IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROLANDO GALLEGO Defendant and Appellant	No. C061749

Sacramento County Superior Court Case No. 06F06085
The Honorable Michael W. Sweet, Judge of the Superior Court

APPLICATION OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA TO FILE AMICUS CURIAE BRIEF and AMICUS BRIEF IN SUPPORT OF APPELLANT ROLANDO GALLEGO

MICHAEL T. RISHER (SBN 191627)
ACLU FOUNDATION OF
NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, California 94111
Telephone: 415/621-2493
Facsimile: 415/255-8437
E-Mail: mrisher@aclunc.org

ATTORNEY FOR *AMICUS CURIAE*

APPLICATION TO FILE AMICUS CURIAE BRIEF

The American Civil Liberties Union of Northern California respectfully requests leave to file the attached amicus brief in support of Defendant Rolando Gallego under California Rules of Court 8.200(c) and 8.360(f). The brief addresses only one of the several issues that Mr. Gallego raises on appeal: whether the analysis of the DNA retrieved from a cigarette butt he discarded constituted a Fourth Amendment search.

Interest 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 use of DNA in the criminal justice system. 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 California's DNA arrestee collection laws. *Weber v. Lockyer*, 365 F. Supp. 2d 1119 (N.D. Cal. 2005); *Haskell v. Brown*, 677 F. Supp. 2d 1187, 1191 (N.D.Cal. 2009) (appeal pending). As a result of this advocacy, the ACLU-NC has developed a perspective on the privacy interests and legal issues involved in the police collection and analysis of DNA which may be helpful in resolving this appeal. The ACLU-NC therefore requests leave to present the attached amicus brief.

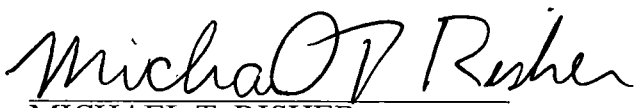
---

[1] Available at http://www.aclu.org/crimjustice/gen/35392leg20080519.html.

Under Rule of Court 8.200(c)(3), I certify that no party or counsel for any party in this matter participated in authoring this brief, and that nobody outside of the ACLU-NC made any monetary contribution to fund the preparation or filing of this brief.

Dated: May 5, 2010

Respectfully submitted,



MICHAEL T. RISHER
ACLU FOUNDATION OF
NORTHERN CALIFORNIA

Attorney for *Amicus*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

CODES AND STATUTES

MISCELLANEOUS

I. INTRODUCTION

This case raises an important issue under the Fourth Amendment: whether we retain a reasonable expectation of privacy in the genetic material that we continuously—and unavoidably—shed from our bodies as we move throughout the world during our daily lives. If we have no such privacy expectation in this material then the Fourth Amendment places absolutely no limits on when, or against whom, the police can troll for genetic material and what they can do with the DNA that they recover. As discussed below, amicus believes that we do continue to have an expectation of privacy in genetic material that we shed, just as we have an expectation of privacy that protects us from government monitoring of our cellular-phone calls and the police use of thermal-imaging devices to invade the privacy of the home. That new technologies allow the police to gather, analyze, and make use of information about us that we unavoidably disclose to all who can interpret it – cell-phone signals, the heat that emanates from our homes, the DNA that we slough off our bodies every day – does not mean that the Fourth Amendment allows them to do so without limit. To the contrary, the purpose of the Fourth Amendment is to place limits – procedural as well as substantive – on the authority of the police to use such investigatory techniques. As with wiretapping and thermal imaging, surreptitious genetic testing infringes upon protected privacy interests and must there be considered a search under the Fourth Amendment.

II. DISCUSSION

A. Surreptitious DNA Collection Raises Serious Privacy Concerns

DNA is our genetic blueprint, and with every passing year science learns how to unlock its secrets to discover more and more about us. "DNA

samples may reveal private information regarding familial lineage and predisposition to over four thousand types of genetic conditions and diseases; they may also identify genetic markers for traits including aggression, sexual orientation, substance addiction, and criminal tendencies." *United States v. Mitchell*, --- F. Supp.2d ----, 2009 WL 5551383 at *10 (W.D. PA. 2009) (appeal pending) (citing Leigh M. Harlan, *When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples*, 54 Duke L.J. 179, 189 (2004)); *see United States v. Kriesel*, 508 F.3d 941, 948 (9th Cir. 2007). Thus, "[o]ne can think of few subject areas more personal and more likely to implicate privacy interests than that of one's... genetic make-up." *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269 (9th Cir. 1998).

These privacy concerns are magnified where collection is done in a law-enforcement context, rather than an informed, consensual, medical one. As Congress recognized when it passed the Genetic Information Nondiscrimination Act of 2008, Americans want to use 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.[2] 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% reported that they had little or no trust in law enforcement having access to their this information.[3] In another Johns Hopkins study, "respondents were

---

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

[3] Genetics and Public Policy Center , *U.S. Public Opinion on Uses of Genetic Information and Genetic Discrimination* at 2 (2007), available at http://www.dnapolicy.org/resources/GINAPublic_Opinion_Genetic_Inform

consistently more worried" about government, as opposed to private, access to their genetic material, and "84% felt that it would be important to have a law protecting [genetic] research information from law-enforcement officials."[4]

It is thus not surprising that California law prohibits the government from using DNA samples collected from convicted felons (or from arrestees) for anything other than "identification purposes." Penal Code § 295.1(a); *see* 42 U.S.C. § 14135e (federal limitations). The government has argued in other cases that these statutory limitations serve to ameliorate the privacy concerns inherent in governmental DNA collection, and some courts have agreed. *See Haskell v. Brown*, 677 F. Supp. 2d 1187, 1191 (N.D.Cal. 2009) (appeal pending); *see also Kriesel*, 508 F.3d at 948.

But because there are no California or federal statutes that address the type of surreptitious DNA sampling done in this case, there are no specific statutory limits on what the police can do with such samples. As far as amicus is aware, the only laws that would in any way limit what the government can do with surreptitiously collected samples are the Genetic Information Nondiscrimination Act of 2008, *supra* note 2, which would prohibit their use in making employment or insurance decisions, and Penal Code § 297(c)(1), which would require that such profiles be removed from the CODIS DNA databank after two years if the person is no longer a suspect. Otherwise, the police are apparently free to conduct any analysis of the sample to discover any genetic information that they feel might be useful. Moreover, they can store the actual biological samples indefinitely

---

ation_Discrimination.pdf; *see generally* E.W. Clayton, *Ethical, legal, and social implications of genomic medicine*. N. Engl. J. Med. 349, 2003.

[4] Kaufaman, D., *et al. Public Opinion About The Importance of Privacy in Biobank Research*, 85 American Journal of Human Genetics Vol. 5, pp. 643-654, at 649 (2009).

for later, more sophisticated analysis. If analysis of these DNA samples is not a search under the Fourth Amendment, the government can lawfully take a surreptitious sample from anybody, based on a hunch or for no reason at all, and analyze that sample to determine anything about the person whose DNA it is that technology can reveal. As discussed below, this is precisely the type of police power to invade our privacy that the Fourth Amendment is meant to regulate.

B. The Analysis of DNA Collected from a Known Person is a Search under the Fourth Amendment, Whether it is Collected Directly from that Person or from DNA that Person has Shed

"[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (quoting *Katz v. United States*, 389 U.S. 347 (1967)).[5] Although some cases use terms like "abandonment" and "standing" in analyzing this issue, those terms are often more confusing than helpful, because they are imported from other areas of the law where they have different meanings. *See People v. Stewart*, 113 Cal. App. 4th 242, 249 (2003); *In re Baraka H.*, 6 Cal. App. 4th 1039, 1048 (1992). What determines whether a particular government action is a Fourth Amendment search has nothing to do with traditional standing or property-law analysis. *Id*; *Stewart*, 113 Cal. App. 4th at 249. Nor can cases involving new technologies be decided using a "mechanical interpretation of the Fourth Amendment." *Kyllo*, 533 U.S. at 35. Instead, the determinative question is "whether the disputed search and seizure has

[5] Although *Kyllo* deals with the privacy of the home, our bodies, like our homes, must be "afforded the most stringent Fourth Amendment protection." *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001). Thus, with our genetic makeup, as with our homes, "all details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37.

infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978); *Stewart*, 113 Cal. App. 4th at 249 (citing *Rakas*). Government actions that infringe such interests constitute searches under the Fourth Amendment, which the government must justify. *People v. Camacho*, 23 Cal.4th 824, 830 (2000) ("Because the officers lacked a warrant, the People bore the burden of establishing either that no search occurred, or that the search undertaken by the officers was justified by some exception to the warrant requirement.") (citations omitted).

It is clear how these principles apply to compulsory DNA collection, where the government demands that an individual provide a sample: every court to have considered the issue has held that compulsory tissue sampling for the purpose of DNA analysis is a search under the Fourth Amendment. *See, e.g., People v. Travis*, 139 Cal. App. 4th 1271, 1281 (2006) (recognizing "the established principle that the compulsory, nonconsensual extraction of DNA samples constitutes a search and seizure under the Fourth Amendment"); *People v. King*, 82 Cal. App. 4th 1363, 1370-71 (2000); *Kriesel*, 508 F.3d at 946 n.6. This result is mandated by the Supreme Court's recognition that the government conducts a search whenever it requires a person to provide bodily tissue or fluids for the purpose of analyzing that material. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) (breath and urine tests for drugs constitute searches.

Importantly, it is also clear in such cases that a second[6] search occurs when the government later conducts DNA analysis of the seized body

[6] Analytically, it might be more accurate to state that the initial taking of the bodily tissue or fluid is just that – a seizure, rather than a search, and that the analysis itself is the only search that occurs, because that analysis is

tissue, because the "ensuing chemical analysis of such [DNA] samples to obtain physiological data, implicate[s] Fourth Amendment privacy interests." *King*, 82 Cal. App. 4th at 1370-71 (citing *Skinner,* 489 U.S. at 616-17); *Norman-Bloodsaw*, 135 F.3d at 1269 ("These tests may also be viewed as searches in violation of the Fourth Amendment ...."); *United States v. Davis*, 657 F. Supp.2d 630, 644 (D.Md. 2009) ("the extraction of blood from Davis' clothing and the subsequent chemical analysis of his DNA profile are both searches subject to scrutiny under the Fourth Amendment"). The unaided examination of a vial of blood or a bit of saliva cannot reveal anything about the donor's genetic makeup, any more than mere visual observation of a urine sample can disclose whether it will test positive for drugs. Both types of bodily fluids yield their secrets only upon laboratory analysis, and when the police conduct a scientific test of a bodily fluid or tissue, that test reveals what had been private; it therefore constitutes a separate search under the Fourth Amendment. *See Skinner,* 489 U.S. at 616.[7]

---

what reveals private information. The cases, however, refer to the first step as a search.

[7] This is consistent with a long line of precedent that makes it clear that the authority of the police to possess, detain, and examine the outside of an item does not mean that they can lawfully probe, manipulate, or use technology to reveal more information about that item. For example, although the authorities can detain and examine the outside of a letter or mailed package, they cannot open it without a warrant. *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970); *see United States v. Forrester*, 512 F.3d 500, 511 (9th Cir. 2008). Nor can they use an x-ray machine to examine its contents it without authorization to search. *United States v. Young*, 350 F.3d 1302, 1307 n.1 (11th Cir. 2003). Likewise, the police can examine the outside of a bag, but when they investigate its contents by squeezing or otherwise manipulating it they have intruded into a protected privacy interest and violate the Fourth Amendment. *Bond v. United States*, 529 U.S. 334 (2000).

It is thus clear that had the government taken a DNA sample directly from Mr. Gallegos, the later analysis of that sample would have constituted a search, separate from any search occasioned by the initial seizure of the sample. The question is whether the fact that Mr. Gallego discarded the cigarette butt containing his DNA changes this. The answer is no.

First, it does not matter that Mr. Gallego clearly intended to relinquish or abandon any property interest in the cigarette butt when he threw it aside.[8] "Abandonment here [*i.e.*, for Fourth Amendment purposes] is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." *In re Baraka H.*, 6 Cal. App. 4th 1039, 1048 (1992) (citations omitted); *National Ass'n of Letter Carriers v. United States Postal Service*, 604 F. Supp.2d 665, 674 (S.D.N.Y. 2004) ("a reasonable expectation of privacy may still exist without a property interest"). That we have discarded or voided a bodily fluid does not mean that we have lost our reasonable expectation of privacy in it. For example, in *Ferguson v. City of Charleston*, the Supreme Court invalidated a program under which nurses at a government hospital collected and tested for drugs urine samples from pregnant women. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). The government did not compel the women to provide the samples; it simply

[8] It is irrelevant whether Mr. Gallego threw the object with his DNA on it into a proper trash receptacle, whether he littered the street with it, or whether he left his DNA on a glass at a restaurant, because the police would have been as justified under the Fourth Amendment in retrieving it from any of these locations. *California v. Greenwood*, 486 U.S. 35 (1988). If the Fourth Amendment allows the police actions that occurred in this case, it allows the police to do the same with any object to which they have access, such as from residential garbage or from a glass retrieved from a restaurant table after the patron has left. *See People v. Juan*, 175 Cal. App. 3d 1064, 1069 (1985) (item left in restaurant).

failed to tell them that the samples would be tested for illicit drugs and that the results would be given to the police. *See Id.* at 77 & n.11. The Supreme Court nonetheless held that the government's actions constituted a search, and one that violated the Fourth Amendment. *Id.* at 85-86.

As the Court's holding in *Ferguson* demonstrates, that we necessarily "discard" various bodily fluids or tissues (and thereby lose any property interest in them) does not mean that we thereby forfeit our reasonable expectation of privacy in the information that can be extracted from those materials through scientific analysis. As one federal court explained in a case involving DNA analysis of blood found on clothing that a suspect had given to hospital personnel when he was admitted,

> Nor does the Court necessarily agree that conscious disposal of an item, or unconscious shedding of hair, saliva, or dermal cells, reasonably supports the conclusion that an individual has manifested an intent to abandon one's privacy interest in the information that can be gleaned from that item or tissue by DNA analysis....
>
> A colorable argument could certainly be made that a reasonable societal expectation exists that law enforcement officials will not follow individuals around, waiting for an opportunity to collect and analyze their DNA without their knowledge or consent.
>
> *Davis*, 657 F. Supp.2d at 650.

The court went on to hold that the analysis of the blood was a Fourth Amendment search. *Id.* at 644.

The conclusion that the Fourth Amendment constrains the government's authority to analyze surreptitiously obtained DNA is consistent with the longstanding rule that, although we forfeit any reasonable expectation of privacy in information that we intentionally expose to the world at large, the mere fact that the police, or others, may be able to use modern technology to discover information about us does not destroy our reasonable expectations of privacy in that information. We

reasonably expect that our telephone calls will remain safe from government or private surveillance, even though we know that phone lines can be tapped and that mobile phone conversations can be intercepted by anybody with the with a signal decoder. *See Katz v. United States*, 389 U.S. 347 (1967); *see also Bartnicki v. Vopper*, 532 U.S. 514, 523 N.6 (2001) ("calls placed on cell and cordless phones can be easily intercepted"). Similarly, that technological advances have given the police the *ability* to detect and analyze the heat that emanates from our homes does not mean that the Fourth Amendment gives them the *authority* to do so. *Kyllo*, 533 U.S. 27. Both of these investigatory techniques are similar to surreptitious DNA sampling in that the police can conduct their investigation from a place where they are lawfully present, without taking anything tangible from us or physically intruding into a protected space. *See id.* at 35.[9] The electromagnetic or sound waves that the government is intercepting is just as "abandoned" and exposed to public view as is the DNA that we shed as we go through life. But the Court has nonetheless held that because each of these surveillance activities has the potential to intrude into our privacy, they are all searches, subject to the constraints of the Fourth Amendment. *Id.* at 40; *Katz*, 389 U.S. at 359. The analysis of DNA in this case should be treated similarly.

Such treatment is particularly appropriate because the technology used by the government in this case is so powerful in its ability to uncover information from such minute quantities of DNA. When the police employ

---

[9] As the Court put it, "just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house-and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth." *Kyllo*, 533 U.S. at 35.

new investigative technologies to uncover information about us, the courts must act to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted," particularly when those technologies are not in general use. *Kyllo*, 533 U.S. at 34. The Court first recognized this more than 40 years ago in *Katz*, when it overruled its prior precedent and held that the use of a concealed listening device could constitute a search, even when there had been no physical trespass. *Katz*, 389 U.S. at 351-53. This Court has applied *Katz* to hold that using high-powered binoculars to observe into an office building that could not be seen by the naked eye was also a search, finding no distinction between aiding one sense or aiding another. *People v. Arno*, 90 Cal.App.3d 505, 511 (1979). More recently, *Kyllo* applied similar reasoning when it held that the use of a thermal-imaging device to detect the head emanating from a house was a search. *Kyllo*, 533 U.S. at 40. Underlying all of these cases is an understanding that when the government uses technology, particularly technology that is not available to the general public, to detect what would otherwise go unseen, it thereby conducts a search, subject to the Fourth Amendment's reasonableness requirement. *See Arno*, 90 Cal.App.3d at 511-512 ("[T]he reasonable expectation of privacy extends to that which cannot be seen by the naked eye or heard by the unaided ear.").

Similar principles apply when the police resort to tactics that, although they do not involve advanced technology, go beyond recognized social norms. Thus, when we travel, the police need a warrant before they can squeeze our luggage to see what it in it, because a "passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." *Bond v. United States*, 529 U.S. 334, 338-39 (2000). They similarly need justification to enter our side yards to look into our houses, because we as a people "would be surprised, indeed startled" by

such behavior. *People v. Camacho*, 23 Cal.4th 824, 836 (2000). Again, that the police *can* learn information through such investigatory techniques does not mean that they *may* do so without satisfying the Fourth Amendment's prerequisites.

These principles demonstrate that a person does not forfeit his reasonable expectation of privacy in his genetic material when he discards a cigarette butt. Although he may well expect that somebody will take the cigarette butt and dispose of it properly—or even that somebody might pick it up and look at it and smoke the rest of it—our society does not expect that discarded butt to be subjected to sophisticated DNA analysis, any more than we expect that our homes will be subject to thermal imaging or close scrutiny by the police, our phones will be tapped, or that our luggage may be squeezed to determine its contents. We as a people "would be surprised, indeed startled" to find that the police had done this without any judicial oversight, statutory authorization, or even any individualized suspicion to think that we had done something wrong. This is particularly true because there is no reasonable way for us to avoid such an intrusion into our genetic privacy, because we are continually shedding skin cells at the rate of 30,000-40,000 per minute.[10] Since we cannot avoid depositing DNA wherever we go, our doing so cannot operate to waive our expectation of privacy. *See Camacho*, 23 Cal.4th at 835 (Californians need not "erect an impregnable barrier" against intrusion to maintain reasonable expectation of privacy). If analysis of our genetic blueprint is not even a search, then the police may take seize and analyze our genetic material without limit and

---

[10] According to Encyclopedia Britannica, the human body "shed[s] 30,000 to 40,000 skin cells every minute," which translates to "about nine pounds of dead skin cells every year." Britannica Encyclopedia Online, *The skin you're in*, (2009), available at http://www.britannica.com/bps/additionalcontent/18/36011874/The-Skin-Youre-In(as of May 3, 2010).

without any individualized suspicion. Such an unprecedented expansion of the government's authority to intrude into our privacy would violate the fundamental values of the Fourth Amendment.

C. Requiring the Police to Justify Surreptitious Collection and Analysis of our DNA will not Unreasonably Hamper Law Enforcement

Recognizing that the Fourth Amendment has a role to play in regulating this investigatory technique will not stand in the way of legitimate law-enforcement investigations. First, the Fourth Amendment prohibits only those searches that are unreasonable. If the police have probable cause to believe a person has committed a crime where DNA evidence was found, they can get a warrant either to require the person to submit to DNA sampling, or a warrant to test an object containing that person's DNA that they have seized, just as they would get a warrant to search a package they had lawfully seized. *See United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970). In an emergency no warrant is required. *See Camacho*, 23 Cal.4th. at 836. *Cf. Davis*, 657 F. Supp.2d at 650-54 (applying general balancing test). Holding that this type of investigative technique constitutes a search does not mean that it is illegal; it means only that the police must act reasonably. *See Skinner*, 489 U.S. at 618-19 ("To hold that the Fourth Amendment is applicable ... is only to begin the inquiry into the standards governing such intrusions.").

Second, this case has no bearing on the authority of the police to take fingerprints, either directly from a person or from a crime scene. Fingerprinting raises none of the privacy concerns that DNA does, because "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." *Kriesel*, 508 F.3d at 947-48 (citation omitted). Indeed, the Supreme Court has suggested that

fingerprinting a person is not even a Fourth Amendment search that requires probable cause. *See Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (taking arrestees fingernail scrapings is a search but fingerprinting is not); *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (suggesting that reasonable suspicion may justify a detention for fingerprinting). In contrast, as discussed above, the law is clear that the government's seizure and analysis of an individual's DNA is a search. In addition, fingerprinting is not a new technology; it has been an established and accepted part of our criminal-justice system for nearly a century. Protecting genetic privacy will simply not affect the government's longstanding authority to detect and use fingerprint evidence.

Third, that it constitutes a search when the police take a surreptitious DNA sample from a known person does not imply that it is also a search when they collect and test DNA from a crime scene, because analyzing the DNA of a specific, known person is quite different from analyzing crime-scene DNA in an attempt to determine whose DNA it is. The analysis of DNA taken from a known individual implicates that person's genetic privacy in the same way as looking at a medical record that includes the patient's name. In contrast, when the police recover and analyze DNA from a crime scene, they do not know to whom it belongs, at least not until after that analysis is completed and the sample is run against the database and a match obtained. The genetic information obtained from that analysis cannot be connected to any particular person. Crime-scene DNA is like a medical file with the patient's name and identifying information redacted: although medical information is inherently sensitive, such information

implicates no privacy interests unless it can be linked to a specific individual.[11]

In a similar vein, because the "Fourth Amendment protects people, not places" *Katz*, 389 U.S. at 351, it is more restrictive of police investigatory tactics directed at particular individuals – their bodies, their effects, their homes – than of investigations of a crime scene. *See Davis*, 657 F. Supp.2d at 650 ("the very fact that a given area is a crime scene changes the balance of interests relevant to a Fourth Amendment analysis of crime scene evidence."). Testing DNA evidence from a crime scene to see whether it leads to a suspect presents little danger of arbitrary or discriminatory law enforcement, because the police cannot know at whom that evidence will point until after they have analyzed it. In contrast, following an individual and surreptitiously taking and analyzing his DNA creates the danger of arbitrary or discriminatory law enforcement—that the police will focus on unpopular or vaguely suspect individuals or groups in the hopes that analyzing their DNA will connect them to some crime. Giving the police the unlimited authority to take DNA from an identified, targeted person – through whatever means – threatens the Fourth Amendment's privacy values far more than does allowing them to analyze DNA evidence taken from a crime scene in an attempt to identify a suspect, and should therefore be subject to the Fourth Amendment.

---

[11] That the forensic sample may later be matched to an individual does not materially change this, because that will only occur when the police already have a DNA sample and have uploaded that sample for inclusion in CODIS. Once the government has a copy of a person's DNA profile in CODIS, the privacy infringement occasioned by its obtaining a second, identical sample from a crime scene is much less serious.

III. CONCLUSION

Like the radio waves that our cell phones broadcast or the heat emanating from our houses, the DNA we slough off as we go about our daily lives can now be analyzed to yield information in ways that would have been inconceivable just a few decades ago. Some of this information is extremely sensitive – medical information, information about potentially unknown familial relationships, information about behavioral tendencies. Some is more pedestrian. But the same can be said about all searches: a search of a car may yield nothing but the registration and the owner's manual; a peek through the window of a house will often reveal nothing that has not already been seen by the neighbors and the meter reader, and a thermal scan of that same house reveals even less. The Fourth Amendment nonetheless requires that the police justify *all* such searches, even those that yield nothing personal or those that invade only areas where we have little privacy, such as our cars. It cannot be that the Fourth Amendment provides less protection for our genetic makeup than it does to the contents of our gloveboxes. To hold that that government analysis of our DNA is not a search, and is therefore not subject to any constraints under the Fourth Amendment, would leave our genetic privacy "at the mercy of advancing technology." *Kyllo*, 533 U.S. at 35.

\\

For these reasons, government analysis of DNA taken from a known person constitutes a search for the purposes of the Fourth Amendment.

Dated: May 5, 2010

Respectfully submitted,

MICHAEL T. RISHER
ACLU FOUNDATION OF
NORTHERN CALIFORNIA

By _____
Michael T. Risher

Attorney for *Amicus*

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of the Court 8.204(c)(1), I certify that the text in the attached Amicus Brief was prepared in Microsoft Word, is proportionally spaces, and contains 5011 words, including footnotes but not the caption, the table of contents, the table of authorities, or the application.

Dated: May 5, 2010

Respectfully submitted,

MICHAEL T. RISHER
ACLU FOUNDATION OF
NORTHERN CALIFORNIA

By _____
Michael T. Risher

Attorney for *Amici*

PROOF OF SERVICE BY U.S. MAIL

People v. Rolando Gallego

Case No C061749

I, Nigar Shaikh, declare that I am employed in the City and County of San Francisco, over the age of 18 years, and not a party to the within action or cause. My business address is 39 Drumm St., San Francisco, CA 94111. On May 5, 2010, I served a copy of the attached:

APPLICATION OF AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA TO FILE AMICUS CURIAE BRIEF and AMICUS BRIEF IN SUPPORT OF APPELLANT ROLANDO GALLEGO

on each of the following by placing true copies in a sealed envelope with postage thereon fully prepaid in our mail basket for pickup this day at San Francisco, California, addressed as follows:

Ralph H. Goldsen
Attorney at Law
5662 Calle Real #389
Goleta, CA 93117

Rolando N. Gallego G-61233
HDSP A-2-223
P.O. Box 3030
Susanville, CA 96127-3030

Sue Karlton
Deputy Public Defender
700 H Street, Suite 0270
Sacramento, CA 95814-1398

Central Cal. Appellate Program
2407 J Street, Suite 301
Sacramento, CA 95816-4736

DDA Chris Ore
Office of District Attorney
901 G Street
Sacramento, CA 95814-1398

Hon. Michael W. Sweet, Judge
c/o Clerk, Superior Court
720 9th Street
Sacramento, CA 95814-1398

Office of Attorney General
P.O. Box 944255
Sacramento, CA 94244-1559
Attn: Daniel Bernstein,
Deputy Attorney General

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 5, 2010 at San Francisco, California.

_____

Nigar Shaikh