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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

vs.

CR S-09-0015 EJG GGH

ORDER

JERRY ALBERT POOL,

Judge: Gregory G. Hollows

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I. Introduction

Defendant on or about January 12, 2007, in Shasta County, in the Eastern District of California, received and possessed on his computer, visual depictions of minors engaged in sexually explicit conduct which were produced and transported in interstate commerce, in violation of 18 U.S.C. § 2252(a)(4)(b). On January 8, 2009, an indictment and arrest warrant were issued. On January 23, 2009, defendant appeared in court for arraignment and entered a plea of not guilty. Defendant has no prior federal criminal record. The court ordered defendant released on a \$25,000 unsecured bond and to obey pre-trial conditions. Defendant consented to all the pre-trial conditions except that he must provide a DNA sample. The court stayed the DNA collection for both parties to brief the issue. Defendant challenges the constitutionality of amendments to the Bail Reform Act, 18 U.S.C. § 3142(b) and (c)(1)(A), which require DNA to

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1 be provided for pre-trial release and the DNA Fingerprinting Act of 2005<sup>1</sup>, 42 U.S.C. § 14135a,<sup>2</sup>  
2 which requires DNA testing of all arrestees.<sup>3</sup>

3 II. Holding

4 This case, involving required DNA “identification” testing of non-convicted  
5 persons, is one of first impression for the federal courts. The court holds that after a judicial or  
6 grand jury determination of probable cause has been made for felony criminal charges against a  
7 defendant, no Fourth Amendment or other Constitutional violation is caused by a universal  
8 requirement that a charged defendant undergo a “swab test,” or blood test when necessary, for the  
9 purposes of DNA analysis to be used solely for criminal law enforcement, identification  
10 purposes.

11 III. Analysis

12 DNA Amendments

13 The Bail Reform Act, 18 U.S.C. § 3142(b) and (c)(1)(A), provide:

14 (b) Release on personal recognizance or unsecured appearance bond. (1) The  
15 judicial officer shall order the pretrial release of the person on personal  
16 recognizance, or upon execution of an unsecured appearance bond in an amount  
17 specified by the court, subject to the condition that the person not commit a  
18 Federal, State, or local crime during the period of release and subject to the  
19 condition that the person cooperate in the collection of a DNA sample from the  
20 person if the collection of such a sample is authorized pursuant to section 3 of the  
21 DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a), unless the  
22 judicial officer determines that such release will not reasonably assure the  
23 appearance of the person as required or will endanger the safety of any other

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20 <sup>1</sup> This act is also referred to as the Violence Against Women and Department of Justice  
21 Reauthorization Act of 2005.

22 <sup>2</sup> In 2000, Congress enacted the DNA Analysis Backlog Elimination Act which required  
23 DNA samples be taken from individuals in custody, on probation or on supervised release after  
24 being convicted of qualifying federal offenses. The scope of qualifying offenses was increased in  
25 2001 under the USA Patriot Act, and extended to any felony pursuant to the Justice for All Act of  
26 2004. It was the DNA Fingerprinting Act of 2005, that extended the act to all persons arrested or  
detained. Pub. L. No. 109-162 §1004. Section 155 of the Adam Walsh Child Protection and  
Safety Act of 2006 also extended the scope of testing to all arrestees. PL 109-248.

<sup>3</sup> Defendant is a pre-trial releasee, but assumes the government will rely on both acts to  
obtain the DNA sample.

1 person or the community.

2 (c) Release on conditions. (1) If the judicial officer determines that the release  
3 described in subsection (b) of this section will not reasonably assure the  
4 appearance of the person as required or will endanger the safety of any other  
5 person or the community, such judicial officer shall order the pretrial release of  
6 the person--

7 (A) subject to the condition that the person not commit a Federal, State, or local  
8 crime during the period of release and subject to the condition that the person  
9 cooperate in the collection of a DNA sample from the person if the collection of  
10 such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog  
11 Elimination Act of 2000 (42 U.S.C. 14135a).

12 An amendment to the DNA Fingerprinting Act, 42 U.S.C. § 14135a, that took  
13 effect in January 2006, provides, “The Attorney General may, as prescribed by the Attorney  
14 General in regulation, collect DNA samples from individuals who are arrested, facing charges, or  
15 convicted or from non-United States persons who are detained under the authority of the United  
16 States.” Id.

17 After a DNA sample is collected, it is provided to the Director of the Federal  
18 Bureau of Investigation (FBI). 42 U.S.C. § 14135a(b). The FBI Director then analyzes the DNA  
19 sample and includes the results in the Combined DNA Index System (CODIS), a FBI-created,  
20 national database that catalogues DNA profiles from numerous sources, including federal and  
21 state convicts, persons who have been charged in an indictment or information with a crime,  
22 DNA samples recovered from crime scenes, and from relatives of missing persons. 42 U.S.C. §  
23 14132(a). CODIS “allows State and local forensics laboratories to exchange and compare DNA  
24 profiles electronically in an attempt to link evidence from crime scenes for which there are no  
25 suspects to DNA samples of convicted offenders on file in the system.” H.R. Rep. 106-900(I), at  
26 8 (2000).

27 The Attorney General issued regulations regarding the practical implementation of  
28 taking DNA samples from an arrestee. Rules and Regulations, Department of Justice, 28 CFR  
29 Part 28, 73 FR 74932, 2008 WL 5155929. The regulations provide:

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1 The rule allows DNA samples generally to be collected, along with a subject's  
2 fingerprints, as part of the identification process. As discussed above, the uses of  
3 DNA for law enforcement identification purposes are similar in general character  
4 to the uses of fingerprints, and these uses will be greatly enhanced as a practical  
5 matter if DNA is collected regularly in addition to fingerprints. Law enforcement  
6 agencies routinely collect fingerprints from individuals whom they arrest. See  
7 Anderson, 650 S.E.2d at 706 ("Fingerprinting an arrested suspect has long been  
8 considered a part of the routine booking process."); Kincade, 379 F.3d at 836 n.31  
9 ("[E]veryday 'booking' procedures routinely require even the merely accused to  
10 provide fingerprint identification, regardless of whether investigation of the crime  
11 involves fingerprint evidence." (citation and quotation omitted)); Jones, 962 F.2d  
12 at 306 (noting "universal approbation of 'booking' procedures whether or not the  
13 proof of a particular suspect's crime will involve the use of fingerprint  
14 identification").

15 73 FR at 74934.

16 The Attorney General regulations also indicate that certain situations exist where  
17 collecting DNA will not be appropriate.

18 The Department recognizes, however, that there may be some circumstances in  
19 which agencies collect fingerprints but in which the collection of DNA samples  
20 would not be warranted or feasible. For example, in relation to non-arrestees,  
21 DHS will not be required to collect DNA samples from aliens who are  
22 fingerprinted in processing for lawful admission to the United States, or from  
23 aliens from whom DNA-sample collection is otherwise not feasible because of  
24 operational exigencies or resource limitations. If any agency believes that such  
25 circumstances exist within its sphere of operations, the agency should bring these  
26 circumstances to the attention of the Department, and exceptions to the  
DNA-sample collection requirement may be allowed with the approval of the  
Attorney General.

73 FR at 74934.

#### Fourth Amendment

It is undisputed that the court sought to impose the DNA testing without engaging  
in a fact specific inquiry regarding if this condition was required to secure defendant's  
appearance in the future. It is also undisputed that the government seeks to impose DNA testing  
without obtaining a warrant. Defendant contends that the imposition of DNA testing to arrestees  
and pre-trial releasees is unconstitutional under the Fourth Amendment. The first argument  
posed involves the standard upon which the Fourth Amendment issue should be judged: "totality  
of the circumstances," or "special needs."

1 Pursuant to the Fourth Amendment,”[t]he right of the people to be secure in their  
2 persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be  
3 violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,  
4 and particularly describing the place to be searched, and the persons or things to be seized.” U.S.  
5 Const. Amend. IV. “The touchstone of our analysis under the Fourth Amendment is always ‘the  
6 reasonableness in all the circumstances of the particular governmental invasion of a citizen’s  
7 personal security.’ ” Pennsylvania v. Mimms, 434 U.S. 106, 108-09, 98 S.Ct. 330 (1977)  
8 (quoting Terry v. Ohio, 392 U.S. 1, 19, 88 S.Ct. 1868 (1968)). The Ninth Circuit has held, “the  
9 compulsory extraction of blood for DNA profiling unquestionably implicates the right to  
10 personal security embodied in the Fourth Amendment, and thus constitutes a ‘search’ within the  
11 meaning of the Constitution.” United States v. Kincade, 379 F.3d 813, 821 n. 15 (9th Cir. 2004)  
12 (en banc).

13 However, every circuit to consider a Fourth Amendment challenge to the Justice  
14 for All Act of 2004, that extended DNA sampling to all felony convictions, has reached the same  
15 conclusion: collecting DNA from nonviolent felons as authorized by the Act does not violate the  
16 Fourth Amendment.

17 The majority of circuits adopt a “totality of the circumstances” framework. In  
18 United States v. Kincade, 379 F.3d 813 at 839-840, the Ninth Circuit held that mandatory blood  
19 draws for DNA testing of violent felons on supervised release does not violate the Fourth  
20 Amendment. In Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995), decided earlier, the Ninth Circuit  
21 held that an Oregon statute requiring convicted murderers and sex offenders to submit to blood  
22 testing for DNA analysis did not violate the Fourth Amendment. Rise, 59 F.3d at 1562. In  
23 Kincade, the Ninth Circuit reaffirmed Rise and held that “its reliance on a totality of the  
24 circumstances analysis to uphold compulsory DNA profiling of convicted offenders both  
25 comports with the Supreme Court’s recent precedents and resolves this appeal in concert with the  
26 requirements of the Fourth Amendment.” Kincade, 379 F.3d at 832. Applying the totality of the

1 circumstances test, in U.S. v. Kriesel, 508 F.3d 941 (9th Cir. 2007), the Ninth Circuit held that  
2 collecting DNA samples from nonviolent felons on supervised (conditioned) release does not  
3 violate the Fourth Amendment. See also, United States v. Weikert, 504 F.3d 1, 9-11 (1st Cir.  
4 2007); Banks v. United States, 490 F.3d 1178, 1184 (10th Cir. 2007); United States v. Kraklio,  
5 451 F.3d 922, 924 (8th Cir. 2006). The reasonableness of a search using the totality of the  
6 circumstances, “is determined by assessing, on the one hand, the degree to which it intrudes upon  
7 an individual’s privacy and, on the other, the degree to which it is needed for the promotion of  
8 legitimate governmental interests.” Samson v. California, 547 U.S. 843, 848, 126 S.Ct. 2193,  
9 2197 (2006).

10 In contrast, the Second and Seventh Circuits rely on the “special needs test.”  
11 United States v. Amerson, 483 F.3d 73, 78 (2d Cir.2007); United States v. Hook, 471 F.3d 766,  
12 772-74 (7th Cir. 2006). The Sixth Circuit has upheld the 2004 Act under both tests. United  
13 States v. Conley, 453 F.3d 674, 677-81 (6th Cir. 2006).

14 Defendant argues that the situation here involving non-convicted, but charged  
15 defendants is different. Therefore, the court must use the “special needs” test because unlike the  
16 Kincade line of cases, defendant has not been convicted and has a presumption of innocence.  
17 Defendant’s Brief at 15. Defendant also contends that a general law enforcement need to take his  
18 DNA sample, the only reason that can apply here according to defendant, will not qualify as a  
19 “special need.” As a result, defendant concludes the sampling is unconstitutional. Defendant’s  
20 Brief at 15. Defendant points to the Supreme Court cases of Ferguson v. City of Charleston, 532  
21 U.S. 67, 121 S.Ct. 1281 (2001) and City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447  
22 (2000). In Ferguson, the Supreme Court held that the use of a hospital’s diagnostic test to obtain  
23 evidence of drug use of pregnant patients for law enforcement purposes was an unconstitutional  
24 search. In Edmond, the Supreme Court struck down a vehicle checkpoint where the primary  
25 purpose was to detect evidence of ordinary criminal wrongdoing, the trafficking of illegal drugs.

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1 Defendant's argument fails. The programs in Ferguson and Edmond are  
2 distinguishable from the instant case. Those cases involved the search and seizure of motorists  
3 on a particular road or patients being admitted to a hospital. Importantly, there had been no  
4 judicial involvement in finding that each specific person to be tested had been involved in  
5 criminal wrongdoing. Rather, the government was simply fishing for substantive evidence with  
6 which to then go to a judge or otherwise commence criminal proceedings. As such, neither the  
7 motorists nor the patients could be compelled to give substantive evidence absent special needs  
8 beyond the mere general need to enforce the criminal laws.<sup>4</sup> The instant case is worlds apart  
9 from that in the above two cited cases – defendant is subject to DNA testing *after* a judicial  
10 finding or grand jury determination of probable cause.

11 The judicial or grand jury finding of probable cause within a criminal proceeding  
12 is a watershed event which should be viewed differently from mere pre-judicial involvement  
13 gathering of evidence. After such a judicial finding, a defendant's liberty may be greatly  
14 restricted – even denied. As part of his pre-trial release, defendant may be deprived of his very  
15 liberty; he can be subject to electronic monitoring; he may be ordered to obey a mandatory  
16 curfew. Also, the court can order a defendant to refrain from traveling outside of the Eastern  
17 District of California without prior approval, not to possess a firearm and that he must reside at a  
18 location that is reviewed and approved by the Pretrial Services Officer. In a pornography case he  
19 can be directed to not have any communications with a minor without the child's parent or  
20 guardian being present, cannot be found within 100 feet of a schoolyard, park, playground or  
21 other place frequented by children, cannot access the internet or possess a computer at his

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23 <sup>4</sup> Suspicionless searches have been upheld where designed to serve “special needs,  
24 beyond the normal need for law enforcement.” See, e.g., Vernonia School Dist. 47J v. Acton,  
25 515 U.S. 646, 115 S.Ct. 2386 (1995) (random drug testing of student-athletes); Treasury  
26 Employees v. Von Raab, 489 U.S. 656, 109 S.Ct. 1384 (1989) (drug tests for United States  
Customs Service employees seeking transfer or promotion to certain positions); Skinner v.  
Railway Labor Executives' Assn., 489 U.S. 602, 109 S.Ct. 1402 (1989) (drug and alcohol tests  
for railway employees involved in train accidents or found to be in violation of particular safety  
regulations).

1 residence without prior approval.<sup>5</sup> These conditions are almost identical to those conditions  
2 which can be imposed on a probationer or parolee for whom a DNA testing requirement has been  
3 found appropriate under a totality of the circumstances standard. The court finds that an up-front  
4 requirement for finding probable cause that the defendant has committed the charged felony  
5 places the issue much more closely with those cases utilizing a totality of the circumstances  
6 standard.<sup>6</sup>

7 In utilizing the totality of the circumstances, the decision to impose the DNA  
8 testing requirement on pre-trial detainees or releasees seems clearly warranted, if not compelling.  
9 An arrestee's identity obviously becomes a matter of legitimate state interest. See Kincade, 379  
10 F.3d at 837; Jones v. Murray, 962 F.2d 302, 306-07 (4th Cir. 1992). An arrestee has a  
11 diminished expectation of privacy in his own identity. Probable cause has long been the standard  
12 which allowed an arrestee to be photographed, fingerprinted and otherwise be compelled to give  
13 information which can later be used for identification purposes. Napolitano v. United States, 340  
14 F.2d 313, 314 (1st Cir. 1963).

15 There are similar compelling interests in the collection of DNA, as a law  
16 enforcement tool that is a technological progression from photographs and fingerprints. In  
17 upholding the sampling of DNA from supervised releasees, the Third Circuit described the vital  
18 governmental interests at stake,

19 A DNA database promotes increased accuracy in the investigation and  
20 prosecution of criminal cases. It will aid in solving crimes when they occur in the  
21 future. Equally important, the DNA samples will help to exculpate individuals  
who are serving sentences of imprisonment for crimes they did not commit and

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22 <sup>5</sup> It should be noted that several of these conditions are currently being challenged in other  
23 cases.

24 <sup>6</sup> The facts of the instant case is also distinguishable from the Ninth Circuit ruling in  
United States v. Scott, 450 F.3d 863 (9th Cir. 2006). In Scott, the Ninth Circuit, struck down a  
25 Nevada state law that conditioned pre-trial release on consenting to warrantless searches of the  
26 individuals home for drugs. The court held that the law did not pass a special needs or a totality  
of the circumstances test and emphasized the penultimate expectation of privacy in one's home.  
Id.



1 will help to eliminate individuals from suspect lists when crimes occur...The  
2 interest in accurate criminal investigations and prosecution is a compelling  
interest that the DNA Act can reasonably said to advance.

3 U.S. v. Sczubelek, 402 F.3d 175, 185 (3rd Cir. 2005).

4 Similarly, the Fourth Circuit assessed governmental interests against the minimal  
5 intrusion:

6 It is a well recognized aspect of criminal conduct that the perpetrator will take  
7 unusual steps to conceal not only his conduct, but also his identity. Disguises  
used while committing a crime may be supplemented or replaced by changed  
8 names, and even changed physical features. Traditional methods of identification  
by photographs, historical records, and fingerprints often prove inadequate. The  
9 DNA, however, is claimed to be unique to each individual and cannot, within  
current scientific knowledge, be altered. The individuality of the DNA provides a  
10 dramatic new tool for the law enforcement effort to match suspects and criminal  
conduct. Even a suspect with altered physical features cannot escape the match  
11 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. The  
12 governmental justification for this form of identification, therefore, relies on no  
argument different in kind from that traditionally advanced for taking fingerprints  
13 and photographs, but with additional force because of the potentially greater  
precision of DNA sampling and matching methods.

14 Jones v. Murray, 962 F.2d at 307. See also Nicholas v. Goord, 430 F.3d 652, 671 (2nd Cir.  
15 2005) (the intrusion of privacy effected by DNA sampling is similar to the intrusion and  
16 maintenance of fingerprint records). While these cases dealt with convicted felons, the rationale  
17 remains identical for the present situation involving pre-trial release.

18 In Anderson v. Commonwealth, 274 Va. 469 (2007), the Supreme Court of  
19 Virginia upheld a state statute that required every person arrested for the commission or  
20 attempted commission of a violent felony to have their DNA collected.<sup>7</sup> The court in Anderson  
21 analogized the taking of a DNA sample to the taking of fingerprints as part of the routine  
22 booking process following an arrest.

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24 <sup>7</sup> Defendant cites, In the Matter of the Welfare of C.T.L., 722 N.W.2d 484 (Ct. App.  
25 Minn. 2006), where the Minnesota Court of Appeals invalidated a statute that authorized DNA  
26 sampling after a judge had found probable cause that the arrestee had committed a crime. This  
court finds that case unpersuasive and believes that a judicial or grand jury determination of  
probable cause is a significant event in the proceedings of case which can allow for DNA  
collection of a person on pre-trial release.

1 [W]hen a suspect is arrested upon probable cause, his identification becomes a  
2 matter of legitimate state interest and he can hardly claim privacy in it. We accept  
3 this proposition because the identification of suspects is relevant not only to  
4 solving the crime for which the suspect is arrested, but also for maintaining a  
5 permanent record to solve other past and future crimes. This becomes readily  
6 apparent when we consider the universal approbation of “booking” procedures  
7 that are followed for every suspect arrested for a felony, whether or not the proof  
8 of a particular suspect's crime will involve the use of fingerprint identification.  
9 Jones, 962 F.2d at 306. Like fingerprinting, the “Fourth Amendment does not  
10 require an additional finding of individualized suspicion” before a DNA sample  
11 can be taken. Id. at 306-07.

12 Anderson, 274 Va. at 474-75 (quoting Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992)). The  
13 Anderson court also held that:

14 [T]he taking of a DNA sample by minimally intrusive means “is justified by the  
15 legitimate interest of the government in knowing for an absolute certainty the  
16 identity of the person arrested, in knowing whether he is wanted elsewhere, and in  
17 ensuring his identification in the event he flees prosecution.” 3 Wayne R. LaFave,  
18 Search and Seizure § 5.3(c), at 168 (4th ed.2004).

19 Anderson, 274 Va. at 475-76.<sup>8</sup>

20 The court agrees that DNA sampling is analogous to taking fingerprints as part of  
21 the routine booking process upon arrest. As the Tenth Circuit noted, FBI’s “CODIS operates  
22 much like an old-fashioned fingerprint database (albeit more efficiently).” Banks v. U.S., 490  
23 F.3d 1178, 1193 (10th Cir. 2007).

24 Secondly, the invasiveness of DNA testing is minimal. The DNA can be taken  
25 by an oral swab, and even blood tests have been held to be a minimal intrusion. See Skinner v.  
26 Railway Labor Executives’ Ass’n, 489 U.S. 602, 625, 109 S.Ct. 1402 (blood tests are  
commonplace, safe, and “do not constitute an unduly extensive imposition on an individual’s  
privacy and bodily integrity.”). See also United States v. Kriesel, supra, 508 F.3d at 948  
 (“Consequently, the additional privacy implications of a blood test collecting DNA, as opposed  
to a cheek swab...do not significantly alter our analysis.”). Pursuant to 28 C.F.R. § 28.12(f)(1),  
DNA will be collected by buccal (oral) swabs or blood draws. There is no evidence that an oral

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<sup>8</sup> The defendant in Anderson also relied on Ferguson and Edmond to argue for a “special needs” test to take a DNA sample. This argument did not persuade the Virginia Supreme Court.

1 swab is any more physically invasive than taking fingerprints.

2           The many courts that have addressed the issue of DNA testing have struggled with  
3 concerns regarding the safeguards in place for the DNA storage and the possibility of misuse.

4 While fears of a “Big Brother” style government harassing or persecuting individuals based on  
5 genetic characteristics is always theoretically possible, that is not the purpose of the amendments  
6 before the court, nor is it at all likely. The court has reviewed the safeguards in the instant  
7 amendments and relies on these protections and the Department of Justice regulations to ensure  
8 that the DNA information will be used solely for law enforcement purposes.

9           The instant amendments serve only to utilize the collected DNA for identification  
10 purposes similar to fingerprints and photographs. The Attorney General regulations describe that  
11 the DNA will be taken during the identification process after the arrest. 73 FR at 74934.

12 Currently, the extracted DNA consists mostly of “junk DNA,” that was purposely selected as it  
13 contains DNA that is not currently associated with containing genetic traits such as physical and  
14 medical characteristics. Kincade, 379 F.3d at 818.

15           Regardless of the “junk” status of the DNA, and more importantly, the statute also  
16 contains privacy protections and imposes criminal and financial penalties for improper use of  
17 DNA samples. The statute provides:

18           A person who knowingly discloses a sample or result described in subsection (a)  
19 of this section in any manner to any person not authorized to receive it, or obtains  
20 or uses, without authorization, such sample or result, shall be fined not more than  
21 \$250,000, or imprisoned for a period of not more than one year. Each instance of  
22 disclosure, obtaining, or use shall constitute a separate offense under this  
23 subsection.

24 42 U.S.C. § 14135e(c).

25           The act also limits access to the DNA samples. DNA test results may only be  
26 disclosed to criminal justice agencies for law enforcement identification purposes, in judicial  
proceedings, for criminal defense purposes and if personally identifiable information is removed  
for population-statistics database, identification research, protocol development purposes and for

1 quality control purposes. 42 U.S.C. § 14133(b)(1)(A)-(C).

2 Defendant's argument that no data sequestration system is immune from abuse is  
3 no reason to disallow DNA identification sampling. The point is that such information cannot be  
4 used outside of the statute's permissible purpose on pain of criminal penalties. This sanction will  
5 deter the vast majority of persons who might otherwise take undue advantage of private  
6 information. The sanction will not absolutely deter everyone, but what sanction does? If  
7 defendant's argument were to hold sway, medical records could not be computerized lest  
8 someone be able to hack into the records; insurance companies would not be allowed access to  
9 such records for payment purposes to alleviate the potential for some errant employee to misuse  
10 this otherwise quasi-private information. Our modern technological society cannot function in an  
11 atmosphere of privacy paralysis occasioned by a parade of "what ifs."

12 The court observes that the arguments, fears and concerns regarding DNA  
13 collection are nearly identical to those expressed about fingerprinting more than seventy years  
14 ago in the 1932 Second Circuit case, United States v. Kelly, 55 F.2d 67 (2nd Cir. 1932). In  
15 Kelly, the court upheld the fingerprinting of an arrestee who sold a quart of gin during  
16 Prohibition. The court emphasized that the arrest was made upon probable cause and the  
17 important need of identifying the individual to determine previous convictions and to aid in  
18 apprehension in the future. Kelly, 55 F.2d at 68. The court held, "Any restraint of the person  
19 may be burdensome. But some burdens must be borne for the good of the community[...]. The  
20 slight interference with the person involved in finger printing seems to us one which must be  
21 borne in the common interest." Id. at 68. The court went on:

22 Finger printing seems to be no more than an extension of methods of  
23 identification long used in dealing with persons under arrest for real or supposed  
24 violations of the criminal laws. It is known to be a very certain means devised by  
25 modern science to reach the desired end, and has become especially important in a  
time when increased population and vast aggregations of people in urban centers  
have rendered the notoriety of the individual in the community no longer a ready  
means of identification.

26 Id. at 69.

1           The court believes that the same rationale described in 1932 holds true today. In  
2 viewing the totality of the circumstances surrounding the instant amendments, the court holds  
3 that after a judicial or grand jury determination of probable cause has been made for felony  
4 criminal charges against a defendant, no Fourth Amendment violation is caused by a universal  
5 requirement that a charged defendant in a felony case undergo a “swab test,” or blood test when  
6 necessary, for the purposes of DNA analysis to be used solely for criminal law enforcement,  
7 identification purposes.

8           The undersigned emphasizes what this holding does not encompass. It does not  
9 authorize DNA sampling after citation or arrest for infractions or misdemeanors, as in these cases  
10 there will be no *judicial* finding of probable cause soon after the arrest or citation, or no *grand*  
11 *jury* finding before or after the arrest. See, Fed. R. Crim. P. 7(a). It does not authorize police  
12 officials to perform DNA sampling prior to a judicial finding of probable cause which must be  
13 made within 48 hours after arrest and detention. Again, it is the finding of probable cause on  
14 criminal charges which allows the court to set release conditions similar to those of probation  
15 and parole, which is the underpinning of the court’s holding in this case. Whether DNA  
16 sampling could be extended to these situations is a matter reserved for a later day.

17           Fifth Amendment, Eighth Amendment, Separation of Powers and Commerce Clause

18           Defendant also alleges the mandatory DNA sampling of the Bail Reform Act, 18  
19 U.S.C. § 3142(b) and (c)(1)(A) violates Fifth Amendment Due Process, the Eighth Amendment,  
20 the Separation of Powers and is also an unconstitutional extension of power under the Commerce  
21 Clause.

22           In analyzing the DNA sampling amendments the court is aware that many district  
23 courts are considering similar challenges to the Adam Walsh Child Protection and Safety Act of  
24 2006 and the mandatory pre-trial conditions that establish electronic monitoring, a curfew and  
25 restrict an individual’s movement from certain public places. See United States v. Smedley,  
26 2009 WL 1086972 (E.D. Mo, April 22, 2009) (under procedural due process, the Adam Walsh

1 Act's amendments to the Bail Reform Act of 1984 are unconstitutional on their face); United  
2 States v. Merritt, 2009 WL 764554 (D.Neb. Mar. 20, 2009) (statute violates procedural due  
3 process under the Fifth Amendment); United States v. Rueb, 2009 WL 764552 (D.Neb. Mar. 20,  
4 2009) (same); United States v. Arzberger, 592 F.Supp.2d 590 (S.D.N.Y. 2008) (statute violates  
5 procedural due process under the Fifth Amendment, but does not violate, on its face, the  
6 Excessive Bail Clause under the Eighth Amendment, or violate the separation of powers  
7 principle of the Constitution); United States v. Kennedy, 593 F.Supp.2d 1221 (W.D.Wash. 2008)  
8 (statute violates procedural due process under the Fifth Amendment, the Excessive Bail Clause  
9 under the Eighth Amendment, and the separation of powers principle of the Constitution); United  
10 States v. Torres, 566 F.Supp.2d 591 (W.D.Tex. 2008) (statute violates procedural due process  
11 under the Fifth Amendment and the Excessive Bail Clause under the Eighth Amendment);  
12 United States v. Vujnovich, No. 07-20126-01 CM DJW, 2007 WL 4125901 (D.Kan. Nov.20,  
13 2007) (statute violates procedural due process under the Fifth Amendment, the Excessive Bail  
14 Clause under the Eighth Amendment, and the separation of powers principle of the Constitution);  
15 United States v. Crowell, No. 06-CR-291E(F), 2006 WL 3541736 (W.D.N.Y. Dec.7, 2006)  
16 (same). Only one case has upheld the provisions against a constitutional attack. United States v.  
17 Gardner, 523 F.Supp.2d 1025 (N.D.Cal. 2007) (statute does not violate procedural due process  
18 under the Fifth Amendment, the Excessive Bail Clause under the Eighth Amendment, or the  
19 separation of powers principle of the Constitution).

20 Many of the courts in the above cases found the mandatory conditions that  
21 establish a curfew and restrict an individual's movement from certain public places implicated a  
22 liberty interest by curtailing an individual's ability to freely move from one place to another.  
23 These courts found that the private interest was significant as an individual's conduct was subject  
24 to monitoring. The issue in the instant case is distinguishable from those above. The DNA is  
25 taken as part of the post-arrest, post-release booking procedure for identification purposes only,  
26 similar to fingerprints and photographs. As such, the liberty interest implicated is non-existent

1 when comparing other strictures of the Adam Walsh Act. Providing a DNA sample does not  
2 restrict an individual's movement or impose an excessive bail condition. The DNA sampling,  
3 unlike a curfew or travel restriction, is not a continuing imposition on one's activities in a pre-  
4 trial situation. Nevertheless, the court will analyze each issue.

5 Fifth Amendment Procedural Due Process

6 Defendant contends that the mandatory DNA sampling is a violation of Fifth  
7 Amendment procedural due process. Defendant argues that the mandatory nature of the  
8 sampling eliminates any independent judicial determination as to its necessity.

9 "The fundamental requirement of [procedural] due process is the opportunity to be  
10 heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319,  
11 333, 96 S.Ct. 893 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187  
12 (1965)). "Procedural due process rules are meant to protect persons not from the deprivation, but  
13 from the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435  
14 U.S. 247, 259, 98 S.Ct. 1042 (1978). "[D]ue process is flexible and calls for such procedural  
15 protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92  
16 S.Ct. 2593 (1972). In resolving claims that an individuals procedural due process rights have  
17 been violated, three factors are considered:

18 First, the private interest that will be affected by the official action; second, the  
19 risk of an erroneous deprivation of such interest through the procedures used, and  
20 the probable value, if any, of additional or substitute procedural safeguards; and  
21 finally, the Government's interest, including the function involved and the fiscal  
and administrative burdens that the additional or substitute procedural  
requirement would entail.

22 Mathews, 424 U.S. at 335, 96 S.Ct. 893.

23 Several courts have rejected Fifth Amendment Due Process challenges to the  
24 DNA sampling of convicted felons. The Ninth Circuit held in Rise v. Oregon, 59 F.3d 1556 (9th  
25 Cir. 1995), that, "the extraction of blood from an individual in a simple, medically acceptable  
26 manner, despite the individual's lack of an opportunity to object to the procedure, does not

1 implicate the Due Process Clause. Id., at 1563. See also, United States v. Hugs, 384 F.3d 762,  
2 768-69 (9th Cir. 2004) (holding the condition of supervised release that requires DNA testing  
3 under the Act is not unconstitutionally vague and therefore meets procedural due-process  
4 requirements); Johnson v. Quander, 370 F.Supp.2d 79, 89-93 (D.D.C. 2005) (holding that DNA  
5 Act violates neither substantive nor procedural due process under the Fifth Amendment), aff'd,  
6 440 F.3d 489, 503 (D.C.Cir. 2006) (concluding that Fifth Amendment challenge to DNA Act is  
7 “without merit and do[es] not warrant separate discussion”).

8           Applying the factors set forth in Mathews, it is clear that defendant’s claim fails.  
9 The court has already discussed at length the applicable private and government interests in the  
10 Fourth Amendment discussion. Defendant’s privacy rights are diminished due to his status as an  
11 arrestee and the government interests are compelling.

12           The only factor that warrants additional discussion is the risk of erroneous  
13 deprivation. Defendant argues that there is a risk of erroneous deprivation as an arrestee is  
14 innocent until proven guilty and may be ultimately exonerated. There are procedures in place to  
15 have DNA expunged from the CODIS system in the event of an exoneration or dismissal of  
16 charges. 42 U.S.C. § 14132(d)(1)(A). The risk of an innocent person’s DNA being included in  
17 CODIS is minimal. Due to the minimal nature of any alleged deprivation or private interest, a  
18 pre-trial detainee does not have a procedural due process right with respect to submitting a DNA  
19 sample.

#### 20           Eighth Amendment

21           Defendant argues that collecting DNA as a mandatory condition of release  
22 violates the Eighth Amendment right to be released on conditions that are not excessive.

23           To find a violation of the Excessive Bail Clause, a court must find that the release  
24 conditions are excessive “in light of the perceived evil.” United States v. Salerno, 481 U.S. 739,  
25 754, 107 S.Ct. 2095 (1987). Bail and conditions of release must be “reasonably calculated to  
26 fulfill” the government’s purpose. Stack v. Boyle, 342 U.S. 1, 5, 72 S.Ct. 1 (1951).



1           The court has already found under the Fourth Amendment that the collection of  
2 DNA was a minimal intrusion as related to the important government interest. The same analysis  
3 satisfies the Eighth Amendment as collecting DNA for identification is not excessive in light of  
4 the government's purpose. As the Supreme Court stated in Salerno, "we reject the proposition  
5 that the Eighth Amendment categorically prohibits the government from pursuing other  
6 admittedly compelling interests through regulation of pretrial release." Id., at 753, 107 S.Ct.  
7 2095. To reiterate: the requirement to submit to a booking procedure type sampling does not  
8 mirror any other terms and condition of release which lasts throughout the pre-trial process. It is  
9 clear that an oral swab or blood test to confirm a pre-trial releasees identity prior to release is not  
10 excessive.

11           Separation of Powers

12           Defendant contends that the Bail Reform Act amendments violate the separation  
13 of powers by depriving the court of its role in determining release conditions and instead  
14 mandating DNA testing.

15           The Constitutional separation of powers doctrine prohibits Congress from  
16 encroaching upon the powers conferred to the federal judiciary. See Kilbourn v. Thompson, 103  
17 U.S. 168, 191 (1880). The Supreme Court has identified a number of legislative encroachments  
18 which transgresses the separation of powers. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211,  
19 115 S.Ct. 1447 (1995). Congress may not prescribe a rule of decision for the judiciary in cases  
20 without amending applicable law. See id., at 218, 115 S.Ct. 1447 (quoting United States v.  
21 Klein, 80 U.S. 128, 13 Wall. 128, 20 L.Ed. 519 (1871)). "Congress cannot vest review of the  
22 past decisions of Article III courts in officials of the Executive Branch." Plaut, 514 U.S. at 218,  
23 115 S.Ct. 1447. Congress may not interfere with the power of the federal judiciary to decide  
24 cases by "command[ing] the federal courts to reopen final judgments." Id., at 219, 115 S.Ct.  
25 1447.

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1           However, “the Framers did not require-and indeed rejected-the notion that the  
2 Branches must be entirely separate and distinct.” Mistretta v. U.S., 488 U.S. 361, 380, 109 S.Ct.  
3 647 (1989). There are many instances where the responsibilities of the branches overlap. While  
4 criminal sentencing is a judicial function, Congress has played a large role in prescribing  
5 mandatory minimum sentences. See Chapman v. United States, 500 U.S. 453, 467, 111 S.Ct.  
6 1919 (1991) (rejecting separation of powers challenge to mandatory minimum sentences). In  
7 U.S. v. Salerno, 481 U.S. 739, 107 S.Ct. 2095 (1987), the Supreme Court held that Congress may  
8 infringe on the judicial function of bail setting by declaring that defendants who meet certain  
9 criteria will not be entitled to bail at all. Id., at 755.

10           The Klein prohibition arises only when Congress has not amended prior law. See  
11 Plaut, 514 U.S. at 218, 115 S.Ct. 1447 (“Whatever the precise scope of Klein, however, later  
12 decisions have made clear that its prohibition does not take hold when Congress ‘amend[s]  
13 applicable law,’ ”). The Ninth Circuit has held that separation of powers is violated where  
14 “Congress has impermissibly directed certain findings in pending litigation, without changing  
15 any underlying law.” Gray v. First Winthrop Corp., 989 F.2d 1564, 1568 (9th Cir. 1993). In the  
16 instant case, Congress has amended the underlying law governing bail conditions and in no other  
17 way has usurped judicial functions.

18           Finally, not all Congressionally directed judicial “findings” qualify as directives  
19 of dispositive decision making subject to a separation of powers prohibition. Just looking to the  
20 Bail Reform Act itself, there exist several mandatory features within the Act prescribed by  
21 Congress which no one has ever contended violate the principle of separation of powers. See  
22 e.g., “During a continuance [of a detention hearing], such person *shall be detained.*” 18 U.S.C. §  
23 3142(f) (emphasis added); “The judicial officer *shall order* that a person who has been found  
24 guilty of an offense [specific offenses listed]... *be detained* [pending appeal]”. Section 3143  
25 (b)(2). (emphasis added). Defendant’s argument that a booking type DNA sampling procedure  
26 violates the separation of power principles, a situation much less invasive than an actual

1 deprivation of liberty, utterly fails.

2 Unconstitutional Extension of Power

3 Defendant also contends that the Commerce Clause does not authorize the  
4 collection of DNA from pre-trial releasees.<sup>9</sup>

5 The Ninth Circuit addressed this issue in a challenge to the collection of DNA  
6 from supervised releasees. United States v. Reynard, 473 F.3d 1008 (9th Cir. 2007). The court  
7 held that:

8 Since the federal government has the authority, under the Commerce Clause, to  
9 denominate Reynard's conduct a federal offense, it has the power to incarcerate  
10 him and impose upon him the terms of his supervised release, including requiring  
11 him to submit a DNA sample under the DNA Act. There is no requirement that  
each individual term of his supervised release be independently authorized under  
the Commerce Clause.

12 Id., at 1022.

13 Similarly, the federal government's authority to impose the instant DNA  
14 requirement arises when an individual is arrested for a crime that Congress had the authority to  
15 identify as a federal offense. Defendant's claim fails.

16 IV. Conclusion

17 The court holds that after a judicial or grand jury determination of probable cause  
18 has been made for felony criminal charges against a defendant, no Fourth Amendment or other  
19 Constitutional violation is caused by a universal requirement that a charged defendant in a felony  
20 case undergo a "swab test," or a blood test when necessary, for the purposes of DNA analysis to  
21 be used solely for criminal law enforcement, identification purposes.

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24 <sup>9</sup> Defendant also argues that the instant amendments are meant to expand DNA collection  
25 from just federal offenders to all defendants, and persons convicted of any crime. Defendant's  
26 Brief at 30. The court will not address this claim as it reads the amendments to apply to federal  
offenders only.

1                   Accordingly, IT IS HEREBY ORDERED that defendant submit to DNA  
2 collection.

3 DATED: May 27, 2009

/s/ Gregory G. Hollows

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GREGORY G. HOLLOWS  
UNITED STATES MAGISTRATE JUDGE

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