No. ______________

IN THE

SUPREME COURT OF THE UNITED STATES

Lamar Johnson — PETITIONER
(Your Name)

VS.

Paul A. Quander, et al. — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

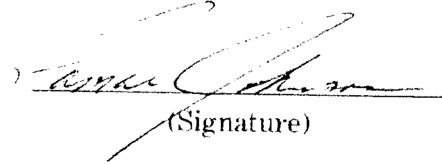
[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States Court of Appeals for the District of Columbia Circuit

United States District Court for the District of Columbia

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.



(Signature)

RECEIVED
SUPREME COURT OF U.S.
POLICE OFFICE

2006 MAY 31 A 11: 33

No. ____________

In the

Supreme Court of the United States

LAMAR JOHNSON,

Petitioner,

v.

PAUL A. QUANDER, ET AL.,

Respondents.

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

---

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY P. O'TOOLE
Counsel of Record
CORINNE BECKWITH
PARISA DEHGHANI-TAFTI
RICHARD SCHMECHEL
Public Defender Service
for the District of Columbia
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

Counsel for Petitioner

QUESTIONS PRESENTED

Petitioner Lamar Johnson, a former probationer who filed a lawsuit challenging Respondents' efforts during the waning days of his probationary period to secure, genetically analyze, and indefinitely retain a blood sample pursuant to the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. §§ 14135 et seq., ("DNA Act"), presents three important questions for this Court's review:

1. Do warrantless, suspicionless DNA searches of probationers violate the Fourth Amendment? (This question is substantially similar to the issue involving warrantless, suspicionless searches of parolees currently pending in *Samson v. California*, No. 04-9728)

2. If the Fourth Amendment permits warrantless, suspicionless searches of probationers under some circumstances, do the warrantless, suspicionless searches and seizures conducted pursuant to the DNA Act nonetheless violate the Fourth Amendment under this Court's "special needs" doctrine because they are part of a regime that is extensively entangled with general law enforcement, serves only the general law enforcement purpose of solving crimes, and has no meaningful link to probation supervision?

3. Does the Fourth Amendment impose any limits on the ability of law enforcement officials to retain indefinitely a blood sample seized from a probationer pursuant to the DNA Act, and to continue to acquire new genetic information from that sample after the supervisory period has ended?

LIST OF PARTIES

Pursuant to Sup. Ct. Rule 14.1(b), Petitioner states that, to counsel's knowledge, the following parties have appeared in this matter:

Petitioner Lamar Johnson, who was the appellant and plaintiff below;

Respondent Paul A. Quander, Jr., in his official capacity as the Director of the Court Services and Offender Supervision Agency for the District of Columbia ("CSOSA"), who was an appellee and defendant below; and

Respondent Michael Johnson, in his official capacity as Community Supervision Officer for CSOSA, who was an appellee and defendant below.

TABLE OF CONTENTS

Questions Presented ii

List of Parties iii

Index to Appendix v

Table of Authorities vi

Opinions Below 1

Statutory Provisions Involved 1

Statement of the Case 2

I. Statement of Facts 5

II. Procedural History 11

Reasons for Granting the Writ 14

I. This Court Should Grant the Petition To Resolve Whether Suspicionless DNA Searches of Probationers Violate the Fourth Amendment or Hold the Case for Summary Disposition in Light of the Forthcoming Decision in *Samson v. California* 19

II. Even If the Fourth Amendment Permits Some Suspicionless Searches of Probationers, This Court Should Grant the Petition To Resolve Whether the Regime of Suspicionless DNA Searches and Seizures Authorized by the DNA Act, Which Have No Supervisory Purpose, Violate The Fourth Amendment 20

III. This Court Should Grant the Petition To Determine Whether the Fourth Amendment Imposes Any Limits on the Ability of Law Enforcement Officials To Retain a Seized Blood Sample Indefinitely, and To Acquire New Genetic Information from That Sample After the Supervisory Period Has Ended. 27

Conclusion 32

INDEX TO APPENDIX

App. 001-023 *Johnson v. Quander*, 370 F. Supp. 2d 79 (D.D.C. 2005)

App. 024 - 035 *Johnson v. Quander*, 440 F.3d 489 (D.C. Cir. 2006)

App. 036 - 052 *Vermont v. Watkins*, No. 6805-12-04 (Vt. Dist. Ct. Apr. 24, 2006)

TABLE OF AUTHORITIES

CASES

Chandler v. Miller, 520 U.S. 305 (1997) 4, 21-22, 24

City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 4, 22, 24

Connally v. Georgia, 429 U.S. 245 (1977) 20

Ferguson v. City of Charleston, 532 U.S. 67 (2002) 4, 18, 22, 28-29

Flippo v. West Virginia, 528 U.S. 11 (1999) 20

Green v. Berge, 354 F.3d 675 (7th Cir. 2004) 23, 26

Griffin v. Wisconsin, 483 U.S. 868 (1987) 4, 22-23

Groceman v. United States, 354 F.3d 411 (5th Cir. 2004) 22

Henry v. United States, 361 U.S. 98 (1959) 14

Illinois v. Lidster, 540 U.S. 419 (2004) 4, 22

Johnson v. Quander, 370 F. Supp. 2d 79 (D.D.C. 2005) .... *passim*

Johnson v. Quander, 440 F.3d 489 (D.C. Cir. 2006) .... *passim*

Jones v. Murray, 962 F.2d 302 (4th Cir. 1992) 22

Katz v. United States, 389 U.S. 347 (1967) 29

Kincade v. United States, 379 F.3d 813 (9th Cir. 2004) 5, 17, 23-24, 30

Kyllo v. United States, 533 U.S. 27 (2001) 4, 13, 18, 27-29

Landrigan v. Stewart, 272 F.3d 1221 (9th Cir. 2001), *reh'g en banc granted and opinion vacated*, 379 F.3d 1235 (9th Cir. 2005) 10

Maryland v. Dyson, 527 U.S. 465 (1999) 20

Maryland v. Raines, 857 A.2d 19 (Md. 2004) 24-25

Nicholas v. Goord, 430 F.3d 652 (2d Cir. 2005) 23, 26

Olmstead v. United States, 277 U.S. 438 (1928) 29-30

Owens v. Kelley, 681 F.2d 1362 (11th Cir. 1982)....................15, 19

Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005)....................17, 22, 24

People v. Reyes, 968 P.2d 445 (Cal. 1998)....................13, 15, 19-20

Pounders v. Watson, 521 U.S. 982 (1997)....................20

Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999)....................7

Samson v. California, No. A102394, 2004 WL 2307111 (Cal. Ct. App. Oct. 14, 2004), *cert.* granted, 74 U.S.L.W. 3199. (U.S. Sept. 27, 2005) (No. 04-9728)....................ii, 3, 15, 18-21

Skinner v. Railway Labor Executives Union, 489 U.S. 602 (1989)....................4, 18, 28-29

Stewart v. LaGrand, 526 U.S. 115 (1999)....................20

United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003)....................24, 26

United States v. Kincade, 345 F.3d 1095 (9th Cir. 2003), *vacated*, 379 F.3d 813 (9th Cir. 2004)....................17, 24-25

United States v. Kincade, 379 F.3d 813 (9th Cir. 2004)....................*passim*

United States. v. Knights, 534 U.S. 112 (2001)....................4, 22-24

United States v. Miles, 228 F.Supp. 2d 1130 (E.D. Ca. 2002), *vacated*, 2005 WL 790817 (9th Cir. 2005)....................24- 25

United States v. Payne, 181 F.3d 781 (6th Cir. 1999)....................15, 19

United States v. Sczubelek, 402 F.3d 175 (3d Cir. 2005), Sup. Ct. No. 05-7955 .... 3, 18, 22, 24-25

United States v. Weikert, 421 F.Supp. 2d 259 (D.Mass. 2006)....................17, 24-25, 30

United States v. Williams, 417 F.3d 373 (3d Cir. 2005)....................15, 19

Vermont v. Watkins, No. 6805-12-04 (Vt. Dist. Ct. April 24, 2006)....................9

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995)....................15

STATUTES

10 U.S.C. § 1565 7

28 U.S.C. § 1254(1) 1

42 U.S.C. 14131 *et seq* .... ii, 1-2, 6-8

Ala. Code §§ 36-18-24, 13A-9-91 (2003) 8

Cal. Penal Code 295-299.7 (2005) 9

D.C. Code § 22-4151(2), (27) 1, 8

Fed. R. Civ. P. 12(b)(1) and 12(b)(6) 11-12

Ga. Code Ann. § 16-10-71, 24-4-60 (2000) 8-9

H.R. Rep. No. 106-900(I) (2000) 6

Kan. Stat. §21-2511 9

La. Rev. Stat. Ann. 15:601-15:620 (2005) 9

Minn. Stat. §299C.105 (2005) 9

Tex. Gov't Code Ann. 411.141-411.154 (2005) 9

Va. Code Ann. 19.2, 310.2-310.7 (2004) 9

Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. 109-162 § 1004, 119 Stat. 2960 (2006) 8

OTHER

Seth Axelrad, *April 2006 Survey of State DNA Statutes Users Guide, available at* www.aslme.org/dna_04/grid 9

Gaia Bernstein, *Accommodating Technological Innovation: Identity, Genetic Testing and the Internet,* 57 Vand. L. Rev. 965 (2004) 24

Sarah L. Bunce, *Comment: U.S. v. Kincade - Justifying the Seizure of One's Identity,* 6 Minn. J.L. Sci. & Tech. 747(2005) 24

Nita Farahany & William Bernet, *Behavioural Genetics in Criminal Cases: Past, Present, and Future,* 2 Genomics, Soc'y and Pol'y 72, 77(2006) 10

R. E. Gaensslen, *Should Biological Evidence or DNA Be Retained by Forensic Science Laboratories After Profiling? No, Except Under Narrow Legislatively-Stipulated Conditions*, 34 J.L. Med & Ethics 375, 377 (2006) 9

Renee A. Germaine, *Louisiana's DNA Detection Of Sexual And Violent Offender's Act: An Impermissible Infringement On Fourth Amendment Search And Seizure*, 22 J. Marshall J. Computer & Info. L. 759 (2004) 24

Henry T. Greely, et al., *Family Ties: The Use of DNA Offender Databases To Catch Offenders' Kin*, 34 J.L. Med. & Ethics 249 (2006) 10

Major Steven C. Henricks, *A Fourth Amendment Privacy Analysis of the Department of Defense's DNA Repository for the Identification of Human Remains: The Law of Fingerprints Can Show Us the Way*, 181 Mil. L. Rev. 69, 79 (2004) 5

D. H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, And The Case For Population-Wide Coverage*, 2003 Wis. L. Rev. 413, 453-54 (2003) 15

Jacqueline K. S. Lew, *The Next Step in DNA Databank Expansion? The Constitutionality of DNA Sampling of Former Arrestees*, 57 Hastings L.J. 199 (2005) 24-25

Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. Med. & Ethics 165 (2006) 25

Pilar N. Ossorio, *About Face: Forensic Genetic Testing for Race and Visible Traits*, 34 J.L. Med. & Ethics 277, 278 (2006) 9-10, 23

Mark A. Rothstein & Sandra Carnahan, *Article: Legal And Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 Brooklyn L. Rev. 127 (2001) 25

Robert F. Service, *The Race for the $1,000 Genome*, Science, March 17, 2006) 12

Gilbert J. Villaflor, *Capping The Government's Needle: The Need To Protect Parolees' Fourth Amendment Privacy Interests From Suspicionless DNA Searches In United States v. Kincade*, 38 Loy. L.A. L. Rev. 2347 (2005) 25

Kathryn Zunno, *U.S. v. Kincade and the Constitutionality of the Federal DNA Act: Why We'll Need a New Pair of Genes To Wear Down the Slippery Slope*, 79 St. John's L. Rev. 769 (2005) 25

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Lamar Johnson, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit was entered on March 17, 2006, and is reported at *Johnson v. Quander*, 440 F.3d 489 (D.C. Cir. 2006). The opinion of the U.S. District Court for the District of Columbia was entered on March 21, 2005, and is reported at *Johnson v. Quander*, 370 F. Supp. 2d 79 (D.D.C. 2005). Both opinions are appended to this petition.

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the District of Columbia Circuit was entered on March 17, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Pursuant to Sup. Ct. R. 29.4(a), counsel states that service of this petition has been made on the Solicitor General and the respondents.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision at issue is the Fourth Amendment of the United States Constitution, which provides:

> 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 persons or things to be seized.

The statutory provisions at issue are 42 U.S.C. §§ 14131-14136, and District of Columbia Code § 22-4151.

STATEMENT OF THE CASE

Just as Petitioner Lamar Johnson was about to complete his two-year probationary period, Respondents, Mr. Johnson's supervising probation authorities, ordered him to submit to an extraction of his blood for DNA analysis. 370 F. Supp. 2d at 84 (App. 6). Respondents had neither a warrant for this search and seizure of Mr. Johnson's blood nor reason to suspect he had committed any crime. Citing the DNA Analysis Backlog Elimination Act of 2000 ("DNA Act"), 42 U.S.C. §§ 14131 *et seq.*, Respondents sought Mr. Johnson's DNA in order to provide the sample to the Federal Bureau of Investigation ("FBI") for genetic analysis, entry of analysis results into the Combined DNA Index System ("CODIS"), and indefinite storage of the sample for the sake of future genetic testing as technology evolves and law enforcement techniques change.

Mr. Johnson raised a Fourth Amendment challenge to Respondents' proposed actions in the U.S. District Court for the District of Columbia, 370 F. Supp. 2d at 82 (App. 6), which dismissed the action and held that any privacy interests invaded by the DNA Act were outweighed by the public interest in DNA collection, analysis and retention. *Id.* at 89 (App. 10). The U.S. Court of Appeals for the District of Columbia affirmed, holding that the privacy invasion caused by a blood test is "relatively small (even when conducted on a free citizen)," 440 F.3d at 496 (App. 30), and was outweighed by Mr. Johnson's lesser privacy interests as a probationer. These holdings violate this Court's precedents applying the special needs doctrine and present the latest manifestation of a circuit split regarding the appropriate Fourth Amendment analysis of warrantless, suspicionless search and seizure regimes.

This Court has never upheld a regime of warrantless, suspicionless searches that seeks evidence of crime to be used against the person searched. Nonetheless, the D.C.

Circuit and several other courts have approved the warrantless and suspicionless searches of genetic samples precisely because such samples primarily promote law enforcement purposes, throwing into disarray this Court's "special needs" doctrine and longstanding precedent requiring individualized suspicion.

The general topic of suspicionless searches of parolees has been the subject of substantial confusion in the lower courts that this Court may soon attempt to clarify in *Samson v. California*, No. A102394, 2004 WL 2307111 (Cal. Ct. App. Oct. 14, 2004), *cert. granted*, 74 U.S.L.W. 3199 (U.S. Sept. 27, 2005) (No. 04-9728). But because the DNA Act goes further than the California scheme at issue in *Samson* by imposing a regime of suspicionless searches for ordinary law enforcement purposes – searches with invasive consequences lasting beyond the supervisory period, the DNA Act has generated additional areas of Fourth Amendment confusion.

Appellate courts throughout the country have struggled over which of this Court's Fourth Amendment precedents applies to a regime of suspicionless searches like the DNA Act, where supervisory officials serve as the ministerial agents of law enforcement in effectuating a classic scheme of general crime control.[1] Some circuits, including the Third, Fourth, Fifth, and Eleventh, have analyzed DNA searches under the general reasonableness (i.e. totality of circumstances) doctrine, rather than the special needs

---

[1] As further evidence of this confusion, a substantially similar issue has been raised in the certiorari petition currently pending in *United States v. Sczubelek*, 402 F.3d 175 (3d Cir. 2005), Sup. Ct. No. 05-7955, which presents a challenge to the DNA Act similar to that raised by Mr. Johnson. Mr. Sczubelek's Fourth Amendment claims were rejected by a divided panel of the Third Circuit over a lengthy dissent by Judge McKee. The petition was filed in December and was originally scheduled for conference in April, but the Court has yet to rule on the petition.

doctrine.[2] Those courts have latched on to two cases of this Court, *United States v. Knights*, 534 U.S. 112 (2001), and *Griffin v. Wisconsin*, 483 U.S. 868, 874-80 (1987), even though those cases involved individualized suspicion and clear supervisory purposes. Other circuits have disagreed, holding that this Court's special needs test governs, but applying that test without the rigor exhibited by this Court's precedents in *Chandler v. Miller*, 520 U.S. 305, 313 (1997), *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000), *Illinois v. Lidster*, 540 U.S. 419, 424 (2004), *Kyllo v. United States*, 533 U.S. 27 (2001), *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and *Skinner v. Railway Labor Executives Union*, 489 U.S. 602 (1989). This analytical confusion among lower courts has turned Fourth Amendment jurisprudence on its head: Where this Court's precedent dictates Fourth Amendment scrutiny should be at its highest—in cases of invasive, suspicionless searches and seizures conducted for the purpose of general law enforcement—the lower courts have given virtual carte blanche to the most invasive search and seizure regime of one's person and effects possible – the forced extraction, permanent retention, and perpetual analysis of one's genetic makeup.

Today, at both the federal and state level, law enforcement agencies increasingly conduct suspicionless searches as they construct vast DNA databases.[3] Such regimes of

---

[2] While the Ninth Circuit's eleven-member en banc panel decided by a slim majority to uphold the DNA statute, only five judges in the majority applied the general balancing test; the deciding vote upheld the statute by applying the special needs test; five dissenters would have applied the special needs test to strike down the statute. *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004).

[3] As of March 2006 the national CODIS database contained over three million DNA samples from convicted offenders. *See* www.fbi.gov/hq/lab/codis/clickmap.htm (FBI Website) (last visited May 25, 2006). This does not include an unknown number of additional DNA samples held by states that cannot be submitted to the national system or the over four million DNA samples from military personnel that are subject to law

forcible extraction, analysis, and indefinite retention have rapidly expanded, first including violent felons, and then all felons, then misdemeanants, and now arrestees and detainees are subject to DNA databasing efforts in many jurisdictions. Lower court decisions on DNA databasing do not impose any meaningful limits on these expansions since such decisions neither restrict suspicionless searches to a demonstrated supervisory regime nor limit law enforcement agencies' ability to acquire additional intrusive information after the supervisory period has ended. Unchecked, there is no reason to believe that these search regimes will stop expanding or using the newest genetic technologies to mine more information from DNA samples. The day may soon come when even free citizens will have their DNA subject to searches for personal and familial genetic information in the name of more efficient law enforcement. On that day, as Judge Alex Kozinski has admonished, "we will look at the regime we approved today as the new baseline and say, this too must be OK because it is just one small step beyond the last thing we approved." *Kincade*, 379 F.3d at 873 (Kozinski, J., dissenting). Now is the appropriate time – and Mr. Johnson's is the perfect case – for this Court to resolve whether the invasive regime of forcible extraction, permanent retention, and perpetual analysis of DNA samples approved by the lower court is indeed our new baseline of privacy.

I. Statement of Facts

1. Just a few weeks before his probation expired, Respondents demanded a sample of Mr. Johnson's blood for DNA analysis. 370 F. Supp. 2d at 84 (App. 6). Respondents

---

enforcement searches. *See* Major Steven C. Henricks, *A Fourth Amendment Privacy Analysis of the Department of Defense's DNA Repository for the Identification of Human Remains: The Law of Fingerprints Can Show Us the Way*, 181 Mil. L. Rev. 69, 79 (2004).

neither suspected a violation of Mr. Johnson's probation nor asserted any supervisory purpose. Rather, the sole justification cited by Respondents was the DNA Act, a statutory scheme compelling federal prisoners, probationers, and parolees, including those in the District of Columbia, to submit biological samples for analysis, inclusion in the nationwide CODIS system, and indefinite retention by the FBI. *Id.*

2. The stated purpose of the DNA Act's legislative scheme is to assist law enforcement authorities in solving past and future crimes. In the words of the statute itself, the DNA Act exists "to facilitate law enforcement exchange of DNA identification information." 42 U.S.C. § 14132. Specifically and succinctly, the Act is designed to help "solve crime." H.R. Rep. No. 106-900(I), *9, *25 (2000). Under the Act, submission of a DNA sample is mandatory for all eligible offenders – any person who "fails to cooperate" is deemed guilty of a federal criminal offense, 42 U.S.C. §§ 14135a(a)(5) & 14135b(a)(5) – and collection authorities may use any means reasonably necessary to "detain, restrain, and collect a DNA sample" from a reluctant donor. 42 U.S.C. §§ 14135a(4)(A) & 14135b(4)(A). Respondents are then required to furnish the sample to the FBI, which must "carry out a DNA analysis on each sample"[4] and "include the results in CODIS." 42 U.S.C. §§ 14135a(b) & 14135b(b). Nothing in the DNA Act restricts how long the FBI may retain the DNA sample or to what extent it may reexamine the sample for additional information as technology evolves and law enforcement techniques change.

In the case of Mr. Johnson, Respondents never intended, nor could they have timely used, the seized DNA for their own supervisory purposes. Respondents' attempt

[4] The Act also broadly defines "DNA analysis" as any review of the "bodily sample" for any "identification information." 42 U.S.C. §§ 14135a(c)(2) & 14135b(c)(2).

to extract Mr. Johnson's DNA sample began only a few weeks before his probation was scheduled to expire—insufficient time for analysis results even to have been generated while Mr. Johnson was under Respondents' supervision. 370 F. Supp. 2d at 84 (App. 6). The timing of the search and seizure in this case highlights what is true in all searches and seizures under the DNA Act: Supervisory officials were acting on behalf of law enforcement authorities wishing to use the sample in ongoing and future criminal investigations.

3. Respondents supported their search request by invoking the District of Columbia offender provisions of the DNA Act, 42 U.S.C. §14135b. 370 F. Supp. 2d at 83 (App. 6). Those provisions are functionally (and often literally) identical to the ones that apply to U.S. Code federal offenders, 42 U.S.C. § 14135a, and to individuals convicted under the Uniform Code of Military Justice, 10 U.S.C. § 1565. Indeed, the DNA information collected from District of Columbia and military offenders pursuant to these provisions is also included in the same FBI databank as the samples collected from federal offenders. 42 U.S.C. § 14135b(b); 10 U.S.C. § 1565(b)(2).[5]

The database scheme of forced blood extraction, analysis, and permanent retention of genetic materials now applies to virtually everyone who comes into contact with the criminal justice system. Although originally law enforcement DNA databases were restricted mostly to sexual offenders, *see generally Roe v. Marcotte*, 193 F.3d 72

[5] The DNA Act also extends to the states, encouraging state governments to develop their own DNA databanks and link them with CODIS. 42 U.S.C. § 14135. The Act permits the Attorney General to make grants to states wishing to put their DNA samples to local law enforcement use, assigning funds "to conduct or facilitate DNA analyses of those samples that relate to [state] crimes in connection with which there are no suspects." 42 U.S.C. § 14135(c). Every state has now, in fact, developed a system of DNA databanks linked to CODIS. *See* www.fbi.gov/hq/lab/codis/partstates.htm (last visited May 25, 2006).

(2d Cir. 1999), the District of Columbia, like every other jurisdiction, now broadly defines the types of convictions that trigger the obligation to provide a blood sample to authorities for DNA analysis. The version of the law that applies to Mr. Johnson compels DNA collection for not only unarmed robbery, D.C. Code § 22-4151(27), but also for a wide variety of nonviolent crimes like insurance fraud, D.C. Code § 22-4151(2).

In the federal system, recent expansion of collection-eligible behavior now permits forcible DNA sampling from all federal detainees (estimated at nearly 1.5 million persons annually) and all federal arrestees. Violence Against Women and Department of Justice Authorization Act of 2005, Pub. L. 109-162 § 1004, 119 Stat. 2960 (modifying 42 U.S.C. § 14135a(a)(1)(A) (2006)).[6] The authority to order such DNA seizures also has moved from the Bureau of Prisons to the Attorney General, who has the discretion to delegate this power to other law enforcement agencies.[7] The federal laws on DNA collection—at the root of which is the DNA Act challenged here—are now the most sweeping of any jurisdiction. Genetic samples from arrestees, juveniles, and detainees are all maintained in the same CODIS system where Mr. Johnson's DNA will be placed.

State laws are similarly broad. Alabama, for instance, requires collection of DNA samples from people convicted of such non-violent crimes as felonious possession of

---

[6] The relevant addition reads, "The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested or from non-U.S. persons who are detained under the authority of the U.S." 42 U.S.C. § 14135a(a)(1)(A).

[7] The relevant addition reads, "The Attorney General may delegate this function within the Department of Justice as provided in section 510 of title 28, U.S. Code, and may also authorize and direct any other agency of the U.S. that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General under this section." 42 U.S.C. § 14135a(a)(1)(A).

food stamps, Ala. Code §§ 36-18-24, 13A-9-91 (2003), and false swearing, Ga. Code Ann. § 16-10-71, 24-4-60 (2000).[8] Overall, as of July 2005, "forty-three states had 'all felony' provisions and thirty-eight included some qualifying misdemeanors."[9] Moreover, like the new federal regime, many states have begun collecting DNA from individuals merely *arrested* for certain offenses. *See, e.g.*, Kan. Stat. § 21-2511, as amended by Bill No. 2554, Sec. 2(3)(e), May 9, 2006; Cal. Penal Code 296-297 (2005); La. Rev. Stat. Ann. 15:601-15:620 (2005); Minn. Stat. § 299C.105 (2005); Tex. Gov't Code Ann. 411.141-411.154 (2005); Va. Code Ann. 19.2, 310.2-310.7 (2004). More than half of the states now also collect samples from juvenile offenders.[10]

4. DNA technology has advanced tremendously in the past decade, driven in large part by medical researchers' work on the Human Genome Project and similar ventures that seek to decode and study the over 20,000 genes in the human genome. However, "[n]ot to be outdone by their biomedical peers, forensic scientists have begun applying advanced genetic technologies to law enforcement problems." Pilar N. Ossorio, *About Face: Forensic Genetic Testing for Race and Visible Traits,* 34 J.L. Med. & Ethics 277, 278 (2006). Some law enforcement officers have already used DNA analysis to create descriptions of a suspect's race and facial characteristics from crime scene evidence and

---

[8] *But see Vermont v. Watkins*, No. 6805-12-04 (Vt. Dist. Ct. April 24, 2006) (App. 36-52) (holding DNA collection from persons convicted of non-violent crimes unconstitutional under the Vermont constitution).

[9] R.E. Gaensslen, *Should Biological Evidence or DNA Be Retained by Forensic Science Laboratories After Profiling? No, Except Under Narrow Legislatively-Stipulated Conditions*, 34 J.L. Med. & Ethics 375, 377 (2006).

[10] *See* Seth Axelrad, *April 2006 Survey of State DNA Statutes Users Guide, available at* www.aslme.org/dna_04/grid (last visited May 25, 2006)

have successfully redirected their investigations. *Id.* In other instances, investigators have relied upon the fact that two people who are close relatives are more likely to have similar DNA sequences to conduct what has been called "familial searching"—a process of extrapolating from a known DNA profile to what close family members' DNA probably looks like. In one high profile case, familial searching of a crime scene DNA sample led police to suspect the relatives of a convicted offender (whose DNA had been seized, analyzed, and maintained in a CODIS database) because the crime scene profile was very similar to, but slightly different from, that of the convicted offender. Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases To Catch Offenders' Kin*, 34 J.L. Med. & Ethics 249 (2006). A third use of genetics in the criminal justice arena is testing convicted offenders' DNA for genetic predispositions to violence; one court has already considered such evidence. *See* Nita Farahany & William Bernet, *Behavioural Genetics in Criminal Cases: Past, Present, and Future*, 2 Genomics, Soc'y, and Pol'y 72, 77 (2006), *citing Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001), *reh'g en banc granted & opinion vacated*, 397 F.3d 1235 (9th Cir. 2005).

These newest applications of DNA analysis are not yet commonplace, but their existence underscores both the enormous potential of DNA to reveal uniquely intimate information and the interest in the law enforcement community in exploiting the newest technology. A genetic sample provides far more information than any previous technology used to aid in the identification of individuals. As the federal government has publicly noted:

> DNA profiles are different from fingerprints, which are useful only for identification. DNA can provide insights into many intimate aspects of a person and their families including susceptibility to particular diseases, legitimacy of birth, and perhaps predispositions to certain behaviors and

sexual orientation. This increases the potential for genetic discrimination by government, insurers, employers, schools, banks, and others.

U.S. Dep't of Energy Office of Science et al., *DNA Forensics*, Human Genome Project Information.[11] The implications of the DNA Act's authorization of the forcible seizure, analysis, and indefinite retention of DNA samples for future retesting must be weighed in light of the power of current and emerging genetic technologies.

II. Procedural History

After Mr. Johnson refused to submit a DNA sample, Respondents moved the District of Columbia Superior Court for an order to show cause why Mr. Johnson's parole should not be revoked. 370 F. Supp. 2d at 84 (App. 6). In response, Mr. Johnson sought a temporary restraining order in the U.S. District Court for the District of Columbia to prevent respondents from obtaining his DNA sample. *Id.* With both actions pending, the parties negotiated an agreement pursuant to which Mr. Johnson supplied a sample of his blood and Respondents agreed to withhold that sample from law enforcement officials pending the completion of Mr. Johnson's legal challenge. *Id.* The Superior Court then terminated Mr. Johnson's probation, as having been successfully completed. *See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, September 27, 2004 (J.A. 228). Mr. Johnson proceeded with his federal lawsuit, seeking the immediate return of his blood sample or, at the very least, the return of his blood sample after an analysis had been completed and the results included in CODIS. *See id.*; Defendants' Reply in Support of Motion to Dismiss, November 29, 2004 (J.A. 309).

---

[11] *Available at* http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml (last visited May 25, 2006).

Respondents moved to dismiss the case under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). 370 F. Supp. 2d at 82 (App. 5). The district court granted the motion and dismissed the complaint, concluding Mr. Johnson did not state a viable Fourth Amendment claim. *Id* at 89. The district court reasoned that probationers have a diminished expectation of privacy as a matter of law, that only minimal privacy interests were at stake, and that any privacy interests invaded by the DNA Act were, under the totality of the circumstances, outweighed by the public interest in DNA collection, analysis, and retention. 370 F. Supp. 2d at 88-89 (App. 10). The district court also refused to prohibit further searches of Mr. Johnson's DNA or order his blood sample returned, holding that the totality of circumstances was unchanged by the expiration of Mr. Johnson's probation. 370 F. Supp. 2d at 105 (App. 22).

The district court's ruling entirely failed to address the scientific evidence presented by Petitioner in two affidavits, instead finding that the privacy risks at stake in DNA databases were comparatively negligible. Specifically, Mr. Johnson's experts had attested that a DNA sample contains the complete genetic information of an individual and his or her family, that a sample can reveal racial and medical information, and that DNA sample material is collected and stored such that further testing can be performed in perpetuity.[12] Because sequencing a person's entire genome is still prohibitively costly,[13] law enforcement agencies have thus far exercised their discretion to select which genetic sequences in the genome to analyze. But, as Petitioner's experts also described in the

---

[12] *See* Declaration of Dr. Greg Hampikan, ¶¶ 2, 3, and 6, executed September 24, 2004 (J.A. 267-69).

[13] *But see* Robert F. Service, *The Race for the $1,000 Genome*, Science, March 17, 2006 (predicting that cost-effective whole-genome DNA sequencing soon will be available).

lower court affidavits, the so-called "junk-DNA," genetic sequences that are most often analyzed in current CODIS database schemes, are not really "junk" because they already reveal information about surrounding genetic sequences that do produce traits, and we can expect "junk-DNA" itself to reveal more about an individual as technology improves.[14]

In a published opinion entered on March 17, 2006, a panel of the D.C. Circuit (composed of Judges Sentelle, Rogers-Brown, and Griffith) upheld the district court's decision and rejected Mr. Johnson's appeal. 440 F.3d at 496 (App. 30). As to Mr. Johnson's challenge to the mandatory extraction and analysis of his blood sample for DNA identifying information, the circuit court determined that "the privacy invasion caused by a blood test is relatively small (even when conducted on a free citizen)," *id.* and was outweighed by Mr. Johnson's lesser privacy interests as a probationer.

In doing so, the circuit court adopted the reasoning of a line of lower court cases holding that the Fourth Amendment permits suspicionless searches of prisoners and persons on supervised release without any showing of a special, non-law enforcement need, and specifically cited to, among other cases, *People v. Reyes*, 968 P.2d 445, 450 (Cal. 1998). 440 F.3d at 496 (App. 30). As to Mr. Johnson's Fourth Amendment challenge to the continued retention of his blood sample for retesting with new technologies in the future, the circuit court ignored this Court's caution in *Kyllo v. United States*, 533 U.S. 27, 35-36 (2001), about the need for Fourth Amendment protections to stand guard against increasing technological invasions. Instead, the circuit court held that any new invasions of Mr. Johnson's privacy through additional genetic analysis posed no

---

[14] *See* Declaration of Dr. Greg Hampikan, ¶¶ 10-13, executed September 24, 2004 (J.A. 270-73).

Fourth Amendment problems because any search was "completed upon the drawing of the blood." 440 F.3d at 500 (App. 32). Despite the fact that Mr. Johnson is now under no form of supervision, the circuit court refused to order the return of Mr. Johnson's seized blood sample.

REASONS FOR GRANTING THE WRIT

Challenges to the DNA Act and related database statutes have left Fourth Amendment law in substantial disarray; appellate courts are sharply divided over which of this Court's precedents govern the analysis of such claims. This dispute is not academic, for at the heart of this analytical split among circuit courts lies a fundamental question, the answer to which will affect the lives and rights of virtually all Americans: Does the Fourth Amendment contain any meaningful limitations on law enforcement's use of DNA and other genetic technologies to shrink the realm of protected privacy?

Mr. Johnson's petition provides an excellent vehicle for resolving this question because it raises three important, recurring questions of constitutional law concerning the scheme of suspicionless searches and seizures authorized by the DNA Act and similar state database laws: (1) does the Fourth Amendment permit suspicionless searches of probationers at all; (2) if some warrantless and suspicionless searches are permissible, do searches and seizures of probationers under the DNA Act nonetheless violate the Fourth Amendment given the lack of any meaningful link to supervisory purposes and the transparent law enforcement purposes; and (3) does the Fourth Amendment impose any limitations on the retention and uses of a blood sample once it has been collected.

The Framers adopted the Fourth Amendment in large part to provide a check against warrantless searches in the absence of individualized suspicion. *See Henry v. United States*, 361 U.S. 98, 100 (1959); *Vernonia School Dist. 47J v. Acton*, 515 U.S.

646, 670 (1995) (O'Connor, J., dissenting). While government intrusion into people's lives based on generalized suspicion of certain groups threatens many other deep-seated constitutional principles, such as equal protection under the law,[15] such searches most directly implicate the Fourth Amendment. However, lower courts are divided as to whether suspicionless searches of probationers pass Fourth Amendment muster.[16] This Court has agreed to decide the issue in *Samson v. California,* No. 04-9728, a case involving the suspicionless search of a parolee pursuant to a parole search condition. This Court should hold Mr. Johnson's petition pending resolution of *Samson*: a determination that the search and seizure in *Samson* is unconstitutional would render this case suitable for summary reversal of the judgment below.

However, even if the Court in *Samson* approves some warrantless, suspicionless searches of people on supervision, significant questions will remain about the constitutionality of *this* regime of suspicionless searches, which goes far beyond that in *Samson*. The DNA Act creates an invasive system of searches and seizures, carried out by law enforcement officials and their ministerial agents, the sole purpose of which is to solve crimes during a period unrelated to the supervisory period or function. In its gloss over the unprecedented invasion of privacy involved, the lower courts in this case ignored

---

[15] *See, e.g,* David H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage,* 2003 Wis. L. Rev. 413, 452, 455 (2003) ("There can be no doubt that any database of DNA profiles will be dramatically skewed by race if the sampling and typing of DNA becomes a routine consequence of criminal conviction. Without seismic changes in Americans' behavior or in the criminal justice system, nearly 30% of black males, but less than 5% of white males will be imprisoned on a felony conviction at some point in their lives...about 90% of urban black males would be included if DNA were routinely sampled on arrest.").

[16] *Compare United States. v. Williams*, 417 F.3d 373, 376 n.2 (3d Cir. 2005), *and United States v. Payne*, 181 F.3d 781, 787 (6th Cir. 1999), *with Owens v. Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982), *and People v. Reyes*, 968 P.2d 445 (Cal. 1998).

the fact that here, unlike *Samson*, no court or party has been able to articulate how the DNA extraction plays a supervisory function, as opposed to a purely law enforcement function.

The lower courts have struggled in determining which of this Court's Fourth Amendment precedents governs the analysis of the regime of suspicionless searches and seizures authorized by the DNA Act. Most courts that have addressed the issue have applied a loose general balancing test in assessing the DNA Act under the Fourth Amendment, rather than the more rigorous "special needs test" this Court has applied in scrutinizing every suspicionless search and seizure case that has come before it. Such a test lets courts bypass the fact that the plain purpose of the DNA Act is to inculpate those searched in ordinary criminal wrongdoing and that the statute involves extensive law enforcement entanglement. Indeed, the D.C. Circuit and other appellate courts have upheld the DNA Act *precisely because* of its importance to general law enforcement—even though this Court has counseled that Fourth Amendment scrutiny should be at its highest when presented with a regime of invasive suspicionless searches and seizures conducted for the purpose of general crime control. The DNA Act's regime of suspicionless searches is substantially unlike the "supervisory schemes" addressed in this Court's general balancing cases where there has always been some degree of individualized suspicion. The importance of clarifying the law on this issue thus cannot be overstated: The lower courts' analysis turns on its head the expectations of the Framers.

Given the substantial legal uncertainty surrounding which of this Court's cases governs the Fourth Amendment analysis, and given the understandable popularity of the

DNA Act as a crime-solving tool for law enforcement, it is hardly surprising that most courts have been reluctant to declare this law unconstitutional in the absence of clear legal guidance from this Court. Although there is only one circuit in which a binding federal court decision has found the DNA Act unconstitutional,[17] it is likely that the outcome of many of the general balancing cases would have been different if courts had felt themselves bound by the special needs test, given the extensive law enforcement involvement in the search, its general crime control purpose, and the extensive privacy invasions it countenances. *Padgett v. Donald*, 401 F.3d 1273, 1278 (11th Cir. 2005) (noting that the DNA Act would be placed in constitutional peril if measured under special needs test).

It is imperative that this Court resolve the split of authority on this question now, before the DNA Act is further expanded. In his dissenting opinion in *Kincade*, Judge Kozinski explained why it is important to resolve this dispute sooner rather than later:

> Later, when further expansions of CODIS are proposed, information from the database will have been credited with solving hundreds or thousands of crimes, and we will have become inured to the idea that the government is entitled to hold large databases of DNA fingerprints. This highlights an important aspect of Fourth Amendment opinions: Not only do they reflect today's values by giving effect to people's reasonable expectations of privacy, they also shape future values by changing our experiences and altering what we come to expect from our government. A[n]...opinion...that draws no hard lines and revels in the boons that new technology will provide to law enforcement is an invitation to future expansion.

Kincade, 379 F.3d at 873 (Kozinski, J., dissenting). Since Judge Kozinski penned his

[17] *United States v. Weikert*, 421 F. Supp. 2d 259, 263-64 (D. Mass. 2006). One appellate court has declared the DNA Act unconstitutional but that decision was overturned in a 6-5 en banc decision. *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), *vacated*, 379 F.3d 813 (9th Cir. 2004) (en banc).

dissent, further expansions of CODIS have been implemented and the scientific community's understanding of the human genome has continued apace.

The general balancing test applied by the D.C. Circuit and the majority of other courts takes such a cramped, formulaic view of the Fourth Amendment concerns raised by the DNA Act that it virtually eliminates the possibility of halting future DNA Act expansions, and has not halted any recent expansions. If such an analysis were correct, the purported benefits of allowing the DNA Act regime would be so large and the purported privacy interests raised by such a scheme so slight that it is hard to see how any Fourth Amendment challenge, even one brought by a free citizen, could succeed. *See Kincade*, 379 F.3d at 873 (Kozinski, J., dissenting).

Because Mr. Johnson evolved from probationer to free citizen at the outset of this litigation, his case presents an ideal vehicle by which to probe limits on the ability of DNA technology to shrink the realm of privacy guaranteed by the Fourth Amendment for probationers and free citizens alike. The lower court's opinion is insensitive to the long-range view taken by this Court in *Kyllo, Ferguson*, and *Skinner*, namely, the potential of placing citizens at the mercy of developing technology. This Court previously has analyzed Fourth Amendment issues with a realistic view of technological progress, and has accordingly protected citizens from future invasions of privacy that would accompany technological advances. Today, this Court is called upon to do so again.

Granting Mr. Johnson's petition will allow this Court to establish the legal framework for addressing DNA extraction, analysis, and retention schemes for the first

time.[18] The issue is ripe, and the litigation has resulted in published opinions substantially representative of the manner in which other courts around the country have resolved the question. Failure to act now may result in forever ceding the legal discussion on this point by permitting an analysis ill-suited to the realities of DNA collection, analysis, and retention to calcify and expand from probationers, to former probationers, arrestees, detainees, and inevitably to other areas.

I. This Court Should Grant the Petition To Resolve Whether Suspicionless DNA Searches of Probationers Violate the Fourth Amendment or Hold the Case for Summary Disposition in Light of the Forthcoming Decision in Samson v. California.

The Court soon may resolve a split of authority regarding whether the Fourth Amendment permits warrantless and suspicionless searches in *Samson v. California*, No. 04-9728.[19] There, the Court will decide whether the suspicionless search of a parolee, pursuant to a parole search condition, violates the Fourth Amendment. Although the search in *Samson* was conducted by a police officer, the parole condition allowing suspicionless searches there served an obvious supervisory purpose—intensive scrutiny of a recently released parolee—and did not allow either law enforcement or parole authorities to act after the termination of supervision.

If this Court determines in *Samson* that the Fourth Amendment requires some level of individualized suspicion to justify a search pursuant to a parole condition, it

---

[18] A substantially similar issue has been raised in the certiorari petition currently pending in *United States v. Sczubelek*, 402 F.3d 175 (3d Cir. 2005), Supreme Court Case No. 05-7955, which presents a challenge to the DNA Act like that raised by Mr. Johnson. Mr. Sczubelek's Fourth Amendment claims were rejected by a divided panel of the Third Circuit over lengthy dissent by Judge McKee.

[19] *Compare United States v. Williams*, 417 F.3d 373, 376 n.2 (3d Cir. 2005), *and United States v. Payne*, 181 F.3d 781, 787 (6th Cir. 1999), *with Owens v. Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982), *and People v. Reyes*, 968 P.2d 445 (Cal. 1998).

should summarily reverse the judgment below in that case. Because the search and seizure of DNA is even more invasive and directly tied to law enforcement in Mr. Johnson's case, any decision striking down the suspicionless search in *Samson* will necessarily undermine the Court of Appeals' decision here. The DNA Act is a general crime control statute that imposes an invasive law enforcement regime of forced blood extraction, permanent retention, and perpetual genetic analysis that continues after the supervisory period has ended. Moreover, the D.C. Circuit's opinion relied on some of the very same authority to support its decision as the lower court did in *Samson*: The California Supreme Court's decision in *People v. Reyes*, 968 P.2d 445 (Cal. 1998), upholding suspicionless searches of parolees generally, is cited by the California Court of Appeal in *Samson* to support the suspicionless parole search condition, *Samson v. California*, No. A102394, 2004 WL 2307111, at *2 (Cal. Ct. App. 1 Dist. Oct. 14, 2004), and by *Johnson* to support the suspicionless DNA Act searches and seizures, 440 F.3d at 496 (App. 29).

If this Court reverses the decision in *Samson*, the D.C. Circuit's decision here will rest on a "demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n. 1 (1999). The fairest and most efficient use of this Court's resources will be to summarily reverse the judgment below in this case. *E.g.,* *Stewart v. LaGrand*, 526 U.S. 115, 118-20 (1999); *Flippo v. West Virginia*, 528 U.S. 11, 11-13 (1999); *Pounders v. Watson*, 521 U.S. 982, 991 (1997); *Connally v. Georgia*, 429 U.S. 245 (1977).

II. ***Even If the Fourth Amendment Permits Some Suspicionless Searches of Probationers, This Court Should Grant the Petition To Resolve Whether the***

Regime of Suspicionless DNA Searches and Seizures Authorized by the DNA Act, Which Have No Supervisory Purpose, Violate The Fourth Amendment.

Should the decision in *Samson* approve of *some* warrantless, suspicionless searches of probationers, significant questions will remain about the Fourth Amendment permissibility of *this* regime of suspicionless searches and seizures, which is far broader and more invasive than the one at issue in *Samson*. This Court's foremost concerns when analyzing a regime of suspicionless searches and seizures have been: (1) the extent of law enforcement involvement in the program, (2) whether the program serves general crime control interests, and (3) the privacy interests potentially invaded by the scheme.

The DNA Act serves no apparent supervisory function: Supervisory officials collect the samples, but they must immediately provide the collected samples to FBI law enforcement officials for genetic analysis and permanent retention for future analyses. Indeed, this case highlights the complete lack of any meaningful relationship between the DNA Act regime and probation supervision, since the attempted extraction did not occur until Mr. Johnson's period of supervision was virtually over. The results of DNA analysis could not even have been received before the supervisory period ended.

The Fourth Amendment traditionally has been most concerned with law enforcement. Despite the core Fourth Amendment concerns raised by the DNA Act, appellate courts around the country have nonetheless struggled to determine how this Court's precedents apply to a scheme of searches conducted for the purpose of solving crimes committed by the searchee. Most have resisted the sort of rigorous Fourth Amendment scrutiny applicable to all other law-enforcement related suspicionless searches and seizures.

The focus of this dispute is the special needs doctrine, an exception to the Fourth

Amendment's protection that "generally bars officials from undertaking a search or seizure absent individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 308 (1997). Analysis under the special needs doctrine looks to whether searches "fit within the closely guarded category of constitutionally permissible suspicionless searches." *Ferguson v. City of Charleston*, 532 U.S. 67, 77 (2002) (*quoting Chandler*, 520 U.S. at 309). As a basic matter, every "special need" approved by this Court as a substitute for individualized suspicion has involved a proffered need "divorced from the State's general interest in law enforcement." *Ferguson*, 532 U.S. at 79. [20]

Rather than apply this Court's special needs analysis to suspicionless searches for DNA, the majority of appellate courts,[21] including the D.C. Circuit in this case, have applied two of this Court's cases governing supervisory searches of probationers and parolees: *Griffin v. Wisconsin*, 483 U.S. 868 (1987), and *United States v. Knights*, 534 U.S. 112 (2001), to DNA Act searches and seizures. But these cases are inappropriate for application to DNA database regimes. *Griffin* and *Knights* applied a general balancing approach to analyze the permissibility of searches of probationers and parolees that were *already* supported by some level of individualized suspicion, and that were conducted

---

[20] *See also Chandler v. Miller*, 520 U.S. 305, 313 (1997) ("Particularized exceptions to the main rule [requiring individualized suspicion] are sometimes warranted based on special needs, beyond the normal need for law enforcement."); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) ("We have upheld certain regimes of suspicionless searches where the program was designed to serve special needs, beyond the normal need for law enforcement."); *Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (reaffirming general prohibition against suspicionless law enforcement searches, but holding that law enforcement interaction with witnesses, as opposed to potential suspects, falls outside of general law enforcement activity).

[21] *E.g.*, *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005); *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992); *Groceman v. United States Dep't of Just.*, 354 F.3d 411, 413 (5th Cir. 2004); *United States v. Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (en banc) (plurality opinion); *Padgett v. Donald*, 401 F.3d 1273, 1278 (11th Cir. 2005).

pursuant to a supervisory regime of searches and seizures imposed pursuant to a release agreement. They did not involve a regime of suspicionless searches for classic law enforcement purposes whose intrusive effects continued long after the supervisory period ended.

Nonetheless, courts like the D.C. Circuit have held that because *Griffin* and *Knights* involved supervisees, and because the DNA Act searches and seizures apply to supervisees, the general balancing approach of *Griffin* and *Knights* serves as the appropriate test for analyzing the permissibility of the DNA Act under the Fourth Amendment. Such an analysis cuts the heart out of *Griffin* and *Knights* because those cases concerned the lower levels of suspicion necessary for searches that were truly supervisory. Reduced to their essentials, cases like the D.C. Circuit's opinion here, however, are about law enforcement regimes that target groups of people that are believed to have a propensity to commit crimes. This form of "group suspicion" as a law enforcement tool would have been abhorrent to the Framers, finds no support in *Griffin* and *Knights*, and has many potentially dangerous consequences.[22]

Three federal appellate courts have disapproved of the general balancing approach, concluding that it is both insufficiently protective of the privacy interests at

---

[22] *See, e.g.*, Pilar N. Ossorio, *About Face: Forensic Genetic Testing for Race and Visible Traits*, 34 J.L. Med. & Ethics 277, 285 (2006) (noting the effect such testing will have on reinforcing or recreating stereotypes of minorities); *Kincade*, 379 F.3d at 864 (Reinhardt, J., dissenting) (listing public school children and motor vehicle drivers and passengers as examples of the many groups deemed to have diminished Fourth Amendment privacy rights under this Court's precedents and who may be subject to suspicionless DNA searches under a general balancing test).

stake and forbidden by this Court's cases.[23] As the Second Circuit explained:

> In light of the Court's emphasis in its recent Fourth Amendment cases on applying the special-needs test to suspicionless search regimes, as well as the Court's focus in *Knights* on the existence of reasonable suspicion in that case, we decline to construe *Knights* as permitting us to apply a general balancing test to suspicionless searches. The Supreme Court has never applied a general balancing test to a suspicionless-search regime.

Nicholas v. Goord, 430 F.3d 652, 666 (2d Cir. 2005) (*citing Chandler*, 520 U.S. at 313-14, *City of Indianapolis v. Edmond*, 531 U.S. 33, 37 (2000), and *Kincade*, 379 F.3d at 862 (Reinhardt, J., dissenting)). The Second Circuit accordingly ruled that "the more prudent route, and the route more consonant with the values underlying the Fourth Amendment," is to apply the special needs test when reviewing the constitutionality of the DNA Act. *Id.*.

This serious dispute "is more than academic: [I]n *Edmond* and *Ferguson*, the Supreme Court limited the scope of the special needs exception by rejecting states' arguments that suspicionless searches with stated goals of drug rehabilitation and interdiction served special needs beyond general law enforcement." *Padgett v. Donald*, 401 F.3d 1273, 1278 (11th Cir. 2005).

Indeed, federal and state judges,[24] as well as many commentators,[25] have

---

[23] *Nicholas v. Goord*, 430 F.3d 652, 666 (2d Cir. 2005); *Green v. Berge*, 354 F.3d 675, 678-79 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003).

[24] *E.g.*, *United States v. Weikert*, 421 F. Supp. 2d 259, 264-65 (D.Mass. 2006); *United States v. Miles*, 228 F. Supp. 2d 1130 (E.D. Cal. 2002), *vacated*, 2005 WL 790817 (9th Cir. 2005); *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), *vacated*, 379 F.3d 813 (9th Cir. 2004) (en banc); *Kincade*, 379 F.3d at 842 (9th Cir. 2004) (Reinhardt, J. dissenting); *Id.* at 871 (Kozinski, J. dissenting); *Id.* at 875 (Hawkins, J. dissenting); *Sczubelek*, 402 F.3d at 189 (3d Cir. 2005) (McKee, J. dissenting); *Maryland v. Raines*, 857 A.2d 19, 50 (Md. 2004) (Bell, Harrell and Greene JJ., dissenting).

[25] Petitioner's research reveals that over fifty law journal articles have appeared on this topic in the past five years and a substantial majority has expressed the opinion that current databasing statutes violate the Fourth Amendment. *See, e.g.*, Gaia Bernstein,

questioned the constitutional implications of DNA databasing and whether the DNA Act can survive Fourth Amendment scrutiny under the special needs test given the extensive law enforcement involvement in the scheme and its general purpose of solving crimes. Those courts and dissenting judges throughout the country that have found the act unconstitutional have done so after concluding that the special needs test governs. *E.g.*, *United States v. Weikert*, 421 F. Supp. 2d 259, 264 (D. Mass. 2006); *United States v. Miles*, 228 F. Supp. 2d 1130 (E.D. Cal. 2002), *vacated*, 2005 WL 790817 (9th Cir. 2005); *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), *vacated*, 379 F.3d 813 (9th Cir. 2004) (en banc); *United States v. Kincade*, 379 F.3d 813, 842 (9th Cir. 2004) (Reinhardt, J., dissenting); *Id.* at 871 (Kozinski, J., dissenting); *id.* at 875 (Hawkins, J., dissenting); *United States v. Sczubelek*, 402 F.3d 175, 189 (3d Cir. 2005) (McKee, J., dissenting); *Maryland v. Raines*, 857 A.2d 19, 50 (Md. 2004) (Bell, Harrell, and Greene, JJ.,

---

Accommodating Technological Innovation: Identity, Genetic Testing and the Internet, 57 Vand. L. Rev. 965 (2004); Sarah L. Bunce, *Comment, United States v. Kincade—Justifying the Seizure of One's Identity*, 6 Minn. J.L. Sci. & Tech. 747 (2005); Renee A. Germaine, *Comment, "You Have the Right to Remain Silent... You Have No Right to Your DNA," Louisiana's DNA Detection of Sexual and Violent Offender's Act: An Impermissible Infringement on Fourth Amendment Search and Seizure*, 22 J. Marshall J. Computer & Info. L. 759 (2004); Jacqueline K. S. Lew, *The Next Step in DNA Databank Expansion? The Constitutionality of DNA Sampling of Former Arrestees*, 57 Hastings L.J. 199 (2005); Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. Med. & Ethics 165 (2006); Kathryn Zunno, *U.S. v. Kincade and the Constitutionality of the Federal DNA Act: Why We'll Need a New Pair of Genes To Wear Down the Slippery Slope*, 79 St. John's L. Rev. 769 (2005). In addition, virtually all of the articles agree that very serious privacy concerns arise from the provision of the Act that permits the FBI to indefinitely retain the blood sample for further genetic analysis. *See, e.g.*, Gilbert J. Villaflor, *Comment, Capping the Government's Needle: The Need To Protect Parolees' Fourth Amendment Privacy Interests from Suspicionless DNA Searches in United States v. Kincade*, 38 Loy. L.A. L. Rev. 2347 (2005); Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 Brooklyn L. Rev. 127 (2001).

dissenting). The few courts that have upheld the DNA Act's regime of suspicionless searches and seizures under the special needs test have struggled to identify a non-law enforcement purpose to support the search, either relying on the circular purpose of "creating a data bank"[26] or describing the law's purpose as "not to search for evidence of criminal wrongdoing [but] . . . to obtain reliable proof of a felon's identity."[27] Such courts ignore the fact that both "creation of a databank" and "obtaining proof of identity" are "needed" solely as part of a classic law enforcement effort to investigate and prosecute crimes, and thus cannot be the sort of "special need" referenced by the Court's special needs cases.

This Court should not "leave for another day" the important question of how the Fourth Amendment applies to a law enforcement scheme like the DNA Act. Courts that have applied the general balancing test, like the D.C. Circuit here, have taken a cramped, formulaic view of the Fourth Amendment concerns raised by the DNA Act, discounting both the extensive law enforcement involvement in the scheme and its serious privacy intrusions. *Johnson*, 440 F.3d at 496. As Judge Kozinski warned in *Kincade*, this approach virtually eliminates the possibility of halting future DNA Act expansions, and further privacy invasions. 379 F.3d at 873 (Kozinski, J., dissenting). Indeed, if the federal appellate courts have correctly viewed their role as simply weighing the

---

[26] *See, e.g.*, *Goord*, 430 F.3d at 668 (upholding New York DNA statute under special need test after finding that statute's "primary purpose is to create a DNA database to assist in solving crimes should the investigation of crimes permit resort to DNA testing"); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003) ("The DNA Act…is a reasonable search and seizure under the special needs exception to the Fourth Amendment's warrant requirement because the desire to build a DNA database goes beyond the ordinary law enforcement need.").

[27] *Green v. Berge*, 354 F.3d 675, 678 (7th Cir. 2004).

effectiveness of the DNA Act as a crime-solving tool against the "relatively small" privacy intrusions caused by forcible blood collection and permanent retention and perpetual analysis of the seized sample, it is hard to see how any Fourth Amendment challenge—even one brought by a free citizen—could succeed. Now is the time for this Court to draw the proverbial line in the sand.

III. This Court Should Grant the Petition To Determine Whether the Fourth Amendment Imposes Any Limits on the Ability of Law Enforcement Officials To Retain a Seized Blood Sample Indefinitely, and To Acquire New Genetic Information from That Sample After the Supervisory Period Has Ended.

This Court should not leave for another day the important question of whether the Fourth Amendment imposes any limits on the ability of law enforcement officials to retain a seized blood sample indefinitely, allowing such officials to continue to acquire new genetic information from that sample long after the supervisory period has ended. Here, the Court of Appeals ruled that that all cognizable Fourth Amendment interests ended at the time of the blood extraction because the panel knew of no authority that would prevent the government from obtaining additional, future information from an already-seized blood sample. 440 F.3d at 500.

Such a cramped view of the privacy interests invaded by a search and seizure of genetic information is fundamentally inconsistent with the traditional role of the federal judiciary to remain both wary and sensitive to "th[e] power of technology to shrink the realm of guaranteed privacy." *Kyllo*, 533 U.S. at 33-34. This Court's decision in *Kyllo* addressed the intersection between technology and the sphere of privacy protected by the Fourth Amendment. In determining that the use of a thermal-imaging device aimed at a private home to detect relative amounts of heat in the home was a search for Fourth Amendment purposes, this Court made clear that it would not limit consideration of the

privacy interests at stake to those presented by the particular thermal-imaging device used in that case. Further, this Court refused to limit the scope of privacy concerns by accepting that officers examined only some of the data that had been recorded coming from the home. *Kyllo*, 533 U.S. at 36. As this Court explained, any rule governing new technologies "must take account of more sophisticated systems that are already in use or in development" because a contrary approach "would leave the homeowner at the mercy of advancing technology." *Id.* This Court took "the long view, from the original meaning of the Fourth Amendment forward," by directly confronting "what limits there are upon this power of technology to shrink the realm of protected privacy." *Id.* at 34, 40.

Similar concerns are absent from the D.C. Circuit's opinion, which is likely to be substantially influential in shaping the law in this area if allowed by this Court to stand. Moreover, although the Court of Appeals seemed to acknowledge the potential tension between its Fourth Amendment analysis and *Kyllo* regarding the significance of permanently retaining DNA samples for re-analysis at a later date, the panel could just as easily have pointed to the conflict between its analysis and other cases decided by this Court.

For example, this Court's Fourth Amendment analysis in *Ferguson* rested entirely on the additional privacy invasions that occurred when law enforcement officials obtained information from a blood sample *after* that sample had been lawfully obtained from the petitioner by her doctor. *Ferguson v. City of Charleston*, 532 U.S. at 78. Yet, the Court of Appeals wrote, "neither *Kyllo* nor any other decision that we have found suggests that evidence becomes any less subject to search, seizure, or retention simply

because it might yield additional information in the future." 440 F.3d at 500 (App. 32).

The Court of Appeals' analysis also ignored *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602 (1989), where this Court expressly noted that later examination of evidence already obtained "may also be a search if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable." *Id.* at 616 (internal citation omitted). This Court pointed to serious privacy concerns raised by chemical analysis of blood samples in light of their ability to reveal "a host of private medical facts about an employee." *Id.* at 617. *Skinner* also raised serious concerns about the indefinite retention of the blood samples for continued analysis, particularly if doing so would "authorize the release of biological samples to law enforcement authorities," *id.* at 621—another teaching that stands in direct contrast with the Court of Appeals' determination that the Fourth Amendment posed no obstacles to obtaining additional information from a seized "effect" after the time of the initial search and seizure.

Nor are *Kyllo*, *Ferguson*, and *Skinner* isolated examples of this Court's focus on ensuring that Fourth Amendment jurisprudence remains sensitive to the threat that new technologies will shrink the realm of guaranteed privacy. More than 75 years ago, in a famous and prescient dissent protesting the majority's formulaic rejection of a Fourth Amendment challenge to warrantless wiretapping of telephones, Justice Brandeis warned that expanding technology inevitably created "subtler and more far-reaching means of invading privacy," and argued that this Court's Fourth Amendment jurisprudence must adapt or risk allowing technology to significantly shrink the sphere of privacy protected by the Framers. *Olmstead v. United States*, 277 U.S. 438, 471-85 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347, 355-60 (1967). As Justice

Brandeis explained, the Court must instead draw the line by taking a realistic view of technological progress, looking not "only of what has been but of what may be," because "the progress of science . . . is not likely to stop with wiretapping." *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting).

Some federal appellate courts and judges similarly have been much more sensitive to the privacy concerns raised by the indefinite retention of the sample for continued genetic analysis than were the courts below. The best example is *Kincade v. United States*, 379 F.3d 813 (9th Cir. 2004) (en banc), where the judge who cast the deciding vote in the court's 6-5 en banc decision expressed the belief that the most difficult Fourth Amendment question posed by the DNA Act was "whether DNA samples, though lawfully obtained from a felon on supervised release, may properly be retained by the government after the felon has finished his or her term and has paid his or her debt to society." *Id.* at 842 (Gould, J., concurring). As Judge Gould explained, "DNA stores and reveals massive amounts of personal, private data about that individual, and the advance of science promises to make stored DNA only more revealing in time." *Id.* at 842 n.3. Thus, serious questions existed in Judge Gould's view about whether, "once the special need for the DNA sample has gone"—that is, once the supervisory period had ended—the government would still "have sufficient reason to retain the sample in order to overcome the felon's privacy interest." *Id.* at 842.[28]

This question is of substantial importance now, and is likely to become even more important as the "information age" continues to evolve. Due to the advance of

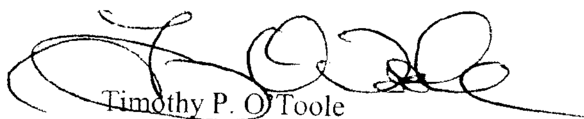
[28] *See also Weikert*, 421 F. Supp. 2d at 269 (expounding on privacy concerns that arise from continued maintenance and analysis of the sample as a main reason the DNA Act violates Fourth Amendment).

technology and the increased use of special needs searches in a variety of areas, such as schools, heavily-regulated industries, and supervisory schemes, the government increasingly acquires all sorts of information from a single, seemingly limited search. If, for example, school officials lawfully seize a laptop computer during the search of a high school student whom they suspect has been writing offensive poems for the school newspaper, are there any limits on the government's ability to forward that computer to law enforcement officials to copy the hard drive – not because they suspect the computer contains any evidence of criminal wrongdoing but just because law enforcement officials would like to have the information in case the student becomes involved in the criminal justice system? Or, if the government lawfully collects a host of telephone records, are there any limits on the government's ability to forward those records to law enforcement officials for inclusion in a national database? The D.C. Circuit's opinion seems to suggest that there are no limits on law enforcement's ability to catalogue and continue to mine data-rich items for additional information indefinitely, even if there is no arguable basis for law enforcement officials to have acquired such additional information in the first place. Such a decision contradicts this Court's prior teachings, is in conflict with the opinions of other federal tribunals, and holds the potential for allowing technology to substantially shrink the realm of protected privacy. The Court should grant the petition.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,



Timothy P. O'Toole
Counsel of Record
Corinne Beckwith
Parisa Dehghani-Tafti
Richard Schmechel
PUBLIC DEFENDER SERVICE
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200

Counsel for Petitioner

INDEX TO APPENDICES

App. 001-023 *Johnson v. Quander*, 370 F. Supp. 2d 79 (D.D.C. 2005)

App. 024-035 *Johnson v. Quander*, 440 F.3d 489 (D.C. Cir. 2006)

App. 036-052 *Vermont v. Watkins*, No. 6805-12-04 (Vt. Dist. Ct. April 24, 2006)

H
Briefs and Other Related Documents

United States District Court,District of Columbia.
Lamar JOHNSON, Plaintiff,
v.
Paul A. QUANDER, Director, Court Services and Offender Supervision Agency for the District of Columbia, et al., Defendants.
No. Civ.A. 04-448(RBW).

March 21, 2005.

Background: Probationer convicted on two counts of unarmed robbery brought action challenging validity of the DNA Analysis Backlog Elimination Act (DNA Act) and District of Columbia's implementing statute, after refusing to provide a DNA sample as required by the Act. Motion to dismiss was filed.

Holdings: The District Court, Walton, J., held that:

4(1) requiring probationer to provide blood sample under the DNA Act and District of Columbia's implementing statute did not violate the Fourth Amendment;

6(2) Act did not violate probationer's procedural due process rights;

10(3) Act did not violate equal protection component of Fifth Amendment;

12(4) neither the Act nor the implementing statute violated Ex Post Facto Clause;

15(5) probationer did not have private right of action under Health Insurance Portability and Accountability Act of 1996 (HIPAA);

16(6) probationer did not have private right of action under International Convention of the Elimination of all Forms of Racial Discrimination (CERD); and

17(7) probationer was not entitled to have his sample discarded and its analysis expunged after he completed his probation.

Motion granted.

West Headnotes

[1] Searches and Seizures 349 ⚷14

349 Searches and Seizures
349I In General
349k13 What Constitutes Search or Seizure
349k14 k. Taking Samples of Blood, or Other Physical Specimens; Handwriting Exemplars. Most Cited Cases
The involuntary taking of a DNA sample is a "search" under the Fourth Amendment. U.S.C.A. Const.Amend. 4.

[2] Searches and Seizures 349 ⚷23

349 Searches and Seizures
349I In General
349k23 k. Fourth Amendment and Reasonableness in General. Most Cited Cases

Searches and Seizures 349 ⚷26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases
The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search 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. U.S.C.A. Const.Amend. 4.

[3] Searches and Seizures 349 ⚷78

349 Searches and Seizures
349I In General
349k78 k. Samples and Tests; Identification Procedures. Most Cited Cases
In determining whether the DNA Analysis Backlog Elimination Act (DNA Act) and similar analogous state statutes violate the Fourth Amendment's protection against unreasonable searches and seizures, court would apply traditional totality of the circumstances analysis, rather than special needs

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

analysis. DNA Analysis Backlog Elimination Act of 2000, § 2 et seq., 42 U.S.C.A. § 14135 et seq.

[4] Sentencing and Punishment 350H ⚷1996

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(H) Searches and Seizures
350Hk1996 k. Tests, Samples, and Specimens. Most Cited Cases

Requiring probationer convicted of two counts of unarmed robbery to provide a DNA sample under the DNA Analysis Backlog Elimination Act (DNA Act) and District of Columbia's implementing statute was not illegal search in violation of the Fourth Amendment; probationer's privacy interest in his identity was diminished while on probation, such interest was outweighed by public interest in solving past and future crimes, and actual physical intrusion of obtaining blood sample was minimal. U.S.C.A. Const.Amend. 4; DNA Analysis Backlog Elimination Act of 2000, § 2 et seq., 42 U.S.C.A. § 14135 et seq.; D.C. Official Code, 2001 Ed. § 22-4151.

[5] Constitutional Law 92 ⚷270(5)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k270 Judgment and Sentence
92k270(5) k. Probation or Suspension of Sentence. Most Cited Cases

Sentencing and Punishment 350H ⚷1996

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(H) Searches and Seizures
350Hk1996 k. Tests, Samples, and Specimens. Most Cited Cases

Probationer convicted of two counts of unarmed robbery could not challenge requirement that he provide blood sample under DNA Analysis Backlog Elimination Act (DNA Act) and District of Columbia's implementing statute as violating substantive due process under the Fifth Amendment; taking of blood under the Act was a search and seizure under the Fourth Amendment, and analysis under that Amendment applied. U.S.C.A. Const.Amends. 4, 5; DNA Analysis Backlog Elimination Act of 2000, § 2 et seq., 42 U.S.C.A. § 14135 et seq.; D.C. Official Code, 2001 Ed. § 22-4151.

[6] Constitutional Law 92 ⚷270(5)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k270 Judgment and Sentence
92k270(5) k. Probation or Suspension of Sentence. Most Cited Cases

Sentencing and Punishment 350H ⚷1996

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(H) Searches and Seizures
350Hk1996 k. Tests, Samples, and Specimens. Most Cited Cases

DNA Analysis Backlog Elimination Act (DNA Act) and District of Columbia's implementing statute did not violate procedural due process rights of probationer convicted of two counts of unarmed robbery, despite probationer's claim that Act had no internal guidelines for determining if a particular individual had actually been convicted of a qualifying offense, or procedures to challenge government's acquisition and testing of DNA samples; risk of erroneous deprivation of liberty interest was minimal, as individual had to be convicted of a qualifying offense beyond a reasonable doubt, Act provided that if conviction was later overturned, the sample would be removed from the database, and Act explicitly limited how DNA samples could be used. U.S.C.A. Const.Amends. 4, 5; DNA Analysis Backlog Elimination Act of 2000, § 2 et seq., 42 U.S.C.A. § 14135 et seq.; D.C. Official Code, 2001 Ed. § 22-4151.

[7] Constitutional Law 92 ⚷251.6

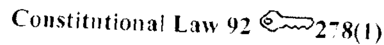
92 Constitutional Law
92XII Due Process of Law
92k251.6 k. Notice and Hearing. Most Cited Cases

The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. U.S.C.A. Const.Amend. 5.

[8] Constitutional Law 92 ⚷255(1)

92 Constitutional Law
92XII Due Process of Law
92k255 Deprivation of Life or Liberty in General
92k255(1) k. In General. Most Cited Cases

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

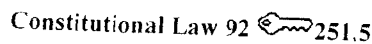
Constitutional Law 92  **278(1)**

92 Constitutional Law
92XII Due Process of Law
92k278 Deprivation of Property in General
92k278(1) k. In General. Most Cited Cases

Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. U.S.C.A. Const.Amend. 5.

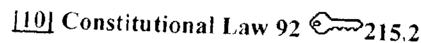
[9] Constitutional Law 92 **251.1**

92 Constitutional Law
92XII Due Process of Law
92k251.1 k. Flexibility; Balancing Interests. Most Cited Cases

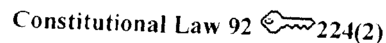
Constitutional Law 92  **251.5**

92 Constitutional Law
92XII Due Process of Law
92k251.5 k. Procedural Due Process in General. Most Cited Cases

Due process is flexible and calls for such procedural protections as the particular situation demands. U.S.C.A. Const.Amend. 5.

[10] Constitutional Law 92  **215.2**

92 Constitutional Law
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k215.2 k. Particular Matters, Discrimination as To. Most Cited Cases

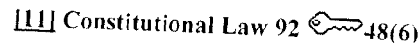
Constitutional Law 92  **224(2)**

92 Constitutional Law
92XI Equal Protection of Laws
92k224 Sex Discrimination
92k224(2) k. Particular Discriminatory Practices. Most Cited Cases

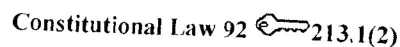
Sentencing and Punishment 350H **1996**

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(H) Searches and Seizures
350Hk1996 k. Tests, Samples, and Specimens. Most Cited Cases

DNA Analysis Backlog Elimination Act (DNA Act) and District of Columbia's implementing statute did not violate equal protection component of Fifth Amendment, despite claim by African-American probationer that both provisions had disparate impact on African-American males; there was no evidence that either provision was enacted with discriminatory intent, and compulsory taking of DNA samples was rationally related to legitimate state interests of preventing and solving past and future crimes. U.S.C.A. Const.Amend. 5; DNA Analysis Backlog Elimination Act of 2000, § 2 et seq., 42 U.S.C.A. § 14135 et seq.; D.C. Official Code, 2001 Ed. § 22-4151.

[11] Constitutional Law 92  **48(6)**

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(4) Application to Particular Legislation or Action or to Particular Constitutional Questions
92k48(6) k. Classification, Uniformity and Discrimination; Special or Local Laws. Most Cited Cases

Constitutional Law 92  **213.1(2)**

92 Constitutional Law
92XI Equal Protection of Laws
92k213.1 Bases for Discrimination Affected in General
92k213.1(2) k. Rational or Reasonable Basis; Relation to Object or Compelling Interest. Most Cited Cases

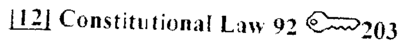
Constitutional Law 92 **215**

92 Constitutional Law
92XI Equal Protection of Laws
92k214 Discrimination by Reason of Race, Color, or Condition
92k215 k. In General. Most Cited Cases

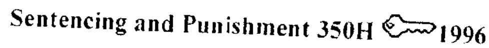
For purposes of analysis of the equal protection component of the Fifth Amendment, the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest; however, when a statute classifies by race, alienage, or national origin, courts must apply a strict scrutiny

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

standard of review. U.S.C.A. Const.Amend. 5.

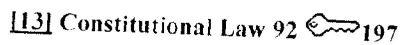

[12] Constitutional Law 92 203

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k198 Retroactive Operation of Ex Post Facto Laws
92k203 k. Nature or Extent of Punishment. Most Cited Cases


Sentencing and Punishment 350H 1996

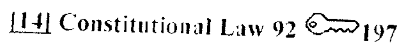
350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(H) Searches and Seizures
350Hk1996 k. Tests, Samples, and Specimens. Most Cited Cases

Neither DNA Analysis Backlog Elimination Act (DNA Act) nor District of Columbia's implementing statute violated the Ex Post Facto Clause provisions of the federal constitution with respect to probationer convicted of two counts of unarmed robbery, though implementing provision was signed after probationer was convicted and sentenced; neither provision was intended to be punitive, and neither provision criminalized any conduct of probationer committed prior to enactment, but rather created new regulatory system for maintenance of DNA samples in order to serve various legitimate law enforcement functions. U.S.C.A. Const. Art. 1, § § 9, cl. 3, 10, cl. 1; DNA Analysis Backlog Elimination Act of 2000, § 2, 42 U.S.C.A. § 14135 et seq.; D.C.Code § 22-4151.


[13] Constitutional Law 92 197

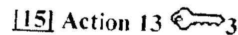
92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k197 k. Nature of Ex Post Facto Laws. Most Cited Cases

The constitutional bar on the enactment of ex post facto laws means that legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts. U.S.C.A. Const. Art. 1, § § 9, cl. 3, 10, cl. 1.


[14] Constitutional Law 92 197

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k197 k. Nature of Ex Post Facto Laws. Most Cited Cases

To determine whether a statute violates the Ex Post Facto Clause, the court must first determine if the legislative bodies involved intended to impose a criminal punishment; if so, the Ex Post Facto Clause applies, but if the legislature intended to create a civil and non-punitive scheme, the court must determine whether the statute is nevertheless so punitive either in purpose or effect as to negate the legislature's intention to deem it civil. U.S.C.A. Const. Art. 1, § § 9, cl. 3, 10, cl. 1.

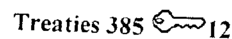

[15] Action 13 3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases

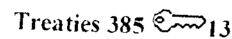
Probationer convicted of two counts of unarmed robbery did not have private right of action under Health Insurance Portability and Accountability Act of 1996 (HIPAA) to challenge DNA Analysis Backlog Elimination Act (DNA Act); only the Secretary of Health and Human Services had the right to pursue such action. DNA Analysis Backlog Elimination Act of 2000, § 2 et seq., 42 U.S.C.A. § 14135 et seq.; Social Security Act, § 1171, as amended, 42 U.S.C.A. § 1320d.

[16] Sentencing and Punishment 350H 1996

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(H) Searches and Seizures
350Hk1996 k. Tests, Samples, and Specimens. Most Cited Cases


Treaties 385 12

385 Treaties
385k12 k. Self-Executing Provisions. Most Cited Cases


Treaties 385 13

385 Treaties
385k13 k. Performance and Enforcement of Provisions. Most Cited Cases

Probationer convicted of two counts of unarmed robbery did not have private right of action under International Convention of the Elimination of all Forms of Racial Discrimination (CERD) to challenge DNA Analysis Backlog Elimination Act (DNA Act), as CERD was not self-executing. International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1 et seq., 660 U.N.T.S. 195.

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

[17] Criminal Law 110 ⚿1226(5)

110 Criminal Law
110XXVIII Criminal Records
110k1226 In General
110k1226(3) Expungement or Correction; Effect of Acquittal or Dismissal
110k1226(5) k. Identification Records. Most Cited Cases

Probationer convicted of two counts of unarmed robbery was not entitled to have blood sample given pursuant to DNA Analysis Backlog Elimination Act (DNA Act) discarded and its analysis expunged, though he had completed term of probation; probationer's privacy interest in his identification information, diminished while on probation, was not regained in full, and was outweighed by government's interest in identifying ex-offenders who commit new offenses. DNA Analysis Backlog Elimination Act of 2000, § 2 et seq., 42 U.S.C.A. § 14135 et seq.

*82 Lamar Johnson, Baltimore, MD, pro se.
Todd A. Cox, Public Defender Service for the District of Columbia, Washington, DC, for Plaintiff.
Jane M. Lyons, United States Attorney's Office, Washington, DC, for Defendant.

MEMORANDUM OPINION

WALTON, District Judge.

The plaintiff brings this action alleging that the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135b, ("the DNA Act") and D.C.Code § 22-4151, which was enacted by the District of Columbia to implement in the District of Columbia the objectives of the DNA Act, violate the Fourth and Fifth Amendments to the United States Constitution; the Ex Post Facto Clauses of Article I, sections 9 and 10 of the Constitution; the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § § 1320d to d-8; and the International Convention of the Elimination of all Forms of Racial Discrimination (CERD). Complaint ("Compl.") ¶ ¶ 14-20. The defendants, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), have filed a motion to dismiss this action. Defendants' Motion to Dismiss at 1. Currently before the Court are the Defendants' Memorandum in Support of Motion to Dismiss ("Defs.' Mem."); the Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Pl.'s Opp'n"); and the Defendants' Reply in Support of Motion to Dismiss ("Defs.' Reply"). For the reasons set forth below, this Court grants the defendants' motion.

I. Background

(A) Statutory History

Under the Violent Crime Control and Law Enforcement Act of 1994 ("1994 Act"), 42 U.S.C. § 14132, "Congress authorized the FBI to create a national index of [deoxyribonucleic acid ("DNA")] samples taken from convicted offenders, crime scenes and victims of crime, and unidentified human remains." H.R.Rep. No. 106-900 at 8 (2000). In response to this congressional mandate, the FBI established the Combined DNA Index System ("CODIS").*83 *Id.* The CODIS database provides a means for State and local forensic laboratories to share DNA profiles in an attempt to "link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the system." FN1 *Id.* However, the 1994 Act was interpreted by the FBI to only permit the creation of the CODIS, not the taking of DNA samples of persons convicted of federal offenses for input into the system. *Id.* Thus, "the FBI requested that Congress enact statutory authority to allow the taking of DNA samples from persons committing Federal crimes of violence, robbery, and burglary, or similar crimes in the District of Columbia or while in the military, and authorizing them to be included in CODIS." *Id.*

FN1. *United States v. Kincade,* 379 F.3d 813, 817-20 (9th Cir.2004) (en banc) provides an indepth discussion of the process used to analyze a DNA sample.

Accordingly, Congress passed the DNA Analysis Backlog Elimination Act of 2000 ("DNA Act"), 42 U.S.C. § 14135 *et seq.*, which authorizes the "Attorney General to make grants to eligible States ... to carry out, for the inclusion in the Combined DNA Index System of the Federal Bureau of Investigation, DNA analyses of samples taken from individuals convicted of a qualifying State offenses." 42 U.S.C. § 14135(a)(1). Moreover, the DNA Act provides that "[t]he Director of the Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of a qualifying Federal offense" and that "the probation office responsible for the supervision under Federal law of an individual on probation,

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

parole, or supervised release shall collect a DNA sample from each such individual who is or has been, convicted of a qualifying Federal offense." 42 U.S.C. § 14135a(a)(1)-(2). In addition, Congress has mandated the collection of DNA samples from "each individual in the custody of the Bureau of Prisons who is, or has been convicted of a qualifying District of Columbia offense" or any "individual under the supervision of the Agency who is on supervised release, parole, or probation who is, or has been convicted of a qualifying District of Columbia offense." 42 U.S.C. § 14135b(a)(1)-(2). Congress left to the District of Columbia the responsibility of determining which offenses under the District of Columbia Code should be deemed qualifying offenses. 42 U.S.C. § 14135b(d). The District of Columbia has determined that forty-nine separate offense qualify for collection under the DNA Act. *See*, D.C.Code § 22-4151(1)-(46). These qualifying offense include, for example, arson, aggravated assault, burglary, kidnaping, robbery, attempted robber and carjacking. *Id.*

Once a DNA sample is entered into the CODIS database, the information can only be released (1) "to criminal justice agencies for law enforcement identification purposes;" (2) "in judicial proceedings;" (3) "for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged;" or (4) "if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes." 42 U.S.C. § 14132(b)(3). In addition, the DNA Act imposes criminal penalties for individuals who improperly disclose sample results or improperly obtains or uses DNA samples. 42 U.S.C. § 14135e(c).

(B) Factual Background

On December 20, 2001, the plaintiff, Lamar Johnson, was convicted in the Superior*84 Court of the District of Columbia of two counts of unarmed robbery in violation of D.C.Code § 22-2801. Compl. ¶ 4. On March 15, 2002, the plaintiff was sentenced to a one year prison sentence and placed on two years supervised release for each conviction. *Id.* However, execution of both sentences were suspended and the plaintiff was placed on two years probation for each offense, which were designated to run concurrently. *Id.* On or around February 18, 2004, prior to the expiration of the plaintiff's probationary term, the defendants, pursuant to the DNA Act and D.C.Code § 22-4151, demanded that the plaintiff provide a sample of his DNA for inclusion in the CODIS because he had been convicted of a predicate offense. *Id.* ¶ 9; *see also* Compl., Ex. A; D.C.Code § 22-4151(27) (listing violations of D.C.Code § 22-2801 (robbery) as a qualifying offense). The plaintiff refused to provide a DNA sample, and a judge of the Superior Court of the District of Columbia ordered the plaintiff to show cause why his probation should not be revoked because of this refusal. Compl., Ex. B (Show Cause Order signed by Judge Campbell, Associate Judge of the Superior Court of the District of Columbia).

On March 18, 2004, the plaintiff filed a complaint in this Court, seeking a temporary restraining order ("TRO") to prevent the defendants from requiring that he provide a DNA sample. Motion for a Temporary Restraining Order at 1. Before this Court could resolve the TRO, the parties filed a Motion to Resolve Certain Preliminary Matters, which proposed to resolve the need for emergency injunctive relief. In the motion, the plaintiff agreed to provide a blood sample to the defendants, and the defendants agreed to delay processing that sample until after the plaintiff's claims in this action and any subsequent appeals had been resolved. The motion was granted by this Court and the motion for a TRO was denied. The parties then filed their papers which are the subject of this opinion.

II. *Standards of Review*

Under Rule 12(b)(1), which governs motions to dismiss for lack of subject matter jurisdiction, "[t]he plaintiff bears the burden of persuasion to establish subject matter jurisdiction by a preponderance of the evidence." *Pitney Bowes, Inc. v. United States Postal Serv.*, 27 F.Supp.2d 15, 19 (D.D.C.1998). In reviewing such a motion, this Court must accept as true all the factual allegations contained in the complaint. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Additionally, in deciding a Rule 12(b)(1) motion, it is well established in this Circuit that a court is not limited to the allegations in the complaint, but may also consider material outside of the pleadings in its effort to determine whether the court has jurisdiction in the case. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624-25 n. 3 (D.C.Cir.1997); *Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 197 (D.C.Cir.1992); [illegible]

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

v. Sessions, 835 F.2d 902, 906 (D.C.Cir.1987); Grand Lodge of Fraternal Order of Police v. Ashcroft, 185 F.Supp.2d 9, 14 (D.D.C.2001).

On a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court must construe the allegations and facts in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the alleged facts. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Barr v. Clinton,* 370 F.3d 1196, 1199 (D.C.Cir.2004) (citing ***85***Kowal v. MCI Communications Corp.,* 16 F.3d 1271, 1276 (D.C.Cir.1994)). However, the Court need not accept inferences or conclusory allegations that are unsupported by the facts set forth in the complaint. *Kowal,* 16 F.3d at 1276. In deciding whether to dismiss a claim under Rule 12(b)(6), the Court can only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference into the complaint, and matters about which the Court may take judicial notice. *St. Francis,* 117 F.3d at 624-25. The Court will dismiss a claim pursuant to Rule 12(b)(6) only if the defendant can demonstrate "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley,* 355 U.S. at 45-46, 78 S.Ct. 99.

III. *Legal Analysis*

The plaintiff's complaint sets forth seven claims. Compl. ¶ ¶ 14-20. These claims assert that it is illegal to demand the plaintiff's DNA while he was on probation, but that it is also illegal for the defendants to retain the plaintiff's DNA sample and any information derived from the sample now that he has completed his probationary term. The Court begins its analysis by discussing whether the DNA Act and D.C.Code § 22-4151 violate any constitutional or statutory rights of the plaintiff while he was on probation. The Court will conclude with a discussion of whether the plaintiff, now that he has completed his probationary term, has a right to have his DNA sample and analysis thereof expunged from the CODIS system. As discussed more fully below, none of the plaintiff's claims have merit.

(A) Fourth Amendment Claim

[1] The plaintiff first contends that the DNA Act and D.C.Code § 22-4151 violate the Fourth Amendment's guarantee to be free from unreasonable searches and seizures. Compl. ¶ 14. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. It is not disputed that the involuntary taking of a DNA sample is a search under the Fourth Amendment. *See Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 618, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) ("the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches"). Moreover, it is undisputed that a warrant was never issued requiring the plaintiff to provide a DNA sample. Accordingly, the focus of this Court's inquiry regarding the plaintiff's Fourth Amendment claim is whether the statutory requirement that he provide the sample is reasonable or falls within one of the Amendment's exceptions to the warrant-and-probable cause requirements. In a recent case substantially analogous to the case at hand, the Ninth Circuit sitting en banc, provided an exhaustive overview of the law in this area. *United States v. Kincade,* 379 F.3d 813, 822-830 (9th Cir.2004) (en banc). While this Court need not engage in the same extensive overview, it is helpful to this Court's analysis to briefly review recent developments in Fourth Amendment jurisprudence.

[2] "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search 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.' " ***86** *United States v. Knights,* 534 U.S. 112, 118-19, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (quoting *Wyoming v. Houghton,* 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999)). In addition to this fundamental assessment of reasonableness based on the totality of the circumstances, there are a number of exceptions to the warrant-and-probable cause requirements of the Fourth Amendment. *Kincade,* 379 F.3d at 822. The Ninth Circuit in *Kincade* labeled the first of these exceptions as "exempted areas," which includes searches at the borders, airports, and entrances to government buildings. *Id.* The second exception encompasses "administrative searches," which includes inspections of closely-regulated businesses. *Id.* at 823. And finally, there is a "special needs" exception to the warrant-and-

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

probable cause requirement. Cases involving this third exception "involve searches conducted for important non-law enforcement purposes in contexts where adherence to the warrant-and-probable cause requirement would be impracticable." *Id.* Thus, the question this Court must answer is whether the search and seizure at issue in this case (the taking of a DNA sample from a qualifying convicted felon) falls under one of these exceptions to the warrant clause of the Fourth Amendment or whether, based on the totality of the circumstances, it is reasonable.

[3] While the issue presented to the Court is one of first impression in this Circuit, many other Federal Circuit, Federal District and state courts throughout the country have weighed in on this issue and have resoundingly concluded that the DNA Act and similar analogous state statutes do not violate the Fourth Amendment's protection against unreasonable searches and seizures. [FN2] In *Kincade*, the Ninth Circuit, sitting en banc, held that the DNA Act did not violate the Fourth Amendment. *Kincade*, 379 F.3d at 840. However, as the Ninth Circuit noted in *Kincade*, courts are split as to the proper analytical framework to apply in resolving this question. One set of courts, including the Ninth Circuit, have applied the traditional totality of the circumstances analysis to assess reasonableness and have concluded that the DNA Act (and similar state statutes) are constitutional. *See Kincade*, 379 F.3d at 831 (citing over twenty cases in which an assessment of the totality of the circumstances was utilized).[FN3] On the other hand, other courts have upheld the constitutionality of the DNA Act (and similar***87** state statutes) under a "special needs" analysis. *See Kincade*, 379 F.3d at 830-31 (citing twelve cases in which a special needs assessment was utilized).[FN4] While this Court believes that the DNA Act can be upheld under either analysis, for the reasons articulated by the Ninth Circuit in *Kincade*, this Court believes, as do a majority of other courts which have examined this issue, that the traditional totality of the circumstances analysis is the more appropriate legal framework under which to analyze this question.[FN5]

FN2. This Court could only find three cases where courts found that a DNA collection statutes violated the Fourth Amendment. However, none of these cases remain good law. For example, in *United States v. Kincade*, 345 F.3d 1095 (9th Cir.2003), a three judge panel of the Ninth Circuit concluded that the DNA Act violated the Fourth Amendment. However, sitting en banc, the Ninth Circuit overruled the panel decision. *Kincade*, 379 F.3d at 831. In addition, before the en banc ruling in *Kincade*, a court in the Eastern District of California concluded that the DNA Act violated Fourth Amendment principles, *see United States v. Miles*, 228 F.Supp.2d 1130, 1135-40 (E.D.Cal.2002), but *Miles* is obviously not good law either as it was decided by a trial court in the Ninth Circuit. Finally, a Montgomery County Maryland Circuit Court in *Maryland v. Raines*, found a similar state statute unconstitutional as violative of the Fourth Amendment. This ruling, however, was vacated by the Court of Appeals of Maryland. *See Maryland v. Raines*, 383 Md. 1, 857 A.2d 19 (2004).

FN3. *See, e.g., Green v. Berge*, 354 F.3d 675, 680-81 (7th Cir.2004) (Easterbrook, J. concurring); *Groceman v. Dep't of Justice*, 354 F.3d 411, 413-14 (5th Cir.2004); *Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir.2003); *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir.1992); *Nicholas v. Goord*, 2004 WL 1432533, at *2-*6 (S.D.N.Y.2004); *United States v. Stegman*, 295 F.Supp.2d 542, 548-50 (D.Md.2003); *Padgett v. Ferrero*, 294 F.Supp.2d 1338, 1343-44 (N.D.Ga.2003).

FN4. *See, e.g., Kincade*, 379 F.3d at 840 (Gould, J., concurring); *Green*, 354 F.3d at 679; *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir.2003); *Roe v. Marcotte*, 193 F.3d 72, 79-82 (2d Cir.1999); *Vore v. Dep't of Justice*, 281 F.Supp.2d 1129, 1133-35 (D.Ariz.2003); *Miller v. U.S. Parole Comm'n*, 259 F.Supp.2d 1166, 1175-78 (D.Kan.2003).

FN5. The Ninth Circuit in *Kincade* noted that the Supreme Court recently concluded in *Knights* that despite its prior Fourth Amendment rulings in *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) and *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001), "it remains *entirely* an open question whether suspicionless searches of conditional releasees pass constitutional muster when such searches are conducted for law enforcement purposes." *Kincade*, 379 F.3d at 830. Accordingly, the Ninth Circuit concluded

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

that the totality of the circumstances analysis was the proper approach to employ in resolving this Fourth Amendment question. *Id.* at 832.

[4] To gauge the reasonableness of requiring the plaintiff to provide a DNA sample under the totality of the circumstances standard, the Court must balance the plaintiff's privacy interest against the public interests served by acquiring the sample. The Court begins its analysis by first assessing the plaintiff's privacy interests implicated by this search. *Knights,* 534 U.S. at 119, 122 S.Ct. 587.

The District of Columbia Circuit has noted that "[t]he protections of the Fourth Amendment are graduated in proportion to the privacy interests affected. Decreasing levels of intrusiveness require decreasing levels of justification." *Willner v. Thornburgh,* 928 F.2d 1185, 1188 (D.C.Cir.1991). It is settled law that individuals on probation, just like parolees and other conditionally released criminal offenders, "are not entitled to the full panoply of rights and protections possessed by the general public." (*Kincade,* 379 F.3d at 833; *Pa. Bd. of Prob. & Parole v. Scott,* 524 U.S. 357, 365, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998)). In fact, the Supreme Court has held that individuals on conditional release have "only ... conditional liberty properly dependent on observances of special parole restrictions" that extend "substantially beyond the ordinary restrictions imposed by law on an individual citizen." *Morrissey v. Brewer,* 408 U.S. 471, 478, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). These type of restrictions "are meant to assure that the [conditional release terms] serve as a period of genuine rehabilitation and that the community is not harmed by the [releasee]'s being at large. These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed." *Griffin v. Wisconsin,* 483 U.S. 868, 875, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). Accordingly, "the Supreme Court ... has noted that conditional releasees enjoy severely constricted expectations of privacy relative to the general citizenry-and that the government has a far more substantial interest in invading their privacy than it does in interfering with the liberty of law-abiding citizens" *Kincade,* 379 F.3d at 834 (citing *Knights,* 534 U.S. at 119-20, 122 S.Ct. 587; *Ferguson v. City of Charleston,* 532 U.S. 67, 79 n. 15, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001); *Griffin,* 483 U.S. at 874-75, 107 S.Ct. 3164).

***88** In this case, the plaintiff claims a privacy interest in the "detailed personal information obtainable from a DNA sample." Pl.'s Opp'n at 13. In its simplest form, the plaintiff asserts a privacy interest in his identity. FN6 *Kincade,* 379 F.3d at 837 (a DNA sample taken from a probationer merely establishes a record of the plaintiff's identity). However, as discussed above, the plaintiff, at least during the time he was on probation, had a diminished expectation of privacy. Thus, while he does have a privacy interest in his identity, his interest does not have the same status as that of an individual who has never been convicted of a qualifying offense as classified by the DNA Act and the District of Columbia Code. Moreover, courts have routinely held, and this Court finds no compelling reason to deviate from these holdings, that "[o]nce a person is convicted of one of the felonies included as a predicate offense under [the DNA Act], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling." *Rise v. Oregon,* 59 F.3d 1556, 1560 (9th Cir.1995); *Groceman v. Dep't of Justice,* 354 F.3d 411, 413-14 (5th Cir.2004); *Jones v. Murray,* 962 F.2d 302, 306-07 (4th Cir.1992).

FN6. The plaintiff provides a thoughtful and thorough discussion of potential misuses of DNA. For example, the plaintiff opines that in the future a DNA sample may be able to provide other information about an individual, such as whether the individual has a hereditary disease, a specific character trait, and possibly even the individual's race. Pl.'s Opp'n at 14. These potential misuses, the plaintiff contends, results in the privacy prong of the reasonableness test weighing in his favor. *Id.* Although the hypotheticals offered by the plaintiff raise legitimate concerns, the Court must decide the constitutionality of the statutes before it based on the purpose for which they were designed and have been utilized, and not on how the plaintiff perceives the statutes might be used in the future. As drafted, the DNA Act limits the permissible use of DNA samples. 42 U.S.C. § 14132(b)(3) (limiting the use of DNA profiles to, *inter alia,* "criminal justice agencies for law enforcement purposes" and "in judicial proceedings"). Moreover, the statute prescribes criminal penalties for the improper acquisition, use or disclosure of DNA or of DNA sample results, 42 U.S.C. § 14135e(c). And, should the plaintiff's hypotheses one day come to fruition, the

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

plaintiff can certainly challenge the improper use of these new developments in a subsequent action.

The Court's next step is to examine the public interest prong of the totality of the circumstances test. In this case, it is clear that the DNA Act and D.C.Code § 22-4151 further a compelling public interest. First, DNA profiling can link conditionally released offenders to crimes committed while on release, which helps to ensure that such individuals comply with the requirements of the their conditional release. *Scott,* 524 U.S. at 365, 118 S.Ct. 2014. It is well-settled that rates of recidivism among parolees and probationers is high and DNA testing can deter such individuals from engaging in further illegal conduct knowing that they might be identified by DNA. *Scott,* 524 U.S. at 365, 118 S.Ct. 2014; *Knights,* 534 U.S. at 120, 122 S.Ct. 587; *Griffin,* 483 U.S. at 875, 107 S.Ct. 3164; *United States v. Crawford,* 372 F.3d 1048, 1069-70 (9th Cir.2004) (Trott, J., concurring). Moreover, in addition to helping solve crimes that may occur in the future, DNA profiling may help resolve past crimes and "help[ ] bring closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large." *Kincade,* 379 F.3d at 839. This Court agrees with the Ninth Circuit that "the weight of these interests in monumental." *Id.*

Balancing the private and public interests here, it is clear that the public's interests***89** far outweigh the plaintiff's interest and thus the taking of his DNA sample does not violate the Fourth Amendment, especially in light of the fact that the plaintiff, while he was on probation, has a diminished expectation of privacy. In addition, the Court notes that the actual physical intrusion in securing a DNA sample is minimal. The Supreme Court concluded long ago that "the intrusion occasioned by a blood test is not significant, since such 'tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.' " *Skinner,* 489 U.S. at 625, 109 S.Ct. 1402 (quoting *Schmerber v. California,* 384 U.S. 757, 771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). Moreover, the DNA Act applies only to anyone who has been convicted of one of the predicate offenses and there is no discretion regarding who is selected for DNA sampling. "By ensuring that blood extractions will not be ordered randomly or for illegitimate purposes, [the DNA Act] fulfills a principal purpose of the warrant requirement." *Rise,* 59 F.3d at 1562. This reason further supports the finding that searches and seizures conducted pursuant to the DNA Act are reasonable.

In conclusion, it is the Court's view that upon weighing the individual privacy rights of the plaintiff against the compelling public interest as discussed above, that the totality of the circumstances favor the defendants' side of the totality of the circumstances analysis, and therefore, the plaintiff's Fourth Amendment challenge to the DNA Act and D.C.Code § 22-4151 must be rejected.

(B) Fifth Amendment Substantive Due Process Claim

[5] Next, the plaintiff makes a Fifth Amendment substantive due process claim against the DNA Act and D.C.Code § 22-4151. Specifically, the plaintiff posits that as "a free citizen who has entirely paid his debt to society, [he] objects to the tremendously invasive and utterly suspicionless search with the potential to reveal his most intimate genetic and medical information." Pl.'s Opp'n at 18. It appears that what the plaintiff is alleging is that the DNA Act and D.C.Code § 22-4151 violate his right "to protect [his] genetic information from disclosure[ ]" and that this amounts to a substantive due process violation. Pl.'s Opp'n at 20. The Fifth Amendment provides that no person may "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. In reviewing substantive due process claims, the Supreme Court has instructed that there are two features to such a claim. "First, [the Court has] regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Washington v. Glucksberg,* 521 U.S. 702, 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (internal citations omitted). Second, the Court requires "in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Id.* (internal citations omitted). Thus, the "[Fifth] Amendment 'forbids the government to infringe [on] ... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* (internal citations omitted).

Other courts that have addressed this same substantive due process challenge to the required

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

submission of DNA samples by conditionally released offenders have *90 declared that the "drawing of blood by a medical professional in an acceptable environment is not offensive to the ordinary sense of justice, and therefore, not violative of the Due Process Clause." *Vore v. Dep't of Justice,* 281 F.Supp.2d 1129, 1138 (D.Ariz.2003) (citing *Schmerber v. California,* 384 U.S. 757, 759-60, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)); *see also Rise,* 59 F.3d at 1562-63; *Groceman v. Dep't of Justice,* 2002 WL 1398559, at *4 (N.D.Tex.2002); *Miller v. U.S. Parole Comm'n,* 259 F.Supp.2d 1166, 1169-70 (D.Kan.2003). However, despite the analyses these courts conducted, this Court concludes that a substantive due process analysis is actually unnecessary. In *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court held that "[w]here a particular [Constitutional] Amendment provides an explicit textual source of constitutional protection against a particular sort of governmental behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver,* 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (quoting *Graham,* 490 U.S. at 395, 109 S.Ct. 1865); *see also United States v. Lanier,* 520 U.S. 259, 272 n. 7, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) ("*Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."). A substantive due process analysis is therefore inappropriate in this case if the plaintiff's claim is covered by the Fourth Amendment. *County of Sacramento v. Lewis,* 523 U.S. 833, 843, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Here, it is clear that the plaintiff's constitutional challenge is "covered by" the Fourth Amendment. As discussed above, it is without question that the taking of blood for DNA analysis is a "search and seizure" under the Fourth Amendment. Accordingly, the Fourth Amendment, and not the substantive due process guarantees of the Fifth Amendment, is the proper benchmark under which the plaintiff's claim must be evaluated. The plaintiff's substantive due process claim must therefore be dismissed.

(C) Fifth Amendment Procedural Due Process Claim

[6] The plaintiff also challenges the constitutionality of the DNA Act and D.C.Code § 22-4151 on the ground that "[t]he taking of Mr. Johnson's DNA without cause, without any legitimate governmental purpose and entirely without any mechanism or opportunity for Mr. Johnson to object violated Mr. Johnson's right to procedural due process." Pl.'s Opp'n at 22. Here, the crux of the plaintiff's argument is that the two statutory provisions do not require individualized determinations, prior to the blood sample being taken, that qualifying individuals are "likely to recidivate via a crime with biological evidence." Pl.'s Opp'n at 22-23. In addition, the plaintiff contends that the DNA Act "has no internal guidelines for determining if a particular individual has actually been convicted of [a] qualifying offense." *Id.* at 23. The plaintiff opines that because the statute is without procedural mechanisms to challenge the government's collection of the sample, and to petition for the destruction or return of a sample once an individual has completed his term of community supervision, nor do the statutes place a limitation on the government's use of the information acquired from the sample, there is a high risk of erroneous deprivation of the plaintiff's liberty interest in his DNA. *Id.* at 24. This challenge must also be rejected.

*91 Similar arguments have been rejected by both the Ninth and Tenth Circuits. In *Rise,* the Ninth Circuit concluded that "[t]he extraction of blood from an individual in a simple, medically acceptable manner, despite the individual's lack of an opportunity to object to the procedure, does not implicate the Due Process Clause." *Rise,* 59 F.3d at 1562-63. Moreover, the Court noted that "[b]ecause the only criterion under [the DNA Act] for extracting blood is a conviction for a predicate offense, there would be little of substance to contest at any provided hearing." *Id.* at 1563. Accordingly, the Ninth Circuit rejected the plaintiff's procedural due process claims. The Tenth Circuit, relying on part in the Ninth Circuit's decision in *Rise,* also rejected the arguments that a plaintiff was denied procedural due process when his blood was taken for a DNA sample. *Boling v. Romer,* 101 F.3d 1336, 1340-41 (10th Cir.1996). Most recently, the United States District Court for the District of Kansas, relying on *Boling,* concluded that there was no procedural due process violation by requiring the plaintiff's to submit a blood sample pursuant to the DNA Act. *Miller,* 259 F.Supp.2d at 1169-70. *Miller* also noted that "even if [the] Plaintiff's challenge is the enactment of the law, rather than the method of the blood draw, his argument fails. When legislation affects a general class, the legislative process satisfies due process

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works

requirements." *Id.* at 1169.

[7][8][9] "The fundamental requirement of [procedural] due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus,* 435 U.S. 247, 259, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey,* 408 U.S. at 481, 92 S.Ct. 2593. In resolving claims that an individuals procedural due process rights have been violated, three factors are considered:

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

Mathews, 424 U.S. at 335, 96 S.Ct. 893.[FN7]

FN7. The defendants invite this Court to conclude that because Congress and the District of Columbia City Council have passed "a law which affects a general class of persons, those persons have received all procedural due process-the legislative process" that is due to them. Def.'s Reply at 9 (quoting *County Line Joint Venture v. City of Grand Prairie,* 839 F.2d 1142, 1144 (5th Cir.1988)). While the defendants accurately quote what the Fifth Circuit said, it is clear after a careful reading of *County Line* that it is simply not analogous to the case at hand. *County Line* and virtually every case adopting its logic address issues regarding land-use regulations. *See, e.g., 75 Acres, LLC v. Miami-Dade County, Fla.,* 338 F.3d 1288, 1295 (11th Cir.2003); *Jackson Court Condos., Inc. v. City of New Orleans,* 874 F.2d 1070 (5th Cir.1989); *but see Moss v. Cole,* 2004 WL 2248262 (N.D.Tex.2004) (cursorily dismissing *pro se* plaintiff's Fifth and Fourteenth Amendment procedural due process claims because he was afforded all the process he was due in the legislative process). Accordingly, this line of cases does not persuade the Court that the passage of the DNA Act and D.C.Code § 22-4151 alone provides all the process the plaintiff is due.

Applying the three *Mathews* factors here, it is clear that the plaintiff's procedural*92 due process claim has no merit.[FN8] This Court has already discussed at length the applicable private and public interest in its discussion of the plaintiff's Fourth Amendment claim. As discussed previously, the private interest at stake in this case is the plaintiff's right to the privacy of his identifying information, *i.e.,* his DNA sample and the information derived from it. However, as this Court discussed in its Fourth Amendment analysis, this privacy right was significantly diminished while the plaintiff was on probation. On the other hand, the government has a compelling interest to ensure that individuals who are on probation do not commit any further crimes and to solve both past and future crimes, which trumped the plaintiff's diminished privacy rights. Thus, the only factor that warrants additional discussion here is the risk of erroneous deprivation.

FN8. The Court limits its analysis to the period of time during which the plaintiff was on probation because that is the time during which the defendants demanded the plaintiff's DNA sample and thus the period when any alleged procedural due process violations occurred. The plaintiff also seems to suggest that his procedural due process rights were violated because the statute does not provide for a right of expungement of his DNA sample after his probationary term expired. Pl's Opp'n at 24. As this Court will more fully discuss below, *see infra,* part III(G), the plaintiff has no right to expungement of his DNA sample or the information contained in the CODIS database.

As to this remaining factor, the plaintiff argues that the DNA Act "has no internal guidelines for determining if a particular individual has actually been convicted of [a] qualifying offense." Pl.'s Opp'n at 23. The plaintiff further opines that because there are no procedures in place to challenge the government's acquisition and testing of samples, to petition for the destruction or return of a DNA

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

sample once an individual has completed his probation, or limit the government's use of the information derived from the sample, there is a high risk of erroneous deprivation of the plaintiff's liberty interest in his DNA. *Id.* at 24. However, this Court finds that the risk of erroneous deprivation is minimal at best. First, the DNA Act itself provides that a sample can only be collected from an individual who has been convicted of a qualifying offense. Thus, a person will only be required to submit a DNA sample if a judge or jury has determined, beyond a reasonable doubt, that the individual has committed the offense or the individual has acknowledged his guilt by entering a guilty plea. The procedures associated with these judicial proceedings for assessing guilt provide sufficient process to ensure that a person is not erroneously convicted of a predicate offense. In addition, the statute provides that if a conviction for a predicate offense is later overturned or reversed on appeal, the individual's DNA information may be removed from the CODIS database. 42 U.S.C. § 14132(d). Thus, the prospect that an innocent individual's DNA would be erroneously included in the CODIS database is minimal. Moreover, should there be a question as to the proper application of the statute's requirements, *i.e.*, if an offense is a "qualifying offense" to warrant the taking and processing of a DNA sample, a person can always bring a challenge in a court of competent jurisdiction. Finally, the statute explicitly limits how DNA samples can be used. Namely, the DNA sample, once obtained, is sent to the Director of the Federal Bureau of Investigation for analysis and inclusion in the CODIS database. 42 U.S.C. § 14135b(b). And such analysis ***93** is only conducted to determine "identification information in a bodily sample." 42 U.S.C. § 14135b(c)(2). In conclusion, the risk of erroneous deprivation, while conceivable, is remote. [FN9] Accordingly, the plaintiff's procedural due process claim is without merit and therefore must be dismissed.

FN9. The plaintiff also contends that there is a risk of "false matches" from the use of the information contained in CODIS database, thus creating a substantial risk that an individual could be implicated in a crime he did not commit. Pl.'s Opp'n at 23-24. He has submitted two declarations of scientific witnesses to support this theory. Pl.'s Opp'n, Ex. B (declaration of Greg Hampikian); Ex. C (declaration of Dan Krane). Assuming the accuracy of the declarations, there is no impediment to a challenge being made to an alleged false match if the government initiates action against an individual based on an alleged erroneous match. Moreover, this Court concludes that the possibility that the CODIS database may produce "false matches" does not outweigh the government's countervailing compelling interests.

(D) Fifth Amendment Equal Protection Claim

[10] The plaintiff also contends that the DNA Act and D.C.Code § 22-4151 violate the equal protection component of the Fifth Amendment [FN10] because they allegedly discriminate against him on the basis of race. Pl.'s Opp'n at 25. The graveman of this claim is that the two statutory provisions have been created and implemented with discriminatory intent. *Id.* Specifically, the plaintiff contends that the provisions have a disproportionate impact on racial minorities, especially African Americans males, because, for example, African American males are incarcerated at a much higher rate than white males. *Id.* at 26-27. Accordingly, the plaintiff opines that a disproportionate number of African American men are subject to mandatory DNA testing. *Id.* at 26-27. Moreover, the plaintiff posits that the United States has a long history of conducting discriminatory criminal investigations against minorities and disregarding the privacy rights of minorities. *Id.* at 27. Therefore, the plaintiff argues that because the DNA Act and D.C.Code § 22-4151 were purportedly enacted with an intent to discriminate, his equal protection claim must be reviewed under the "strict scrutiny" standard of review. *Id.* at 25.

FN10. The equal protection component of the Fifth Amendment is derived from the Amendment's due process clause. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 616, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

[11] "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)). "The general rule is that legislation is presumed to be valid and will be

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440, 105 S.Ct. 3249. However, "when a statute classifies by race, alienage, or national origin," courts must apply a "strict scrutiny" standard of review. *Id.* Accordingly, this Court must first determine what level of review it must employ in this case.

The plaintiff argues the DNA Act and D.C.Code § 22-4151 must withstand the heightened standard of review of strict scrutiny because their adoption and implementation have been "motived by ... racially discriminatory purpose[s]." Pl.'s Opp'n at 30. The plaintiff's argument in ***94** this regard is meritless. Despite the plaintiff's best effort to parse out portions of the legislative history of D.C.Code § 22-4151, there is simply no evidence, actual or circumstantial, that the District of Columbia Council ("D.C.Council") enacted D.C.Code § 22-4151 with any discriminatory intent. Moreover, the plaintiff does not point to any evidence in the legislative history of the DNA Act to suggest Congress had a discriminatory motive when it adopted the legislation.

In addition, the plaintiff claims that discriminatory intent can be inferred because the government should have been aware of the historical discriminatory impact the criminal justice system has had on racial and ethic minorities also has no merit.[FN11] The plaintiff's position is similar to arguments rejected by courts concerning whether the Federal Sentencing Guidelines violate the Equal Protection Clause as a result of the statistical proof that African-American's are convicted more often of drug crimes involving crack cocaine, while Caucasians are convicted at a statistically higher rate for drug offenses involving powder cocaine, which exposes them to less serious punishment. Courts which have addressed this issue have routinely affirmed the differing sentences based on the equal protection rational basis analysis, despite the statistical disparities. *See, e.g., United States v. Holton,* 116 F.3d 1536, 1548-49 (D.C.Cir.1997); *United States v. Watson,* 953 F.2d 895, 897-98 (5th Cir.1992). In *Holton,* the District of Columbia Circuit noted that when

> analyzing whether the sentencing disparity denies constitutional equal protection, the first inquiry is whether the mandatory crack minimums discriminate based on race. In order to prove that a facially neutral statute, such as the one involved here, violates equal protection guarantees, a challenger must demonstrate a racially discriminatory purpose behind the statute.

Holton, 116 F.3d at 1548 (citing *Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). The court further noted that while "[d]isparate racial impact can be probative of such purpose, ... it is not dispositive without more." *Id.* Applying this analytical framework to this case leads the Court to the conclusion that the plaintiff has simply failed to produce any evidence that the facially neutral statutes at issue here were enacted with a discriminatory purpose. In fact, the only evidence offered by the plaintiff in this regard is proof that the overall criminal justice system nationally, and specifically in the District of Columbia, has a disparate impact on the African American population. And this alone is simply insufficient to demonstrate discriminatory intent. *Id.* Accordingly, the plaintiff's equal protection challenge must be rejected if there is a rational basis for the statutes' enactment and enforcement is predicated on a legitimate state interest. *City of Cleburne,* 473 U.S. at 441, 105 S.Ct. 3249.

In fact, the plaintiff has failed to even invoke the protections provided by the Equal Protection Clause. As noted earlier, as a predicate to evoking the protections of the Equal Protection Clause, the plaintiff must demonstrate that he was similarly situated to other non-minority D.C.Code offenders who were treated differently. *See Plyler v. Doe,* 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Cook v. Babbitt,* 819 F.Supp. 1, 11 (D.D.C.1993) (citing *City of Cleburne,* 473 U.S. at 439, 105 S.Ct. 3249). Here, the law in ***95** question makes no distinction between offenders on the basis of their race. If an offender is convicted of one of the qualifying offenses, then, without regard to the offender's race, he or she is required to submit a DNA sample. In any event, as already discussed at length, the government has compelling interests in securing and processing DNA samples of individuals with qualifying convictions, *i.e.*, ensuring compliance with conditional release requirements, preventing future crimes, and solving past and future offenses. Clearly, the compulsory taking of DNA samples is rationally related to these legitimate state interests. Therefore, the plaintiff's equal protection claim must

> FN11. The plaintiff does not allege, nor can he, that an individual on probation is part of a suspect class warranting "strict scrutiny" review of his equal protection claim. *See Nicholas v. Riley,* 874 F.Supp. 10, 12 (D.D.C.1995), *aff'd* 1995 WL 686227 (D.C.Cir.1995).

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works

be dismissed.

(E) Ex Post Facto Clause Claim

[12][13][14] The plaintiff further argues that the DNA Act and D.C.Code § 22-4151 violate the Ex Post Facto Clause provisions of Article I, sections 9 and 10 of the Constitution because the D.C.Code provision implementing the DNA Act was signed after the plaintiff was convicted and sentenced in his underlying criminal case. Pl.'s Opp'n at 31. "The constitutional bar on the enactment of ex post facto laws means that '[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts.' " *Blair-Bey v. Quick,* 151 F.3d 1036, 1048 (D.C.Cir.1998) (quoting *Collins v. Youngblood,* 497 U.S. 37, 43, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)). Thus,

> [a] law implicates the Ex Post Facto Clause only if it criminalizes conduct that was not a crime when it was committed, increases the punishment for a crime beyond what it was at the time the act was committed, or deprives a person of a defense available at the time the act was committed.

Rise, 59 F.3d at 1562 (citing *Collins,* 497 U.S. at 42-43, 110 S.Ct. 2715). To determine whether a statute violates the Ex Post Facto Clause, the Court must engage in a two step analysis.[FN12] *Smith v. Doe,* 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). First, this Court must determine if the legislative bodies, through the enactment of the DNA Act and D.C.Code § 22-4151, intended to impose a criminal punishment. *Id.* If the intention was to impose a criminal punishment, then the Ex Post Facto Clause applies. *Id.* However, if the legislature intended to create a civil and non-punitive scheme, the Court must determine whether the statute is nevertheless " 'so punitive either in purpose or effect as to negate [the legislature's] intention' to deem it 'civil.' " *Id.*

> FN12. As a predicate to this analysis, of course, the Court must first determine whether the statute in question was intended to be applied or is being applied retroactively. *See, e.g., INS v. St. Cyr,* 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). The parties concede that the statutes in question were intended to have a retroactive affect, accordingly, this Court need not engage in this analysis. Defs.' Reply at 12 ("plain language of the DNA Act calls for retroactive application"); Pl.'s Opp'n at 31 ("The issue here is merely whether the DNA Act 'makes more burdensome the punishment for a crime.' ").

Just as courts have upheld the constitutionality of the DNA Act under the Fourth Amendment, so to have courts found that the DNA Act does not run afoul of the Ex Post Facto Clause. *See, e.g., Rise,* 59 F.3d at 1562; *Jones,* 962 F.2d at 308-10; *United States v. Reynard,* 220 F.Supp.2d 1142, 1157-1162 (S.D.Cal.2002); *Raines,* 857 A.2d at 25-41. The analyses by the courts that have addressed the question are convincing and this Court declines to take a different position.

The plaintiff first argues that the DNA Act, as implemented in the District of Columbia by the D.C. Council, is punitive and thus violates the Ex Post Facto Clause. ***96** Pl.'s Opp'n at 32. To support this conclusion, the plaintiff alleges that (1) the District of Columbia statutory provision is codified in Title 22 of the District of Columbia Code which is titled "Criminal Offenses and Penalties;" (2) the Bureau of Prisons and Court Services and Offender Supervision Agency administer the program; and (3) DNA collection is now a condition of probation, making it part of a defendant's sentence. *Id.* Moreover, the plaintiff opines that the D.C. Council, when enacting D.C.Code § 22-4151, intended for the legislation to be punitive in nature. *Id.* Finally, the plaintiff contends that even if the statute is considered to be civil in nature and not punitive, its effect is sufficiently punitive to implicate the Ex Post Facto Clause. *Id.* at 33.

The Court begins by noting that there are two distinct statutes in play. The first is the DNA Act passed by Congress. 42 U.S.C. § 14135 *et seq.* The second is the application of the DNA Act by the D.C. Council to certain "qualifying offenses" through the enactment of D.C.Code § 22-4151. The plaintiff's argument attempts to conflate the two statutes, which were created by two separate legislative bodies, in his effort to strengthen his argument that the legislative intent underlying the DNA Act and the District of Columbia implementing statute demonstrate that DNA collection is intended to be punitive. This Court cannot accept the plaintiff's reasoning.

The congressionally enacted DNA Act mandates that the Bureau of Prisons and Court Services and Offenders Supervision Agency administer the process of securing DNA samples from qualifying individuals. 42 U.S.C. § 14135b(a)(5)-[illegible].

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

Moreover, the requirement that qualifying individuals provide DNA samples as a condition of post-conviction community release is also contained in the congressionally enacted legislation. 42 U.S.C. § 14135c. Contrary to the plaintiff's position, the DNA Act was not intended by Congress to be punitive. As noted by another district court:

The legislative history of the DNA Act demonstrates that Congress did not create the Act as a means for punishing qualifying offenders for past convictions. Instead, Congress desired to assist law enforcement agencies to perform their basic law enforcement function by "match[ing] DNA samples from crime scenes where there are no suspects with the DNA of convicted offenders." 146 Cong. Rec. H8572-01, at *H8575. Additionally, Congress intended to increase the efficacy of the criminal justice system by "eliminat [ing] the prospect that innocent individuals w[ill] be wrongly held for crimes that they did not commit." *Id.* at *H8576. Furthermore, Congress desired to prevent violent felons from repeating their crimes in the future. 146 Cong. Rec. S11645-02, at *S11646 ("Statistics show that many of these violent felons will repeat their crimes once they are back in society"). This legislative history indicates that Congress did not authorize blood draws under the DNA Act to "punish" qualifying offenders.

Reynard, 220 F.Supp.2d at 1161. This Court agrees with this analysis. It is one thing to impose criminal sanctions for the commission of criminal conduct while it is quite another thing to establish mechanisms designed to deter or detect criminal conduct. The former is punishment, the latter is not. Moreover, as discussed more fully below, the DNA Act does not have the punitive effect necessary to implicate the Ex Post Facto Clause. *Id.* at 1161-62; *see also* *Jones,* 962 F.2d at 309; *Rise,* 59 F.3d at 1562.

In his attempt to demonstrate that the D.C. Council's enactment of the local qualifying*97 offense component of the DNA Act was intended to be punitive, the plaintiff relies on the location of the provision in the D.C.Code (Title 22 "Criminal Offenses and Penalties") and the report from the D.C. Council on the bill. Pl.'s Opp'n at 32. First, the location of this provision does not, by itself, show that D.C.Code § 22-4151 was intended by the D.C. Council to be punitive in nature. As noted by the Supreme Court, "[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Smith,* 538 U.S. at 94, 123 S.Ct. 1140; *cf. Johnston v. Comm'r of Internal Revenue,* 114 F.3d 145, 150 (10th Cir.1997) (holding that "under the general rules of statutory interpretation, the title to a statutory provision is not part of the law itself, although it can be used to interpret an ambiguous statute.").

Moreover, the plaintiff's reliance on the D.C. Council's Committee the Judiciary Report on Bill 14-63, entitled the DNA Sample Collection Act of 2001, (April 24, 2001) (hereinafter "D.C. Council Report"), does not aid his cause. The plaintiff first contends that a statement by former Councilmember Harold Brazil supporting an amendment to expand the number of qualifying offenses buttress his conclusion that D.C.Code § 22-4151 was enacted to punish criminal defendants. Pl.'s Opp'n at 32-33 (citing D.C. Council Report at 14-15). The Court cannot agree. The Court does not construe the former Councilmember's statements as reflecting his intent to make the DNA requirement punitive.[FN13] But even if that construction can be attached to the remarks, they were merely statements by one member of the Council, not the sentiment of the entire body and are thus deserving of little weight. *See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 118, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980) ("ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."). Moreover, the amendment to expand the number of qualifying offenses was not adopted. D.C. Council Report at 15. Accordingly, it appears that the majority of the Council disagreed with former Councilmember Brazil's position.

FN13. Former Councilmember Brazil stated that while he supported the bill, he believes it should be expanded to include a greater number of qualifying offenses. He noted "these are people who are convicted of crimes." D.C. Council Report at 14-15.

The plaintiff also references a portion of the Report which reads: "[i]t is the Committee's view that the mere possibility that someone convicted of a property crime or low level felony may commit a more serious crime in the future is insufficient to justify the significant invasion of privacy at issue here." *Id.* at 6. The plaintiff opines that this statement "reveals a clearly *retributive* legislative rationale in the D.C. Council's discussion of the appropriate extent of the Act." Pl.'s Opp'n at 32. The plaintiff's reading of this statement misses the mark. When viewing the Report as a whole, rather than in fragmented sections, it is clear that this statement reflects the D.C.

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

Council's view that it had attempted to carefully balance legitimate law enforcement objectives with privacy rights in determining what offenses merited DNA sample collection. This effort to reach the appropriate balance fails to demonstrate that the D.C. Council intended D.C.Code § 22-4151 to be punitive. Such a reading is simply not a reasonable interpretation of the Council's Report. Thus, since neither the DNA Act, nor the D.C.Code provision implementing it in the District of Columbia were intended to be punitive in nature, this Court must now assess whether the statute is nonetheless so punitive, either in *98 purpose or effect, that the legislative intent becomes irrelevant.

In making this second determination, the Court is guided by seven factors enunciated by the Supreme Court in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). Specifically, the Court stated that "[a]bsent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face." *Id.* at 168, 83 S.Ct. 554.

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. at 168-69, 83 S.Ct. 554. Applying these factors to both the DNA Act and the District of Columbia statute does not call for the conclusion that these two statutory provisions violate the Ex Post Facto Clause.

First, to assess whether the statutes invoke an "affirmative disability" or "restraint" the Court must "inquire how the effects of the [statute] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Hatton v. Bonner,* 356 F.3d 955, 963 (9th Cir.2004) (internal quotation marks omitted). In this case, the DNA Act requires individuals to submit only one DNA sample and requires no further action by the individual, therefore, the "affirmative disability or restraint" is minimal. 42 U.S.C. § 14135b(a)(1)-(2) ("The Director of the Bureau of Prisons shall collect *a* DNA sample ....") (emphasis added); [FN11] *see Russell v. Gregoire,* 124 F.3d 1079, 1082, 1088 (9th Cir.1997) (sex offender registration requirement enacted after plaintiff's conviction held not to violate Ex Post Fact Clause because, *inter alia,* the restraint placed on the plaintiff to register as a sex-offender was minimal). Second, the plaintiff concedes that although they contend that DNA sampling is punishment, the second factor does not come into play in this case since there is no history of the use of DNA sampling as punishment. *See* Pl.'s Opp'n at 33 n. 26. However, as discussed below, there is a history of using conditions of release as a deterrent, and since DNA sampling is a condition of release, it could be viewed as punishment. *See, e.g., Reynard,* 220 F.Supp.2d at 1162. Third, there is no scienter component to either the DNA Act or D.C.Code § 22-4151. "Fourth, conditions of supervised release have not historically been regarded as punishment, but instead as a means to further the deterrent, protective, and rehabilitative goals of sentencing." *Reynard,* 220 F.Supp.2d at 1162 (citing *United States v. Eyler,* 67 F.3d 1386, 1393 (9th Cir.1995)). This factor could support both the plaintiffs and the defendants' positions because DNA sampling does serve as a deterrent, but was not created for retribution. Fifth, an individual's failure to comply with the requirement to provide a sample is punishable under the DNA Act as a separate offense-a class A misdemeanor-as opposed*99 to enhancing the sentence previously imposed for the qualifying offense. 42 U.S.C. § 14135a(a)(5)(A)-(B). In addition, the legislative history of the DNA Act indicates that there is a non-punitive, alternative purpose underlying its enactment-"eliminat[ing] the prospect that innocent individuals w[ill] be wrongly held for crimes they did not commit." 146 Cong. Rec. H8572-01, at *H8576. Balancing these factors, it is clear that neither the DNA Act nor D.C.Code § 22-4151 criminalize any conduct of the plaintiff committed prior to the statutes' enactment, nor do the statutes inflict any greater punishment for such conduct. Rather, the Act simply, in a reasonable fashion, creates a new regulatory system for the maintenance of DNA samples in order to serve various legitimate law enforcement functions. Moreover, failure to comply with this new regulatory system provides for a penalty separate and apart from the penalty for the underlying qualifying offense. [FN12] Accordingly, neither the DNA Act nor D.C.Code § 22-4151 offend the Ex Post Facto Clause and the plaintiff's claim asserting this constitutional violation must be dismissed.

FN11. However, the Director of the Bureau

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

of Prisons or an agency "may (but need not) collect a DNA sample from" an individual who's DNA analysis is already contained in the CODIS database. 42 U.S.C. § 14135b(a)(3).

FN15. Admittedly, because submission of a DNA sample is now a condition of release for individuals on probation, parole, or supervised release, failure to comply with this condition could result in their release being terminated. However, this potential consequence does not increase the punishment for the commission of the underlying offense and therefore does not alter this Court's Ex Post Facto Clause analysis. *See, e.g., Jones,* 962 F.2d at 309-310.

(F) Health Insurance Portability and Accountability Act Claim

[15] The plaintiff also contends that the DNA Act violates the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § § 1320d to d-8, by "disclosing highly sensitive medical and genetic information in which [the plaintiff] has a strong privacy interest." Compl. ¶ 19. The HIPAA imposes requirements on the Department of Health and Human Services, health plans, and healthcare providers involved in the exchange of health information to protect the confidentiality of such information and provides for both civil and criminal penalties for individuals who improperly handle or disclose individually identifiable health information. 42 U.S.C. § § 1320d to d-8. The defendants contend that the HIPAA does not provide for a private right of action and therefore this statutorily based claim cannot be maintained because the government has not waived its sovereign immunity. Def.'s Reply at 16-17. The plaintiff counters that a private right of action can be implied in the statute. Pl.'s Opp'n at 34.

In order for this Court to find that there is an implied private right of action under the HIPAA, this Court must determine whether Congress intended to create such a right. *Anderson v. USAir, Inc.,* 818 F.2d 49, 54 (D.C.Cir.1987).

Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

Alexander v. Sandoval, 532 U.S. 275, 286-87, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (internal citations omitted). While only a handful of courts have examined whether a *100 private right of action is implied under the HIPAA, each Court has rejected the position. *See O'Donnell v. Blue Cross Blue Shield of Wyo.,* 173 F.Supp.2d 1176 (D.Wyo.2001); *Brock v. Provident Am. Ins. Co.,* 144 F.Supp.2d 652 (N.D.Tex.2001); *Means v. Indep. Life and Accident Ins. Co.,* 963 F.Supp. 1131 (M.D.Ala.1997); *Wright v. Combined Ins. Co. of Am.,* 959 F.Supp. 356 (N.D.Miss.1997). In fact, the most recent opinion to address this question was written by another member of this court. In *Logan v. Dep't of Veterans Affairs,* 357 F.Supp.2d 149 (D.D.C.2004), after reviewing the HIPAA provisions governing the disclosure of individually identifiable health information, the court concluded thatCongress enacted HIPAA, in part, to address concerns about the confidentiality of health information, particularly in the era of electronic communication. Section 262 of HIPAA (codified as 42 U.S.C. § § 1320d to d-8) defines terms and imposes requirements on the Department of Health and Human Services ("HHS"), health plans, and healthcare providers involved in the exchange of health information. HIPAA provides for both civil and criminal penalties to be imposed upon individuals who improperly handle or disclose individually identifiable health information. 42 U.S.C. § § 1320d-5 to d-6. However, the law specifically indicates that the Secretary of HHS shall pursue the action against an alleged offender, not a private individual.

Id. at 155. In *Logan,* a government employee attempted to bring an action against the government for allegedly disclosing individually identifiable health information. The *Logan* court concluded that the HIPAA did not provide for a private right of action and it therefore did not have subject matter jurisdiction over the plaintiff's HIPAA claim. Accordingly, the claim was dismissed pursuant to Rule 12(b)(1). *Id.* at 155.

Here, the plaintiff challenges, pursuant to the HIPAA, the disclosure of information regarding his DNA. Compl. ¶ 19. Assuming for the sake of argument that the HIPAA prevents the disclosure of this type of medical information, the plaintiff and not the Secretary of HHS has initiated this action. And

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

it is the Secretary who is empowered by the HIPAA to do so. 42 U.S.C. § 1320d-5. Accordingly, because no private right of action exists under the HIPAA, this Court does not have subject matter jurisdiction over this claim and it must be dismissed.

(G) International Convention of the Elimination of all Forms of Racial Discrimination

[16] The plaintiff's final cause of action is that the DNA Act and D.C.Code § 22-4151 violate the International Convention of the Elimination of all Forms of Racial Discrimination ("CERD"), 660 U.N.T.S. 195. The purpose of the CERD is "to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination...." *Id.* at *54. The defendants argue that the plaintiff does not have a private right of action under the CERD. Defs.' Mem. at 18.

It is well-established in this Circuit that in order for a party to assert a claim under a treaty, the treaty (or clauses therein) must confer such a rights. "Whether a treaty clause does create such enforcement rights is often described as part of the larger question of whether that clause [or treaty] is 'self-executing.' " ***101** *Comm. of United States Citizens Living in Nicaragua v. Reagan,* 859 F.2d 929, 937 (D.C.Cir.1988). The Circuit Court "has noted that, in 'determining whether a treaty is self-executing' in the sense of its creating private enforcement rights, 'courts look to the intent of the signatory parties as manifested by the language of the instrument.' " *Id.* (quoting *Diggs v. Richardson,* 555 F.2d 848, 851 (D.C.Cir.1976)).

Only two courts have reviewed the CERD for the purpose of determining whether it is self-executing and therefore permits a private right of action, both concluding that it did not. Both the United States District Court for the District of Connecticut in *United States v. Perez,* No. 03-02, 2004 WL 935260, at *17 (D.Conn. April 29, 2004) and the United States District Court for the Southern District of New York in *Hayden v. Pataki,* No. 00-8586, 2004 WL 1335921, at *7 (S.D.N.Y. June 14, 2004) concluded that the CERD was not self-executing and thus did not create a private right of action. Thus, both courts concluded that they did not have authority to hear claims brought pursuant to the treaty. This Court agrees. *See* International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (ratified by the United States June 24, 1994); S. Res. of Advice and Consent to Ratification of the CERD, 103d Cong., 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994) ("the United States declares that the provisions of the Convention are not self-executing."); *see also* S. Res. of Advice and Consent to Ratification of the ICCPR, 102d Cong., 138 Cong. Rec. S4781, S4783 (daily ed. Apr. 2, 1992) (declaring that "the provisions of articles 1 through 27 of the Covenant are not self-executing."). Accordingly, this Court does not have jurisdiction to entertain claims brought pursuant to the CERD and therefore this claim must be dismissed.

(G) Expungement of the Plaintiff's DNA Sample and Its Analysis

[17] The plaintiff's final argument, and one that is discussed throughout his opposition, is that since he has now completed his term of probation, the supervisory function served by taking his DNA sample no longer exists. Pl.'s Opp'n at 4 (this case "calls upon the Court to decide, among other things, the heretofore unresolved question of whether a DNA sample collected pursuant to the DNA Act 'may properly be retained by the government after the felon has finished his or her term and has paid his or her debt to society.' "). Accordingly, the plaintiff opines that even if he could have been required to submit a DNA sample earlier, because he is now "free" from government supervision, the sample would now have to be discarded and the analysis expunged from the CODIS database. *Id.*

In *Kincade,* Judge Gould, in his concurrence, noted that the court did not decide the issue of whether a CODIS entry should be erased once the offender has completed his sentence. *Kincade,* 379 F.3d at 841 (Gould, J., concurring). Judge Gould commented, however, that when this issue is properly presented to that court, it "would presumably need to weigh society's benefit from retention of the DNA records of a felon against that person's right, in a classical sense, to privacy." *Id.* at 842. Judge Gould noted that in making such a determination the court could arguably make use, through analogy, of fingerprints, which "are routinely maintained in law enforcement files once taken...." *Id.* at 842 n. 3. However, Judge Gould acknowledged that "unlike fingerprints, DNA stores and reveals massive amounts of personal,

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

private data about that individual...." *Id.* *A.A. v. Att'y General of New Jersey,* Civil Action No. MER-L-0346-04, December ***102** 22, 2004 (N.J.Super. Ct. Law Div.) (Sabatino, S.J.C.) is the only case this Court's research has disclosed that directly addresses the issue. There, the court concluded that "[i]f and when [an individual's] supervised release status ends, the individual's privacy expectations increase and the State's justifications for maintaining the DNA profile decline." *Id.* at 55. The court analogized the failure to return an individual's DNA sample and its analysis with the government retaining an individual's property without a forfeiture hearing being conducted or there being a waiver of one's interest in the property. *Id.* at 56. Accordingly, the New Jersey Superior Court "engraft[ed], a right of post-conviction expungement upon the [New Jersey] DNA Act as an appropriate measure to save the law's constitutionality." *Id.* at 56-57.

This Court cannot buy in on the conclusion reached by the New Jersey Superior Court. At the outset, the Court does not find the forfeiture analogy employed by the New Jersey court persuasive. Specifically, this Court does not believe that a DNA sample is akin to a right in property. The interest here is a privacy interest in identification information. As the Ninth Circuit recognized, a DNA sample "establishes only a record of the defendant's identity-otherwise personal information in which the qualified offender can claim no right of privacy once lawfully convicted of a qualifying offense." Kincade, 379 F.3d at 837. This Court does not believe that an identification record is similar, in any respect, to an interest in property. Rather, to determine whether an individual's DNA profile must be expunged after that individual's sentence has been completed, this Court must, as Judge Gould posited, balance the individual's privacy interest with the public's interest in maintaining the records.

The Court first starts this analysis with an assessment of the privacy interest at stake.

Although the full measure of the constitutional protection of the right to privacy has not yet been delineated, we know that it extends to two types of privacy interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."

United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir.1980) (quoting *Whalen v. Roe,* 429 U.S. 589, 599-600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (footnotes omitted)). "[M]atters relating to marriage, procreation, contraception, family relationships, and child rearing and education" fall into the latter category. *Paul v. Davis,* 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). "The privacy interest asserted in this case falls within the first category referred to in *Whalen v. Roe,* the right not to have an individual's private affairs made public by the government." *Westinghouse,* 638 F.2d at 577.

The analysis of the privacy interest here requires the Court to determine what interest an individual who was convicted of a qualifying offense and who was therefore required to submit a DNA sample has in that DNA sample once his sentence has been completed. As discussed earlier, while on probation, an individual has a substantially diminished privacy interest. As the Ninth Circuit noted in *Rise,* "[o]nce a person is convicted of one of the felonies included as predicate offenses under [the DNA Act], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling." *Rise,* 59 F.3d at 1560. When an individual completes his or her sentence for a predicate offense, the diminished privacy***103** interest is, to some extent, reclaimed. For example, a former offender's privacy right in his property and person that had been lost while incarcerated or on conditional release are restored. *See, e.g., United States v. Thomas,* 991 F.2d 206, 213-14 (5th Cir.1993) (discussing the restoration of an ex-offender's civil rights under Texas law). However, that individual does not regain in full, the privacy rights possessed by an individual who has never been convicted of a predicate offense. For example, despite having served their sentences, law enforcement officials routinely retain fingerprints of ex-offenders and even those individuals who were arrested but never convicted of the crime for which they were arrested, and such fingerprints are entered into databases routinely used to help solve both past and future crimes. *See Kincade,* 379 F.3d at 842 n. 3. Courts have found that "under the obligations which the ... Police Department has in maintaining the public safety and welfare ... the ... Police [are] justified and, indeed, duty-bound to compile and retain arrest records [including fingerprints] of all persons arrested, and the execution of that policy does not violate [a] plaintiff's right to privacy." *Herschel v. Dyra,* 365 F.2d 17, 20 (7th Cir.1966); *see also United States v. Schnitzer,* 567 F.2d 536, 539 (2d Cir.1977) ("Retaining and preserving arrest records [including fingerprints] serves important functions of promoting effective law enforcement"

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

and thus expungement is not warranted); *United States v. Seasholtz,* 376 F.Supp. 1288, 1290 (N.D.Okla.1974) ("There is a compelling public need for an effective and workable criminal identification procedure."). In this Circuit, expungement is warranted only when it is proven that an arrest was illegal.[FN16] *See Humbles v. District of Columbia,* No. 97-1924, 2000 WL 246578 (D.D.C. Feb.18, 2000); *Sullivan v. Murphy,* 380 F.Supp. 867, 868 (D.D.C.1974). Admittedly, fingerprints and a "genetic fingerprint" based on DNA processing are not identical, especially since the amount of identifying information contained in DNA is much greater.[FN17] Nevertheless, retention of fingerprints is a generally accepted practice of law enforcement and supports the conclusion that ex-offenders have a reduced expectation of privacy in his or her identity even after their sentences have been completed.

FN16. In some instances, juveniles are entitled to have their arrest records, including fingerprints expunged. *See Matter of Cheso,* 146 Misc.2d 861, 552 N.Y.S.2d 822 (N.Y.Fam.Ct.1990); *but see In Interest of Jacobs,* 334 Pa.Super. 613, 483 A.2d 907 (1984).

FN17. The potential that a DNA sample may be "mined" for data far beyond what is necessary for the CODIS database and then shared with private parties or other non-law enforcement entities is curtailed by the structure of the DNA Act. For example, as noted earlier, information contained in the CODIS database can only be accessed by a small group of individuals. *See* 42 U.S.C. § 14132(b)(3). Moreover, the DNA analysis conducted on a sample is only conducted to determine "identification information." *See* 42 U.S.C. § 14135b(c)(2). Thus, the Act itself protects the privacy interests of those individuals whose samples are contained in the database. Moreover, if future technology permits the type of mining of data and analysis about which the plaintiff is concerned and his sample is being used in that manner, he can at that time challenge the new procedures and the use of his sample as being violative of the DNA Act.

A second example further illustrates this point. An ex-offender's reduced expectation of privacy in his or her identity is also seen in sex offender statutes. For example, individuals who are convicted of sexual offenses must, despite having completed their sentences, nevertheless register with local authorities pursuant to state and federal sex offender registration statutes. *See, e.g.,* D.C.Code § 22-4001 *et seq.* ***104** These regulations require that ex-offenders provide to local authorities certain identifying information, *i.e.,* their name and addresses. *See, e.g.,* D.C.Code § 22-4007 (registration information may include: name, aliases, date of birth, sex, race, height, weight, eye color, identifying marks and characteristics, driver's license number, social security number, home address or expected place of residence, and any current or expected place of employment or school attendance). Moreover, under sex-offender registration statutes, this identifying information can be shared with victims, witnesses, public and private education institutions, day care facilities, members of the public or governmental agencies requesting information for employment or foster care background checks, the public at large, and any unit of the police department. D.C.Code § 22-4011(a)(1)-(5). The constitutionality of these statutes have been universally upheld and courts have concluded that they do not violate an ex-offenders right of privacy. *See, e.g., A.A. ex rel. M.M. v. New Jersey,* 341 F.3d 206 (3d Cir.2003) ("We conclude that whatever privacy interest the Registrants have in their home addresses is substantially outweighed by the State's interest in expanding the reach of its notification to protect additional members of the public."); *Paul P. v. Farmer,* 92 F.Supp.2d 410 (D.N.J.2000) (same); *People v. Malchow,* 193 Ill.2d 413, 250 Ill.Dec. 670, 739 N.E.2d 433 (2000) ("The information defendant contends should not be disclosed under the Notification Law is not within any of these recognized areas of the right to privacy" under the United States Constitution); *cf. Paul P. v. Farmer,* 80 F.Supp.2d 320, 325 (D.N.J.2000) (State procedures for sex-offender information "unreasonably infringe upon plaintiffs' privacy rights and [the Court ordered] that they be redrafted to reasonably limit disclosure to those entitled to receive it.").

Compared with the intrusion occasioned by sex offender registries, the privacy infringement resulting from the retention of DNA results is much more limited. Here, the DNA analyses can only be shared with a very limited group (not the public at large), 42 U.S.C. § 14132(b)(3), and there are criminal penalties for the improper dissemination of DNA data. 42 U.S.C. § 14135e(c). It is therefore the Court's conclusion that although individuals convicted of a predicate offense have an enhanced privacy interest in their identifying information after

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

the termination of their sentences, that interest is not totally restored (and is certainly not at the same level as someone who has never been convicted of such offense), and is outweighed by the compelling government interests associated with the retention of the information.

As to the government's interests, although the need to supervise and monitor qualifying individuals after their conditional release drops out of the picture at the conclusion of their sentences, the government's interests regarding the identify of such individuals remains compelling. This is so because the government still has a substantial interest in identifying ex-offenders who commit new offense and to prevent them from thereafter committing further crimes. As already noted, the rate of recidivism among ex-offenders is high. *Crawford,* 372 F.3d at 1069-70 (Trott, J., concurring). In fact, the Department of Justice, Bureau of Justice Statistics reports that "[o]f the 272,111 persons released from prisons in 15 States in 1994, an estimated 67.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.9% were reconvicted, and 25.4% resentenced to prison for a new crime." Department of Justice, Bureau of Justice ***105** Statistics, *Criminal Offender Statistics* (Dec. 28, 2004) *available at* http://www.ojp. usdoj.gov/bjs/c rimoff.htm. Thus, "[t]here is a compelling public need for an effective and workable criminal identification procedure." *Seasholtz,* 376 F.Supp. at 1290. Such systems further the government's continued interest in protecting the public and solving criminal offenses committed in the past. As the District of Columbia Court of Appeals noted in *District of Columbia v. Hudson,* 404 A.2d 175, 178 (D.C.1979) (en banc), "[t]he 'retention of arrest records is justified by their potential future usefulness in helping police prevent crimes and apprehend criminals.' " *Id.* at 178. Retaining DNA samples and their analyses serves the same useful purposes.

In balancing these competing interests, the Court first notes that the requirement that a person submit to a DNA sample for testing is not, as discussed when the Court addressed the plaintiff's ex post facto claim, a punitive requirement, but rather one that serves a proper governmental regulatory function. Thus, any intrusion into the plaintiff's privacy right is not punitive in effect or otherwise. Moreover, as discussed above, the government has a compelling interest in maintaining this regulatory function through the CODIS database. This Court therefore concludes that the government's interest far outweighs the diminished privacy interest held by the plaintiff even after the completion of his sentence. Accordingly, the government is not violating the plaintiff's privacy interest by retaining his DNA sample and its analysis now that his sentences has been completed. [FN18]

FN18. Even if this Court concluded that expungement is required, it is not clear that this Court has before it the proper defendant to order that the DNA sample and its analysis be expunged. As Laura Hankins, Chief Legislative Counsel for the Public Defenders Service noted, "the FBI, not the District, has custody of the DNA sample." D.C. Council Report at 13; 42 U.S.C. § 14135b(b) (mandating that DNA samples be given to the FBI for analysis). Moreover, the FBI, not the District of Columbia maintains the CODIS database. H.R.Rep. No. 106-900, at 8. And the FBI is not a defendant in this action, and therefore this Court could not order the defendants before it to provide the relief being requested.

VI. *Conclusion*

For the foregoing reasons, all of the plaintiff's claims are without merit and must be dismissed.

SO ORDERED this day of 21st day of March, 2005.[FN19]

FN19. An Order consistent with the Court's ruling accompanies this Memorandum Opinion.

D.D.C.,2005.
Johnson v. Quander
370 F.Supp.2d 79

Briefs and Other Related Documents (Back to top)

- 2004 WL 3262555 (Trial Motion, Memorandum and Affidavit) Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss (Sep. 27, 2004)
- 2004 WL 3262556 (Trial Motion, Memorandum and Affidavit) Defendants' Motion to Dismiss (Jul. 16, 2004)
- 2004 WL 2056934 (Trial Motion, Memorandum and Affidavit) Defendants' Opposition to Plaintiff's Motion for a Temporary Restraining Order (Mar. 29, 2004)
- 2004 WL 2056925 (Trial Pleading) Complaint (Fed.

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

R. Civ. P. 3 & 8) (Mar. 18, 2004)
• 1:04cv00448 (Docket) (Mar. 18, 2004)

END OF DOCUMENT

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

H
Briefs and Other Related Documents

United States Court of Appeals,District of Columbia Circuit.
Lamar JOHNSON, Appellant
v.
Paul A. QUANDER, et al., Appellees.
No. 05-5156.

Argued Feb. 17, 2006.
Decided March 17, 2006.

Background: Probationer convicted on two counts of unarmed robbery brought action challenging validity of the DNA Analysis Backlog Elimination Act (DNA Act) and District of Columbia's implementing statute, after refusing to provide a DNA sample as required by the Act. The United States District Court for the District of Columbia, Walton, J., 370 F.Supp.2d 79, granted defendant's motion to dismiss. Probationer appealed.

Holdings: The Court of Appeals, Sentelle, Circuit Judge, held that:

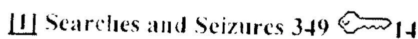
3(1) requiring probationer to provide DNA sample under DNA Analysis Backlog Elimination Act was reasonable under Fourth Amendment;

5(2) Fourth Amendment did not prohibit government from storing probationer's genetic fingerprint n database after period of probation ended; and

6(3) District of Columbia statute implementing DNA Analysis Backlog Elimination Act did not violate the Ex Post Facto Clause.

Affirmed.

West Headnotes

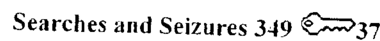

[1] Searches and Seizures 349 14

349 Searches and Seizures
349I In General
349k13 What Constitutes Search or Seizure
349k14 k. Taking Samples of Blood, or Other Physical Specimens; Handwriting Exemplars. Most Cited Cases

The compulsory extraction of blood for DNA profiling constitutes a search within the meaning of the Fourth Amendment. U.S.C.A. Const.Amend. 4.

[2] Searches and Seizures 349 23

349 Searches and Seizures
349I In General
349k23 k. Fourth Amendment and Reasonableness in General. Most Cited Cases


Searches and Seizures 349 37

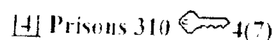
349 Searches and Seizures
349I In General
349k36 Circumstances Affecting Validity of Warrantless Search, in General
349k37 k. Nature and Source of Information in General; Suspicion or Conjecture. Most Cited Cases

In certain limited circumstances, the Government's interests are sufficiently compelling to justify the intrusion on privacy entailed by conducting searches without any measure of individualized suspicion. U.S.C.A. Const.Amend. 4.

[3] Sentencing and Punishment 350H 1996

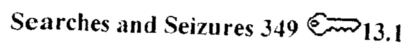
350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(H) Searches and Seizures
350Hk1996 k. Tests, Samples, and Specimens. Most Cited Cases

Requiring probationer convicted of two counts of felony level unarmed robbery to provide DNA sample under DNA Analysis Backlog Elimination Act (DNA Act) and District of Columbia's implementing statute was reasonable under Fourth Amendment; probationer's privacy interest in his identity was diminished while on probation, such interest was outweighed by government's interests in monitoring probationers, deterring recidivism, and protecting public, and privacy invasion caused by blood test was relatively minimal. U.S.C.A. Const.Amend. 4; DNA Analysis Backlog Elimination Act of 2000, § 2, 42 U.S.C.A. § 14135 et seq.; D.C. Official Code, 2001 Ed. § 22-4151.


[4] Prisons 310 4(7)

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

310 Prisons
310k4 Regulation and Supervision
310k4(7) k. Personal Grooming and Effects; Contraband and Searches. Most Cited Cases
The Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken from incarcerated felons for the purpose of identifying them. U.S.C.A. Const.Amend. 4.


[5] Criminal Law 110 1226(1)

110 Criminal Law
110XXVIII Criminal Records
110k1226 In General
110k1226(1) k. In General; Right to Maintain. Most Cited Cases

Searches and Seizures 349 13.1

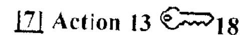
349 Searches and Seizures
349I In General
349k13 What Constitutes Search or Seizure
349k13.1 k. In General. Most Cited Cases
Fourth Amendment did not prohibit government from storing probationer's genetic fingerprint, created from his DNA sample collected under DNA Analysis Backlog Elimination Act (DNA Act) and District of Columbia's implementing statute, in database after period of probation for felony level unarmed robbery ended; accessing records stored in database was not a search for Fourth Amendment purposes, since search was completed when blood was drawn, and any further test on stored blood sample would not constitute a physical intrusion. U.S.C.A. Const.Amend. 4; DNA Analysis Backlog Elimination Act of 2000, § 2, 42 U.S.C.A. § 14135 et seq.; D.C. Official Code, 2001 Ed. § 22-4151.

[6] Constitutional Law 92 203

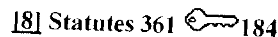
92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k198 Retroactive Operation of Ex Post Facto Laws
92k203 k. Nature or Extent of Punishment. Most Cited Cases

Sentencing and Punishment 350H 1996

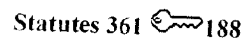
350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(H) Searches and Seizures
350Hk1996 k. Tests, Samples, and Specimens. Most Cited Cases
District of Columbia statute implementing DNA Analysis Backlog Elimination Act (DNA Act) did not violate the Ex Post Facto Clause provisions of the federal constitution with respect to probationer convicted of two counts of felony level unarmed robbery, even though implementing provision was signed into law three months after probationer was convicted and sentenced; purpose and effect of implementing statute was not punitive, statute carried out part of state's power to protect health and safety of its citizens by keeping track of ex-convicts, statute did not create new punishments or increase extant punishments, and statute imposed no physical restraint. U.S.C.A. Const. Art. 1, § § 9, cl. 3, 10, cl. 1; DNA Analysis Backlog Elimination Act of 2000, § 2, 42 U.S.C.A. § 14135 et seq.; D.C. Official Code, 2001 Ed. § 22-4151.


[7] Action 13 18

13 Action
13II Nature and Form
13k18 k. Civil or Criminal. Most Cited Cases
Whether the purpose of a statutory scheme is civil or criminal is first of all a question of statutory construction.


[8] Statutes 361 184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases


Statutes 361 188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
With all questions of statutory interpretation, the Court of Appeals considers the statute's text and its structure to determine the legislative objective.

[9] Constitutional Law 92 203

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k198 Retroactive Operation of Ex Post Facto

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

Laws

92k203 k. Nature or Extent of Punishment.
Most Cited Cases
In determining whether the effects of a statute are punitive, for ex post facto purposes, the Court of Appeals must consider whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. U.S.C.A. Const. Art. 1, § § 9, cl. 3, 10, cl. 1.

[10] Constitutional Law 92 **203**

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k198 Retroactive Operation of Ex Post Facto Laws

92k203 k. Nature or Extent of Punishment.
Most Cited Cases
A statute is not deemed punitive for ex post facto purposes simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance; instead, the party challenging the statute must show that the statute's non-punitive, alternative purpose is a sham or mere pretext. U.S.C.A. Const. Art. 1, § § 9, cl. 3, 10, cl. 1.

***491** Appeal from the United States District Court for the District of Columbia (No. 04cv00448).

Timothy P. O'Toole, Attorney, Public Defender Service of the District of Columbia, argued the cause for appellant. With him on the briefs was Todd A. Cox, Attorney.
Jane M. Lyons, Assistant U.S. Attorney, argued the cause for appellees. With her on the brief were Kenneth L. Wainstein, U.S. Attorney, and Michael J. Ryan, Assistant U.S. Attorney. R. Craig Lawrence, Assistant U.S. Attorney, entered an appearance.

Before: SENTELLE, BROWN and GRIFFITH, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE SENTELLE, Circuit Judge.
Lamar Johnson, a former District of Columbia probationer, appeals from a District Court judgment dismissing his action seeking to enjoin the application of the DNA Analysis Backlog Elimination Act of 2000 ("DNA Act" or "the Act"), 42 U.S.C. § § 14135-14135e. Johnson argued that the Act violated his constitutional rights under the Fourth Amendment and violated other of his constitutional and statutory rights. Because we conclude that the District Court correctly held that the Act is neither facially unconstitutional nor unconstitutional as applied to Johnson, we affirm.

I

On March 27, 2001, Johnson stole two cars while suffering from "previously untreated emotional and mental health problems." Shortly after his arrest, Johnson was taken to a hospital because he was found sitting in a puddle eating dirt. On December 20, 2001, he was convicted in the Superior Court of the District of Columbia on two counts of unarmed robbery in violation of D.C.Code § 22-2801, for ***492** which he received a suspended sentence and two years probation.

While Johnson was on probation, the Appellees-agents from the District of Columbia Court Services and Offender Supervision Agency ("CSOSA")-demanded that Johnson provide a DNA sample for inclusion in the Combined DNA Index System ("CODIS"). The CSOSA agents did not have a warrant and did not have individualized suspicion that Johnson had committed a crime (other than the two counts of unarmed robbery for which he had been convicted and placed on probation). However, the agents claimed that Johnson was obligated under the Act to submit his DNA for inclusion in the CODIS database.

The Act provides that CSOSA officials "shall collect a DNA sample from each individual under the supervision of the Agency who is on supervised release, parole, or probation who is, or has been, convicted of a qualifying District of Columbia offense ...." 42 U.S.C. § 14135b(a)(2). Congress left to the District of Columbia the responsibility of determining which offenses should be deemed "qualifying District of Columbia offenses." *Id.* § 14135b(d). In turn, the District designated forty-nine separate crimes as "qualifying ... offenses" under the DNA Act, including robbery and carjacking. *See* D.C Code § 22-4151(27), (29).

Despite the fact that Johnson was convicted on two counts of a "qualifying offense," he refused to

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

440 F.3d 489

provide a DNA sample to the CSOSA. A Superior Court judge then ordered Johnson to show cause why his probation should not be revoked because of this refusal to comply with the DNA Act. Prior to the probation-revocation proceeding, Johnson filed a complaint in the United States District Court for the District of Columbia, seeking a temporary restraining order ("TRO") to prevent the Appellees from requiring him to provide a DNA sample. Before the District Court could rule on the TRO, the parties proposed to resolve the need for emergency injunctive relief. The parties filed a joint motion, under which Johnson agreed to provide a blood sample. The Appellees agreed to delay processing that sample until after his claims in this action and any subsequent appeals had been resolved. The District Court granted the parties' joint motion and denied Johnson's motion for a TRO.

Thereafter the Appellees filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). The District Court concluded-after "[b]alancing the private and public interests" under the totality of the circumstances-that because probationers have diminished expectations of privacy, Johnson did not state a viable Fourth Amendment claim. The court also rejected Johnson's claims under the Ex Post Facto Clause, the Fifth Amendment, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub.L. No. 104-191, 110 Stat.1936, and the International Convention on the Elimination of all Forms of Racial Discrimination ("CERD"). Accordingly, the court granted the Appellees' motion in full and dismissed the case. This appeal ensued.

II

Johnson raises two claims under the Fourth Amendment. First, Johnson argues it was unconstitutional for the CSOSA to collect his blood while he was still on probation. Second, Johnson argues it is unconstitutional for the government to retain his DNA profile and "re-search" it in the CODIS database after his probationary term expires (which it now has). We reject both claims.

A

Johnson's first claim is that collection and storage of his DNA is unconstitutional *493 under the Fourth Amendment, which guarantees that the people shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ...." In Johnson's view, the collection and storage of a probationer's DNA "[s]trik[es] at the heart of the Fourth Amendment's most inviolate zone," and as a result, "these searches must always be predicated on some measure of individualized suspicion." Because the Act requires every prisoner, probationer, and parolee convicted of a "qualifying offense" to submit his DNA sample without any showing of individualized suspicion, Johnson argues the Act is unconstitutional. For the reasons set forth below, we disagree.

[1] There is no question that the compulsory extraction of blood for DNA profiling constitutes a "search" within the meaning of the Fourth Amendment. *See Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) ("We have long recognized that a compelled intrusion into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search." (internal quotation marks, alteration, and citation omitted)); *see also Winston v. Lee,* 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985); *Schmerber v. California,* 384 U.S. 757, 767-68, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The question before us, therefore, is whether the search was "reasonable." *See Pennsylvania v. Mimms,* 434 U.S. 106, 108-09, 98 S.Ct. 330, 54 L.Ed.2d 331 (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 v. Ohio,* 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968))).

Although ordinarily the reasonableness *vel non* of a search depends on governmental compliance with the Fourth's Amendment's Warrant Clause, *see, e.g., United States v. U.S. Dist. Court,* 407 U.S. 297, 315-16, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972), the Supreme Court has applied the "special needs" exception to the warrant requirement to uphold the warrantless search of a probationer's residence, *see Griffin v. Wisconsin,* 483 U.S. 868, 879-80, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). In *Griffin,* a police detective contacted Griffin's probation officer's supervisor with information that Griffin might have weapons in his apartment. The supervisor, another probation officer, and three plainclothes policemen went to Griffin's apartment, searched it, and found a weapon. *Id.* at 871, 107 S.Ct. 3164. Griffin was arrested and charged with possession of a firearm by a felon. He eventually moved to suppress the evidence uncovered during the warrantless search of

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

his residence. *Id.* at 872, 107 S.Ct. 3164.

After he was convicted, Griffin appealed. Affirming his conviction, the Supreme Court explained:

> A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements. Probation, like incarceration, is a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.... [I]t is always true of probationers (as we have said it to be true of parolees) that they do not enjoy the absolute liberty to which every citizen is entitled, but only conditional liberty properly dependent on observance of special probation restrictions.
>
> These restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community*494 is not harmed by the probationer's being at large. These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed.

Id. at 873-75, 107 S.Ct. 3164 (internal quotation marks, alterations, and citations omitted). While *Griffin* may not establish that every suspicionless search of a parolee is a constitutionally sound "special need," *Griffin* does permit the search of a probationer based on no more than reasonable suspicion-even where the search at issue is triggered by a desire to obtain law enforcement information and motivated by ordinary law enforcement purposes. *Id.* at 880, 107 S.Ct. 3164. Thus, even though *Griffin* does not establish the constitutionality of suspicionless searches of probationers, it does stand for the proposition that probationers are entitled to fewer Fourth Amendment protections than are ordinary citizens, and it does suggest that the special needs exception can apply to law enforcement searches. [FN1]

FN1. Subsequent to *Griffin* the Court has recognized some limits to the "special needs" exception in the context of law enforcement searches. *See Ferguson v. City of Charleston,* 532 U.S. 67, 79, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001); *City of Indianapolis v. Edmond,* 531 U.S. 32, 37, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000). Because we conclude the statute passes constitutional muster under the totality of the circumstances, we need not explore the somewhat unclear boundaries of the limits on the "special needs" doctrine.

[2] Notwithstanding *Griffin,* Johnson argues that "*all* law enforcement searches [must] be premised on some quantum of individualized suspicion." Appellant's Br. at 20 (emphasis in original). But the Supreme Court has "long held that 'the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion.' " *Bd. of Educ. v. Earls,* 536 U.S. 822, 829, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (alteration in original) (quoting *United States v. Martinez-Fuerte,* 428 U.S. 543, 561, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)). "[I]n certain limited circumstances, the Government's [interests are] sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." *Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656, 668, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989); *see also Skinner,* 489 U.S. at 624, 109 S.Ct. 1402.

Since *Griffin,* the Supreme Court has on only one occasion considered whether law enforcement officials need individualized suspicion to search a probationer. In *United States v. Knights,* 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001), the Court considered the constitutionality of a probation order that required the defendant to submit to warrantless, suspicionless searches of his person and residence at any time. *See id.* at 114, 122 S.Ct. 587. Shortly after Knights was placed on probation for an unrelated drug offense, someone committed an arson targeting a Pacific Gas & Electric ("PG & E") electrical transformer. *Id.* at 114-15, 122 S.Ct. 587. Because prior crimes against PG & E had coincided with Knights' court appearances, law enforcement authorities suspected that Knights might be involved in the arson. The police staked out Knights' apartment and observed a suspected accomplice leave with three cylindrical items-potential pipe bombs-going toward a nearby waterway. The police heard three splashes and watched Knights' compatriot walk back to the residence empty-handed. *Id.* at 115, 122 S.Ct. 587. Shortly thereafter, the police approached the accomplice's vehicle and saw "a Molotov cocktail and explosive materials, a gasoline can, and two brass padlocks that fit the description of those removed from the PG & E transformer vault." *Id.*

*495 Knowing that Knights' probation was conditioned on his obligation to submit to suspicionless searches of his person and residence, the police promptly searched Knights' home without a warrant. They uncovered "a detonation cord,

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

ammunition, liquid chemicals, instruction manuals on chemistry and electrical circuitry, bolt cutters, telephone pole-climbing spurs, drug paraphernalia, and a brass padlock stamped 'PG & E.' " *Id.* After Knights was arrested and charged, he moved to suppress the evidence. *Id.* at 116, 122 S.Ct. 587.

The Court analyzed the constitutionality of the search of Knights' apartment under a "totality-of-the-circumstances" standard rather than the "special needs" doctrine. *Id.* at 117-18, 122 S.Ct. 587. Balancing the invasion of Knights' interest in privacy against the State's interest in searching his home without a warrant supported by probable cause, the Court explained that "Knights' status as a probationer subject to a search condition informs both sides of that balance." *Id.* at 119, 122 S.Ct. 587. On one side of the balance is Knights' interest in privacy:

Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled. Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.

The judge who sentenced Knights to probation determined that it was necessary to condition the probation on Knights' acceptance of the search provision. It was reasonable to conclude that the search condition would further the two primary goals of probation-rehabilitation and protecting society from future criminal violations. The probation order clearly expressed the search condition and Knights was unambiguously informed of it. The probation condition thus significantly diminished Knights' reasonable expectation of privacy.

Id. at 119-20, 122 S.Ct. 587 (internal quotation marks, citations, and footnotes omitted).

On the other side of the balance is the government's interest in keeping tabs on a probationer:

[T]he very assumption of the institution of probation is that the probationer is more likely than the ordinary citizen to violate the law. The recidivism rate of probationers is significantly higher than the general crime rate. And probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because probationers are aware that they may be subject to supervision and face revocation of probation, and possible incarceration ....

* * * * * *

The State has a dual concern with a probationer. On the one hand is the hope that he will successfully ... be integrated back into the community. On the other is the concern, quite justified, that he will be more likely to engage in criminal conduct than an ordinary member of the community.... [The State's] interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen.

Id. at 120-21, 122 S.Ct. 587 (internal quotation marks and citation omitted). Given this balance, the Court held, the government needs "no more than reasonable suspicion to conduct a search of [a] probationer's house." *Id.* at 121, 122 S.Ct. 587. Because the government had reasonable suspicion that the probationer had engaged*496 in unlawful activity, the Court did not decide whether the government could have relied exclusively upon the warrantless search condition in the defendant's probation order to conduct a suspicionless search. *Id.* at 120 n. 6, 122 S.Ct. 587. Thus, "it remains *entirely* an open question whether suspicionless searches of [probationers and parolees] pass constitutional muster when such searches are conducted for law enforcement purposes." *United States v. Kincade,* 379 F.3d 813, 830 (9th Cir.2004) (en banc) (emphasis in original), *cert. denied,* 544 U.S. 924, 125 S.Ct. 1638, 161 L.Ed.2d 483 (2005). However, every court of appeals that has considered the issue has concluded that the DNA Act is constitutional. *See id.* at 840; *Nicholas v. Goord,* 430 F.3d 652 (2d Cir.2005); *United States v. Sczubelek,* 402 F.3d 175 (3d Cir.2005); *Jones v. Murray,* 962 F.2d 302 (4th Cir.1992); *Groceman v. U.S. Dep't of Justice,* 354 F.3d 411 (5th Cir.2004) (per curiam); *Green v. Berge,* 354 F.3d 675 (7th Cir.2004); *United States v. Kimler,* 335 F.3d 1132 (10th Cir.2003); *Padgett v. Donald,* 401 F.3d 1273 (11th Cir.2005).

[3] Today we join this unanimous body of authority,[FN2] and we conclude that the mandatory collection of Johnson's DNA sample was "reasonable" under the Fourth Amendment's balancing test. On one side of the balance, it is well settled that probationers have lesser privacy interests than do ordinary citizens. *See Griffin,* 483 U.S. at 875, 107 S.Ct. 3164; *see also Ferguson v. City of Charleston,* 532 U.S. 67, 79-80 n. 15, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (emphasizing that *Griffin* turned on "the fact that probationers have a lesser expectation of privacy than the public at large"); *Knights,* 534 U.S. at 119, 122 S.Ct. 587 ("Just as

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens."); *see also* People v. Reyes, 19 Cal.4th 743, 80 Cal.Rptr.2d 734, 968 P.2d 445, 450 (1998) ("As a convicted felon still subject to the Department of Corrections, a parolee has conditional freedom-granted for the specific purpose of monitoring his transition from inmate to free citizen.").

> FN2. We note that some of these courts have upheld the DNA Act under the "special needs" exception to the warrant requirement, *see, e.g.,* Nicholas, 430 F.3d at 668; Green, 354 F.3d at 678-79, while others have upheld the Act under the Fourth Amendment's traditional "totality-of-the-circumstances" standard, *see, e.g.,* Padgett, 401 F.3d at 1280; Groceman, 354 F.3d at 413-14. We do not preclude the possibility that the Act could satisfy the "special needs" analysis.

Moreover, the privacy invasion caused by a blood test is relatively small (even when conducted on a free citizen). *See* Skinner, 489 U.S. at 625, 109 S.Ct. 1402; Schmerber, 384 U.S. at 771, 86 S.Ct. 1826; Breithaupt v. Abram, 352 U.S. 432, 435-36, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957). In *Schmerber,* the Court upheld the warrantless extraction of a blood sample from a motorist suspected of driving while intoxicated, despite his refusal to consent to the intrusion. The Court noted that the intrusion occasioned by a blood test is minimal because such "tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." Schmerber, 384 U.S. at 771, 86 S.Ct. 1826 (footnote omitted). "*Schmerber* thus confirmed society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity." Skinner, 489 U.S. at 625, 109 S.Ct. 1402 (internal quotation marks and citation omitted).

***497** In *Jones v. Murray,* the Fourth Circuit considered the applicability of the *Skinner* line of precedent to the collection of blood for DNA identification bank purposes. That circuit held that "[w]hile we do not accept even this small level of intrusion for free persons without Fourth Amendment constraint ... the same protections do not hold true for those lawfully confined to the custody of the state." 962 F.2d at 306. The Fourth Circuit went on to note the indisputable principle that "when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it." *Id.*

[4] The Fourth Circuit further reasoned that courts must "accept this proposition because the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes." *Id.* Therefore, it cannot be denied that the universal practice of " 'booking' procedures that are followed for every suspect arrested for a felony," including fingerprinting, ensues without respect to the relevance of fingerprint identification to the suspect's particular crime. *Id.* As with fingerprinting, we agree with the Fourth Circuit that "the Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken from incarcerated felons for the purpose of identifying them." *Id.* at 306-07. While we need not decide whether the Fourth Amendment permits the suspicionless collection of blood samples from every suspect arrested for a felony, *cf. id.* at 306, it certainly permits the collection of a blood sample from a *convicted* felon, like Johnson, while he is still on probation.

Arguably, Johnson's privacy interests differ somewhat from those at stake in *Skinner, Schmerber,* and *Jones:* A probationer may have stronger privacy interests than a prisoner, and an individual may have a stronger privacy interest in his permanent identity than he has in the temporary toxicity of his blood. However, we have never held that an *innocent* individual has a Fourth Amendment right to expunge the government's records of his identity. *See* Stevenson v. United States, 380 F.2d 590 (D.C.Cir.), *cert. denied,* 389 U.S. 962, 88 S.Ct. 347, 19 L.Ed.2d 375 (1967). In *Stevenson,* we held that an individual has no constitutional right to the expungement of his mugshots and fingerprints, notwithstanding the fact that his conviction was subsequently set aside. *Id.* at 593-94. *A fortiori,* a felon like Johnson-whose privacy interests have been diminished by his probationary status-has no viable objection to the government's retention of his identifying information.

On the other side of the balance, the government is "quite justified" in taking steps to keep tabs on ex-convicts, to deter recidivism, and to solve past and future crimes. *Knights,* 534 U.S. at 121, 122 S.Ct.

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

587; *see also* Reyes, 80 Cal.Rptr.2d 734, 968 P.2d at 450 ("The state has a *duty* not only to assess the efficacy of its rehabilitative efforts but to protect the public, and the importance of the latter interest justifies the imposition of a warrantless search condition." (emphasis added)). The need to ensure that the community "is not harmed by the probationer's being at large" permits the government "a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large." Griffin, 483 U.S. at 875, 107 S.Ct. 3164. Balancing Johnson's reduced privacy interests against the government's interests in monitoring probationers, deterring recidivism, and protecting the public, we hold it was reasonable for the Appellees to collect Johnson's DNA while on probation.

***498 B**

[5] Johnson's second argument is that the Fourth Amendment prohibits the government from storing his "genetic fingerprint" in the CODIS database and "re-searching" it after he has left the probationary rolls (as he now has). In Johnson's view, "[o]nce probation ends, the individual's privacy interest is restored to the level of other citizens while the government's penal interest disappears." Appellant's Br. at 34. Given this reshuffling of the parties' interests, Johnson argues, the post-probation balance makes it unreasonable to "re-search" ex-convicts' DNA profiles. For the reasons set forth below, we disagree.

1

After a donor's DNA is collected under the Act, it is analyzed "in accordance with publicly available standards that satisfy or exceed the guidelines for [the FBI's] quality assurance program for DNA analysis." 42 U.S.C. § 14132(b)(1). Using "short tandem repeat" ("STR") technology, the government creates a "genetic fingerprint" for each donor by looking for the presence of genic variants known as alleles at thirteen specific loci on DNA present in the specimen. *See* Kincade, 379 F.3d at 818. A copy of the donor's "genetic fingerprint" is then uploaded to the CODIS database, 42 U.S.C. § 14132(a)(1), which allows government officials to match a "genetic fingerprint" with its donor's identity only for "law enforcement identification purposes," "judicial proceedings," and "criminal defense purposes," *id.* § 14132(b)(3). Unauthorized uses or disclosures of DNA information stored in the database are punishable by fines and imprisonment. *Id.* § 14133(c).

We conclude that accessing the records stored in the CODIS database is not a "search" for Fourth Amendment purposes. As the Supreme Court has held, the process of matching one piece of personal information against government records does not implicate the Fourth Amendment. *See* Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). In *Hicks*, a police officer found an expensive stereo while searching an apartment under exigent circumstances. Suspecting that the stereo system was stolen, the officer wrote down the serial numbers of some of its components. The officer then conveyed the numbers to headquarters and confirmed a match between the serial numbers and stereo components stolen during an armed robbery. *Id.* at 323-24, 107 S.Ct. 1149. The Supreme Court held that copying the serial numbers constituted a "search" (insofar as the officer moved the equipment to see the serial numbers), but matching the copied serial numbers against those of the stolen stereo components did not independently implicate the Fourth Amendment. *Id.* at 324-25, 107 S.Ct. 1149.

Johnson attempts to avoid the implications of *Hicks* by arguing that the installation of a video camera inside someone's home constitutes one "search," and a new "search" occurs every time a government official monitors the camera. In Johnson's view, "[t]he harm from the government's ability to indefinitely search and re-search [an ex-probationer's] genetic information [is no different] than placing a video camera in a citizen's home." Appellant's Br. at 30. We reject the analogy.

Monitoring an in-home video camera raises Fourth Amendment concerns where it is tantamount to repetitive, surreptitious surveillance of a citizen's private goings on. *Cf.* United States v. Karo, 468 U.S. 705, 716, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) ("Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape ***499** entirely some sort of Fourth Amendment oversight."). And because a video feed is constantly updated, it implicates the Fourth Amendment each time a government official monitors it to spy on otherwise private matters. *Cf. id.* at 713-14, 104 S.Ct. 3296. By contrast, a felon's DNA fingerprint is more akin to a *snapshot*: It reveals identifying information based on a blood test conducted at a single point in time. Of course, even

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

snapshots can raise Fourth Amendment concerns. *See Mincey v. Arizona,* 437 U.S. 385, 389-92, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). However, if a snapshot is taken in conformance with the Fourth Amendment, the government's storage and use of it does not give rise to an independent Fourth Amendment claim. *See California v. Ciraolo,* 476 U.S. 207, 213-15, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); *Dow Chem. Co. v. United States,* 476 U.S. 227, 239, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986).

Accordingly, we conclude that accessing the DNA snapshots contained in the CODIS database does not independently implicate the Fourth Amendment. We note that the consequences of the contrary conclusion would be staggering: Police departments across the country could face an intolerable burden if every "search" of an ordinary fingerprint database were subject to Fourth Amendment challenges. The same applies to DNA fingerprints.

To be sure, genetic fingerprints differ somewhat from their metacarpal brethren, and future technological advances in DNA testing (coupled with possible expansions of the DNA Act's scope) may empower the government to conduct wide-ranging "DNA dragnets" that raise justifiable citations to George Orwell. *See, e.g., Kincade,* 379 F.3d at 849 (Gould, J., concurring); *id.* at 873-74 (Kozinski, J., dissenting); Appellant's Br. at 36-40. Today, however, the DNA Act applies only to felons, and CODIS operates much like an old-fashioned fingerprint database (albeit more efficiently). As the Supreme Court has noted:

> if such dragnet-type law enforcement practices as [Johnson] envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable. Insofar as [Johnson's] complaint appears to be simply that scientific devices such as [DNA testing and CODIS] enable[ ] the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.

United States v. Knotts, 460 U.S. 276, 284, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (citation omitted). We therefore reject Johnson's claim that the Fourth Amendment applies to each "search" of the CODIS database.

2

Johnson also challenges the government's retention of his blood sample, which he claims might be retested with new technologies in the future. Nothing in the record suggests such future testing is imminent, nor can we analyze its invasiveness until it appears. It is surely not uncommon that evidence of every sort obtained by a lawful search and retained may be useful or provide additional information in the future. If something about some undefined future technology raises constitutional issues, that is a problem for another day.

We are nonetheless advertent to the Supreme Court's teaching in *Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). There the Court considered whether the use of thermal imaging technology to examine the interior of a dwelling constitutes a "search." After noting that the Fourth Amendment does not ***500** "leave the homeowner at the mercy of advancing technology-including imaging technology that could discern all human activity in the home," *id.* at 35-36, 121 S.Ct. 2038, the Court held that "[w]here ... the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' ...." *Id.* at 40, 121 S.Ct. 2038.

This is not such a case. Not only is blood testing in common use, *Schmerber,* 384 U.S. at 771, 86 S.Ct. 1826, but a "search" is completed upon the drawing of the blood: Any future test on a stored blood sample will not "discern [any] human activity," nor will it constitute a "physical intrusion." Neither *Kyllo* nor any other decision that we have found suggests that evidence becomes any less subject to search, seizure, or retention simply because it might yield additional information in the future.

III

Johnson next argues that the federal DNA Act and the District of Columbia's implementation statute (D.C.Code § 22-4151, which defines a "qualifying District of Columbia offense[ ]" under the federal DNA Act) violate the Ex Post Facto Clauses of the United States Constitution, art. I, § 9, cl. 3; § 10, cl. 1. In Johnson's view, the legislative histories of both statutes suggest they were enacted with "punitive intent," and it is unconstitutional to apply the statutes retroactively to Johnson's crime, which was committed on March 27, 2001. For the reasons set forth below, we disagree

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

A

[6] At the outset, we note that the application of the federal DNA Act to Johnson cannot possibly violate the Ex Post Facto Clause. The federal statute was enacted on December 19, 2000-more than three months before Johnson committed felonious robbery, and more than one year before Johnson was convicted. Thus, the federal DNA Act does not operate retroactively as to Johnson by its own terms. *See INS v. St. Cyr,* 533 U.S. 289, 316-26, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). Accordingly, the ex post facto issue arises (if at all) only with respect to the District's implementation statute, which was signed into law on June 15, 2001 (a little less than three months after Johnson committed his crimes).

Appellees concede that the District's implementation statute makes the DNA Act operate retroactively. Thus, the District's implementation statute may be unconstitutional under the Ex Post Facto Clause if it is "punitive." As the Supreme Court has held:

If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the District's] intention to deem it "civil."

Smith v. Doe, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (internal quotation marks and citations omitted). In *Smith,* the Court held Alaska's sex offender registry law does not violate the Ex Post Facto Clause, notwithstanding the fact that the statute's registration provisions were codified in the state's criminal code, failure to register was itself a crime, some of the law's provisions related to criminal administration, and the state's criminal pleading rules required informing a defendant of the statute's requirements. *See id.* at 95-96, 123 S.Ct. 1140. Emphasizing the statute's anti-recidivism and public safety provisions, the Court held the statute was non-punitive in both purpose *501 and effect. We reach the same conclusion here.

B

[7][8] We first consider whether the "purpose" of D.C.Code § 22-4151 was "punitive." As the Supreme Court has instructed: "Whether [the purpose of] a statutory scheme is civil or criminal is first of all a question of statutory construction." *Smith,* 538 U.S. at 92, 123 S.Ct. 1140 (internal quotation marks and citation omitted). Johnson urges us to look for the implementation statute's "punitive intent" by construing its legislative history "in the light most favorable to Mr. Johnson." Appellant's Br. at 46. We reject Johnson's novel canon of interpretation. As with all questions of statutory interpretation, "[w]e consider the statute's text and its structure to determine the legislative objective." *Smith,* 538 U.S. at 92, 123 S.Ct. 1140; *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.,* ---U.S. ----, ----, 125 S.Ct. 2611, 2626, 162 L.Ed.2d 502 (2005); *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002).

Nothing in the text or structure of the District's implementation statute suggests its purpose was "punitive"-the law simply defines the offenses subject to DNA collection under the federal Act. *See* D.C.Code § 22-4151 (requiring forty-nine categories of ex-convicts to donate DNA to CODIS, but adding no substantive requirements-punitive or otherwise-to the federal DNA Act's requirements). Given the definitional nature of the implementation statute, it can be understood only as a policy judgment by the District's elected officials regarding which offenses are serious enough to warrant coverage by the federal DNA Act. As the Supreme Court has held, such policy judgments are "an incident of the State's power to protect the health and safety of its citizens," and they should be construed "as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment." *Flemming v. Nestor,* 363 U.S. 603, 616, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). Relying on *Flemming,* the Court rejected an Ex Post Facto challenge to an Alaska statute that retroactively forced sex offenders to provide the state with identifying information (including mugshots and fingerprints), which the state stored in a massive database. *Smith,* 538 U.S. at 89-91, 123 S.Ct. 1140. The Court emphasized that "even if the objective of the [sex offender registration statute] is consistent with the purposes of the Alaska criminal justice system, the State's pursuit of it in a regulatory scheme does not make the objective punitive." *Id.* at 94, 123 S.Ct. 1140; *cf. United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 364, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) (upholding a statute requiring forfeiture of unlicensed firearms against a double jeopardy challenge because "[k]eeping potentially dangerous weapons out of the hands of unlicensed dealers is a goal plainly more remedial than punitive")

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.

Similarly here, the District's implementation statute simply carried out part of the state's power to protect the health and safety of its citizens by keeping track of (and deterring future crimes by) ex-convicts. Despite the fact that the statute is codified in the District's criminal code, it did not create new punishments or increase extant punishments. The statute did create a new obligation for ex-convicts to donate their DNA to the CODIS database; however, a minimally invasive blood test, *Skinner*, 489 U.S. at 625, 109 S.Ct. 1402, is no more of a "punishment" than forcing convicted sex offenders to disclose their identities or confiscating unlicensed firearms. Moreover, the Supreme Court has held that the revocation of probation (which was the threatened sanction that prompted Johnson's motion for a TRO) does not constitute a "punishment" for ***502** purposes of the Ex Post Facto Clause. *See Johnson v. United States*, 529 U.S. 694, 700-01, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000). Therefore, the "purpose" of the statute was non-punitive.

C

[9] We next consider whether the "effect" of D.C.Code § 22-4151 is "punitive," notwithstanding its non-punitive "purpose." As the Supreme Court has instructed, our inquiry into the effects of the District's implementation statute should be guided by seven factors, which are "neither exhaustive nor dispositive." *89 Firearms*, 465 U.S. at 365 n. 7, 104 S.Ct. 1099 (internal quotation marks and citation omitted). Specifically, we must consider:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) (footnotes omitted). In Johnson's view, a mandatory DNA test constitutes "an affirmative disability or restraint," which is "excessive in relation to [any] alternative purpose" that can be assigned to it. Yet again, we disagree.

A blood test differs mightily from "an affirmative disability or restraint." Like a sex-offender registry, the DNA Act "imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." *Smith*, 538 U.S. at 100, 123 S.Ct. 1140; *see also id.* at 99-101, 123 S.Ct. 1140 (requiring sex offenders to disclose their identities does not constitute an affirmative disability or restraint); *Flemming*, 363 U.S. at 617, 80 S.Ct. 1367 (eliminating deportees' Social Security benefits does not constitute an affirmative disability or restraint); *Hudson v. United States*, 522 U.S. 93, 104, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (debarring an individual from an entire occupation does not constitute an affirmative disability or restraint). The collection and retention of a felon's fingerprints (genetic or otherwise) is far less of an impingement on his liberty than a permanent employment ban or the mandatory disclosure of a sex offender's identity. *Cf. Breithaupt*, 352 U.S. at 435-38, 77 S.Ct. 408 (holding an involuntary blood test does not implicate an individual's liberty interests). Accordingly, the DNA Act does not impose an "affirmative disability or restraint."

[10] Finally, Johnson argues that the statutes are "excessive in relation to [any] alternative purpose" that might be assigned to them. However, as the District Court correctly pointed out, the statutory text suggests the DNA Act was enacted, in part, to facilitate DNA-based exonerations. *See* 42 U.S.C. § 14132(b)(3)(C) (allowing the use and disclosure of CODIS records for "criminal defense purposes"). The statutory means for accomplishing this "alternative purpose" need not be narrowly tailored: As the Supreme Court has instructed, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 U.S. at 103, 123 S.Ct. 1140. Instead, Johnson must show that the Act's non-punitive, alternative purpose is a "sham or mere pretext." *Id.* (internal quotation marks and citation omitted). Nothing in the record or the parties' briefs suggests anything of the sort. Accordingly, the DNA Act's sanction ***503** is not "excessive in relation to [its] alternative purpose."

In sum, the DNA Act and the District's implementation statute are "punitive" in neither purpose nor effect. Accordingly, we hold the dismissal of Johnson's ex post facto claim was proper.

IV

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works

We have considered Johnson's other arguments-which include claims under the Due Process and "equal protection" Clauses of the Fifth Amendment, as well as HIPAA and the CERD-and conclude that they are without merit and do not warrant separate discussion. For the reasons set forth above, the judgment of the District Court is

Affirmed.

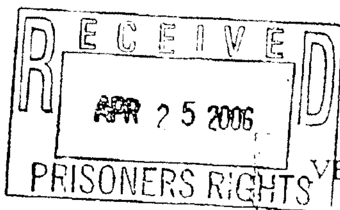
C.A.D.C.,2006.
Johnson v. Quander
440 F.3d 489

Briefs and Other Related Documents (Back to top)

- 2005 WL 3488488 (Appellate Brief) Reply Brief for Appellant Lamar Johnson (Dec. 6, 2005) Original Image of this Document with Appendix (PDF)
- 2005 WL 3221139 (Appellate Brief) Brief For Appellees (Nov. 22, 2005)
- 2005 WL 2662354 (Appellate Brief) Brief For Appellant Lamar Johnson (Oct. 12, 2005) Original Image of this Document with Appendix (PDF)
- 05-5156 (Docket) (Apr. 28, 2005)

END OF DOCUMENT

© 2006 Thomson West. No Claim to Orig. U.S. Govt. Works.


RECEIVED
APR 25 2006
PRISONERS RIGHTS

STATE OF VERMONT
CHITTENDEN COUNTY, ss.

VERMONT DISTRICT COURT

APR 24 2006

STATE OF VERMONT

v.

MARK WATKINS	DOCKET NO. 6805-12-04 CnCr
DENNIS BARBOUR	DOCKET NO. 3044-06-04 CnCr
TRAVIS LAMBERTON	DOCKET NO. 0574-02-04 CnCr
MICHAEL LEWIS	DOCKET NO. 6174-11-04 CnCr
STEVE MARTIN	DOCKET NO. 1866-04-99 CnCr
RAYMOND ST.PETER	DOCKET NO. 1339-03-01 CnCr
JOEY THIBAULT	DOCKET NO. 6611-12-04 CnCr
RICHARD WASHINGTON	DOCKET NO. 5593-10-04 CnCr
JOSEPH WILLIAMS	DOCKET NO. 2345-05-99 CnCr

DECISION AND ORDER

This matter is before the Court on the defendants' motion to dismiss the State's motion to order the defendants to provide DNA samples. The defendants are represented by Rory Malone, Esq. The State of Vermont is represented by Assistant Attorney General John Treadwell, Esq. The Defendants are convicted of a variety of nonviolent felonies such as false pretenses, driving while intoxicated (8th), possession of marijuana, conspiracy to deliver, aiding in the commission of a felony, and violation of abuse prevention order (2nd).

The statutory provisions challenged by the defendants read:

> (a) The following persons shall submit a DNA sample:
> (1) every person *convicted in a court in this state of a designated crime* on or after the effective date of this subchapter; and
> (2) every person who was convicted in a court in this state of

a designated crime prior to the effective date of this subchapter and, after the effective date of this subchapter, is:

(A) in the custody of the commissioner of corrections pursuant to 28 V.S.A. § 701;
(B) on parole for a designated crime;
(C) serving a supervised community sentence for a designated crime; and
(D) on probation for a designated crime.

20 V.S.A. § 1933 (emphasis added).

'*Designated crime*' means any of the following offenses:

(A) *a felony*;
(B) an attempt to commit any offense listed in this subdivision; or
(C) any other offense, if, as part of a plea agreement in an action in which the original charge was a crime listed in this subdivision and probable cause was found by the court, there is a requirement that the defendant submit a DNA sample to the DNA data bank.

20 V.S A. § 1932(12).

"[C]urrently all fifty states and the federal government, see 42 U.S.C. §§ 14131-34, have some type of DNA collection statute that requires some or all convicted felons to submit a tissue sample, either blood, saliva or other tissue, for DNA profile analysis and storage in a DNA data bank." See *State v. Raines*, 857 A.2d 19, 23 (Md. 2004).

In the instant case, the defendants argue that the Vermont statute requiring all persons convicted of felonies to submit DNA samples is unconstitutional under the Fourth Amendment of the United States Constitution and under Article 11 of the Vermont Constitution..

1. Jurisdiction

The State argues that the defendants may not bring their constitutional challenge in a § 1935 hearing because the statute grants a person refusing to provide a sample "a hearing by the court, limited in scope solely to the issues described in subsection (c) of this section." 20 V.S.A. § 1935(b). Section (c) and (d) require the court to determine whether the person who refused to submit a DNA sample is or is not required to submit a sample under § 1933. The defendants are clearly within the group of people referenced in the amended § 1933. However, if the amended statute is not constitutional, the defendants will not be required to submit DNA samples. Therefore, this court has jurisdiction to perform the constitutional analysis which will determine whether the above-named defendants are required to submit DNA samples.

2. The Fourth Amendment

The Maryland Supreme Court observed that every appellate court but one has upheld the DNA collection statute at issue before it. See *State v. Raines*, 857 A.2d 19, 25-27 (Md. 2004) (citing *Roe v. Marcotte*, 193 F.3d 72, 76-82 (2d Cir. 1999) (upholding a Connecticut DNA collection law); *Jones v. Murray*, 962 F.2d 302, 305-08 (4th Cir.) (upholding a Virginia DNA collection law), *cert. denied*, 506 U.S. 977, 113 S.Ct. 472, 121 L.Ed.2d 378 (1992); *Groceman v. United States Dep't of Justice*, 354 F.3d 411, 413-14 (5th Cir. 2004) (per curiam) (upholding the federal DNA collection law); *Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir. 2003) (per curiam)(upholding the Texas DNA collection law); *Green v. Berge*, 354 F.3d 675, 677-79 (7th Cir. 2004) (upholding the

Wisconsin DNA collection law); *Rise v. Oregon,* 59 F.3d 1556, 1559-62 (9th Cir. 1995) (upholding the Oregon DNA collection law prior to the Supreme Court cases in *Edmond* and *Ferguson* and the Ninth Circuit's *Kincade* opinion, which, although it impliedly overruled *Rise,* subsequently was vacated by the Ninth Circuit, that, as stated previously, has yet to render a decision on rehearing en banc), *cert. denied,* 517 U.S. 1160, 116 S.Ct. 1554, 134 L.Ed.2d 656 (1996); *United States v. Kimler,* 335 F.3d 1132, 1146 (10th Cir. 2003) (upholding the federal DNA collection law), *cert. denied,* 540 U.S. 1083, 124 S.Ct. 945, 157 L.Ed.2d 759 (2003); *Shaffer v. Saffle,* 148 F.3d 1180, 1181-82 (10th Cir. 1998) (upholding the Oklahoma DNA collection law); *Schlicher v. Peters,* 103 F.3d 940, 943 (10th Cir. 1996) (upholding the Kansas DNA collection law); *Boling v. Romer,* 101 F.3d 1336, 1339-40 (10th Cir. 1996) (upholding the Colorado DNA collection law); *In the Matter of the Appeal in Maricopa Juvenile Action Nos: JV-512600 and JV-512797,* 187 Ariz. 419, 930 P.2d 496, 500-01 (1996); *Alfaro v. Terhune,* 98 Cal.App.4th 492, 505-06, 120 Cal.Rptr.2d 197 (Cal.App.2002), *cert. denied,* 537 U.S. 1136, 123 S.Ct. 922, 154 L.Ed.2d 828 (2003); *People v. Calahan,* 272 Ill.App.3d 293, 208 Ill.Dec. 532, 649 N.E.2d 588, 591-92 (1995); *State v. Martinez,* 276 Kan. 527, 78 P.3d 769, 773-76 (2003); *Landry v. Attorney General,* 429 Mass. 336, 709 N.E.2d 1085, 1091-92 (1999); *Gaines v. State,* 116 Nev. 359, 998 P.2d 166, 171-73 (2000), *cert. denied,* 531 U.S. 856, 121 S.Ct. 138, 148 L.Ed.2d 90 (2000); *Cooper v. Gammon,* 943 S.W.2d 699, 704-05 (Mo.App.1997); *State v. Steele,* 155 Ohio App.3d 659, 802 N.E.2d 1127, 1132-37 (2003); *State ex rel. Juvenile Dep't v. Orozco,* 129 Or.App. 148, 878 P.2d 432, 435-36 (1994); *Dial v. Vaughn,*

733 A.2d 1, 6-7 (Pa.Cmwlth.1999); *In re D.L.C.*, 124 S.W.3d 354, 363-68 (Tex.App.2003); *Johnson v. Commonwealth*, 259 Va. 654, 529 S.E.2d 769, 779 (Va.), *cert. denied*, 531 U.S. 981, 121 S.Ct. 432, 148 L.Ed.2d 439 (2000); *State v. Olivas*, 122 Wash.2d 73, 856 P.2d 1076, 1080-86 (1993); *Doles v. State*, 994 P.2d 315, 318-19 (Wyo. 1999); *see also*, some federal district courts which have upheld state DNA collection laws, *Padgett v. Ferrero*, 294 F. Supp.2d 1338, 1342-44 (N.D.Ga.2003) (upholding the Georgia DNA collection law), *Kruger v. Erickson*, 875 F. Supp.. 583, 588-89 (D.Minn.1995) (upholding the Minnesota DNA collection law)). Since the *Raines* decision was issued, the Ninth Circuit has reversed the *Kincade* panel, upholding the DNA collection statute. See *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (en banc), reversing *United States v Kincade*, 345 F.3d 1095 (9th Cir. 2003).

The Maryland Supreme Court concluded:

> In light of the overwhelming precedent upholding the constitutionality of DNA collection statutes and the reasonableness of such searches, and upon our own independent assessment, we hold that the Maryland DNA Collection Act does not violate the Fourth Amendment and that the Act in the case *sub judice* is constitutional. As we hold that the Act and the buccal swab conducted under it were reasonable under the Fourth Amendment, we need not address whether the Act falls into the special needs exception to the Fourth Amendment.

See *Raines*, 857 A.2d at 27.

In the absence of any contrary precedent, this court also holds that requiring DNA samples from all convicted felons does not violate the Fourth Amendment of the federal constitution However, a separate analysis is required under the Vermont Constitution.

3. Special-Needs Doctrine

There are two main approaches which have been used to test the constitutionality of warrantless and non-individualized seizures of DNA from people who are convicted and incarcerated or under the supervision of corrections. The first is the balancing approach used in *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992). The second is the special needs analysis employed in *State v. Olivas*, 856 P.2d 1076, 1086 (Wash. 1999) The Second Circuit has utilized the special needs test in the DNA data bank context. See *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005). The Vermont Supreme Court has also applied the special needs analysis to a different type of inmate search in the prison context. See *State v. Berard*, 154 Vt. 306 (1990). One author explained the special needs doctrine as developed by the United States Supreme Court under the Fourth Amendment

> The "special needs" doctrine can be labeled as the established framework used by the Supreme Court to analyze suspicionless searches. . . ."Special needs" cases involve *searches whose primary purpose is not to detect evidence of ordinary criminal wrongdoing, but rather to address some need "beyond the normal need for law enforcement."* For example, under the "special needs" doctrine, the Supreme Court has upheld random, suspicionless, drug testing of public school students who participate in extracurricular activities because the results are not turned over to any law enforcement agency. The Supreme Court has also upheld suspicionless drug testing of certain U.S. Customs officials because the "results may not be used [against the employee] in a criminal prosecution." The Supreme Court, however, has never approved a suspicionless search regime designed to pursue normal, ordinary law enforcement objectives; this is the paradigmatic category of searches that are intolerable under the "special needs" doctrine. Stated differently, *no programmatic suspicionless search is reasonable under the Fourth Amendment unless its purpose is "divorced from the State's general interest in law enforcement."* This limitation on the "special needs" exception is derived from the Framers' historic mistrust of placing excessive power in the hands of law enforcement. Accordingly, any

> effort via a search to obtain information related to a possible crime that the searched individual may have committed or may commit in the future does not fall within the extremely limited "special needs" exception to the warrant-and-probable cause requirement of the Fourth Amendment.

Comment, *United States v. Kincade and the Constitutionality of the Federal DNA Act: Why We'll Need a New Pair of Genes of Wear Down the Slippery Slope*, 79 St. John's L. Rev. 769, 806-808 (2005) (emphasis added).

4. Purpose of the Vermont data bank statute

In order to perform the special needs analysis, the court must first examine the statute's objective. It is the statute's immediate rather than ultimate objective that is relevant. See *Ferguson v. City of Charleston*, 532 U.S. 67, 82-83 (2001). The Vermont legislature laid out its policy objective in the preface to the statute:

> It is the policy of this state to assist federal, state and local criminal justice and law enforcement agencies in the identification, detection or exclusion of individuals who are subjects of the investigation or prosecution of violent crimes. Identification, detection and exclusion may be facilitated by the DNA analysis of biological evidence left by the perpetrator of a violent crime and recovered from the crime scene. The DNA analysis of biological evidence can also be used to identify missing persons.

20 V.S.A. § 1931.

The DNA data bank statute's primary purpose is to facilitate the identification, detection and exclusion of persons suspected of committing violent crimes. The secondary purpose is identification of missing persons.

Unlike the search of inmate cells, where the purpose was to maintain the security of the prison, see *State v. Berard*, 154 Vt. 306 (1990), the collection of DNA samples

from all convicted felons in Vermont is "not motivated by concerns for inmate safety and health, institutional order, or discipline that have usually supported a special-needs exception in the prison context." See *Nicholas v. Goord*, 430 F.3d 652, 667 (2d Cir 2005). In contrast, the purposes articulated in the challenged Vermont data bank statute are to (1) aid law enforcement in solving past and future crimes, and (2) help identify missing persons.

Vermont has adopted the special needs test stated by Justice Blackmun in his concurring opinion in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). See *State v. Berard*, 154 Vt. 306, 310-11 (1990):

> Whatever the evolving federal standard, when interpreting Article Eleven, this Court will "abandon the warrant and probable-cause requirements, which constitute the standard of reasonableness for a government search that the Framers established, '[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . . .' " *O'Connor v. Ortega*, 480 U.S. 709, 741, 107 S.Ct. 1492, 1511, 94 L.Ed.2d 714 (1987) (Blackmun, J., dissenting and quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 748, 83 L.Ed.2d 720 (1985) (opinion concurring in judgment)); see *State v. Record*, 150 Vt. 84, 97, 548 A.2d 422, 430 (1988) (Hill, J., dissenting).

Berard, 154 Vt. at 310.

The next question is whether the DNA data bank statute serves a "special need" as defined by Vermont law. Vermont's statute clearly serves a purpose related to law enforcement. Some courts draw a distinction between "information-seeking" searches and seizure regimes aimed at "detect[ing] evidence of ordinary criminal wrongdoing." See *Goord*, 430 F.3d at 668, citing *Illinois v. Lidster*, 540 U.S. 419, 423-424 (2004), and

have distinguished the building of a DNA data bank from ordinary law enforcement activities undertaken for the investigation of a specific crime. See *Goord*, 430 F.3d at 669 (citing *Green v. Berge*, 354 F.3d 675, 678 (7th Cir. 2004)).

The main legislative purpose of the Vermont data bank statute is to aid in the identification and detection of violent criminals. There is no meaningful distinction between aiding in the identification and detection of persons who commit violent crimes and normal law enforcement activities, which involve identifying and detecting those responsible for violent crimes.

Like other states, Vermont has a governmental interest in obtaining identifying information from convicted offenders and keeping a record of such information. A DNA data bank of all convicted felons advances that interest, but here there is a question of "fit." Identity is never at issue in the type of crimes in which the above-named defendants were convicted, that is false pretenses, drug possession, or driving while intoxicated. It is crimes against persons where DNA identification and exclusion is most relevant, not the non-contact crimes involving possession, intoxication or larceny.

Even if Vermont's DNA statute did serve a special need apart from usual law enforcement, which it does not appear to do, the next step is to weigh the special need for a DNA data bank against the reasonable expectation of privacy protected by Article 11 of the Vermont Constitution.

5. Article 11 of the Vermont Constitution

The Vermont Constitution states:

> That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

Vt. Const. ch. I, art. 11.

"[O]ur Article 11 jurisprudence has diverged from the United States Supreme Court's analysis of the Fourth Amendment." See *State v. Welch*, 160 Vt. 70, 76 (1992), citing *State v. Berard*, 154 Vt. 306, 310 (1990) (federal law "tends to derogate the central role of the judiciary in Article Eleven jurisprudence") and *State v. Wood*, 148 Vt. 479, 487 (1987) (in focusing away from judicial review and curtailing scope of protected right to be free from unlawful governmental conduct, federal test is incompatible with Article 11). "Although warrantless searches are sometimes permitted under Article 11, these exceptions must be 'jealously and carefully drawn.' " *State v. Savva*, 159 Vt. 75, 85 (1991), citing *State v. Jewett*, 148 Vt. 324, 328 (1986).

> Article 11 offers free-standing protection from unreasonable searches and seizures in Vermont." See *State v. Savva*, No. 90-035, slip op. at 10 (Vt. Oct. 25, 1991); *State v. Berard*, 154 Vt. 306, 309, 576 A.2d 118, 120 (1990). In interpreting Article 11, we have adopted the test suggested by Justice Blackmun in his concurring opinion in *New Jersey v. T. L. O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 747, 83 L.Ed.2d 720 (1985), and will abandon the warrant and probable-cause requirement "[o]nly in those exceptional circumstances in which *special needs*, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *Berard*, 154 Vt at 310-11, 576 A.2d at 120-21.

State v. Richardson, 158 Vt. 635, 635-636 (1992) (emphasis added).

[F]ocus must be on the objective reasonableness of one's privacy interest . . . This focus is consistent with our prior case law on Article 11, in which we have emphasized that the core value of privacy is the quintessence of Article 11, and that we must determine in such cases whether those persons searched have a reasonable expectation of privacy in the affairs or possessions intruded upon.

State v. Morris, 165 Vt. 111, 120 (1996).

"Article 11 protects the people of the state 'from unreasonable, warrantless governmental intrusion into affairs which they choose to keep private.'" See *State v. Kirchoff*, 156 Vt. 1, 10 (1991) (quoting *State v. Zaccaro*, 154 Vt. 83, 91 (1990). "In determining whether persons have a privacy interest in any given area or activity, we examine both private subjective expectations and general social norms." See *Morris*, 165 Vt. at 115.

Article 11 has been held to apply to prison inmates. See *Berard*, 154 Vt. at 311-312. The Vermont Supreme Court "share[s] the concerns expressed by Justice Stevens in his dissent to *Hudson v. Palmer* that '[d]epriving inmates of any residuum of privacy or possessory rights is in fact plainly contrary to institutional goals.'" *Id.* at 315, citing *Hudson v. Palmer*, 468 U.S. 517, 552 (1984). In contrast with *Berard*, where the "reasonableness of a warrantless and random search of a prisoner's cell hinges on a balancing of the governmental interest in the security of its prisons against the privacy and possessory interests of the prisoner," *Berard*, 154 Vt. at 317. DNA collection has nothing to do with the security of Vermont's prisons.

Article 11 protects persons "from unreasonable, warrantless governmental intrusions into affairs which they choose to keep private." *State v. Zaccaro*,

154 Vt. 83, 91, 574 A.2d 1256, 1261 (1990). The first and foremost line of protection is the warrant requirement. Requiring advance judicial approval before subjecting persons to police searches represents a balance in which an individual's privacy interest outweighs the burdens on law enforcement in obtaining a warrant. *Savva*, 159 Vt. at 85-86, 616 A.2d at 780. Thus, absent exceptional circumstances, the government's decision to invade a person's privacy must be made by a neutral judicial officer rather than the police. *Id.* at 85, 616 A.2d at 779.

State v. Morris, 165 Vt. 111, 115 (1996).

The Vermont Supreme Court has recently limited the use of another type of "special need," the community caretaking doctrine. See *State v. Jestice*, 2004 VT 65, 177 Vt. 513, 516. "A police officer acting under the community caretaking doctrine must have 'specific and articulable facts' that led him to reasonably believe the *defendant was in need of assistance*." *Id.* at ¶ 10 (citations omitted) (emphasis added). The "seizure was not justified by suspicion of criminal wrongdoing or community caretaking" because "[n]o evidence suggested that either person in the car was in any sort of trouble when the officer arrived on the scene." *Id.* at ¶¶ 10-11.

In the *Jestice* case, the Vermont Supreme Court demonstrated again that the warrant and probable cause requirement of Article 11 will only be abandoned in exceptional circumstances in which bona fide special needs, such as community caretaking, separate and beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.

6. Nontestimonial Orders for DNA samples

The Vermont Supreme Court has held that a suspect must submit a DNA (saliva)

sample when a Nontestimonial Order is made based on reasonable suspicion that the person named has committed a particular offense. See *In re Nontestimonial Identification Order Directed to R.H.*, 171 Vt. 227, 228 (2000). V.R.Cr.P. 41.1 states the standard for issuing an NTO:

> An order shall issue only on an affidavit or affidavits sworn to before the judicial officer and establishing the following grounds for the order:
> (1) that there is probable cause to believe that an offense has been committed;
> (2) that there are reasonable grounds, that need not amount to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and
> (3) that the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.

V.R.Cr.P. 41.1(c).

There must be reasonable suspicion and judicial review before Vermont citizens are compelled to give a sample of their DNA under Article 11. See *R.H.*, 171 Vt. at 234. Under the DNA data bank statute challenged here, persons convicted of nonviolent felonies would be compelled to give DNA samples *without* a court finding reasonable suspicion that the individual committed a particular crime. See 20 V.S.A. § 1933.

7. Intrusions caused by DNA sampling

The Court now turns to the question of how DNA sampling intrudes on a person's reasonable expectation of privacy. The first intrusion convicted felons are subject to is a physical intrusion when they are required to provide a DNA sample by saliva sample or cheek swab

100/100 A KANIERI 802 651 1758 10:10 04/25/06

The "removal of pubic hair, involving an area of the body that is traditionally concealed from public view, implicates Article 11 of the Vermont Constitution." See *State v. Towne*, 158 Vt. 607, 621 (1992). "Although the inside of one's mouth is often hidden from public view, exposing it [for the taking of a saliva sample] does not entail the embarrassment and social discomfort which accompanies the sexual and excretory functions associated with the pubic area. See *In re Nontestimonial Identification Order Directed to R.H.*, 171 Vt. 227, 233 (2000). The Vermont Supreme Court does "not believe that taking a saliva sample by swabbing a pad on the inside of the mouth involves the same intrusiveness as drawing blood by piercing the skin with a needle." See *Id.* at 234. The physical intrusion of taking a saliva sample is minimal and is outweighed by the governmental interest in obtaining the identifying information that DNA provides.

The second intrusion to which convicted felons are subject is the analysis and maintenance of their DNA information in Vermont's data bank, and that intrusion may considered either as a search or a seizure. See *Goord*, 430 F.3d at 670. "DNA profiling seeks to determine whether genetic material unique to an unknown source, such as evidence from a crime scene, matches genetic material from a known source, thereby linking the known source to the crime." *State v. Passino*, 161 Vt. 515, 519 (1994).

The analysis of the unique information contained in a person's DNA is a much greater intrusion than the physical collection of DNA, since the State analyzes the DNA sample for information and will maintain the DNA records in the data bank indefinitely. It is this intrusion that has caused the greatest concern among those of our

> colleagues who would strike down DNA-indexing statutes as unconstitutional. See *Kincade*, 379 F.3d at 867 (Reinhardt, J., dissenting) (arguing that DNA indexing "constitutes far more of an intrusion than the mere insertion of a needle," since the samples are turned into "profiles capable of being searched time and time again throughout the course of an individual's life"); *id.* at 872 (Kozinski, J., dissenting) ("[I]f we accept the legal presumption ... that once [an offender] leaves supervised release he will be just like everyone else, authorizing the extraction of his DNA now to help solve crimes later is a huge end run around the Fourth Amendment."); see also *Sczubelek*, 402 F.3d at 201 (McKee, J., dissenting) ("In order to sustain the DNA search of Sczubelek, we must conclude that it is reasonable to catalogue his DNA even though he has committed no new crimes because of the possibility, however remote or theoretical, that he may one day commit another crime.").

See *Goord*, 430 F.3d at 670.

Analysis of DNA is an intrusion into personal information which many people choose to keep private. It is unique to the individual, and contains information concerning the person's medical conditions and frailties, paternity and other familiar relationships. DNA analysis not only identifies an individual, but also members of his or her family. Under Article 11, Vermonters have a reasonable expectation of privacy in their DNA. ~~If this were not the case, an NTO based on reasonable suspicion would not be~~ required before a DNA sample could be taken.

8. Balancing by other courts

The Second Circuit found that the inmates' "status as convicted felons renders *minimal* the degree to which the New York statute intrudes on their privacy." See *Goord*, 430 F.3d at 671 (emphasis added). The Second Circuit then concluded that the New York DNA data bank indexing statute was "supported by strong governmental interests that

outweigh the relatively minimal intrusion on plaintiff's expectation of privacy." *Id.* at 671. A Vermont District Court also recently held that the forced collection of DNA samples from all convicted felons "constitutes a reasonable balance of special need overcoming relatively minimal privacy intrusion," See *State v. Martin*, No 485-7-02 (Vt. Add. Dist. Ct., Feb. 14, 2006). Neither a ruling from the Second Circuit nor another Vermont trial court is mandatory authority. The Second Circuit was applying a reasonable expectation of privacy defined by the Fourth Amendment to the federal Constitution, and this Court must perform its analysis under Article 11 of the Vermont Constitution.

9. Conclusions

Article 11 prevents the warrantless seizure of DNA samples from the non-felon population residing within Vermont's borders, because the State's interest in helping to identify individuals who have committed violent crimes can not justify obliterating Vermonters' reasonable expectation of privacy in their DNA, their unique genetic code. Convicted nonviolent offenders have the same reasonable expectation of privacy because there is no logical nexus between convictions for false pretenses, driving while intoxicated, possession of marijuana, and any crime of violence. While some might argue that DNA sampling of nonviolent offenders may deter future violent crime, that is not the articulated purpose of the statute, and the same can be said of taking DNA samples from the entire Vermont population.

"We reiterate that under Article Eleven, *until a determination of special needs is made*, or some other recognized exception applies, we will *presume* the necessity of

probable cause and a search warrant." See *State v. Berard*, 154 Vt. 306, 312 n. 2 (1990) (emphasis added).

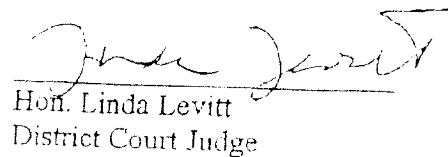
The suspicionless collection and banking of DNA samples from all convicted nonviolent felons in Vermont violates the reasonable expectation of privacy guaranteed by Article 11, because judicial review and an NTO can easily be obtained if reasonable suspicion exists that a particular convicted nonviolent offender did commit a violent crime. The interests of law enforcement in having a data bank containing the DNA of all convicted Vermont felons, without having to obtain a warrant or NTO, does not outweigh the reasonable expectation of privacy accorded to all persons under the Vermont Constitution, including those convicted of nonviolent felonies.

For the reasons stated above, the amended definition of "designated crime," found in 20 V.S.A. § 1932(12), requiring DNA samples from all felons, is unconstitutional. The defendants, persons convicted of nonviolent felonies, are not required to provide DNA samples for the Vermont DNA data bank.

ORDER

The defendants' motion to dismiss the State's motion to order DNA samples is *granted*

Dated at Burlington, Vermont, this 24 day of April, 2006.



Hon. Linda Levitt
District Court Judge

No. ____________

IN THE SUPREME COURT OF THE UNITED STATES

LAMAR JOHNSON,
Petitioner,

v.

PAUL A. QUANDER, ET AL.,
Respondents.

CERTIFICATE OF SERVICE

Timothy P. O'Toole, Counsel for Petitioner, states that on May 31, 2006, he sent copies of the Motion for Leave to Proceed in Forma Pauperis, Affidavit/Declaration in Support of Motion, Petition For A Writ Of Certiorari, and Appendices to Petition for Writ of Certiorari, to the Solicitor General of the United States and to Counsel for Respondent:

Jane M. Lyons,
Asst. U.S. Attorney
U.S. Attorney's Office
for the District of Columbia
Civil Division
555-4th Street, N.W.
Washington, DC 20530

Paul Clement
Solicitor General
of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

by placing these documents in a properly addressed envelope with fully prepaid first-class postage affixed thereon, and depositing the envelope with the United States Postal Service in Washington, D.C.

Timothy P. O'Toole
Public Defender Service
of the District of Columbia
633 Indiana Avenue, N.W.
Washington, D.C. 20004