No. ___

In The
Supreme Court of the United States

DANIEL BILL, BRYAN HANANIA,
AND MICHAEL MALPASS

Petitioners,

V.

WARREN BREWER AND HEATHER POLOMBO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether or under what circumstances the *Fourth Amendment* permits the police to search an individual's DNA to exclude that person as the source of unknown DNA found at a crime scene.

PARTIES TO THE PROCEEDINGS

Petitioners Daniel Bill, Bryan Hanania, and Michael Malpass (collectively "Plaintiffs") – three officers of the Phoenix Police Department ("PPD") – sued Warren Brewer and Heather Polombo (collectively "Defendants"), also officers of the PPD, for violating Plaintiffs' *Fourth Amendment* rights.

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PETITION FOR A WRIT OF CERTIORARI

Plaintiffs respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. This case raises an important federal question:

> Whether or under what circumstances the *Fourth Amendment* permits the police to search an individual's DNA to exclude that person as the source of unknown DNA found at a crime scene.

DECISIONS BELOW

The Ninth Circuit affirmed the District Court's judgment. The opinion of the Ninth Circuit is reported at 799 F.3d 1295 and is reproduced at App. 2a-16a. The unpublished ruling of the District Court is reproduced at App. 19a-49a.

JURISDICTION

The Ninth Circuit issued its opinion on August 31, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only relevant constitutional or statutory provision is the *Fourth Amendment* to the U.S. Constitution:

> The 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.

STATEMENT OF THE CASE

Plaintiffs brought suit for declaratory and injunctive relief and nominal damages to remedy the violation of their rights under the *Fourth Amendment*. More specifically, Plaintiffs alleged that Defendants violated Plaintiffs' *Fourth Amendment* rights when they subjected Plaintiffs to warrantless, suspicionless searches of their DNA. Not only did Defendants fail to obtain search warrants before taking DNA from Plaintiffs, but Defendants did not have probable cause nor individualized suspicion of any wrongdoing by Plaintiffs. Rather, Defendants' justification for the searches was to exclude Plaintiffs as the sources of unknown DNA found at the scene of the death of a fellow officer. Although the Ninth Circuit ultimately found that the orders authorizing Plaintiffs' detentions for purposes of obtaining their DNA were equivalent to search warrants, the mere fact that Plaintiffs responded to the scene, but were never in close proximity to the locations where the unknown DNA was found, does not satisfy the *Fourth Amendment*'s probable cause requirement.

I. Factual Background.

On October 18, 2010, PPD Sgt. Sean Drenth was found dead outside of his patrol car in an empty dirt lot just south of the Arizona State Capitol. Appendix ("App.") at 4a. Shortly after Sgt. Drenth's body was discovered, over 300 persons – including PPD officers – converged on the area where Sgt. Drenth's body had been found. *Id.* Included among them were Plaintiffs, who responded to an "officer down" emergency radio broadcast. *Id.*

During the course of the investigation, a full unknown male DNA profile was found in Sgt. Drenth's patrol car and a partial unknown male DNA profile was found on Sgt. Drenth's weapons. *Id.* at 5a. At no time had Plaintiffs been in sufficient proximity to the patrol car or weapons to have deposited their DNA on the car or weapons. *Id.* at 20a-21a.

On August 8, 2011, Defendants applied to a judge of the Maricopa County Superior Court for orders of detention authorizing the temporary detention of Plaintiffs for purposes of taking samples of their DNA. *Id.* at 22a. Defendants' applications and supporting affidavits were completely devoid of any facts establishing individualized suspicion that Plaintiffs had committed criminal wrongdoing or were otherwise responsible for the death of Sgt. Drenth. *Id.* The affidavits stated, in pertinent part, as follows:

Your Affiant, Detective Warren Brewer, a Peace Officer for the City of Phoenix in the State of Arizona, being first duly sworn, upon oath, deposes and says that:

I

He is engaged, within the scope of his authority, in the investigation of an alleged criminal offense punishable by at least one year in the State Prison;

II

There is probable cause to believe that on or about the 18th day of October 2010, in the County of Maricopa, State of Arizona, the felony of Homicide in violation of A.R.S. § 13-1105A1 was committed by suspect/s unknown;

III

The procurement of a saliva sample by mouth swab from [names and dates of birth of Plaintiffs BILL, HANANIA, and MALPASS and the other search team members] may contribute to the identification of the individual who committed the felony offense described above;

IV

Such evidence cannot be obtained by our Affiant from the Law Enforcement Agency employing his (sic) or from the Criminal Identification Division of the Arizona Department of Public Safety.

V

Your Affiant further deposes and says that:

On October 18th, 2010 at approximately 2255 hours, Phoenix Police Sergeant Sean Drenth was found deceased from a single gunshot wound to his chin area. He was lying outside of his patrol vehicle, in a dirt lot at 1825 W. Jackson Street. A shotgun was lying on his chest, his duty weapon was found on the opposite side of a fence and his secondary weapon was lying on the ground next to his right ankle . . . [P]artial unknown male DNA found on the weapons, and a full unknown male DNA profile collected from Sergeant Drenth's patrol vehicle indicate this was a homicide . . .

Approximately 300 City of Phoenix Police Officers responded to the call by Capitol Police regarding an injured City of Phoenix Officer. Approximately 50

Phoenix Police Officers entered the scene where Sergeant Drenth was found. In attempts to identify the unknown DNA profile/s, investigators have collected buccal swabs from all but five of the Phoenix Police Personnel that were inside the scene. All Phoenix Fire Personnel and Capitol Police Personnel that entered the scene have voluntarily provided buccal swabs. Five of the approximately 50 Phoenix Police Officers that were inside the scene refused to provide buccal swabs.

All five officers had the potential to inadvertently deposit their DNA on the collected evidence. The five officers were earlier contacted by Investigators and were asked to voluntarily provide buccal swabs for elimination purposes. The five officers are Bryan Hanania #6581, Patrick Clinton #7113, Daniel Bill #7540, Michael Malpass #6532 and Brian Milhone #6471 . . .

This investigation has led investigators to believe that at least two possible scenarios could have taken place. The possible scenarios are the scene was a homicide staged to look like a suicide or a suicide staged to look like a homicide . . .

> Your affiant requests the issuance of this court order to allow investigators to obtain a saliva sample from [name of birth of Plaintiffs BILL, HANANIA, and MALPASS and the other search team members] to be analyzed for DNA and compared to other evidence in this investigation.

Id. at 22a-24a. The detention orders were issued later that day. *Id.* at 24a. The detention orders also were completely devoid of any conclusions that individualized suspicion existed or that Plaintiffs had committed criminal wrongdoing or were otherwise responsible for the death of Sgt. Drenth. *Id.* at 24a-25a. The detention orders stated, in pertinent part, as follows:

> IT IS THE FINDING OF THIS COURT:
>
> I
>
> That there is probable cause to believe that the crime of Homicide had been committed, such offense being a felony punishable by more than one year in the state prison;
>
> II
>
> The procurement of a saliva sample by mouth swab [names and dates of birth of Plaintiffs BILL, HANANIA, and

MALPASS and the other search team members] may contribute to the identification of the individual who committed the offense;

III

That such evidence cannot be obtained by Detective Warren Brewer #6828 from either the Phoenix Police Department or the Criminal Identification Division of the Arizona Department of Public Safety;

IT IS HEREBY ORDERED:

I

That [name and badge numbers of Defendants BREWER and POLOMBO], Detective Darrell Branch #5986, or Detective Brian Hansen #6250 of the City of Phoenix Police Department is authorized to effectuate this order;

II

That a saliva sample by mouth swab from the person of [names and dates of birth of Plaintiffs BILL, HANANIA, and MALPASS and the other search team members] is to be obtained;

III

> That this evidence is to be obtained in connection with the crime of homicide;

IV

> That this evidence is to be used in the identification or exclusion of [names and dates of birth of Plaintiffs BILL, HANANIA, and MALPASS and the other search team members] as the perpetrator of the offense listed herein.

Id.

Between August 15, 2011 and August 17, 2011, Defendants used buccal swabs to take Plaintiffs' DNA and impounded the samples as evidence. *Id.* at 24a. Defendants subsequently had the DNA analyzed. *Id.* at 25a. They continue to maintain possession of both the DNA and the results of the analyses and will continue to do so for as long as fifty-five years, or until 2066. *Id.*

II. The Course of Proceedings.

In response to Plaintiffs' Complaint, Defendants moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Id.* at 8a. In their motion, Defendants argued that Plaintiffs' Complaint failed to state a claim for a violation of the *Fourth Amendment* and that Defendants were entitled to qualified immunity. *Id.* at 28a.

On April 16, 2013, the U.S. District Court for the District of Arizona dismissed Plaintiffs' Complaint. *Id.* at 48a. In doing so, the District Court found that the warrantless, suspicionless searches of Appellants' DNA were reasonable under the *Fourth Amendment*. *Id.* Because the District Court determined that the Complaint failed to state a claim upon which relief could be granted, the District Court did not decide whether Defendants were entitled to qualified immunity. *Id.* at 28a. Plaintiffs subsequently appealed.

On August 31, 2015, a panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the District Court's judgment. However, unlike the District Court, the Ninth Circuit concluded that the detention orders authorizing the taking of Plaintiffs' DNA satisfied the Warrant Clause of the *Fourth Amendment*. *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

Every day, the average person sheds roughly 400,000 skin cells. Suzanna R. Ryan, *Touch DNA Analysis: Using The Literature To Help Answer Some Common Questions*, Forensic Magazine (June 18, 2012), http://www.forensicmag.com/articles/2012/06/touch-dna-analysis-using-literature-help-answer-some-common-questions. With five or six of those cells, a forensic scientist can obtain a DNA profile. *Id.* If a person touches an object for 10 seconds, there is more than a 50 percent chance that that individual will leave enough skin cells to produce a DNA profile. *Id.* Police therefore find the collection

and analysis of DNA to be an extremely helpful evidentiary tool. *See DA's Office v. Osborne*, 557 U.S. 52, 55 (2009).

To deal with this "expanding technology already in widespread use throughout the Nation[,]", this Court granted certiorari in *Maryland v. King* to establish "a standard" for the collection and analysis of DNA from individuals charged with serious crimes. 133 S. Ct. 1958, 1968 (2013). This case presents a question the Court did not address in *King*, however: what standard governs the collection and analysis of DNA from an individual neither charged nor even suspected of committing a serious crime, but whom police seek to exclude as the source of unknown DNA. Since it is more likely than not that a person will unknowingly leave DNA at home, at work, and everywhere else in between and "expanding technology" enables the police to collect all or some of that DNA weeks later, the Court should grant certiorari to address whether or under what circumstances the *Fourth Amendment* permits police to search an individual's DNA to exclude that person as the source of unknown DNA found at a crime scene.

I. Defendants did not have probable cause to believe that Plaintiffs' DNA would meaningfully aid in the investigation of the death of Sgt. Drenth.

The taking of an individual's DNA constitutes a search under the *Fourth Amendment*. *King*, 133 S. Ct. at 1968-69. For a search to comply with the

Fourth Amendment, the police must either first obtain a warrant to conduct the search or the search must fall within "a few specifically established and well delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967); *see also Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) ("[A] warrantless search of a person is reasonable only if it falls within a recognized exception."). That principle applies to a search for evidence that will be used "in a criminal investigation." *Id.*

This Court has interpreted the *Fourth Amendment* to require the following of search warrants:

> First, warrants must be issued by neutral, disinterested magistrates. Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense. Finally, warrants must particularly describe the things to be seized as well as the place to be searched.

Dalia v. United States, 441 U.S. 238, 255 (1979) (internal citations and quotations omitted). Of issue in this case is the second prong: whether Defendants had probable cause to believe that Plaintiffs' DNA would aid in the investigation of Sgt. Drenth's death.

Although "[t]he *Fourth Amendment* does not require probable cause to believe evidence will *conclusively* establish a fact before permitting a search," it does require "probable cause to believe the evidence sought *will aid* in a particular apprehension or conviction." *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1248 (2012). In *Warden v. Hayden*, the police entered a house that they believed an armed bank robber had entered. 387 U.S. 294, 297 (1967). Upon gaining permission to enter the house, they found the suspected robber as well as "a shotgun and a pistol in a flush tank" and "a jacket and trousers of the type of the fleeing man was said to have worn" in a washing machine. *Id.* at 298. In determining whether a search warrant was needed to search for and seize the clothing, the Court examined whether there is a different analysis for a search for "mere evidence" instead of a search for "fruits, instrumentalities or contraband." *Id.* at 306-307. The Court concluded that there is no difference. *Id.* It stated:

> The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for "mere evidence" or for fruits, instrumentalities or contraband. There must, of course, be a nexus -- automatically provided in the case of fruits, instrumentalities or contraband – between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to

> believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required. But no such problem is presented in this case. The clothes found in the washing machine matched the description of those worn by the robber and the police therefore could reasonably believe that the items would aid in the identification of the culprit.

Id. (internal citation omitted). In short, the Court concluded that there must be more than a generalized or attenuated connection between the place to be searched, the item to be seized, and the crime that was committed.

In this case, the connection between the place to be searched (Plaintiffs' mouths), the items to be seized (Plaintiffs' DNA), and the crime under investigation (the possible homicide of Sgt. Drenth) was extraordinarily attenuated at best. Plaintiffs were never considered to be suspects. Plaintiffs also were never closer than fifteen feet from Sgt. Drenth's body and weapons (thirty feet, in the case of Plaintiff Malpass). They never touched or entered Stg. Drenth's patrol car. It was highly unlikely that any of them could have deposited their DNA on either the patrol car or weapons. The only connection between Plaintiffs' DNA and Sgt. Drenth's death was that Plaintiffs showed up to work that day and assisted with the investigation.

The DNA left at the scene could have been deposited by anyone. It could be that of the killer (if it was, in fact, a homicide). It could be that of any of the approximately 50 PPD officers or unidentified number of fire personnel or Arizona State Capitol police who entered "the scene," an area that was never defined. It could be that of a fellow officer who used the patrol car or received a ride from Sgt. Drenth at some point during the six weeks prior to Sgt. Drenth's death. It could be that of a mechanic who had serviced the patrol car. Or, it could be that of an arrestee who had been placed in the back of the patrol car within the previous six weeks. There is any number of possible explanations for the unknown DNA, including contamination. What is known is that Plaintiffs were never in sufficient proximity to where the unknown DNA was found to make it likely that one or more of them could have been the source of the unknown DNA. As a result, searching Plaintiffs' mouths for their DNA was unlikely to assist the police investigation in any meaningful way. Plaintiffs' privacy was compromised for no meaningful gain.

Although the Ninth Circuit paid lip service to the principle that "probable cause to search concerns the connection of the items sought with the crime and the present location of the items" (App. at 12a), the court applied this standard only superficially. Instead of conducting a searching review for any connection between the police investigation into Sgt. Drenth's death and Plaintiffs' DNA, the Ninth Circuit concluded that "there was probable cause to believe the evidence sought could be found in the

place to be searched (inside of [P]laintiffs' mouths)." *Id.* Of course there was probable cause that Plaintiffs' DNA would be found in Plaintiffs' mouths. The assertion is practically a tautology. It is a scientific certainty that if an individual's mouth is swabbed, that individual's DNA will be found. If the police only need to show that there is probable cause that an individual's DNA will be found in that individual's mouth, the *Fourth Amendment* becomes meaningless. That is not a protection against invasion of privacy; it is a license for it.

The Ninth Circuit also failed to undertake any meaningful analysis of how taking Plaintiffs' DNA could have aided the police's investigation. It accepted at face value the police's bald assertion that taking Plaintiffs' DNA "may contribute to the identification of the individual who committed the offense," and determined, without any explanation, that doing so "would plainly 'aid in' the conviction of an eventual criminal defendant, by negating any contention at trial that police had contaminated the relevant evidence." App. at 13a. At no point did the Ninth Circuit address Plaintiffs' precise locations, distance from where the unknown DNA was found, or the substantial unlikelihood that Plaintiffs could have been the source(s) of the unknown DNA. Given that the undeniable purpose of obtaining Plaintiffs' DNA was to exclude Plaintiffs as the source(s) of the unknown DNA found at the scene, the Ninth Circuit's ruling provides no limiting principle whatsoever governing when the police may compel an individual to provide a DNA sample to exclude that person as the source of unknown DNA. Without

such a limiting principle, the *Fourth Amendment* provides no protection against "exclusionary" DNA searches such as the searches to which Plaintiffs were subjected.

II. The probable cause standard required to search an individual's DNA is of paramount importance.

"The advent of DNA technology is one of the most significant scientific advancements of our era. The full potential for use of genetic markers in medicine and science is still being explored." *King*, 133 S. Ct. at 1966. While the insertion of a buccal swab into a person's mouth may seem like a relatively insignificant physical intrusion, the information obtained by the police about a person as a result of this intrusion is far from insignificant. DNA reveals "far-reaching and complex characteristics like genetic traits" along with an individual's identity. *Id.* at 1967. The privacy interests in information obtained from DNA samples are so significant that statutes authorizing them frequently contain substantial privacy protections. The Maryland DNA Collection Act at issue in *King* explicitly

> limit[ed] the information added to a DNA database and how it may be used. Specifically, "[o]nly DNA records that directly relate to the identification of individuals shall be collected and stored." §2-505(b)(1). No purpose other than identification is permissible: "A person may not willfully test a DNA

> sample for information that does not relate to the identification of individuals as specified in this subtitle." §2-512(c). Tests for familial matches are also prohibited. See §2-506(d) ("A person may not perform a search of the statewide DNA data base for the purpose of identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the DNA sample was acquired").

Id.

Similarly, the Maryland DNA Collection Act mandated a procedure in which the police took DNA samples from all arrestees charged with particular crimes. As the Court stated:

> The Maryland DNA Collection Act provides that, in order to obtain a DNA sample, all arrestees charged with serious crimes must furnish the sample on a buccal swab applied, as noted, to the inside of the cheeks. The arrestee is already in valid police custody for a serious offense supported by probable cause. The DNA collection is not subject to the judgment of officers . . .

Id. at 1970. Because of these statutory safeguards and procedures, the Court concluded that searches under the Maryland DNA Collection Act "did not

amount to a significant invasion of privacy that would render the DNA identification impermissible under the Fourth Amendment." *Id.* at 1980.

However, a few safeguards in very specific circumstances do not prevent the police from invading the privacy of individuals in all possible circumstances. In this case, the facts are completely inapposite. Defendants seized Plaintiffs' DNA, which implicated Plaintiffs' significant privacy interests, without any of the statutory safeguards that existed in *King*. Nor was Plaintiffs' DNA taken pursuant to a standardized procedure that applies to an entire class of persons, such as all persons arrested for particular offenses. Nothing protects Defendants from analyzing Plaintiffs' DNA in any way Defendants see fit.

As noted above, the average person sheds roughly 400,000 skin cells every day. The collection of only a few of those skin cells can be used to create a DNA profile. In addition, DNA unknowingly can be left on an object after 10 seconds of contact, and that DNA could be retrievable as long as six weeks after such contact occurs. DNA is left by everyone. It can be found everywhere. Because it contains the most private, intimate information of an individual, the *Fourth Amendment* cannot allow the police to haphazardly search an individual's DNA simply because it may assist in identifying unknown DNA.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13-15844

D.C. No. 2:12-cv-02613-SRB

FILED
SEP 23 2015

U.S. District Court for Arizona,
Phoenix

DANIEL BILL; et al.,

Plaintiffs – Appellants,

v.

WARREN BREWER and HEATHER POLOMBO,

Defendants – Appellees.

MANDATE

The judgment of this Court, entered August 31, 2015, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court

Rhonda Roberts
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13-15844

D.C. No. 2:12-cv-02613-SRB

U.S. District Court for Arizona,
Phoenix

DANIEL BILL; et al.,

Plaintiffs – Appellants,

v.

WARREN BREWER and HEATHER POLOMBO,

Defendants – Appellees.

OPINION

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted
June 9. 2015 – San Francisco, California

Filed August 31, 2015

Before: Barry G. Silverman, Ronald M. Gould,
and Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Hurwitz

SUMMARY*

Civil Rights

The panel affirmed the district court's dismissal of an action brought by three Phoenix police officers who alleged that two other officers violated the Fourth and Fourteenth Amendments when, pursuant to a state court order, they obtained DNA samples from the plaintiffs to exclude them as contributors of DNA at a crime scene.

The panel held that the superior court orders authorizing the collection of plaintiffs' DNA satisfied the Warrant Clause of the Fourth Amendment. The panel further held that it was not unreasonable, under the circumstances, to ask sworn officers to provide saliva samples for the sole purpose of demonstrating that the DNA left at a crime scene was not the result of inadvertent contamination by on-duty public safety personnel.

COUNSEL

Paul J. Orfanedes, Michael Bekesha (argued), Judicial Watch, Inc., Washington, D.C., for Plaintiffs-Appellants.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Gary Verburg, City Attorney, Robert A. Hyde (argued), Assistant City Attorney, Office of the City Attorney, Phoenix, Arizona, for Defendants-Appellees.

OPINION

HURWITZ, Circuit Judge:

In this 42 U.S.C. § 1983 action, three Phoenix police officers allege that two other officers violated the Fourth and Fourteenth Amendments when, pursuant to a state court order, they obtained DNA samples from the plaintiffs to exclude them as contributors of DNA at a crime scene. The district court dismissed the complaint, and we affirm.

I.

A.

On October 18, 2010, Phoenix Police Sergeant Sean Drenth died from a gunshot wound to his head. His body was found in the northwest corner of an empty lot near the Arizona State Capitol; a shotgun was across his chest and a second weapon by his ankle. Sergeant Drenth's patrol car was in the center of the lot, and his service weapon was found just beyond the south side of the lot. More than 300 public safety personnel, the chief of police, and the mayor quickly converged on the scene. Roughly 100 people entered the area where Sergeant Drenth's body was discovered, including the three plaintiffs, who were assigned to canine search teams.

The police investigators assigned to the case initially attempted to determine whether Sergeant Drenth's death was a homicide staged to look like a suicide or a suicide staged to look like a homicide. Detective Warren Brewer led the investigation with the assistance of Detective Heather Polombo. That investigation revealed unknown male DNA profiles on Drenth's patrol car and weapons. Over the ensuing months, Polombo received consent to collect DNA samples from more than 100 individuals who had entered the crime scene in order to eliminate them as contributors of the unknown DNA. Each of the approximately fifty Phoenix Police Department officers who entered the crime scene consented to give samples, with the exception of the three plaintiffs and two others.

Polombo met with the five non-consenting officers in April 2011. She told them that they had been excluded as suspects in any crime because "their portable radios and the mobile digital communicators in their vehicles confirmed their locations on the night of" Drenth's death, and she again requested DNA samples to exclude them as contributors of the questioned DNA. Polombo provided each officer with a police department "DNA Collection Fact Sheet – Drenth Investigation" (the "DNA Memo"), explaining that their DNA samples would be used only for this limited purpose, and would "not be entered into [the Combined DNA Index System ("CODIS")]"[1] or used to identify DNA found at future crime scenes.

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[1] CODIS is a "centrally-managed database linking DNA profiles culled from federal, state, and territorial DNA collection

B.

The five officers nonetheless continued to refuse to provide DNA samples. Brewer and Polombo then sought court orders pursuant to Arizona Revised Statutes § 13-39052[2] to obtain buccal swabs—a Q-tip swab along the inside

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programs, as well as profiles drawn from crime-scene evidence, unidentified remains, and genetic samples voluntarily provided by relatives of missing persons." *United States v. Kincade*, 379 F.3d 813, 819 (9th Cir. 2004) (en banc).

[2] Arizona Revised Statutes § 13-3905 provides, in relevant part:

A. A peace officer who is engaged, within the scope of the officer's authority, in the investigation of a felony may make written application upon oath or affirmation to a magistrate for an order authorizing the temporary detention, for the purpose of obtaining evidence of identifying physical characteristics, of an identified or particularly described individual residing in or found in the jurisdiction over which the magistrate presides. The order shall require the presence of the identified or particularly described individual at such time and place as the court shall direct for obtaining the identifying physical characteristic evidence. The magistrate may issue the order on a showing of all of the following:

1. Reasonable cause for belief that a felony has been committed.

2. Procurement of evidence of identifying physical characteristics from an identified or particularly described individual may contribute to the identification of the individual who committed such offense.

3. The evidence cannot otherwise be obtained by the investigating officer from either the law enforcement agency employing the affiant or the department of public safety.

of the five officers' cheeks—for DNA testing. In support of the applications for the orders, Brewer submitted affidavits describing the five officers' presence at the crime scene, noting their "potential to [have] inadvertently deposit[ed] their DNA on the collected evidence," and avowing that the DNA samples "may contribute to the identification of the individual who committed" the homicide. A superior court judge issued the orders, and buccal swabs were taken from the five officers. The samples were analyzed and the results included in investigative reports along with the results of analysis of swabs taken from others at the scene. The swabs are currently impounded by the Department pursuant to Arizona Revised Statutes §13-4221.[3] The Department has repeatedly stated that none of the officers is suspected of having committed any crime.

***

G. For the purposes of this section, "identifying physical characteristics" includes, but is not limited to, the fingerprints, palm prints, footprints, measurements, handwriting, handprinting, sound of voice, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance or photographs of an individual.

[3] Arizona Revised Statutes § 13-4221(A) provides that DNA samples collected in connection with a homicide must be retained for "[t]he period of time that a person who was convicted" of the offense "remains incarcerated for that offense or until the completion of the person's supervised release," or, for cold cases, "fifty-five years or until a person is convicted of the crime and remains incarcerated or under supervised release for that offense." The statute gives government entities "discretion concerning the conditions under which biological evidence is retained, preserved or transferred among different entities." *Id.* § 13-4221(F).

C.

On December 7, 2012, plaintiffs filed this 42 U.S.C. § 1983 action, claiming that Brewer and Polombo violated the Fourth Amendment by obtaining, analyzing, and retaining plaintiffs' DNA. The complaint sought (1) nominal damages of $1.00 for each plaintiff; (2) a declaration that the seizure of the DNA was unlawful; and (3) injunctive relief precluding defendants "from continuing to maintain possession, custody, or control" of the DNA samples and ordering them to destroy "samples and any analyses and reports of Plaintiffs' DNA samples."

The district court dismissed the complaint for failure to state a claim. This appeal timely followed. We have jurisdiction under 28 U.S.C. § 1291. "We review *de novo* the district court's granting of a motion to dismiss for failure to state a claim," *Weiland v. Am. Airlines, Inc.*, 778 F.3d 1112, 1114 (9th Cir. 2015), and "accept as true the factual allegations in [the] complaint," *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2079 (2011). "We may affirm the district court on any basis supported by the record." *Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1114 n.1 (9th Cir. 2014).

II.

The Supreme Court has held that "using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search" under the Fourth Amendment. *Maryland v. King*, 133 S. Ct. 1958, 1968-69 (2013); *see also Missouri v. McNeely*,

133 S. Ct. 1552, 1565 (2013) ("[A]ny compelled intrusion into the human body implicates significant, constitutionally protected privacy interests."). Thus, the issue before us is whether the defendants "respected relevant Fourth Amendment standards" in collecting plaintiffs' DNA. *Schmerber v. California*, 384 U.S. 757, 768 (1966). Plaintiffs' briefs argue that because defendants "fail[ed] to obtain search warrants before taking DNA samples" and had no "individualized suspicion that Plaintiffs had committed criminal wrongdoing," collection of their DNA violated the Fourth Amendment because it does not fall within any of the "established exceptions" to the warrant requirement.[4]

We disagree. The superior court orders authorizing the collection of the DNA samples fully satisfied the warrant requirement of the Fourth Amendment.

A.

"Ordinarily, the reasonableness of a search depends on governmental compliance with the Warrant Clause, which requires authorities to demonstrate probable cause to a neutral magistrate and thereby convince him to provide formal authorization to proceed with a search by issuance of

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[4] On appeal, plaintiffs have not developed the arguments made below that continued possession of their DNA violates the Fourth Amendment and that the defendants omitted material information from the applications to the superior court. Thus, these arguments are forfeited. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (declining to address argument because it was not argued "with any specificity" on appeal).

a particularized warrant." *United States v. Kincade*, 379 F.3d 813, 822 (9th Cir. 2004) (en banc). The orders issued by the superior court pursuant to Arizona Revised Statutes § 13-3905 were not formally denominated as search warrants. Moreover, the state statute requires a showing of only reasonable cause "for belief that a felony has been committed" to support a detention order, *id.*, § 13-3905(A)(1)—something the Arizona Supreme Court has defined as "less than probable cause," *State v. Rodriguez*, 921 P.2d 643, 651 (Ariz. 1996)—and specifies no particular quantum of suspicion that the evidence sought "may contribute to the identification of the individual who committed such offense," § 13-3905(A)(2).

However, when considering Fourth Amendment challenges to evidence seized pursuant to § 13-3905 orders, the Arizona Supreme Court has described such orders as "warrants." *State v. Jones*, 49 P.3d 273, 280 (Ariz. 2002). That court has also stated that "probable cause is the standard that must be met" for a § 13-3905 order involving a "bodily invasion" constituting "a search under the Fourth Amendment." *Id.* at 281; *see also State v. Wedding*, 831 P.2d 398, 404 (Ariz. Ct. App. 1992) ("The affidavit [supporting a § 13-3905 order for saliva and blood samples] clearly supports the . . . finding that there was probable cause to search and seize the defendant at the time of the detention."). Thus, we analyze the § 13-3905 orders in this case, notwithstanding the more limited language of the statute, for compliance with the Warrant Clause of the Fourth Amendment.

The "precise and clear" words of the Fourth Amendment "require only three things" for a valid search warrant:

> First, warrants must be issued by neutral, disinterested magistrates. Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a particular offense. Finally, warrants must particularly describe the things to be seized, as well as the place to be searched.

Dalia v. United States, 441 U.S. 238, 255 (1979) (citations and internal quotation marks omitted). There can be no contest that the orders here satisfied the first and third requirements: they were issued by a superior court judge and described a "saliva sample" to be seized "by mouth swab" from the person of the plaintiffs. Whether the orders satisfy the Warrant Clause therefore turns on whether the submitted affidavits demonstrated probable cause to believe that the evidence sought would aid in an apprehension or conviction for a particular offense.

To be sure, the orders here did not seek to obtain evidence that the plaintiffs committed a crime. But contrary to plaintiffs' intimations, "[t]he critical element in a reasonable search is not that the owner

of the property," or in this case the person, to be searched "is suspected of crime." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). Rather, "probable cause to search . . . concerns the connection of the items sought with crime and the present location of the items." *United States v. O'Connor*, 658 F.2d 688, 693 n.7 (9th Cir. 1981). Of course, law enforcement must demonstrate "a nexus . . . between the item to be seized and criminal behavior." *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967). "[I]n the case of 'mere evidence,' probable cause" for such a nexus "must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Id.*

These constitutional requirements were satisfied here. The superior court expressly found "probable cause to believe that the crime of Homicide had been committed." Plaintiffs wisely do not challenge this finding; indeed, the affidavits detailed the date, time, victim, and crime scene of the highly publicized death being investigated. The affidavits also explained that DNA samples were sought from all public safety personnel who entered the crime scene to exclude them as depositors of the questioned DNA. It cannot be meaningfully debated that there was probable cause to believe the evidence sought could be found in the place to be searched (inside of plaintiffs' mouths). *See Illinois v. Gates*, 462 U.S. 213, 230 (1983) (explaining that probable cause is a "commonsense, practical question").

Moreover, the affidavits plainly demonstrated "a nexus" between the crime under investigation and

the evidence sought. *Warden*, 387 U.S. at 307. They stated that "[a]pproximately 50 Phoenix Police Officers entered the scene," along with numerous other public safety personnel; that all of these public safety personnel except for plaintiffs and two other Phoenix police officers (identified by name and badge number) had already provided samples; and that such samples would be "analyzed for DNA and compared to other evidence in th[e] investigation" "[i]n attempts to identify the unknown DNA profile/s" found at the scene, and thus "may contribute to the identification of the individual who committed the felony offense described."

That plaintiffs had themselves already been excluded as suspects does not undermine the nexus between the evidence desired and the crime investigated; excluding public safety personnel as the source of DNA would plainly "aid in" the conviction of an eventual criminal defendant, by negating any contention at trial that police had contaminated the relevant evidence. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1248 n.7 (2012) (emphasis and citation omitted); *see also In re Morgenthau*, 457 A.2d 472, 473-76 (N.J. Super. Ct. App. Div. 1983) (per curiam) (affirming order compelling collection of "blood and hair samples and finger and palm prints" from individuals who were "not suspects" in a homicide investigation because these "physical exemplars constituted material evidence relevant to [the suspect's] guilt" and the orders, while not denominated as warrants, "comport[ed] with all the requisites of a search warrant"). We therefore conclude that the superior

court orders authorizing the collection of plaintiffs' DNA satisfied the Warrant Clause of the Fourth Amendment. Given that conclusion, we need not address whether an exception to the warrant requirement would have applied in the absence of the orders.

B.

To be sure, "a search could be unreasonable, though conducted pursuant to an otherwise valid warrant, by intruding on personal privacy to an extent disproportionate to the likely benefits from obtaining fuller compliance with the law." *United States v. Torres*, 751 F.2d 875, 883 (7th Cir. 1984). The Fourth Amendment thus also requires an analysis of "the extent of the intrusion on [plaintiffs'] privacy interests and on the State's need for the evidence." *Winston v. Lee*, 470 U.S. 753, 763 (1985); *see also Spencer v. Roche*, 659 F.3d 142, 146 (1st Cir. 2011) (applying reasonableness analysis to bodily search conducted pursuant to warrant). Because "'intrusions into the human body'" implicate the "most personal and deep-rooted expectations of privacy," the Fourth Amendment requires "a discerning inquiry into the facts and circumstances to determine whether the intrusion was justifiable." *Winston*, 470 U.S. at 760 (quoting *Schmerber*, 384 U.S. at 767-68).

But no undue intrusion occurred here. The Supreme Court has expressly held that buccal swabs are "brief and . . . minimal" physical intrusions "'involv[ing] virtually no risk, trauma, or pain.'"

King, 133 S. Ct. at 1979 (quoting *Schmerber*, 384 U.S. at 771). A buccal swab, like a breathalyzer test, does "not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment." *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 625 (1989).

Moreover, the reasonableness of a particular search "must be considered in the context of the person's legitimate expectations of privacy." *King*, 133 S. Ct. at 1978. Although "policemen do not abandon their constitutional rights upon induction into the department," *L.A. Police Protective League v. Gates*, 907 F.2d 879, 886 (9th Cir. 1990) (citation and internal quotation marks omitted), the government's interest in the integrity of its police force "may justify some intrusions on the privacy of police officers which the fourth amendment would not otherwise tolerate," *Kirkpatrick v. City of Los Angeles*, 803 F.2d 485, 489 (9th Cir. 1986); *see also Biehunik v. Felicetta*, 441 F.2d 228, 231 (2d Cir. 1971) ("The policeman's employment relationship by its nature implies that in certain aspects of his affairs, he does not have the full privacy and liberty from police officials that he would otherwise enjoy."). It was hardly unreasonable here to ask sworn officers to provide saliva samples for the sole purpose of demonstrating that DNA left at a crime scene was not the result of inadvertent contamination by on-duty public safety personnel.

And, although we share plaintiffs' concerns over potential misuse of DNA samples to reveal private

information about contributors, *see King*, 133 S. Ct. at 1979-80, no such danger is realistically posed here. The DNA Memo expressly guarantees plaintiffs' DNA samples "will be used for comparison to evidence in this report only" and "will not be used for any research type testing, including race, ethnicity or health," "provided to any outside organization for those purposes," "entered into the employee database," or "entered into CODIS."[5] The plaintiffs have not alleged any plausible reason to believe that the Phoenix Police Department will not abide by these limitations, and the district court did not err in declining to speculate about possible future abuse.

III.

We **AFFIRM** the judgment of the district court.

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[5] Because the complaint quoted extensively from the DNA Memo, it was incorporated by reference and we may "assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CV 12-2613-PHX-SRB

Daniel Bill, Bryan Hanania, and Michael Malpass,

Plaintiffs,

v.

Warren Brewer, Heather Polombo, John Does I-V, and Jane Does I-V,
Defendant(s).

JUDGMENT OF DISMISSAL
IN A CIVIL CASE

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order dated April 16, 2013, judgment is entered in favor of Defendants and against Plaintiffs. Plaintiffs to take nothing, and complaint and action are dismissed.

BRIAN D. KARTH
District Court
Executive/Clerk

April 16, 2013

s/Kathy Gerchar
By: Deputy Clerk

cc: (all counsel)

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CV 12-02613-PHX-SRB

Daniel Bill, Bryan Hanania, and Michael Malpass,

Plaintiffs,

v.

Warren Brewer, Heather Polombo, John Does I-V, and Jane Does I-V,
Defendants.

ORDER

At issue is Defendants Warren Brewer and Heather Polombo's Motion to Dismiss ("MTD") (Doc. 12). The Court held oral argument on Defendants' Motion on March 18, 2013. (*See* Doc. 25, Min. Entry.)

I. BACKGROUND

Pursuant to 42 U.S.C. § 1983, Plaintiffs Daniel Bill, Bryan Hanania, and Michael Malpass have brought suit against Defendants for violation of their Fourth and Fourteenth Amendment rights under the United States Constitution and are seeking declaratory and injunctive relief, as well as nominal damages. (Doc. 1, Compl. at 1.) Plaintiffs are all police officers in the City of Phoenix Police Department ("PPD") who were among over

300 persons who converged on the area where Sergeant Sean Drenth was found dead on October 18, 2010. (*Id.* ¶¶ 3-5, 9, 11-15.) Plaintiffs Bill and Hanania were never closer than fifteen feet from Sergeant Drenth's body and the weapons found nearby, and Plaintiff Malpass was never closer than thirty feet from the weapons found with Sergeant Drenth's body. (*Id.* ¶¶ 10, 17-18.) Plaintiffs never touched or entered Sergeant Drenth's patrol car. (*Id.* ¶¶ 17-18.) Reports detailing Plaintiffs' actions and locations were available to PPD detectives Defendants Brewer and Polombo at all relevant times. (*Id.* ¶¶ 6-7, 21-24.)

During the course of the PPD's homicide investigation into the death of Sergeant Drenth, a full unknown male DNA profile was found on Sergeant Drenth's patrol vehicle, and a partial unknown male DNA profile was found on Sergeant Drenth's weapons. (*Id.* ¶¶ 25-26.) Beginning on December 27, 2010, and continuing over the next several months, Defendant Polombo communicated with Plaintiffs and other members of their search teams about obtaining DNA samples for what Defendant Polombo said were exclusionary purposes. (*Id.* ¶ 29.) Plaintiffs "agreed in principle to provide the samples on the condition that they receive satisfactory assurances about the use and disposition of the samples and any subsequent analysis of the samples." (*Id.*) During their communications Plaintiffs informed Defendant Polombo of their specific locations and activities on October 18, 2010, so he "knew or had substantial reason to know" that they could not have been the

source of any DNA found on Sergeant Drenth's patrol vehicle and weapons. (*Id.* ¶ 30.) Plaintiffs allege on information and belief that Defendant Polombo shared this information with Defendant Brewer and others. (*Id.*)

On April 18, 2011, Defendant Polombo met with Plaintiffs and provided them with a memorandum entitled "DNA Collection Fact Sheet – Drenth Investigation," which stated that DNA samples had been recovered from the scene that had not been identified, that "DNA samples from all known people in the scene [we]re needed to eliminate them as contributors," that recipients of the memorandum were being requested to provide samples of DNA based on information indicating they were in the scene, that DNA samples would be obtained by buccal swabs and retained by a laboratory in accordance with Arizona Revised Statutes ("A.R.S.") § 13-4221, and that the results of the DNA testing would be documented in a report and would be discoverable in accordance with Arizona law. (*Id.* ¶ 33.) During the April 18, 2011, meeting, Defendant Polombo told Plaintiffs that she knew they "were not involved in Sergeant Drenth's death because the locators in their portable radios and the mobile digital communicators in their vehicles confirmed their locations on the night of October 18, 2010." (*Id.* ¶ 35.)

After this meeting Plaintiffs retained counsel in an attempt to negotiate a compromise with the PPD, and while these negotiations were continuing, Defendants Brewer and Polombo were instructed to

apply to the Maricopa County Superior Court for detention orders pursuant to A.R.S. § 13-3905, authorizing the temporary detention of Plaintiffs for purposes of taking samples of their DNA. (*Id.* ¶¶ 36-37.) On August 8, 2011, Defendant Brewer applied to the Maricopa County Superior Court for detention orders for Plaintiffs, and in support of these applications he executed affidavits stating that there was probable cause to believe that the felony of homicide was committed by an unknown suspect on October 18, 2010, that the procurement of a saliva sample by mouth swab from Plaintiffs "may contribute to the identification of the individual who committed the felony offense," and that such evidence could not be obtained from the law enforcement agency employing him or from the criminal identification division of the Arizona Department of Public Safety. (*Id.* ¶ 39.)

The affidavits also described the circumstances under which Sergeant Drenth's body was found and explained that partial unknown male DNA was found on the weapons by his body and a full unknown male profile was collected from his vehicle, indicating that this was a homicide. (*Id.*) The affidavits stated that investigators believed two possible scenarios could have taken place: that the scene was a homicide staged to look like a suicide or a suicide staged to look like a homicide. (*Id.*) The affidavits also stated that on October 18, 2010, approximately 300 PPD officers responded to the call regarding an injured officer and that approximately 50 PPD officers "entered the scene where Sergeant Drenth was found." (*Id.*) The affidavits affirmed that

investigators had collected buccal swabs from all but five of the PPD personnel that were inside the scene and stated that "[a]ll five officers had the potential to inadvertently deposit their DNA on the collected evidence." (*Id.*) The affidavits listed Plaintiffs as three of these five officers and requested that the court issue an order to allow investigators to obtain a saliva sample from Plaintiffs "to be analyzed for DNA and compared to other evidence in this investigation." (*Id.*)

Plaintiffs allege that Defendant Polombo assisted in the preparation of the applications for the detention orders, including the affidavits, and that at the time that Defendants Brewer and Polombo prepared and submitted the affidavits, they knew or had substantial reason to know that the following statements contained in the affidavits were false: (1) that the procurement of a saliva sample from Plaintiffs "may contribute to the identification of the individual who committed the felony," (2) that approximately fifty PPD officers entered the scene where Sergeant Drenth was found, and (3) that "[a]ll five officers had the potential to inadvertently deposit their DNA on the collected evidence." (*Id.* ¶¶ 40, 42.) Plaintiffs allege that the applications and affidavits "were completely devoid of any fact establishing individualized suspicion that Plaintiffs . . . had committed criminal wrongdoing or were otherwise responsible for the death of Sergeant Drenth" and that Defendants Brewer and Polombo omitted facts well known to them establishing the locations and activities of Plaintiffs "on the night of October 18, 2010, including the fact that none of the

officers were in sufficient proximity to Sergeant Drenth's body or his patrol vehicle or weapons to have deposited their DNA either on the vehicle or on any of the weapons." (*Id.* ¶¶ 41, 43.)

On August 8, 2011, the Honorable Douglas L. Rayes of the Maricopa County Superior Court issued the detention orders requested, finding that there was probable cause to believe that a homicide had been committed, that the procurement of a saliva sample from Plaintiffs "may contribute to the identification of the individual who committed the offense," and that Detective Brewer could not obtain such evidence from the PPD or the criminal identification division of the Arizona Department of Public Safety. (*Id.* ¶ 44.) Judge Rayes ordered that a saliva sample by mouth swab be obtained from Plaintiffs and that this evidence "be used in the identification or exclusion of [Plaintiffs] . . . as the perpetrator of the offense." (*Id.*) On August 15 and 17, 2011, Defendants Brewer and Polombo served Plaintiffs with the detention orders and obtained buccal swabs from them, which were subsequently provided to the PPD's Laboratory Services Bureau for processing and analysis; at no point did Plaintiffs "consent to the taking and subsequent processing and analysis of their DNA." (*Id.* ¶¶ 45-47, 49.)

On at least two occasions the PPD denied that the detention orders served on Plaintiffs were search warrants or that Plaintiffs were suspects in Sergeant Drenth's death. (*Id.* ¶ 51.) The PPD specifically stated on August 21, 2011, that "[t]hese are not search warrants and do not require the same level of

cause," and on August 22, 2011, the PPD issued a notice again denying that the court orders were search warrants and stating that "[t]hese court orders are based on reasonable cause." (*Id.* ¶¶ 52-53.) The PPD explained, "Members of some media and other outlets may make claims these employees are considered suspects. This is not true. These employees were determined to be within a critical area within the scene and their DNA was collected strictly for comparative analysis." (*Id.* ¶ 53.) The PPD recognized that Plaintiffs were among certain employees who "exercised their constitutional right and refused to provide their DNA, necessitating a court order." (*Id.*)

The PPD's Laboratory Services Bureau processed the buccal swabs taken from Plaintiffs and prepared reports; Defendants Brewer and Polombo continue to maintain control over these reports as well as the impounded buccal swabs. (*Id.* ¶¶ 54-57.) The DNA samples will be retained by the PPD for as long as fifty-five years, or until 2066, pursuant to § A.R.S. 13-4221. (*Id.* ¶ 58.)

Plaintiffs allege that the act of taking a buccal swab was an unconstitutional search under the Fourth and Fourteenth Amendments of the United States Constitution, as it was done without a search warrant, without probable cause, and without having a non-law enforcement special need. (*Id.* ¶¶ 60-62.) Plaintiffs also allege that Defendants Brewer and Polombo omitted material information when seeking the orders of detention and that they continue to violate Plaintiffs' constitutional rights by

retaining the samples of DNA, as well as analyses and reports of these samples, which were derived from unlawful searches and seizures. (*Id.* ¶¶ 63-64.) Plaintiffs seek a declaration that the searches and seizures of their DNA were unlawful; an injunction enjoining "Defendants from continuing to maintain possession, custody, or control of Plaintiffs' DNA samples"; an order that Defendants "expunge or destroy the buccal swabs . . . and any analyses and reports of Plaintiff's DNA samples"; nominal damages in the amount of one dollar each; and reasonable attorneys' fees and costs. (*Id.*, Prayer for Relief.)

II. LEGAL STANDARDS AND ANALYSIS

A. Standard of Review

The Federal Rules of Civil Procedure require "only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Thus, dismissal for insufficiency of a complaint is proper if the complaint fails to state a claim on its face. *Lucas v. Bechtel Corp.*, 633 F.2d 757, 759 (9th Cir. 1980). "While a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic

recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted).

A Rule 12(b)(6) dismissal for failure to state a claim can be based on either (1) the lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal claim. *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011), *cert. denied*, *Blasquez v. Salazar*, 132 S. Ct. 1762 (2012). In determining whether an asserted claim can be sustained, "[a]ll of the facts alleged in the complaint are presumed true, and the pleadings are construed in the light most favorable to the nonmoving party." *Bates v. Mortg. Elec. Registration Sys., Inc.*, 694 F.3d 1076, 1080 (9th Cir. 2012). "[A] wellpleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). However, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In other words, the complaint must contain enough factual content "to raise a reasonable expectation that discovery will reveal evidence" of the claim. *Twombly*, 550 U.S. at 556.

B. Analysis

Defendants argue that Plaintiffs' Complaint should be dismissed because "Plaintiffs do not state a valid claim for a constitutional violation and Defendants are entitled to qualified immunity." (MTD at 1.) Because Plaintiffs are seeking declaratory and injunctive relief in addition to nominal damages, qualified immunity would be a defense only to their claim for nominal damages. *See Am. Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991) ("'Qualified immunity is an affirmative defense to damage liability; it does not bar actions for declaratory or injunctive relief.'" (quoting *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989))). The relevant question this Court must address for Plaintiffs' claims to both equitable and monetary relief is whether they have adequately stated a claim for a violation of their constitutional rights under the Fourth and Fourteenth Amendments. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (in order for the defense of qualified immunity to fail, a plaintiff must allege facts "mak[ing] out a violation of a constitutional right" and show that this right "was clearly established at the time of defendant's alleged misconduct" (quotation omitted)). Because the Court determines that Plaintiffs have not stated a claim for a constitutional violation, it need not address whether any alleged right was clearly established.

1. Plaintiffs' Claim That They Were Subjected to Unjustified Warrantless, Suspicionless Searches

Plaintiffs bring a single count pursuant to 42 U.S.C. § 1983 for a violation of their Fourth Amendment "right to be secure in their persons against unreasonable searches and seizures," (*see* Compl. ¶¶ 59-66), which is "made applicable to the States by the Due Process Clause of the Fourteenth Amendment." *See City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619, 2624 (2010). The Fourth Amendment provides that

> The 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.

U.S. Const. amend. IV. Plaintiffs do not allege that Defendants violated A.R.S. § 13-3905, nor do they allege that they were unlawfully detained or seized. (*See generally* Compl.) Rather, they allege that Defendants violated "their rights under the U.S. Constitution by subjecting them to buccal swabs for purposes of DNA analysis without obtaining search warrants, without probable cause, and without having a non-law enforcement special need." (Compl.

¶ 62; *see also* Doc. 20, Pls.' Mem. in Opp'n to MTD ("Resp.") at 3 ("Plaintiffs do not claim that they were unlawfully detained; they claim that they were unlawfully searched.").)

It is clearly established that taking a buccal swab to extract DNA "constitute[s] a search under the Fourth Amendment." *Friedman v. Boucher*, 580 F.3d 847, 852 (9th Cir. 2009); *see also Kohler v. Englade*, 470 F.3d 1104, 1109 n.4 (5th Cir. 2006) ("It is undisputed that the collection of a saliva sample for DNA analysis is a search implicating the Fourth Amendment."). It is also generally true that "[a] warrantless search is unconstitutional unless the government demonstrates that it falls within certain established and well-defined exceptions to the warrant clause." *Friedman*, 580 F.3d at 853 (internal quotation marks and citation omitted; alteration incorporated). Plaintiffs point out "'three categories of searches'" that the Ninth Circuit Court of Appeals has characterized as "'help[ing] organize the jurisprudence,'" and argue that because the searches here did not occur in an exempted area such as a border, airport, or prison; were clearly not administrative; and did not encompass a non-law enforcement special need, they are unconstitutional. (*See* Resp. at 5-7 (quoting *United States v. Kincade*, 379 F.3d 813, 822-23 (9th Cir. 2004)).) The Court agrees with Plaintiffs that the searches here do not fall within any of these particular exceptions to the warrant clause, but these categories are "not necessarily mutually-exclusive," and there are "a variety of conditions" under which "law enforcement may execute a search without first complying with

[the] dictates [of the Warrant Clause]." *See Kincade*, 379 F.3d at 822; *see also, e.g.*, *United States v. Knights*, 534 U.S. 112, 121 (2001) ("Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser degree satisfies the Constitution [and the warrant requirement is rendered unnecessary] when the balance of governmental and private interests makes such a standard reasonable."); *Terry v. Ohio*, 392 U.S. 1, 27-31 (1968) (holding constitutional "a reasonable search for weapons for the protection of [a] police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime").

Regardless of whether they fall into one of the three categories described by *Kincade*, *Terry* and other cases stand for the proposition that in some cases warrantless searches – even of the body – are reasonable and thus permissible. *See, e.g.*, *United States v. Cameron*, 538 F.2d 254, 258 (9th Cir. 1976) ("The law of this circuit . . . is that there is no per se requirement for a warrant to conduct a body search in border crossing cases."); *see also Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989) (affirming "the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance"). Instead of concluding that the searches here are per se unconstitutional because they were executed without a search warrant and do not fall within one of the three exceptions to the

warrant requirement discussed in *Kincade*, the Court concludes that it should apply the "totality of circumstances" test for determining whether the searches here were reasonable. *See Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) ("The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" (quoting *Terry*, 392 U.S. at 19)); Angus J. Dodson, *DNA "Line-Ups" Based on a Reasonable Suspicion Standard*, 71 U. Colo. L. Rev. 221, 231-32 (Winter 2000) ("[A]lthough the Fourth Amendment protects people from unreasonable search and seizure, the Amendment does not per se preclude "reasonable" searches and seizures, regardless of whether they are conducted with probable cause or a search warrant."); *see also Samson v. California*, 547 U.S. 843, 847-48 (2006) (applying totality of circumstances test to determine whether a "suspicionless search" of a parolee violated the Fourth Amendment); *Knights*, 534 U.S. at 118-19, 122 (applying totality of circumstances test in finding that a warrantless search of a probationer was reasonable where it was "supported by reasonable suspicion and authorized by a condition of probation"); *Haskell v. Harris*, 669 F.3d 1049, 1053-54 (9th Cir. 2012), *reh'g en banc granted*, 669 F.3d 1049 ("We apply the 'totality of the circumstances' balancing test to determine whether a warrantless search is reasonable."); *United States v. Kriesel*, 508 F.3d 941, 942, 946-47 (9th Cir. 2007) (determining that the court should apply the totality

of circumstances test in evaluating constitutionality of DNA Act requiring the DNA sample of a convicted felon on supervised release); *Kincade*, 379 F.3d at 830-32 (determining that the court should apply the totality of circumstances test to decide the constitutionality of "suspicionless searches of conditional releasees . . . conducted for law enforcement purposes"). Under this test, "[w]hether a search is reasonable 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Samson*, 547 U.S. at 848 (quoting *Knights*, 534 U.S. at 118-19).[1]

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[1] The Court rejects Plaintiffs' argument that "'there may be a prerequisite to the application of this test: there must be some legitimate reason for the individual having less than the full rights of a citizen.'" (Resp. at 10 (quoting *United States v. Pool*, 621 F.3d 1213, 1219 (9th Cir. 2010), *vacated as moot*, 659 F.3d 761 (2011)).) In the absence of any controlling authority that the Court should *not* apply what the Supreme Court has termed the "'general Fourth Amendment approach,'" the Court will apply it here. *See Samson*, 547 U.S. at 848 (quoting *Knights*, 534 U.S. at 118); *see also Wyoming v. Houghton*, 526 U.S. 295, 297-300, 303-06 (1999) (in determining whether a particular governmental action violates the Fourth Amendment, courts "inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed" and where "that inquiry yields no answer, [they] must evaluate the search or seizure under traditional standards of reasonableness") (applying balancing test to search of passenger's belongings in car). In addition, while the detention orders issued here were concededly not search warrants in the typical sense, they were prior judicial authorizations based on individual suspicion that Plaintiffs had evidence relevant to the crime being investigated, which the Supreme Court has suggested takes

Turning to the governmental interest at issue here, "[c]ertainly the interest of society in the investigation of felonies is very high," especially when the felony is homicide. *See State v. Grijalva*, 533 P.2d 533, 535-37 (Ariz. 1975) (upholding constitutionality of A.R.S. § 13-3905 and applying balancing test to conclude that the interest in felony investigation is "very high," while the "degree of intrusion into the person's privacy is relatively slight"); *see also Washington v. Glucksberg*, 521 U.S. 702, 728-729 (1997) (recognizing that state homicide laws advance states' commitment to their "unqualified interest in the preservation of human life" (quotation omitted)). Indeed, the importance of the governmental interest in solving crimes was one of the animating reasons behind the Supreme Court's dictum in *Davis v. Mississippi* that detentions for the sole purpose of obtaining fingerprints "might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *See* 394 U.S. 721, 727 (1969) (noting that "fingerprinting is an inherently

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this case outside the realm of not only the special-needs and administrative-search cases, but also cases such as *City of Indianapolis v. Edmond*, where the Court suggested that the balancing approach should not be applied to suspicionless searches or seizures conducted for general law enforcement purposes. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2082 (2011) ("The existence of a judicial warrant based on individualized suspicion takes this case outside the domain of not only our special-needs and administrative-search cases, but of *Edmond* as well."); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38, 40-43, 47 (2000).

more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the 'third degree'").

The Supreme Court's elaboration on why probable cause may be unnecessary in certain circumstances is relevant to the case at hand:

> Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. . . . Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or a[t] an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.

Id. at 727-728; *see also Hayes v. Florida*, 470 U.S. 811, 816-817 (1985) ("We also do not abandon the

suggestion . . . that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting.").

In response to *Davis*, nine states, including Arizona, enacted procedures for judicially authorizing detentions to obtain evidence of identifying physical characteristics. *See In re Nontestimonial Identification Order Directed to R.H.*, 762 A.2d 1239, 1245-46 & n.3 (Vt. 2000); Paul C. Giannelli & Edward L. Imwinkelried, Jr., *Scientific Evidence* § 2.04[a][2] at 112 & n.130 (4th ed. 2007) ("*Scientific Evidence*"); *see also* A.R.S. § 13-3905.[2]

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[2] A.R.S. § 13-3905 provides that an officer investigating a felony "may make written application upon oath or affirmation to a magistrate for an order authorizing the temporary detention, for the purpose of obtaining evidence of identifying physical characteristics, of an identified or particularly described individual" and that the

> magistrate may issue the order on a showing of all of the following: 1. Reasonable cause for belief that a felony has been committed. 2. Procurement of evidence of identifying physical characteristics from an identified or particularly described individual may contribute to the identification of the individual who committed such offense. 3. The evidence cannot otherwise be obtained by the investigating officer from either the law enforcement agency employing the affiant or the department of public safety.

A.R.S. § 13-3905(A). Identifying physical characteristics include, but are "not limited to, the fingerprints, palm prints,

These statutes have generally been held constitutional by state courts, even when they allow for detentions and obtaining physical evidence on less than probable cause. *See Scientific Evidence* § 2.04[a][2] at 112-16 & nn.142-45; *see also Grijalva*, 533 P.2d at 535-36 (upholding constitutionality of Arizona statute and ruling that the issuing judge must have "reasonable cause to believe that" a "nexus . . . between the person detained and the crime being investigated . . . exists"). It was pursuant to Arizona's statute that Plaintiff's buccal swabs of DNA were obtained in this case. (*See* Compl. ¶¶ 37-39, 44-47.)

Despite the fact that DNA buccal swabs have been denominated searches within the meaning of the Fourth Amendment, the Court finds that they have all the characteristics of fingerprinting that the Supreme Court indicated could justify requiring less than probable cause: they "constitute a much less serious intrusion upon personal security than other types of police searches and detentions," they involve "none of the probing into an individual's private life and thoughts that marks an interrogation," they need not "be employed repeatedly," they constitute "an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions," and they need not – nor are they alleged to have – "come unexpectedly or a[t] an inconvenient time." *See Davis*, 394 U.S. at 727; *see*

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footprints, measurements, handwriting, handprinting, sound of voice, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance or photographs of an individual." *Id.* § 13-3905(G).

also In re Nontestimonial Identification Order, 762 A.2d at 1246-47 (upholding Vermont rule allowing saliva sampling for DNA based on a showing of only reasonable suspicion and concluding "that the basic elements of saliva sampling for DNA are similar to the characteristics of fingerprinting as described in *Davis*"); Dodson, *supra* at 254 ("DNA profiling is closely analogous to fingerprinting, and the Fourth Amendment supports a limited application of DNA line-ups under the Davis v. Mississippi theory."). Here, there was even "the authorization of a judicial officer . . . obtained in advance" that the Supreme Court deemed so important. *See Davis*, 394 U.S. at 728. The Court finds that the fact that a DNA buccal swab constitutes a search is not dispositive of whether it may be carried out on reasonable suspicion, as opposed to probable cause, pursuant to a *Davis*-contemplated procedure. *See Terry*, 392 U.S. at 27 (articulating reasonable suspicion standard (though not using those words) in a search case); *cf. Kincade*, 379 F.3d at 821 n.15 ("[T]he fact that [a DNA] extraction constitutes a search is hardly dispositive [of its constitutionality], as 'the Fourth Amendment does not proscribe all searches and seizures . . . .'" (quoting *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989))).

Indeed, "the Fourth Amendment's proper function is to constrain, not against all [compelled intrusions into the body] as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Schmerber v. California*, 384 U.S. 757, 768 (1966). The Court has already found that the PPD's

interest in investigating a homicide was great. In considering Plaintiffs' privacy interests, this Court joins with other courts and commentators in finding that the intrusion upon Plaintiffs' privacy and bodily integrity caused by the buccal swabs – the searches at issue here – was minimal. *See, e.g.*, *Haskell*, 669 F.3d at 1059 ("The buccal swab cannot seriously be viewed as an unacceptable violation of a person's bodily integrity."); *United States v. Amerson*, 483 F.3d 73, 84 n.11 (2d Cir. 2007) (finding that intrusion occasioned by taking DNA by blood sample was minimal and noting that "[i]f instead, the DNA were to be collected by cheek swab, there would be a lesser invasion of privacy because a cheek swab can be taken in seconds without any discomfort"); *In re Nontestimonial Identification Order*, 762 A.2d at 1247 ("[W]e do not believe a saliva procedure involves a 'serious intrusion upon personal security.'" (quoting *Davis*, 394 U.S. at 727)); Jules Epstein, *"Genetic Surveillance" – The Bogeyman Response to Familial DNA Investigations*, 2009 U. Ill. J.L. Tech. & Pol'y 141, 152 (Spring 2009) ("The taking of bodily material for DNA testing is perhaps the least intrusive of all seizures--it involves no penetration of the skin, pain, or substantial inconvenience."); *cf. Skinner*, 489 U.S. at 625 ("[B]lood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity." (quotation omitted)).

While the Ninth Circuit Court of Appeals has noted in "assessing the nature of the privacy intrusion . . . that DNA often reveals more than identity," it has also found that such concerns "are

mitigated by . . . privacy protections." *See Kriesel*, 508 F.3d at 947-48 (noting DNA Act's "criminal penalties for the unauthorized use of DNA samples"). Here, Plaintiffs quoted extensively from a Fact Sheet they were given by Defendant Polombo, and thus the Court may consider this document as incorporated by reference in Plaintiffs' Complaint. (*See* Compl. ¶ 33); *see also United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) ("Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim."). The fact sheet attached to Defendants' Motion reveals that Defendants told Plaintiffs—and Plaintiffs do not allege that any of these statements are false—that their DNA samples would "be used for comparison to evidence in this report only," would "not be entered into CODIS," would "not be entered into the employee database" without Plaintiffs' permission, and would "not be used for any research type testing, including race, ethnicity or health nor will the sample[s] be provided to any outside organization for those purposes." (MTD, App'x A, Fact Sheet.) In light of these protections, the Court finds that any "concerns about DNA samples being used beyond identification purposes . . . are mitigated," *see Kriesel*, 508 F.3d at 948, and that, on balance, the invasion on Plaintiffs' privacy interests was slight in comparison to the important governmental interest of investigating homicides.

Finally, the Court considers Plaintiffs' argument that "conducting warrantless,

suspicionless, 'exclusionary' searches of persons, including police officers, as part of an ongoing criminal investigation, can never be reasonable under the Fourth Amendment." (Resp. at 11.) While it is undisputed that Plaintiffs were *not* suspects in Sergeant Drenth's death, this does not mean that the searches of Plaintiffs' DNA were "suspicionless" in the traditional sense. Rather, as A.R.S. § 13-3905 and Arizona courts make clear, there must be "[r]easonable cause for belief that a felony has been committed"[3] and "reasonable cause to believe that" a connection exists "between the person detained and the crime being investigated," which is a form of individualized suspicion. *See* A.R.S. § 13-3905(A)(1); *Grijalva*, 533 P.2d at 536; *see also State v. Via*, 704 P.2d 238, 243-44 (Ariz. 1985); *State v. Wedding*, 831 P.2d 398, 402 (Ariz. Ct. App. 1992) ("In *Grijalva*, the Arizona Supreme Court held that under the statute, probable cause to believe that the suspect committed the crime is not a necessary requirement for the temporary detention of a person to obtain evidence of physical characteristics."); *see also al-Kidd*, 131 S. Ct. at 2082 & n.2 (rejecting the dissent's suggestion that individualized suspicion necessarily means that the person is suspected of wrongdoing and noting that it is common to make statements "such as 'I have a suspicion he knows something about the crime'"). Here, based on the facts alleged by Plaintiffs, the Court concludes that there was reasonable cause to believe that there was a nexus between Plaintiffs and the crime being investigated

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[3] Here, Judge Rayes found that there was probable cause to believe that a homicide had been committed. (Compl. ¶ 44.)

– namely, that Plaintiffs responded to the "officer down" broadcast and were present at the crime scene. (*See* Compl. ¶¶ 12-15.) Plaintiffs were not random persons pulled off the street with no connection whatsoever to Sergeant Drenth's death; rather, while alleging they were never closer than fifteen feet from Sergeant Drenth's body and weapons, they admit that they were at the crime scene, which is sufficient to establish the requisite nexus between them and the crime being investigated and to allow Defendants to infer that their DNA could have been present. (*See id.* ¶¶ 14-15, 17-18); *cf. Via*, 704 P.2d at 244 (determining that requisite nexus existed between defendant and crime of forgery where "police reasonably inferred that" the victim's encounters with the defendant and another individual's reportedly suspicious encounters with defendant were part of a common scheme).

Furthermore, the Court is not convinced that under either the Arizona statute or the Fourth Amendment of the United States Constitution, Plaintiffs had to be suspected of committing the crime in order to be searched. *See* A.R.S. 13-3905(A)(2) (magistrate may issue order upon showing that "[p]rocurement of evidence of identifying physical characteristics from an identified or particularly described individual *may contribute* to the identification of the individual who committed such offense") (emphasis added); *cf. Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) ("The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the

specific 'things' to be searched for and seized are located on the property to which entry is sought."); Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 5.4(d) n.131 (5th ed. 2012) ("[P]robable cause to search has to do only with the probability of finding evidence at the place searched, and . . . there is no need to show probable cause as to the person connected with that place."). Indeed, the Supreme Court has found that "the State's interest in enforcing the criminal law and recovering evidence is the same whether the third party is culpable or not." *Zurcher*, 436 U.S. at 555. While *Zurcher* admittedly did not deal with the search of a person, but rather of a person's premises, the Court finds that its reasoning is applicable here: "whether the third-party occupant is suspect or not, the State's interest in enforcing the criminal law and recovering the evidence remains the same" and "the seeming innocence of" Plaintiffs does not "foreclose the [right] to search." *See id.* at 560.

Plaintiffs undisputedly did not engage in any wrongdoing through which they sacrificed their right to privacy. Nevertheless, given that there was probable cause for belief that a homicide had been committed, the PPD's great interest in investigating the homicide, reasonable cause for belief that there was a nexus between Plaintiffs and the crime, a prior judicial determination that procuring Plaintiffs' DNA "may contribute to the identification of the individual who committed such offense," (Compl. ¶ 44), and the minimal intrusion upon Plaintiffs' privacy and bodily integrity, the Court finds that Plaintiffs have not stated a claim for a

violation of their constitutional right to be free from *unreasonable* searches. *See Skinner*, 489 U.S. at 619 ("[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable."); *Schmerber*, 384 U.S. at 768 ("[T]he Fourth Amendment's proper function is to constrain, not against all [bodily] intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.").[4]

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[4] Other courts, commentators, and lawmakers considering the issue have reached similar conclusions that DNA or other bodily samples can be obtained for exclusionary purposes in some circumstances without violating the Fourth Amendment. *See, e.g.*, Ind. Code § 35-38-7-15(b) (providing that court may require DNA elimination samples from a third party where the petitioner has been excluded as the perpetrator or accomplice by DNA testing or where "extraordinary circumstances are shown"); *Commonwealth v. Draheim*, 849 N.E.2d 823, 829 (Mass. 2006) ("[W]here the third parties are not suspects, in order to respect the third parties' constitutional rights, the Commonwealth must show probable cause to believe *a* crime was committed, and that the [saliva] sample will probably provide evidence relevant to the question of the defendant's guilt."); *Matter of Morgenthau*, 457 A.2d 472, 473, 475-76 (N.J. Super. Ct. App. Div. 1983) (holding that an order compelling hair and blood samples and finger and palm prints "is not to be denied on the basis that it was directed to a nonculpable third party" and finding that the trial judge "balanced the privacy interest of the appellants and the effect of the minimal invasion of that privacy against the societal interest of an adequate prosecution for multiple serious criminal acts" and correctly concluded "that the societal interest should prevail"); Paul C. Giannelli, *ABA Standards on DNA Evidence*, 24-SPG Crim. Just. 24, 30 (Spring 2009) (explaining that the ABA Standards on DNA Evidence permit "collecting biological samples from nonsuspects" and "would permit the issuance of a court order to a nonsuspect if there is

2. Plaintiffs' Claim That Defendants Omitted Material Information When They Sought the Orders of Detention

Plaintiffs argue in the alternative that "if the Court were to determine that the orders of detention permitted Defendants to obtain samples of Plaintiffs' DNA, then Defendants' subsequent searches of Plaintiffs' DNA were nonetheless unlawful under the Fourth Amendment because the affidavits submitted by Defendants in obtaining the orders omitted material information." (Resp. at 14.) Specifically, Plaintiffs allege that Defendants Brewer and Polombo omitted from the applications and affidavits facts well known to them "establishing the locations and activities of Plaintiffs . . . on the night of October 18, 2010, including the fact that none of the officers were in sufficient proximity to Sergeant Drenth's body or his patrol vehicle or weapons to have deposited their DNA either on the vehicle or on any of the weapons." (Compl. ¶ 43; *see also* Resp. at 14.)

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probable cause to believe that a serious crime has been committed, and 'a sample is necessary to establish or eliminate that person as a contributor to or source of the DNA evidence or otherwise establishes the profile of a person who may have committed the crime'" (citation omitted)); *see also Zurcher*, 436 U.S. at 556-57 & n.6, 559 (finding support in an American Law Institute Model Code and commentators on the Fourth Amendment for its holding that the "critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property").

Ordinarily, for a claim of an invalid search warrant, the plaintiff must adequately allege (1) "that the warrant affidavit contained misrepresentations or omissions material to the finding of probable cause, and (2) . . . that the misrepresentations or omissions were made intentionally or with reckless disregard for the truth." *See Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011); *see also United States v. Rettig*, 589 F.2d 418, 422 (9th Cir. 1978). In reviewing the sufficiency of an affidavit, a "magistrate's determination of probable cause should be paid great deference," and "courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (internal quotation marks and citations omitted; alterations incorporated). "The mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit." *United States v. Burnes*, 816 F.2d 1354, 1358 (9th Cir. 1987).

The Court agrees with Defendants that "Plaintiffs incorrectly contend as 'fact' the allegation that 'Plaintiffs were never in sufficient proximity to Sgt. Drenth's patrol vehicle or weapons to have deposited their DNA on either the vehicle or the weapons.'" (Doc. 22, Defs.' Reply on MTD ("Reply") at 9 (quoting Resp. at 14).) Plaintiffs allege that it was a false statement in the affidavits that they "had the potential to inadvertently deposit their DNA on the collected evidence,'" but they also allege that "over 300 . . . persons . . . converged on the area where Sergeant Drenth's body had been found" and that

they were among those who went to the scene. (*See* Compl. ¶¶ 11, 14-15, 42.) The Court finds that it was reasonable for Judge Rayes to determine based on these facts that Plaintiffs' DNA could have contaminated the crime scene and that saliva samples from them could "contribute to the identification of the individual who committed the offense" by helping establish whether the unknown DNA profiles on Sergeant Drenth's weapons and patrol car were from a potential killer or from crime scene contamination. (*See id.* ¶ 44.) While Plaintiffs allege that Plaintiff Malpass was never closer than thirty feet from the weapons found with Sergeant Drenth's body and that he never touched or entered Sergeant Drenth's patrol car, and likewise that Plaintiffs Bill and Hanania were never closer than fifteen feet from Sergeant Drenth's body or weapons and never touched or entered his patrol car, the Court finds that any omission of these facts was not material to Judge Rayes' determination that the taking of Plaintiffs' DNA was warranted. (*See id.* ¶¶ 17-18). Notably, Plaintiffs do not allege that the affidavits falsely represented that Plaintiffs were suspects; rather, the affidavits clearly stated that Plaintiffs "were asked to voluntarily provide buccal swabs for elimination purposes" and that the PPD wanted to compare Plaintiffs' DNA "to other evidence in this investigation." (*See id.* ¶ 39.) To require Defendants to have included the exact whereabouts of Plaintiffs and the fact that they were never within fifteen or thirty feet of Sergeant Drenth's body or weapons would be to impose a "hypertechnical" requirement that the Court is confident was *not* material to Judge Rayes'

determination that obtaining Plaintiffs' DNA could contribute to the identity of the killer. *See Gates*, 462 U.S. at 236 (quotation omitted); *see also United States v. Ventresca*, 380 U.S. 102, 108 (1965) ("[A]ffidavits for search warrants . . . must be tested and interpreted by . . . courts in a commonsense and realistic fashion. . . .Technical requirements of elaborate specificity . . . have no proper place in this area."). The Court finds that any omission from Defendant Brewer's affidavits was not material and that Plaintiffs have failed to state a claim upon which relief can be granted.

III. CONCLUSION

Taking all of Plaintiffs' allegations as true, the Court finds that there was nothing unreasonable about Defendants' search of Plaintiffs' DNA or the manner in which it was conducted, nor did Defendants omit any material information from their affidavits. The Court accordingly grants Defendants' Motion to Dismiss Plaintiffs' Complaint.

IT IS ORDERED granting Defendants' Motion to Dismiss (Doc. 12) and instructing the Clerk to enter judgment in favor of Defendants.

Dated this 16th day of April, 2013.

/s/ Susan R Bolton
Susan R. Bolton
United States District Judge