No. 02-50380

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS CAMERON KINCADE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PETITION OF THE UNITED STATES FOR REHEARING AND FOR REHEARING EN BANC

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INTRODUCTION

A divided panel of this Court has held that the Fourth Amendment does not permit the government to obtain the DNA of convicted serious offenders via a blood draw that is performed without individualized suspicion. *United States v. Kincade*, No. 02-50380, 2003 WL 22251374 (9th Cir. Oct. 2, 2003) (Addendum A). In so holding, the panel majority has shut down DNA collection in this Circuit pursuant to the federal DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. 14135 *et seq.* (the "DNA Act") (Addendum B), which requires federal probation officers and the Bureau of Prisons to collect the DNA of prisoners, probationers, supervised releasees and parolees who have been convicted of a qualifying

offense. The *Kincade* majority is the first appellate court in the country to invalidate this common method of DNA collection, creating a conflict with the decisions of every other federal and state appellate court to have addressed the issue, see Part II, *infra.* The *Kincade* majority also overruled another panel of this Court, which upheld Oregon's DNA collection statute eight years ago. *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995), cert. denied, 517 U.S. 1160 (1996) (Addendum C). The *Rise* court upheld the Oregon law as reasonable under the Fourth Amendment on the ground that the public interest in combating recidivism and in accurate law enforcement justifies the minimally intrusive procedure of obtaining a blood sample from convicted serious felons, who have a substantially diminished expectation of privacy. *Id.* at 1559-62.

As explained below, the *Kincade* panel majority had no legitimate basis on which to overrule *Rise* or to issue a decision contrary to the DNA rulings of every state and federal appellate court rendered over the past decade. Equally problematic, the decision precludes operation of a federal law that is critical to the administration of justice. This erroneous decision accordingly merits en banc review. See Fed. R. App. P. 35(b)(1)(A) and 35(b)(1)(B).

REQUEST FOR EXPEDITED HEARING

The United States respectfully requests expedited consideration of this petition. The DNA samples that are collected pursuant to the DNA Act are placed in the combined DNA Index System ("CODIS"), a national database linking DNA evidence in a nationwide computer network that includes samples collected from state offenders. As of September 2003, that database contained 1,407,627 convicted offender profiles and has aided 9,842 investigations. See www.fbi.gov/hq/lab/codis/aidedmap.htm. The panel majority's decision requires the United States to cease collecting DNA samples from offenders convicted within the Ninth Circuit, see Addendum D, and to remove DNA profiles from such offenders already in the database. It effectively requires all the States within the Ninth Circuit, each of which has a similar DNA collection law, and each of which provides samples to the national database, to do the same.[1] The disruption that this ruling already has caused to the enforcement of a federal law whose efficacy depends on uniform, nationwide application justifies prompt consideration of this petition.

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[1] For this reason, all of the State Attorneys General within the Ninth Circuit support the filing of this petition.

BACKGROUND

A. The DNA Act

In 1994, Congress enacted legislation that authorized the Federal Bureau of Investigation to create the Combined DNA Index System, or CODIS. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 210304, 108 Stat. 1796. Although each of the fifty States enacted legislation to require DNA collection from designated convicted offenders and to provide those samples to CODIS, the federal government had no collection procedure until 2000. In that year, Congress enacted the DNA Analysis Backlog Elimination Act (the "DNA Act"), which requires the collection of DNA samples from certain federal convicted offenders. Pub. L. No. 106-546, 114 Stat. 2726 (42 U.S.C. 14135-14135e). In doing so, Congress sought to "close[] once and for all this loophole that allows DNA samples from Federal (including military) and Washington, D.C. offenders to go uncollected." 146 Cong. Rec. S11645-02, at *S11648 (statement of Sen. Kohl).

The DNA Act requires the Bureau of Prisons and United States Probation Officers to collect DNA samples from prisoners, probationers, parolees, or supervised releasees (collectively, "parolees"), who are convicted of certain qualifying offenses, including homicide, sexual abuse, and other crimes of

violence. 42 U.S.C. 14135a(a)(2), (d). The Act makes cooperation from qualifying offenders an express condition of supervised release, 42 U.S.C. 14135c; 18 U.S.C. 3583(d), and makes failure to cooperate a misdemeanor offense. 42 U.S.C. 14135a(a)(5). The collecting agency must provide the DNA sample, which identifies the individual but does not convey other information such as physical or medical characteristics, to the FBI for analysis and entry into CODIS. H.R. Rep. No. 106-900(I), 106th Cong., 2d Sess. (Sept. 26, 2000), 2000 WL 1420163, at *27, *36.

B. Defendant's Refusal to Provide the DNA Blood Sample

Defendant was convicted of armed bank robbery (18 U.S.C. 2113(a)(d)) and using or carrying a firearm during that crime (18 U.S.C. 924(c)). (CR 13). Defendant was sentenced to 97 months' imprisonment and three years' supervised release. (CR 23). The conditions of supervised release required defendant to follow the instructions of the probation officer. (CR 24; GER 49). While on supervised release, defendant twice refused to provide a DNA sample to his probation officer. (ER 1-2). The district court (Tevrizian, J.) found defendant in violation of the terms of his supervised release and sentenced defendant to four months' imprisonment and two years' supervised release. (RT [7/15/02] 34-35; ER 36-37).

C. The Appeal and the Panel Opinion

Defendant asserted that he could not be subject to DNA testing without individualized suspicion. Defendant contended that this Court's prior decision in *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995), cert. denied, 517 U.S. 1160 (1996), upholding Oregon's DNA sampling law against a Fourth Amendment challenge, had been overruled by *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), which invalidated suspicionless drug interdiction checkpoints to stop civilian motorists, and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), which invalidated suspicionless drug testing of pregnant women for law enforcement purposes.

The government responded that *Rise* controlled this case. *Rise*'s analysis was premised on a balancing of the important law enforcement interests that the Oregon DNA law served and the substantially diminished privacy rights of convicted felons. *Rise*, 59 F.3d at 1560. The government contended that this analysis was consistent with the same balancing of interests that the Supreme Court performed in *United States v. Knights*, 534 U.S. 112 (2001), which upheld the constitutionality of a warrantless search of a probationer's home.

A divided panel of this Court reversed and ruled that collection of DNA samples from parolees without individualized suspicion violated the Fourth Amendment. The panel majority first rejected the proposition that the *Knights*

totality-of-the-circumstances test supported DNA collection under the Act. 2003 WL 2251374, at *4-6. In doing so, the panel majority held that "a search of a parolee's body to obtain DNA -- the compulsory extraction of blood for a law enforcement purpose -- is reasonable only if the search is supported by individualized reasonable suspicion." *Id.* at *6.

The panel majority did not address *Rise* in this analysis. Instead, the panel majority reserved that discussion for its review of DNA collection under the "special needs" doctrine. In that analysis, the panel majority held that *Edmond* and *Ferguson* effectively had overruled *Rise*. 2003 WL 2251374, at *6-9. The panel majority deemed *Rise* to be "clearly irreconcilable" with these cases, which "stand for the proposition that a program of suspicionless searches, *conducted for law enforcement purposes*, violates the Fourth Amendment, whether the person searched is a model citizen (and thus the search will produce no useful evidence), or whether he is not law-abiding (and as a result evidence of a crime may sometimes be obtained)." *Id.* at *9 (emphasis in original).

In dissent, Judge O'Scannlain maintained that the panel majority improperly deemed *Rise* to be invalid, in that *Rise* was not a special needs case, but rather applied the same balancing test that the Supreme Court approved in *Knights*. 2003 WL 2251374, at *14-17. Judge O'Scannlain also noted that, given that *Knights*

rejected the notion that warrantless searches of probationers must serve "special needs" to satisfy the Constitution, the applicability of *Edmond* and *Ferguson* to the probation context was "sketchy at best." *Id.* at *16. Judge O'Scannlain further pointed out that the panel majority had no basis to erect a *per se* rule that individualized suspicion is required for any search of a parolee, because *Knights* expressly reserved the question whether a search of the probationer's home without any suspicion would satisfy the Fourth Amendment. *Ibid.* Because that "remains an open question," Judge O'Scannlain reasoned that "the majority cannot legitimately contend that the *Edmond-Ferguson* line of cases has overruled *Rise*." *Ibid.* Accordingly, Judge O'Scannlain concluded that the panel was bound by *Rise*. *Id.* at *17.

REASONS FOR GRANTING THE PETITION

I. The *Kincade* Panel Majority Cannot Overrule *Rise* Because It Is Fully Consistent With Intervening Supreme Court Precedent .

By holding that nonconsensual blood draws of parolees pursuant to the DNA Act violate the Fourth Amendment, the panel majority overruled *Rise* without justification. The panel majority's asserted justification – that *Rise* is "clearly irreconcilable" with *Edmond* and *Ferguson,* 2003 WL 22251374, at *9 – is demonstrably incorrect. Both *Edmond* and *Ferguson* addressed intrusions on

ordinary citizens who enjoy a substantial expectation of privacy. What *Ferguson* and *Edmond* make clear is that warrantless and suspicionless searches or seizures of that broad category of individuals must be justified by something other than "the general interest in crime control." *Edmond*, 531 U.S. at 48; *Ferguson*, 532 U.S. at 83.

Rise, however, did not involve a category of persons whose expectation of privacy is undiminished; rather, it involved convicted felons in "the lawful custody of the state."[2] 59 F.3d at 1560. As the *Rise* Court explained, "[t]hese persons do not have the same expectations of privacy in their identifying genetic information that 'free persons,' have." *Ibid.* *Ferguson*, on which the panel majority heavily relied, itself acknowledged that the distinction the *Rise* Court drew is meaningful. 532 U.S. at 79 n.15 (distinguishing *Griffin v. Wisconsin*, 483 U.S. 868 (1987), which upheld a warrantless search of a probationer's home on reasonable suspicion, because a probationer has "a lesser expectation of privacy than the public at large").

If the distinction under the Fourth Amendment between ordinary citizens

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[2] At the time *Rise* was decided, the Oregon law applied to convicted murderers and sex offenders serving a term of imprisonment or a term of probation. See Or. Rev. St. 137.076 (1991). The current version of the law applies more broadly to all convicted felons sentenced to terms of imprisonment or probation. Or. Rev. St. 137.076(1)(a) & (5) (2003).

and offenders in the criminal justice system were not clear enough before *Knights*, that decision should have put any doubts to rest. The *Knights* Court explained that, because probationers "do not enjoy the absolute liberty to which every citizen is entitled," 534 U.S. at 119 (internal quotation marks omitted), and because the State has reason to suspect that probationers are "more likely than the ordinary citizen to violate the law," *id.* at 120, probationers do not receive the same level of Fourth Amendment protection as ordinary citizens. That lesser protection means that the State's "*interest in apprehending violators of the criminal law*, thereby protecting potential victims of criminal enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary citizen." *Id.* at 121 (emphasis added).

Thus, the Supreme Court in *Knights* adopted the "unique construction of the Constitution," *Kincade*, 2003 WL 22251374, at *9, that the panel majority attributed to the government in distinguishing ordinary citizens and parolees. Indeed, the *Knights* Court expressly rejected the claim that the search of the probationer's home – which did not satisfy the Warrant Clause's warrant or probable cause requirements – had to serve "special needs" in order to be held

constitutional.[3] *Id.* at 117.

The Supreme Court held instead that a warrantless search of a probationer may be evaluated under the "ordinary Fourth Amendment analysis that considers all the circumstances of a search" to determine whether it is reasonable. *Id.* at 122. To this end, a court must balance on the one hand "the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 119. The *Knights* Court conducted this balancing and concluded that the State's interest in combating recidivism justified an intrusive search of the probationer's home on reasonable suspicion. *Id.* at 119-122.

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[3] The panel majority mistakenly attempts to discredit *Rise* by contending that it mischaracterized *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), as standing for the proposition that "the State may interfere with an individual's Fourth Amendment interests with less than probable cause and without a warrant if the intrusion is only minimal and is justified by law enforcement purposes." 59 F.3d at 1560. The panel majority pointed to *Edmond*'s observation that the checkpoints in *Sitz* were designed to prevent the immediate threat to highway safety posed by drunk drivers, rather than to serve "'a general purpose of investigating crime.'" 2003 WL 22251374, at *9 (quoting *Edmond*). First, as we explain below, pp. 14-16, *Sitz* is not a special needs case, see *Ferguson*, 532 U.S. at 83 n.21, and does in fact support *Rise*. Second, regardless of whether *Rise*'s interpretation of *Sitz* is the correct one, the proposition that law enforcement interests can justify minimal, warrantless intrusions on *parolees* is undoubtedly true. See *Knights, supra* (upholding intrusive law enforcement search of probationer's home without a warrant). *Rise*'s reliance on that proposition thus does not undermine *Rise*'s analysis or outcome in any way.

The *Knights* approach is precisely the one the *Rise* Court took when it upheld Oregon's DNA law against a Fourth Amendment challenge. Compare 534 U.S. at 117-22, with 59 F.3d at 1559-62. The *Rise* Court concluded that the public's "incontestable" interest in preventing recidivism and in correctly identifying serious felons outweighed the "relatively minimal intrusion" DNA collection worked on a convicted felon's diminished expectation of privacy. 59 F.3d at 1562. The panel majority seizes on the fact that *Knights* did not approve a *suspicionless* search, but the panel majority's emphasis on that factor derives from the line of "special needs" cases upon which the *Knights* Court disavowed reliance. 534 U.S. at 117-18. Moreover, the *Knights* Court expressly *left open* the question whether an intrusive search of a probationer's home could have been justified in the absence of reasonable suspicion. 534 U.S. at 120 n.6. As Judge O'Scannlain explained in dissent, had the Court believed that the *Ferguson/Edmond* "special needs" cases foreclosed the question, the Court would have not "expressly reserved" it. 2003 WL 22251374, at *16. Because the Supreme Court has not decided the constitutionality of suspicionless searches of parolees, the panel was bound by *Rise*.

Under *Rise* and a correct application of the Fourth Amendment balancing test for searches of parolees, blood collection pursuant to the DNA Act is

constitutional. First, the blood-draw method used to obtain a parolee's DNA is the same as that upheld in *Rise*, which held that method to be "minimally intrusive."[4] Second, the class of individuals whose Fourth Amendment rights are implicated by the federal law – qualifying federal offenders in custody or under court supervision – have the same reduced expectation of privacy that the more limited class of offenders covered by the original Oregon law had. See note 2, *supra*.

Finally, the federal law advances the same "incontestable" public interests in combating recidivism and prosecuting crimes accurately and will similarly assist, and arguably assist more effectively than the 1991 Oregon law, in investigations of crimes likely to involve DNA, because it covers an even broader range of offenders. See 42 U.S.C. 14135a(d)(2)(B) (covering convictions for *inter alia*, "[a]ny crime of violence").[5] *Rise* thus compels the conclusion that the

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[4] The panel majority also unjustifiably overturned this conclusion, because it is supported, as *Rise*'s own citations plainly indicate, by a half century of Supreme Court cases taking the position that a blood draw is a minor intrusion. See, *e.g.*, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989) (blood tests do not "infringe significant privacy interests"); *Winston v. Lee*, 470 U.S. 753, 762 (1985) (not "an unduly extensive imposition"); *Schmerber v. California*, 384 U.S. 757, 771 (1966) (describing blood tests as "commonplace"); *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957) (noting that blood tests are "routine" and "would not be considered offensive by even the most delicate").

[5] The legislative history to the DNA Act supports covering a broader range of convicts than the original Oregon law did in order to enhance the efficacy of the DNA database: the studies and individual cases discussed there have shown that

DNA Act does not violate the Fourth Amendment.

Contrary to the panel majority, blood testing under the DNA Act is also constitutional under the balancing approach reflected in the Supreme Court's checkpoint cases, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). See also *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) ("Routine searches of the persons and effects of entrants [to the United States] are not subject to any requirement of reasonable suspicion, probable cause, or warrant[.]"). These cases stand for the proposition that specialized law enforcement interests can justify modest intrusions – without individualized suspicion – even on ordinary citizens where the special law enforcement concern is closely tailored to the law enforcement practice.

In *Sitz*, the Court upheld Michigan's highway sobriety checkpoint program, which involved brief, suspicionless stops of motorists to look for signs of intoxication. In *Martinez-Fuerte*, the Court upheld "brief, suspicionless seizures of motorists at a fixed Border Patrol checkpoint designed to intercept illegal aliens." *Edmond*, 531 U.S. at 37. The Supreme Court recognized in *Edmond* that

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many individuals who commit serious violent crimes such as murder and rape have previously been convicted of only less serious crimes such as robbery or burglary. *See* H.R. Rep. No. 106-900(I), at *33-35.

these checkpoint seizures "are, of course, law enforcement activities," inasmuch as "law enforcement officers employ arrests and criminal prosecutions in pursuit" of the goals served by the checkpoints. *Id.* at 42. But what distinguished those checkpoints from the drug interdiction checkpoints at issue in *Edmond* (and the drug testing of pregnant women in *Ferguson*) is the close fit that existed between the particularized law enforcement problems the *Sitz* and *Martinez-Fuerte* programs addressed – namely, highway safety and alien smuggling – and "the law enforcement practice at issue." *Edmond*, 531 U.S. at 38-39. The same can be said about the routine, suspicionless searches "of the persons and effects" of those entering the country which the Court permits in order to prevent, *inter alia*, the smuggling of contraband. See *Montoya de Hernandez*, 473 U.S. at 538 & n.1.

Like the law enforcement practices in those cases, the DNA Act does not implement a generalized interest in law enforcement; rather, it advances the narrowly particularized and exceptional law enforcement interest in combating recidivism by parolees. The manner in which the government implements that interest – by obtaining key identification information from the parolee before release from supervision or custody in a manner that the Supreme Court has repeatedly described as relatively non-intrusive – bears a close connection to the

recidivism problem the DNA Act seeks to combat. In this way, DNA collection pursuant to the DNA Act is analogous to the "relatively modest * * * intrusion[s]" upheld in *Sitz* and *Martinez-Fuerte*. *Edmond*, 531 U.S. at 38. Because the practice of obtaining DNA from parolees bears a close, targeted fit with the specialized problem of recidivism, and because the practice involves only a modest intrusion on a category of individuals who have a diminished expectation of privacy, that practice is constitutional under the *Sitz* line of cases (which, like *Knights*, simply applies the Fourth Amendment's reasonableness balancing test).

The collection of a blood sample pursuant to the DNA Act is also constitutional under the "special needs" rationale of *Griffin v. Wisconsin*, 483 U.S. 868 (1987). There, the Supreme Court held that "A State's operation of a probation system * * * presents 'special needs' beyond normal law enforcement." *Id.* at 873-874. The Court explained that the goals of probation – rehabilitating the offender and protecting the community against the offender's commission of additional crimes – are "special needs." *Id.* at 875. The Court upheld the warrantless search of a probationer's home on reasonable suspicion that served those special needs. Because collecting a blood sample from parolees pursuant to the DNA Act serves the same interests as the search in *Griffin*, it is constitutional under the "special needs" doctrine.

II. The Panel Decision Is In Severe Tension With *Knights* And Creates An Inter-circuit Conflict.

The panel majority's application of a *per se* rule prohibiting a suspicionless search of parolees regardless of the degree of the intrusion if the search promotes law enforcement interests places *Kincade* in severe tension with *Knights*.[6] *Kincade* also is in conflict with every state and federal appellate court to have decided the question.[7]

For example, in *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003), the Tenth Circuit upheld the DNA Act against a Fourth Amendment challenge, rejecting the panel majority's holding that the Supreme Court's decisions in *Edmond* and *Ferguson* render the Act unconstitutional. The Tenth Circuit, like Judge O'Scannlain here, found those decisions inapposite, because "'[a] broad range of choices that might infringe constitutional rights in free society fall within

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[6] The panel majority set out this same *per se* rule in *United States v. Crawford*, 323 F.3d 700. This Court agreed to rehear *Crawford* en banc and vacated the panel's decision. See 343 F.3d 961 (9th Cir. 2003).

[7] The state decisions include: *Gaines v. State*, 998 P.2d 166, 171-73 (Nev. 2000); *Doles v. State*, 994 P.2d 315, 317-19 (Wyo. 1999); *State v. Olivas*, 856 P.2d 1076, 1083-86 (Wash. 1993); *Alfaro v. Terhune*, 98 Cal.App.4th 492, 505-06 (Cal. Ct. App. 2002); *Cooper v. Gammon*, 943 S.W.2d 699, 705 (Mo. Ct. App. 1997); *In the Matter of Maricopa County Juvenile Action*, 930 P.2d 496, 500-01 (Ariz. Ct. App. 1996); *State ex rel. Juvenile Dep't v. Orozco*, 878 P.2d 432, 435-36 (Or. Ct. App. 1994).

the expected conditions * * * of those who have suffered a lawful conviction.'" *Id.* at 1146 n.14 (quoting *McKune v. Lile*, 536 U.S. 24, 36 (2002)). See *Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir. 2003) (relying on *Rise* as "persuasive authorit[y]" to uphold district court's determination that Fourth Amendment challenge to state DNA collection law was "frivolous"); *Roe v. Marcotte*, 193 F.3d 72, 76-82 (2d Cir. 1999) (upholding Connecticut DNA collection statute against Fourth Amendment challenge); *Schlicher v. Peters*, 103 F.3d 940, 943 (10th Cir. 1996) (same for Kansas DNA law); *Boling v. Romer*, 101 F.3d 1336, 1339-40 (10th Cir. 1996) (same for Colorado DNA law); *Jones v. Murray*, 962 F.2d 302, 305-08 (4th Cir. 1992) (same for Virginia DNA law).

III. The Decision Is Of Exceptional Importance Because It Prevents The Enforcement Of A Federal Law.

This Court should grant rehearing en banc for the additional reason that the conflict the panel majority created precludes enforcement of the DNA Act (and the analogous state laws) in the Ninth Circuit, thereby frustrating the administration and efficacy of a nationwide DNA database that, as Congress found when it enacted the law, is an invaluable tool in combating recidivism and promoting accuracy in the criminal justice system.[8]

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[8] See, *e.g.*, 146 Cong. Rec. S11645-02, at *S11646 (Dec. 6, 2000) ("Collection of convicted offender DNA is crucial to solving many of the crimes

CONCLUSION

For the reasons stated above, this case should be reheard en banc on an expedited basis.

Respectfully submitted,

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occurring in our communities.") (statement of Sen. Dewine); *ibid.* ("DNA testing is critical to the effective administration of justice in 21st century America.") (statement of Sen. Leahy); *ibid.* ("In more than a dozen cases, * * * post-conviction DNA testing that has exonerated an innocent person has also enhanced public safety by providing evidence that led to the apprehension of the real perpetrator.") (statement of Sen. Leahy); *id.* at *S11647 ("The effectiveness of the database is directly related to the number of DNA profiles it contains.") (statement of Sen. Kohl).

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Petition for Rehearing and for Rehearing En Banc to be served this 21st day of October 2003 by first-class mail, postage prepaid, on the following:

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rules 35-4 and 40-1, the attached petition for rehearing and rehearing en banc is:

_____ Proportionately spaced, has a typeface of 14 points or more and contains 4169 words (petitions and answers must not exceed 4,200 words).

or

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or

_____ In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

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