

No. 05-30541

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

SHANNON KOHLER,

Plaintiff-Appellant,

v.

PAT ENGLADE, et al.

Defendants-Appellees

On Appeal from the United States District Court
for the Middle District of Louisiana

Case No. 3:03-cv-00857-JJB-CN

**BRIEF OF *AMICUS CURIAE*
ELECTRONIC PRIVACY INFORMATION CENTER,
IN SUPPORT OF PLAINTIFF-APPELLANT**

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SHANNON KOHLER,)	
)	No. 05-30541
Plaintiff-Appellant,)	
)	
v.)	
)	
PAT ENGLADE, et. al.,)	
)	
Defendants-Appellees)	

**MOTION OF *AMICUS CURIAE* ELECTRONIC PRIVACY
INFORMATION CENTER FOR LEAVE TO FILE ACCOMPANYING
*AMICUS BRIEF***

Pursuant to Fed. R. App. P. 29(b), *amicus curiae* Electronic Privacy Information Center ("EPIC") requests leave to file the accompanying *amicus curiae* brief in support of Plaintiff-Appellant. This brief urges reversal of the District Court's decision. Counsel for the Plaintiff-Appellant has consented to the filing of this brief, while counsel for the Defendants-Appellees has not.

The Electronic Privacy Information Center is a public interest research center in Washington, D.C., that was established to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC has participated as *amicus curiae* in numerous privacy cases, including most recently *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004), *Doe v. Chao*, 540 U.S. 614 (2003), *Smith v. Doe*, 538 U.S. 84 (2003), *Dep't of Justice v.*

City of Chicago, 537 U.S. 1229 (2003), and *Watchtower Bible and Tract Soc'y of N.Y. Inc. v. Vill. Of Stratton*, 536 U.S. 150 (2002).

The search to obtain DNA raises privacy concerns more significant than the search of a vehicle, of a house, or even a person's pockets because DNA reveals the most intimate details about a person. In this case, Plaintiff-Appellant Shannon Kohler declined to voluntarily submit a buccal swab containing his DNA during a police dragnet conducted in hopes of identifying a rapist and murderer. His refusal to voluntarily provide a swab resulted in the issuance of a seizure warrant for his DNA. EPIC believes it is vital to understand the extent to which police collection and use of DNA implicates Fourth Amendment interests, and therefore respectfully requests that this Court grant it leave to file the accompanying *amicus curiae* brief.

Dated: October 11, 2005

Respectfully submitted,

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CERTIFICATE OF INTERESTED PARTIES

In accordance with Fed. R. App. P. 26.1 and 5th Cir. R. 28.2.1, *amicus curiae* Electronic Privacy Information Center ("EPIC") discloses that it is a not-for-profit corporation established under the laws of the District of Columbia. EPIC has no parent corporation and no stock. EPIC's purpose is to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC has no members, thus no member has issued shares or debt securities to the public.

The undersigned counsel for EPIC certifies that the following persons and entities have an interest in the outcome of this case:

1. City of Baton Rouge, Defendant-Appellee.
2. Pat Englade, Defendant-Appellee.
3. James Leslie Hilburn, Attorney for Defendant-Appellees.

4. Christopher Johnson, Defendant-Appellee.
5. Shannon Kohler, Plaintiff-Appellant.
6. Elmer Litchfield, Defendant-Appellee.
7. Parish of East Baton Rouge, Defendant-Appellee.
8. Dennis R. Whalen, Attorney for Plaintiff-Appellant.

Marc Rotenberg
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STATEMENT OF AMICUS CURIAE

The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C., that was established in 1994 to focus public attention on emerging civil liberties issues. EPIC has participated as *amicus curiae* in numerous privacy cases, including *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004), *Doe v. Chao*, 540 U.S. 614 (2003), *Smith v. Doe*, 538 U.S. 84 (2003), *Dep’t of Justice v. City of Chicago*, 537 U.S. 1229 (2003), and *Watchtower Bible and Tract Soc’y of N.Y. Inc. v. Vill. Of Stratton*, 536 U.S. 150 (2002).¹

¹ IPIOP Law Clerks Louisa Garib, Guilherme Roschke, Jessica Shannon, and Kathryn Sheely assisted in the preparation of this brief.

SUMMARY OF ARGUMENT

The search to obtain DNA raises privacy concerns more significant than the search of a vehicle, a house, or even a person's pockets because DNA reveals the most intimate details about a person. In this case, Appellant Shannon Kohler declined to voluntarily submit a buccal swab containing his DNA during a dragnet search. His refusal to voluntarily provide a swab resulted in the issuance of a seizure warrant for his DNA. However, an examination of dragnets such as the one that occurred in this case shows that this investigative technique has failed repeatedly to identify the intended targets of investigations, but DNA dragnets compromised the privacy rights of thousands of innocent people.

Free persons targeted by DNA dragnets enjoy the full protection of the Fourth Amendment. The method used by police in a DNA dragnet and the nature of DNA evidence leads to uninformed, unintelligent, and potentially coerced consent, which may violate the Fourth Amendment. Individuals who are asked to give samples in DNA dragnets are often unaware of their right to refuse. They may not understand that the police can use the sample for purposes unrelated to the investigation in which it was collected, which may produce incriminating evidence in an unrelated investigation. Individuals who provide DNA during a dragnet may also not know that the sample can be retained for unrelated future uses.

For these reasons, police that conduct DNA dragnets should conform to best practices to ensure that Fourth Amendment guarantees are not violated. DNA dragnets should only be used when all other investigative avenues have been exhausted. The scope of a dragnet should be narrowly tailored to individuals who match a description of a perpetrator or had access to a victim. Police should inform individuals that they may refuse to volunteer a DNA sample, and should not use a refusal as the sole basis for subjecting individuals to additional scrutiny or legal action. Any sample that exculpates an individual should be made available to the person who provided the sample. Finally, the police should protect the privacy of any individual who gives a DNA sample during a dragnet or exercises the right not to provide a sample voluntarily.

ARGUMENT

I. DNA Dragnets Ensnare Thousands of Innocent People, But Fail to Find Their Intended Targets.

Individuals caught in a DNA dragnet are asked to reveal the most intimate details of their persons, “including susceptibility to particular diseases, legitimacy of birth, and perhaps predispositions to certain behaviors and sexual orientation.” U.S. Dep’t of Energy Office of Science *et al.*, *DNA Forensics*, Human Genome Project Information.² Police have undertaken at least 20 DNA dragnets across the United States in the past 15 years. Table 1 (showing the increasing use of DNA dragnets in the U.S.); Samuel Walker, *Police DNA “Sweeps” Extremely Unproductive: A National Survey of Police DNA “Sweeps,”* Police Professionalism Initiative, Dep’t of Crim. Justice, University of Nebraska (2004)³ (hereinafter “Nebraska Study”); Jeffery S. Grand, *The Bleeding of America: Privacy and the DNA Dragnet*, 23 *Cardozo L.Rev.* 2277 (2002) (examining dragnets in Chicago, Ill., and Truro, Mass.) (hereinafter “Grand”).

In this case, Appellant Shannon Kohler declined to submit a buccal swab containing his DNA during one such dragnet. Mr. Kohler claims that law enforcement initially threatened to obtain a court order and to reveal his identity to the media as a suspect to coerce a DNA sample from him. Mr. Kohler was

² http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last modified Sept. 16, 2004).

³ Available at <http://www.policeaccountability.org/dnareport.pdf>.

eventually forced to provide the sample when the police obtained a seizure warrant. Though police had sealed other documents in the investigation to maintain the confidentiality of sources and “guard the privacy of innocent people who come under suspicion,” police did not file the Kohler warrant under seal. Ryan Goudelocke, *BR police say hundreds DNA-tested*, *The Advocate* (Baton Rouge), Nov. 19, 2002.⁴

An examination of dragnets such as the one that occurred in this case shows that this investigative technique has failed time and time again to identify the intended targets of investigations, but has compromised the privacy rights of thousands of innocent people.

A. Ann Arbor, Michigan: Racial Profiling and Retention Problems

In 1994, police in Ann Arbor, Michigan, asked more than 600 African-American men to submit DNA samples during the investigation of a serial rapist. Nebraska Study at 9. Detectives decided to target African-American men based on a vague description that the perpetrator of the underlying crime was black. Jack Leonard, *Using DNA to Trawl for Killers*, *L.A. Times* Mar. 10, 2001, at A1 (hereinafter “Leonard”). Approximately 160 men were voluntarily tested and excluded from suspicion. More than 400 men refused to provide a DNA sample

⁴ Available at http://www.2theadvocate.com/sk/old_articles/stories/new_forced001.shtml.

and were not tested. Eight men were tested pursuant to a warrant after they refused to consent to testing. *Id.*; Grand at 2279.

The police chief in charge of the dragnet admitted to a CBS reporter that anyone who did not volunteer DNA became a suspect, saying: “[f]or them not to cooperate with us in solving her case, it leaves an open end out there for us to look at.” *60 Minutes*, CBS News, Sept. 12, 2004.⁵ The perpetrator of the crimes was eventually caught while attacking a fourth woman. Leonard, *supra*. He was not among those initially tested in the DNA sweep. Nebraska Study at 9.

A class action suit was filed by some of the innocent 160 men who “voluntarily” submitted samples in the search. One of the litigants, Blair Shelton, alleges he lost his job after detectives informed his co-workers that they wanted to interview him. He stated: “It was horrible, your worst nightmare . . . Who knows what they’ll do? They’ve got your DNA . . . Why would they want to keep something if you’re innocent?” Leonard, *supra*. Police had sought to retain lab records of the DNA samples for 30 years, but agreed to destroy or return DNA samples and paid monetary damages to plaintiffs in the suit. Grand at 2323; Nebraska Study at 9-10.

⁵Available at <http://www.cbsnews.com/stories/2004/09/10/60minutes/main642684.shtml>.

B. Miami, Florida: DNA Retention Leads to Wrongful Arrest

In one of two Miami dragnets, more than 120 Hispanic males were asked to submit DNA samples to exclude them from suspicion in a serial rape investigation. Nebraska Study at 11. Detectives in the case “followed up on everybody who was a preliminary match and everybody who refused to consent voluntarily.” Grand at 2323. The perpetrator was not found as a result of the DNA dragnet, but was identified through an unrelated incident.

The samples taken in the search were not destroyed when the actual rapist was found. Instead, they were run through a database of unsolved crimes. Peter J. Neufeld, Co-Director of the Innocence Project, Member of N.Y. State’s Forensic Science Review Board, Testimony at the Subcomm. on Crime, Terrorism, and Homeland Security (July 17, 2003). Jorge Garcia, one of the men who voluntarily submitted a DNA sample, was arrested and charged with an unrelated 1996 rape. Officials cited the arrest as an example of how DNA databanks help authorities catch rapists: “Had we not had this massive search for this other offender,” according to the executive assistant to the police chief, “we wouldn’t have gotten this guy.” *Id.* Unfortunately, the police did not consult the victim of the 1996 rape before charging Mr. Garcia, and “[t]he day after Mr. Garcia’s arrest, the victim of the 1996 rape came forward to proclaim Mr. Garcia’s innocence.” *Id.* She and Mr. Garcia had consensual sex shortly before a stranger raped her, which caused the

crime lab to incorrectly identify the DNA sample of Mr. Garcia as a sample left by the rapist. Three days after Mr. Garcia's arrest, the police dismissed the charges against him and released him from jail. *Id.*

C. Omaha, Nebraska: Troubling Use of Race in Dragnet

In June 2004, Omaha police launched a DNA dragnet to obtain DNA samples of more than 36 men during the investigation of a series of rapes. Nebraska Study at 13. Police claimed that they obtained a warrant for the names of black employees at the Omaha Public Power District based on witness descriptions of the rapist. Leigh Jones, *DNA "dragnets" bring privacy fight*, Nat'l L.J., Sept. 27, 2004⁶; Kevin Bersett, *Victims Challenge Police Use of Controversial "DNA Dragnets,"* News Standard, Sept. 27, 2004.⁷ The list of 84 employees provided by the employer was narrowed to 32 men who matched the rough description of the perpetrator. The Omaha Channel, *Police Chief Won't Apologize For DNA Tests*, June 29, 2004.⁸ Police said they were searching for a black man described as 25 to 40 years old, 5-foot-3 to 5-foot-9 and 175 to 250 pounds. Todd Cooper, *Mayor says no to DNA committee*, Omaha World-Herald, July 11, 2004.⁹ The men tested during the dragnet included a 32-year-old mentally challenged man; a longtime

⁶ Available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1095434466118>.

⁷ Available at http://newstandardnews.net/content/?action=show_item&itemid=1044.

⁸ <http://www.theomahachannel.com/news/3473699/detail.html>.

⁹ Available at http://www.ci.omaha.ne.us/departments/public_safety_auditor/OWH%2020040711.pdf#search='Omaha%20DNA%20dragnet'.

Omaha Public Power District professional; an 18-year-old at a Youth Center and a 37-year-old felon, giving rise to the view that testing was random and largely based on race. *Id.*

A number of black men reported that police arrived without prior notice at their homes, asking for their DNA for the rape investigation in front of their wives and children. *Id.* Before taking the DNA, police obtained the men's signatures using the police department's generic consent-to-search forms. *Id.*

Other men reported that police told them to submit a sample or be taken to Central Police Headquarters and said they felt that they did not have a choice to refuse. *Id.* Duke Law School Professor Erwin Chemerinsky commented on the Omaha Dragnet, declaring, "[it] is completely inappropriate to use the refusal to give a sample as the basis for probable cause," and added, "[w]henver law enforcement uses race, it's troubling." Jones, *DNA "dragnets" bring privacy fight.*

To date the police have not apprehended the rapist. The application for the warrant was ordered unsealed but no description of its contents has been found. *Id.*

D. Truro, Massachusetts: Dragnet May Have Delayed Catching Killer

In a 2002 case that garnered national attention, a local garbage collector was an early suspect in a Truro, Massachusetts murder because he regularly visited the victim's home and had a lengthy criminal record. *Cape Cod Murder Mystery*

Solved, CBS/AP, April 15 2005.¹⁰ In 2002 the police asked the suspect to provide a DNA sample, but did not take it from him until 2003 and did not submit the sample for processing for several months. Rebecca Sinderbrand, *A Lingering Mystery on the Cape: Why did it Take so Long to Arrest a Suspected Killer?*

Newsweek/MSNBC, Apr. 25, 2005.¹¹ Due to processing backlogs, the sample languished in a crime lab for eight more months. *Id.* In April 2005, after more than 175 innocent men had been randomly tested, the suspect was identified as the killer by DNA testing. *Arrest relieves family in Cape Cop murder mystery: Man pleads not guilty in fashion writer's death*, AP, Apr. 16, 2005.¹² Lab officials reportedly said that the suspect's results could have been processed within days had they known that he was a high-priority suspect. Sinderbrand, *A Lingering Mystery on the Cape: Why did it Take so Long to Arrest a Suspected Killer?*

E. Wichita, Kansas: "BTK Killer" Caught by Traditional Police Work

The police in Wichita, Kansas, used DNA sampling in an attempt to capture the "BTK Killer." Over 1,300 men were tested in the unsuccessful DNA sweep. *Man in BTK sweep wants DNA sample destroyed*, Chic. Tribune, Mar. 22, 2005, at A9. A suspect was arrested and confessed to the killings in 2005 after traditional

¹⁰ Available at <http://www.cbsnews.com/stories/2005/04/15/national/main688478.shtml>.

¹¹ Available at <http://www.msnbc.msn.com/id/7528902/site/newsweek>.

¹² Available at <http://msnbc.msn.com/id/7514313>.

police investigatory methods — not the DNA sweep — lead police to the suspect.

BTK Killer Waives Trial, Admits 10 Slayings, AP Newswire, June 27, 2005.¹³

Police retained the DNA profiles of tested men after they were excluded from suspicion in the investigation. Roxana Hegeman, *Judge orders removal of Wichita man's DNA sample from database*, AP Newswire, Mar. 21, 2005.¹⁴ Roger Valdez, a former target of the DNA sweep, was forced to ask the courts to limit the use of his DNA sample for the single purpose of exculpation. *Id.* He obtained an order from a Kansas district court directing the police to destroy his DNA sample and purge the related DNA profile from the state database. *Id.*

F. San Diego, California: Early Dragnet Did Not Find Perpetrator

One of the first DNA dragnets in the United States was launched by the San Diego Police Department in 1990. Police tested approximately 800 African-American men during a serial murder investigation. Aaron B. Chapin, Note, *Arresting DNA: Privacy Expectations of Free Citizen Versus Post-Convicted Persons and the Unconstitutionality of DNA Dragnets*, 89 Minn. L. Rev. 1842, 2278; Mark Hansen, Feature, *DNA Testing – DNA Dragnet*, 90 A.B.A.J. 38, 42 (2004). None of the men tested proved to be the killer. The individual who was ultimately convicted of the crimes had refused to provide police with a DNA

¹³ Available at <http://www.msnbc.msn.com/id/8367581>.

¹⁴ Available at <http://abcnews.go.com/US/wireStory?id=600841&CMP=OTC-RSSFeeds0312>.

sample. He was eventually identified after he was arrested for an unrelated crime.

Grand at 2277, 2279.

G. Prince George’s County, Maryland: Coercion an Issue

In another unsuccessful DNA dragnet, police in Prince George’s County, Maryland, tested more than 400 men in a 1998 rape-murder at a local hospital. Nebraska Study at 9-10. Police initially questioned all male hospital employees and any outsiders who may have had access to the area in which the victim was located. Grand at 2323. Potential suspects were brought to police headquarters and asked to sign a consent form allowing police to collect DNA samples. *Id.* Union members complained the police were singling out maintenance workers and bullying employees into agreeing to the search. Nebraska Study at 11. Reports from hospital maintenance workers indicated “they felt coerced by the police and did not know the DNA sample was voluntary.” Grand at 2323. Police have agreed to destroy all samples once the crime is solved. Nebraska Study at 11.

H. Chicago Illinois: Familial Testing

In a Chicago, Illinois, DNA dragnet, police took samples from approximately 300 dark-skinned African-American men over six years. Grand at 2323. Suspects were advised of their constitutional right to refuse to give a sample, and donors signed consent forms that stated the samples “may be used for this investigation or any other investigation or any legitimate law enforcement

purpose.” *Id.* Police have admitted, however, that those who did not volunteer a sample “might have been scrutinized more closely [than those who did].” *Id.*

The perpetrator of the underlying crime was not found through voluntary DNA testing. *Id.* In 1999, when a particular suspect refused to submit a DNA sample, police obtained a saliva sample from his mother, which showed that the perpetrator was likely to be a member of her family. *Id.* The perpetrator was then arrested and a DNA sample linked him to the murders. *Id.*

I. Oklahoma City, Oklahoma: Perpetrator Found in Prison

A DNA dragnet was launched to find the perpetrator of a 1996 crime in Oklahoma City, Oklahoma. Police tested 200 men who had either lived near the victim and had a criminal record of violence, who resembled the police sketch of the suspect, or who had been otherwise identified as a possible suspect. Jennifer L. Brown, *DNA dragnet for killer of woman angers some*, AP, May 31, 2001 at A09; Nebraska Study at 10; *60 Minutes*, CBS News. Most individuals voluntarily provided samples, but prosecutors obtained search warrants when people refused to submit a sample. Brown, *DNA dragnet for killer of woman angers some*. The perpetrator was not identified in the group of men tested in the dragnet. *Id.* Police eventually charged a prisoner at the Oklahoma State Penitentiary with the crime. His DNA was collected as part of a routine prison procedure when he was jailed for burglary. *60 Minutes*, CBS News.

J. Charlottesville, Virginia: Problematic Dragnet Suspended

In Charlottesville, Virginia, 187 suspects were asked to give DNA samples between 1997 and 2004 during a DNA dragnet investigating a suspected serial rapist. Press Release, American Civil Liberties Union, *ACLU Praises Charlottesville Police for Temporary Suspension of DNA Dragnet, Offers Advice for New Rules* (Apr. 15, 2004).¹⁵ Police requested samples from 197 men, and 10 refused. Maria Glod, *Police in Charlottesville Suspend 'DNA Dragnet,'* Wash. Post, Apr. 15, 2004, at B1¹⁶; *Religion and Ethics Newsweekly: DNA Testing and Crime*, Public Broadcasting System, May 28, 2004.¹⁷ Police suspended the dragnet amidst criticisms that the criteria for asking individuals for samples were ill-defined. Police also agreed to return or destroy an individual's DNA sample once he had been excluded as a suspect. Nebraska Study at 13.

K. Muncie, Indiana: Dragnet Fails to Catch Rapist

In Muncie, Indiana, 23 men were tested within a neighborhood during a 2003 dragnet investigating rapes of two girls. *Police: DNA tests tie Muncie man to rapes of two girls*. AP State & Local Wire, Oct. 6, 2003. None of the men tested matched the genetic profile of the rapist. An individual who was initially canvassed, but not tested, in the dragnet was arrested and convicted based on DNA

¹⁵ Available at <http://www.acluva.org/pressreleases2004/april15cvilledna2.doc>.

¹⁶ Available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A12880-2004Apr14¬Found=true>.

¹⁷ Available at <http://www.pbs.org/wnet/religionandethics/week739/cover.html>.

results from an unrelated crime. *Jury convicts Muncie man whose DNA linked him to rapes*, AP State & Local Wire, Dec. 2, 2004; Tim Schellberg and Lisa Hurst, DNA Resource Report, DNA Resource, Oct. 10, 2003.¹⁸

L. Costa Mesa, California: First Dragnet Fails to Solve 1988 Murder

Costa Mesa tested 113 men its first DNA dragnet, which was launched in hopes of solving a 1988 murder. Nebraska Study at 9; Leonard, *supra*. The crime remains unsolved.

M. Costa Mesa, California: Second Dragnet Fails to Solve 1997 Murder

A 1997 murder in Costa Mesa sparked a second DNA dragnet during which 188 suspects were tested. Nebraska Study at 10; Leonard, *supra*. A Costa Mesa police lieutenant described the dragnet as a broad, unspecific technique: “It’s like casting your net out... You try to cast it out as wide as you can, because you don’t know where you’re going to catch your suspect.” Leonard, *supra*. He proposed in an L.A. Times interview, “What if we swab everyone we run across who will give us a swab?” *Id.*

There is at least one report of alleged coercion in the second Costa Mesa dragnet. When police arrived at a man’s home and asked him to provide his DNA, he assumed that he had no choice but to give a sample, and did so immediately. *Id.* Afterwards, the man expressed his anger to an L.A. Times reporter: “I did feel

¹⁸ Available at <http://www.dnaresource.com/10-102003%20Summary.pdf>.

pressured to do that [provide a DNA sample]...I absolutely felt that there wasn't going to be an option." The man also said that he felt that the police treated anyone who came forward to offer information about the crime like a suspect. *Id.*

N. Los Angeles, California: Testing Reasonable Suspects Narrows Dragnet Scope

In 1999, a DNA dragnet was launched to solve the 1985 murder of a Los Angeles County Sheriff's deputy. Leonard, *supra*. Police created a list of 165 possible suspects, one of whom, a former colleague of the deputy's at the Sheriff's Department, refused to give a swab. *Id.* After gathering additional evidence, the police obtained a court order to compel the suspect to provide a saliva sample, which showed that the suspect was the killer. *Id.*

O. Simi Valley, California: Traditional Police Work Catches Killer

In 2001, police asked for samples from 500 men during a dragnet launched to investigate a series of rapes. T.J. Sullivan, *Simi police tactics under fire*, Ventura County Star (California), Aug. 12, 2001 at A01. The dragnet targeted Asian, Hispanic and white males between the ages of 17 and 25, 5-foot-6 and 5-foot-10 in height and 150 and 180 pounds in weight. *Id.* The individual arrested for the crimes fit the general description of the suspect, but was identified based on statements and other evidence provided by the man's housemates. *Id.*

In this case it was unclear how the DNA samples from the 500 exonerated men would be used in the future. There was no commitment from law enforcement to destroy the samples once they were used for exculpation. *Id.*

Mary Broderick, executive director of California Attorneys for Criminal Justice observed:

Any time the government has possession of information about innocent people there's a strong potential for abuse Even if the people who have responsibility for the data intend to keep it secure, that doesn't mean that other people who have access to the data won't abuse it, either in criminal cases, or civil cases, or employment issues. The possibilities are endless

We could potentially solve every open case involving DNA by having DNA samples for every adult male or female in the country in a huge database, but that's like something out of "1984," the novel [by George Orwell]. It's not the American way.

Id.

P. Kearney, Nebraska: Serial Rapist Identified by Other Means

The Kearney Police Department collected DNA samples from 75 men during a 2002 serial rapist investigation. *UNO [University of Nebraska at Omaha] study says DNA sweeps 'extremely unproductive'* AP State & Local Wire, Sept. 10, 2004. Eventually the case was solved through traditional police work: following up on tips. Professor Sam Walker, author of the Nebraska Study, commented on the Kearney case: "I understand that police are under tremendous pressure to catch

someone in these cases. . . . But we can't let that kind of pressure lead to tactics that are both ineffective and probably illegal." *Id.*

Q. Philadelphia, Pennsylvania: DNA Fails to Catch Serial Rapist

In 1999, an unknown number of suspects were tested during the investigation of a series of Philadelphia murders. Men who fit the description of the serial rapist and murderer were asked for DNA samples. Nebraska Study at 11. The crimes remain unsolved.

R. Miami Florida: Strangler Identified by Victim and Neighbors

A 1994 dragnet tested over 2,300 men to find a serial rapist and murderer in Miami, FL. Nebraska Study at 10; Hansen, 90 A.B.A.J. at 43. The killer was caught after a victim was found by neighbors who heard her pounding on the walls. *Id.*

S. Lawrence, Massachusetts: Success From Good Practices

In what has been labeled one of the only "successful" DNA sweeps, police tested 33 men in Lawrence, Massachusetts, during the 1998 investigation of a sexual assault of a nursing home resident. Grand at 2323. The police requested DNA from only the 32 hospital employees and the victim's father, because the men were identified as being the only males with access to the victim. *Id.* One of the men who consented to DNA testing was found to be the perpetrator of the underlying crime. *Id.*

II. DNA Collection Through Buccal Swabs May Violate the Fourth Amendment Protections Against Unreasonable Search and Seizure.

The Supreme Court has made clear that the Fourth Amendment attaches to biological materials. *Schmerber v. California*, 384 U.S. 757, 767 (1966); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616; *Chandler v. Miller*, 520 U.S. 305, 313 (1997).

This Circuit held in *Groceman v. Dep't of Justice* that the “collection of a DNA sample for purposes of identification implicates the Fourth Amendment[.]” 354 F.3d 411, 413-14 (5th Cir. 2004). This Court concluded, as have other circuits, that DNA collection of prisoners is reasonable because of a prisoner’s diminished expectation of privacy. *Id.*; see, e.g., *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998); *Jones v. Murray*, 962 F.2d 302, 306-08 (4th Cir. 1992).

However, Mr. Kohler was not a prisoner when asked to provide his DNA during a dragnet; he was a free person. As the Supreme Court said in *United States v. Knights*, “we do not accept” even minimal intrusions on the privacy of “free persons.” 534 U.S. 112, 121 (2001); see also *Hudson v. Palmer*, 468 U.S. 517, 527-28 (1984); *United States v. Keith*, 375 F.3d 346, 350 (5th Cir. 2004), cert. denied 125 S. Ct. 367 (2004). Mr. Kohler and any other free person asked to provide a sample in the course of a DNA dragnet enjoys a reasonable expectation of privacy that is significantly greater than the privacy rights of prisoners and

probationers. *United States v. Keith*, 375 F.3d at 350. Free persons targeted by DNA dragnets enjoy the full protection of the Fourth Amendment.

A. In Particular, DNA Dragnets May Violate the Fourth Amendment Because Consent Obtained in Such Dragnets Does Not Meet the Fifth Circuit’s Test for Voluntariness.

The method used by police in a DNA dragnet and the nature of DNA evidence leads to uninformed, unintelligent, and potentially coerced consent. Chapin, 89 Minn. L.Rev 1843; *see also* Nebraska Study; Berry Scheck, *Testimony at the Laboratory Funding Report Proceedings*, Nat’l Comm’n on the Future of DNA Evidence (Jul. 26, 1999).¹⁹ Individuals may not be informed of their right to refuse consent or that their DNA may be used for other purposes. Grand at 2323 (targets of the Maryland dragnet said that they “felt coerced by the police and did not know the DNA sample was voluntary.”); Leonard, *supra*.

The Supreme Court has ruled that the prosecution must prove that consent for a search is “voluntarily given” by a totality of circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223, 248-49 (1973). The Fifth Circuit has identified six factors to be used in determining the voluntariness of consent using a totality of the circumstances. *United States v. Morales*, 171 F.3d 978, 982-83 (5th Cir. 1999).²⁰ DNA dragnets do not meet this Court’s test for voluntariness.

¹⁹ available at <http://www.ojp.usdoj.gov/nij/dnamtgtrans6/trans-g.html>.

²⁰ The six factors identified in *Morales* are:

1. the voluntariness of the defendant’s custodial status;

i. Police use coercive measures to obtain consent in DNA dragnets.

The DNA dragnets implemented in the U.S. concern high-profile cases that have generated “fear among citizens and put pressure on the police to identify and arrest the perpetrator.” Nebraska Study at 11. This pressure to arrest a suspect at all costs has led to the use of coercive measures to compel suspects to consent to provide a DNA sample as the incidents described above indicate.

As in this case, police also coerce consent by threatening to seek or obtain a warrant. *United States v. Tompkins*, 130 F.3d 117, 122 (5th Cir. 1997). For example, in a Lawrence, Massachusetts dragnet, the district attorney publicly stated, “if [targets] don’t volunteer, we will be compelled to seek a warrant [for an involuntary sample] through a grand-jury procedure.” Grand at 2323. Similarly, in Mr. Kohler’s case, police threatened to obtain a warrant if he refused to consent to give a sample, which he did. Complaint at 5, *Kohler*, 365 F.Supp. 758.

The frequency of allegations of coercion, the apparent lack of any policy guiding police in the way DNA dragnets are conducted, and the serious consequences of coerced consent should move the court to use its authority to

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2. the presence of coercive police procedures;
 3. the extent and level of the defendant’s cooperation with the police;
 4. the defendant’s awareness of his right to refuse consent;
 5. the defendant’s education and intelligence; and
 6. the defendant’s belief that no incriminating evidence will be found.
- 171 F.3d at 982-83.

guide law enforcement on the best way to respect the Fourth Amendment rights of suspects when soliciting a DNA sample.

ii. Individuals asked to give samples in DNA dragnets are often unaware of their right to refuse.

Ignorance of one's right to refuse also weighs against the voluntariness of consent. *Morales*, 171 F.3d at 982-83. Police in DNA dragnets ask persons to provide DNA samples; some provide a sample without knowing that they have the right to refuse. In the Maryland dragnet, subjects provided DNA samples but later reported they did not know that giving a sample was voluntary. Grand at 2323. In Omaha, Nebraska, targets were asked to submit a sample or be taken to police headquarters; those who provided DNA later stated they felt that they did not have the choice to refuse. Jones, *DNA 'Dragnets' Bring Privacy Fight*.²¹ The search to obtain DNA raises privacy concerns more serious than the search of a vehicle, of a house, or even a person's pockets because DNA reveals the most intimate details about a person. U.S. Dep't of Energy Office of Science, *DNA Forensics*. The significant privacy interests that arise when a person submits a DNA sample weigh in favor of requiring that individuals be made fully aware of their right to refuse consent before they are asked to voluntarily provide a sample.

²¹ Available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1095434466118>.

iii. Subjects of DNA dragnets may reasonably, but falsely, believe their consent will produce no incriminating evidence.

Individuals asked to provide samples during DNA dragnets are told that their DNA are being collected to exclude them from suspicion in one particular case. These individuals may believe that since they did not commit the particular crime, no incriminating evidence of an unrelated crime will be found if they consent to provide DNA. They may not know that their DNA can be run against profiles in state or federal DNA databases to see if they match any evidence collected in other open criminal investigations.²² The likelihood that a person will consent to providing a DNA sample in one case while justifiably believing that use of the sample will be limited to the investigation for which it was collected is yet another factor weighing against the voluntariness of consent to provide a DNA sample. *See Morales*, 171 F.3d at 982-83.

B. Consent to Provide a DNA Sample in a Dragnet Is Not Consent To Use DNA For Other Purposes.

DNA samples can be used for purposes outside the scope of the investigation for which the dragnet was conducted. In addition to not being aware that samples may be used in all open police investigations, subjects might not be

²² State and Federal criminal justice agencies are able to use a DNA sample to compare a person's DNA profile to open Federal investigations using the Combined DNA Index System ("CODIS") and to open state investigations using the state-wide DNA index system. States, however, are not permitted to enter into CODIS the DNA identification records from persons who voluntarily submit samples for elimination purposes. 42 U.S.C. § 14132(a)(1).

informed that their DNA samples may be retained and entered into a DNA database for use in future investigations. *See, e.g.*, Nebraska Study at 9-10. These factors affect not only the voluntariness of consent to provide a DNA sample; they also limit the scope of consent. The Supreme Court found in *Florida v. Jimeno* that the scope of consent is “that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?” 500 U.S. 248, 251 (1991). When individuals consent to provide a DNA sample in a dragnet, they do so to be eliminated as a suspect in that particular case. The “typical person” would not assume that this consent covers imputing a DNA sample into a state database, using the DNA in unrelated criminal investigations, or analyzing the DNA for genetic or medical purposes. *See* Nebraska Study at 8-10.

In Ann Arbor, Michigan, subjects in a DNA dragnet fought the retention of their DNA in the state database after they had been eliminated from suspicion in the original crimes. In 1997, four years after the dragnet began, police agreed to destroy or return DNA samples and pay monetary damages to the volunteers. Grand at 2323. In Wichita, Kansas, a district court recently granted an order directing the police to destroy the DNA sample and purge the related DNA profile from the state database of one man caught in the city’s DNA dragnet. *Judge orders removal of Wichita man’s DNA sample from database*, AP Newswire, Mar. 21,

2005. A class action lawsuit currently pending in federal court challenges the retention and use of DNA samples collected during the dragnet in which Mr. Kohler's DNA was obtained. *Wagster v. Litchfield*, No. 3:03-cv-00589 (Mid. Dist. La. filed Jul. 31, 2003). In light of the limited scope of consent given in a DNA dragnet and the ability of police to use DNA for outside that scope, the use of DNA samples should be limited to the comparison against evidence collected in the particular crime for which the DNA sample was collected.

III. To Ensure That DNA Dragnets Are Constitutional, This Court Should Recognize Police “Best Practices” That Conform to the Protections of the Fourth Amendment.

A model of best practices can be created to ensure that police conducting DNA dragnets do not violate the Fourth Amendment rights of individuals. This model includes the following practices:

- Only use dragnets as a last resort.
- Limit scope of dragnet to those who match the description of the perpetrator or who had access to the victim.
- Inform potential donors of their right to refuse to volunteer a DNA sample.
- Do not threaten potential donors with increased scrutiny and future legal action.
- Destroy samples gathered from donors exculpated in the DNA dragnet or disclose how the sample will be used.
- Protect the privacy of donors and those who exercise the right not to provide a sample voluntarily.

A. Only Use Dragnets As a Last Resort.

The DNA dragnets used in the U.S. underscore the need for exhausting alternative police investigative methods before resorting to DNA dragnets. In at least seven dragnets, perpetrators of crimes have been identified using traditional police investigative methods.²³ The “successful dragnet” in Lawrence, Massachusetts, also underscores the need to exclude all probable suspects through selective DNA testing before initiating a broad dragnet. In Lawrence, the only men tested were the ones who were known to have direct access to the victim. Grand at 2323. The testing was carried out on only thirty-three individuals and remains the only “successful” dragnet in U.S. history. *Id.*

In other instances where the police are permitted to use intrusive investigative techniques, they are required first to provide “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.” Federal Wiretap Act, 18 U.S.C. § 2518(1)(c). Since a DNA dragnet is a similarly intrusive investigative technique and a suspicionless search of a large number of people, a DNA dragnet should be used as a last resort.

²³ These dragnets include Baton Rouge, La.; Wichita, Kan.; Chicago, Ill.; Oklahoma City, Okla.; Omaha, Neb.; Simi Valley, Cal. and Kearney, Neb. Grand, 23 Cardozo L.Rev. at 2277; Nebraska Study, *supra*.

B. Limit the Scope of a Dragnet to Those Who Match the Description of the Perpetrator Or Who Have Access to the Victim.

The purpose of a DNA dragnet is to capture the perpetrator of a specific crime for which there is DNA evidence. If the Court allows DNA dragnets to continue, it should limit the scope of a dragnet to those suspects who police reasonably suspect could have committed the crime. If the police request a DNA sample from someone who could not have committed the crime, they are not using the DNA dragnet to solve a specific crime but rather to create a DNA database to be used in other cases: this is a suspicionless search and is a clear violation of the Fourth Amendment. *See generally Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Groce*, 354 F.3d at 412.

DNA dragnets based on the vague description of a “white male” or “black male” are similarly unconstitutional. *See Davis v. Mississippi*, 394 U.S. 721 (1969) (finding that the police could not detain the defendant to take his fingerprint sample based on the victim’s description of her assailant as a “black male”). In Omaha, Nebraska, police were criticized for conducting a DNA dragnet largely based on race. *Cooper, Mayor Says No to DNA Committee*.²⁴ DNA dragnets should only be implemented when there is a description of a suspect that is sufficiently narrow that it does not include all members of a particular race or age.

²⁴ Available at http://www.ci.omaha.ne.us/departments/public-safety_auditor/OWH%2020040711.pdf#search=‘Omaha%20DNA%20dragnet.’

Limiting the scope of a DNA dragnet reduces the clear negative consequences of incorrect DNA matches. Using a DNA dragnet to find a suspect, instead of using DNA to confirm that a suspect committed the crime, places an increasing burden on the reliability of DNA evidence. Problems that come up in DNA matching include: (1) the procedure for determining a match, including laboratory protocols, *see generally* 36 Am. Jur. 3d Proof of Facts §§ 26-29 (2005) (discussing grounds for challenging DNA evidence, including: lack of standardized laboratory practices and procedures; degradation of samples; contamination of samples; and problems of DNA typing interpretation), (2) frequency estimation issues that lead to different estimates of the probability that the match is coincidental, *see generally* 36 Am. Jur. 3d Proof of Facts § 30 (2005) (problems with the calculation of population frequencies, including racial sub-populations); *see also* Thomas M. Fleming, *Annotation, Admissibility of DNA Identification Evidence*, 84 A.L.R. 4th 313, § 7 (2005) (cases on the admissibility of population frequency data), and (3) a fact finder's ability to handle these different issues and objectively make a determination. *See generally* 36 Am. Jur. 3d Proof of Facts § 48 (2005) (evidentiary strategies such as how much to educate the jury; the cross examination of experts; and the use of demonstrative aids). DNA dragnets are not conducted in an adversarial setting; therefore, there are no external checks on the

methods used in DNA matching, and police may be tempted to ignore problems in matching techniques if they ultimately obtain their desired result.

C. Police Should Inform Potential Donors Of Their Right to Refuse to Volunteer a DNA Sample.

Consent to provide DNA must be voluntary. *Supra* at 6-7. The defendant's awareness of his right to refuse consent is one of the six factors identified by the Fifth Circuit in determining whether consent is voluntary. *Morales*, 161 F.3d at 982. Given the serious privacy interests that are waived when a person consents to provide a DNA sample, the police should ensure that individuals subject to DNA dragnets know that providing a sample is voluntary.

D. Police Should Not Be Permitted to Threaten Potential Donors With Increased Scrutiny and Future Legal Action.

The threat of future legal action is a coercive method to obtain a "voluntary" DNA sample. The Ann Arbor, Michigan, and Prince George's County, Maryland, dragnets are examples where individuals were reportedly informed or felt that they that they would be subject to increased scrutiny if they refused to provide a sample. *Supra* at 6. Although the threat to seek or obtain a warrant does not make a subsequent consent automatically invalid, this threat is one of the factors used by the court to determine if consent is voluntary. *Tompkins*, 130 F.3d at 122.

E. Police Should Destroy Samples Gathered From Donors Exculpated in a DNA Dragnet or Disclose How the Samples Will Be Used.

If a person in a dragnet is not informed that his DNA sample may be used for purposes outside the investigation for which it was collected, then he may believe that his DNA sample will not be used to inculcate him in an unrelated crime. This false belief is one of the Fifth Circuit's factors to determine whether consent is voluntary. *Morales*, 161 F.3d at 983. To ensure that consent to provide a DNA sample is voluntary, DNA samples should only be used for identification or exclusion in the case for which the sample was obtained. In addition, samples should be destroyed and DNA records expunged immediately upon exclusion of a donor in the DNA dragnet. If the Court allows the use of a DNA sample outside of the purposes of the DNA dragnet, then police should be required to inform potential volunteers of the full scope of the use of their DNA samples.

F. Police Should Protect the Privacy of Innocent Donors and Those Who Exercise the Right Not to Provide DNA Voluntarily.

Police should not release the names of people affected by a DNA dragnet or the names of those who invoke their constitutional right to refuse to volunteer a DNA sample. As the Ann Arbor dragnet illustrates, an individual's reputation and livelihood are threatened if his privacy is not protected. One of the targets of that

dragnet claimed that he lost his job when detectives told his co-workers that they wanted to question him for the dragnet.

CONCLUSION

The collection of DNA samples during a DNA dragnet has repeatedly proven ineffective and may violate the Fourth Amendment. For the reasons set forth above, the decision of the district court should be reversed, and this Court should explicitly prescribe safeguards to protect the privacy of individuals affected by DNA dragnets.

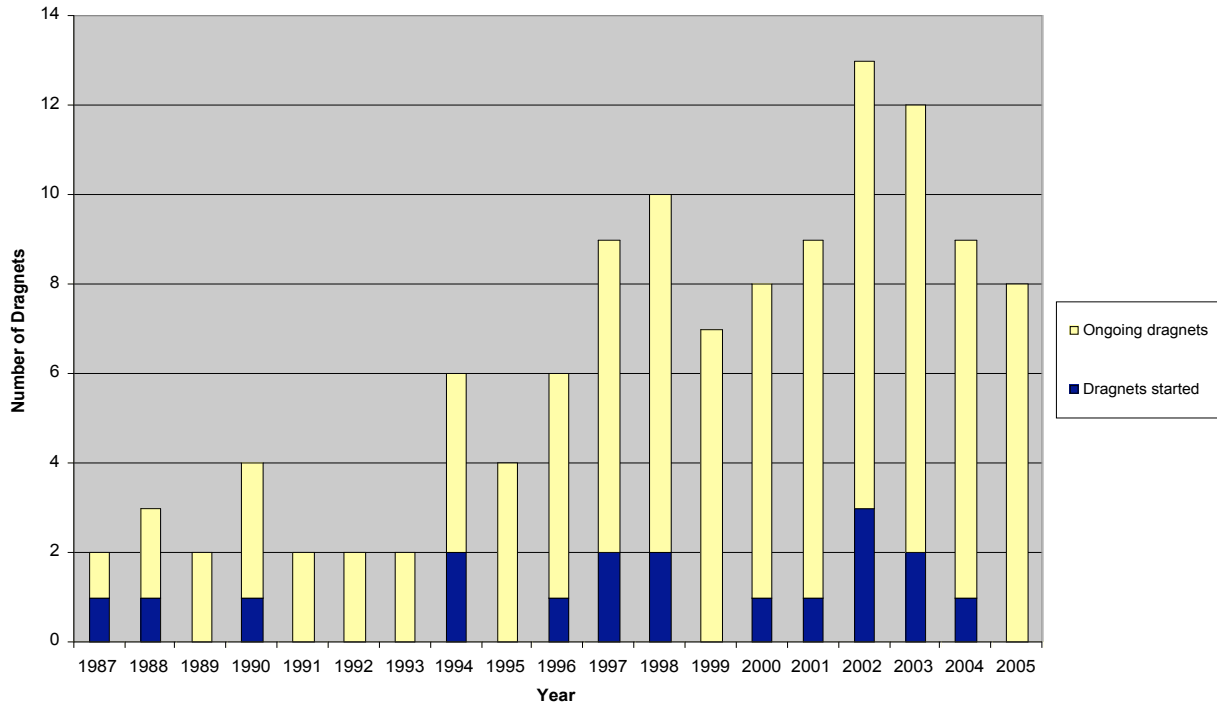
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TABLE 1

Increasing Use of DNA Dragnets



Sources: Aaron B. Chapin, Note, *Arresting DNA: Privacy Expectations of Free Citizens Versus Post-Convicted Persons and the Unconstitutionality of DNA Dragnets*, 89 Minn. L. Rev. 1842, 2278 (2005); Jeffery S. Grand, *The Bleeding of America: Privacy and the DNA Dragnet*, 23 Cardozo L.Rev. 2277 (2002); Samuel Walker, *Police DNA “Sweeps” Extremely Unproductive: A National Survey of Police DNA “Sweeps,”* Police Professionalism Initiative, Dept. of Crim. Justice, University of Nebraska (2004).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 5th Cir. R. 32.3, the undersigned attorney for the *amicus curiae* certifies that this brief is proportionally spaced, has a typeface of 14 points or more and contains 6,957 words, and therefore complies with the word limitation imposed upon *amicus curiae* briefs by Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B)(i). This brief was prepared using Microsoft Word v. X.

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I hereby certify that on this 11th day of October 2005, two copies of the forgoing *amicus curiae* brief were served on the following by First Class U.S. mail:

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