C.A. No. 09-10303

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before the Honorable Mary M. Schroeder, Consuelo M. Callahan, and Carlos F. Lucero, CJJ.
(Opinion filed September 14, 2010)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY ARBERT POOL,

Defendant-Appellant.

On Appeal From The United States District Court
For The Eastern District of California

Honorable Edward J. Garcia
Senior United States District Judge

U.S.D.C. No. Cr. S. 09-0015-EJG
(Sacramento Division)

PETITION FOR REHEARING EN BANC

DANIEL J. BRODERICK, #89424
Federal Defender
RACHELLE BARBOUR, Bar #185395
Research and Writing Attorney
801 I Street, 3rd Floor
Sacramento, California 95814
Telephone: (916) 498-5700

Attorneys for Defendant-Appellant
JERRY ARBERT POOL

I. STATEMENT OF REASONS FOR EN BANC REVIEW

The majority opinion in this case holds that once a judge has found probable cause against a defendant, the government may compel a DNA sample, retain it, profile it, and use it to investigate unrelated crimes. This is an unprecedented expansion of government power to DNA profile defendants who have never been convicted. The Court has previously struggled in deciding the point in the criminal justice process at which the government's interest in compelling DNA outweighs an individual's right to bodily integrity and privacy. Friedman v. Boucher, 580 F.3d 847 (9th Cir. 2009); United States v. Kriesel, 508 F.3d 941 (9th Cir. 2007); United States v. Kincade, 379 F.3d 813 (9th Cir. 2004)(en banc). This case presents a question of exceptional importance that should be decided by this Court sitting en banc. Fed. R. App. P. 35(a)(2).

The majority opinion also squarely conflicts with this Court's prior opinions in Friedman, 580 F.3d 847, and United States v. Scott, 450 F. 3d 863 (9th Cir. 2006). In Friedman, this Court held that the government could not constitutionally DNA profile a detained sex offender charged with new offenses. In Scott, this Court held that the government could not search a pretrial releasee without probable cause. Both cases rejected the argument that pretrial defendants can constitutionally be searched for evidence without a warrant or probable cause. Consideration by the full Court is necessary to secure and maintain uniformity of this Court's decisions. Fed. R. App. P. 35(a)(1).

II. PROCEDURAL BACKGROUND

Mr. Pool has been charged with violating 18 U.S.C. §§ 2252 and 2253. On January 23, 2009, he was brought before a magistrate judge for his arraignment. He entered a plea of not guilty and was ordered released that day on a $25,000

unsecured bond and pretrial conditions. Pursuant to the Bail Reform Act (18 U.S.C. § 3142(b) and (c)(1)(A)), the magistrate judge sought to impose a release condition that Mr. Pool submit to DNA sampling by the government. Mr. Pool objected to this condition, and the magistrate judge stayed the condition and ordered the parties to brief the issue. The magistrate judge found the condition constitutional, as did the district judge.

Mr. Pool appealed the district judge's order imposing the condition, and the divided opinion affirms the district judge.[1] The majority opinion holds that the compulsory extraction of DNA unquestionably implicates Mr. Pool's right to personal security embodied in the Fourth Amendment. United States v. Pool, 2010 U.S. App. LEXIS 19133, *10, No. 09-10303 at p. 14023 (Sept. 14, 2010).[2] Based on the judicial determination of probable cause for the crime charged. the majority opinion employs the "totality of circumstances" test, even though Mr. Pool has not been convicted of a crime. Id., at *15-17, p. 14025-27. It concludes that because he has no right to hide his identity from the government, Mr. Pool's Fourth Amendment rights in his DNA are outweighed by the government's interests. Id., at *27-30, p. 14034-35. The majority opinion notes that "there is language in Friedman and Scott which may appear to be inconsistent with our decision. . ." and attempts to distinguish those cases. Id., at *30-37, p. 14035-38. It does not explain how its holding – that a judicial finding of probable cause

---

[1] This case generated three opinions: a majority opinion by Judge Callahan, a concurring opinion by Judge Lucero (a Tenth Circuit judge sitting by designation), and a dissenting opinion by Judge Schroeder. These opinions shall be referred to in this petition as the majority, concurring, and dissenting opinions.

[2] This petition will refer to the panel opinion by LEXIS page cite, as well as the page in the attached slip opinion.

allows DNA testing of a criminal defendant – can be squared with Friedman's holding that the government could not DNA test a felon charged with new crimes.

The concurring opinion acknowledges the importance of this issue, and stresses the "narrowness" of the holding. Id., at *44, p. 14044 It further attempts to distinguish Friedman. Id., *57-61, p. 14051-53. It identifies several issues that are not decided in the majority opinion, and in doing so notes with trepidation that the DNA law does not contain several of the limitations that it finds persuasive in evaluating the reasonableness of the search. Id., *51-2, n. 4, p. 14048. In assessing the government interest, the concurring opinion acknowledges that the CODIS database "promises enormous potential as an investigatory tool, but its expansion or misuse poses a very real threat to our privacy." Pool, at *61, p. 14054.

The dissenting opinion notes that no circuit has ever before approved such a warrantless search or seizure before an individual has been convicted of any crime, and would hold that the government failed to justify a Fourth Amendment exemption of this magnitude. Id., at *62, p. 14055. It emphasizes that the Supreme Court has upheld searches as a condition of release under the "totality of circumstances" test only after an individual has been convicted of a crime and hence has a lowered privacy interest. Id., at *63, p. 14055. The dissenting opinion points out that the majority and concurring opinions conflict with both Friedman and Scott in holding that a probable cause determination, rather than a conviction, constitutes the "watershed event" that results in a diminished expectation of privacy. Id., at *69, p. 14058. In addition, the decision in Friedman squarely forecloses the government's reliance on using the DNA samples of pretrial defendants to solve past and future crimes. Id., at *74,

p. 14061. Because Mr. Pool's privacy interests have not been diminished as a result of any conviction, the dissent would hold that the intrusion the government must justify is substantial, because the government seeks to seize, and indefinitely retain, not only his DNA profile, but samples of his entire DNA. Id., at *72, p. 14060.

III. ARGUMENT

A. This Case Presents an Issue of Exceptional Importance

The DNA Analysis Backlog Elimination Act and the challenged release condition apply to all persons arrested or charged with a federal offense. 42 U.S.C. § 14135a(a)(1); 18 U.S.C. § 3142(b). This includes felony defendants charged by complaint, indictment, or information, as well as misdemeanor defendants charged by information, citation, or ticket, whether or not they are arrested. Despite the majority's attempt to limit its analysis to defendants for whom probable cause has been found by a judge or grand jury, there is no such limitation in the statute itself.

The history in this Circuit highlights the sensitive and contentious nature of this issue. This Court has previously struggled over cases challenging the seizure of DNA samples from convicted defendants. In United States v. Kincade, 379 F. 3d 813 (9th Cir. 2004), the en banc Court addressed the constitutionality of DNA profiling felons on supervised release for a narrow range of serious "qualifying federal offenses." Five members of the Court applied the totality of the circumstances test to conclude that DNA profiling of convicted felons on supervision was constitutional. This opinion relied heavily on the "transformative changes wrought by a lawful conviction and accompanying term of conditional release . . . ." 379 F.3d at 834-35. The opinion then outlined how the defendant's

status as a convicted defendant on supervision substantially affected both his privacy interest and the government's interest under the totality of circumstances test. These five judges emphasized the "limited nature" of their holding. Id., 379 F.3d at 835.

A sixth member of the en banc panel joined in the plurality opinion, but only after noting in a concurring opinion that the totality of circumstances test was not the correct analysis for DNA profiling convicted defendants. Instead, the concurring opinion focused on the "special need" to monitor convicts on supervised release and deter their possible recidivism.[3] Id., 379 F.3d at 840. Further, the concurrence did not agree that the forced extraction and retention of a DNA sample was minimally invasive.

Five judges dissented in Kincade, in three dissenting opinions, all of which emphasized the importance of the constitutional rights at stake. Kincade, 379 F.3d at 843 (Reinhardt, J., dissenting)(under the reasoning of the plurality, "all Americans will be at risk, sooner rather than later, of having our DNA samples permanently placed on file in federal cyberspace"); 379 F.3d at 871 (Kozinski, J., dissenting)("If collecting DNA fingerprints can be justified on the basis of the plurality's multi-factor, gestalt high-wire act, then it's hard to see how we can keep the database from expanding to include everybody."); 379 F.3d at 875 (Hawkins, J., dissenting)("In a world unrestrained by our Fourth Amendment, every citizen, convicted or not, might be forced to supply a DNA sample.").

After Kincade, Congress expanded the reach of the DNA profiling law, extending it to all federal felons on supervised release, rather than the previously-

---

[3] The majority opinion in Mr. Pool's case finds the special needs test "problematic" here because the DNA sampling is for a law enforcement purpose. Pool, at *11, p. 14024.

limited list of violent crimes. In another split decision, this Court held in United States v. Kriesel, 508 F.3d 941, 950 (9th Cir. 2007) that the law was constitutional regarding a "convicted felon currently serving a term of supervised release."[4] The majority applied the same totality of circumstances analysis used in Kincade, again concluding that the defendant's status as a convicted defendant substantially affected both his privacy interest and the government's interest in sampling and using his DNA. The majority noted that the issue is "sensitive and contentious" and expressly limited its opinion to "convicted individuals." 508 F.3d at 942-43, n. 1 & 2. The dissenting opinion in Kriesel thoroughly canvassed the relevant Supreme Court and federal circuit cases, concluding that the majority's decision was neither dictated or supported by the Supreme Court's opinion in Samson v. California, 547 U.S. 843 (2006).

Prior to Pool, "[n]either the Supreme Court nor [the Ninth Circuit] has permitted general suspicionless, warrantless searches of pre-trial detainees for grounds other than institutional security or other legitimate penological interests." Friedman, 580 F.3d at 857. As the dissenting opinion notes, the Supreme Court has never applied the totality of the circumstances test to uphold a search prior to a conviction of a crime. Pool, at *63, p. 14055. In various ways, the majority opinion extends Fourth Amendment law into new territory that dramatically decreases individual rights against government intrusion.

One substantial change to Fourth Amendment law is the majority's adoption of a judicial finding of probable case as a "watershed event" undermining Fourth Amendment protections. This unprecedented holding reduces Fourth Amendment

---

[4] It is worth noting that Kriesel and Friedman, as well as Pool, are split opinions where the deciding vote was cast by a judge sitting on this Court by designation.

rights so dramatically, at such an early stage in the criminal justice process, that it directly conflicts with settled Supreme Court law regarding search incident to arrest. See Arizona v. Gant, 129 S.Ct. 1710 (2009)(limiting searches incident to arrest).

Further, the majority opinion's use of the term "identification purposes" to include criminal investigation and the solving of cold cases renders that term limitless.[5] See Pool, at *6-7, p. 14021 (discussing purpose of DNA database to link evidence from crime scenes to profiles in the system). In Kincade, this Court found that there are only two uses for the DNA database: to match crime scenes to each other and to "match evidence obtained at the scene of a crime to a particular offender's profile." 379 F.3d at 819. Yet the majority asserts without support that DNA can be used to ascertain the "identity of the person being released to the public." Pool, at *27, p. 14033. Because the database (unlike fingerprinting) does not compare a defendant's profile with other offender profiles, it cannot be used to identify defendants in this way.[6] Rather, a defendant profile in the database is only used to attempt to "identify" that defendant as the perpetrator of an unsolved crime. Fingerprints or a booking photo amply satisfy the government's need to identify a defendant; finding suspects for crimes is pure criminal investigation.

The concurring opinion below acknowledges that "[t]his is a vexing case."

---

[5] The majority opinion wrongly claims, "Pool does not really challenge that identity is the primary purpose of the Act." Pool, at *28, p. 14034. This is incorrect. Mr. Pool raised the issue in his opening brief, and, once the government asserted identity as a basis for the DNA search, spent over seven pages of his reply brief arguing that identity had nothing to do with the government's interests.

[6] The government advanced no argument that they were concerned that they had arrested the wrong person, or that Mr. Pool's fingerprints and booking photo would be insufficient to identify him.

Pool, at *61, p. 14054. While acknowledging an "enormous potential" for DNA profiling as an investigatory tool, the concurrence notes that "its expansion or misuse poses a very real threat to our privacy." Id. Meanwhile, the dissenting opinion notes, "No circuit has ever before approved such a warrantless search or seizure before an individual has been convicted of any crime." Pool, at *62, p. 14054. The Pool opinion deals with issues of overwhelming, national importance.[7] This Court should grant en banc review.

B. The Majority Opinion in Pool Conflicts With This Court's Opinions in United States v. Scott and Friedman v. Boucher

This Court has addressed the Fourth Amendment privacy interests of pretrial defendants in two prior cases: United States v. Scott, 450 F. 3d 863 (9th Cir. 2006) and Friedman v. Boucher, 580 F. 3d 847 (9th Cir. 2009). Pool directly conflicts with both of these cases.

1. Friedman v. Boucher, 580 F.3d 847 (2009).

In Friedman, this Court held, "The warrantless, suspicionless, forcible extraction of a DNA sample from a private citizen violates the Fourth Amendment." 568 F.3d at 1130. Friedman directly precludes the majority's holding that the government can constitutionally compel DNA from Mr. Pool. It is axiomatic that a three-judge panel may not overturn Ninth Circuit precedent. Nichols v. McCormick, 929 F.2d 507, 510 n.5 (9th Cir. 1991).

This Court considered Mr. Friedman a "private citizen" despite the fact that he had previously been convicted of sex offenses and was in custody charged with

---

[7] The Third Circuit just granted sua sponte en banc review in United States v. Mitchell, 2010 U.S. App. LEXIS 21615, No. 10-145 (Oct. 20, 2010), which was argued and submitted to a panel on March 25, 2010. In that case the district court held that the federal government could not constitutionally DNA test a pretrial federal detainee under the same law challenged here. United States v. Mitchell, 681 F.Supp.2d 597 (2009).

a new sex offense. See Friedman, 580 F.3d at 860 (Callahan, J., dissenting) (characterizing Friedman as a "convicted sex offender . . . pre-trial detainee facing charges of indecent exposure and open and gross lewd conduct.") Under Friedman, Mr. Pool is a "private citizen" as well: although he has been charged with a federal offense, he has never been convicted of any crime and is out of custody. Because Mr. Friedman had previously been convicted and was in custody, there is no rationale by which he had more Fourth Amendment rights than Mr. Pool.

As in Friedman, the search in Mr. Pool's case is warrantless and suspicionless. Further, it is forcible: the government "may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample." 42 U.S.C. § 14135a(a)(4)(A). Mr. Pool's pretrial liberty would depend on his submission to DNA testing, and he is subject to prosecution and punishment for failing to cooperate. 42 U.S.C. § 14135a(a)(5)(A).

The majority opinion in Pool attempts to distinguish Friedman on the ground that Mr. Pool's DNA furthers the government's interest in establishing his identity. Yet, the only "identity" at issue is the attempt to identify Mr. Pool as a suspect in other crimes. This reasoning was specifically rejected in Friedman:

> However, the considerations underlying Sampson, Kincade, and Kriesel are absent here. Friedman was not on parole. He had completed his term of supervised release successfully and was no longer under the supervision of any authority. The Nevada authorities extracted the DNA from Friedman not because they suspected he had committed a crime, nor to aid in his reintegration into society, nor as a matter of his continuing supervision. Their purpose was simply to gather human tissue for a law enforcement databank, an objective that does not cleanse an otherwise unconstitutional search.

580 F.3d at 858. Other than the goal of identifying Mr. Pool as a suspect in other

cases, there is no identification issue here. The dissenting opinion correctly points out that the burden is on the government to support the search, and that it failed to do so. Pool, at *70-71, p. 14060.

The majority opinion attempts to distinguish Friedman on the basis that here the "government has probable cause to believe that Pool committed the crime," but it elides the distinction, also present in Friedman, between cause to arrest someone for any crime, and cause to search someone for evidence of a specific crime. In Friedman, the government had probable cause against the person they wanted to DNA test – he was in custody for new offenses. However, this Court clearly held that despite Friedman's status as an inmate, a convicted sex offender, and a criminal defendant, the government could not constitutionally DNA test him without a warrant or probable cause. 580 F.3d at 858.

The majority and concurring opinions also attempt to distinguish Friedman by claiming that an authorizing statute can permit an otherwise unconstitutional search. As aptly noted by the dissent, "[A] statute does not trump the Constitution." Pool, at *69, p. 14059. Although the majority opinion spends only one sentence and one footnote on this issue, the concurrence discusses it more in depth, noting, "It does appear counterintuitive that a search may be permissible because it is *less* particularized, but the Supreme Court's holdings regarding 'programmatic' searches compel this conclusion." Pool, at *58, p. 14052. However, the DNA statute does not constitute a "programmatic" search because of its law enforcement purpose. Indianapolis v. Edmond, 531 U.S. 32 (2000) (programmatic search with primary purpose of crime control unconstitutional); cf. Florida v. Wells, 495 U.S. 1, 4 (1990) (inventory search that protects owner's property, insures against claims of lost, stolen, or vandalized property, and guards

police from danger constitutional); Colorado v. Bertine, 479 U.S. 367, 374 n.6 (1987) (same).

Finally, the majority opinion attempts to distinguish Friedman by claiming to be engaging in a fact-specific analysis regarding Mr. Pool. Id., at *32, p. 14037. Nothing about the opinion is fact-specific. A fact-specific analysis would take into account the specific facts of Mr. Pool's case, the charged offense, any circumstances at the time of arrest, and any issues that might affect his ability to be released on supervision. It would look at all of these issues in determining the government's interest in having Mr. Pool (as opposed to any other person charged with a federal crime) DNA tested. The panel did not look at any facts in this case because there were no facts to look at. Despite being repeatedly invited by the defense to establish by any facts that DNA testing was justified based on the particular circumstances of Mr. Pool's case, the government never tried to justify testing on any fact-specific basis.

Simply put, Friedman and Pool cannot be reconciled. Friedman states that the government cannot DNA profile an incarcerated repeat sex offender charged with a new offense, while Pool states that the government can DNA profile an unconvicted defendant who is out of custody. There is no method by which law enforcement or lower courts can reconcile these cases to comply with the law. The issue must be resolved by the en banc Court.

2. United States v. Scott, 450 F.3d 863 (9th Cir. 2006)

In Scott, this Court considered whether the police may conduct a search based on less that probable cause of an individual released while awaiting trial. Scott, 450 F.3d at 864. This Court held that the defendant's privacy interest was not diminished by his status as a pretrial releasee. Id. at 873-74. The Court stated

that the dissent's inability to see a constitutionally relevant distinction "between someone who has been convicted of a crime and someone who has been merely accused of a crime but is still presumed innocent, overlooks both common sense and our caselaw." Id. at 873.

The majority and concurring opinions in the current case make the same mistake as the dissent in Scott. The Pool majority recognizes that Scott is "inconsistent" with its holding, and attempts to distinguish it. Pool's finding that a determination of probable cause (instead of a conviction) is a watershed event allowing warrantless, suspicionless DNA searches cannot be reconciled with Scott's statement that a pretrial releasee does not suffer a diminished expectation of privacy.[8] En banc review is merited.

IV. CONCLUSION

For the reasons set forth above, we respectfully request that the Court grant this petition for rehearing en banc.

Dated: October 28, 2010

Respectfully Submitted,

Daniel J. Broderick
Federal Defender

/s/ Rachelle Barbour

Rachelle Barbour
Research and Writing Attorney
Attorney for JERRY ARBERT POOL

[8] Seven judges dissented from the denial of rehearing en banc in Scott, contending that the majority opinion "misconceives the reality of pretrial release and the applicable constitutional principles." Id., 450 F.3d at 889 (Callahan, J.). The same sentiment asserted by these judges to the denial of rehearing in Scott fully supports the need for rehearing in Mr. Pool's case: "[f]ailing to rehear this case en banc, we regrettably succumb to a dangerous, disruptive, and poorly conceived sea change foisted upon all of the states and federal districts encompassed by the Ninth Circuit."

CERTIFICATION OF COMPLIANCE PURSUANT TO
CIRCUIT RULES 35-4(a) AND 40-1(a)
FOR CASE NO. 09-10303

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) and Circuit Rule 40-1 because this brief contains no more than 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32.

Dated: October 28, 2010

Respectfully submitted,

DANIEL J. BRODERICK
Federal Defender

/s/ Rachelle Barbour

RACHELLE BARBOUR
Research and Writing Attorney

Attorneys for Defendant-Appellant
JERRY ARBERT POOL

C.A. No. 09-10303

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JERRY ARBERT POOL, Defendant-Appellant.	No. Cr. 09-0015-EJG CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2010, I electronically filed the foregoing PETITION FOR REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Service on the government and amicus counsel will be accomplished by the appellate CM/ECF system.

Dated: October 28, 2010

/s/ Rachelle Barbour