No. 10-15152

IN THE

United States Court of Appeals for the Ninth Circuit

ELIZABETH AIDA HASKELL, et al.,

Appellants,

v.

EDMUND G. BROWN, et al.,

Appellees.

Appeal from the United States District Court
for the Northern District of California
in Case No. C 09-04779 CRB
Judge Charles R. Breyer

BRIEF FOR AMICUS CURIAE DNA SAVES IN SUPPORT OF APPELLEE AND AFFIRMANCE

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STATEMENT REGARDING CONSENT

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this Brief for Amicus Curiae for DNA Saves.

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INTEREST OF AMICUS CURIAE

Amicus curiae DNA Saves is a 501(c)(4) non-profit association organized to educate policy makers and the public about the value of forensic DNA.[1] The association was formed by Jayann and David Sepich in late 2008, marking the five year anniversary of the vicious murder of their daughter, Katie. Had a DNA

[1] Pursuant to Fed. R. App. P. 29(a), amicus states that this brief is filed with the consent of both appellant and appellee.

sample been taken from Katie's murderer, Gabriel Avilla, upon arrest for an unrelated crime, the Sepichs would have discovered who killed their daughter only three months after her death. See Decl. of Jayann Sepich ("Sepich Decl.") ¶¶ 9-10 (SER2-3). Instead, Avilla remained free for over three years to victimize more unsuspecting daughters, while the Sepichs waited for answers. The Sepichs hope that by advocating for better DNA testing laws they can prevent another mother and father from asking "why?"

DNA Saves is committed to working with every state and the federal government to pass laws allowing DNA to be taken upon arrest, and to provide meaningful funding for DNA programs. In January 2007, the State of New Mexico implemented "Katie's Law," which requires DNA profiles for most felony arrestees to be included in the database. As of November 2009, New Mexico's DNA database program had registered at least 101 matches of unsolved crimes to 83 individual arrestee DNA profiles. Nine of those matches identified suspects in unsolved murders, and 16 identified suspects in unsolved sex-related crimes. The very first arrestee sample was matched to a double homicide case, leading to a conviction. Id. ¶ 12-13. [2]

[2] According to information available to amicus, as of the time this brief was filed, the New Mexico database had registered 129 matches of unsolved crimes to 104 individual profiles. Ten matches identified suspects in unsolved murders, and 18 identified suspects in unsolved sex-related crimes.

In connection with that effort, DNA Saves is also vitally committed to ensuring that courts correctly apply the Constitution and allow legislatures to enact these sensible and effective laws. Amicus therefore urges the Court to affirm the judgment below, which correctly recognizes that the interests of the government and its law-abiding citizens in protection from preventable violent crimes outweighs the low privacy interest arrestees have against accurate and minimally-invasive DNA profiling for identification purposes.

INTRODUCTION

DNA identification of arrestees is a crucial law enforcement tool that saves lives, prevents crimes, and protects the public and the innocent. In declining to enjoin California's DNA Act, the District Court protected these vital interests and correctly weighed them against the non-existent privacy interests of arrestees in concealing their identities. Like fingerprinting, DNA sampling under the statute is minimally intrusive and useful only for identification. And the law strictly prohibits any use of collected DNA samples other than for identification. There is a compelling interest in DNA identification at the time of arrest, and arrestees have no protected interest in concealing this identifying information—regardless of whether they have been indicted or convicted. Accordingly, amicus urges the Court to affirm the District Court's decision.

BACKGROUND

A. Like Fingerprints, DNA Testing Is Used Solely As An Identification Tool Under The Statute.

For more than 100 years, law enforcement agencies have routinely collected fingerprints from individuals they arrest. Fingerprinting not only can solve the crime for which the suspect is arrested, but also maintains a record to solve other past and future crimes. See, e.g., Anderson v. Commonwealth, 650 S.E.2d 702, 706 (Va. 2007); U.S. v. Kincade, 379 F.3d 813, 836 n.31 (9th Cir. 2004) (en banc); Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992).

Although fingerprinting was long the "gold standard" in identification, recent years have seen the "spectacular rise to prominence in DNA technologies in the forensic arena." Sandy L. Zabell, Fingerprint Evidence, 13 J. L. & Pol'y 143 (2005). DNA is the fingerprint of the 21st century. DNA identification technology is "one of the most important advances in criminal identification methods in decades." H.R. Rep. No. 106-900, pt. 1, at 9 (2000). "The information derived from [DNA] is substantially the same as that derived from fingerprinting—an identifying marker unique to the individual from whom the information is derived." Rise v. Oregon, 59 F.3d 1556, 1559 (9th Cir. 1995). But it is important because "DNA is a further—and in fact a more reliable—means of identification" than fingerprints. U.S. v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005). Indeed,

"DNA is the most reliable evidence of identification—stronger even than fingerprints or photographs." Green v. Berge, 354 F.3d 675, 679 (7th Cir. 2004).

Here, the government obtained DNA samples from appellees pursuant to the DNA and Forensic Identification Database and Data Bank Act of 1998, as amended by 2004's Proposition 69 (the "Act"). ER1-2. The people of California recognized that DNA "analysis is a useful law enforcement tool for identifying and prosecuting criminal offenders and exonerating the innocent." Cal. Penal Code. § 295(b)(1). Thus, they enacted a requirement for law enforcement to collect a felony arrestee's DNA sample "immediately following arrest, or during the booking . . . process or as soon as administratively practicable after arrest." Cal. Penal Code § 296.1(a)(1)(A). "The purpose of [this] program is to assist . . . law enforcement agencies . . . in the expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other crimes, the exclusion of suspects who are being investigated for these crimes, and the identification of missing and unidentified persons, particularly abducted children." Cal. Penal Code §295(c). Now, "[l]ike the collection of fingerprints, the collection of DNA samples . . . is an administrative requirement to assist in the accurate identification of criminal offenders." Cal. Penal Code § 295(d). Collected profiles are kept in California's DNA Data Bank, which is part of the FBI's Combined DNA Index System ("CODIS"). ER3; Cal. Penal Code. § 298.3.

DNA samples obtained from arrestees will be used solely for "identification or exclusion" purposes. Cal. Penal Code §299.5 (criminal penalties for use of DNA profiles for any purpose other than identification or exclusion as a suspect). Each person's DNA is unique (with the exception of identical twins), and is found in samples from blood, hair, and other body tissues and biological products left at a crime scene and elsewhere. See U.S. Dep't of Justice, DNA Initiative ("DNA Initiative"), About Forensic DNA (www.dna.gov/basics). DNA can be found almost anywhere, such as on eyeglasses, a cigarette, a bite mark or a ligature; only a tiny sample is needed, even if invisible to the naked eye. DNA Initiative, Identifying DNA Evidence (www.dna.gov/basics/evidence_collection/identifying). Under the Act, samples are obtained by buccal swab. Cal. Penal Code § 296(a).

The CODIS database includes only a very small amount of identifying information for each individual, referred to as a DNA profile or DNA fingerprint. ER2; 28 C.F.R. § 28.12(f)(2). DNA profiles include only 13 "short tandem repeat" ("STR") regions found on nuclear DNA. ER2-3. See also Decl. of Douglas R. Hares at ¶ 9 (ER513). The likelihood that any two individuals (except identical twins) will have the same 13-loci DNA profile is one in 80,000,000,000,000,000. See Decl. of Kenneth C. Konzak ¶ 41 (ER496).

DNA profiles include only non-coding DNA (sometimes referred to as "junk" DNA). ER2-3. The 13 chosen STR loci identify an individual uniquely,

but do not disclose traits, disorders, or dispositions. See Kincade, 379 F.3d at 818-19; Johnson v. Quander, 440 F.3d 489, 498 (D.C. Cir. 2006); Jones, 962 F.2d at 306. These STR loci are "non-genic stretches of DNA not presently recognized as being responsible for trait coding," and were "purposely selected" for DNA analysis because they are not "associated with any known physical or medical characteristics." Kincade, 379 F.3d at 818. See also H.R. Rep. No. 106-900, pt. 1, at 27. Reflecting Congress's intent to maintain CODIS strictly as an identification tool, the "core genetic markers" used in CODIS cannot be changed unless the Department of Justice notifies Congress at least 180 days beforehand and "explain[s] the reasons for such change." Pub. L. No. 108-405, § 203(f), 118 Stat. 2271. Presently, no prediction of future disease status can be made from an STR profile in a law enforcement DNA database. D.H. Kaye, Mopping Up After Coming Clean About "Junk DNA" at 2 (Nov. 23, 2007) (homepages.law.asu.edu/~kayed/pubs/genlaw/07-MoppingUp.pdf).

CODIS "operates much like an old-fashioned fingerprint database (albeit more efficiently)." Johnson, 440 F.3d at 499. DNA profiles are entered into CODIS from laboratories at the local, state, and national levels. See Hares Decl. ¶ 6 (ER511). The database includes forensic profiles, including from cases where the perpetrator is not known, often called "cold" cases. It also includes profiles from convicted felons. And as in this case, the federal government and 22 states

have passed laws to allow for collection of arrestee profiles. See 42 U.S.C. § 14135a; Hares Decl. ¶ 21 (ER518).

The CODIS software permits the more than 170 law enforcement laboratories throughout the country that use it to share and compare DNA identification data by providing a central database of DNA profiles from all user laboratories, known as the National DNA Index System ("NDIS"). See Hares Decl. ¶¶ 19-23 (ER518-19); FBI, CODIS Combined DNA Index System (www.fbi.gov/hq/lab/html/codisbrochure_text.htm). The DNA profiles in NDIS are searched weekly, and matches to forensic data are automatically returned by the software to the laboratory that originally submitted the DNA profile. Hares Decl. ¶ 12 (ER514); Decl. of Linton von Beroldingen ¶ 15 (ER464).

Matches between forensic and offender profiles can provide investigators with the identity of a suspect. Konzak Decl. ¶ 12 (ER484-85). And a match made between forensic profiles can link crime scenes to each other, possibly identifying serial offenders. Id. When an offender hit is made, a new DNA sample is typically obtained from that suspect so the match can be confirmed by a crime laboratory before a new arrest is made. Von Beroldingen Decl. ¶ 19 (ER465).

B. The Use Of Collected DNA Samples Is Narrowly Circumscribed By Law.

The Act limits access to information obtained from DNA samples to law enforcement personnel. ER3. And samples may only be used for "identification or

exclusion purposes." Cal. Penal Code § 299.5(i). Anyone who misuses a sample is subject to criminal penalties including up to a year in prison. Id. To date, no one has been charged under that section, nor has any audit of a California CODIS lab revealed any violation of confidentiality or use restrictions. ER3-4.

Moreover, including the DNA profiles in CODIS entails little risk of misuse at the federal level. "CODIS records contain only an identifier for the agency that provided the DNA sample, a specimen identification number, and the name of the personnel associated with the analysis." Kincade, 379 F.3d at 819 n.8. Only the originating laboratory can identify an individual by name after the cold hit. See 61 Fed. Reg. 37,495, 37,496 (July 18, 1996) ("Since NDIS records contained in NDIS do not include personal identifiers of the individuals from whom the DNA samples were collected, retrieval by personal identifiers of these record subjects is not possible."); Konzak Decl. ¶ 42(2) (ER496-97).

"The design and legal rules governing the operation of CODIS reflect the system's function as a tool for law enforcement identification, and do not allow DNA samples or profiles within the scope of the system to be used for unauthorized purposes." 73 Fed. Reg. 74,932, 74,933 (Dec. 10, 2008). See also 42 U.S.C. §§ 14132, 14133(b)-(c), 14135e. Disclosing a DNA sample to one not authorized to receive it, or collecting a sample without authorization, is punishable by imprisonment for one year or a fine not to exceed $250,000. Id. § 14135e(c).

Law enforcement access to the federal index may be cancelled for failing to meet the quality control and privacy requirements of federal law. See id. §§ 14132(c), 14133(c), 14135e(c); 61 Fed. Reg. at 37,497 ("criminal justice agencies with direct access to NDIS must agree to . . . restrict access to DNA samples and data").

California law also provides for expungement of DNA information if the underlying conviction is overturned, if charges against an arrestee are dismissed or result in acquittal, or if no charges are filed within the applicable time period. Cal. Penal Code § 299. Federal law includes a similar provision. See 42 U.S.C. § 14132(d)(1)(A).

C. Arrestee DNA Identification Solves And Prevents Crime.

DNA identification gets results. CODIS has already achieved remarkable success, in large part due to the number of available profiles. As of November 2009, the NDIS contained 7,249,777 offender profiles and 291,232 forensic profiles. Hares Decl. ¶ 22 (ER518). By the end of 2009, CODIS produced over 103,700 hits assisting in more than 101,700 investigations. FBI, CODIS – NDIS Statistics (www.fbi.gov/hq/lab/codis/clickmap.htm). Adding arrestee profiles has expanded the database, and with it, the number of hits that can solve crimes and prevent others. In California alone, there were 291 matches to arrestee DNA samples in the first 10 months that such sampling was authorized. See Konzak Decl. ¶ 12 (ER484-85). Hits for previous murders, rapes, and robberies have come

from samples spanning the gamut of qualifying crimes underlying the arrest, including fraud, drug crimes, and DUIs. California Department of Justice, Arrestee Hits to Serious Crimes: Qualifying Offenses for DNA Collection (http://ag.ca.gov/bfs/pdf/arrestee_3192010.pdf).

The State of Virginia, which began arrestee DNA testing in 2003, has also shown how arrestee profiles can assist in solving and preventing crime. As of November 30, 2009, there were 303,265 DNA samples in the state database, resulting in 5,972 hits. See Virginia, Department of Forensic Science, DNA Databank Statistics (www.dfs.virginia.gov/statistics/index.cfm). These hits assisted 5,829 investigations, including nearly 500 murders and nearly 900 sex crimes. Id. A total of 555 of the hits were obtained from the Arrestee Database, with 89 of those associated with sexual assault cases. Id.

Arrestee DNA can also catch repeat offenders before they continue a pattern of violent crime. Seventy percent of America's crime is committed by only six percent of its criminals. See James E. Hooper, Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act, 89 Mich. L. Rev. 1951, 1951 n.3 (1991). From 1990-2002, 56 percent of violent offenders had prior convictions. U.S. Department of Justice, Bureau of Justice Statistics, Violent Felons In Large Urban Counties (http://bjs.ojp.usdoj.gov/content/pub/pdf/vfluc.pdf). And this does not include the many crimes that are never resolved.

Studies have shown that for every burglary conviction obtained through DNA matches, 7.4 additional crimes are avoided. John K. Roman, et al., The DNA Field Experiment: Cost-Effectiveness Analysis of the Use of DNA in the Investigation of High-Volume Crimes 13 (Urban Inst. Justice Pol'y Ctr. 2008). Some serial burglars can be individually responsible for more than 200 crimes a year. J.M. Chaiken et al., Varieties of Criminal Behavior 44 (1982). Sexual assault offenders have been documented to commit an average of eight sexual assaults for every one detected. A. Nicholas Groth, et al., Undetected Recidivism Among Rapists and Child Molesters, 28 Crime & Delinquency 450-458 (1982).

These general statistics are also borne out by individual case profiles. For instance, in 1987, Chester Turner was arrested for assault in California, but set free due to lack of evidence. At that time, California law did not require that his DNA be taken on arrest. Turner continued to terrorize a Los Angeles community and was arrested 19 more times before he was convicted of rape in 2002. Only then was his DNA taken, and it matched the evidence found on twelve rape and murder victims, the first of whom was murdered only two months after his 1987 arrest. See Andrew Blankstein, et al., DNA Analysis Links Inmate to 12 Slayings, L.A. Times, Oct. 23, 2004, at A1; Sepich Decl. ¶¶ 19-20 (SER4-5). See also 151 Cong. Rec. S9528 (July 29, 2005) (Sen. Kyl) (detailing preventability of Turner's

crimes). Those crimes could have been prevented had Turner's DNA been taken upon his initial arrest, rather than only after a qualifying conviction.

In Texas, Christopher Dye raped three women before being arrested in 1993 for burglary. Unaware he was a serial rapist, authorities released him on bail. Over the next six months, Dye raped four more women before being arrested again for burglary. He served two months in jail, and then raped seven more women before finally being caught. Testing Dye upon his first burglary arrest could have led to a DNA match from his first three crimes, and prevented 11 others. See Laylan Copelin, Texas Legislature Expands Use of DNA Testing, Cox News Service (June 8, 2001). See also Sepich Decl. ¶¶ 21-23 & Exs. C-E (detailing studies from Illinois, Maryland and Colorado on repeat offenders who could have been identified by earlier DNA testing) (SER5, 11-17).

This statistical and anecdotal information confirms what common sense teaches: that DNA sampling upon arrest—even for non-violent crimes—prevents and solves crimes, and saves lives.

D. DNA Identification Exonerates And Reduces Unnecessary Investigations Of The Innocent.

The Chester Turner story, a California case, was made even worse by the fact that another man was wrongfully convicted of three of Turner's murders based on blood-typing evidence and served eleven years in prison for crimes he did not commit. See Blankstein, supra. Had Turner's DNA been sampled upon his first

arrest, this wrongful conviction likely never would have occurred. Likewise, an arrestee DNA match obtained under Katie's Law both solved the murder of an 11-year-old New Mexico girl and exonerated a mentally challenged man who had wrongfully confessed to the crime and had been jailed for two years. See Sepich Decl. ¶¶ 15-17 (SER3-4); Charges Dismissed Against Child Rape, Murder Suspect: DNA Test Exonerates Gonzales In Victoria Sandoval Case (June 27, 2008) (www.koat.com/news/16732539/detail.html). Thus, DNA identification upon arrest not only catches the guilty, but can exonerate the innocent as well.

DNA identification also helps reduce far more serious invasions of privacy that result from inefficiency, inaccuracy or bias in law enforcement. DNA is a "silent biological witness at the crime scene." DNA Initiative, History of Forensic DNA Analysis (www.dna.gov/basics/analysishistory). As such, it does not leave prosecutions to the memory of witnesses or the discretion of law enforcement officers. DNA evidence leads police immediately to the right suspect, reducing the need for more intrusive investigations of the innocent and eliminating racial profiling or other biases that might otherwise creep into criminal investigations. Moreover, unlike fingerprints, DNA profiles are stored as numeric files without any personal information or criminal background.

Prosecutions based on DNA evidence are also far more efficient than those without it, because the evidence often results in consolidated prosecution, higher

charges, and more guilty pleas. For example, an analysis of Denver burglaries found that 75 percent of cases involving DNA evidence were pled to the highest charge, compared to only 30 percent in non-DNA cases. Jay Siegel & Susan D. Narveson, Why Arrestee DNA Legislation Can Save Indiana Taxpayers Over $50 Million Per Year at 9 (Jan. 2009) (Ex. C to Decl. of Daniel J. Powell) (ER564). This significantly reduced prosecution, defense and adjudication costs. Id.

Lack of arrestee DNA information does not only risks intruding on individuals who might unnecessarily become part of an investigation, it prolongs investigations and the suffering of victims' families and wastes resources. A 2003 study found that analyzing the DNA evidence in 366,460 sexual assault incidents that year would have cost $366 million. But about $12.9 billion would have been saved by apprehending serial offenders early. Ray A. Wickenheiser, The Business Case for Using Forensic DNA Technology to Solve and Prevent Crime 58 (www.dnaresource.com/documents/BusinessCaseforDNA.pdf).

ARGUMENT

I. DNA IDENTIFICATION SERVES A COMPELLING GOVERNMENT INTEREST IN SOLVING AND PREVENTING CRIMES, AND PROTECTING THE PUBLIC.

Obtaining DNA identification information from all arrestees is a reasonable method of serving the compelling government interest in protecting the public. There is no dispute among the parties that a buccal swab, albeit an extremely

minimal intrusion, is nonetheless technically a "search" for Fourth Amendment purposes. Therefore, this Court's task in determining whether the arrestees have a likelihood of success is to assess whether searches under the Act are reasonable. Kincade, 379 F.3d at 836. In deciding this issue, the Court must assess the totality of the circumstances, balancing the government's interests against any intrusion on the arrestee's privacy. Id.

The government has a compelling interest in solving and preventing crimes, and DNA identification serves that interest by making criminal investigations more effective and more efficient. "The governmental justification for [DNA] identification . . . relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods." Sczubelek, 402 F.3d at 185-86. "As with fingerprints, the collection of DNA samples at or near the time of arrest . . . can serve purposes relating directly to the arrest and ensuing proceedings." 73 Fed. Reg. at 74934. It can help identify the arrestee if other means fail. But more important, it helps authorities determine whether and when to release him. Id. DNA identification also is much more effective than fingerprinting or name searching to determine if an arrestee is wanted elsewhere and to aid identification if he flees prosecution. Anderson, 650 S.E.2d at 706. Thus, the government has a compelling interest in obtaining DNA

identification information to process the arrestee for the immediate offense, regardless of whether it is able to learn a defendant's name by other means. Cf. Appellants' Br. 52-55.

But the government's interest in identification goes beyond linking the arrestee to the crime at issue. It also has a compelling interest in accurately identifying the arrestee as the perpetrator of other crimes. As the District Court correctly held, identification means more than just knowing who is standing in front of the arresting officer. Contrary to appellants' arguments, identification also includes associating the person with what he has done. Kincade, 379 F.3d at 838 (noting the use of DNA profiling as identification that can be used to link perpetrators to crimes). Just like fingerprints, the use of DNA identification to solve crimes other than the one for which the person has been arrested serves the government's interest and also serves the public interest. Sczubelek, 402 F.3d at 185 ("The interest in accurate criminal investigations and prosecutions is a compelling interest that the DNA Act can reasonably be said to advance."). It therefore serves potential victims' interests by taking criminals off the streets. Kincade, 379 F.3d at 839 (convictions based on DNA profiling "help[] bring closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large").

Virginia's experience shows the benefits of DNA arrestee sampling. The very case in which the Virginia Supreme Court upheld the taking of DNA samples from arrestees, finding it "analogous to the taking of a suspect's fingerprints upon arrest," exemplifies how arrestee DNA solves cold cases. See Anderson, 650 S.E.2d at 706. In 1991, a woman was raped, sodomized and robbed while walking to work. Id. at 703. A forensic DNA sample was taken, but the case went unsolved until 2003, when Virginia began to take arrestee DNA. Id. at 704. The perpetrator was arrested on unrelated charges of rape and sodomy, a DNA sample was taken from him and entered into a database, and a routine analysis resulted in a "cold hit" that matched his DNA to the 1991 crime. Id.

Potential criminal victims are not the only people who benefit from arrestee DNA identification. Catalogued DNA identification "will help to exculpate individuals who are serving sentences of imprisonment for crimes they did not commit and will help to eliminate individuals from suspect lists when crimes occur." Sczubelek, 402 F.3d at 185. See also id. ("While the presence of Sczubelek's DNA in CODIS may inculpate him in the future, it may also exonerate him."). As discussed above, DNA evidence obtained upon arrest has been instrumental in saving wrongfully convicted individuals from years of incarceration, and in preventing many more wrongful arrests.

As also detailed above, DNA identification also makes the government more effective and more efficient at solving crimes by directly targeting investigatory resources on the guilty. See supra at 14-15. Communities will therefore be safer, and the innocent will face fewer police intrusions, because police will follow fewer wrong leads and have fewer time-wasting interviews with suspects and other witnesses that could easily have been excluded. Kincade, 379 F.3d at 839 n.38 ("use of CODIS promptly clears thousands of potential suspects—thereby preventing" unnecessary intrusions into the lives of innocent people and "'advancing the overwhelming public interest in prosecuting crimes accurately'") (citation omitted) (emphasis in original). Police can then focus their resources on suspects who could not so easily be excluded, saving taxpayers billions of dollars and freeing up strained law enforcement resources to further investigate other cases. See Wickenheiser, supra, at 58.

This Court has already recognized that DNA identification serves compelling governmental interests by supplementing other identification methods to solve crimes. Kincade, 379 F.3d at 838-39. Other circuits have as well. See, e.g., Sczubelek, 402 F.3d at 186 (noting that "the collection of DNA samples will protect society"). Fingerprinting is a useful identification tool, but it is not as effective as DNA identification. Id. at 185. "It is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his

conduct, but also his identity." Id. He may wear disguises or gloves or change his physical features or name. Id. But DNA identification "provides a dramatic new tool" for identifying perpetrators because "[e]ven a suspect with altered physical features cannot escape the match that his DNA might make with a sample contained in a DNA bank or left at the scene of a crime within samples of blood, skin, semen, or hair follicles." Id. And as the District Court recognized, the government always has a great interest in checking identity by multiple means because "[t]he more ways the government has to identify who someone is, the better chance it has of doing so accurately." ER16.

Finally, the government has a compelling interest in collecting DNA samples upon arrest, rather than waiting until a later stage of proceedings. As with fingerprints, collection of DNA samples at arrest can prevent and deter subsequent criminal conduct—benefits that may be lost if samples are not taken until conviction. 73 Fed. Reg. at 74,934. For example, a DNA sample collected from an arrestee may match DNA found in crime scene evidence from a murder, rape, or other serious crime. Id. Such information helps authorities to assess whether an individual may be released safely to the public pending trial and to establish appropriate conditions for his release, or to ensure proper security measures in case he is detained. Id. Collection of a DNA sample may also provide an alternative means of directly ascertaining or verifying an arrestee's identity, where fingerprint

records are unavailable, incomplete, or inconclusive. Id. See Anderson, 650 S.E.2d at 706 (noting value of DNA-sample collection from arrestees "in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution").

We will never know the exact number of people whose lives will be saved, or crimes that will be prevented, by DNA identification of arrestees, because we will never know how many people would have been victimized by a criminal who is taken off the streets as a result of a match. But the data summarized above strongly suggest that the benefits are enormous. And given that DNA sampling (as next shown) involves minimal, if any, intrusion on legitimate privacy interests, even one preventable crime is one too many.

II. THE ACT IMPLICATES MINIMAL, IF ANY, PRIVACY INTERESTS OF ARRESTEES.

A. Methods Used For Taking DNA Samples, Like Fingerprinting, Are An Insignificant Intrusion.

Like fingerprinting, DNA identification cataloguing involves no significant invasion of the body. In past years, DNA samples were generally obtained by a blood draw from the arm. 73 Fed. Reg. at 74,935. But now, far less invasive procedures are used. Id. As in this case, law enforcement agencies are now generally collecting samples by swabbing the inside of the arrestee's cheek—a

procedure known as a "buccal swab." Id. When performed by buccal swab, "[t]he taking of bodily material for DNA testing is perhaps the least intrusive of all seizures—it involves no penetration of the skin, pain, or substantial inconvenience." Jules Epstein, "Genetic Surveillance"—The Bogeyman Response to Familial DNA Investigations, 2009 U. Ill. J.L. Tech. & Pol'y 141, 152 (2009). In California, the subject can even perform the swab by himself. See Decl. of Jeannine M. Willie ¶ 8 (ER576-77); Konzak Decl. ¶ 30 (ER491-92). This procedure is hardly invasive at all, especially when compared with drawing blood from the arm, which the Supreme Court and this Circuit have already recognized as minimally invasive. See Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 625 (1989) ("the intrusion occasioned by a blood test is not significant" because the procedure is common and low-risk); Kincade, 379 F.3d at 838.

B. Samples Collected Under The Act Are Used Solely For Identification Purposes.

The intrusion on arrestees' privacy caused by DNA identification cataloguing is minor—if it exists at all—because such cataloguing is narrowly focused on individual identification. Appellants concede that an arrestee "may lack a privacy interest in his identity—his name, date of birth, etc." Appellants' Br. 28. But then they raise three privacy concerns by claiming that an arrestee's lack of privacy interest in identity "does not mean that he additionally lacks a privacy interest in his bodily integrity, his DNA, or what he has ever done in the

past." Id. None of the three concerns changes the analysis. As discussed above, the intrusion on bodily integrity of a buccal swab is minimal, and an arrestee has no privacy interest in bodily integrity that outweighs the government's interest in obtaining the swab.

The assertion of a privacy interest in an arrestee's DNA is a red herring. Contrary to appellants' assertion, nobody will have his or her "genetic blueprint included in a criminal database." Appellants' Br. 17. The database includes only 13 markers whose only known use is to identify someone, which are not a "blueprint" for anything. As detailed above, these 13 markers are useful for no purpose other than identification. See supra at 5-7. Among the 3 billion base pairs in a human strand of DNA, only 3 million of them are variable from person to person. Epstein, supra at 143. Among those are many pairs "not known to determine a human attribute such as height, weight, or susceptibility to a particular disease." Id. These pairs have no known value for coding human traits, and they are the only ones used for forensic identification. Id. Because CODIS intentionally uses a standard set of 13 markers that have no known correlation with physical traits, the database is of no use to anyone interested in any other information. As this Court has already stated, arrestees lack any privacy interest in these DNA factors. Kincade, 379 F.3d at 837 ("the DNA profile derived from the defendant's blood sample establishes only a record of the defendant's identity—

otherwise personal information in which the qualified offender can claim no right of privacy once lawfully convicted of a qualifying offense (indeed, once lawfully arrested and booked into state custody)") (emphasis added).

Appellants concede that they lack a privacy interest in their identities. Appellants' Br. 28. And to the extent they are concerned with any other parts of their DNA, that concern is irrelevant to this case. According to appellants, arrestee DNA testing is unconstitutional because of "a potential for misuse of the seized tissues"—not any actual misuse. Appellants' Br. 42 (emphasis added). The First Circuit addressed, and dismissed, these concerns in U.S. v. Weikert, 504 F.3d 1 (1st Cir. 2007). It recognized two possible concerns implicated by DNA identification: (1) that the government might go beyond the identification-only markers and review other genetic information; and (2) that scientific advances might eventually allow the government to discern more information than just identity from the genetic markers it uses. Id. at 12-13. The court rejected the defendant's theory that these possibilities raised his privacy interest against DNA identification. Id. at 13. As to the first, the court reviewed the criminal sanctions for misuse of genetic information and determined that the potential for abuse is minimal. Id. As to the second, the court recognized that the case before it should be decided based on current technology, with any challenge on the basis of potential future technology considered only if that potential is ever realized. Id.

Moreover, the Act provides additional protections against abuse of the DNA coding system. The law instructs authorities to use and keep only those 13 specific markers used for identification, and it provides criminal penalties—including up to a year in prison—for misuse of the collected information. Cal Penal Code § 299.5(i). See also 42 U.S.C. § 14133 (federal criminal penalties for misuse of CODIS information). It is thus highly doubtful that a "rogue" employee would risk a career and criminal penalties in order to disclose confidential DNA information, and doing so poses such significant technical hurdles that it is unlikely such testing and disclosure could be accomplished. See 155 Cong. Rec. S12904-12907 (Dec. 10, 2009) (remarks of Sen. Kyl). This is borne out by the FBI's experience. Though millions of offender profiles have been added to the NDIS database over more than 10 years, and although the FBI has been conducting analysis of DNA from criminal suspects and victims for 20 years, "there has never been one noted case in which a lab employee has ever made an unauthorized disclosure of DNA information." Id. at S12905 (emphasis added). Therefore, "[t]he risk that lab employees will undertake such acts is not substantial enough to merit consideration in a reasoned analysis of the privacy risks posed by the operation of NDIS." Id.

Contrary to appellants' assertion, Appellants' Br. 43, restrictions on the use of DNA do in fact bear upon the reasonableness of the search. The same potential

for abuse and technological advancements exists for a DNA search pursuant to a warrant, but no court has ever disallowed such a search because of that unrealized potential. In Kincade, this Court recognized that its "job is limited to resolving the constitutionality of the program before [it]." Kincade, 379 F.3d at 838. It is therefore irrelevant that some sort of DNA analysis could, theoretically, "reveal a host of private information about a person," Appellants' Br. 42, because the record reveals that no information other than identification markers is ever discerned under the program at issue. This includes appellants' references to so-called "familial" searching, because the record is undisputed that arrestee DNA samples are not, in fact, used for that purpose. See Von Beroldingen Decl. ¶ 13 (ER463-64). If a future program implicates DNA factors used for other purposes, the Court should address that issue when it arises and not in the context of a program with numerous safeguards to prevent the use of DNA for any purposes beyond identification. Kincade, 379 F.3d at 838.

These safeguards—and the statutory scheme generally—easily distinguish this case from Friedman v. Boucher, 580 F.3d 847 (9th Cir. 2009), the principal authority on which appellants rely. There, the Court assessed the reasonableness of a sample taken by physical force at the discretion of an individual detective and Deputy District Attorney, with no legal or other safeguards on how that blood sample would be used or stored. Id. at 851-53. In Friedman, the DNA sample

could have been used by anyone for any purpose. Here, by contrast, individual officers are strictly limited by law—enforced by significant criminal penalties—regarding how DNA samples may be used. Cal. Penal Code §§ 296, 299.5(i). As this Court has recognized, such a statutory scheme makes DNA cataloging more reasonable because the potential for abuse is substantially lower. See, e.g., Rise, 59 F.3d at 1561 (noting that rules regarding use of sample and lack of discretion for agents make DNA cataloging under the applicable statute more reasonable). Other circuits agree. Sczubelek, 402 F.3d at 187; Nicholas v. Goord, 430 F.3d 652, 670 (2d Cir. 2005). The analysis in Friedman therefore does not control the different reasonableness inquiry in this case.

Third, appellants object to intrusions into an arrestee's privacy with regard to "what he has ever done in the past." Arrestees' Br. 28. But the only link that DNA identification will provide to past acts is a link to criminal acts, since arrestee DNA profiles are matched against forensic profiles taken from crime scenes. Appellants' arguments boil down to the assertion that people under arrest have a reasonable expectation of privacy in concealing other crimes they have committed. That assertion, however, is belied by the universal acceptance of fingerprinting arrestees. No one can assert a Fourth Amendment right to the privacy of his past criminal endeavors. See United States v. Cardoza-Hinojosa, 140 F.3d 610, 616 (5th Cir. 1998) ("the 'subjective expectation of not being discovered' conducting

criminal activities is insufficient to create a legitimate expectation of privacy") (citation omitted). And searches into "whatever [the arrestee] has ever done in the past" performed under the Act are limited to just that.

C. Arrestees Have No Protected Privacy Interests In Concealing Their Identifying DNA Information.

Arrestees have a lesser privacy interest than the general population. Rise, 59 F.3d at 1559. In particular, they have no expectation of privacy in their identities because "when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it." Jones, 962 F.2d at 306. In most instances, arrestees have been physically detained against their will—a far greater intrusion than DNA identification—based on a police officer's assessment of probable cause. Based on that same determination, arrestees are fingerprinted and photographed, and that information is catalogued for comparison against evidence of other crimes, both past and future. U.S. v. Pool, 645 F. Supp. 2d 903, 910 (E.D. Cal. 2009). Likewise, DNA identification of arrestees "occurs after (at a minimum) a determination of probable cause that the subject has been involved in criminal activity. That probable cause determination may have been made by a police officer rather than an independent magistrate, but it remains a prerequisite to the seizure and sampling." Epstein, supra at 157.

Given these lessened interests, sampling under the Act represents no significant intrusion on any legitimate privacy interests. An arrestee has no

protected interest in concealing his fingerprint identification, and he has even less of an interest in preventing DNA identification. By the time a DNA sample has been taken formally, an arrestee has already left his DNA all over the police station, at the place of arrest, and almost everywhere he has been. Our "DNA is exposed to the public and abandoned every time we move." Id. at 151. No one has a reasonable expectation of privacy in information they leave lying about. For example, there is no reasonable expectation of privacy in trash left on the curb for collection. California v. Greenwood, 486 U.S. 35, 41 (1988). That is because "[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." Id. at 40.

DNA samples are no different; indeed, they are even more difficult to conceal than fingerprints. Thus, courts have held that the Fourth Amendment does not protect a person against police searches of DNA inadvertently provided to police even when the suspect has not been arrested. In Washington, police obtained a suspect's DNA sample by posing as a law firm inviting him to join a class action suit. State v. Athan, 158 P.3d 27, 31 (Wash. 2007). They tested his DNA by using the saliva provided on the return letter when he licked the envelope. Id. at 32. His DNA matched, and he was convicted of a 20-year-old rape and murder. Id. at 31-32. On appeal, the defendant argued that the DNA test was an unreasonable

search. Id. at 36. The Supreme Court of Washington disagreed and held that he had no reasonable expectation of privacy in the DNA information left in his saliva. Id. at 37. Courts in this circuit and elsewhere have reached similar conclusions.[3]

Given that police can lawfully test found DNA samples to determine the identity of a suspect who has not been arrested—even without the safeguards of the Act—it follows that the government can use minimally invasive methods to take a DNA sample from someone who has been arrested on probable cause, subject to stringent restrictions on the use of the information. DNA profiles catalogued under the Act are useful only for identification purposes, and samples cannot be used for any other purposes. And in the normal process of arrest and booking, an arrestee has just as little interest in keeping his identifying DNA information a secret as he does his name, fingerprint, or photograph.

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[3] See, e.g., U.S. v. Posadas, No. 09-cr-147, 2009 WL 3021163 at *3 (D. Neb. Sept. 17, 2009) (no reasonable expectation of privacy in DNA sample obtained from abandoned bag); Piro v. State, 190 P.3d 905, 912 (Idaho 2008) (weight of authority suggests that suspect had little reasonable expectation of privacy in DNA identification information taken from water bottle left in interrogation room); Commonwealth v. Ewing, 854 N.E.2d 993, 1001 (Mass. App. Ct. 2006) (no reasonable expectation of privacy in DNA information contained on cigarette butts left in interrogation room).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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March 25, 2010

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)(B)

I hereby certify that this brief was produced using the Times New Roman 14 point typeface and contains 6,973 words.

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2010, 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.

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.

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