CA 02-50380

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	DC No. CR 93-714-RAG-01
	)	
v.	)	
	)	
THOMAS CAMERON KINCADE,	)	
	)	
Defendant-Appellant.	)	
_____	)	

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APPELLANT'S SUPPLEMENTAL BRIEF EN BANC

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A. Introduction

The government cannot cite a single case in which any court in the country has, outside the DNA-sampling area, sanctioned searches conducted for the typical law enforcement purpose of solving crime without *any* level of individualized suspicion that the person being searched has committed an offense. Not a single case.

Within the DNA-sampling area, however, the cases are virtually unanimous in holding that blood extractions and DNA analyses from parolees and prisoners (and, in some states, arrestees never convicted or convicts with only convictions that may

go back decades[1]) are not unconstitutional. The three-judge panel in this case is one of only three courts in the country to hold that DNA sampling violates the Fourth Amendment.[2]

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[1] Hawaii, for example, compels any person *ever* convicted of certain offenses, regardless of whether he is or has ever been to prison or on supervision, to report to a police station and provide a blood sample for DNA analysis, even if the person is merely a visitor to the state but plans to stay more than thirty days. H.R.S., Title 37, §706-603 (2003). Louisiana compels any person *arrested* for certain offenses to provide a blood sample for DNA analysis. La.R.S., Title 15, §609 (2003)

[2] The other two of which appellant knows are *United States v. Miles*, 228 F.Supp.2d 1130 (E.D.Ca. 2002) (pending on appeal in this Court), and *State of Maryland v. Charles Raines*, Cr. No. 98303, Circuit Court for Montgomery County, Maryland (2004) (pending the state's appeal in the state appellate court).

The government places great reliance on this wall of authority it has to support its argument that DNA sampling is constitutional, and appellant concedes that it appears to be a great wall to get over. But the legal framework used by these courts and proposed by the government in this case is one which has no basis in Fourth Amendment jurisprudence, certainly not from the Supreme Court or this Court.[3] Indeed, the Supreme Court has repeatedly held, including as recently as last month, that a search conducted for the typical law enforcement purpose of solving crime requires individualized suspicion to be consistent with the Fourth Amendment.[4] Since there is no question that DNA sampling is a search and is conducted for the purpose of solving crime, settled and consistent Supreme Court law requires that such sampling be preceded by individualized suspicion. The parties agree that no individualized suspicion is required or present when DNA sampling occurs. Thus, the searches violate the Fourth Amendment.

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[3] Appellant has previously briefed, in his Opening and Reply Briefs, the constitutional violation of DNA sampling under settled Fourth Amendment jurisprudence, and in his Opposition to Rehearing, his responses to many of the arguments raised by the government. He does not repeat that here, as the panel has access to all the prior briefing. Rather, appellant uses this supplemental brief to respond to points raised by the government now that the Department of Justice has taken over the litigation.

[4] Appellant uses the term "solve crime" to mean an attempt to identify the person searched as the perpetrator of a criminal offense; the term, as used, does not include a detention or questioning of persons as possible *witnesses* to offenses.

B. The Purpose of the Backlog Elimination Act

The purpose of the Backlog Elimination Act, like that of all DNA-sampling laws, is unquestionably general law enforcement or, more specifically, the typical law enforcement purpose of solving crime. That is clear on the face of the statute, from the Congressional history, from the FBI's stated purpose for CODIS and through application of common sense.

On its face, the primary purpose of the Backlog Elimination Act is general law enforcement: The act requires samples taken to be turned over to the FBI for DNA analysis and inclusion in CODIS, a nationwide DNA databank. 42 U.S.C. §14135a(b) The law allows the DNA information in CODIS to be disclosed solely for law enforcement purposes. 42 U.S.C. §14135a(b)(3).

The very purpose of CODIS, as stated by the FBI, is to solve crime by matching DNA taken from a crime scene with a person's DNA on file in CODIS. Its expressed "mission statement" is to "blend[] forensic science and computer technology into an effective tool for solving violent crimes." www.fbi.gov/hq/lab/codis/program.htm. And, according to the FBI, it is meant to "enable[] federal, state, and local crime labs to exchange and compare DNA profiles electronically, thereby linking crimes to each other and to convicted offenders."

www.fbi.gov/hq/lab/codis/brochures.htm.[5]

[5] A copy of the FBI's CODIS brochure, downloaded from its website, is attached hereto as an appendix.

Because CODIS banks DNA samples from crime scenes (in addition to DNA samples from offenders), it gives the FBI the ability to link crime scenes together. Such a link can lead to police in multiple jurisdictions coordinating their respective investigations, sharing leads and solving crimes more quickly and efficiently. That, of course, is an important law enforcement tool and one that does not violate any person's constitutional rights, as the links are made independent of any DNA sampling of people.

Additionally, CODIS includes DNA samples from military personnel to be used as a means of identifying remains should that become necessary; whether or not such samples have been "voluntarily" provided, the sampling is not for law enforcement purposes and thus does not raise Fourth Amendment issues. Finally, CODIS includes DNA samples from persons who have consented to giving samples; assuming their consents were voluntary, such samples raise no Fourth Amendment

The Congressional history of the Backlog Elimination Act further demonstrates that the purpose of DNA sampling offenders is to solve crimes. The Department of Justice itself stated in its letter to Congress regarding the act that the database was created to "solve crimes" by "matching DNA from crimes scenes to convicted offenders." H.R. Rep. No. 106-900 at 26 (2000). And that reason was echoed by the legislators. *See, e.g.,* 146 Cong.Rec. S11645-02, S11647 (statement of Sen. Kohl, sponsor of the legislation: databank designed to "enable law enforcement officials to link DNA evidence found at a crime scene with a suspect whose DNA is already on file").

Although at times apparently conceding that the purpose of the DNA sampling under the Backlog Elimination Act is to solve crime (*see* US Supp. Brief at 13-14, discussing the "overwhelming" interest in solving and prosecuting crime), the government also seems to argue that the purpose of the law is the identification of certain prisoners and parolees. (*Id.* at 9, fn. 6; at 10-12, at 20.) But the history, language and application of the law make it clear that identification of the prisoners and parolees is not the purpose of the law; rather, identification of *perpetrators* of unsolved crimes is the purpose of the law.

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issue.

Common sense also makes it clear that identification of the prisoners and parolees sampled is not the purpose of the law. At the time that prisoners and parolees are sampled, their identifications are well known, having been determined in many ways, including through fingerprints. If the identifications of these offenders were not known, sampling them would be useless because there would be no way to know who was being sampled and thus no way to later match a "hit" to a person.

C. The Legal Significance of the Searches Being to Solve Crime

"A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). The Supreme Court has allowed some limited exceptions to this ordinary Fourth Amendment rule when there are "special needs," but it has drawn a rather bright line in holding that exceptions will apply only when the primary purpose of (or the "special need" for) the search is something other than law enforcement. *Id.*; *Ferguson v. City of Charleston*, 532 U.S. 67, 79-80 (2001) (noting that searches without individualized suspicion have been approved only when the search was "divorced from the State's general interest in law enforcement"); *Illinois v. Lidster*,

124 S.Ct. 885 (2004).[6]

Just last month, in *Lidster*, the Supreme Court yet again made the distinction between a search where the primary purpose is to see if the person searched has committed a crime and one conducted for some other reason. The activity at issue in *Lidster* was, as it was in *Edmond*, a roadblock; but the roadblock in *Edmond* was to investigate the possibility that the person stopped was involved in a crime while the roadblock in *Lidster* was "not to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others." 124 S.Ct. at 889. In *Lidster*, the "police expected the information elicited to help them apprehend, *not the vehicle's occupants*, but other individuals." *Id.*

The Supreme Court thus upheld the stops in *Lidster* as constitutional, noting that they were significantly different than the stops in *Edmond*, because the stops in *Edmond* were unconstitutional for the very reason that they were "'justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that *any given motorist has committed some crime.*'" 124 S.Ct. at 889

[6] This Court has also held that searches without any individualized suspicion are valid only when the purpose is not the typical law enforcement purpose of solving crime. *See, e.g., Henderson v. City of Simi Valley*, 305 F.3d 1052 (9th Cir. 2002).

(emphasis in original).

Sampling and banking of offenders' DNA is justified only by the generalized and ever-present possibility that comparison of it to crime-scene material may someday reveal that *any given prior offender has committed another crime*. Such sampling and banking is, quite clearly, *not* done in order to apprehend *others*. Thus, the situation presented in this case is an *Edmond/Ferguson* type situation and not a *Lidster* type situation, as those situations are clearly distinguished in *Lidster*.

D. The Legal Significance of Parolee Status

Although some state statutes include more than prisoners and parolees among the persons who are required to provide DNA samples, the Backlog Elimination Act currently applies only to prisoners and parolees convicted of specified offenses.[7] The

[7] Generally, databases are most useful when the data is as widespread as the purpose of the database would require for completeness. The purpose of CODIS is to match DNA samples from a crime scene to a person's DNA to come up with a perpetrator of the offense. Thus, its usefulness is enhanced by including DNA samples from more and more people. And, not surprisingly, both the federal and state DNA-sampling laws have been amended repeatedly to include more and more people within their reach. The federal statute was broadened most recently by the Patriot Act, which added to the list of persons required to provide samples. *See* 68 FR 74855. And, as previously noted (footnote 1, *ante*), some state statutes have been enlarged to include persons not currently on supervision or in prison or not even ever convicted of any offense. There is certainly no reason to believe that the statutes will not continue to be broadened. Indeed, the government itself refers to the federal statute as "more effective" than some state statutes because "the federal law covers a broader range of offenders." (US Supp. Brief at 14.)

government believes that this status is the salient fact in rendering the Backlog Elimination Act constitutional. Thus, the government argues that the "special needs" cases are not applicable to DNA sampling searches and such searches may be constitutionally conducted for law enforcement purposes.

The government has no case to support that argument. And that is so because supervision has been recognized by the Supreme Court as a "special need," and thus logic and consistency would compel the conclusion that the "special needs" line of cases are controlling. Indeed, that is exactly what the Supreme Court did in *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

Many offenses, including many very serious violent offenses, are committed by persons who have never before run afoul of the law. And everyone who commits an offense commits a first offense. Thus, CODIS provides a more useful and productive tool to law enforcement in solving crimes if it banks DNA samples from the most people possible. And, as appellant will discuss more later, if the government were correct that the intrusion is minimal and the governmental interest great and that balance is sufficient to allow DNA sampling, there is no legal or logical reason (albeit there may be a political one) for restricting sampling to those

with some prior contact with law enforcement.

In *Griffin*, the Supreme Court upheld a search of a probationer's home on reasonable suspicion. In discussing why probable cause and a warrant were not required despite recognizing that a "probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable'"(*id.* at 873), the Court cited to its "special needs" cases[8] and found that supervision of a probationer, "like ... operation of a school ... or ... supervision of a regulated industry" presents "'special needs' *beyond normal law enforcement* that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 873-74 (emphasis added); *see also id.* at 875 ("Supervision, then, is a 'special need' ...").

The dissent in *Ferguson* cited to *Griffin* and contended that it supported the proposition that searches for law enforcement purposes were constitutional when "special needs" existed. The majority replied: "Viewed in the context of our special needs cases and even viewed in isolation, *Griffin* does not support the proposition for which the dissent invokes it." *Ferguson*, 532 U.S. at 79, n.15. The majority continued immediately to note, yet again and with direct reference to *Griffin*, that the Court has tolerated suspension of the Fourth Amendment's requirement of

[8] As appellant has discussed in prior briefing, the concept of "special needs" started with Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985). (*See* Appellant's Opposition to Rehearing at 4-5.) *Griffin* cites to

individualized suspicion only when there was no law enforcement purpose. *Id.*

Thus, the Supreme Court itself has recognized that parole supervision cases belong with the "special needs" line of cases.[9] And that line of cases could not be any clearer: searches without individualized suspicion are allowed only when the primary purpose of the law is not the typical law enforcement goal of solving crime.[10]

T.L.O. in discussing supervision as a "special need." 483 U.S. at 873.

[9] This Court also has, in the context of discussing the limitations of "special needs" searches, cited to *Griffin* as being a "special needs" case. *Henderson v. City of Simi Valley*, 305 F.3d at 1055.

[10] Citing *Skinner v. Railway Labor Executives*, 489 U.S. 602, 619 (1989) ("special needs" must be a need "beyond the normal need for law enforcement") and *Edmond*, 531 U.S. at 44 ("special needs" must be other than the "general interest in crime control"), the government argues that DNA sampling is valid under a "special needs" analysis. (US Supp. Brief at 25.) But the "normal need for law enforcement" and the "general interest in crime control" are exactly what DNA

sampling is for. *See* Section B, *ante*. Indeed, there is no other need that DNA sampling furthers.

The government places great emphasis on *United States v. Knights*, 534 U.S. 112 (2001), arguing that *Knights* makes the principles of *Edmond* and *Ferguson* inapplicable to DNA sampling of prisoners and parolees. (US Supp. Brief at 19-24.) But nothing in *Knights* suggests that the requirement of individualized suspicion for a search when done with the purpose of connecting the person searched to criminal wrongdoing would be inapplicable to DNA sampling searches. *Knights* involved a reasonable suspicion search of a probationer's home to look for evidence of criminal wrongdoing. The Supreme Court rejected the argument that a search of a probationer's home was governed by the same probable cause/warrant requirement as the search of the home of one not under supervision, but it in no way held that a search of the home (let alone the bodily integrity) of a person under supervision was constitutional when done for purposes of discovering evidence of criminal wrongdoing but without any level of individualized suspicion. Indeed, the actual holding in *Knights* focuses on the fact that there was reasonable suspicion:

> Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable. [Citations.] Those interests warrant a lesser than probable-cause standard here. When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished

privacy interests is reasonable.

Id. at 592-93. The Court allowed "a lesser degree," not no degree at all.

Knights may not be the end of the line in how far the Supreme Court may be willing to go in reducing the Fourth Amendment protections of probationers and parolees, but it is as far as either that Court or this Court has gone.[11] And the Supreme Court could easily have held that no individualized suspicion is necessary to search a parolee or his property, and yet it expressly opted not to. *Id.* at 592, n. 6. Indeed, it expressly held "a lesser degree" of probability than probable cause sufficed, not no degree of probability at all.

E. The Parameters of a "Special Needs" Search

The government argues that even as a "special needs" search, DNA sampling of parolees is constitutional. (US Supp. Brief at 25-28.) But a "special needs" search is not constitutional if done for the typical law enforcement purpose of solving crime.

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[11] The government recognizes that this Court has consistently found that a search by law enforcement of a parolee must be supported by reasonable suspicion, although it reduces its recognition to a *but see* citation to cases such as *United States v. Guagliardo*, 278 F.3d 868, 873 (9th Cir. 2002) and *United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991). (US Supp. Brief at 18.)

See Section C, *ante.* To the extent the government argues that DNA sampling is not done for the typical law enforcement purpose of solving crime, it is wrong. *See* Section B, *ante*.

But it is important to remember that a "special needs" search is restricted to the special need, that is, to the non-law enforcement reason for the search. *Griffin*, 483 U.S. at 875. The "special need" with parolees is supervision, and thus any suspicionless, "special needs" search must be one related to a legitimate supervisory concern. DNA sampling for purposes of potentially connecting a parolee to a past or future offense is not a supervisory concern.

That is not to say that supervision is not aimed, in part, at trying to prevent parolees from returning to crime.[12] And there are many conditions of supervision that would otherwise be unlawful except that they relate to trying to prevent a parolee from committing a new offense. Thus, for example, a probation officer keeps close track of a parolee's living circumstances, employment and associates because those matters can be indicators that a parolee is at risk for returning to criminal behavior. The same is true of drug use; thus, drug testing of parolees does not violate the Fourth Amendment because it is closely associated with risk of criminal behavior.

[12] CODIS is used to try to connect prisoners and parolees to *past* crimes (crimes committed before the offender went to prison or was placed on supervision) as well as future crime. It is impossible, of course, to prevent an offender from

committing an offense already committed.

DNA is not in any way associated with risk of criminal behavior. DNA sampling is simply a way to help law enforcement solve crimes. Supervision is not aimed at investigating and solving crimes; that is law enforcement's job, not a probation officer's job. Thus, DNA sampling has no valid supervisory purpose and does not further the "special need" of supervising parolees.[13]

The government emphasizes the serious concern of recidivism. (US Supp. Brief at 26.) Appellant does not contest that recidivism is a serious concern. But DNA sampling does not prevent recidivism; it merely helps solve a small number of the crimes that come from recidivism. It is conditions of supervision that are related to risk of criminal behavior, such as unemployment or drug use, that help prevent

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[13] Of course, all the DNA sampling laws, including the Backlog Elimination Act, require prisoners and not just parolees to provide DNA samples. Prisoners are supervised by prison staff and supervised even more closely than are parolees, but legitimate prison supervision is related to prison security issues such as escape and internal order; obviously, nothing about prisoners' DNA furthers those interests.

recidivism.[14]

Finally, even if DNA sampling qualified for "special needs" consideration as a non-law enforcement search, it could not meet the standard for being constitutional. The Supreme Court has addressed three factors that are to be considered in deciding whether a "special needs" search (one conducted for a reason other than solving crime) is constitutional: 1) the nature of the privacy interest, 2) the character of the intrusion, and 3) the "nature and immediacy" of the government's need for searching and the efficacy of the search for meeting the need. *Vernonia School District v. Acton* 515 U.S. 646, 657-60 (1995).

The privacy interest, as appellant discusses more thoroughly below (*see* Section F, *infra*), is great because DNA sampling not only involves invading bodily integrity to obtain the blood sample but also includes indexing and banking private information about an individual.

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[14] Of course, what really prevents recidivism is rehabilitation, which requires providing services such as education, employment training and substance abuse treatment to offenders. But the choices legislators and society make as to how to deal with recidivism, and the efficacy of those choices, is a political and philosophical issue more than a legal one; it becomes a legal issue only when the choice made runs afoul of the Constitution, as does DNA sampling.

The character of the intrusion is one of forced blood extraction. In all the "special needs" cases in which the Supreme Court has upheld the searches, the search was, at least in some sense, voluntary insofar as the person was free to refuse the search, albeit refusal might mean that he was unable to participate in some activity he otherwise wished to participate in. Here, the searches are literally forced: if a parolee refuses, he is sent to prison; and if a prisoner refuses, he is tied down while the blood draw is executed.

The "nature and immediacy" of the government's need is also problematic. While DNA databases may be easier or more convenient ways for the government to solve some crimes, traditional law enforcement has been solving crimes for hundreds of years. Ease and convenience are not the same as need. More important, there is no immediacy. CODIS is used to solve crimes, crimes already committed. The "special needs" searches upheld by the Supreme Court have been searches aimed at preventing a harm, not ones to help clean up after the harm is done.

DNA sampling does not meet the requirements for a suspicionless "special needs" search. It is done for purposes of solving crime, and suspicionless "special needs" searches are not allowed for that purpose. And the factors the Supreme Court has identified for determining whether a non-law enforcement "special needs" search is constitutional all weigh against the constitutionality of DNA sampling.

F. Fourth Amendment Reasonableness and DNA Sampling

The government argues that DNA sampling searches are reasonable by application of a balancing test, which considers the degree of intrusion upon privacy on the one hand and the degree to which the search is needed for the promotion of legitimate governmental interests on the other hand. (US Supp. Brief at 6-18.) Appellant agrees that the touchstone of the Fourth Amendment is reasonableness and that the Supreme Court has often assessed reasonableness by balancing the privacy intrusion with the governmental interests at stake. Appellant disagrees, however, that the balance turns out on the government's side with DNA-sampling searches. But before getting to that specific argument, there is a preliminary point that the government simply ignores but which is critical.

The Supreme Court has never found a search for purposes of solving crime to satisfy the Fourth Amendment touchstone of reasonableness without some level of individualized suspicion. Never. The government would have this Court just balance away the Fourth Amendment altogether. Outside the DNA-sampling area, there is absolutely no precedent for doing so. The Supreme Court balances in any particular case to determine *what* level of individualized suspicion will satisfy the Fourth Amendment. Depending on the nature of the intrusion or, sometimes, the status of the person searched, the Supreme Court has held in some circumstances that a

standard less than probable cause satisfies the Fourth Amendment. But it has never simply balanced away any level of individualized suspicion altogether. Indeed, in the context of a law enforcement search, even the Supreme Court could not balance away individualized suspicion altogether because doing so would be tantamount to abrogating the Fourth Amendment.[15]

The government argues that the intrusion necessary for DNA sampling is "minimal" and the governmental interest is "compelling." The government is wrong as to both ends of the scale.

1. The Intrusion

It is astounding that the government would characterize a *forced* blood extraction followed by genetic decoding as a "modest" or "minimal" intrusion. It is

[15] The very purpose of the Fourth Amendment was to restrict the ability of the government to search for evidence of criminal wrongdoing. Leonard Levy, "Origins of the Fourth Amendment," *Political Science Quarterly*, April 1, 1999. As the Supreme Court has noted, ordinarily the restriction is probable cause. *Edmond*, 531 U.S. at 37. In exceptional cases, the restriction may be reasonable suspicion. But if it were possible to search for evidence of criminal wrongdoing without any level of individualized suspicion, the Fourth Amendment would be rendered meaningless.

doubtful that it feels that way to anyone made to undergo such a search. And it is clear that the Supreme Court has not viewed it that way.

In *Schmerber v. California*, 384 U.S. 757 (1966), the Supreme Court held that an involuntary blood extraction is an intrusion into bodily integrity so significant that it normally requires a warrant supported by probable cause. *Id.* at 770. Because "[t]he integrity of an individual's person is a cherished value in our society," searches that invade bodily integrity cannot be executed as mere fishing expeditions to acquire useful evidence. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion on the mere chance that desired evidence might be obtained." *Id.* at 772. Forced blood extractions intrude on the private personal sphere and infringe upon an individual's "most personal and deep-rooted expectations of privacy." *Winston v. Lee*, 470 U.S. 753, 760 (1985).

The government notes that the Supreme Court in *Schmerber* referred to blood testing as "commonplace" and "for most people ... involves no risk, trauma or pain." (US Supp. Brief at 8.) But the Court was not holding that a forced blood extraction is a minimal intrusion; indeed, the Court had already discussed at length the serious intrusion of invading bodily integrity. What the Court was referring to in the

quotations cited by the government is that a blood extraction was a reasonable search given the probable cause and the exigent circumstances that existed; the Court had already determined that some search to determine Schmerber's alcohol level was justified and, given that justification, a blood test was not unconstitutional. The fact that blood tests may be sufficiently common that they are considered constitutional ways of obtaining evidence if the search is otherwise lawful (supported by individualized suspicion and a warrant or exigent circumstances) does not mean that a blood test is a minimal intrusion into privacy.[16] And the Supreme Court has made it clear, in cases such as *Schmerber* and *Winston* that blood tests are significant invasions into privacy.

Moreover, the blood test is not the full extent of the search in DNA sampling; there follows the genetic decoding of the DNA in the blood. The government doesn't really discuss that part of the search, but rather seems to dismiss it with an argument that federal law protects against misuse of the DNA profiles.[17] (US Supp.

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[16] To be constitutional, a search must be reasonable both in purpose and cause and in manner. Thus, in *Rochin v. California*, 342 U.S. 165 (1952), the Supreme Court held that the forced pumping of an arrestee's stomach to retrieve evidence the officer had seen the arrestee swallow (probable cause) was unreasonable because the manner chosen to search for the evidence was unacceptable. *Schmerber* does not suggest that blood tests are minimal invasions into privacy; it merely holds that blood tests are a reasonable manner of searching for evidence when there is probable cause and exigent circumstances.

[17] Of course, appellant contends that *any* use is misuse because the search

Brief at 12-13.) The efficacy of laws restricting use of collected data is questionable, especially when laws change over time as there is more and more pressure to release information held by the government, sometimes for significant reasons such as medical research. But more important, a person whose DNA profile has been disclosed in violation of the law is hardly compensated by someone's prosecution because that does nothing to restore the person's privacy interests.[18]

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violates the Fourth Amendment.

[18] The scientific advancement of DNA and its law enforcement potential in sampling has already led to "DNA dragnets" in which law enforcement have asked, demanded, tricked and cajoled people with no history of contact with the criminal justice system to give DNA samples, including 800 men in San Diego in 1990 during the investigation of serial killings, 2,300 men in Dade County, Florida, in 1995 during the investigation of serial killings, and 400 men in Prince George County, Maryland, in 1998 during the investigation of a nurse's death. Fred Drobner, "DNA Dragnets: Constitutional Aspects of Mass DNA Identification Testing," 28 Capital Univ. L.R. 479 (2000).

More critically, the information held by the government, even if it never goes further than that, is extremely private information. While the government may, at this time, intend to use the information only for purposes of connecting a person to a crime scene, that does not change the fact that what has been seized holds much more information.[19] Certainly, there are times when the government is allowed, consistent with the Constitution, to seize and review very private information, such as a journal or a diary with the author's most intimate thoughts or medical and financial records. But the fact that such seizures are allowed because supported by individualized suspicion does not make the privacy intrusion any less of an intrusion ... it simply makes it a lawful intrusion.

[19] And that is so whether or not the government currently knows how to access the information. The use of so-called "junk sites" means only that science has not progressed far enough yet to know what information is held on those sites. Not very long ago, all DNA contained were "junk sites" because scientists had not yet decoded the information.

The government argues that the intrusion is different with a parolee than with a person not on supervision because parolees have diminished expectations of privacy and no expectation of privacy in their identities. (US Supp. Brief at 10-12.) As previously discussed (*see* Section B, pp. 5-6, *ante*), DNA sampling is not done for purposes of identifying the parolee being sampled; rather it is done to identify the perpetrator of some unspecified past or future crime. The identity of the parolee sampled is never an issue, for the government knows very well his identity before he is sampled. Thus, it is of no moment whether or not a parolee has any privacy interest in his identity.[20]

Appellant agrees that parolees have diminished expectations of privacy, but the government would give them *none*. That is inconsistent with the law. When the Supreme Court held in *Griffin* that a "probationer's home, like anyone else's, is protected by the Fourth Amendment" (483 U.S. at 873), it made it clear that those on supervision still have some expectations of privacy. While holding that supervision permits "a degree of impingement upon privacy that would not be

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[20] To the extent the government may be arguing that parolees have no reasonable expectation of privacy in their identities because they have already been made to give up evidence of their identity through information and fingerprints, the argument goes too far. Everyone is required to give up evidence of their identities at certain points, including often to law enforcement. Anyone with a driver's license or a bar card has given HIS fingerprints to establish his identity. Surely, the government is not suggesting that such people no longer have a sufficient expectation

constitutional if applied to the public at large," the Court immediately qualified that statement by holding that "[t]hat permissible degree is not unlimited." *Id.* at 875.

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of privacy in their identities to allow them to refuse to be DNA sampled.

Parolees' expectations of privacy are diminished only as to matters that are related to supervision. Those matters are many and include issues that the public at large is allowed to protect as private, such as employment and financial records, drug testing, associations and even, sometimes, medical and psychological care records. But DNA sampling is not related to any legitimate supervisory interest. Thus, parolees have the same expectation of privacy in their blood and DNA as any other citizen has.[21]

DNA sampling of parolees is a significant intrusion into their privacy rights and is unrelated to any diminished expectation of privacy they may have. The scale weighs much more heavily on this side than the government acknowledges.

2. <u>The Governmental Interest</u>

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[21] There are many groups that the Supreme Court has found have diminished expectations of privacy, but appellant assumes that even the government would not suggest that such groups could be DNA sampled. For example, it is beyond dispute that motorists have diminished expectations of privacy, so diminished that they may be stopped on a public roadway without any individualized suspicion to see if they are driving while under the influence of alcohol or drugs. *Michigan State Police v. Sitz*, 496 U.S. 444 (1990). Does the government believe that it could DNA sample

motorists because they have a diminished expectation of privacy?

Against the intrusion, we weigh the governmental interest at stake. The government identifies two "compelling" interests it has in DNA sampling: solving crime and deterring future crime. (US Supp. Brief at 13-15.) Appellant agrees that both of those are compelling interests. The problem, however, is that if those interests were sufficient to outweigh privacy concerns, then everyone could be DNA sampled. At the very least, under the government's theory, anyone with a reduced expectation of privacy, which includes motorists and air travelers as well as parolees, could be sampled because their reduced expectation of privacy could never outweigh the governmental interests at stake. The authors of the Fourth Amendment already weighed the governmental interest in solving and deterring crime and came up with individualized suspicion (usually probable cause and a warrant). It is not up to the government or to this Court to decide that solving or deterring crime is more important than the framers of the Bill of Rights thought.

The contention that DNA sampling deters crime is entirely unfounded and illogical.[22] There is no empirical or even common sense support for the contention that DNA sampling will deter someone from committing an offense. Such a

[22] Additionally, that is quite clearly not the purpose of the Backlog Elimination Act. The purpose of the act is to *solve* crime, not deter it. And, of course, any deterrence theory is contradicted by the fact that DNA sampling is used to solve crimes (which, by definition, have already occurred) and the fact that all DNA sampling laws cover prisoners, who are not at large to commit new offenses

deterrence theory assumes that people will, on the one hand, be thinking so seriously of the consequences of their potential criminal action that they will consider the possibility of being caught through CODIS and yet, on the other hand, not thinking seriously enough about the matter to realize that they are safe as long as they avoid leaving DNA evidence at the scene. Such an assumption is far fetched, especially when we consider that knowledge that law enforcement has their fingerprints does not seem to stop offenders from either committing new offenses or leaving their fingerprints at crime scenes. The government has cited no study, and makes no logical argument, that suggests that DNA sampling has any deterrent effect.

As with the government's interest in solving crime, the interest in deterrence is the same with all people. The government has no greater interest in deterring a parolee from committing an offense than it does in deterring a federal judge from committing an offense. To be sure, the government has more reason to believe a parolee *will* commit an offense than a federal judge will; and that is the very reason parolees are supervised so closely. But the interest in deterrence is the same with all citizens.

3. The Outcome of Balancing

People have a reasonable expectation of privacy in their blood and in their

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and thus need not be deterred.

DNA. And a parolee's interest in this regard, albeit not in other regards, is the same as anyone else's. The intrusion with DNA sampling is great. The government has cited no interest that outweighs that intrusion. If the government's interests in solving and deterring crime were sufficient to outweigh an expectation of privacy in bodily integrity and DNA, it would be sufficient as to everyone, at the very least, everyone with any diminished expectation of privacy.

If the government were correct that a parolee has no reasonable expectation of privacy in his bodily integrity and thus the interest in solving or deterring crime allowed bodily invasions, many frightening scenarios could, and probably would at some point, occur. Could the government, without individualized suspicion, subject a parolee to a strip search or a body cavity search, just to see if they come up with any evidence of a crime, even if it is not immediately identified as evidence of a crime? That is essentially what DNA sampling is: it invades a person's bodily integrity and genetic privacy to seize something that is neither contraband nor evidence of a crime and it does so without any reason at all to believe that the person being subjected to the sampling has committed or will commit another crime.

G. Conclusion

The government is asking this Court to find that prisoners and parolees have no expectation of privacy that can stand up to the governmental interest in solving

crime. In other words, the government is asking this Court to find that the Fourth Amendment does not apply to prisoners and parolees. Even were this Court free to do that (and it is not given the current state of Supreme Court law), it should not do so.[23]

As the Supreme Court recognized in *Kyllo v. United States*, 533 U.S. 2(2001), in this day and age there are many technological advances that have the potential for making it easier and more convenient for law enforcement to detect, prevent and solve crime. But their use is not always a good idea ... and it certainly is not always constitutional. DNA sampling is unconstitutional.

Respectfully submitted,
MARIA E. STRATTON
Federal Public Defender

DATED: February 26, 2004

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MONICA KNOX
Deputy Federal Public Defender

[23] While the government places great emphasis on the limitations and supposed protections of the Backlog Elimination Act, the statute itself is actually irrelevant. Congress cannot restrict anyone's Fourth Amendment rights by statute. The Backlog Elimination Act sets the minimum regarding testing, not the maximum. If this Court upholds the right of government to DNA sample parolees, then law enforcement would be free to walk up to any and all parolees and demand blood samples for DNA banking, regardless of the limitations in the statute.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7)(C), I certifiy that this brief is proportionately spaced using 14 points Times New Roman and contains 6,780 words.

DATED: February 26, 2004

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MONICA KNOX
Deputy Federal Public Defender

CERTIFICATE OF SERVICE

I, the undersigned, declare that I am a resident or employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012-4202; that I am over the age of eighteen years; that I am not a party to the above-entitled action; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the United States District Court for the Central District of California, and the United States Court of Appeals for the Ninth Circuit, at whose direction the service by mail/hand delivered described herein was made to:

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A copy of: **APPELLANT'S SUPPLEMENTAL BRIEF EN BANC**

This certification is executed on February 26, 2004, at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

_____
Maria Garza

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