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No. 02-50380

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

THOMAS CAMERON KINCADE,

Defendant/Appellant.

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Appeal from the United States District Court  
for the Central District of California

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BRIEF OF *AMICUS CURIAE*  
PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA  
FOR THE EN BANC COURT

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## INTEREST OF AMICUS CURIAE

The Public Defender Service for the District of Columbia (PDS) represents thousands of individuals whose interests are affected by cases such as this one due to the very close similarities between Section 3 of the DNA Analysis Backlog Elimination Act of 2000 (DNA Act), which governs federal offenders like the appellant, and Section 4 of the Act, which contains parallel provisions governing collection and use of DNA information from District of Columbia offenders. PDS therefore has substantial experience litigating the issues presented here as well as a substantial interest in the Court’s analysis. PDS accordingly seeks leave to participate as *amicus curiae*.

## STATEMENT

This case raises important questions concerning the constitutionality of the DNA Act and its provisions compelling thousands of prisoners, probationers and parolees to submit samples of biological materials for analysis and inclusion in the Combined DNA Index System (CODIS), a nationwide DNA database operated by the Federal Bureau of Investigation (FBI). Submission of such samples is mandatory for all eligible offenders<sup>1</sup> under the Act – any person who “fails to cooperate” is deemed guilty of a federal criminal offense, 42 U.S.C. §§

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<sup>1</sup> A discussion of the ever-expanding list of collection-eligible offenses appears in Sec. C.1., *infra*.

14135a(a)(5), 14135b(a)(5)<sup>2</sup> – and collection authorities may use any means reasonably necessary to “detain, restrain, and collect a DNA sample” from a reluctant or recalcitrant offender, 42 U.S.C. §§ 14135a(4)(A), 14135b(4)(A). The purpose of the database – and, accordingly, the DNA Act itself – is to link individuals who have submitted samples pursuant to the Act with evidence collected from crime scenes nationwide. In the words of Department of Justice/FBI website, the “mission” of CODIS is to provide law enforcement with “an effective tool for solving violent crimes.”

See <http://www.fbi.gov/hq/lab/codis/program.htm> (FBI Website describing “Program Mission Statement and Background” of CODIS).

Although only the federal offender provisions of the DNA Act are directly implicated in this case, both the compulsory powers of the DNA Act and the contents of the CODIS database stretch well beyond United States Code offenders. In fact, the Act’s reach includes virtually all offenders within the purview of the national government as the statute also contains identical provisions governing collection and use of DNA information from District of Columbia offenders, 42 U.S.C. § 14135b, and from individuals convicted under the Uniform Code of Military Justice, 10 U.S.C. § 1565. The DNA information collected from D.C. and

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<sup>2</sup> All citations to the United States Code are to the 2003 West edition and its supplements.

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).

In addition, the DNA Act extends to the states, encouraging state governments to develop their own DNA databanks and to link their forensic systems with CODIS. 42 U.S.C. § 14135. The Act also 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, enacted the necessary enabling legislation to develop a linked system of DNA databanks.<sup>3</sup>

A. The Evolution of the DNA Act

Congress first authorized the establishment of a national, FBI-operated, DNA databank via the DNA Identification Act of 1994, a subchapter of the Violent Crime Control and Law Enforcement Act of that same year. Pub. L. No. 103-322, 108 Stat. 1796 (1994)(codified in scattered sections of Title 42 of the United States Code). States began transmitting information from their DNA databanks to the

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<sup>3</sup> See Appendix A, a chart summarizing the DNA collection statutes of all 50 states and the District of Columbia. See also Appendix B, a similar chart created by the private firm of Smith Alling Lane and updated regularly at <http://www.dnaresource.com>.

FBI soon thereafter, but because the 1994 Act failed to specifically authorize any additional mechanisms for gathering DNA samples, DNA from federal, District and military offenders went uncollected. In an effort to remedy this oversight, Congress next included a provision directing the FBI to “expand” CODIS to include “Federal crimes and crimes committed in the District of Columbia,” 28 U.S.C. § 531(f)(1)(C), in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. 104-132, 110 Stat. 1214 (1996)(codified in scattered sections of 5, 8, 18, 19, 21, 22, 28, 40, 42, 49, 50 U.S.C.).

After the passage of AEDPA, however, the Department of Justice determined that federal officials still did not possess sufficient statutory authority to conduct the constitutionally sensitive searches and seizures at issue. The DNA Act of 2000 was then enacted in an express effort to fill that gap, specifically authorizing the collection of DNA samples by federal, D.C. and military authorities and specifically requiring that such samples (or, in the case of samples obtained from military offenders, the results of the military’s own DNA analysis) be furnished directly to the Director of the FBI. The FBI, in turn, is now expressly commanded by the Act to use the samples to “link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the [CODIS] system.” H.R. Rep. No. 106-900(I), 106<sup>th</sup> Cong., 2d Sess. (Sept. 26, 2000) at \*8.

## B. The Purpose of the DNA Act

The manifest purpose of the DNA Act is to create an “index 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. In fact, legislative history makes clear not only that the DNA Act was designed to assist law enforcement but also that DNA data collected pursuant to the Act is to “be used *solely* for law enforcement purposes.” *Id.* at \*25 (emphasis added); *see also id.* at \*36 (“The statutory rules for the system provide that stored DNA samples and DNA analyses may be used for law enforcement identification purposes and virtually nothing else.”). Not surprisingly, every iteration of the Act has also been codified as a federal law enforcement provision.<sup>4</sup>

## C. DNA Databases: The Practical Reality

The government pleadings in this case portray forensic DNA as an unqualified public good – a failsafe method for identifying and convicting perpetrators of crime. In reality, however, dangers inherent in the collection and dissemination of personal information, as well as chronic imperfections in forensic

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<sup>4</sup> As noted, the 1994 legislation was contained within the Violent Crime Control and Law Enforcement Act of that year. In 1996, the DNA database provisions were contained within the Funding for Law Enforcement section of AEDPA. The DNA Act of 2000 appears within the State and Local Law Enforcement subchapter of the Violent Crime Control and Law Enforcement chapter of Title 42 of the U.S. Code.

DNA practice, significantly undermine the nature of the governmental interests represented by DNA databases.

### 1. DNA Databases Are Rapidly Expanding

The government relies on the relatively limited nature of current DNA databases to diminish the threat to personal privacy represented by forced DNA collection. Such databases have been steadily expanding, however, ever since their inception and calls to expand them further grow louder every day. *See generally* Rebecca Sasser Peterson, Note, *DNA Databases: When Fear Goes Too Far*, 37 *Am. Crim. L. Rev.* 1219, 1224, 1227 (2000). Indeed, although forensic DNA databases were originally quite circumscribed – requiring samples only from adults convicted of felony sex offenses and a handful of other violent crimes – DNA databases have now been expanded to include many other offenses as well as other classes of offenders. Thus, the federal DNA Act compels DNA collection from convicted bank robbers like Mr. Kincade, 42 U.S.C. § 14135a(d)(1)(E), and from District of Columbia offenders convicted of burning their own property for insurance fraud, D.C. Code § 22-4151(2).<sup>5</sup> Various state laws likewise require collection of DNA samples from people convicted of such non-violent crimes as felonious possession of food stamps, Ala. Code §§ 36-18-24, 13A-9-91 (2003), and false swearing, Ga. Code Ann. § 16-10-71, 24-4-60 (2000).

<sup>5</sup> All citations to the D.C. Code are to the 2001 edition and its supplements.



Many other state databases now reach even wider, collecting DNA from anyone convicted of *any* kind of felony,<sup>6</sup> and it is expected that “eventually, all 50 states will include [in their collection statutes] all felony offenses.” *See* <http://www.fbi.gov/hq/lab/codis/brouchure.pdf> (FBI Website); Govt. Supp. En Banc Brief at 14, n.8. In the meantime, a number of states are expanding their database laws to require DNA extraction from misdemeanants<sup>7</sup> and even from individuals merely *arrested* for certain offenses. *See, e.g.*, La. Rev. Stat. Ann. § 15:609(A) (West Supp. 2003); Tex. Gov’t Code Ann. § 411.1471(a)(2)(West 2003); Va. St. § 19.2-310.2:1 (2003). *See also* D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case For Population-Wide Coverage*, 2003 Wisc. L. Rev. 413, 430-435 (2003). More than half of the states now also collect samples from juvenile offenders.<sup>8</sup>

Indeed, expansion of collection-eligible behavior has already occurred with respect to the federal DNA Act as the Department of Justice recently modified the Act’s implementing regulations to add “a large number of offenses ... not otherwise included” in the original statute. *Regulations Under the DNA Analysis Backlog Elimination Act of 2000*, 68 Fed. Reg. 74855, 74856 (December 29, 2003)

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<sup>6</sup> *See* Appendices A & B.

<sup>7</sup> *See* Appendices A & B.

<sup>8</sup> *See* Appendices A & B.

(discussing modifications to 28 C.F.R. Pt. 28 based on Sec. 503 of the USA Patriot Act). These changes include extension of DNA collection requirements to all crimes covered by 18 U.S.C. § 16, *id.* at 74856-7, which itself includes even crimes involving attempted damage to property.<sup>9</sup> Moreover, there is potential for virtually limitless growth with respect to qualifying offenses under the DNA Act as the Attorney General is empowered to re-define the breadth of the Act, as appropriate, in perpetuity. 42 U.S.C. § 14135a(d)(1).

But even these developments do not represent the outer limit of contemplated database expansion. Legislators, commentators, and even the President, are every day promoting expansion of collection laws to include misdemeanants and more arrestees<sup>10</sup> and “the strong trend in State law reform is towards [ever] broader sample collection.” *Funding Forensic Sciences DNA and Beyond*, 108<sup>th</sup> Cong. (2003)(testimony of The Honorable Sarah V. Hart, Director, National Institute of Justice)(Hart Testimony), *available at* 2003 WL 56336510.

<sup>9</sup> 18 U.S.C. § 16 establishes federal “crimes of violence,” specifically defining such crimes as “(a) an offense that has as an element the use, *attempted use*, or threatened use of physical force against the person *or property of another*, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense” (emphasis added).

<sup>10</sup> *See, e.g.*, Richard Willing, *FBI May Collect Juveniles’ DNA*, USA Today, Nov. 17, 2003, *available at* 2003 WL 5323471(discussing impending federal legislation to add juvenile offenders and arrestees to CODIS); Laylan Copelin, *Allow DNA Samples At Arrests, Officials Urge*, Austin American-Statesman, June 9, 2000.

Given this evolution, it seems “inevitable,” as one commentator has observed, that at some point “there will be calls for a universal DNA law enforcement data bank with samples from every resident in the country.” Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 *Brook. L. Rev.* 127, 129 (2001). In fact, DNA sampling of the entire population – for law enforcement use – has already been recommended by more than one ostensibly reputable source. *See, e.g.*, Kaye & Smith, *supra*, at 452-59.

In this era of pervasive national security concerns, how long before someone proposes to import into a criminal justice database the 282 million DNA samples currently sitting in tissue repositories in the United States? National Bioethics Advisory Commission, *Research Involving Human Biological Materials: Ethical Issues and Policy Guidance* 13 (1999), available at [http://www.georgetown.edu/research/nrcbl/nbac/hbm\\_exec.pdf](http://www.georgetown.edu/research/nrcbl/nbac/hbm_exec.pdf). Or the DNA information now routinely extracted by hospitals from newborn babies? Kaye & Smith, *supra*, at 444-45. Or, insofar as database collection principles are premised on behavior that has some nominal predictive value with respect to future crime, DNA collection based on social characteristics even more highly correlated with involvement in the criminal justice system, such as family dysfunction, economic status, race, unemployment, neighborhood, gender or age? *Id.* at 420-421 (citing 9

*Prediction and Classification: Criminal Justice Decision Making* (Don Gottfredson & Michael Tonry eds., 1987); *Prediction in Criminology* (David Farrington & Roger Tarling eds., 1985); Jack F. Williams, *Process and Prediction: Return to a Fuzzy Model of Pretrial Detention*, 79 Minn. L. Rev. 325 (1994); Daniel S. Goodman, Note, *Demographic Evidence in Capital Sentencing*, 39 Stan. L. Rev. 499 (1987)).

## 2. DNA Databases are Vulnerable to Misuse and Abuse

All 50 states require collection of DNA samples but only one state, Wisconsin, provides for destruction of such samples upon completion of DNA typing.<sup>11</sup> Virtually every state, therefore, collects and then retains the personal medical information of thousands of its citizens, potentially retaining access to those citizens' biological secrets for however long, and to whatever end, state authorities see fit. The testing protocol under the federal DNA Act is effectively identical – implementing regulations provide that DNA testing be conducted by the FBI per the FBI's internal regulations, *see e.g.* 28 C.F.R. 812.4; the FBI's "Standards for Forensic DNA Testing Labs" require that "[w]here possible, the laboratory shall retain or return a portion of the evidence sample." *See* <http://www.fbi.gov/hq/lab/codis/forensic.htm>. The Act also neither requires, nor even recommends, destruction of samples after analysis.

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<sup>11</sup> See Appendix A.

While intentional misuse of such information is prohibited by law in many jurisdictions,<sup>12</sup> recent exposés regarding database insecurity and unauthorized data sharing demonstrate that when private information is collected by the government, it is almost inevitably vulnerable to exposure and abuse. Not one month ago, for example, the governor of Georgia was alarmed to discover that information accumulated by the state regarding the private lives of ordinary, law-abiding citizens – including marriage and divorce records as well as fingerprints – had been shared with “Matrix,” a privately-owned multistate law enforcement databank. Dick Pettys, *Georgia Stayed With Database Despite Governor's Statement*, Associated Press, January 30, 2004, *available at* 1/30/04 APWIRES 20:43:04. Even more alarming, other states apparently continue to affiliate with Matrix, demonstrating just how dangerous it has become to allow government entities access to private information, no matter how regulated such access may, on paper, be. Indeed, insofar as the DNA Act provides that collection authorities “may enter into agreements with ... *private* entities to provide for the collection of the samples” required under the act, 42 U.S.C. §§ 14135a(a)(4)(B), 14135b(a)(4)(B), 10 U.S.C. § 1565(a)(3) (emphasis added), there is even more cause for concern regarding the government’s ability to control access to and use of the biological information it collects.

<sup>12</sup> The DNA Act provides for a fine – but no jail time – upon “knowing[] disclos[ure]” of indexed DNA information. 42 U.S.C. §§ 14133(c), 14135e(c).

Database insecurity and evolving standards for database use have been, in fact, the topic of considerable controversy across Europe in the wake of the Icelandic Parliament's recent endorsement of a private company's plan to collect DNA samples from the country's entire population. Although the Icelandic database is intended – at the moment – for use solely by genetic researchers, the porousness of government files, the voraciousness of law enforcement databases, and the increasing development of “second use” rationales for retroactively re-writing database disclosure principles have rendered privacy advocates extremely concerned. Editorial, *Privacy Precedent*, The Boston Globe, March 7, 2001, available at 2001 WL 3922738; Gary Taubes, *Your Genetic Destiny For Sale*, 104 M.I.T. Tech. Rev. 3 (2001); John Schwartz, *For Sale in Iceland: A Nation's Genetic Code; Deal With Research Firm Highlights Conflicting Views of Progress, Privacy and Ethics*, The Washington Post, January 12, 1999, available at 1999 WL 2193418.

Closer to home, we have seen exactly how the government proposes to square the inevitably competing interests of law enforcement and medical privacy in the Department of Justice's on-going efforts to subpoena, from six major metropolitan hospitals, the complete medical histories of every woman who has undergone an abortion procedure performed by the doctor-plaintiffs challenging the breadth of the Partial Birth Abortion Ban Act of 2003. *See e.g.* Eric Lichtblau,

*Ashcroft Defends Subpoenas*, The New York Times, February 12, 2004, available at 2004 WL 59683051. It is apparently the position of the government that neither state privacy protections nor the federal strictures recently imposed under the Health Insurance Portability & Accountability Act of 1996, 29 U.S.C. § 1173(d)(2)(a), can or should impede its prosecutorial efforts.

As for an American example of the “second use” phenomenon – where initial or official database standards are modified or eroded over time – there are the military offender provisions of the DNA Act itself, which now authorize law enforcement use of a Defense Department DNA repository initially designed solely for the identification of soldiers lost on the battlefield. Patricia A. Ham, *An Army of Suspects: The History and Constitutionality of the U.S. Military’s DNA Repository and Its Access For Law Enforcement Purposes*, 2003-AUG Army Law.

1. The Defense Department regulations that originally implemented this repository indicated plainly that “[t]he data collected and stored” for the repository would “not be analyzed until needed for the identification of human remains.” 62 Fed. Reg. 51835, \*51835 (Oct. 3, 1997).

In addition, even ostensibly limited databases are still subject to abuse by overzealous officials. The residents of Ann Arbor, Michigan learned this lesson in 1998 when the local police “investigated” a sexual assault case by “requesting” that all African American men in a particular neighborhood “volunteer” DNA

samples for the state's DNA database. Those who declined were told their refusal would be considered grounds for suspicion in the case and, in fact, often found themselves targeted by search warrants. Peterson, *supra*, at 1227 (citing Richard Willing, *Privacy Issue Is the Catch for Police DNA "Dragnets,"* USA Today, Sept. 16, 1998). Similarly, and just months ago, 1,200 citizens were "asked" to submit to DNA sampling by the Louisiana State Police. Those who resisted were allegedly told by state authorities that any failure to cooperate would result in public identification as a suspect. Keith O'Brien, *Men Seek Return of DNA From Serial Killer Search: Some Claim Police Bullied Them For Swabs*, Times-Picayune, December 28, 2003, available at 2003 WL 60084616; Alan Sayre, *Tool of DNA Offers Potential for Abuse*, The Baton Rouge Advocate, December 22, 2003, available at 2003 WL 4895631. Indeed, if the temptation and the ability to improperly collect and improperly disseminate DNA material were not so powerful, there would be no need to criminally proscribe misuse of database information.

Finally, it is important to understand that even the limited information contained in the profiles stored in a DNA databank is subject to abuse, despite assertions by database proponents that these profiles contain no significant personal information. In fact, many geneticists believe that the "non-coding" portions of the DNA strand used to create forensic profiles will someday yield the



same kind of personal biological details held in “coded” DNA.<sup>13</sup> See, e.g., Sophia Kazmi, *'Junk' DNA Has Purpose, East Bay Researchers Say*, Contra Costa Times, October 17, 2003, available at 2003 WL 65736421; *An Ancient Helper - Useful "Junk" DNA: Some 'Junk' DNA May Have a Function*, The Economist, September 6, 2003, available at 2003 WL 58583958; Tina Hesman, *Human Genome Sequencing Project: Scientists Say Map May Lead to New Medical Frontiers*, St. Louis Post-Dispatch, April 20, 2003, available at 2003 WL 3572097. In fact, while “much biomedical research and clinical care threatens subjects’ or patients’ privacy ... information derived from DNA can do so to a significantly greater extent” given the “information-rich nature of DNA.” Ronald M. Green & A. Matthew Thomas, *DNA: Five Distinguishing Features for Policy Analysis*, 11 Harv. J.L. & Tech. 571, 579 (1998). The risks of DNA related discrimination, in variety of contexts, are therefore both very real and very frightening. *Id.* at 573, 577 (citing E. Virginia Lapham et al., *Genetic Discrimination: Perspectives of Consumers*, 274 Science 621 (1996)).

### 3. Forensic DNA Is Not Infallible.

Notwithstanding the popular perception that DNA evidence is essentially infallible, expert study has repeatedly revealed that DNA evidence is far from

<sup>13</sup> “Coded” DNA is a portion of the DNA molecule whose function is now known and understood by scientists. “Junk,” or “non-coding” DNA is simply that portion of the molecule not yet associated with a particular biological function.

flawless; it can – and does – result in the implication of innocent people. Indeed, early statements regarding the “impossibility” of erroneous forensic “matches” have been repudiated and retracted by even those who initially uttered them.

William C. Thompson et al., *How the Probability of a False Positive Affects the Value of DNA Evidence*, Vol. 8, No. 1 J. of Forensic Sci. 1 (2003) (citing K. Roeder, *DNA Fingerprinting: A Review of the Controversy*, 9 Stat. Sci. 263, 269 (1994); D. Kaye, *DNA Evidence: Probability, Population Genetics and the Courts*, 7 Harv. J. Law Technology, 101, 172 (1993); see also R.N. Jonakait, *Stories, Forensic Science and Improved Verdicts*, 13 Cardozo L. Rev. 343 (1991)).

Nonetheless, courts, litigants and jurors continue to labor under the layperson’s misconception that DNA evidence can never be wrong,<sup>14</sup> compounding significantly the horrifying consequences of an erroneous DNA “match.”

Moreover, concerns regarding forensic DNA “matches” are especially troubling in the “cold hit” database context where, potentially, the DNA “match” constitutes the bulk, or even the entirety, of the prosecution’s case. For this reason, the general scientific community has become increasingly wary of DNA databanks and of cases built upon such evidence. See generally Thompson, *How the*

<sup>14</sup> See Appendix C, a recent poll of 1000 potential District of Columbia jurors conducted on December 8-14, 2003 by Lake Snell Perry & Associates. The poll reveals that many potential jurors consider DNA evidence to be unassailably reliable; nearly a third of those surveyed expressed the opinion that DNA evidence could never be wrong or mistaken.

*Probability of a False Positive Affects the Value of DNA Evidence, supra* at 1 (noting that “the potential for a false positive [DNA ‘match’] can lead to serious errors of interpretation, particularly when [a] ... suspect is identified through a ‘DNA dragnet’ or database search”). Specifically, these scientists warn of the “false positive” results born of problems inherent in forensic DNA practice generally<sup>15</sup> and in the procedures followed by the FBI<sup>16</sup> in particular. Such errors have been documented in both law enforcement crime labs<sup>17</sup> and in “independent”

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<sup>15</sup> Two types of erroneous “matches” are discussed in the context of forensic DNA typing: (1) “coincidental matches,” which occur when two different people have the same DNA profile and (2) “false positive matches, which occur as a result of errors in collection, errors in sampling, errors in data interpretation and/or errors in the reporting of test results.

<sup>16</sup> Experts have expressed the following concerns, among others, about the FBI’s DNA practices: (1) the FBI’s reluctance to conduct blind proficiency testing, *see* Joseph L. Peterson et al., National Institute of Justice, *Developing Criteria for Model External DNA Proficiency Testing* at xi (2001); (2) the FBI’s refusal to disclose its DNA testing error rates, *see* Richard Lempert, *After the DNA Wars: Skirmishing with NRC II*, 37 *Jurimetrics J.* 439 (1997); William C. Thompson, *Accepting Lower Standards: The National Research Council’s Second Report on Forensic DNA Evidence*, 37 *Jurimetrics J.* 405, 419-21 (1997); (3) the lack of independent “peer review” of FBI procedures, Jaiprakash G. Shewale et al., *Anomalous Amplification of the Amelogenin Locus Typed by AmpFLSTR Profiler Plus Amplification Kit* in *Forensic Science Communications* Vol. 2, No. 4 (Oct. 2000); and (4) the FBI’s practice of “manufacturing” peer review by its own scientists in advance of litigation, U.S. Dep’t of Justice Office of Oversight and Review, *Memorandum of Investigation*, Case No. C & R 2002003 (May 1, 2002). Given that state law enforcement agencies are directed by the DNA Act look to the FBI for guidance with respect to “quality assurance protocols and practices,” 42 U.S.C. § 14135(d)(2)(A), the FBI’s documented shortcomings in this regard are troubling.

laboratory<sup>18</sup> testing.<sup>19</sup> False positives are also generated with disturbing frequency in the few published “proficiency” (or practice) tests run by reputable DNA labs.

*Subjective Interpretation, Laboratory Error and the Value of Forensic DNA*

*Evidence: Three Case Studies*, 96 *Genetica* 153, 168 (1995); Jonathan J. Koehler,

*DNA Matches and Statistics: Important Questions, Surprising Answers* 76

*Judicature* 222, 229 (1993); see also Jonathan J. Koehler, *The Random Match*

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<sup>17</sup> The Philadelphia City Crime Laboratory “accidentally switched” the reference samples of the defendant and the complainant in a recent sexual assault case. This error led the laboratory to label a defendant a “potential contributor” of what the lab had misidentified as a “seminal stain” on a complainant’s clothing. Thompson, *How the Probability of a False Positive Affects the Value of DNA Evidence*, *supra*, (citing L. Brenner & B. Pflieger, *Investigation of the Sexual Assault of Danah H.*, Philadelphia Police Department DNA Identification Laboratory, Sept. 24, 1999). Sample contamination was also apparently the source of a recent DNA “match, reported by officials in New Zealand, of biological material collected from the clothing of a murdered child and a reference DNA sample submitted by the complainant in an unrelated sexual assault case. See generally, *DNA contamination likely*, *The Cairns Post*, February 7, 2004, available at 2004 WL 64380051.

<sup>18</sup> In 1995, Cellmark Diagnostics “accidentally switched” two reference samples and consequently reported an erroneous match between a defendant and an evidentiary swab from a crime scene. Thompson, *How the Probability of a False Positive Affects the Value of DNA Evidence*, *supra*, (citing R.W. Cotton & C. Word, *Cellmark Diagnostics: Amended Report of Laboratory Examination Case No. F951078* (1995)).

<sup>19</sup> For a general discussion of the “lack of standards for forensic laboratories that conduct DNA testing,” see Veronica Valdivieso, Note, *DNA Warrants: A Panacea for Old, Cold Rape Cases?* 90 *Geo. L.J.* 1009, 1023, n.118 (2002) (noting that “[m]edical standards for the diagnosis of strep throat are more stringent than those for laboratories conducting DNA testing for the criminal justice system”).

*Probability in DNA Evidence: Irrelevant and Prejudicial?* 35 *Jurimetrics* 201 (1995).

In addition, current criminal justice statistics indicate while only 2% of white adults will ever be subject to correctional supervision, fully 9% of African Americans can expect to be incarcerated or placed on probation or parole during their lifetime.<sup>20</sup> “There can be no doubt,” therefore, “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.” Kaye & Smith, *supra*, at 452-59. There can also be no doubt, then, that the tragic consequences of flawed forensic DNA practice are inordinately visited upon minority communities.

In the end, however, even if the absolute number of erroneous DNA “matches” is relatively low, the implication of even one innocent person, via seemingly infallible evidence, is extremely troubling. Just a few years ago, a false positive error was discovered in Oklahoma via post-conviction DNA re-testing,<sup>21</sup>

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<sup>20</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Correctional Populations in the United States, 1997* (Nov. 2000) at iii, 5 available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus97.pdf>

<sup>21</sup> Of course, the analysis involved in DNA exoneration is considerably more reliable than the procedures involved in declaring a DNA “match,” where subjective eye-ball analysis can lead to the erroneous “calling” of very similar DNA profiles as identical. When DNA evidence is used to prove innocence, however, the DNA profile of the defendant and of the evidence sample are often completely and unquestionably distinct.

an avenue of vindication not available in many jurisdictions and simply not possible in many cases. The defendant in that matter had been sentenced to 3000 years in jail.<sup>22</sup>

### ARGUMENT

The panel was correct when it concluded that the DNA Act violates the Fourth Amendment.<sup>23</sup> Indeed, the privacy invasions created by the Act’s attempt to capitalize on modern medical science – for the express purpose of assisting law enforcement officials – could have scarcely been imagined when the Fourth Amendment was drafted more than 200 years ago. Although recent Supreme Court cases have recognized the serious privacy concerns inherent in scientific analysis of biological materials, *Schmerber v. California*, 384 U.S. 757, 767-68 (1966), and have warned that such analysis “can reveal a host of private medical facts,” *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 616-17 (1989),<sup>24</sup> even those cases have not fully confronted the overwhelming privacy

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<sup>22</sup> Thompson, *How the Probability of a False Positive Affects the Value of DNA Evidence*, *supra* (discussing false conviction of Timothy Durham).

<sup>23</sup> In pertinent part, 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 . . . .” U.S. Const. amend. IV (emphasis added).

<sup>24</sup> *See also Chandler v. Miller*, 520 U.S. 305, 313 (1997) (“collection and testing of urine” constitutes a “search” for Fourth Amendment purposes); *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (“detentions for the sole purpose of

concerns created by the rapid advancement of medical technology. Modern DNA science has dramatically heightened the government's ability to glean information from a blood sample, in a way that would have been inconceivable at the time of *Schmerber*.

It is only in this context that the Court can understand the serious Fourth Amendment implications posed by the DNA Act.<sup>25</sup> Without any requirement of individualized suspicion, the DNA Act compels thousands of people across the country to submit to a medical procedure with the potential to reveal their most intimate genetic secrets. The category of triggering offenses under the federal statute includes crimes such as Mr. Kincade's – bank robbery – for which the usefulness of DNA evidence is dubious at best and the regime is rapidly increasing its reach to include arrestees, juvenile offenders, and people convicted of such non-violent offenses as illegal possession of food stamps and insurance fraud.<sup>26</sup> Someday soon, the same public policies animating Georgia's attempt to perform

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obtaining fingerprints are . . . subject to the constraints of the Fourth Amendment").

<sup>25</sup> Appellate courts considering this issue have often misapprehended the nature of the privacy interests implicated by forced DNA collection – focusing, for example, on the extent of the initial seizure of the sample rather than on the extent of subsequent (and potential) searches. *See e.g., Green v. Berge*, 2004 WL 42498 (7<sup>th</sup> Cir. Jan. 9, 2004) (“DNA collection is less invasive than a search of one's home”) (Easterbrook, J., concurring).

<sup>26</sup> See discussion, Sec. C.1., *supra*.

drug tests on candidates for political office, *Chandler*, 520 U.S. at 305, will likely prompt requests for DNA samples from public officials, including even officers of this Court. Indeed, the state of Louisiana has just recently enacted legislation requiring DNA samples from police officer applicants. La. Rev. Stat. Ann. §2405.4 (West 2004).

Though the Framers of the Constitution could scarcely have imagined the bounty of personal information collected by the DNA Act, they would have immediately recognized the motivations behind the Act, because the Framers well understood the desire to invade the privacy of citizens for the purpose of solving crimes. From the Star Chamber to the Revolutionary War, Anglo-American history had been replete with attempts to fight crime by allowing law enforcement officials to invade protected spheres of privacy in the absence of any particularized evidence of wrongdoing. It was precisely that history, moreover, that led the Framers to adopt the Fourth Amendment, which was designed as a safeguard both against the widespread use of suspicionless “general warrants” in England and the use of “writs of assistance” against the American colonists. *See* LaFare, *Search and Seizure*, § 1.1(a) (3d ed. 1996).

In light of its origins, therefore, it is hardly surprising that the Supreme Court has in a recent trilogy of cases – *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000); *Ferguson v. City of Charleston*, 532 U.S. 67, 79-80 (2001); and *Illinois v.*



*Lidster*, 124 S.Ct. 885 (2004) – interpreted the Fourth Amendment as requiring *all* “reasonable” searches and seizures to involve individualized suspicion unless they are “divorced” from the state’s general interest in law enforcement.

The most critical inquiry in determining whether a regime of suspicionless searches can survive Fourth Amendment scrutiny is thus whether the scheme’s “primary purpose [is] to detect evidence of ordinary criminal wrongdoing.”

*Edmond*, 531 U.S. at 41.<sup>27</sup> The Supreme Court has “never approved” a scheme of suspicionless law enforcement searches because, as the Court explained in *Edmond*, 531 U.S. at 41, 44, “the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life,” if they could be “justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given [person] has committed some crime.”

The searches at issue in this case are not “divorced” from law enforcement interests – the entire point of the DNA databank statutes is to aid law enforcement. Indeed, as the government candidly admitted to Congress, the primary purpose of these searches is “to solve crime.” H.R. Rep. No. 106-900(I) at \*9, \*27. The panel

<sup>27</sup> As the panel correctly observed, recent Supreme Court decisions like *Ferguson* completely undercut the reasoning of *Rise v. Oregon*, 59 F.3d 1556 (9<sup>th</sup> Cir. 1995). These decisions have also prompted other courts to question the constitutional validity of suspicionless searches authorized by the DNA Act. *See United States v. Miles*, 228 F.Supp.2d 1130 (E.D. Ca. 2002); *Maryland v. Raines*, Montgomery County Circuit Court Criminal Case No. 98303 (January 28, 2004) (attached hereto as Appendix D).

thus correctly saw the DNA Act for what it was: An unconstitutional use of modern technology to significantly narrow the broad realm of privacy that the Framers of the Constitution sought to protect with the inclusion of the Fourth Amendment in the Bill of Rights.

The privacy interests at stake in this case are also not at all diminished by law enforcement promises not to look – for now – at various portions of the DNA sample. As the Supreme Court has made clear in the context of home searches, the government cannot belittle the severity of a privacy invasion on the ground that law enforcement officials averted their eyes and thus failed to “detect private activities occurring in private areas.” *Kyllo v. United States*, 533 U.S. 27, 37 (2001). By parity of reasoning, the government cannot lessen the privacy invasion caused by its forcible procurement of a DNA specimen containing an individual’s genetic secrets on the ground that it does not currently plan to discover or divulge those secrets. Indeed, the Defense Department’s initial pledge to use the DNA samples it has collected from over three million American service members solely for the purpose of identifying of battlefield remains is cold comfort to the military personnel whose DNA has now, by legislative fiat, been made available to law enforcement.<sup>28</sup>

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<sup>28</sup> See discussion, Sec. C.2., *supra*.

It makes absolutely no difference, moreover, that the DNA Act allows suspicionless invasions into the realm of guaranteed privacy only for probationers, parolees, supervised releasees and prisoners. Even for people like these, with admittedly lesser privacy interests, the Supreme Court has held firm to the individualized suspicion requirement as a necessary component of a “reasonable” search. The Court has thus never permitted any general law enforcement search or seizure of such persons – much less the sort of sweeping privacy invasions permitted by the DNA Act. Instead, the Supreme Court cases have involved both some form of individualized suspicion as well as particular searches and seizures that were justified not as a matter of general crime control but by a genuine need to closely *supervise* probationers, parolees and prisoners. *Griffin v. Wisconsin*, 483 U.S. 868, 875-79 (1987); *United States v. Knights*, 534 U.S. 112, 120-21 (2001).

The DNA Act, in contrast, has nothing to do with “supervision.” The collected biological information does not aid in observing the behavior of probationers or parolees – as, for example, more stringent home search or drug testing requirements might do. Instead, the law effectively deputizes supervisory officials as the collection agents for *law enforcement officers*; those officials are empowered to collect genetic samples but are then *required* to provide those samples to law enforcement officials for analysis and inclusion in a nationwide forensic databank. The DNA Act thus specifically charges law enforcement

officials with obtaining evidence about unspecified, unsolved crimes for use in subsequent, unspecified criminal prosecutions. In the process, the Act creates a class of people – one whose demographics are extremely skewed<sup>29</sup> – who become “the usual suspects” in every crime for the rest of their lives. Moreover, because of the dangerous combination of three factors – the lack of any corroborating suspicion, the significant likelihood that jurors will uncritically accept the reliability of the DNA results, and the demonstrated fallibility of DNA testing in at least some cases – these suspicionless searches create a grave risk of wrongful conviction for a small number of random people.

Although the government’s most recent pleading suggests that the potential deterrence value of DNA testing renders the Act a supervisory tool, it is clear that this “deterrence” rationale is one manufactured for litigation purposes. As discussed above, the legislative history of the DNA Act plainly establishes that the Act has always been envisioned as, above all, a law enforcement mechanism implemented via the assistance of supervisory authorities. This is why the “CODIS Success Stories” section of the Department of Justice/FBI website is illustrated with a drawing of two handcuffed hands. *See* <http://www.fbi.gov/hq/lab/codis/brochure.pdf>. Moreover, if the hypothetical deterrence value of DNA collection is determined to provide a supervisory

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<sup>29</sup> See discussion, Sec. C.3., *supra*.

rationale sufficient to override the clear law enforcement purpose of such action, *every* search or seizure of parolees or probationers will inevitably pass constitutional scrutiny because it will be easy for the government to spin out arguments as to why *every* law enforcement procedure that helps the government solve crimes may also deter someone's inclination to commit them. If such a phony deterrence claim is enough, therefore, it is hard to imagine any limits on the government's ability to search and seize for "deterrence" purposes.

In addition, the DNA Act also contains absolutely no element of consent, an aspect which Justice Kennedy has recently described as an "essential, distinguishing feature" of a permissible suspicionless search. *Ferguson*, 532 U.S. at 90-91 (Kennedy, J. concurring in the judgment).<sup>30</sup> This case is therefore very different from a case in which the person being searched has at least impliedly consented by voluntarily engaging in some regulated activity or profession, which he or she could have chosen to forego rather than undergo the search. *Compare Skinner*, 489 U.S. at 615 (drug testing of railway employees for railroad safety purposes); *Treasury Employees v. Von Raab*, 489 U.S. 656, 660-61 (1989) (drug testing of customs employees to prevent corruption); *Vernonia School Dist. 47J v.*

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<sup>30</sup> See *Ferguson*, 532 U.S. at 77 ("Because the hospital seeks to justify its authority to conduct drug tests and turn the results over to law enforcement without the knowledge or consent of the patients, this case differs from the four previous cases in which we have considered whether comparable drug cases 'fit within the closely guarded category of constitutionally permissible suspicionless searches.'").

*Acton*, 515 U.S. 646, 650-51 (1995) (drug testing of high school student-athletes). Rather, this is a case where testing is involuntary and unavoidable. The DNA Act makes refusal to cooperate in the testing process a crime, and resistance is effectively futile: Those who fail to cooperate may be forcibly detained for the purpose of sample collection and those who continue to refuse are remanded to prison where correctional authorities forcibly conduct the testing anyway.<sup>31</sup>

The compulsory nature of the Act, moreover, is completely unnecessary with respect to what the government claims is another potential purpose of the Act – the exoneration of the innocent. Innocence Protection Acts around the country, including the District of Columbia, D.C. Code § 22-4133, permit prisoners who wish to demonstrate their innocence to voluntarily submit a DNA sample for testing. *See Hart Testimony, supra*, (noting that “over 30 States have enacted special statutory provisions for post-conviction DNA testing, and [that] additional States make post-conviction testing available through other procedures”). This sort of voluntary scheme would fulfill any legitimate interest in exoneration while at the same time protecting the rights of those prisoners who do not wish to submit to intrusive bodily searches.

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<sup>31</sup> Indeed, this is ultimately what happened in this very case. *See Govt. Supp. En Banc Brief* at 5.

## CONCLUSION

The sweeping, suspicionless privacy intrusions permitted by the DNA Act violate the Fourth Amendment because they are conducted entirely for the purpose of solving general, unknown crimes. The entire Court should so hold, and should reverse the order of the lower court requiring Mr. Kincade to submit to DNA testing in the absence of individualized suspicion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2004, a copy of the foregoing brief has been served, by mail, upon:

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to this Court's order dated January 16, 2004, the forgoing brief is:

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