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 OPENING BRIEF

_____

MARIA E. STRATTON
Federal Public Defender
MONICA KNOX
Deputy Federal Public Defender
321 E. 2nd St.
Los Angeles, California 90012-4758
(213) 894-2936

Attorneys for Defendant-Appellant

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.	)	
_____	)	

QUESTIONS PRESENTED

Does the DNA Analysis Backlog Elimination Act of 2000, which mandates that all those in prison or on supervised release for specified offenses submit to blood extraction for purposes of a DNA analysis to be placed into a DNA databank and used by law enforcement to solve crime, violate the Fourth Amendment?

STATEMENT OF THE CASE

Statement of Jurisdiction and Standard of Review

This is an appeal by Thomas Cameron Kincade of the district court's order finding him in violation of his supervised release for refusing to submit to a blood extraction for DNA analysis and sentencing him to four months in prison. The district court had jurisdiction pursuant to 18 U.S.C. §3231. This Court has jurisdiction pursuant to 28 U.S.C. §§1291 and 18 U.S.C. §3742.

The district court entered judgment finding Kincade in violation of supervision and imposing four months custody on July 19, 2002. (ER 42; CR 72-73.) This appeal is timely, Kincade having filed his notice of appeal on July 23, 2002. (ER 43; CR 74.) This Court reviews the constitutionality of a statute de novo. United States v. Michael R., 90 F.3d 340, 343 (9th Cir. 1996).

Course of the Proceedings and Statement of Facts[1]

In 1993, Kincade pleaded guilty to armed bank robbery and use of a firearm. (18 U.S.C. §§2113, 924(c).) He was sentenced to prison for 97 months, to be

[1] The issue presented by this appeal involves only the constitutionality of the Backlog Elimination Act, the statute that Kincade's refusal to comply with resulted in his violation and sentence. Both the procedural facts and the substantive fact (of Kincade's refusal) are undisputed; so all facts are set forth briefly in one section.

followed by a three-year term of supervised release. (CR 13, 23.)

Kincade was released from prison and commenced his term of supervised release on August 4, 2000. He has maintained appropriate residence and employment since then. In September, 2000, and again in April, 2001, drug tests revealed Kincade's use of cocaine; upon his request, he was placed in a residential treatment program from June through October, 2001. (ER 1-2.)

In March, 2002, pursuant to the DNA Analysis Backlog Elimination Act of 2000, the Probation Office ordered Kincade to submit to a blood extraction for DNA analysis. Kincade refused, and his refusal became the basis of Probation requesting the district court to find him in violation of supervision. (ER 1-2.)

A hearing was held on July 15, 2002. Kincade objected to the order to submit to a blood extraction on the basis that the Backlog Elimination Act was unconstitutional. The district court found the statute to be constitutional and Kincade's refusal to comply with the order to submit to a blood extraction to be a violation of supervision. The court sentenced Kincade to four months in custody for the violation and otherwise ordered all conditions of supervised release to continue for a two-year term following release. The court stayed the order of custody pending this appeal, so Kincade is currently on supervision but not in custody. (ER 3-41;

7/15/2002 RT.)[2]

SUMMARY OF ARGUMENT

"It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." Kyllo v. United States, 533 U.S. 27, 33-34 (2001). Thirty-five years ago, the fight centered on electronic listening devices (Katz v. United States, 389 U.S. 347 (1967)); twenty years ago it was pen registers to pick up what numbers a person dialed from his private phone (Smith v. Maryland, 442 U.S. 735 (1979); last year, it was thermal imaging to register the heat emissions from a building (Kyllo). Today, it is DNA analysis.

Parallel to, and sometimes made possible by, the technology advancements have been developments to forever brand felons as persons likely to commit some new offense at a moment's notice. Whether it's keeping sex offenders in custody beyond their maximum terms (see Kansas v. Crane, 534 U.S. 407 (2002)) or posting information about, including residential addresses of, released felons on websites for general public access (see Smith v. Doe, certiorari granted February 19, 2002, 01-

[2] The district court set a status conference for December 16, 2002, to inquire into the status of the appeal. Upon Kincade's request, unopposed by the government, this Court expedited the appeal.

729; Connecticutt v. Doe, certiorari granted May 20, 2002, 01-1231), these developments make it extremely difficult for felons, many of whom will never commit any other offense, to reintegrate into society. They also often violate the felons' constitutional rights.

The DNA Analysis Backlog Elimination Act of 2000 is at the intersection of these two issues. The Backlog Elimination Act mandates that every felon in prison or on supervision for specified offenses submit to a blood extraction; the blood is turned over to the FBI for a DNA analysis, and the data is placed in a national data bank for use by federal, state and local law enforcement in investigating and solving crime.

DNA analysis can be a powerful tool for law enforcement in the investigation and solving of crime.[3] But the extraction of blood and the analysis done on it are searches and seizures; and in the context of the Backlog Elimination Act, these searches and seizures are done without any individualized suspicion. The United

[3] Of course, it can also be a powerful tool for innocent persons incarcerated for crimes they did not commit. But the evidence suggests that DNA analysis in the hands of the government is used much more often to incriminate someone than to exonerate someone. Indeed, the government often vigorously fights a prisoner's request for a DNA analysis to prove his innocence. See, e.g., National Public Radio, transcript of May 6, 2002 program "All Things Considered," 2002 WL 3496126; "Freed Former Rape Convict Sues," Philadelphia Inquirer, September 9, 2002, B5; "Canadian Man In United States Prison Seeks DNA Test," Hamilton Spectator, September 17, 2002, A13.

States Supreme Court has held that searches done for the purpose of law enforcement must be accompanied by some level of individualized suspicion. Yet, despite the fact that the sole purpose of the Backlog Elimination Act is to assist law enforcement in the investigation and solving of crime, the Act allows, indeed mandates, these searches without any individualized suspicion. Thus, the Act is unconstitutional in that it mandates searches that violate the Fourth Amendment.

ARGUMENT

BECAUSE THE BACKLOG ELIMINATION ACT ALLOWS FOR SEARCHES AND SEIZURES WITHOUT ANY INDIVIDUALIZED SUSPICION, IT IS UNCONSTITUTIONAL

A. Introduction

On December 19, 2000, Congress enacted the DNA Analysis Backlog Elimination Act of 2000 (hereinafter the Backlog Elimination Act). 42 U.S.C. §14135a. The Act requires those either in prison or on supervised release for certain specified offenses to submit to the extraction of a blood sample. The blood samples are then turned over to the Director of the Federal Bureau of Investigation, who then carries out a DNA analysis on them and includes the results in the "Combined DNA Index System" ("CODIS"). CODIS is used by federal, state and local law enforcement to match DNA taken from a crime scene to DNA in the system to come up with a suspect; that is the only use allowed of the DNA samples taken pursuant to the Backlog Elimination Act. See 42 U.S.C. §§ 14132, 14135(c), 14135e.

Bank robbery is one of the specified offenses. Thomas Kincade is on supervised release for a bank robbery. Thus, his probation officer ordered him to appear for a blood extraction to be turned over to the FBI for the DNA analysis and inclusion in CODIS. Kincade, through counsel, challenged the law as

unconstitutional and thus refused to comply with the order to submit to the blood extraction. The district court found the law to be constitutional, found Kincade in violation of supervised release for refusing to comply with the probation officer's order to submit to the blood extraction and imposed a term of four months in prison for the violation. The district court did, however, stay the custody order so that Kincade could have his constitutional challenge heard by this Court.

B. The Fourth Amendment and the Forced Extraction of Blood

There are several matters that, we assume, are beyond dispute. The drawing and analysis of blood from anyone by or at the direction of government agents is a search and seizure within the meaning of the Fourth Amendment.[4] In the context of the Backlog Elimination Act, these searches and seizures are conducted without individualized suspicion, that is, without probable cause and without reasonable suspicion to believe that the person whose blood is being taken has committed any offense.[5] The purpose of the Backlog Elimination Act for taking and analyzing the

---

[4] The Backlog Elimination Act actually involves two separate searches and seizures: the first in the drawing of blood and the second in the DNA analysis done of the blood drawn.

[5] Obviously, since the law applies only to convicted felons, the person whose blood is taken has committed some offense at some point; but that is an offense for which he has already been convicted and sentenced and does not justify further investigation. The purpose of the Backlog Elimination Act is to try to solve unsolved offenses. Under the Act there is no need for any suspicion or belief that the person

blood is to aid in the solving of criminal offenses.[6]

---

whose blood is taken has or will commit any offense other than the one for which he has already been convicted and sentenced.

[6] As noted previously, the only use allowed of the DNA analyses done of felons' blood is by federal, state and local law enforcement to match DNA taken from a crime scene to DNA in CODIS to come up with a suspect in an unsolved crime. See 42 U.S.C. §§ 14132, 14135(c), 14135e.

The forced extraction of blood to gather evidence is not just a search that implicates the Fourth Amendment, it is a unique type of search. In Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court considered such an intrusion into bodily integrity to be so significant that it normally would require a warrant supported by probable cause. Id. at 770. Because "[t]he integrity of an individual's person is a cherished value in our society," searches that invade bodily integrity cannot be executed as mere fishing expeditions to acquire useful evidence. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." Id. at 772. Forced blood extraction intrudes on the private personal sphere and infringes upon an individual's "most personal and deep-rooted expectations of privacy." Winston v. Lee, 470 U.S. 753, 760 (1985). Thus, the Supreme Court has never allowed a search and seizure involving the forced extraction of blood for purposes of obtaining evidence of criminal wrongdoing unless there is probable cause and either a warrant or exigent circumstances.[7]

Any search or seizure done to assist law enforcement in the investigation or solving of crime requires individualized suspicion to be consistent with the Fourth

[7] In Winston v. Lee, 470 U.S. at 760-61, the Supreme Court noted that Schmerber's threshold standard was a requirement of probable cause "where intrusions into the human body are concerned" because such intrusions implicate

Amendment. Ferguson v. City of Charleston, 532 U.S. 57 (2001); City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

Under the Backlog Elimination Act, blood extraction and DNA analysis is compelled without individualized suspicion only of prisoners and those on supervision. The Fourth Amendment sometimes provides lesser protections to those in prison or on supervision, but it does not allow the forced extraction of blood for purposes of obtaining evidence of criminal wrongdoing without individualized suspicion.

"deep-rooted expectations of privacy."

Prisoners do not shed all their constitutional rights at the prison gate. Hudson v. Palmer, 468 U.S. 517, 523 (1984). Both prisoners and those on supervised release have protections under the Fourth Amendment, although concededly those protections are less than the amendment provides other citizens. But they are less only to the extent that there is a "legitimate penological interest" in depriving the felon of the full protections afforded by the Fourth Amendment.[8] Turner v. Safley, 482 U.S. 78, 89 (1987); see also Hudson v. Palmer, 468 U.S. at 523 ["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 are constitutional "as long as they are 'reasonably related to legitimate penological interests'"]; Thompson v. Souza, 111 F.3d 694, 698 (9th Cir. 1997) [Turner analysis of "legitimate penological interests" applicable to

---

[8] 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 U.S. 396, 420 (1974); Pell v. Procunier, 417 U.S. 817, 822, 827 (1974). Obviously, only the latter two apply with those not in prison but on supervision.

prison searches]; Somers v. Thurman, 109 F.3d 614 (9th Cir. 1997) [applying Turner test to prison searches and recognizing Fourth Amendment's application even inside prison].

A prisoner has no legitimate expectation of privacy in his cell because prison security mandates prison officials be able to search for and seize contraband, weapons or other items that could implicate security concerns. Hudson v. Palmer, 468 U.S. at 523. But a prisoner has a legitimate expectation of privacy in his body unless there is reasonable cause to invade his body and a legitimate penological interest in doing so. Vaughn v. Ricketts, 950 F.2d 1464, 1468-69 (9th Cir. 1991); Tribble v. Gardner, 860 F.2d 321, 325 (9th Cir. 1988).

Kincade, of course, is not a prisoner; he is on supervised release. The constitutional "rights of parolees are even more extensive than those of inmates." Sepulveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 1992). A supervised release search for purposes of investigating or solving crime requires reasonable suspicion. United States v. Stokes, 292 F.3d 964 (9th Cir. 2002) [reasonable suspicion needed to search parolee's car]; United States v. Conway, 122 F.3d 841, 842 (9th Cir. 1997). A person on supervision has only a limited expectation of privacy in his house or car because searches further the two primary goals of supervision - rehabilitation and protecting society from future criminal violations. United States v. Knights, 122 S.Ct. 587, 591-92 (2001). But even the search of the home of a person on supervision requires reasonable suspicion. Griffin v. Wisconsin, 483 U.S. 868.[9]

[9] As the Court stated in Griffin: "A probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'"

483 U.S. at 873. In Ferguson v. City of Charleston, 532 U.S. 57, the Supreme Court held that the drawing of blood without individualized suspicion from pregnant women for drug testing violated the Fourth Amendment. 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." (Emphasis added.) The majority continues 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. at 79, n.15.

The Backlog Elimination Act allows for searches and seizures without any individualized suspicion, and it does so for the purpose of assisting law enforcement in gathering evidence and solving crime. That is the most classic and elementary type of Fourth Amendment violation. Absent a legitimate penological interest, prisoners and supervisees have the same Fourth Amendment rights as do all other citizens.

C. The Caselaw on DNA Seizures From Felons

As the foregoing discussion makes clear, the forced extraction of blood, even from a convicted felon, requires individualized suspicion that the person whose blood is to be taken and analyzed has committed an offense. Thus, if this Court were considering the issue as one of first impression, the conclusion would be inescapable that the Backlog Elimination Act is unconstitutional.

But this Court is not writing on an entirely clean slate. Four circuits, including this one, have addressed varying types of state statutes allowing blood extractions and DNA analysis of some felons, prisoners and/or parolees and upheld them against Fourth Amendment challenges. Jones v. Murray, 962 F.2d 302 (4th Cir. 1992) [statute applicable to all felony offenses but only to felons currently in prison]; Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995) [statute applicable to murder and sex offenses but only to prisoners]; Boling v. Romer, 101 F.3d 1336 (10th Cir.

1997) [statute applicable to sex offenses and only prisoners]; Schlicher v. Peters, 103 F.3d 940 (10th Cir. 1996) [statute applicable to murders and sex offenses and to prisoners and parolees]; Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999) [statue applicable to sex offenses and to prisoners and probationers].[10] All but the Second Circuit have relied on the "special needs" balancing of extent of intrusion against significance of reason for search; the Second Circuit relied upon the "special needs" of prisoners and probationers having reduced expectations of privacy. Neither analysis withstands scrutiny under United States Supreme Court cases.

---

[10] The Seventh Circuit has addressed a statute allowing blood extraction and DNA analysis of sex offenders in prison, but there was no Fourth Amendment challenge addressed in that case. Gilbert v. Peters, 55 F.3d 237 (7th Cir. 1995).

Recently, a district court in this circuit analyzed several constitutional challenges to the Backlog Elimination Act and found it to be constitutional. United States v. Reynard, ___ F.Supp.2d ___, 2002 WL 1088176 (S.D.Cal. 2002). As to the Fourth Amendment challenge, the Reynard court found that the Backlog Elimination Act served purposes other than law enforcement. Appellant will discuss

that further infra.

As already discussed, and contrary to the Second Circuit's analysis, prisoners and parolees *do* have expectations of privacy entitled to protection under the Fourth Amendment. Their privacy rights are entitled to less protection under the Fourth Amendment than a non-felon's *only* when the reason for the search is a legitimate penological interest; investigating and solving crime is not a legitimate penological interest. And parolees have more privacy rights entitled to constitutional protection than do prisoners. No case, other than these DNA testing cases, allow prisoners or parolees to be searched for the investigation and attempt to solve crime without individualized suspicion.[11]

[11] The requisite individualized suspicion will not always be probable cause. If the intrusion is minimal or the person whose body or property is to be searched has a minimal expectation of privacy, it may be sufficient if there is reasonable suspicion. But individualized suspicion is necessary.

This circuit's decision in Rise is typical of the DNA-sampling cases.[12] The Rise court recognized that the non-consensual extraction of blood implicates Fourth Amendment privacy rights. 59 F.3d at 1558-59. The majority then went on, however, to make two fatal and erroneous conclusions: first, that convicted felons have no privacy right in their "identifying genetic information" (Id. at 1559-60) and second, that the constitutionality of the law was subject to the balance of factors related to "special needs" searches.[13] Id. at 1561-62.

---

[12] The Fourth Circuit's decision in Jones was the first case in the series, but it relies on the same cases the majority in Rise relied upon, as Rise relied heavily upon the majority opinion in Jones. The Tenth Circuit cases rely on Jones and Rise.

[13] All the DNA cases have applied a "special needs" exception to the Fourth Amendment's requirement of individualized suspicion. As appellant will show that is not only wrong, it is entirely inconsistent with United States Supreme Court authority. The statute under consideration in Rise was not, of course, the Backlog Elimination Act; and thus the Rise decision is not directly binding on the panel that

decides this case. But even the analysis of Rise should not be deemed controlling, as Supreme Court cases subsequent to Rise have entirely undercut the basis of that opinion and made it clear that the Rise majority simply misunderstood the "special needs" exception. See 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" of the Supreme Court.

The Rise majority analogized the forced extraction of blood and the ensuing DNA analysis to the taking of fingerprints; to the majority, both were nothing more than identifying information and if the taking of one was permissible (as the taking of fingerprints during the booking process is), the taking of the other was also. Kincade challenges the notion that the forced extraction of a bodily fluid and a DNA analysis on it is the same as the taking of fingerprints,[14] but that is actually not the most serious flaw in the Rise court's analysis. What the majority did not consider or understand is that even the taking of fingerprints requires probable cause unless done for a purpose other than to solve crime. Fingerprinting of arrestees is allowed as part of the administrative booking process; but if the police want to obtain a person's fingerprints for the purpose of attempting to solve a crime, they would need probable

---

[14] The Rise majority "reasoned" that once a person has given his fingerprints, he has lost any privacy expectation in his "identifying genetic information." 59 F.3d at 1560. There are at least two significant problems with that "reasoning." First, it would allow the government to forcibly extract blood for a DNA analysis from every person who has ever been arrested, regardless of how trivial the offense for which he was arrested and regardless of whether he was even charged with any offense let alone actually convicted, for all arrestees are fingerprinted (as are persons who apply for passports, persons who apply for certain types of licenses, most law enforcement officers and many others). And second, it completely ignores the facts that a blood extraction is a bodily intrusion when fingerprinting is not and a DNA analysis reveals significantly more about a person than a fingerprint analysis ever could. That is why courts have, at least outside the area of these DNA-sampling-of-felons cases, recognized that taking blood from a person is *not* the same as taking fingerprints. See In re Grand Jury Proceedings, 686 F.2d 135 (6th Cir, 1982) [blood sampling not akin to fingerprinting]; Pace v. City of Des Moines, 201 F.3d 1050, 1053 (8th Cir.

cause just as they would for any search. See Hayes v. Florida, 470 U.S. 811 (1985) [Fourth Amendment precludes taking to station for fingerprinting for investigation on less than probable cause; fingerprinting in field with reasonable suspicion *might* be constitutional]; see also Davis v. Mississippi, 394 U.S. 721 (1969) [same]. A person does not forever lose his expectation of privacy, or his Fourth Amendment protections, because he has once been lawfully required to give up the information.[15]

The more critical flaw in the court's analysis in Rise is the underlying

---

2000) [fingerprints daily revealed so expectation of privacy in them less].

[15] The argument in Rise, and more recently in Reynard, that blood extraction for DNA analysis seeks no more than identifying information in the same way that fingerprinting does is misleading. Fingerprinting upon booking is done for identification purposes, to verify the identity of the person being booked (upon probable cause for his arrest, incidently); and it is allowed for that purpose. The Backlog Elimination Act is not aimed at verifying the identity of a particular person or suspect but is instead aimed at obtaining information to be used in the investigation and solving of crime. See United States v. Parga-Rosa, 238 F.3d 1209, 1214 (9th Cir. 2001) [fingerprints taken for identification different than those taken for investigatory purposes].

assumption that searches and seizures without any individualized suspicion are constitutional if the reason for the search is sufficiently compelling. Relying exclusively on cases in which the Supreme Court has found "special needs" that allow a search or seizure without individualized suspicion, the Rise court found that the Constitution did not require individualized suspicion of the convicted felons because society's interest in identifying and prosecuting serious offenders was great. But in *none* of the cases relied upon did the Supreme Court uphold a search or seizure without individualized suspicion when the purpose of the search or seizure was the usual law enforcement goal of solving crime.

In Michigan State Police v. Sitz, 496 U.S. 444 (1990), the Supreme Court upheld a sobriety checkpoint at which police briefly stopped all passing cars to look for drunk drivers; the Court held that the safety of highways allowed for the brief detention without individualized suspicion. In Skinner v. Railway Labor Executives, 489 U.S. 602 (1989), the Supreme Court upheld the drug testing of railroad workers; the Court held that the safety of railway travel allowed for the testing without individualized suspicion in this highly-regulated industry. And in Vernonia School District v. Acton, 515 U.S. 646 (1995), the Supreme Court upheld random drug testing of high school athletes; the Court held that the school's duty to protect students and the dangers involved in athletes using drugs allowed for the testing

without individualized suspicion.

Subsequent to the Rise decision, the Supreme Court has made it absolutely clear that searches and seizures made for the purpose of detecting "evidence of ordinary criminal wrongdoing" are not constitutionally allowed without some individualized suspicion. In City of Indianapolis v. Edmond, 531 U.S. 32 (2000), the Court invalidated a highway checkpoint at which the police briefly stopped motorists in order to look for narcotics; the Court found that because the program's "primary purpose [was] to uncover evidence of ordinary criminal wrongdoing, the program contravene[d] the Fourth Amendment." Id. at 42. And in Ferguson v. City of Charleston, 532 U.S. 57 (2001), the Court invalidated 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 of the patient. In Ferguson, the Court specifically addressed Skinner and Acton, the cases relied upon by the majority in Rise, and explained how they did not justify the hospital drug testing:

> "The critical difference between those four[16] cases and this

[16] In addition to Skinner and Acton, the Court was also discussing Treasury Employees v. Von Raab, 489 U.S. 656 (1989), in which it upheld drug testing without individualized suspicion for Customs Service employees seeking promotion to sensitive positions, and Chandler v. Miller, 520 U.S. 305 (1997), in which it struck down drug testing without individualized suspicion for candidates for designated states offices.

> one, however, lies in the nature of the 'special need' asserted as justification for the warrantless searches. In each of those earlier cases, the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement. ... In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment."

Id. at 79-80.

It is noteworthy that in Ferguson, the state and hospital argued that their ultimate purpose was the beneficent one of protecting the health of both the mother and the child and, although they were using law enforcement and prosecution as the means to do that, the ultimate purpose of protecting health should constitutionally validate the program. The Supreme Court was unmoved:

> "While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes. ... Because law enforcement involvement always serves some broader social purpose or objective, under [the hospital's] view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment."

Id. at 83-84.

The clear and only purpose of the Backlog Elimination Act is for law

enforcement to gather evidence to be used to solve crime.[17] A search for that purpose requires individualized suspicion. Such a statute is not subject to validation by the balance and weighing of factors used for "special needs" situations. As the Ferguson court put it: "In none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes." Id. at 84, n.20.

Edmond and Ferguson make it clear that the Rise majority and the other courts that have addressed DNA sampling statutes got it wrong and simply misunderstood

[17] A recent district court decision, United States v. Reynard, 2002 WL 1988176, found no Fourth Amendment violation with the blood extractions mandated under the Backlog Elimination Act because, the district court found, the purpose of the law was not law enforcement. The district court "reasoned" that the purposes of the law were to fill the CODIS database and to assist federal, state and local law enforcement agencies with their law enforcement functions by increasing the accuracy of matching suspects to crime scenes. Id. at *20. By that "reasoning," of course, it is hard to imagine a search whose purpose would be law enforcement. The sole purpose and use of CODIS is to investigate and solve crime ... whether used by federal, state or local law enforcement agencies. Ultimately, all law enforcement investigation is "data gathering" of one sort or another; that does not make its purpose anything other than law enforcement.

the Supreme Court's jurisprudence. The Supreme Court made it very clear in Edmond and Ferguson that a search for the collection of evidence for criminal law enforcement purposes requires individualized suspicion. The Backlog Elimination Act is a violation of the Fourth Amendment because it allows for just such a search without individualized suspicion. The fact that the Act is limited to prisoners and parolees means only that the *degree* of individualized suspicion might be different; it does not mean that law enforcement searches are constitutional when there is *no* individualized suspicion.

D. Conclusion

Thomas Kincade has a privacy expectation in his body, bodily fluids and DNA. The government cannot constitutionally invade that privacy to investigate or solve crime without *some* level of individualized suspicion. They have none. Requiring him to submit to blood extraction and a DNA analysis for law enforcement purposes violates his Fourth Amendment rights.

CONCLUSION

For the foregoing reasons, appellant requests this Court to find the Backlog Elimination Act violates the Fourth Amendment and to reverse the district court order finding Kincade in violation of supervision for his refusal to submit to the blood extraction.

Respectfully submitted,

MARIA E. STRATTON
Federal Public Defender

DATED: September 30, 2002

_____
MONICA KNOX
Deputy Federal Public Defender

CERTIFICATE OF RELATED CASES

Counsel for appellant certifies that she is aware that other cases challenging the constitutionality of the Backlog Elimination Act are pending in this Court. She is aware of at least two: United States v. Lisa Lujan, 02-30237 (AOB due 10/15/02), and United States v. John Reynard, 02-50476 (AOB due 12/11/02).

DATED: September 30, 2002

_____

MONICA KNOX
Deputy Federal Public Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7)(C), I certify that this brief is proportionately spaced using 14 pints Time New Roman and contains 5,319 words.

DATED: September 30, 2002

_____

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:

CLERK U.S., DISTRICT COURT
Central District of California
312 North Spring Street
Los Angeles, California 90012
ATTENTION: APPEALS SECTION

John Owens
U.S. ATTORNEY's OFFICE
1200 U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012
cc: Ron Cheng
Chief of Appeals

OFFICE OF THE CLERK
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT
P.O. Box 193939
San Francisco, CA 94119-3939

A copy of: **APPELLANT'S EXCERPT OF RECORD**

This certification is executed on September 30, 2002, 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES (Cont.)

Cases **Page**

TABLE OF AUTHORITIES (Cont.)

Cases **Page**

TABLE OF AUTHORITIES (Cont.)

Cases **Page**

Statutes

TABLE OF AUTHORITIES (Cont.)

Statutes **Page**