DNA, is more intrusive when it is mandatory and done by a law enforcement officer than it would be if done in a physician's office as part of a medical exam. We routinely consent to medical examinations and procedures – from simply undressing for examination to having one's stomach pumped to remove poison -- by our doctors, where those same actions would be unreasonable if conducted by law enforcement without consent. *Cf. Redding*, 129 S.Ct. at 2640-42 (strip search violates the Fourth Amendment); *Rochin v. California*, 342 U.S. 165, 172 (1952) (stomach pumping by police “shocks the conscience”). Thus, the purely physical aspects of warrantless DNA testing raise serious Fourth Amendment concerns beyond those

¹¹ The federal protocol for collecting DNA using a buccal swab calls for the officer to first insert the swab into the subject's mouth, use it to soak-up any saliva, and then swab the cheek for 15 seconds, and then to repeat the entire procedure. *See* <http://www.fbi.gov/hq/lab/html/instructions.htm>.

implicated by more traditional searches. These concerns are heightened because such searches are mandatory and conducted by law enforcement, rather than voluntary and in a medical setting.

2. The *Schmerber* Rule Applies Because DNA Testing Implicates Serious Privacy Interests

In addition to the physical intrusion, taking biological samples for the purpose of DNA analysis raises additional issues relating to privacy. “One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up.” *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269 (9th Cir. 1998). DNA is our genetic blueprint, and with every passing year science learns how to unlock its secrets to discover more and more about us.¹² It is therefore the scientific examination and analysis, more than the initial seizure, that most impacts the privacy interests protected by the Fourth Amendment. *See Kriesel*, 508 F.3d at 948; *Kincade*, 379 F.3d at 873 (Kozinski, J., dissenting) (“[I]t is important to recognize that the Fourth Amendment intrusion here is not primarily the taking of the blood, but the seizure of the DNA fingerprint and its inclusion in a searchable database.”). With our genetic makeup, as with our homes, “all details are intimate

¹² The Court’s analysis “must take account of more sophisticated systems that are already in use or in development.” *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (thermal imaging device under Fourth Amendment).

details, because the entire area is held safe from prying government eyes.” *Kyllo v. United States*, 533 U.S. 27, 37 (2001).

As with the strictly physical aspects of DNA collection, these privacy concerns are magnified where collection is mandatory and done in a law enforcement context, rather than a therapeutic, voluntary, medical one. As Congress recognized when it passed the Genetic Information Nondiscrimination Act of 2008, Americans want to have their genetic information used for medical purposes, but at the same time we worry that this same information could be misused by governmental or private entities.¹³ Recent research by the Johns Hopkins University Genetics and Public Policy Center found that although 86% of Americans surveyed would trust their doctors with their genetic test results, 54% of them stated that they had little or no trust in law enforcement having access to their this information.¹⁴ An even more recent survey conducted by the Center in 2008 questioned 4,659 Americans on their interest in participating in a large prospective cohort study on genes and environment and found that 84% of responders

¹³ Genetic Information Nondiscrimination Act of 2008, PL 110-233, 122 Stat 881 § 2 (findings) (2008).

¹⁴ U.S. Public Opinion on Uses of Genetic Information and Genetic Discrimination 2, available at http://www.dnapolicy.org/resources/GINAPublic_Opinion_Genetic_Information_Discrimination.pdf; see generally E.W. Clayton, *Ethical, legal, and social implications of genomic medicine*. N. Engl. J. Med. 349, 2003.

indicated that it would be important to have laws protecting research information from law enforcement.¹⁵ Our society plainly recognizes both the value of physicians' access to our genetic information and the paramount importance of protecting our genetic privacy DNA from infringement by law-enforcement officials.

That the government claims it will use DNA collected under this program only for law-enforcement identification purposes does not eliminate these concerns. The Fourth Amendment does not allow the government to seize and warehouse our personal papers just because it promises not to examine them, and the rule should be no different with our DNA. Unfortunately, the police sometimes violate the law, willfully or not, and the same pressures that lead to violations of the Fourth Amendment and other statutory or legal privacy protections in more traditional investigations exist in our nation's crime labs, whether run by government or private contractors. For example, an investigation of the Houston, Texas crime lab found multiple instances of misconduct, including cases where analysts "reported conclusions, frequently accompanied by inaccurate and misleading statistics, that often suggested a strength of association between a

¹⁵ Kaufaman, D., *et al. Public Opinion About The Importance of Privacy in Biobank Research*, __ American Journal of Human Genetics, __ (2009) (forthcoming).

suspect and the evidence that simply was not supported by the analyst’s actual DNA results” and other instances where lab personnel simply fabricated test results.¹⁶ In fact, the temptation to break or push the limits of what is allowed may well be greater in the privacy of a crime lab, shielded from public scrutiny, particularly if the purpose is to develop investigative leads that will never be subject to examination in court.

The risk of misusing DNA samples in crime labs is particularly pressing because, as technology moves far beyond what was available when DNA databanks were legislatively authorized, the question of what is and is not allowed under the authorizing statutes becomes less and less clear. For example, both federal and California laws state that the databanks may be used only for “identification” purposes. 42 U.S.C. § 14135e(b); Cal. Penal Code § 295.1(a). When these statutes were enacted, the term “identification” had a clear meaning in this context – a person was identified by a perfect match between his DNA profile and a crime-scene profile. But already federal and state authorities have adopted a broader interpretation of “identification” so as to allow so-called familial searching.

¹⁶ June 13, 2007, Final Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room at 5, available at <http://www.hpdlabinvestigation.org/reports/070613report.pdf>.

In familial searching, law enforcement uses the DNA database to focus on a person whose DNA does not match the crime-scene evidence -- and who is therefore demonstrably innocent of the crime -- because that profile is *similar* to DNA taken from a crime scene, based on the hope that the culprit may be related by blood to the known person who provided the similar sample.¹⁷ The California protocol for familial searching in the CODIS database allows the government to create an “initial candidate list” comprising up to 168 offender/arrestee samples that are similar to the crime-scene sample.¹⁸ These samples are then subject to further investigation and analysis. “As part of this process the initial candidate list of offenders’ DNA samples will be profiled for Y-STR type, meaning that they

¹⁷ See Henry T. Greely, Daniel P. Riordan, Nanibaa' A. Garrison, Joanna L. Mountain, *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, *Journal of Law, Medicine & Ethics*, 34:248-262 (Summer 2006) Recently both the California and federal Departments of Justice have authorized the use of their databanks for this purpose. California Department of Justice, Division of Law Enforcement Information Bulletin 2008-BFS-01, DNA Partial Match (Crime Scene DNA Profile to Offender) Policy (April 24, 2008), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1548_08-bfs-01.pdf; CODIS Bulletin BT072007, Interim Plan for Release of Information in the Event of a “Partial Match” at NDIS (July 20, 2006.), available at http://www.ndaa.org/publications/newsletters/codis_bulletin_2006.pdf; see Maura Dolan and Jason Felch, Tracing a crime suspect through a relative, *Los Angeles Times* (November 25, 2008), available at <http://www.latimes.com/news/local/la-me-familial25-2008nov25,0,3394236,full.story>.

¹⁸ California Department of Justice, CAL-DNA Data Bank Technical Procedures Manual, at 29 (10/17/08), available at http://www.aclunc.org/news/press_releases/asset_upload_file490_8577.pdf.

will be retested to check for a specifically paternal relationship.”¹⁹ Thus, a person whose DNA is included in the databank may find himself subject to having his sample further analyzed at any time in the future simply because it is one of the 168 profiles that are similar to one found at a crime scene. And, if this further analysis fails to show that he is not related to the person who left the sample at the crime scene, he – and his family-- may well be subject to other forms of investigation as well.²⁰

This controversial broadening of how DNA profiles can be used was done through internal policy memoranda, without any legislative authorization or formal regulatory action; the law was simply reinterpreted by law enforcement. Whatever the merits of familial searching as an investigatory tool, its quiet adoption shows that the statutory limits do not prevent state and federal law enforcement from using the databanks and the DNA samples themselves in novel and potentially troubling ways.

As California’s familial searching protocol shows, the reason the government maintains the biological samples indefinitely is to allow it to conduct

¹⁹ *Id.* at 27.

²⁰ *Id.* (“Any offenders not eliminated by the Y-STR type comparison could be patrilineally related to the true perpetrator and will be candidates for further investigation and consideration as potential genetic relatives of the true perpetrator.”).

future analyses whenever it chooses to do so. If the actual samples were destroyed after they were initially analyzed and the profiled uploaded into CODIS, some of the privacy problems inherent in this program would be ameliorated. But, far from that, the government instead stores the physical sample forever, in the form of the original sample, the extracted DNA, and/or blood spot or buccal swab cards.

Moreover, although the statute does not require it, each of these re-analyses should require a separate justification. The purpose of such retesting of a sample is to obtain additional information from it, whether for familial-searching or other purposes. Thus, each re-analysis reveals private information that had been previously inaccessible and therefore constitutes a separate search. *See Skinner*, 489 U.S. at 616-17 (“The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests.”) (breath sample); *Kyllo*, 533 U.S. at 33 (“a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.”) (internal citation omitted). Under the Fourth Amendment, each new search of material in the government’s possession requires a separate justification, usually a search warrant. *Walter v. United States*, 447 U.S. 649, 654 (1980) (“an officer's authority to possess a package is distinct from his authority to examine its contents”) (plurality); *United States v. Licata*, 761 F.2d 537, 541 (9th

Cir. 1985) (quoting *Walter*); accord *United States v. Payton*, 573 F.3d 859, 861-62 (9th Cir. 2009) (search of lawfully seized computer not justified without separate warrant). But the DNA collection law places no limitations on the number of additional warrantless searches the government may perform on a sample once it has taken it, and, as discussed above, the government's purpose in maintaining the biological samples is to allow such additional searches.

Thus, the DNA testing procedure constitutes a more serious invasion of bodily integrity and especially privacy than did the blood-draw at issue in *Schmerber*. Persons merely arrested or charged with crimes therefore cannot constitutionally be required to provide such samples, absent probable cause coupled with exigent circumstances or a warrant.

A. The Benefits of Expanding CODIS to Include DNA Profiles from Persons like Mr. Pool do not Justify Overturning the *Schmerber* Rule

It is, of course, possible that DNA testing of persons who have not been convicted of a crime is so valuable to society that the forty-year-old *Schmerber* rule should be discarded so as to allow it. But the Supreme Court has long warned against expanding the “closely guarded” handful of exceptions to the usual Fourth Amendment rules, particularly when the searches are conducted by law enforcement or for primarily law-enforcement purposes. *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001); see *City of Indianapolis v. Edmond*, 531 U.S.

32, 40-41 (2000); *Flippo v. West Virginia*, 528 U.S. 11, 14 (1999) (rejecting any sort of exception for murder or other serious crimes to the Fourth Amendment warrant requirement) (per curiam); *Mincey v. Arizona*, 437 U.S. 385 (1978) (same). The nationwide Combined DNA Index System (CODIS) is administered by law enforcement and for law-enforcement purposes: CODIS is run by the FBI, 42 U.S.C. § 14132(a)(1)(B)(3); the DNA profiles in it are available to “criminal justice agencies,” *id.* § 14132(b)(3)(A); and the title of § 14132 is “Index to facilitate law enforcement exchange of DNA identification information.”²¹ The U.S Department of Justice, when it promulgated regulations for arrestee testing in late 2008, made perfectly clear that CODIS and arrestee testing are law-enforcement tools:

The design and legal rules governing the operation of CODIS reflect the system's function as a tool for law enforcement identification Positive biometric identification . . . by means of DNA profiles, facilitates the solution of crimes through database searches that match crime scene evidence to the biometric information that has been collected from individuals. Solving crimes by this means furthers the fundamental objectives of the criminal justice system, helping to bring the guilty to justice and protect the innocent, who might otherwise be wrongly suspected or accused, through the prompt and certain identification of the actual

²¹ “The title of a statute and the heading of a section are tools available for resolution of a doubt about the meaning of a statute.” *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quotation omitted).

perpetrators²². . . . [T]here is a vast class of crimes that can be solved through DNA matching that could not be solved in any comparable manner (or could not be solved at all) if the biometric identification information collected from individuals were limited to fingerprints.

In addition, as with taking fingerprints, collecting DNA samples at the time of arrest or at another early stage in the criminal justice process can prevent and deter subsequent criminal conduct--a benefit that may be lost if law enforcement agencies wait until conviction to collect DNA. Indeed, recognition of the added value of early DNA-sample collection in solving and preventing murders, rapes, and other crimes was a specific motivation for the enactment of the legislation that this rule implements.²³

It is thus indisputable that the primary purpose of CODIS, and the taking of DNA before conviction, is to facilitate the detection and solving of crimes. It is therefore inappropriate to create an exception to the Fourth Amendment warrant requirement to allow for DNA sampling from people who have not been convicted of a crime. *Ferguson*, 532 U.S. at 81 (2001) (“special needs” not applicable if “primary purpose” is law enforcement); *City of Indianapolis*, 531 U.S. at 40-41 (2000) (same). Nor can such sampling be justified, as it has been for convicted felons, on the basis that those subject to it have forfeited their privacy rights, since persons awaiting trial retain their privacy rights. *Compare United States v. Scott*,

²² As this passage shows, even if CODIS were truly useful in exonerating the innocent, this is still a law-enforcement purpose, because sorting the guilty from the innocent is a core law-enforcement function.

²³ DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932, 74933-34 (Dec. 10, 2008) (citations omitted).

450 F.3d 863, 873-74 (9th Cir. 2006) (persons awaiting trial have enforceable privacy rights) *with Samson v. California*, 547 U.S. 843 (2006) (convicted felons have virtually no privacy rights). Thus, upholding this type of DNA sampling would require creating a new exception to the warrant requirement based purely on policy grounds. Even if this were an appropriate approach to the privacy rights of persons who have not been convicted of any crime, it would not justify this testing program.

1. Taking and Databanking DNA from Persons not Convicted of Crime Is of Little Value for Combating Crime

Although DNA evidence and databanks have revolutionized the criminal-justice system, the benefits of adding more and more known samples²⁴ taken from a broader and broader range of persons, including innocent persons, is limited. Although DNA *testing* has served to free the innocent as well as to convict the guilty, the mass data-banking of DNA from people not convicted of crimes is not particularly helpful for either of these goals.

The databanking of DNA of people convicted of serious violent and sex crimes is indisputably useful for solving and preventing crime. However, expanding the database to include people merely accused of less serious crimes

²⁴ A known sample is one taken from an identified individual, as opposed to a forensic sample, which is collected from a crime scene.

brings little marginal return, because the databanks then include many samples from people who are innocent or who have committed only minor crimes where DNA evidence is rarely involved. In this regard, the experience in the United Kingdom, which has had an arrestee-testing program since 2004, is instructive. A 2006 report analyzed government statistics from the British Home Office and concluded that

it is the number of DNA profiles from crime scenes added to the [National DNA Database]—not the number of individuals' profiles retained—that largely determines the number of detections. This analysis is further confirmed by comparing the DNA-detection rate with those from previous years; this number has remained relatively constant for the years for which figures are available (38% in 2002/2003, 43% in 2003/2004 and 40% in 2004/2005), whereas the number of individuals' profiles kept in the NDNAD has expanded rapidly during this period (from 2 million in 2002/2003 to 3 million in 2004/2005). This implies that detections have increased since 1999 because more crime-scene DNA profiles have been loaded, not because there have been more detections per crime-scene DNA profile. If adding or keeping more DNA from individuals rather than from crime scenes were important, the DNA detection rate—the likelihood of making a detection—would have increased as the NDNAD expanded.²⁵

²⁵ Helen Wallace, *The UK National DNA Database: Balancing crime detection, human rights and privacy*, European Molecular Biology Organization Report 7(SI) (July 2006), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1490298>

The British program of retaining the DNA of persons arrested but not convicted was subsequently struck down by the European Court of Human Rights as violative of the European Convention on Human Rights. *Marper v. United Kingdom*, 48 E.H.R.R. 50, 158 N.L.J. 1755, 2008 WL 5044408 (2008).²⁶

2. Taking and Databanking DNA from Persons not Convicted of Crime Hurts Public Safety by Exacerbating Backlogs and Delays

Because including such samples to the database does not meaningfully increase the number of crimes solved, the overall effect may be, in fact, to *decrease* public safety by diverting laboratory and other resources away from the important work of collecting and promptly and thoroughly analyzing crime-scene DNA evidence as well as evidence from convicted violent offenders. The state and federal backlogs of both of these types evidence are enormous, and as more and more jurisdictions enact arrestee-testing laws the backlogs are increasing.²⁷ A March 2009 report by the U.S. Justice Department reports a total national backlog

²⁶ The full opinion is also available at <http://www.bailii.org/eu/cases/ECHR/2008/1581.html>.

²⁷ A report by the Justice Department concludes that the increase in incoming samples caused by arrestee testing could offset current attempts to reduce these backlogs and “estimate[d] that the expansion of legislation to include arrestees would increase the annual receipt of DNA samples by 223 percent for those states.” U.S. Department of Justice, *Audit of the Convicted Offender DNA Backlog Reduction Program* (March 2009) at 31-32. available at: <http://www.usdoj.gov/oig/reports/OJP/a0923/final.pdf>. See id. at 29-30 (discussing California backlog in light of arrestee testing).

of more than 700,000 samples.²⁸ At the end of July 2009 California alone reported a backlog of 60,815 samples in the state DNA lab, a figure that does not include the thousands of samples sitting in local crime labs throughout the state.²⁹

As a result of these backlogs, samples go untested for months or years, sometimes with disastrous consequences. According to the Justice Department's Office of the Inspector General, "16 percent of the state laboratories reported that they were aware of specific instances where additional crimes may have been committed by an offender while that offender's DNA sample was part of the backlog in their state."³⁰

A recent highly publicized case illustrates the horrible impact this can have. In Florida, a convicted felon who had provided a DNA sample before he was released from federal prison allegedly went on a spree of home-invasion attacks and rapes, leaving DNA evidence at the scene which was not matched to the offender because his profile was part of a federal backlog of 295,000 untested samples.³¹ The police collected crime-scene DNA on February 22, 2009, and if the

²⁸ *Id.* at 16.

²⁹ Monthly report available on <http://www.ag.ca.gov/bfs/pdf/Monthly.pdf>.

³⁰ U.S. Department of Justice, Audit of the Convicted Offender DNA Backlog Reduction Program (March 2009) at 6. available at <http://www.usdoj.gov/oig/reports/OJP/a0923/final.pdf>

³¹ Robert Napper / McClatchy Newspapers, "Did FBI delay of DNA test prolong Florida rape spree?" (October 7, 2009) available at

sample taken from the offender in prison had been promptly uploaded into CODIS he could quickly have been caught and jailed for violating his supervised release, since he was in contact with his federal probation officer. Because of the backlog, however, this never happened, and the rapist was not arrested until September, when his probation officer found him in possession of property stolen from some of the victims. Only then was his DNA sample analyzed and found to match evidence from the crime scenes.

In California a backlog of untested rape kits is also harming public safety. A March 2009 report by Human Rights Watch revealed that crime labs in Los Angeles County had 12,669 sex-assault kits that were awaiting analysis.³² The resulting backlogs in testing these kits had predictable consequences: hundreds of cases that could never be prosecuted because the statute of limitations expired before the kit was tested; increased trauma to rape victims because of the long delays between the crime and the apprehension of a suspect; and, at least one documented case where a serial rapist whose profile was already in CODIS attacked more victims while evidence that could have taken him off the street sat

http://www.bostonherald.com/news/national/south/view/20091007dna_backlog_kept_police_from_linking_felon_to_string_of_violent_crimes/srvc=home&position=recent

³² Human Rights Watch, *Testing Justice: The Rape Kit Backlog in Los Angeles City and County* p. 1 (March 2009).

on a shelf untested.³³ Although testing a complete rape kit costs more than does testing a single sample take from a buccal swab, the testing of thousands of samples from tens of thousands of arrestees consumes tax dollars that could instead be spent testing hundreds or thousands of samples from crime scenes.

3. Taking and Databanking DNA from Persons Not Convicted of Crime Does Not Serve to Exonerate the Innocent, to Establish the Identity of Arrestees, or to Supervise Persons Released Pending Trial

Finally, several of the other justifications often raised for testing persons not convicted of any crimes do not withstand scrutiny. First, although DNA *analysis* has been critical in exonerating the wrongly accused and convicted, this process rarely involves DNA databanks or compelled testing. DNA exoneration involves a comparison of two samples – a sample left by the perpetrator at the crime scene (*e.g.*, semen in a rape kit) and a sample taken from the wrongfully accused or convicted, usually at his request. If the DNA from the crime scene does not match the accused's DNA, that should end the matter, whether or not the process also results in the identification of the real culprit.³⁴ *E.g.*, *People v. Dodds*, 801 N.E.2d

³³ *Id.* 1-2, 3-4, 5-7.

³⁴ Of course, law enforcement may be more willing to admit they arrested or convicted the wrong person if they can say who the actual culprit was, but this is a public-relations, rather than logical, obstacle to exoneration. In any event, even when postconviction DNA testing does lead to a cold hit that proves that a different person was involved in the offense, the government may argue, sometimes successfully, that the conviction should stand. *See, e.g.*, *Grayson v.*

63, 71-72 (Ill. App. 2003) (discussing the significance of a post-conviction finding of a non-match); see *DNA Evidence as Newly Discovered Evidence Which Will Warrant Grant of New Trial or Other Postconviction Relief in Criminal Case*, 125 A.L.R.5th 497§ 4(a) (2005 and 2008 update) (collecting cases). Accordingly, the Innocence Project notes that of the “244 post-conviction DNA exonerations in the United States,” the true perpetrator has been identified (through DNA or other means) in only 104 of them.³⁵ In fact, the backlogs caused by testing arrestees and others for inclusion in CODIS may lead to delays in testing DNA voluntarily given by persons wrongfully accused or convicted, as in the case of a California man who sat in jail for six months on charges of sexually assaulting a college student before being cleared when his DNA did not match evidence taken from the victim.³⁶

Nor can DNA be used to supervise persons released on bail. Unlike a GPS device or electronic monitoring anklet, DNA cannot be used to track a person.

King, 460 F.3d 1328, 1339 (11th Cir. 2006) (“The requested DNA tests, even if exculpatory, would simply indicate that a third man was involved and had raped Mrs. Orr and would not exclude Grayson's involvement in the capital murder, much less definitively show his innocence.”).

³⁵ The Innocence Project, Facts on Post-Conviction DNA Exonerations, available at <http://www.innocenceproject.org/Content/351.php>.

³⁶ L.A. Now, “DNA evidence clears man accused of attacking Santa Monica College student,” available at <http://latimesblogs.latimes.com/lanow/2009/10/man-accused-of-attacking-santa-monica-college-student-cleared-with-dna-evidence.html>

Certainly, if the government collected DNA from a crime scene, and that DNA turned out to match the DNA of a person released pre-trial, that would connect that person to the crime. However, this is simply another way of saying that including the person's DNA in CODIS may help the government's generalized interest in fighting crime. Although this interest is an important one it cannot justify a whole-scale requirement that all persons released on bail submit to a search. *United States v. Scott*, 450 F.3d 863, 869-70 (9th Cir. 2006).

Finally, taking DNA from persons arrested or released pending trial fails to advance any governmental interest in determining the identity of persons that have been arrested. The actual process of DNA analysis of a known sample takes a minimum of twenty hours of laboratory work, which is usually spread out over several days.³⁷ Of course, samples must also be transported to the lab for testing. Because of federal and state backlogs the time from taking a sample to getting an analysis, in reality, is measured in months.

In contrast, the FBI guarantees that a request for a fingerprint identification of an arrestee using the nationwide Automated Fingerprint Identification System will be processed and sent back to the requesting agency "within two hours or less"

³⁷ Napper, *supra* n.31.

of the FBI's electronic receipt of a scanned print.³⁸ The FBI further promises that fingerprint comparison "offers[s] an infallible means of personal identification."³⁹

Because this type of fingerprint identification is considered so reliable and efficient, the government does not even take DNA from arrestees if they have already provided a sample, meaning that it must first positively identify them (though fingerprint comparison) before determining that they need not provide a new sample.⁴⁰ Once a DNA sample is taken and analyzed, there is not even any procedure for comparing that sample to the other offender samples in CODIS (it is only compared with crime scene samples in an attempt to link the new sample to crime). Thus, taking DNA samples has absolutely no relationship to the goal of ascertaining the true identify of arrestees or persons to be released pending trial.

³⁸ Federal Bureau of Investigation, document captioned "Fingerprint Identification," at 2, available at <http://www.fbi.gov/hq/cjisd/ident.pdf>.

³⁹ Federal Bureau of Investigation, Fingerprint Identification: an Overview, available at <http://www.fbi.gov/hq/cjisd/ident.htm> ("Fingerprints offer an infallible means of personal identification.").

⁴⁰ "[T]o the extent that individuals entering the system through arrest or detention previously have had DNA samples collected . . . repetitive collection is not required." 73 FR 74932, 74941 (Dec. 10 2008); see 28 C.F.R. § 28.12(e)(2). The California protocol similarly states that DNA will not be taken from persons until after they have been identified through fingerprint comparison and found not to have given samples. California Department of Justice Information Bulletin No. 08-BFS-02, "Expansion of State's DNA Data Bank Program on January 1, 2009: Collection of DNA Samples from All Adults Arrested for Any Felony Offense" at 2, 4 (12/15/08), available at http://ag.ca.gov/bfs/pdf/69IB_121508.pdf.

IV. CONCLUSION

The mandatory seizure and databanking of DNA from persons awaiting trial violates well-established Fourth Amendment law, and the societal interests served by such collection do not warrant creating a new, special exception to this precedent. This Court should therefore hold that requiring Mr. Pool to agree to provide a DNA sample as a condition of pretrial release would violate the Fourth Amendment.

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Respectfully submitted,

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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 October 15, 2009.

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

I further certify that I have caused to be mailed a copy of the foregoing document by First-Class U.S. Mail and electronic mail to the following:

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