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.	)	
	)	

APPELLANT'S OPPOSITION TO GOVERNMENT'S PETITION FOR REHEARING AND REHEARING EN BANC

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Introduction

The DNA collection statute at issue in this appeal requires parolees[1] to submit to forced blood extractions so that law enforcement may use their DNA to try to solve crimes. The panel held that the statute violates the Fourth Amendment because it requires no level of individualized suspicion. The government has asked the Court to grant rehearing en banc in this matter. The government argues that the panel has

[1] Appellant uses the term parolee to describe those persons on some form of criminal justice supervision. There are several forms of supervision imposed on persons convicted of criminal offenses, including probation, supervised release and parole; but for ease of reference, appellant uses the term parolee to refer to any of those on supervision.

failed to acknowledge the significance of a parolee's status, has improperly overruled *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995), and has upset state and federal laws regarding the gathering of DNA samples from prisoners and parolees despite the importance of DNA data banks in solving crime.

The panel's opinion in this case follows settled Fourth Amendment law as set forth by the United States Supreme Court. The foundation of the analysis in *Rise* has been completely undercut by subsequent Supreme Court cases, and it was entirely appropriate for the panel to follow Supreme Court analyses and guidance rather than the *Rise* analysis. The panel gave full consideration to appellant's status as a parolee, following Supreme Court and Ninth Circuit cases holding that a parolee may have less protection than a person not under supervision but still has some protections. To the extent that the panel's opinion results in DNA-collection statutes being rendered unlawful and thus not a viable tool in law enforcement's arsenal, that is no ground to grant rehearing. The Fourth Amendment precludes law enforcement from engaging in many practices that would assist them in solving, or even preventing, crime. The authors of the Bill of Rights balanced the need of law enforcement to prevent and solve crime against the privacy rights of individuals and came up with the Fourth Amendment, which allows law enforcement to take virtually any action to prevent or solve crime as long as there is a level of individualized

suspicion. It was not up to the panel, and it is not up to an en banc court, to create a new balance that allows for measures by law enforcement without *any* level of individualized suspicion. Rehearing should be denied.

The Fourth Amendment and Special Needs

From a perspective of the Fourth Amendment and Supreme Court law interpreting it, there is nothing astounding about the panel's decision in this matter. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." "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 government acknowledges that the Backlog Elimination Act (like other DNA sampling laws) does not require any level of individualized suspicion before blood may be forcibly extracted from a person. Thus, the "ordinary" Fourth Amendment application would preclude such searches, which is what the panel held.[2] The government, however,

[2] The government itself recognizes that the Supreme Court has held that a warrantless search of a parolee is to be evaluated under "ordinary Fourth Amendment analysis." (Petition for Rehearing at 11, citing *United States v. Knights*, 534 U.S. 112 (2001).)

says the panel is wrong because a "special needs" analysis applies to DNA sampling laws and allows for the forcible extraction of blood from prisoners and parolees.

The concept of some "special needs" searches being outside the protections of the Fourth Amendment started with Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985). In his concurrence, Justice Blackmun agreed with the Court that there are limited exceptions to the probable-cause requirement, in which reasonableness is determined by "a careful balancing of governmental and private interest," but concluded that such a test should be applied "in those exceptional circumstances in which special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable ... ." *Id*. (emphasis added); *see also Ferguson v. City of Charleston*, 532 U.S. 67, 75, n. 7 (2001) (discussing the origins and justification for "special needs" searches).

The Supreme Court has followed that application of "special needs" searches, allowing searches without individualized suspicion only when the purpose of the search is other than typical law enforcement. *See, e.g., Michigan State Police v. Sitz*, 496 U.S. 444 (1990) (upholding sobriety checkpoints at which police briefly stopped all passing cars to look for drunk drivers, finding that the safety of the highways allowed for the brief detention without individualized suspicion); *Skinner v. Railway Labor Executives*, 489 U.S. 602 (1989) (upholding drug testing of railroad workers,

finding that the safety of railway travel allowed for the testing without individualized suspicion; *Vernonia School District v. Acton*, 515 U.S. 646 (1995) (upholding random drug testing of high school athletes, finding that the school's duty to protect students and the dangers involved in athletes using drugs allowed for the testing without individualized suspicion).

But the Court has rejected a "special needs" balancing approach when the purpose of the search is the typical law enforcement purpose of detecting, investigating or solving crime. *See, e.g., Indianapolis v. Edmond*, *supra*, (invalidating a highway checkpoint at which the police briefly stopped motorists to look for narcotics because the program's "primary purpose [was] to uncover evidence of ordinary criminal wrongdoing"); *Ferguson v. City of Charleston*, *supra*, (invalidating a hospital program of drug testing obstetrics patients because the testing was done without individualized suspicion and positive results were turned over to law enforcement for prosecution). In *Ferguson*, the Court noted that the "critical difference" between these two lines of cases "lies in the nature of the 'special need' asserted as justification," noting that searches without individualized suspicion have been approved only when the search was "divorced from the State's general interest in law enforcement." *Id.*, at 79-80. The panel has done nothing more than recognize the distinction the Supreme Court has mandated.

The Fourth Amendment and Parolees

The government, however, thinks the panel is wrong because the DNA sampling laws affect only prisoners and parolees. But, the Fourth Amendment does not protect the right of only some people; it certainly does not exempt parolees from its protections. And both the Supreme Court and this Court have held that prisoners and parolees have those Fourth Amendment protections that are not inconsistent with legitimate penological interests.[3] *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) ("we have insisted that prisoners be accorded those [Constitutional] rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration"); *Griffin v. Wisconsin*, 483 U.S. 868, 874 n.2 (1987) (regulations infringing constitutional rights of probationer are constitutional "as long as they are reasonably related to legitimate penological interest") (citation omitted); *Thompson v. Souza*, 111 F.3d 694, 698 (9th Cir. 1977) (*Turner* analysis of "legitimate penological interests" applicable to prison searches); *Somers v. Thurman*, 109 F.3d 614 (9th Cir. 1997) (applying *Turner* test to prison

[3] Legitimate penological interests are maintaining internal order and discipline (in prison), assuring security (preventing unauthorized access to or escape from prison), rehabilitation and deterrence of crime. *Procunier v. Martinez*, 416

searches and recognizing Fourth Amendment's application inside prison).

U.S. 396, 420 (1974); *Pell v. Procunier*, 417 U.S. 817, 822, 827 (1974).

The Fourth Amendment standard is reasonableness. Sometimes, due to the nature of the circumstances, such as the circumstances of parole supervision, reasonableness may be a level of individualized suspicion short of probable cause. And sometimes, when the purpose of the search is not a law enforcement one, reasonableness may not even require individualized suspicion. But the government seeks to conflate those two exceptions to the ordinary Fourth Amendment requirement of probable cause and come up with a rule that when the circumstances involve searches of those on parole supervision, reasonableness requires no level of individualized suspicion at all. *No* case suggests that such a rule would be constitutional. The Supreme Court has *never* sanctioned a suspicionless search for law enforcement purposes.[4] Indeed, the government has not cited any case by any court (outside the DNA sampling laws) where a total abdication of *any* level of

[4] The government places great emphasis on *United States v. Knights*, *supra*, but nothing in *Knights* sanctions suspicionless investigatory searches of parolees. The investigatory search of probationer Knights was supported by reasonable suspicion, which the Supreme Court found to be sufficient individualized suspicion given the totality of the circumstances, including a probation search condition to which Knights had agreed. To the extent the government would like *Knights* to be expanded to include suspicionless searches of parolees and even to the extent that the government thinks the Supreme Court is open to such an expansion, those are issues for the Supreme Court to decide. At this point, the Supreme Court has *not* sanctioned law enforcement searches of anyone, even parolees or prisoners, without some level of individualized suspicion; and this Court is compelled to follow the current state of Supreme Court law, not what the government hopes the Supreme Court might do in the future.

individualized suspicion was upheld when the purpose of the search was law enforcement. The panel has not done anything extraordinary in this case, but has merely followed settled Fourth Amendment jurisprudence; it is the government that is advocating an unprecedented interpretation and application (or abrogation) of the Fourth Amendment.

<u>Minimal Intrusions and Prosecuting Crime</u>

The government invites an en banc Court to balance the "minimal intrusion" of forced blood extraction and DNA analysis with the "'incontestable' public interests in combating recidivism and prosecuting crimes" and come up with a rule that allows forced blood extraction without any individualized suspicion. (Petition for Rehearing at 12-13.) This Court is not free to do that, given the Supreme Court caselaw requiring that a search for law enforcement purposes be supported by some level of individualized suspicion. But even were this Court free to adopt a rule that a law enforcement search without any level of individualized suspicion is constitutional under some circumstances, this would not be the case to do that in, for neither side of the scale is weighted as the government suggests.

Citing four Supreme Court cases, the government argues that the forcible extraction of blood is a "minimal intrusion." (Petition for Rehearing at 13 n.4.) The

government, however, has taken the words of the Supreme Court out of context. *Skinner v. Railway Labor Executives*, *supra*, did not involve a law enforcement search but an employment search in a "highly-regulated industry" in order to ensure safety of railway travel; and even then the Supreme Court discussed a blood search as significant because it invades bodily integrity. 489 U.S. at 615. *Winston v. Lee*, 470 U.S. 753 (1985), held that it would violate the Fourth Amendment to surgically remove a bullet from the chest of a robbery suspect despite the fact that there existed probable cause and the bullet was evidence of the robbery; the *Winston* court held that surgery was more invasive than a blood draw, but citing *Schmerber v. California*, 384 U.S. 757 (1966), the Court noted that even a blood draw implicates a person's "most personal and deep-rooted expectations of privacy" and thus that the Fourth Amendment requires a "discerning inquiry" before allowing such a search. *Winston*, 470 U.S. at 760. The Court in *Schmerber* had allowed the blood draw based on probable cause to believe Schmerber had been driving while under the influence of alcohol (resulting in an accident) and based on exigent circumstances because his blood alcohol level was decreasing as time passed.[5] *Breithaupt v. Abram*, 352 U.S.

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[5] Even when individualized suspicion exists, the Fourth Amendment confines the scope of the search to one for contraband or evidence of a crime. To know whether non-contraband is evidence of a crime, there must be a particular crime that is being investigated. The taking of Schmerber's blood was constitutional because there was probable cause to believe that he had been driving while under the

432 (1957), is not a Fourth Amendment case; the Court there held only that a blood test was not so serious as to shock the conscience (when done with probable cause to believe the person had been driving under the influence of alcohol and had caused an accident in which three persons had been killed).

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influence of alcohol and that his blood would show evidence of alcohol. But DNA sampling laws allow for the search and seizure of blood when there is no crime being investigated and thus no way of knowing that there is anything in the blood that will be evidence of a crime. If a particular crime (say, a bank robbery) were being investigated and there was some hair or other matter left at the crime scene, a search and seizure of a person's blood might well be a search for evidence connecting someone to a crime (much the way that a search for clothing of the type described by a crime victim as what the perpetrator wore would be a search for evidence of a crime). But when there is no crime that is being investigated, the forcible extraction of blood is not a search for evidence of a crime and thus violates the Fourth Amendment limitations on even probable-cause searches.

In context, what the Court was talking about in the quotes pulled out of these cases by the government was the rather *routine nature* of voluntary blood draws in our society (for medical, donation or employment purposes). But a routine act is not necessarily a minimally-intrusive act.[6] The Supreme Court has consistently recognized the significant intrusion into one's privacy that occurs with any search involving "intrusions beyond the body's surface," finding that the "interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." *Schmerber* 384 U.S. at 769-70. The Supreme Court has never upheld an investigatory blood-extraction search on less than probable cause. Moreover, in none of the cases the government cites to was the Court faced with a *forced* extraction of blood. *Cf. Rochin v. California*, 342 U.S. 165 (1952) (forced pumping of stomach to retrieve evidence officer had seen defendant swallow violates due process because it "shocks the

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[6] It has become routine, in these days of "reality television," for some people to conduct extremely private matters in public, including disrobing and engaging in sex; that does not make governmental intrusions into such matters "minimal." Nor do governmental intrusions into people's private writings become "minimal" just because it has become routine for many people to post their private musings and on

conscience”).

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chat room sites or weblogs on the Internet.

The government misunderstands the other side of the scale also. No one disputes the governmental interest in "combating recidivism and prosecuting crime," but those factors must be considered in the context of the Fourth Amendment. Obviously, investigating and prosecuting crime were the legitimate governmental interests the authors of the Fourth Amendment had in mind when allowing governmental intrusions into privacy at all. But the Framers did not allow such intrusions no matter what the circumstances; they allowed such intrusions only when those intrusions were reasonable. Thus, the balance has already been made. The result is that some level of individualized suspicion is necessary even when the government's interest is the significant one of investigating and prosecuting crime. Nothing about the government's interest in combating recidivism changes that balance. While the government has a strong interest in preventing recidivism, DNA sampling laws do not prevent recidivism; they simply help solve a small number of the crimes that come from recidivism.[7]

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[7] Moreover, the Congressional history makes it clear that solving crime, and

not preventing recidivism, was the purpose behind the Backlog Elimination Act. *See* DOJ letter to Congress, stating that the DNA data bank was created to "solve crimes" by "matching DNA from crime scenes to convicted offenders" and provide a nationwide data bank for "law enforcement identification purposes." H.R. Rep. No. 106-900 at 26 (2000). And if the purpose of the law were to prevent recidivism, it would not require the sampling of prisoners who are in prison with no possibility of ever being released.

If the government's suggested balance were acceptable, every person could be made to give a blood sample for DNA analysis. While a parolee may have a lesser expectation of privacy than a person not under supervision as to many matters, he has the same expectation of privacy in his blood that any person has. More important, if a blood extraction is only a minimal intrusion and the government's interest in investigating and prosecuting crime outweighs it, that would be true for any person, no matter what his status. And it becomes hard to imagine a search, whether of a parolee or of one not on supervision, that would be unconstitutional. The governmental interest in investigating, solving and prosecuting crime is so strong that only a search that shocked the conscience (and thus violated due process) would be unconstitutional because the governmental interest would outweigh any individual interest on the other side of the scale.[8] If invading bodily integrity is a minimal intrusion outweighed by the governmental interest in solving crime, certainly searching one's property, reading one's writings and strip-searching one's body

[8] In 2000, two teenage sisters were raped in a park in the Goldsworth Park Estate area of Surrey in Great Britain. Investigation suggested that the rapist was familiar with and might live in the Goldsworth Park Estate area, so the police launch a "genetic dragnet" to DNA test the 12,000 men who lived in and immediately around the area. *See* "Teenage Sister are Raped in Park. Suddenly Every Man Seems to be a Suspect," *The Daily Express*, January 30, 2000. Certainly, catching the rapist of two teenagers is an "incontestable" governmental interest that outweighs the "minimal intrusion" of a blood draw. Of course, Great Britain does not have anything equivalent to the Fourth Amendment. But then the government would have

would also be considered sufficiently minimal when weighed against the governmental interest .

The authors of the Bill of Rights did the balancing 200 years ago and came up with the Fourth Amendment, allowing for law enforcement searches with individualized suspicion. Neither the panel nor an en banc court is free to change the balance now.

Rise v. Oregon

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this Court bypass the Fourth Amendment for DNA sampling in the United States.

The government argues that the panel improperly failed to follow *Rise v. Oregon*, *supra*, a 1995 case in which this Circuit found that an Oregon statute allowing for DNA sampling of prisoners was constitutional.[9] The government does not challenge the proposition that a panel is not required to follow a prior circuit case when the foundational analysis of that case has been entirely undercut by subsequent Supreme Court cases. *See, e.g., United States v. Gaudin*, 515 U.S. 506, 521 (1995) (principle of *stare decisis* may yield where prior decision's "underpinnings [have been] eroded by subsequent decisions"). The panel in this case found just that, that the reasoning of *Rise* has been undermined by subsequent Supreme Court cases. Thus, the only issue is whether the panel's finding is accurate.

Rise relied on *Sitz, Skinner* and *Acton* in finding that the DNA sampling

[9] The statute in *Rise* involved only prisoners. Mr. Kincade is not a prisoner but a parolee. This Court has held that the constitutional "rights of parolees are even more extensive than those of inmates," *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992), and has repeatedly held that a search of a parolee for investigatory purposes requires reasonable suspicion. *United States v. Stokes*, 292 F.3d 964 (9th Cir. 2002); *United States v. Conway*, 122 F.3d 841 (9th Cir. 1997). Thus, even if not undercut by subsequent Supreme Court authority, *Rise* was not controlling in the panel's consideration of this case.

searches without individualized suspicion were constitutional. In doing so, the *Rise* court found that the "minimal intrusion" of blood extraction was "justified by law enforcement purposes." 59 F.3d at 1559. But after the *Rise* decision, the Supreme Court decided *Edmond* and *Ferguson,* which made it clear that *Sitz, Skinner* and *Acton* do *not* allow for law enforcement searches without some level of individualized suspicion. As the panel correctly noted, *Edmond* and *Ferguson* make clear that the Supreme Court has "declined to suspend the usual requirement of individualized suspicion where the police seek to employ a [search] primarily for the ordinary enterprise of investigating crimes." *Edmond*, 531 U.S. at 44.

Nothing about Kincade's status as a parolee changes the impact of *Edmond* and *Ferguson* on *Rise*. In *Griffin v. Wisconsin*, *supra*, the Supreme Court held that a "probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" 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 case law *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 (emphasis added). 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 individualized suspicion only when there was no law enforcement purpose. *Id.*

Thus, there can be no question that *Edmond* and *Ferguson* have substantially, if not completely, undermined the entire foundation for the majority's opinion in *Rise*. It was both appropriate and required for the panel in this matter to look behind *Rise* and decline to follow it.

Conclusion

The government asked the panel to find that the Fourth Amendment provides no protection to parolees; it asked the panel to find that a law enforcement search, even one undertaken outside the parameters of the investigation of a particular crime, may take place without any level of individualized suspicion, even if the search invades bodily integrity, simply because the person to be searched is on parole. Having been unsuccessful with the panel, the government now asks for an en banc court. The government's quest raises serious issues regarding which group of citizens will be next to lose its Fourth Amendment protections. More important, the government's quest is not appropriately pursued in the circuit. The Supreme Court has held clearly that law enforcement searches require some level of individualized suspicion. If the government wants a court to exempt parolees from that rule, it will

have to ask the Supreme Court to do it.

Under current Supreme Court law, a law enforcement search requires individualized suspicion. DNA sampling laws require none. The government notes that the CODIS DNA data bank contains 1,407,627 profiles and has "aided" 9,842 investigations.[10] Even if one were to accept the dubious proposition that the violations of the rights of 9,842 persons (less than one percent of the persons forced to give blood) were justified by the "aid" that law enforcement obtained, the statistics also show that the constitutional rights of 1,397,785 people have been violated for no reason at all.[11]

The panel here has done nothing more than follow the Fourth Amendment and the current state of Supreme Court law. There is no reason for an en banc court to consider this matter.

Respectfully submitted,
MARIA E. STRATTON
Federal Public Defender

DATED: November 18, 2003 ______________________________

[10] The government does not say what it means by "aided." Appellant assumes that had 9,842 investigations been solved and prosecuted through use of the data bank that the government would have used a word stronger than "aided."

[11] All of those people are *not* convicted offenders. The FBI website the government cites to shows that a percentage of the profiles in the data bank belongs to those other than convicted offenders.

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 Nd 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 OPPOSITION TO GOVERNMENT'S PETITION FOR REHEARING AND REHEARING EN BANC**

This certification is executed on November 19, 2003, 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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