No. 10-15152

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELIZABETH AIDA HASKELL, REGINALD ENTO, JEFFREY PATRICK LYONS, JR., and AAKASH DESAI, on behalf of themselves and others similarly situated,
Plaintiffs-Appellants,

v.

EDMUND G. BROWN, JR., Attorney General of California; EVA STEINBERGER, Assistant Bureau Chief for DNA Programs, California Department of Justice,
Defendants-Appellees.

On Appeal From The United States District Court
For The Northern District of California
Honorable Charles R. Breyer, United States District Judge
U.S. D.C. No. C-09-04779 CRB

JOINT BRIEF OF FEDERAL DEFENDER OF THE EASTERN AND SOUTHERN DISTRICTS OF CALIFORNIA, NACDL, AND CACJ In Support of Plaintiffs-Appellants and Urging Reversal of the Underlying Judgment

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TABLE OF AUTHORITIES

FEDERAL CASES

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Chimel v. California,
395 U.S. 752 (1969) 14

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Friedman v. Boucher,
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Gouled v. United States,
255 U.S. 298 (1921) 8

Olmstead v. United States,
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Safford Unified Sch. District #1 v. Redding,
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United States v. Kincade,
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United States v. Scott,
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Virginia v. Moore,
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Weeks v. United States,
232 U.S. 383 (1914) 12

Weems v. United States,
217 U.S. 349 (1910) 7

STATE CASES

Birotte v. Superior Court,
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DOCKETED CASES

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United States v. Anderson
Cr.S. 09-264-KJM (E.D. Cal.) 11

United States v. Heal
Cr.S. 09-492-DAD (E.D. Cal.) 11

United States v. Kershaw
Cr.S. 09-493-DAD (E.D. Cal.) 11

United States v. Ponce,
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United States v. Pool,
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§ 261.58(i) 10

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Title 38 Code of Federal Regulations

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U.S. Const. amend. IV 6

STATE STATUTES

California Penal Code

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MISCELLANEOUS

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 23

Ralph Blumenthal, In Texas, Oversight for Crime Labs is Urged, N.Y. Times, Jan. 5, 2005, at A18 20

Jeff Coen & Carlos Sadovi, Crime Lab Botched DNA Tests, State Says, Chi. Trib., Aug. 19, 2005, at C1 21

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 22

DNA Testing Mistakes at the State Patrol Crime Labs, Seattle Post-Intelligencer, July 22, 2004 21

Robert E. Kessler, Policing the Internet's Streets, Newsday, Jan. 13, 2009 at A24 18

Teresa Mask, How Jurors See DNA Evidence May Decide Unsolved Killing: 1969 Slaying Trial Continues Today, Detroit Free Press, July 19, 2005 19

Keith Matheny, Supervisor Accused of Passing Off DNA Test, Traverse City Record-Eagle, Dec. 19, 2004 21

Jennifer L. Mnookin, Fingerprint Evidence in an Age of DNA Profiling, 67 Brook. L. Rev. 13, 49-50 (2001) 19

Rick Orlov, Lab Used by LAPD Falsified DNA Data, L.A. Daily News, Nov. 19, 2004, at N1 21

Keith Paul, Audit Calls for Changes in Police DNA Lab, Las Vegas Sun, May, 23, 2002, at 1 19

Maurice Possley, Steve Mills & Flynn McRoberts, Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S., Chi. Trib., Oct. 21, 2004, at C1 20

Glenn Puit, Police Forensics: DNA Mix-up Prompts Audit at Lab, Las Vegas Review-J., Apr. 19, 2002, at 1B 21

Christine Rosen, Liberty, Privacy, and DNA Databases, The New Atlantis (Spring 2003) 18

Vic Ryckaert, Judge Asked to Halt DNA Retests: Crime Lab Less Than Candid About Cases Under Review, Attorney Says, The Indianapolis Star, Aug. 13, 2003, at 1B 21

Maryann Spoto, Murder, Rape Charges Dropped Due to Botched DNA Evidence, Star-Ledger (Newark), Feb. 7, 2006, at 28 19

Annie Sweeney & Frank Main, Botched DNA Report Falsely Implicates Woman, Chi. Sun-Times, Nov. 8, 2004, at 18 19

William C. Thompson, Tarnish on the "Gold Standard": Understanding Recent Problems in Forensic DNA Testing, The Champion, Jan./Feb. 2006, at 10-12 18

Richard Willing, Mueller Defends Crime Lab After Questionable DNA Tests, USA Today, May 1, 2003, at 3A 20

Michael Risher, Racial Disparities in Databanking of DNA Profiles at 3-4 (Council for Responsible Genetics 2009), available at: http://www.councilforresponsiblegenetics.org/page Documents/BBIQ0EKC20.pdf 4

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 17

Kaufaman, D., *et al*. *Public Opinion About The Importance of Privacy in Biobank Research*, __ American Journal of Human Genetics, __ (2009) (forthcoming) 17

Eric M. Weiss, Consultant Breached FBI's Computers, Wash. Post, July 6, 2006 at A5 (consultant cracked FBI's classified computer system) 18

U.S. Department of Justice, Office of the Inspector General, Audit Division, Combined DNA Index System Operational and Laboratory Vulnerabilities, Audit Report 06-32, May 2006(www.justice.gov/oig/reports /FBI/a0632/final.pdf). 18

Erin Murphy, The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence, 95 Calif. L. Rev. 721, 755 n.155 (2007) 19

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 22

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 22

I.

INTERESTS OF AMICI

The Federal and Community Public Defenders in the Eastern and Southern Districts of California represent indigent defendants in the California federal courts in the Ninth Circuit pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. The Federal Defender's Office of the Eastern District of California is defense counsel in United States v. Pool, C.A. No. 09-10303, a case currently pending in this Court raising the issue whether the federal statutes providing for arrestee DNA testing are constitutional. These organizations have a unique perspective to offer the Court concerning their clients' privacy rights and their interests in protecting their DNA from being taken, profiled, searched, and placed in a government database.[1]

California Attorneys for Criminal Justice is a statewide organization of criminal defense lawyers in California that has approximately 2,000 members, which regularly appears as an amicus curiae in matters of interest to its membership. The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000

[1] All parties have consented to the filing of this brief *amici curiae*. *See* Fed. R. App. P. 29(a).

affiliate members in 50 states, including private criminal defense lawyers, public defenders, and law professors. Among NACDL's objectives are to ensure that constitutional privacy rights are scrupulously honored.

All amici are well situated to present the Court with the practical consequences of this unprecedented expansion of governmental power to search arrestees.

II.

INTRODUCTION

Plaintiffs-Appellants are California arrestees who were compelled on the basis of California law to submit to DNA extraction, search, and profiling. The Federal Defender's Offices, NACDL, and CACJ, who represent defendants in both federal and California courts, submit this amicus brief in support of the Plaintiffs' appeal. As detailed below there are compelling policy reasons why compulsory DNA testing of arrestees is unconstitutional.

III.

DISCUSSION

A. DNA Testing of Arrestees Undermines the Privacy Rights of Innocent Persons

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.

However, the compulsory extraction of DNA from persons who have never been convicted of a crime, for analysis and inclusion in a criminal database, implicates important concerns relating to privacy, the presumption of innocence, and the limits of police power.

DNA databanking laws affect hundreds of thousands of people every year. As of January 2009, every person arrested in California for any felony must have his or her 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 Jan. 1, 2009). This affects 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.[2] 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

[2] 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.[3] While they wait, the arrestees' biological samples are in police custody and their genetic profiles are subject to weekly search. 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).

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. 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).

The federal statute permits for the removal of a DNA profile from the database only in particular circumstances. 42 U.S.C. § 14132(d). If the sample was compelled on the basis of an arrest "under the authority of the United States,"

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[3] *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 .

the Attorney General must receive "for each charge against the person on the basis of which the analysis was or could have been included in the index, a certified copy of a final court order establishing that such charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period." 42 U.S.C. § 14132(d)(1)(A)(ii). The burden is thus on the person who has been wrongly arrested or falsely accused to obtain a court order that meets the statutory definition. Although the law provides for expungement of the DNA analysis from the index, it does not provide for destruction or return of the DNA sample.

This Court's decision regarding the constitutionality of compulsory DNA sampling for persons not convicted of any crime will affect many more people than just California felons. As discussed below, these laws mandating the seizure of DNA without a warrant from persons awaiting trial, arrestees, or others who have not been convicted of a crime violate the Fourth Amendment.

B. The History of the Fourth Amendment Makes Clear that it Prohibits DNA Testing of Persons Who Have Not Been Convicted of a Crime

Although the framers of the Constitution could never have foreseen the advent of a mandatory DNA testing regime, they would have greeted the prospect of massive government programs filled with private information about individuals

with deep suspicion. The text of the Fourth Amendment makes it clear that the framers were not only worried about infringement of the home, but of the body: "The right of the people to be secure in their *persons* . . . against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV; see Safford Unified Sch. Dist. #1 v. Redding, 129 S.Ct. 2633, 2639 (2009).

The Fourth Amendment was born out of the arbitrary use of English power, which "inaugurated the resistance of the colonies to the oppressions of the mother country." Boyd v. United States, 116 U.S. 616, 625 (1886).[4] These abuses of power "were fresh in the memories of those who achieved our independence and established our form of government." Id.

The constitutional principles at stake in the Fourth Amendment "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." Id. As the Supreme Court recognized, the "essence" of the government intrusion that the Fourth Amendment prohibits is "the invasion of [a person's] indefeasible right of personal security, personal liberty and privacy property, where that right has never been forfeited by his

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[4] In Olmstead v. United States, 277 U.S. 438 (1928), Justice Brandeis called Boyd "a case that will be remembered as long as civil liberty lives in the United States." Id. at 473 (Brandeis, J., dissenting). The Supreme Court recently cited Boyd's historical analysis approvingly in Arizona v. Gant, 129 S.Ct. 1710, 1720 n. 5 (2009) and Virginia v. Moore, 128 S.Ct. 1598, 1603 (2009).

conviction of some public offense. . . ." Id., 116 U.S. at 630 (emphasis added).

The history of the Fourth Amendment strongly weighs against the wholesale right to search asserted by the government here. As Justice Bradley stated in Boyd, "The struggles against arbitrary power in which [the framers] had been engaged for more than twenty years, would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred." Id., 116 U.S. at 630.

In other words, the framers of the Constitution were distrustful of government surveillance and intrusion. The inclusion of the Fourth Amendment was intended to protect the individual against the power of the state. The framers had much to say about the perils of unquestioned government intrusion. As Thomas Jefferson wrote, "The time to guard against corruption and tyranny is before they shall have gotten hold of us." Thomas Jefferson, Notes on Virginia viii (Ford ed. iii 225) (1782).

The framers recognized that the Fourth Amendment would need to provide for continuing protection against changing intrusions by the state. As the Supreme Court has previously noted, "Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth." Weems v. United States,

217 U.S. 349, 373 (1910). This is especially true for constitutional protections: "The future is their care and provision for events of good and bad tendencies of which no prophecy can be made." Id. Otherwise, "Rights declared in words might be lost in reality." Id.

Central to liberty and the pursuit of happiness, the framers "conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting); see also Gouled v. United States, 255 U.S. 298, 303-304 (1921) (describing the Fourth and Fifth Amendments as indispensable to the "full enjoyment of personal security, personal liberty and private property" and the very essence of constitutional liberty). These rights are eternal:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appeal unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won – by legal and constitutional means in England, and by revolution on this continent – a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). As the Court held in Boyd, the government's assertion of a general power to search "may suit the

purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." Id., 116 U.S. at 632.

The values inherent in the Fourth Amendment prohibit the arbitrary search regime imposed here.

C. The Analysis by the District Court Would Permit DNA Extraction from Persons Suspected of the Most Minor Offenses, Including Parking and Dog Walking Tickets

The California DNA testing scheme at issue in this civil case applies only to those arrested for felonies. Cal. Penal Code § 296(a)(2)(C). However, the analysis by the district court applies across the board to any arrest, without consideration of the type or seriousness of the crime for which the person is arrested. Accordingly, because of its broad use of the term "identification" and its downgrading of individual rights, the opinion opens the door to DNA testing of any person whom the government has an interest in identifying. This easily extends to anyone suspected of any violation of law, including misdemeanors and infractions.

This concern is by no means hypothetical. While, the California law at issue in this case only applies to those arrested for a felony, the federal statute, currently being challenged in the Court in United States v. Pool, C.A. No. 10-10303, applies far more broadly than California Penal Code section 296(a)(2)(C).

Federal law mandates DNA testing for all arrestees, not just those arrested for felonies. 42 U.S.C. § 14135a(a)(1)(A). It also mandates DNA testing for everyone "facing charges," without limitation to the seriousness of the charges or their classification as felony, misdemeanor, or infraction. Id.

The broad opinion by the district court in this case has substantial ramifications for the federal government's assertion that it can DNA test all federal arrestees and defendants. Especially in the federal system, this has very serious consequences for privacy rights.

In the federal system, virtually every petty offense that can be committed on federal land is punishable as a misdemeanor. See e.g. 36 C.F.R. § 261.1 (punishing a variety of petty offenses on National Forest land as Class B misdemeanors); 38 C.F.R. § 1.218(b) (punishing a variety of petty offenses on VA property as Class B misdemeanors). Lest the Court think that these provisions are rarely enforced, on the petty offense calendar in July 2009 in the Eastern District of California the U.S. Attorney's Office charged the following crimes: 36 C.F.R. § 261.13 (vehicle off route); 36 C.F.R. § 261.16(c) (bathing at a faucet not provided for that purpose); 36 C.F.R. § 261.58(bb) (possession of alcohol); 36 C.F.R. § 261.58(i) (possessing part of a tree);36 C.F.R. 261.8 (fishing with two poles); 36 C.F.R. § 261.8 (fishing without a license); 36 C.F.R. § 761.15(i) (no sticker on

off-road vehicle); 38 C.F.R. § 1.218 (numerous parking violations); 38 C.F.R. 1.218(B)(6) (unattended dog in a car). Under 42 U.S.C. § 14135a(a)(1)(A) and 28 C.F.R. § 28.12(b), all of these charged defendants are subject to mandatory DNA testing and inclusion in CODIS.

In federal court, misdemeanor cases are prosecuted on the basis of an information signed by a prosecutor, or a complaint (often in the form of a ticket or citation) written by an agent. Fed. R. Crim. Pro. 58(b)(1). In the Eastern District of California, the government has sought and obtained DNA testing conditions in misdemeanor cases charged by information. See United States v. Anderson, Cr. S. 09-264-KJM (E.D. Cal.)(misdemeanor traffic violations and entering military property); United States v. Kershaw, Cr. S. 09-493-DAD (E.D. Cal.)(misdemeanor possession of marijuana); United States v. Aguilar, Cr. S. 09-490-DAD (E.D. Cal.)(misdemeanor presentation of fake identification – dismissed on 12/14/09); United States v. Heal, Cr. S. 09-492-DAD (E.D. Cal.)(misdemeanor possession of marijuana).

Supreme Court caselaw makes it clear that defendants can be arrested for petty offenses, even those infractions that cannot be punished by imprisonment under the law. See Virginia v. Moore, 128 S.Ct. 1598 (2008) (warrantless arrest valid, even if not allowed under state law, for driving on a suspended license);

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (valid arrest of mother on seatbelt offense only punishable by a fine). Because the federal DNA profiling scheme applies broadly to all "individuals who are arrested, facing charges, or convicted" (42 U.S.C. § 14135a(a)(1)), it sweeps in huge numbers of people, some who are charged with nothing more serious than parking in the wrong spot at the VA, fishing with two poles instead of one, or leaving their dog in the car for a moment.

Further, not only does the relevant federal law allow DNA testing of all arrestees, there is no requirement in the statute that the arrest be lawful or valid. See Gant, 129 S.Ct. at 1716; Weeks v. United States, 232 U.S. 383, 392 (1914) (authority to search the accused "when legally arrested"). The Supreme Court recently affirmed that "officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence." Moore, 128 S.Ct. at 1607 (emphasis added). Allowing such a wide-spread invasive search scheme without any requirement that the arrest be constitutional and valid, without an opportunity to test the constitutionality of the arrest prior to the extraction of a sample, and without automatic expungement of the sample and results in the event of an invalid arrest, undermines settled constitutional protections.

Finally, if any arrestee can be constitutionally DNA searched, then no

arrestee anywhere can find protection in his or her state's refusal to implement mandatory DNA testing. This is because, as the Supreme Court recently reasoned in Moore, the standard is a constitutional one, not a statutory one. Accordingly, any constitutional search could be engaged in by law enforcement without regard to whether any particular state statute allowed DNA testing. Moore, 128 S.Ct. at 1607. Moore makes it clear that if such testing is constitutional for arrestees in general, then the presence or absence of state law on the issue makes no difference. Id.

D. The Analysis in the District Court Opinion Undermines Settled Fourth Amendment Precedent

The history of compulsory DNA testing is a good example of how the government's attempts to assert its power has become more and more invasive. The Supreme Court has previously recognized the ominous creep of government interference. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Boyd, 116 U.S. at 635; cited with approval in Arizona v. Gant, 129

S.Ct. 1710, 1720, n. 5 (2009); Coolidge, 403 U.S. at 453-54.

In his dissent in United States v. Kincade, 379 F.3d 813, 873 (9th Cir. 2004), now-Chief Judge Kozinski predicted exactly what has come to pass, "Later, when further expansions of CODIS are proposed, information from the database will have been credited with solving hundred or thousands of crimes, and we will have become inured to the idea that the government is entitled to hold large databases of DNA fingerprints." (Kozinski, J. dissenting).

Not only is the current testing regime itself an example of this type of stealthy expansion of government power and intrusion, but a determination that an arrest upon probable cause allows for this type of unmitigated search will undermine an entire line of search and seizure precedents. The Supreme Court has never held that arrestees have no rights against searches of their persons and property. To the contrary, the Supreme Court has repeatedly found narrow searches permissible while affirming arrestee's Fourth Amendment expectations of privacy in other areas.

For example, in Chimel v. California, 395 U.S. 752, 763 (1969), the Supreme Court recognized only a narrow scope of search-incident-to-arrest: police could only search the space within an arrestee's "immediate control," which meant "the area from within he might gain possession of a weapon or destructible

evidence." As recently as Arizona v. Gant, 129 S.Ct. 1710 (2009), the Court affirmed the narrow scope of that search exception.

In Gant, the Supreme Court refused to countenance the government's assertion of a broad authority to search a vehicle after an arrest. In Gant, the defendant was arrested for a traffic offense. His car was searched after the arrest, when he had already been handcuffed and placed in the back of a patrol car. The Supreme Court found the search unconstitutional, noting that even thought Gant had been arrested, "A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals." 129 S.Ct. at 1720. In that case, the Supreme Court also acknowledged the risk that police would make custodial arrests that they otherwise would not make "as a cover for a search which the Fourth Amendment otherwise prohibits." Id., n. 5, citing 3 LaFave § 7.1(c), at 527.

The Supreme Court has never held that an arrest extinguishes the privacy rights of an arrestee. Likewise, this Court has affirmed that arrestees and criminal defendants retain a broad range of rights under the Fourth Amendment. Notably, in United States v. Scott, 450 F.3d 863 (9th Cir. 2006), the Ninth Circuit struck

down a Nevada state law that conditioned pretrial release on a defendant's consent to a warrantless search of his or her home. This condition passed neither a special needs or a totality of the circumstances test. In Scott, this Court firmly held that the "constitutionally relevant distinction" for the purposes of search is "between someone who has been convicted of a crime and someone who has been merely accused of a crime but is still presumed innocent." 450 F.3d at 873.

The district court's opinion not only rejects this Court's binding precedent (Friedman v. Boucher, 580 F.3d 847 (9th Cir. 2009)), but it also undermines settled Fourth Amendment law that holds that arrestees retain significant privacy and Fourth Amendment rights.

E. The Government Databases at Issue Cannot Safeguard the Privacy of DNA Information

The district court's opinion significantly downplays the interest of individuals in maintaining the privacy of their genetic information. 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 the public worries that this same information could be misused by governmental or private entities. Genetic Information Nondiscrimination Act of 2008, PL 110-233, 122 Stat 881 § 2 (findings) (2008);

Steven Greenhouse, Law Seeks to Ban Misuse of Genetic Testing, N.Y. Times, November 16, 2009, at B5.

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 information.[5] 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 indicated that it would be important to have laws protecting research information from law enforcement.[6] 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.

It turns out that Americans have a good reason to fear the government's

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[5] 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.

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

ability to maintain the privacy of genetic databases. Government databases themselves are far from immune to privacy intrusions. See e.g., Robert E. Kessler, Policing the Internet's Streets, Newsday, Jan. 13, 2009 at A24 (16-year-old Swedish hacker broke into and "rummage[d] through the files in hundreds of U.S. computer systems, including sensitive ones involved in industrial secrets, nuclear power-plant operation, and the military."); Eric M. Weiss, Consultant Breached FBI's Computers, Wash. Post, July 6, 2006 at A5 (consultant cracked FBI's classified computer system). No less an authority than the Office of the Inspector General has found repeatedly significant vulnerabilities in CODIS. U.S. Department of Justice, Office of the Inspector General, Audit Division, Combined DNA Index System Operational and Laboratory Vulnerabilities, Audit Report 06-32, May 2006 (www.justice.gov/oig/reports/FBI/a0632/final.pdf).

The concerns are even graver in the particular context of DNA laboratories. Christine Rosen, Liberty, Privacy, and DNA Databases, The New Atlantis (Spring 2003), available at http://www.thenewatlantis.com/archive/ 1/rosenprint.htm (noting "the lack of consistent privacy protections for criminal databases and their samples.") Scandals have also revealed systemic problems in a number of DNA laboratories and horrific tales of false-positive DNA matches. William C. Thompson, Tarnish on the "Gold Standard": Understanding Recent Problems in

Forensic DNA Testing, The Champion, Jan./Feb. 2006, at 10-12 (listing scandals); see also, e.g., Jennifer L. Mnookin, Fingerprint Evidence in an Age of DNA Profiling, 67 Brook. L. Rev. 13, 49-50 (2001) (suspect was arrested and charged after cold hit at six loci, but released after it was revealed that illness prevented him from having committed the crime); Maryann Spoto, Murder, Rape Charges Dropped Due to Botched DNA Evidence, Star-Ledger (Newark), Feb. 7, 2006, at 28; Annie Sweeney & Frank Main, Botched DNA Report Falsely Implicates Woman, Chi. Sun-Times, Nov. 8, 2004, at 18 (partial match was erroneous, woman was incarcerated at time of offense).

DNA databases are also prone to errors. Keith Paul, Audit Calls for Changes in Police DNA Lab, Las Vegas Sun, May, 23, 2002, at 1 (defense expert caught a forensic lab mistakenly labeling DNA results with the name of an innocent man.); Teresa Mask, How Jurors See DNA Evidence May Decide Unsolved Killing: 1969 Slaying Trial Continues Today, Detroit Free Press, July 19, 2005 (likely case of cross-contamination at laboratory: suspect was only four years old at time of unsolved murder and lived 100 miles away); Erin Murphy, The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence, 95 Calif. L. Rev. 721, 755 n.155 (2007).

Undersigned counsel has personally represented a client who was falsely

implicated in two armed bank robberies in Southern California after DNA obtained from a hat recovered at the scene was wrongly matched to his DNA profile through CODIS. United States v. Ponce, Mag. No. 07-00215-DAD (E.D. Cal.) (arrest and detention in Sacramento), SW 07-200-KJM (E.D. Cal.) (application for search warrant), Mag. No. 07-0199 (C.D. Cal.)(complaint and dismissal). Mr. Ponce was charged in the case and arrested, and the FBI obtained a search warrant for a new DNA sample. Mr. Ponce presented evidence that he was at work in Sacramento on the dates of the bank robberies, but nonetheless was detained in custody for five days before the government agreed to his release on bond pending the DNA retest. The retest cleared Mr. Ponce and the case was subsequently dismissed against him. The California DNA lab resisted counsel's attempts to determine how the error was made so that it would not be repeated.

In recent years, problems ranging from negligence to outright deception have been uncovered at DNA crime labs in at least 17 states. Maurice Possley, Steve Mills & Flynn McRoberts, Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S., Chi. Trib., Oct. 21, 2004, at C1; see also Ralph Blumenthal, In Texas, Oversight for Crime Labs is Urged, N.Y. Times, Jan. 5, 2005, at A18 (Houston DNA lab); Richard Willing, Mueller Defends Crime Lab After Questionable DNA Tests, USA Today, May 1, 2003, at 3A (technician failed

to run negative controls in 100 DNA cases, caught only when coworker revealed the problem); Vic Ryckaert, Judge Asked to Halt DNA Retests: Crime Lab Less Than Candid About Cases Under Review, Attorney Says, The Indianapolis Star, Aug. 13, 2003, at 1B; Keith Matheny, Supervisor Accused of Passing Off DNA Test, Traverse City Record-Eagle, Dec. 19, 2004 (Michigan State Police Crime Lab DNA unit); Glenn Puit, Police Forensics: DNA Mix-up Prompts Audit at Lab, Las Vegas Review-J., Apr. 19, 2002, at 1B (discussing audit at Las Vegas laboratory after switched names on DNA profiles led to imprisonment); DNA Testing Mistakes at the State Patrol Crime Labs, Seattle Post-Intelligencer, July 22, 2004 (cross-contamination of samples and other errors). Nor have private laboratories proven exempt from such corruption. See, e.g., Rick Orlov, Lab Used by LAPD Falsified DNA Data, L.A. Daily News, Nov. 19, 2004, at N1 (allegations that technician at private lab manipulated DNA data); Jeff Coen & Carlos Sadovi, Crime Lab Botched DNA Tests, State Says, Chi. Trib., Aug. 19, 2005, at C1 (numerous errors in results from independent lab).

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. 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.

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.[7] 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

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[7] *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.

that are similar to the crime-scene sample.[8] 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 will be retested to check for a specifically paternal relationship."[9] 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.[10]

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

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[8] 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.

[9] *Id*. at 27.

[10] *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.").

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 future analyses whenever it chooses to do so. If the actual samples were destroyed after they were initially analyzed and the profile 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.

IV.

CONCLUSION

For the foregoing reasons, amici urge reversal of the district court's opinion in this case.

Dated: February 25, 2010

DANIEL J. BRODERICK
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/s/ Rachelle Barbour

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Research and Writing Attorney

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel states:

1. The National Association of Criminal Defense Lawyers (NACDL) is a not-for-profit professional Bar Association for the criminal defense bar, with over ten thousand members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates. The NACDL is not a publicly held company; does not have any parent corporation; does not issue or have any stock; and does not have any financial interest in the outcome of this litigation.

2. California Attorneys for Criminal Justice is a statewide organization of criminal defense lawyers in California that has approximately 2,000 members, which regularly appears as an amicus curiae in matters of interest to its membership. It does not have any financial interest in the outcome of this litigation.

Dated: February 25, 2010

Respectfully submitted,

/s/ Rachelle Barbour

Rachelle Barbour

CERTIFICATION OF COMPLIANCE PURSUANT TO

FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1

FOR CASE NO. 10-15152

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains no more than 7000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type of style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface 14-point Times New Roman type style.

Dated: February 25, 2010

Respectfully submitted,

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No. 10-15152

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELIZABETH AIDA HASKELL, REGINALD ENTO, JEFFREY PATRICK LYONS, JR., and AAKASH DESAI, on behalf of themselves and others similarly situated,
Plaintiffs-Appellants,

v.

EDMUND G. BROWN, JR., Attorney General of California; EVA STEINBERGER, Assistant Bureau Chief for DNA Programs, California Department of Justice,
Defendants-Appellees.

On Appeal From The United States District Court
For The Northern District of California
Honorable Charles R. Breyer, United States District Judge
U.S. D.C. No. C-09-04779 CRB

I hereby certify that on February 25, 2010, I electronically filed the foregoing JOINT BRIEF OF FEDERAL DEFENDER OF THE EASTERN AND SOUTHERN DISTRICTS OF CALIFORNIA, NACDL, AND CACJ In Support of Plaintiffs-Appellants and Urging Reversal of the Underlying Judgment with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 25, 2010

/s/ Katina Whalen