



Forensic DNA in the US Current Law and Policy

As of March 2012, the NDIS contains over 10,662,200 offender DNA profiles and 423,000 forensic profiles. The number of profiles has grown rapidly from 460,365 total profiles in 2000. Originally DNA collection and profiling was only mandated for individuals convicted of a small group of Federal offenses. Congress increased mandatory collection for "qualifying offenses" in the DNA Analysis and Backlog Elimination Act of 2000 ("2000 DNA Act"), made it a misdemeanor to fail to cooperate with collection, and authorized the use of force to collect the sample, if necessary. The category of "qualifying offenses" was expanded after 9/11 in the USA Patriot Act of 2001, Pub.L. 107-56, 115 Stat. 272 (October 26, 2001). In 2004, Congress again expanded the category of qualifying offenses to include "any felony" and "any crime of violence." Justice for All Act of 2004, Pub.L. 108-405, 118 Stat. 2260 (October 30, 2004).

The collection of DNA samples from such broad categories of convicted offenders was not sufficient, and in 2006 Congress authorized the Attorney General to promulgate regulations for the collection of DNA samples from all persons arrested under federal authority. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub.L. 109-162, 119 Stat. 2960 (January 5, 2006). Congress also authorized the Attorney General to collect samples from all persons "facing charges," in addition to those "arrested" under federal authority. Adam Walsh Child Protection and Safety Act of 2006, Pub.L. 109-248, 120 Stat. 587 (July 27, 2006).

Every state in the nation collects DNA samples from those who are convicted of certain crimes for use in state and/or federal databanks. Currently 49 states collect DNA samples from all felony convicts. Idaho is the exception. Each year, some states expand their convicted offender databases to include more classifications of convicted criminals. California and New York are the most expansive states; they collect DNA samples from all felony and misdemeanor convictions.

A growing number of states are collecting DNA samples from those arrested for certain offenses. These statutes differ from those in the "DNA Requirements for Convicted Offenders" section because arrestees who have not been found guilty of any crime are submitting DNA samples. Currently 27 states have passed laws authorizing collection of DNA from arrestees.

Federal law does not authorize familial searching, and many state laws are silent on the issue of familial searching. Those states which have adopted or rejected familial searching have done so under a variety of authorities. California implemented its familial search program with the approval of their Attorney General. Several other states have recently introduced legislation (currently still in committee): Minnesota, Pennsylvania, and Tennessee. Two jurisdictions currently prohibit, by law, the use of familial searching; Maryland and the District of Columbia. Other jurisdictions have implemented familial searching based upon laboratory policy.

In some states, arrestee statutes have raised Fourth Amendment rights and privacy issues. To address these concerns, Maryland, Minnesota and Tennessee have added judicial hearings to determine whether there was probable cause for the arrest. If probable cause exists, then the sample can be loaded into a DNA database. Another concern with arrestee statutes is the process for expungement (removing and destroying the sample) once charges have been dropped or the arrestee has been found innocent. States such as Alabama, Arizona and Arkansas require the arrestee to file a petition with the appropriate agency to get the sample expunged, while states such as South Carolina, Vermont and Texas automatically expunge the sample.

Legal Background

DNA Collection and the Fourth Amendment Generally

The Fourth Amendment ensures that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Kentucky v. King*, 563 U.S. ___, ___, 131 S. Ct. 1849, 1856 (2011), *quoting* U.S. Const. Amend. IV. This Amendment was intended to protect the "sanctity of a man's home and the privacies of life," *Boyd v. United States*, 116 U.S. 616, 630 (1886), from searches under unchecked general authority.

The Supreme Court made clear in *Schmerber v. California*, 384 U.S. 757 (1966), that taking blood for alcohol testing constitutes a Fourth Amendment "search" and "seizure." Thus it is undisputed that DNA collection, whether by buccal swab or blood test, also constitutes a "search" under the Fourth Amendment. *See United States v. Kincade*, 379 F.3d 813, 821 (9th Cir. 2004) (en banc). Therefore when mandatory DNA collection occurs without a warrant, courts must determine whether the search is an *unreasonable* search under the Fourth Amendment. *See Haskell v. Harris*, 669 F.3d 1049, 1053 (9th Cir. 2012). In the context of searches of parolees or convicted offenders, the Supreme Court has applied a "totality of the circumstances" balancing test to determine whether a warrantless search is reasonable. *See Samson v. California*, 547 U.S. 843, 848 (2006) (whether mandatory search as a condition of parole violates the Fourth Amendment); *United States v. Kriesel*, 508 F.3d 941, 946-47 (9th Cir. 2007) (mandatory DNA collection from convicted federal felons).

In a historical line of cases involving suspicion-based searches of convicted offenders, the Supreme Court has balanced the (diminished) Fourth Amendment interests of the parolees against the states interest in rehabilitation, reintegration, and recidivism. *See Samson v. California*, 547 U.S. 843, 848 (2006); *United States v. Knights*, 534 U.S. 112, 122 (2001). This same test has been applied to the collection of DNA samples from convicted felons. *See Hamilton v. Brown*, 630 F.3d 889 (9th Cir. 2011); *United States v. Kriesel*, 508 F.3d 941 (9th Cir. 2007); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004); *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995).

Challenges to Mandatory DNA Collection from Convicted Offenders

Since the passage of the DNA Act in 2000 there have been a number of challenges to the warrantless collection of DNA samples from parolees and other convicted offenders. See, e.g., *United States v. Stewart*, 532 F.3d 32, 36-37 (1st Cir.2008); *United States v. Kriesel*, 508 F.3d 941, 950 (9th Cir.2007); *United States v. Weikert*, 504 F.3d 1, 15 (1st Cir. 2007); *Banks v. United States*, 490 F.3d 1178, 1193 (10th Cir. 2007); *United States v. Amerson*, 483 F.3d 73, 75 (2d Cir.2007); *United States v. Hook*, 471 F.3d 766, 773 (7th Cir. 2006); *United States v. Conley*, 453 F.3d 674, 679-81 (6th Cir. 2006); *United States v. Kraklio*, 451 F.3d 922, 924-25 (8th Cir. 2006); *Johnson v. Quander*, 440 F.3d 489, 497 (D.C.Cir. 2006); *Nicholas v. Goord*, 430 F.3d 652, 655 (2d Cir. 2005); *United States v. Sczubelek*, 402 F.3d 175, 177 (3d Cir. 2007); *United States v. Kincade*, 379 F.3d 813, 839 (9th Cir. 2004). Recently, in *Boroian v. Mueller*, 616 F.3d 60 (1st Cir. 2010), the First Circuit addressed the issue of whether the Government's retention of a former probationer's DNA profile in CODIS implicated the Fourth Amendment. The Court of Appeals held that the "FBI's retention and periodic matching of [the offender's DNA profile] against other profiles in CODIS for the purpose of identification" did not constitute an "intrusion on the offender's legitimate expectation of privacy and thus [did] not constitute a separate Fourth Amendment search." 616 F.3d at 68.

The New Regime: Mandatory Collection of DNA Samples from Felony Arrestees

Friedman v. Boucher

The United States Court of Appeals for the Ninth Circuit first considered the constitutionality of a warrantless, suspicionless, forcible extraction of a DNA sample from a pre-trial detainee in *Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009). The Plaintiff Friedman was a resident of Las Vegas, Nevada incarcerated in Clark County Jail as a pre-trial detainee pending prosecution. *Id.* at 851. He had previously pled guilty to an unrelated sexual crime in Montana in 1980 and completed his sentence in 2001. *Id.* He was no longer a parolee, probationer, or otherwise under state supervision when he was arrested in Nevada in 2003. *Id.* A Nevada detective asked Friedman to provide a DNA sample, without a warrant, court order, or individualized suspicion, and Friedman refused. *Id.* After obtaining authorization from the Deputy District Attorney, the detective forced Friedman's jaw open and took a buccal swab. *Id.* The District Attorney confirmed that the purpose of the search was to aid in the investigation of cold cases. *Id.* Friedman filed suit in federal court on March 10, 2004, alleging that the detective had violated his Fourth Amendment rights. *Id.* at 852.

The court noted that the collection of a DNA sample was a Fourth Amendment search, and that "[a] warrantless search is unconstitutional unless the government demonstrates that it 'fall[s] within certain established and well-defined exceptions to the warrant clause.'" *Id.* at 853 (citing *United States v. Brown*, 563 F.3d 410, 414-15 (9th Cir. 2009)). The court rejected the Government's arguments that (1) the "special needs" exception applied, (2) a Montana statute authorized the search, and that (3) the search was "reasonable" under the circumstances. *Id.* The court stressed that only "important non-law enforcement purposes" can justify the special needs exception. *Id.* Gathering DNA samples for the purpose of solving cold cases was clearly a "law enforcement purpose." The court rejected the extraterritorial application of a Montana statute on

several grounds. *Id.* at 854-56. The court also rejected the Government's argument that the search was "reasonable" due to the limited privacy rights of pre-trial detainees. *Id.* at 856-57. The court stressed that "neither the Supreme Court nor [the 9th Circuit] has ever ruled that law enforcement officers may conduct suspicionless searches of pretrial detainees for reasons other than prison security." *Id.* Ultimately, the court ruled that "[t]he warrantless, suspicionless, forcible extraction of a DNA sample from a private citizen violates the Fourth Amendment." *Id.* at 858.

United States v. Mitchell

In *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011), the United States Court of Appeals for the Third Circuit, sitting en banc, considered the constitutionality of 42 U.S.C. § 14135a(a)(1)(A), which permits the collection of DNA samples from "individuals who are arrested, facing charges, or convicted." Defendant Mitchell, who was indicted on one count of attempted possession with intent to distribute cocaine, objected to the collection of his DNA sample before a Magistrate Judge. The Judge ordered briefing and stayed the collection pending resolution by the District Court. The District Court applied the "totality of the circumstances" test and held that § 14135a(a)(1)(A) and its implementing regulation violate the Fourth Amendment "insofar as they permit the warrantless collection of DNA from individuals who have not been convicted of a crime." *Mitchell*, 652 at 390. A divided en banc panel of the Third Circuit reversed the lower court opinion, applying the totality of the circumstances test. The Court held that the search was "reasonable" because (1) "the intrusion of a blood test is minimal," (2) the Government has a "compelling interest in the collection of identifying information of criminal offenders," and (3) the DNA Act leaves "no discretion ... specifies permissible uses ... and provides for expungement." *Id.* at 404. The Court found it particularly significant that the DNA Act provided limitations on the use of the DNA profiles generated by the samples, which only contain "junk DNA" information, and the fact that such information only serves an "identification purpose" similar to fingerprints. *Id.* at 407-10.

The dissenting opinion in *Mitchell*, written by judge Rendell, argued that "[w]hen the privacy and Government interests are weighted appropriately, one can only conclude that the Government's program of warrantless, suspicionless DNA collection from arrestees and pretrial detainees is fundamentally incompatible with the Fourth Amendment." *Mitchell*, 652 F.3d at 416. As the dissent noted, the impact of the majority's conclusion is that the Government has the right to forcefully take a DNA sample from a person arrested for a federal crime, even in an "all-to-common" case of mistaken identity, and the arrestee has "no way to protest or to prevent [this]" short of a long, drawn-out expungement process. *Id.* at 420. Even if the arrestee successfully gets the CODIS profile expunged, "the Government will retain his DNA *sample* indefinitely." *Id.* The dissent argued that the majority opinion relies on the Government's asserted "law enforcement objective of obtaining evidence to assist in the prosecution of past and future crimes[, which] presents precisely the potential for abuse the Fourth Amendment was designed to guard against." *Id.* at 421. The dissent stressed that arrestees and pretrial detainees do not have the same diminished privacy interest as convicted felons under state supervision. *Id.* The dissent argued that the collection of DNA samples does not present one of the "narrow circumstances" in which courts have "sanctioned government intrusion into [Fourth Amendment] rights..." *Id.* at 422. The dissent concluded that (1) DNA collection implicates more than the arrestee's "identity," (2) DNA is meaningfully different than fingerprints or photographs, and (3) no

authority supports the conclusion that arrestee's and pretrial detainees have a diminished expectation of privacy in their DNA. *Id.* at 422-25.

Haskell v. Harris

The Ninth Circuit revisited the constitutionality of DNA collection of arrestees in *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012), this time in response to the application of the 2004 amendment to California's DNA and Forensic Identification Data Base and Data Bank Act of 1998 ("California DNA Act"), Cal. Penal Code § 296(a)(2)(C). The 2004 amendment "requires law enforcement officers to collect DNA samples from all adults arrested for felonies," and criminalizes an arrestee's failure to cooperate with the collection. *Haskell*, 669 F.3d at 1050, 1051. A group of individuals arrested for felonies in California and required to provide DNA samples under the Act, including two named plaintiffs who were never charged and two whose charges were dismissed, filed a class-action complaint under 42 U.S.C. § 1983 against the State officials who administered the DNA collection system. *Id.* at 1066, 1052. Plaintiffs alleged that the 2004 amendment violates their Fourth Amendment rights and Fourteenth Amendment due process rights, and sought a preliminary injunction. *Id.* at 1052. The District Court certified the class but denied their preliminary injunction. *Id.* The plaintiffs appealed to the Ninth Circuit. *Id.*

A divided Ninth Circuit panel in *Haskell* applied the "totality of the circumstances" test and reached the same conclusion as the Third Circuit in *Mitchell*, that the warrantless collection of DNA from all arrestees required by the California DNA Act does not violate the Fourth Amendment. *Id.* at 1050. The majority held that "[t]he constitutionality of California's requirement that all felony arrestees provide DNS samples is a question of first impression," and distinguished *Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009), on the grounds that "its holding is expressly limited to the unique set of facts in that case." *Haskell*, 669 F.3d at 1056. Specifically, the majority held that the search in *Friedman* was dissimilar because (1) it occurred "at the whim of one deputy district attorney, acting without any statutory authority," (2) it was discretionary rather than a search of all felony arrestees, (3) it involved the use of force, which was "weighed heavily in [the] reasonableness analysis," (4) the DNA was collected without the use restrictions present in the California DNA Act, and (5) the DNA collection did not occur for "identification" purposes. *Id.* at 1056-57. The majority also found persuasive previous Ninth Circuit decisions regarding collection of DNA from convicted offenders: *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995), *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (en banc), *United States v. Kriesel*, 508 F.3d 941 (9th Cir. 2007), and *Hamilton v. Brown*, 630 F.3d 889 (9th Cir. 2011).

In his dissenting opinion, Judge Fletcher argued that the "decision in *Friedman* requires [the court] to hold that [the 2004 Amendment] violates the Fourth Amendment." *Haskell*, 669 F.3d at 1065 (Fletcher, J., dissenting). The dissent went on to argue that even if *Friedman* were not binding authority, he would still conclude that the amendment requiring DNA collection from all felony arrestees without warrant or reasonable suspicion is unconstitutional. *Id.* This dissent's argument relies on a simple point, while arrestees may be fingerprinted for identification purposes, law enforcement officials may not collect DNA (or fingerprints) solely for an investigative purpose. *Id.* at 1066. The dissent criticized the majority's attempt to distinguish *Friedman*, noting that the neither the non-discretionary nature of the search or the presence of an

authorizing statute cures the constitutional infirmity. *Id.* at 1070. The dissent discussed the Supreme Court's fingerprint jurisprudence, including *Hayes v. Florida*, 470 U.S. 812 (1985), *Davis v. Mississippi*, 394 U.S. 721, 722 (1969), and *Draper v. United States*, 358 U.S. 307, 310 (1959), which makes clear that fingerprints can be taken for identification purposes, but not for investigatory purposes. *Haskell*, 669 F.3d at 1071-72 (Fletcher, J., dissenting). The dissent rejected the majority's "idiosyncratic, expansive definition of 'identification,' including investigation within that definition." *Id.* at 1073. As the dissent points out, "[o]nce police have identified the arrestee, they check to determine whether he has already given a DNA sample. ... the arrestee must be identified before his DNA sample can be taken." *Id.* at 1074-75. The dissent finally concluded that the 2004 amendment is also unconstitutional under the "totality of the circumstances" test applied by the majority, since any investigatory benefit of DNA profiles is marginal given that the DNA will be collected anyway once the arrestee is convicted. *Id.* at 1076-77.

The Plaintiffs in *Haskell* have been granted a petition for rehearing en banc, currently scheduled for this December.

United States v. Shavlovsky (and Tuzman)

The most recent DNA Act case to reach the Ninth Circuit is *United States v. Shavlovsky*, No. 11-427, 2012 WL 652672 (E.D. Cal. Feb. 24, 2012), *appeal docketed*, *United States v. Tuzman*, No. 12-10114 (9th Cir. Mar. 05, 2012). Defendant Tuzman was indicted for a mortgage fraud and voluntarily surrendered to the U.S. Marshals Service around September 30, 2011. *Id.* at 1. An Attorney General regulation, 28 C.F.R. § 28.12(b), promulgated in 2008 pursuant to the DNA Act, 42 U.S.C. § 14135a(a)(1)(A), required the Marshals Service to take Tuzman's DNA sample while it had him in custody. *Id.* Tuzman was on his way to be arraigned by a Magistrate Judge when his DNA sample was taken without a warrant, and he was later released on an "unsecured appearance bond." *Id.* at 8, 7. Tuzman moved for the return of his DNA sample pursuant to Fed. R. Crim. P. 41(g) and *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010) (en banc) (per curiam), "arguing that it was taken pursuant to an unlawful search and seizure." *Id.* at 1.

The District Court drafted an opinion and order granting Tuzman's motion and holding that the "compelled, warrantless, suspicionless taking of DNA from Tuzman's body, based solely upon the mandate of the Attorney General's regulation violated Tuzman's Fourth Amendment rights." *Id.* However, the day before the court's opinion was published, the Ninth Circuit issued its opinion in *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012), and so the District Court ordered that Tuzman's motion be denied (but attached its drafted [opinion](#)). Tuzman appealed the denial of this motion under 18 U.S.C. § 1291 (collateral order doctrine), and the case is currently being briefed.

King v. Maryland

The Maryland Supreme Court considered the constitutionality of certain portions of Maryland's DNA Collection Act, amended in 2008, which allows collection of DNA samples from "individuals arrested for crimes (or attempted crimes) of violence or burglary prior to being

found guilty or pleading guilty." *King v. State of Maryland*, ___ A.3d ___, No. 68, 2012 WL 139263 at *6 (Md. Apr. 24, 2012). The court in *King* agreed with the analysis of the First Appellate District, Division Two, of the Court of Appeals in California in *People v. Buza*, 129 Cal. Rptr. 3d 753 (Cal. Ct. App. 2011), *cert. granted*, ___ Cal. 4th ___, 132 Cal. Rptr. 3d 616 (2011), and held that the collection of King's DNA pursuant to the Maryland DNA Act without a warrant or suspicion violated the Fourth Amendment. The court applied the *Knights* "totality of the circumstances" test but agreed with Judge Rendell's dissent in *Mitchell* that the primary purpose of the DNA collection under the Act was for investigatory, not "identification" purposes as the State argued.

The State of Maryland filed a Motion for Reconsideration, which was denied by the Maryland Supreme Court on May 18, 2012.

The US Supreme Court granted cert and finally stepped into the debate about the use of DNA databases in the criminal justice system. The majority opinion, written by Justice Kennedy, held that the collection of a DNA sample from an arrestee without a warrant or probable constituted a reasonable Fourth Amendment search, given the outcome of a balancing of interests between the government and the individual. In a sharply written dissent, Justice Scalia criticized the majority's approval of searches that were conducted specifically for law enforcement purposes yet did not conform to traditional Fourth Amendment requirements.

While *King* affirms that DNA databanking in the criminal justice system is here to stay, the majority opinion, when considered with some of the Court's prior Fourth Amendment decisions, raises at least three potentially troubling concerns about policing and genetic privacy

First, Justice Kennedy's majority opinion permits the police to use arrests in an instrumental manner to collect DNA samples from those persons whom the police suspect are involved in crimes unrelated to the crime of arrest. Secondly, while the state law in question does limit arrestee DNA collection to certain serious crimes, there is little in the majority opinion to prevent legislatures from expanding the pool of eligible arrestees. Finally, brief investigative stops and limited searches, sanctioned by the Court in *Terry v. Ohio* (so-called *Terry* stops), are part of standard police practice. The Supreme Court has made it clear that included within the scope of a legitimate *Terry* stop is an investigation into the suspect's identity. If an investigation into one's identity is an acceptable objective in the *Terry* stop context, the collection of DNA for that purpose would seem to be appropriate even in circumstances short of arrest when on site DNA analyses becomes standard.