This case is not yet scheduled for argument

No. 05-5156

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAMAR JOHNSON,
Plaintiff – Appellant

v.

PAUL A. QUANDER, et al.,
Defendants – Appellees

Appeal from the United States District Court
for the District of Columbia

Brief For Appellant Lamar Johnson

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District Court
04-448(RBW)

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellant Lamar Johnson hereby states as follows:

A. Parties and Amici:

The parties in this appeal are Petitioner-Appellant Lamar Johnson, and Defendants-Appellees Paul A. Quander and Michael Johnson of the District of Columbia Court Services and Community Supervision Agency (CSOSA). There are no intervenors or amici.

B. Rulings Under Review:

The ruling under review is a judgment issued by the Honorable Reggie B. Walton on March 21, 2005, granting defendants' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. This ruling is reported at *Johnson v. Quander*, 370 F. Supp. 2d 79 (D.D.C. 2005).

C. Related Cases:

To counsel's knowledge, there is a related case or matter, *U.S. v. Rice*, No. 1:2001-cr-00020-EGS, pending in the District Court for the District of Columbia before Judge Sullivan, involving substantially the same or similar issues. Also, Judge Bates granted summary judgment to Defendants in September 2004 in a related District Court for the District of Columbia case, *Tootle v. Sec. of Defense*,

CA 03-1014, involving substantially the same or similar issues on appeal here. Counsel believes that this case is now pending in this Circuit as a mandamus matter, *In re Tootle*, 04-5409. In addition, *Nicholas v. Goord*, No. 04-3887, an appeal of a ruling upholding the constitutionality of New York State's collection of the DNA profiles of prison inmates and inclusion of those profiles in the federal and state DNA databases, is pending before the United States Court of Appeals for the Second Circuit. Finally, *A.A v. Attorney General of New Jersey*, MER-L-0346-04, N.J. Super. Ct. Law Div. (2004), holding that it is unconstitutional to maintain DNA samples or profiles indefinitely once one's term of supervision has expired, is currently on appeal to the Appellate Division of the New Jersey Superior Court.

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STATUTES AND REGULATIONS

The relevant statutes and regulations are set out in the Addendum.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 and the power to grant the requested relief pursuant to 28 U.S.C. § 2201; 28 U.S.C. § 2202; 42 U.S.C. § 1983 as well as Federal Rules of Civil Procedure 57 and 65. This court has jurisdiction over this appeal pursuant to 28 U.S.C.A. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in summarily dismissing Mr. Johnson's civil rights complaint where the trial court did not accept Mr. Johnson's alleged facts as true and did not give Mr. Johnson the benefit of all inferences to be derived from such facts and where a number of key disputed facts were left unresolved?

2. Whether a suspicionless search of a probationer, conducted for law enforcement purposes and designed to obtain evidence to be used against the subject of the search in a subsequent criminal proceeding, violates the Fourth Amendment to the United States Constitution?

3. Whether, viewing the facts in the light most favorable to Mr. Johnson, Mr. Johnson has stated a cognizable claim that the DNA Analysis Backlog Elimination Act of 2000 also violates the Fifth Amendment to the United States Constitution, the Ex Post Facto Clause, the Health Insurance Portability and Accountability Act of 1996 and the International Convention on the Elimination of all Forms of Racial Discrimination?

STATEMENT OF THE CASE

Plaintiff Lamar Johnson, who has fully paid his debt to society and who is suspected of committing no crime, initiated the instant case in response to the defendants' attempts to secure his DNA, without a warrant or just cause, in the waning days of his probationary period. Mr. Johnson, who complains that the defendants' suspicionless demand violated both his constitutional and statutory rights, requested exclusively declaratory and injunctive relief to correct the violations of his rights. Seeking only to protect his most intimate medical and genetic secrets – and in an effort to comply as fully as possible with the terms of his probation – Mr. Johnson has even provided a blood sample for the defendants to hold, without analysis, until complete resolution of this case.

In support of his claims and his requested remedy, Mr. Johnson submitted detailed pleadings to the trial court alleging a number of facts regarding the constitutional and statutory violations of which he complains. In addition, Mr. Johnson submitted declarations from Dr. Greg Hampikian and Dr. Daniel Krane, noted experts, respectively, in the fields of biogenetics and forensic DNA. The doctors' sworn statements, along with the other evidence and allegations contained in Mr. Johnson's initial pleadings, established numerous facts that amply support his claims.

Nonetheless, no fact development was permitted by the court below and even Mr. Johnson's request for a hearing was denied. Instead, despite Mr. Johnson's detailed allegations and the existence of many unresolved essential facts – including, *e.g.*, what procedures, if any, exist for targeted collectees to challenge their selection; what protocols, if any, ensure that collection, analysis, storage and destruction of biological samples are properly conducted; what safeguards, if any, protect against discovery and disclosure of the wealth of highly personal information contained in a person's DNA; and what connection, if any, has been established between DNA collection and legitimate supervisory goal– the trial court granted the government's motion to dismiss.[1]

This summary disposition was inappropriate because of both legal and factual errors. Indeed, dismissal ought to have been foreclosed not only by the many allegations made in – and unanswered questions raised by – the initial

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[1] The trial court also noted that, even if it had deemed expungement and return of Mr. Johnson's blood sample to be warranted, it might have been powerless to effect such a remedy to the extent the court did not have "the proper defendants" before it. Memorandum Opinion and Order (J.A. 42 n.18). This conclusion, too, was erroneous; if, as the court speculated, the current defendants in this case had proven unable to secure the cooperation of the Federal Bureau of Investigation (FBI) in order to comply with any court order, the court could have and should have joined the FBI as a party. *See* F.R.C.P. 21 ("Misjoinder of parties is not a ground for dismissal of an action. Parties may be dropped or added by order of the court by motion of any party or of its own initiative at any stage of the action and on such terms as are just"). Indeed, such amendment would have been especially easy to accomplish in this case as the FBI would have been represented by the United States Department of Justice, the same entity that represents the current defendants.

pleadings, but also by the very rubric under which the trial court chose to evaluate Mr. Johnson's Fourth Amendment claim: a necessarily fact-intensive comparison of the competing privacy and government interests. *See, e.g.*, Memorandum Opinion and Order (J.A. 11) ("the Court must balance the plaintiff's privacy interests against the public interests"). Moreover, Mr. Johnson's probationary term expired not long after the filing of his complaint, adding additional factual and legal components to any assessment of when and with what consequences Mr. Johnson's full Fourth Amendment rights would be restored.[2] Finally, many of the factual conclusions that the court did reach were entirely unsupported by the record or, in some instances, flatly contradicted by Mr. Johnson's uncontested evidence.[3]

In short, the trial court viewed the facts in the case as the *defendants* would have had them – making dubious assumptions regarding a number of key issues and ignoring many other factual disputes entirely – rather than through the plaintiff-friendly lens required at the preliminary proceeding stage. *See, e.g.*,

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[2] Mr. Johnson contends, that the search at issue in this case is illegal regardless of whether or not the searchee is currently under some form of criminal justice supervision. Both the court and the government, however, have repeatedly depicted Mr. Johnson's probationary status as a dispositive factor in this case. *See, e.g.*, Mem. Op. (J.A. 11-12); Def. TRO Opp. (J.A. 158); Def. Mot. Dismiss (J.A. 193).

[3] Although, as mentioned above, Mr. Johnson submitted expert affidavits in support of his Complaint, his Motion for a Temporary Restraining Order and his Opposition to the Defendants' Motion to Dismiss, as well as documentation regarding Mr. Johnson's completion of probation, Mem. M. Johnson (J.A. 264), the government submitted no expert testimony to the trial court whatsoever.

Marshall County Health Care Authority v. Shalala, 988 F.2d 1221, 1227 (D.C. Cir. 1993) (district court must "accept the plaintiff's allegations as true and construe those allegations in the light most favorable to the pleader" when evaluating a motion to dismiss) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Mr. Johnson accordingly seeks reversal of the trial court's erroneous order and remand in order to pursue the fact-finding necessary for just resolution of his claims.

STATEMENT OF THE FACTS

On February 18, 2004, approximately one month before Lamar Johnson's term of probation was scheduled to successfully expire, the defendants in this case demanded that Mr. Johnson submit a sample of his DNA for inclusion in the FBI's Combined DNA Index System (CODIS), a law enforcement database designed and used to solve crime. In full compliance with the terms of his supervision and on the cusp of his full return to free society, Mr. Johnson objected to this warrantless, suspicionless, highly invasive search and, in particular, to the defendants' intention of retaining his DNA in perpetuity for future analysis.

On March 18, 2004, Mr. Johnson filed a civil rights complaint in the district court alleging that the defendants' actions violated rights secured to him by the United States Constitution and under federal law. Comp. (J.A. 48). In his complaint, Mr. Johnson sought purely injunctive and declaratory relief, including a temporary restraining order. On March 29, 2004, the defendants opposed Mr. Johnson's motion for a temporary restraining order, noting in their supporting papers that the defendants were seeking to have Mr. Johnson's probation revoked based on his refusal to comply with their efforts to obtain his DNA. Decl. M. Johnson (J.A. 172). On April 9, 2004, the parties filed a joint motion proposing to resolve this dilemma by arranging for Mr. Johnson to provide a blood sample to be

stored without testing during the pendency of this case. Joint Mot. (J.A. 179). That joint motion explicitly preserved all of Mr. Johnson's claims, including his argument that the taking of his blood sample violates the Fourth Amendment. Joint Mot. (J.A. 182). On that same day, Mr. Johnson provided a blood sample to the defendants pursuant to the terms of this agreement. Def. Not. Filing (J.A. 187). On April 13, 2004, Mr. Johnson's probation terminated successfully.

On March 21, 2005, having earlier denied Mr. Johnson's request for a TRO, Docket (J.A. 44), the district court granted the government's motion to dismiss without a hearing, rebuffing Mr. Johnson's request for injunctive relief and refusing to order post-probation expungement.

On April 19, 2005, Mr. Johnson filed notice of the instant appeal.

Since the termination of his probation, Mr. Johnson has not committed any crime or other act to justify a warrantless, suspicionless search of his DNA profile.

SUMMARY OF THE ARGUMENT

This case involves a fact-intensive dispute about the privacy interests at stake when the government forcibly extracts a blood sample from a probationer, conducts DNA analysis, shares discovered genetic information with others, and permanently retains that original blood sample for the purpose of conducting later analysis as the technology evolves. The complicated factual questions about these processes—for example, about what information can be gleaned from DNA under the current state of science and law, what scientists will likely be able to discern from retained blood samples in the long term, and what procedures are and could be put in place to minimize privacy invasions—seem woefully inappropriate for summary resolution. Nonetheless, the district court summarily resolved these factual disputes against Mr. Johnson despite his uncontested expert declarations and detailed factual allegations about the potential of such searches to reveal private medical and genetic secrets.

Furthermore, the district court's order was particularly inappropriate given the rapidly-evolving legal precedents regarding the privacy rights of those who once had contact with the criminal justice system. For example, among others, the facts in this case present the novel question of whether a DNA sample "may properly be retained by the government after the felon has finished his or her term and has paid his or her debt to society." *United States v. Kincade*, 379 F.3d 813,

842 (9th Cir. 2004) (Gould, J. concurring). At the outset of this litigation, this issue was a question of first impression nationwide. Now, however, the few lower courts that have weighed in – other than the one below – have granted relief on such claims.

For example, the Superior Court of New Jersey has recently ruled, in *A.A. v. Attorney General of New Jersey*, C.A. No. MER-L-0346-04, (N.J. Super. Ct. Law Div. December 22, 2004), that the government must "expunge ...[former probationers'] DNA from its databases, when and if they have completed their supervisory terms and have fully resumed civilian life." *A.A.* slip. op. at 3. In addition, in the few months that have passed since the trial court's order here, a federal district court has granted an injunction and return of the DNA sample in a case involving a Fourth Amendment challenge to Alaska's DNA Act by a former parolee. *Doe v. Tandeske*, 2005 WL 1220936 (D. Alaska May 18, 2005). Indeed, the Supreme Court's recent grant of certiorari in *Samson v. California*, No. SC052426, 2004 WL 2307111 (Cal. Ct. App. Oct. 14, 2004), *cert. granted,* 2005 WL 916785 (U.S. Sep 27, 2005) (No. 04-9728), a case in which the Supreme Court has agreed to decide whether the Fourth Amendment prohibits suspicionless searches of parolees,[4] also signals how important and complicated the issues are

[4] Note that while Mr. Johnson was a probationer at the time his blood sample was taken, probationers and parolees often are treated alike for Fourth Amendment

that surround the privacy rights of those under supervision. Doubtless, the law in this area will continue to evolve in the near-term.

In short, this case presents novel and complicated issues — both legal and factual — that Mr. Johnson should have been permitted to pursue beyond the pleadings stage. This Court should reverse the judgment below.

ARGUMENT

I. The Trial Court Erred In Dismissing Mr. Johnson's Claims Where A Number Of Factual Issues Remained Unresolved At The Time And Where, With Respect To The Factual Issues That Were Resolved By The Trial Court, The Trial Court Did Not Accept Mr. Johnson's Alleged Facts As True And Did Not Give Mr. Johnson The Benefit Of All Inferences To Be Derived From Such Facts.

The standard by which a trial court must review a motion to dismiss is a familiar one. A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). "To that end, a complaint must be construed liberally in the plaintiffs' favor and [the Court must] grant [the] plaintiff the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994); *Atchinson v. District of Columbia*, 73 F.3d 418, 422 (D.C. Cir. 1996); *Sachs v. Bose*, 201 F.2d 210, 210 (D.C. Cir. 1952). As the Supreme Court has held,

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purposes. *See, e.g., Moreno v. Baca,* 400 F.3d 1152, 1158 (9th Cir. 2005); *United States v. Tucker,* 305 F.3d 1193, 1199 n.1 (10th Cir. 2002).

> [w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheur v. Rhodes, 416 U.S. 232, 236 (1974).

Indeed, at the preliminary pleadings stage, the trial court is not called upon to assess "the truth of what is asserted or [to] determin[e] whether a plaintiff has any evidence to back up what is in the complaint." *ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 467 (D.C. Cir. 1991). Instead, the Federal Rules of Civil Procedure require only that a complaint "simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests'...[as the] simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley*, 355 U.S. at 47). Moreover, federal courts must apply this standard of generous review with "particular strictness when the plaintiff complains of a civil rights violation," as is the case here. *See, e.g., Irish Lesbian*

and Gay Org. v. Guiliani, 143 F.3d 638, 644 (2d Cir. 1998) (quoting *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991)).

The defendants' motion to dismiss ought not to have withstood scrutiny under these controlling standards. In fact, the pleadings in this case alleged a number of essential facts that both (1) provided ample support for Mr. Johnson's claims, especially when viewed in the light most favorable to Mr. Johnson, and (2) required additional discovery and litigation to adequately resolve. Indeed, at the time the trial court dismissed Mr. Johnson's claims without a hearing, a number of factual matters bearing directly on the key issue in this case – the true extent of the search in question and the nature of the government's purportedly countervailing interests – had been both adequately alleged by Mr. Johnson and inadequately resolved by the trial court. These matters included, but were not limited to, the following:

- Mr. Johnson's allegation that "[There is an] incredible range of detailed personal information obtainable from a DNA sample, which includes, but is not limited to, data regarding such intimate and revealing information as genetic traits, susceptibility to disease, 'biogeographic heritage' (i.e. race), medical conditions and paternity." *See* Pl. Mem. (J.A. 237); Decl. Dr. G. Hampikian (J.A. 270-272).

- Mr. Johnson's allegation that "the information disclosed in a DNA profile tells us not only about the individual, but also about [the donor's] relatives." *See* Decl. Dr. G. Hampikian (J.A.269).

- Mr. Johnson's allegation that even the thirteen DNA loci often analyzed by the FBI "may yield probabilistic information evidence of the contributor's race or sex." *See* Pl. Mem. (J.A. 237-238).

- Mr. Johnson's allegation that even the thirteen DNA loci often analyzed by the FBI "may someday, soon, be revealed to contain the same highly personal [genetic and medical] information found elsewhere on the DNA strand." *See* Pl. Mem. (J.A. 238); Declaration of Dr. G. Hampikian (J.A. 270).

- Mr. Johnson's allegation that "under the FBI's current authority to administer CODIS, it could change the kind of 'identifying' genetic information included in the database tomorrow." *See* Pl. Mem. (J.A. 245); Decl. Dr. D. Krane (J.A. 286-87).

- Mr. Johnson's allegation that "the DNA Act does not proscribe or define or limit analyses to non-coding DNA or require that blood samples be destroyed after the identification analysis has been performed." *See* Pl. Mem. (J.A. 245).

- Mr. Johnson's allegation that "[t]here is...nothing preventing initial or official database limitations from being modified or eroded over time" as with the military offender provisions of the DNA Act (which now authorize law enforcement use of a Defense Department DNA repository initially designed solely for the identification of soldiers lost on the battlefield)." *See* Pl. TRO Mot. (J.A. 76).

- Mr. Johnson's allegation that "a number of factors including: the possibility of examiner bias...ambiguities related to recognized technical artifacts...complications associated with the interpretation of mixed samples...allele sharing between related individuals...and contamination/inadvertent transfer" place an individual at risk of false-inclusion. *See* Pl. Mem. (J.A. 248); Decl. Dr. D. Krane (J.A. 278).

- Mr. Johnson's allegation that no administrative procedures exist "for determining whether an individual has actually been convicted of a qualifying offense and CSOSA regulations do not set forth any official procedures for correctly identifying such individuals." *See* Pl. Mem. (J.A. 248).[5]

[5] The Public Defender Service is aware of individuals who, though never convicted of a "qualifying offense," have nonetheless been erroneously subjected to DNA testing by CSOSA. CSOSA lacks proper administrative procedures for

- Mr. Johnson's allegation that no administrative procedures exist for those targeted for collection to challenge improper requests for DNA. *See* Comp. (J.A. 51); Pl. Mem. (J.A. 248).

- Mr. Johnson's allegation that the DNA Act "is not narrowly tailored" because qualifying offenses appear to have been arbitrarily selected and because no mechanism exists to allow expungement "in the event a conviction is reversed on appeal or in the case of someone like Mr. Johnson whose aberrant and highly-situational criminal behavior bears all the hallmarks of a singular event." *See* Pl. Mem. (J.A. 245-46).

- Mr. Johnson's allegation that the defendants' DNA collection procedures could be more narrowly tailored "without compromising the government's stated interest." *See* Pl. Mem. (J.A. 248-49).

- Mr. Johnson's allegation that "[t]he DNA Act disproportionately burdens racial minorities, especially African Americans, a population disparately impacted by the criminal justice system." *See* Pl. Mem. (J.A. 248-49).

II. The Trial Court Erred in Holding That A Suspicionless Search, Conducted For Law Enforcement Purposes And Designed To Obtain Evidence To Be Used Against The Subject Of The Search, Does Not Violate The Fourth Amendment To The United States Constitution.

The trial court wrongly applied a balancing test[6] in its summary dismissal of Mr. Johnson's claim that the DNA Act violates his Fourth Amendment rights. Furthermore, when weighing the privacy interests of Mr. Johnson against the government's interest in searching his DNA, the lower court disregarded plaintiff's

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challenging the government's demand of a blood sample or returning a sample and DNA analyses taken in error. In the absence of such process and fearful of reprisal, many of these individuals acquiesced to illegal searches.

[6] The trial court also stated its belief, without further comment, that the DNA Act could be upheld under a "special needs" analysis. Mem. Op. (J.A. 10). As discussed in section II.A.3 *infra*, plaintiff asserts that the DNA Act also fails scrutiny under a special needs analysis.

numerous factual assertions about the extent of the privacy invasion and government need for DNA.

Mr. Johnson's Fourth Amendment claim arises from four distinct actions authorized by the DNA Act, corresponding to four different stages of processing plaintiff's DNA sample. All four of these stages are governed by different aspects of the DNA Act, occur at different times, are conducted by different actors, and have different implications for Mr. Johnson's privacy. The DNA Act 1) mandates the physical extraction and seizure of blood; 2) authorizes analysis of the blood for identification information by either government or private entities; 3) requires entry of that information into a permanent national database accessible to at least thousands of individuals and government entities; and 4) allows for subsequent re-testing for other desired "identification" information by permitting permanent retention of the physical sample. The DNA Act authorizes that these last three actions be conducted even against an individual who is a free citizen, after his or her release from court supervision. In Mr. Johnson's case, all of these last three actions would occur while he is a free citizen.[7]

When conducting its analysis of plaintiff's Fourth Amendment claim, the trial court—following case law from other jurisdictions on disparate facts—largely

[7] Per standard DNA processing practices, these last three actions would have taken place when Mr. Johnson was a free citizen, even if plaintiff and defendants had not reached agreement to delay further processing of plaintiff's DNA sample pending outcome of this litigation.

failed to address Mr. Johnson's legal and factual allegations concerning the latter three actions taken by the government pursuant to the DNA Act. The court did not inquire into CSOSA's collection and transfer of the blood sample to the FBI. The court did not ask what analysis could be done to the DNA sample under the current legal authorization for "identifying information" or, in case of misuse or a change in laws, that is scientifically possible. The court did not examine any aspect of the CODIS database to determine the number of persons who can view Mr. Johnson's information, whether any particular need must be demonstrated to search his electronic profile, or whether the database searches have been shown to be a reliable and necessary tool for government law enforcement. Finally, the court did not consider under what conditions and with what limitations plaintiff's DNA sample would be permanently retained. The facts behind each of these questions—many of which Mr. Johnson asserted before the trial court—are necessary to determine the scope of the privacy harm to Mr. Johnson.

The Supreme Court has clearly stated that consideration of both current and potential future uses or misuses of a given search mechanism is required in a Fourth Amendment analysis of technology-based searches. *Kyllo v. United States*, 533 U.S. 27, 42 (2001) ("the Court takes the long view and decides this case based largely on the potential of yet-to-be-developed technology") (internal quotations omitted). The trial court ignored this mandate by ruling that "hypotheticals"

regarding the risks inherent in forensic DNA databanks were not relevant to the court's inquiry. Mem. Op. (J.A. 12 n.6). To correct this error and to be consistent with the Supreme Court's mandates in *Kyllo*, this Court, in reviewing the legal and factual claims supporting Mr. Johnson's Fourth Amendment argument, should give attention to the alleged current and potential future government actions concerning plaintiff's DNA at each of the four above-mentioned stages. Where facts about the current and potential operation of the DNA Act are unknown or questioned, this need for factual development counsels toward reversing the lower court order dismissing this case and permitting the litigation to proceed to discovery.

A. A Simple Totality of Circumstances Balancing of Interests Test May Not Be Applied To A Suspicionless Law Enforcement Search Because The Fourth Amendment Requires That All Law Enforcement Searches Be Premised on Some Measure of Individualized Suspicion.

The trial court is the first and, to date, only court in the country that has held that the suspicionless seizure, analysis, and inclusion of an ex-supervisee's DNA in a database do not violate the Fourth Amendment. In fact, forced DNA collection pursuant to the DNA Act is an unreasonable, suspicionless search and seizure that is constitutionally barred regardless of the weight of the individual and government interests involved.

1. Since Its Inception The Primary Purpose Of The Fourth Amendment Has Been To Prevent Suspicionless Searches Under Guise Of Law.

No issue is more fundamental to the protections of the Fourth Amendment than whether law enforcement searches and seizures are conducted with individualized suspicion. "It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583 (1980). From the Star Chamber to the Revolutionary War, Anglo-American history is replete with attempts by law enforcement officials to invade protected spheres, in the absence of any particularized evidence of wrongdoing, under the banner of preventing or solving crime. It was precisely this history that led the Framers to adopt the Fourth Amendment and to design it as a safeguard against the use of suspicionless "general warrants" and "writs of assistance." *See* Joseph Story, *Commentaries on the Constitution of the United States* Sec. 1902 (5th ed. 1891) (the Fourth Amendment "was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants"); *see also* Leonard W. Levy, *Origins of the Bill of Rights*, 153-54 (1999); LaFave, *Search and Seizure*, § 1.1(a) (3d ed. 1996); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The*

Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1371 (1983).[8]

2. The Supreme Court Has Only Upheld Suspicionless Searches When They Are For A "Special Need," Not For Ordinary Law Enforcement Purposes.

In a recent trilogy of cases – *Indianapolis v. Edmond*, 531 U.S. 32 (2000), *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and *Illinois v. Lidster*, 540 U.S. 419 (2004) – the Supreme Court has re-affirmed that the Fourth Amendment requires that *all* law enforcement searches be premised on some quantum of individualized suspicion. Non-law enforcement searches, in contrast, may be reviewed less rigorously and may take refuge in one of the enumerated – though "closely guarded," *Ferguson*, 532 U.S. at 68; *Chandler v. Miller*, 520 U.S. 305, 309 (1997), exceptions that the Court has established for searches that serve some other governmental purpose.

The seizures in this case are factually similar to the circumstances previously before the Supreme Court in *Ferguson*. There, petitioners challenged a state hospital program that, without any suspicion, tested pregnant women for drug use and made positive results available to police. *Ferguson*, 532 U.S. at 72. The Supreme Court did not allow the program's stated goal of monitoring the women's

[8] Many early state constitutions also expressly prohibited use of general warrants. *See, e.g.*, Virginia Declaration of Rights of 1776, Art. X; Delaware Declaration of Rights of 1776 Sec. 17.

treatment to outweigh the actual, immediate objective of generating evidence of the women's wrongdoing for law enforcement purposes. *Id.* at 83. Despite the Court finding prenatal drug treatment a compelling motive, it held that "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Id.* at 86 (quoting *Edmond,* 531 U.S. at 42). The Fourth Amendment prevents state actors, without any suspicion, from taking "evidence from their patients *for the specific purpose of incriminating those patients*." *Id.* at 85 (emphasis in original).

The three exceptions to the ban on suspicionless searches, highly specific and extremely narrow, are inapplicable to Mr. Johnson's case. Such exceptions extend only to well-defined types of non-law enforcement searches: (1) administrative searches of, for example, closely regulated businesses, *see, e.g., New York v. Burger*, 482 U.S. 691, 702-04 (1987); (2) searches conducted in "exempted areas", such as airports, *see, e.g., United States v. Flores-Montano*, 540 U.S. 149, 154-5 (2004); and (3) searches serving other "special needs beyond the normal need for law enforcement" where "the warrant and probable cause requirement [are rendered] impracticable." *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). Searches falling into one of these non-law enforcement categories need not be supported by individualized suspicion and may instead be squared with the Fourth Amendment so long as the interests served by

the search outweigh any attendant invasion of privacy. For this reason, entrée into one of these categories is quite difficult to obtain; these exceptions are by no means intended to swallow the individualized suspicion rule. *See Ferguson*, 532 U.S. at 68 (describing these exceptions as "closely guarded" categories).

Traditional law enforcement searches, therefore – searches intended to collect items or information to be used as criminal evidence against the searchee – remain subject to the Framers' stringent requirements. Striking at the heart of the Fourth Amendment's most inviolate zone, these searches must always be predicated on some measure of individualized suspicion. Accordingly, the most critical component of the Fourth Amendment inquiry with respect to a particular suspicionless search is a determination of whether the "primary purpose [of the search is] to detect evidence of ordinary criminal wrongdoing." *Edmond*, 531 U.S. at 41.

3. The Suspicionless Searches In The Present Case Are For Ordinary Law Enforcement Purposes, Do Not Meet Survive A Special Needs Test, And Are Therefore Unconstitutional.

The primary purpose of the search at issue in this case is, without question, an ordinary law enforcement purpose – the collection of evidence to be used to prosecute the person who is the target of the search. It is by no means distinct from ordinary law enforcement searches, or, as the Supreme Court has articulated this threshold determination, "divorced from the State's general law enforcement

interest." *Ferguson*, 532 U.S. at 68. On the contrary, 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 (emphasis added); both the Act and the databank are designed and devoted to helping to "solve crime." DNA Analysis Backlog Elimination Act of 2000, H.R. REP. NO. 106-900(I), at 9, 27 (2000) (citing Letter submitted to the House Judiciary Committee by the Department of Justice). Indeed, the Department of Justice has repeatedly stressed that CODIS "will be used *solely* for law enforcement purposes." *Id.* at 25 (emphasis added); *see also id.* at 27, ("[t]he national DNA identification index administered by the FBI compiles the DNA profiles obtained under the state systems and makes them accessible on a nationwide basis for *law enforcement* identification purposes") (emphasis added); *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") (emphasis added).[9]

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[9] In addition, every single iteration of the DNA Act has been conceived and codified as a law enforcement provision. In 1994, the first version of the DNA Act was contained within the Violent Crime Control and *Law Enforcement* Act; in 1996, the federal DNA provisions were contained within the Funding for *Law Enforcement* section of AEDPA; in 2000, they appear 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 (emphases added). Similarly, the D.C. Code provisions specifying which D.C. offenders are to be subject to the federal DNA Act, D.C. Code § 22-4151, are codified in Title 22, "Criminal Offenses and Penalties."

The DNA Act cannot credibly be said to serve a supervisory purpose for probationers.[10] Indeed, while the trial court in this case suggested that there may be such a supervisory purpose, not one of the authorities cited by the trial court in support of its assertion that "DNA profiling" "helps to ensure that such [conditionally released offenders] comply with the requirements of the [sic] their conditional release," Mem. Op. (J.A. 13), even mentions DNA. There is no reliable empirical evidence indicating that DNA collection has a deterrent effect. There are no data of any kind indicating that DNA collection has any effect on re-offense rate above and beyond whatever deterrence might in fact be achieved by traditional supervisory methods. *See* Sarah L. Bunce, *United States v. Kincade – Justifying the Seizure of One's Identity*, 6 Minn. J. L. Sci. & Tech. 747, 785 (2005)

[10] Similarly, exoneration of the innocent is not the purpose of the DNA Act. First, any defendant seeking DNA testing has other means at his or her disposal and need not submit to the forced, wide-scale suspicionless sampling of millions of his fellow citizens. Second, it would be disingenuous to suggest that the government would ever allow criminal defendants to use the CODIS system to aid their exoneration, especially given the many, many examples of government officials blocking defendants' attempts to secure exonerative DNA testing. *See, e.g.*, Bill Moushey, *DNA Test Clears Man After 20 Years in Jail*, PITTSBURGH POST-GAZETTE, July 30, 2005, available at www.pittsburghpost gazette.com/pg/05211/546262.stm (describing prosecutors' attempts to prevent potentially exonerative DNA testing). Finally, even the most candid versions of this argument – wherein proponents concede that the "exoneration" interest they advance refers merely to the supposedly improved "accuracy" of criminal prosecutions involving DNA evidence – are themselves window-dressing. To the extent prosecution of one individual "exonerates" the balance of the citizenry with respect to that particular crime, this "interest" is in no way linked or limited to suspicionless DNA searches. This "interest in exoneration," then, is just an attempt to mask the obvious purpose of the Act—general law enforcement.

(noting absence of any statistical support indicating connection between DNA collection and reduced recidivism). No evidence was offered to the district court to support this assertion and the court was wrong to assume this critical fact at this stage of proceedings.

Thus, the search at issue in this case is classic criminal investigation, intended, as the trial court itself makes clear, "to link evidence from crime scenes" to the DNA donors via the collected DNA. Mem. Op. (J.A. 3) (internal citation omitted); *see also* Def. Mem. (J.A. 202) (quoting Council of the District of Columbia Report on Bill 14-63 (April 24, 2001)). As such, the search falls squarely within heartland Fourth Amendment jurisprudence and none of the "general balancing" exceptions can be called upon to redeem it. *See Edmond*, 531 U.S. at 42 (special needs exception can not be invoked to validate search designed "to uncover evidence of ordinary criminal wrongdoing"); *Roe v. Marcotte*, 193 F.3d 72, 78 (2d Cir. 1999)(special needs exception applies only "outside the criminal investigatory context").

4. *Even Though Probationers May Not Enjoy The Same Privacy Rights As The General Public, A Simple Totality Of Circumstances Balancing of Interests Test May Not Be Applied To Suspicionless Searches And Seizures Of Probationers' DNA.*

The Supreme Court has recently granted a writ of certiorari to settle a split among federal and state courts about whether parolees may be subjected to

suspicionless searches. *Samson v. California*, No. SC052426, 2004 WL 2307111 (Cal. Ct. App. Oct. 14, 2004), *cert. granted,* 2005 WL 916785 (U.S. Sep 27, 2005) (No. 04-9728).[11] However, the *Edmund/Ferguson/ Lidster* trilogy of decisions by the Supreme Court indicate that such suspicionless searches will not be upheld. While an individual's supervisory status may require a lower degree of suspicion to conduct a law enforcement search, being a parolee or probationer does not completely strip a citizen of his or her Fourth Amendment protection against suspicionless searches.

Relying on a number of other courts that applied a totality of the circumstances balancing test to parolee and probationer cases, the trial court in this case used a balancing test.[12] However, some of these cases pre-date the *Edmund/Ferguson/ Lidster* line, *see, e.g., Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992); and many involved *pro se* plaintiffs, *see, e.g., Groceman v. U.S. Dept. of Justice,* 354 F.3d 411 (5th Cir. 2004); *Velasquez v. Woods*, 329 F.3d 420 (5th Cir.

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[11] State and federal courts that have considered the validity of parole or probation searches have generally adopted either a reasonable suspicion requirement or a rule barring searches when the parole or probation officer was acting as an agent of the police. *See, e.g., United States v. Carnes,* 309 F.3d 950 (6th Cir. 2002); Knox v. Smith, 342 F.3d 651 (7th Cir. 2003), *People v. Lampitok*, 207 Ill. 2d 231, 251-53 (Ill. 2003); *Riley v. Commonwealth*, 120 S.W.3d 622, 627 (Ky. 2003); State v. Baca, 135 N.M. 490, 504 (N.M. 2004). *But see People v. Reyes*, 968 P.2d 445 (Cal. 1998).

[12] When considering whether to use a special needs or totality of circumstances balancing test the trial court stated that it "believes that the DNA Act can be upheld under either analysis," but that "the traditional totality of the circumstances analysis is the more appropriate." Mem. Op. at 9.

2003); *United States v. Stegman*, 295 F.Supp.2d 542 (D. Md. 2003). Also, at least one of the cited cases is under active appellate review, *Nicholas v. Goord*, F. Supp. 2d, 2004 WL 1432533 (S.D.N.Y. 2004). Moreover, as the trial court noted, many other courts have declined or refused to apply a balancing test when evaluating suspicionless DNA searches. *See, e.g.*, *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003); *Roe v. Marcotte*, 193 F.3d 72, 79-82 (2d Cir. 1999); *Vore v. Dep't of Justice*, 281 F. Supp. 2d 1129-1133-35 (D. Ariz. 2003); *Miller v. U.S. Parole Comm'n*, 259 F. Supp. 2d, 1166, 1175-78 (D. Kan. 2003). The decision to apply a totality of circumstances balancing test was, therefore, a choice to rely on precedents in sharp conflict with much of the case law in this emerging area.

The trial court and those jurisdictions that have used a totality of the circumstances balancing test rely exclusively on language from *United States v. Knights*, 534 U.S. 112 (2001) as their Supreme Court authority for not applying a special needs analysis. *Knights*, however, does not stand for the proposition that searches can be conducted in the absence of any suspicion at all. On the contrary, the *Knights* court expressly clarified that *Knights* must *not* be read as endorsing such a rule. *Knights*, 534 U.S. at 120 n.6. The facts of that case involved a search of a probationer that law enforcement officers had reasonable suspicion to believe was illegally carrying an incendiary device – i.e., the search was not suspicionless.

Id. at 116. Despite this clear distinction from the suspicionless searches and seizures under the DNA Act, the trial court in Mr. Johnson's case followed the test used in *Knights*, bypassing the usual presumption that a special need must be found for law enforcement to conduct suspicionless searches.

B. The Trial Court Erred Both By Unreasonably Narrowing the Scope Of The Searches And Privacy Interests It Considered, And By Only Viewing Mr. Johnson As A Probationer, When Evaluating Mr. Johnson's Fourth Amendment Claims.

Contrary to the trial court's narrow focus on just "the taking of [Mr. Johnson's] DNA," Mem. Op. (J.A. 12), it is well-established that the continued or renewed examination of seized materials constitutes an additional search for 4th Amendment purposes when doing so reveals new private information or discloses such information to new parties. Even before the advent of forensic DNA, the Supreme Court reasoned that the chemical analysis of urine can reveal a "host of private medical facts" and consequently held that, "the ensuing chemical analysis of the [drug] sample to obtain physiological data is a further invasion of the tested employee's privacy interests." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989). The *Ferguson* Court quite recently affirmed this same proposition—that a privacy invasion lies not just in the initial seizure of evidence, but in subsequent uses of such evidence that reveal sensitive information. *See* section II.A.2, *supra.*

A hypothetical may help show how a legal search and seizure of an object does not entitle the government to avoid constitutional scrutiny when subsequent searches of the object are made to uncover new information. Assume that the government in *Knights* had used the home search provisions of the probation agreement to install a video camera in the probationer's house, upon a showing of reasonable suspicion. Even assuming that installation of the camera would have been permissible, it seems unlikely that the mere installation of the camera would have ended all Fourth Amendment concerns with subsequent use; rather potential violations would arise each time governmental officials monitored the camera. New information could potentially be gained at each review, and new government personnel potentially would invade the privacy of the probationer's home. Moreover, it seems extraordinarily unlikely that the government could continue to monitor the video camera once the probation ended merely on the theory that the invasion of privacy occurred during the probationary period when the probationer had lesser Fourth Amendment rights. Instead, it seems a virtual certainty that even if installing the camera were permissible during the probationary period, any monitoring of the camera post-probation would violate the Fourth Amendment because it would be an additional, suspicionless search of a person with full privacy protections against ordinary law enforcement purposes.

The government's pending analysis of Mr. Johnson's blood for "identifying" information, the sharing of this information through law enforcement databases, and the permanent retention of his blood sample for future analysis would subject Mr. Johnson to indefinite searches for new information by thousands of new people. The trial court reduced all of Mr. Johnson's Fourth Amendment privacy interests to a "privacy interest in his identity" and then stated that, once convicted, plaintiff's "identity has become a matter of state interest." Mem. Op. (J.A. 12). In doing so, the trial court ignored Mr. Johnson's factual assertions that extremely private information can be determined by current scientific methods and, given the vagueness of the statute regarding what is "identifying information," would be authorized even under the appropriate use of the current DNA Act. Pl. Mem. (J.A. 245). The harm from the government's ability to indefinitely search and re-search such genetic information may seem more abstract than placing a video camera in a citizen's home, but DNA technology in this respect should not be treated any differently than more traditional means of law enforcement monitoring. DNA is no less an intimate picture into an individual's personal life—medical, parentage, race, and other biological may all be gleaned from a probationer's DNA. *See* Pl. Mem. (J.A. 237); Decl. Dr. G. Hampikian (J.A. 270-272). Therefore, every search of Mr. Johnson's DNA sample for new identifying information constitutes a new

search for Fourth Amendment purposes. The taking of Mr. Johnson's blood is just the first of many, indefinite searches and seizures the DNA Act authorizes.

Second, the trial court's approach was flawed because its analysis of the constitutionality of the DNA Act ignored future privacy risks inherent in the statutory scheme. The Supreme Court has clearly stated that consideration of both current and potential future uses or misuses of a given search mechanism is required in a Fourth Amendment analysis of a technology-based search. *Kyllo v. United States*, 533 U.S. 27, 36 (2001) ("While the technology in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development"). The *Kyllo* court found that law enforcement viewing of a house through a thermal imager constitutes a Fourth Amendment search. Even though the thermal imager was able to detect very little information given the technological device used by the police in that instance, the Supreme Court did not so constrain its opinion about the extent of the threatened privacy invasion. Seeing the thermal imager in that case as a harbinger of a line of technology applications that would reveal more intimate details, the Court framed the question presented to it as a question "of what limits there are upon this power of technology to shrink the realm of guaranteed privacy." *Kyllo* at 34. The trial court in this case refused to consider applications of DNA technology elsewhere in use or in development to reveal "identifying information" such as race or

parentage. The lower court ruled that "hypotheticals" regarding the risks inherent in forensic DNA databanks were not relevant to the court's inquiry. Mem. Op. (J.A. 12 n.6). Clearly the fact that Mr. Johnson's blood sample has not yet been analyzed, included in databases, or stored and re-searched for new identifying information does not preclude him from raising these planned government actions—plainly authorized in the DNA Act and imminent should this suit be dismissed—in a §1983 civil rights suit for injunctive relief.

Moreover, even assuming, *arguendo,* that the initial seizure of Mr. Johnson's blood was constitutionally permissible because the scope of his privacy rights were diminished as a probationer, defendants' actions with his DNA pursuant to the DNA Act would violate the Fourth Amendment now that he is no longer under court supervision.

Any purported supervisory purpose served by the DNA Act or temporary decrease in Mr. Johnson's privacy rights as a probationer is of no relevance to most of the government actions objected to in this case. As noted above, in addition to authorizing the taking of Mr. Johnson's blood, the DNA Act compels the analysis of this blood for "identifying" information, entry of this information into law enforcement databases, and the permanent retention of the blood sample for future analysis. Given that Mr. Johnson's term of probation expired just days after the defendants demanded his DNA, none of these actions could have been applied to

him as a probationer. It is as an ordinary citizen, free of court supervision and with the same full privacy rights as any other person that Mr. Johnson is being subjected to the government's proposed actions.

This case presents an issue of first impression in this Circuit that, to date, only two other courts nationally have ruled on—whether a DNA sample "may properly be retained by the government after the felon has finished his or her term and has paid his or her debt to society." *United States v. Kincade*, 379 F.3d 813, 842 (9th Cir. 2004) (Gould, J., concurring). Both courts confronting this question have ruled in favor of the defendants. First, the Superior Court of New Jersey ruled, in *A.A. v. Attorney General of New Jersey*, C.A. No. MER-L-0346-04, (N.J. Super. Ct. Law Div. December 22, 2004), that the government must "expunge ... [former probationers'] DNA from its databases, when and if they have completed their supervisory terms and have fully resumed civilian life." *A.A.* slip. op. at 3. In addition, in the few months that have passed since the trial court issued its order dismissing Mr. Johnson's suit, yet another court, the U.S. District Court for the District of Alaska has granted precisely the relief that Mr. Johnson is here requesting – an injunction and the return (or destruction) of his DNA sample – in a case involving a Fourth Amendment challenge to Alaska's DNA collection statute. *Doe v. Tandeske*, 2005 WL 1220936 (D. Alaska May 18, 2005). Indeed, though the trial court relied heavily on the *Kincade* case, finding it "substantially

analogous" to the case at bar, Mem. Op. (J.A. 8), in fact neither *Kincade* – nor any of the other decisions cited by the court – "address[es] whether a person previously subject to conditional release, who has successfully completed the terms of his incarceration and conditional release, may be compelled to provide a DNA sample absent individualized suspicion of wrongdoing." *Doe v. Tandeske*, 2005 WL 850862 *1 (D. Alaska Feb 03, 2005).

Since his conviction and mental health treatment there has been no suspicion of wrongdoing by Mr. Johnson and a supervisory goal for the collection of his DNA no longer applies. The Supreme Court in *Knights* did not suggest that the home search provision there at issue could continue beyond the probationary period. Instead, the Supreme Court likened probation to incarceration and distinguished both criminal sanctions from the "absolute liberty to which every citizen is entitled." *Id. at* 119. Once probation ends, the individual's privacy interest is restored to the level of other citizens while the government's penal interest disappears—all that remains is the government's ordinary law enforcement purpose and the Fourth Amendment shields against suspicionless searches in those circumstances. In fact, given that Mr. Johnson is now, in fact, no longer a probationer – and the fact that the analysis in *Knights* was heavily informed by the probation status of the searchee in that case – it would seem that *Knights'* reliance on reasonable suspicion to authorize probationer searches establishes a dispositive

constitutional floor in such cases and that a legitimate search of Mr. Johnson's blood sample now would have to be supported by something *more* than the reasonable suspicion deemed necessary for a search of Mr. Knights, not something less.

In its Memorandum Opinion and Order the trial court did not address any of Mr. Johnson's Fourth Amendment concerns regarding the operation of the DNA Act on him as an ordinary citizen who has completed his probationary period.[13] The trial court framed the Fourth Amendment search and seizure solely in terms of the "taking of a DNA sample from a qualifying convicted felon." Mem. Op. (J.A. 9). The trial court's selection of a balancing test to evaluate Mr. Johnson's Fourth Amendment claim also was exclusively based on the DNA Act's requirement that "plaintiff to provide a DNA sample." Mem. Op. (J.A. 11). Yet, the "taking" or "provision" of a DNA sample is just the first of the acts the DNA Act authorizes

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[13] The trial court's discussion of the "Expungement of the Plaintiff's DNA Sample and Its Analysis," Mem. Op. (J.A. 35-42) was not a Fourth Amendment analysis but instead looked to a mixture of statutory and general constitutional privacy protections for its authority. Moreover, that entire section of the trial court's Memorandum Opinion appears to be based on the fiction that Mr. Johnson's DNA sample already has been analyzed, entered into national databases, and put into permanent storage. In fact, none of the actions have or could have occurred, both because of a mutual agreement of the parties to first see resolution of this litigation, and because—even if no such agreement had been reached—the normal processing time for DNA samples is quite lengthy. There are no records of Mr. Johnson's DNA analysis; the issue before this court, in part, is whether the defendants at this time should be allowed to search the blood sample for information that will create such records.

and Mr. Johnson has challenged. In addition, the DNA Act authorizes the analysis, sharing of analyzed information, and indefinite retention of the sample for future re-analysis. The most attention the trial court gave to these aspects of the DNA Act was in a footnote to its Fourth Amendment analysis where it stated that while Mr. Johnson's "discussion of potential misuses of DNA" in fact "raise legitimate concerns, the Court must decide the constitutionality of the statutes before it based on the purpose for which they were designed and have been utilized, and not on how the plaintiff perceives the statutes might be used in the future." Mem. Op. (J.A. 12). Rather than consider the entirety of the DNA Act's pending actions on Mr. Johnson, nearly all of which would occur now when plaintiff is a private citizen, the trial court cut short its Fourth Amendment analysis.

C. Even If Defendants' Actions Were To Be Evaluated Under A Simple Totality of Circumstances Balancing of Interests Test, The Privacy Interest Of Mr. Johnson Outweighs The Government's Interest In Searching His DNA.

Even assuming, *arguendo*, that forced forensic DNA collection could be evaluated pursuant to a simple balancing test, the search in this case still fails to pass constitutional muster. To the extent that such a balancing test requires a sensitive factual assessment of the various interests at stake, application of this standard alone should have foreclosed dismissal of Mr. Johnson's claims without further factual development.

The detailed pleadings and affidavits submitted to the trial court by Mr. Johnson assert numerous facts that the trial court either entirely failed to consider or improperly weighed. Many of these facts were recited in Section I, *supra.* However, several facts of particular significance to Mr. Johnson's Fourth Amendment claim merit further explanation.

1. Forensic DNA Analysis Reveals Information About The Donor's Relatives.

Only a few months after Mr. Johnson's expert averred that "the information disclosed in a DNA profile tells us not only about the individual, but also about [the donor's] relatives," *see* Decl. Dr. G. Hampikian at 4 (J.A. 269), a North Carolina case brought to national attention the practice of familial DNA searches. Richard Willing, *Suspects Get Snared by a Relative's DNA*, USA Today, June 8, 2005 ("Siblings parents and even uncles and cousins increasingly are being investigated for crimes because their genetic fingerprints closely resemble the DNA of a known criminal"). The ability to deduce from one known DNA sample the DNA makeup of family members has sparked intense debates on the ethics of invading the privacy of the family in both the United States and other countries where this particular way of extracting "identification information" from DNA is coming into widespread usage. *See* Mark A. Jobling, *Encoded Evidence: DNA in Forensic Analysis*, Nature Reviews/Genetics, October 2004 (discussing ethical implications of "familial" database searches); Case Note, *Comparative Law –*

Genetic Privacy – Icelandic Supreme Court Holds that Inclusion of an Individual's Genetic Information in a National Database Infringes on the Privacy Interests of His Child – Guomundsdottir v. Iceland, 118 Harv. L. Rev. 810 –817 (2004). These developments show how analysis of Mr. Johnson's DNA could reveal extremely personal "identifying information" about the parentage and medical status of family members to government eyes.

2. The 13 Genetic Markers Currently In the FBI Database Reveal Racial Information.

When Mr. Johnson filed his initial pleadings in this case, it was believed that, without further testing, even the thirteen DNA locations that make up the CODIS database could "yield probabilistic information evidence of the contributor's race or sex." *Kincade*, 379 F.3d at 818 n.4 (citing *Report of the Nat'l Comm. for the Future of DNA Evidence*, Nat'l Inst. of Justice, U.S. Dep't of Justice, The Future of Forensic DNA Testing 35, Nov. 2000, available at http:// www.ncjrs.org/pdffiles1/nij/183697.pdf). Those assertions have since proven correct. The ability to cull racial and ethnic information from a forensic DNA profile, once denounced as a doomsday fantasy, has now become a stark reality. *See* Jill Barnholtz-Sloan *et al.*, *Informativeness of the CODIS STR Loci for Admixture Analysis*, J. Forensic Science, Vol. 50, No. 6, November 2005 (describing how both race and ethnicity may now be derived from the 13 CODIS loci). Mr. Johnson objects to inclusion of his DNA analysis among the millions of

DNA analyses already in the national CODIS system, all of which have now become subject to government-directed racial and ethnicity tests.

3. *The Privacy Infringement Of The DNA Act Is Vastly Greater Than That Of Information In Government Sex Offender Registries Or Fingerprints.*

The Supreme Court has unequivocally and repeatedly said that the Fourth Amendment only protects against searches that violate a subjective expectation of privacy that society recognizes as reasonable. *See Kyllo* at 33 (citing Justice Harlon's famous dissent in *Katz v. United States*, 389 U.S. 347, 361 (1967)). Nonetheless, in rejecting Mr. Johnson's privacy claims, the trial court in this case relied upon analogies to fingerprint collection practices and the distribution of sex offender registry information. *See* Mem. Op. (J.A. 39) ("[c]ompared with the intrusion occasioned by sex offender registries, the privacy infringement resulting from the retention of DNA results is much more limited"). A crucial problem with reliance on either of these examples when evaluating the effects of the DNA Act is that the markings left by a finger on an external surface and the open records of court proceedings are both available for public inspection in a way that a person's blood and the information that may be analyzed from that blood simply are not. The information gleaned from a blood sample and DNA analysis display personal attributes that, by nature and by general social expectation, are not for public scrutiny. Stigmatizing as sex offender status may be, it is nearly all public

information—the Supreme Court's decision to uphold the constitutionality of the sex offender registries relied heavily on that fact. *See Smith v. Doe,* 538 U.S. 84, 86 (2003). Fingerprints do not now, and never will, have the potential to disclose medical, parentage, ethnic, and other characteristics. By contrast, Mr. Johnson's genetic information is perhaps the most essential and non-public information about his personhood that the government could seize. This Court should reject the lower court's oversimplied analogies and, as noted in Section II.B, *supra,* give serious consideration to the undefined scope of the "identifying information" authorized by the DNA Act and the possibility of uses beyond the current statutory authorization as this Court reviews Mr. Johnson's Fourth Amendment claim.

III. Viewing The Facts In The Light Most Favorable To Appellant, Appellant Has Stated Cognizable Claims That The DNA Act Also Violates The Fifth Amendment To The United States Constitution, The Ex Post Facto Clause, The Health Insurance Portability And Accountability Act Of 1996, And The International Convention Of The Elimination Of All Forms Of Racial Discrimination.

At the preliminary pleadings stage, the trial court is not called upon to assess "the truth of what is asserted or [to] determine[e] whether a plaintiff has any evidence to back up what is in the complaint." *ACLU Found. of S. Cal. v. Barr,* 952 F.2d 457, 467 (D.C. Cir. 1991). The simplified pleading rules rely on factual discovery and, where necessary, summary judgment to dispose of unmeritorious claims. *Swierkiewicz v. Sorema N.A.,* 534 U.S.at 512. The defendants' motion to

dismiss Mr. Johnson's several well-pled claims ought not to have withstood scrutiny under these controlling standards.

A. The Lower Court Erred By Ignoring The Plaintiff's Factual And Legal Assertions When It Chose To Dismiss Mr. Johnson's Procedural Due Process Claim As Unmeritorious Based On Its Weighing Of Mr. Johnson's Privacy Interests Against The Government's Interest In His DNA Sample And Its Finding The Risk Or Erroneous Deprivation To Be "Remote."

When reviewing Mr. Johnson's procedural due process claim, the lower court ignored all aspects of the DNA Act besides collection of Mr. Johnson's blood sample, wrongly re-applied its balancing of individual and government interests under the Fourth Amendment to Mr. Johnson's procedural due process claim, and ignored Mr. Johnson's uncontested factual allegations regarding the risk of erroneous deprivation.

Because the DNA Act, both on its face and as applied to Mr. Johnson, authorizes a course of actions implicating plaintiff's procedural due process rights that extends far into the future, the court was wrong to limit its review to the very short period during which the plaintiff was on probation. Mem. Op. (J.A. 19 n. 8). By so limiting its analysis, the court gave no consideration to Mr. Johnson's procedural due process allegations regarding the DNA Act's inadequate procedures for stopping future misuse of his DNA sample or information, preventing accidental matches in the CODIS database, or properly detecting and expunging DNA records. *See* Pl. Mem. (J.A. 248). The trial court should have undertaken an

analysis of how all actions authorized under the DNA Act, on its face and in their application by the CSOSA, could impact Mr. Johnson's due process rights.

Second, the lower court improperly applied the same balancing of individual and government interests to Mr. Johnson's procedural due process claim that it had applied in its Fourth Amendment analysis. "Thus, the only factor that warrants additional discussion here is the risk of erroneous deprivation." Mem. Op. (J.A. 19). In addition to his Fourth Amendment privacy interest in his genetic and medical information, Mr. Johnson claimed an individual liberty interest in not being wrongly compelled to submit a DNA sample or having his DNA profile be wrongfully entered into the CODIS system. *See* Pl. Mem. Opp. (J.A. 247). Mr. Johnson presented extensive, uncontested factual allegations in expert declarations about the known risks of accidental database matches that would harm plaintiff's liberty interests. Decl. Dr. D. Krane (J.A. 278). The lower court, in clear error, did not even address this element of the Mr. Johnson's procedural due process claim or his factual allegations on this point. Mem. Op. (J.A. 19).

Third, when considering the final factor required by *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976), the risk of erroneous deprivation of the individual's protected interests, the district court ignored Mr. Johnson's uncontested factual allegations about the DNA Act, particularly as applied by CSOSA and the FBI, and incorrectly found the risk "minimal." *Id.* The court did not consider the probable

value of additional or substitute procedural safeguards as required by *Matthews* and made no inquiry as to whether the structure or operation of the DNA Act creates a likelihood of error. Yet, Mr. Johnson has repeatedly asserted facts about the irregularities of collection practices mandated by the DNA Act, unnecessary risks in the CODIS search processes, and near costless safeguards that could reduce the risk of erroneous deprivation of Mr. Johnson's due process rights—all of which the court ignored in its *Matthews* balancing. *See* Pl. TRO Mot. (J.A. 68-69, 76); Pl. Mem. 237, 248-49; Declaration of Dr. D. Krane (J.A. 278). With no facts contrary to those Mr. Johnson's allegations presented concerning the DNA Act *as applied*, and without consideration of Mr. Johnson's alleged facts when balancing the *Matthews* factors, the court wrongly determined that the risk to Mr. Johnson of erroneous deprivation of his interests was minimal.

Mr. Johnson merely asks this Court for the opportunity to prove his claims that the DNA Act, both on its face and as applied, violates the constitution's procedural due process protections of his liberty and privacy.

B. The Trial Court Erred When It Summarily Dismissed Mr. Johnson's Substantive Due Process Claim Regarding The Manner In Which The Act Permits Widespread Disclosure Of Private Medical And Genetic Information.

The lower court dismissed Mr. Johnson's substantive due process claim solely on the basis of the Court's determination that this claim was "actually unnecessary" because it was "'covered by'" the Fourth Amendment, as "the taking

of blood for DNA analysis is a 'search and seizure' under the Fourth Amendment." Mem. Op. (J.A. 15-16). In so doing, the lower court misinterpreted the role of substantive due process in this case, misapplied the precedents that it cited, and failed to appreciate the distinctions between the two claims and assess the facts that form the basis of Mr. Johnson's substantive due process.

The district court stated that Mr. Johnson's substantive due process claim should be dismissed because it is "covered" by his Fourth Amendment claim.[14] However, the Fourth Amendment "covers only 'searches and seizures.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). As Mr. Johnson exhaustively demonstrated in his response to Appellees' motion to dismiss, through, among other facts, the undisputed testimony of national experts in this area, his substantive due process claim addresses an even broader set of privacy violations. *See* Pl. Mem. (J.A. 242-44). For instance, federal courts have repeatedly recognized the existence of a fundamental constitutional right of privacy with respect to the nondisclosure of personal data or medical information. *See, e.g.,*

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[14] Essentially, the district court refused to consider the full breadth of Mr. Johnson's privacy claims in its Fourth Amendment analysis by narrowing the scope of its Fourth Amendment analysis to the seizure of Mr. Johnson's blood and disregarding how that genetic information from that blood could be used, *see* section II.B, *supra*, while also saying that any substantive due process claim of risks to the full spectrum of Mr. Johnson's privacy rights was "covered" by the Fourth Amendment. But, the lower court cannot have it both ways. The trial court should not be allowed to escape consideration of the totality of the privacy implications of defendants' actions that Mr. Johnson has raised in his pleadings.

Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 2000); *Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000), *cert. denied*, 534 U.S. 840 (2001). In fact, Mr. Johnson's substantive due process claim touches on the core principle underlying the constitutional substantive due process guarantee established by the Supreme Court:

> We have emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government,' whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.

County of Sacramento v. Lewis, 523 US 833, 846 (1998) (citations omitted).

The cases cited by the trial court, *Graham v. Connor*, 490 U.S. 386 (1989) and *Albright v. Oliver*, 510 U.S. 266 (1994), do not provide a basis for summary dismissal of Mr. Johnson's substantive due process claim or create an absolute bar to consideration of such a claim in this case. *See United States v. Lanier*, 520 U.S. 259, 272 (1997) ("*Graham v. Connor* [citation omitted] does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments. . . "). In both cases cited by the district court, where the factual context was police or government misconduct explicitly covered by the Fourth Amendment, the Court only stated that the Fourth Amendment "must be *the guide* for analyzing these claims." *Albright v. Oliver*, 510 U.S.

266, 273 (1994) (emphasis added). In neither case did the Court draw a cursory comparison between the two constitutional principles and immediately proceed to dismiss summarily the substantive due process claim. Rather, the Court engaged in a rigorous analysis of the facts of the particular case and decided which principle to apply to resolve the matter. *See, e.g., Graham*, 490 U.S. at 393-396; *County of Sacramento*, 523 U.S. at 842-856. The lower court erred by not assuming the alleged facts in the light most favorable to Mr. Johnson and by not undergoing the intensive analysis required to evaluate a substantive due process claim.

C. The Lower Court Erred When It Stated That The DNA Act Does Not Violate Mr. Johnson's Rights Under The Ex Post Facto Clause Of The United States Constitution Because It Neither Accepted The Plaintiff's Allegations About The Punitive Intent And Impact Of The DNA Act As True, Nor Construed Those Allegations In The Light Most Favorable To Mr. Johnson.

The district court erred by summarily dismissing Mr. Johnson's Ex Post Facto claim.

First, while the trial court did not disagree with the facts Mr. Johnson presented regarding the punitive intent evident from the legislative history of the DNA Act (including its enabling legislation in the D.C. Code), it repeatedly chose to downplay the weight of these portions of the legislative history rather than view them in the light most favorable to Mr. Johnson. For example, the court indicated that the location of the DNA Act in the D.C. criminal code was a sign of punitive

intent but "does not, by itself, show that D.C. Code §22-4151 was intended by the D.C. Council." Mem. Op. (J.A. 27); *See also* Pl. Mem. Opp. (J.A. 251). Similarly, the trial court did not view the legislative history in the light most favorable to Mr. Johnson when it disregarded the Council's discussion of how the Act targeted individuals who had committed a crime and accordingly deserved to suffer a loss of their privacy. *See* Pl. Mem. Opp. (J.A. 251-52). However, it was premature for the court to draw conclusions regarding the ultimate strength of evidence of a punitive intent behind the DNA Act, as the present issue is only whether Mr. Johnson is entitled to offer evidence to support his claim. *Scheur v. Rhodes,* 416 U.S. 232, 236 (1974). Especially when construed in the plaintiff's favor, Mr. Johnson has pointed out several features of the statute that indicate an intent to make the statute punitive in nature. Therefore, Mr. Johnson's claim of an Ex Post Facto Clause violation by the DNA Act should be granted further hearing and not dismissed.

Second, while the trial court agreed that many of the factors indicative of a statute's punitive purpose and effect, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), are present in Mr. Johnson's case, the court incorrectly weighed several of the *Mendoza-Martinez* factors and wrongly applied a sufficiency standard of whether the plaintiff can ultimately prevail on his Ex Post Facto claim. The first *Mendoza-Martinez* factor—whether the sanction imposes an affirmative

disability or constraint—was viewed by the trial court as applicable to Mr. Johnson's case insofar as he was required to submit a DNA sample. Mem. Op. (J.A. 30). However, the significance of this affirmative disability depends largely on the weight given to the loss of private information given up with the collection of the DNA sample from Mr. Johnson. As noted in the sections above, Mr. Johnson alleges this loss of privacy is extreme, unlike the lower court's exclusive focus on the "minimal" act of physically giving a blood sample. Mem. Op. (J.A. 29). Furthermore, the district court entirely failed to consider the constraints on Mr. Johnson's liberty that he suffers from being subject to indefinite law enforcement database searches that are known to produce errors and coincidental matches. *See* Pl. Mem. (J.A. 248); Decl. Dr. D. Krane (J.A. 278). By disregarding these privacy and liberty effects of the DNA Act, the court failed to consider facts alleged by Mr. Johnson or allow further inquiry into these matters.

In addition, the district court wrongly found the fourth *Mendoza-Martinez* factor—whether operation of the statute will promote retribution and deterrence—to be ambiguous. *See* Mem. Op. (J.A. 30). On the current record no evidence has been introduced as to whether the DNA Act does in fact operate to deter crime as the trial court supposed. Mr. Johnson has clearly asserted that the operation of the statute has a punitive effect on him. To the extent ambiguity exists, the trial court

should have denied appellees' motion to dismiss and permitted further factual development.

Finally, the trial court's assertion per the sixth *Mendoza-Martinez* factor that there is an alternative purpose to the DNA Act, exonerating the innocent, also is in error. For the reasons mentioned above, *See* Section II. A. 3, *supra*, the DNA database can only be reasonably construed as a law enforcement tool to discover criminal wrongdoing, not a means of exonerating the innocent. The seventh *Mendoza-Martinez* factor, moreover, required that the lower court determine if the DNA Act was narrowly tailored to the alternative purpose of exoneration. *Mendoza-Martinez*, 372 U.S. 144, 169 (1963). The trial court completely ignored consideration of this last factor when conducting its balancing. Balancing the *Mendoza-Martinez* factors in the light most favorable to Mr. Johnson, it is clear that his Ex Post Facto claim has merit. The trial court erred by applying a sufficiency of evidence standard, not viewing Mr. Johnson's allegations as true, and not ordering further judicial proceedings to determine the extent of the punitive effect of the DNA Act.

D. The District Court Erred in Dismissing Mr. Johnson's Equal Protection Claim.

The district court dismissed Mr. Johnson's equal protection claim because it found that "plaintiff simply failed to produce any evidence that the facially neutral statutes at issue here were enacted with a discriminatory purpose" and there was no

evidence that the District of Columbia Council or Congress enacted the DNA Act with discriminatory intent. *See* Mem. Op. (J.A. 22-23). The district court erred by failing to acknowledge and credit the significant amount of evidence produced by Mr. Johnson, to engage in the careful analysis required by the Supreme Court and this Circuit in this area, and by dismissing this claim at this early stage of the litigation.[15]

Mr. Johnson contends that the DNA Act violates his right to equal protection of the law by discriminating against him on the basis of race. The district court's contention not withstanding, Mr. Johnson did provide ample evidence that, if viewed in the light most favorable to him, supported his equal protection claim and required the court to uphold it at this early stage. Mr. Johnson presented evidence

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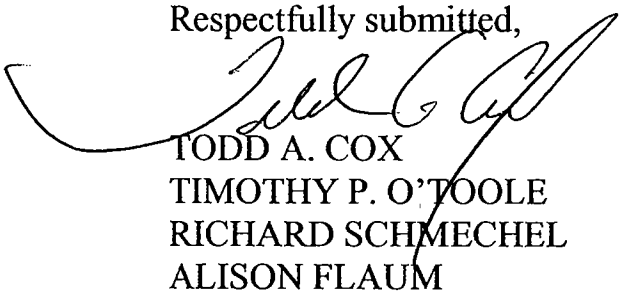
[15] The lower court analogized Mr. Johnson's equal protection claim to the ones raised in cases, *see United States v. Watson*, 953 F.2d 895 (1992) and *United States v. Holton*, 116 F.3d 1536 (1997), challenging the racial discrimination resulting from disparities in crack cocaine sentencing, s*ee* Memorandum of Law at 21. However, the comparisons are not sound. As discussed, unlike the challenger in *Watson*, 953 F.2d at 898, Mr. Johnson has alleged more than statistical disparities as the basis for his equal protection claim. In fact, the *Watson* court determined that the challenger in that case "made no assertion of a discriminatory intent on the part of the United States Sentencing Commission in formulating the [sentencing] Guidelines." Similarly, while the court in *Holton*, 116 F.3d at 1548 found that the challenger in that case had "not offered any specific evidence of disparate impact," Mr. Johnson has clearly demonstrated that the enforcement of the DNA Act disproportionately impact African-Americans and other racial and ethnic minorities. As Mr. Johnson's allegations include intentional discrimination and are supported by facts that include more than statistical disparities, the district court was incorrect in drawing comparisons between equal protection challenges in these crack-cocaine cases and Mr. Johnson's challenge in this case.

CONCLUSION

For the foregoing reasons, this Court must reverse the trial court's order and remand this case for further proceedings.

Respectfully submitted,



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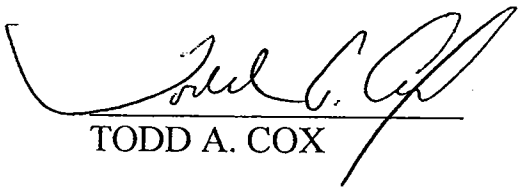
CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

This brief complies with type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,812 , excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B) and D.C. Circuit Rule 32(a)(2). This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced type-face program using Word 2000 in Time New Roman 14-point font.



TODD A. COX

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was hand-delivered to the following counsel this 12th day of October 2005:

Jane M. Lyons, Assistant United States Attorney
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on this 12th day of October 2005.

TODD A. COX

ADDENDUM

ADDENDUM TABLE OF CONTENTS

U.S.C.A. Const. Amend. IV

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
CONSTITUTION OF THE UNITED STATES
ANNOTATED
AMENDMENT IV--SEARCHES AND SEIZURES

➡ Amendment IV. Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Current through P.L. 109-76 (excluding P.L. 109-59, 109-74) approved 09-29-05

END OF DOCUMENT

ADDENDUM C

U.S.C.A. Const. Art. I § 10, cl. 1

Effective: [See Text Amendments]

United States Code Annotated Currentness
Constitution of the United States
Annotated
Article I. The Congress (Refs & Annos)

➡Section 10, Clause 1. Treaties, Letters of Marque and Reprisal; Coinage of Money; Bills of Credit; Gold and Silver as Legal Tender; Bills of Attainder; Ex Post Facto Laws; Impairment of Contracts; Title of Nobility

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility

<This clause is displayed in six separate documents according to subject matter,>

<see USCA Const Art. I § 10, cl. 1-Treaties, Etc.>

<see USCA Const Art. I § 10, cl. 1-Coinage of Money>

<see USCA Const Art. I § 10, cl. 1-Bills of Credit>

<see USCA Const Art. I § 10, cl. 1-Legal Tender>

<see USCA Const Art. I § 10, cl. 1-Bills of Attainder, Etc.>

<see USCA Const Art. I § 10, cl. 1-Impairment of Contracts>

LAW REVIEW COMMENTARIES

Drawing the line between taxes and takings: The continuous burdens principle, and its broader application. Eric Kades, 97 Nw. U. L.Rev. 189 (2002).

ADDENDUM D

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 136--VIOLENT CRIME CONTROL AND LAW ENFORCEMENT
SUBCHAPTER IX--STATE AND LOCAL LAW ENFORCEMENT
PART A--DNA IDENTIFICATION

➡§ 14131. Quality assurance and proficiency testing standards

(a) Publication of quality assurance and proficiency testing standards

(1)(A) Not later than 180 days after September 13, 1994, the Director of the Federal Bureau of Investigation shall appoint an advisory board on DNA quality assurance methods from among nominations proposed by the head of the National Academy of Sciences and professional societies of crime laboratory officials.

(B) The advisory board shall include as members scientists from State, local, and private forensic laboratories, molecular geneticists and population geneticists not affiliated with a forensic laboratory, and a representative from the National Institute of Standards and Technology.

(C) The advisory board shall develop, and if appropriate, periodically revise, recommended standards for quality assurance, including standards for testing the proficiency of forensic laboratories, and forensic analysts, in conducting analyses of DNA.

(2) The Director of the Federal Bureau of Investigation, after taking into consideration such recommended standards, shall issue (and revise from time to time) standards for quality assurance, including standards for testing the proficiency of forensic laboratories, and forensic analysts, in conducting analyses of DNA.

(3) The standards described in paragraphs (1) and (2) shall specify criteria for quality assurance and proficiency tests to be applied to the various types of DNA analyses used by forensic laboratories. The standards shall also include a system for grading proficiency testing performance to determine whether a laboratory is performing acceptably.

(4) Until such time as the advisory board has made recommendations to the Director of the Federal Bureau of Investigation and the Director has acted upon those recommendations, the quality assurance guidelines adopted by the technical working group on DNA analysis methods shall be deemed the Director's standards for purposes of this section.

(b) Administration of advisory board

(1) For administrative purposes, the advisory board appointed under subsection (a) of this section shall be considered an advisory board to the Director of the Federal Bureau of Investigation.

(2) Section 14 of the Federal Advisory Committee Act (5 U.S.C. App.) shall not apply with respect to the advisory board appointed under subsection (a) of this section.

(3) The DNA advisory board established under this section shall be separate and distinct from any other advisory board administered by the FBI, and is to be administered separately.

(4) The board shall cease to exist on the date 5 years after the initial appointments are made to the board, unless the existence of the board is extended by the Director of the Federal Bureau of Investigation.

(c) Proficiency testing program

(1) Not later than 1 year after the effective date of this Act, the Director of the National Institute of Justice shall certify to the Committees on the Judiciary of the House and Senate that--

(A) the Institute has entered into a contract with, or made a grant to, an appropriate entity for establishing, or has taken other appropriate action to ensure that there is established, not later than 2 years after September 13, 1994, a blind external proficiency testing program for DNA analyses, which shall be available to public and private laboratories performing forensic DNA analyses;

(B) a blind external proficiency testing program for DNA analyses is already readily available to public and private laboratories performing forensic DNA analyses; or

(C) it is not feasible to have blind external testing for DNA forensic analyses.

(2) As used in this subsection, the term "blind external proficiency test" means a test that is presented to a forensic laboratory through a second agency and appears to the analysts to involve routine evidence.

(3) Notwithstanding any other provision of law, the Attorney General shall make available to the Director of the National Institute of Justice during the first fiscal year in which funds are distributed under this subtitle up to $250,000 from the funds available under part X of Title I of the Omnibus Crime Control and Safe Streets Act of 1968 [42 U.S.C.A. § 3796kk et seq.] to carry out this subsection.

Current through P.L. 109-76 (excluding P.L. 109-59, 109-74) approved 09-29-05

END OF DOCUMENT

Effective: October 30, 2004

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 136--VIOLENT CRIME CONTROL AND LAW ENFORCEMENT
SUBCHAPTER IX--STATE AND LOCAL LAW ENFORCEMENT
PART A--DNA IDENTIFICATION

➞§ 14132. Index to facilitate law enforcement exchange of DNA identification information

(a) Establishment of index

The Director of the Federal Bureau of Investigation may establish an index of--

(1) DNA identification records of--

(A) persons convicted of crimes;

(B) persons who have been charged in an indictment or information with a crime; and

(C) other persons whose DNA samples are collected under applicable legal authorities, provided that DNA profiles from arrestees who have not been charged in an indictment or information with a crime, and DNA samples that are voluntarily submitted solely for elimination purposes shall not be included in the National DNA Index System;

(2) analyses of DNA samples recovered from crime scenes;

(3) analyses of DNA samples recovered from unidentified human remains; and

(4) analyses of DNA samples voluntarily contributed from relatives of missing persons.

(b) Information

The index described in subsection (a) of this section shall include only information on DNA identification records and DNA analyses that are--

(1) based on analyses performed by or on behalf of a criminal justice agency (or the Secretary of Defense in accordance with section 1565 of Title 10) in accordance with publicly available standards that satisfy or exceed the guidelines for a quality assurance program for DNA analysis, issued by the Director of the Federal Bureau of Investigation under section 14131 of this title;

(2) prepared by laboratories that--

(A) not later than 2 years after October 30, 2004, have been accredited by a nonprofit professional association of persons actively involved in forensic science that is nationally recognized within the forensic science community; and

(B) undergo external audits, not less than once every 2 years, that demonstrate compliance with standards established by the Director of the Federal Bureau of Investigation; and

(3) maintained by Federal, State, and local criminal justice agencies (or the Secretary of Defense in accordance with section 1565 of Title 10) pursuant to rules that allow disclosure of stored DNA samples and DNA analyses only--

(A) to criminal justice agencies for law enforcement identification purposes;

(B) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules;

(C) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or

(D) if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.

(c) Failure to comply

Access to the index established by this section is subject to cancellation if the quality control and privacy requirements described in subsection (b) of this section are not met.

(d) Expungement of records

(1) By director

(A) The Director of the Federal Bureau of Investigation shall promptly expunge from the index described in subsection (a) of this section the DNA analysis of a person included in the index on the basis of a qualifying Federal offense or a qualifying District of Columbia offense (as determined under sections 14135a and 14135b of this title, respectively) if the Director receives, for each conviction of the person of a qualifying offense, a certified copy of a final court order establishing that such conviction has been overturned.

(B) For purposes of subparagraph (A), the term "qualifying offense" means any of the following offenses:

(i) A qualifying Federal offense, as determined under section 14135a of this title.

(ii) A qualifying District of Columbia offense, as determined under section 14135b of this title.

(iii) A qualifying military offense, as determined under section 1565 of Title 10.

(C) For purposes of subparagraph (A), a court order is not "final" if time remains for an appeal or application for discretionary review with respect to the order.

(2) By States

(A) As a condition of access to the index described in subsection (a) of this section, a State shall promptly expunge from that index the DNA analysis of a person included in the index by that State if--

(i) the responsible agency or official of that State receives, for each conviction of the person of an offense on the basis of which that analysis was or could have been included in the index, a certified copy of a final court order establishing that such conviction has been overturned; or

(ii) the person has not been convicted of an offense on the basis of which that analysis was or could have been included in the index, and all charges for which the analysis was or could have been included in the index have been dismissed or resulted in acquittal.

(B) For purposes of subparagraph (A), a court order is not "final" if time remains for an appeal or application for discretionary review with respect to the order.

(e) Authority for keyboard searches

(1) In general

The Director shall ensure that any person who is authorized to access the index described in subsection (a) for purposes of including information on DNA identification records or DNA analyses in that index may also access that index for purposes of carrying out a one-time keyboard search on information obtained from any DNA sample lawfully collected for a criminal justice purpose except for a DNA sample voluntarily submitted solely for elimination purposes.

(2) Definition

For purposes of paragraph (1), the term "keyboard search" means a search under which information obtained from a DNA sample is compared with information in the index without resulting in the information obtained from a DNA sample being included in the index.

(3) No preemption

This subsection shall not be construed to preempt State law.

Current through P.L. 109-76 (excluding P.L. 109-59, 109-74) approved 09-29-05

END OF DOCUMENT

Effective: October 30, 2004

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 136--VIOLENT CRIME CONTROL AND LAW ENFORCEMENT
SUBCHAPTER IX--STATE AND LOCAL LAW ENFORCEMENT
PART A--DNA IDENTIFICATION

➡§ 14133. Federal Bureau of Investigation

(a) Proficiency testing requirements

(1) Generally

(A) Personnel at the Federal Bureau of Investigation who perform DNA analyses shall undergo semiannual external proficiency testing by a DNA proficiency testing program meeting the standards issued under section 14131 of this title.

(B) Within 1 year after September 13, 1994, the Director of the Federal Bureau of Investigation shall arrange for periodic blind external tests to determine the proficiency of DNA analysis performed at the Federal Bureau of Investigation laboratory.

(C) In this paragraph, "blind external test" means a test that is presented to the laboratory through a second agency and appears to the analysts to involve routine evidence.

(2) Report

For 5 years after September 13, 1994, the Director of the Federal Bureau of Investigation shall submit to the Committees on the Judiciary of the House and Senate an annual report on the results of each of the tests described in paragraph (1).

(b) Privacy protection standards

(1) Generally

Except as provided in paragraph (2), the results of DNA tests performed for a Federal law enforcement agency for law enforcement purposes may be disclosed only--

(A) to criminal justice agencies for law enforcement identification purposes;

(B) in judicial proceedings, if otherwise admissible pursuant to applicable statues [FN1] or rules; and

(C) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged.

(2) Exception

If personally identifiable information is removed, test results may be disclosed for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.

(c) Criminal penalty

(1) A person who--

(A) by virtue of employment or official position, has possession of, or access to, individually identifiable DNA information indexed in a database created or maintained by any Federal law enforcement agency; and

(B) knowingly discloses such information in any manner to any person or agency not authorized to receive it,

shall be fined not more than $100,000.

(2) A person who, without authorization, knowingly obtains DNA samples or individually identifiable DNA information indexed in a database created or maintained by any Federal law enforcement agency shall be fined not more than $250,000, or imprisoned for a period of not more than one year, or both.

[FN1] So in original. Probably should read "statutes".

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END OF DOCUMENT

Effective: [See Text Amendments]

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 136--VIOLENT CRIME CONTROL AND LAW ENFORCEMENT
SUBCHAPTER IX--STATE AND LOCAL LAW ENFORCEMENT
PART A--DNA IDENTIFICATION

➞§ 14134. Authorization of appropriations

There are authorized to be appropriated to the Federal Bureau of Investigation to carry out sections 14131, 14132, and 14133 of this title--

(1) $5,500,000 for fiscal year 1996;

(2) $8,000,000 for fiscal year 1997;

(3) $8,000,000 for fiscal year 1998;

(4) $2,500,000 for fiscal year 1999; and

(5) $1,000,000 for fiscal year 2000.

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END OF DOCUMENT

Effective: October 30, 2004

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 136--VIOLENT CRIME CONTROL AND LAW ENFORCEMENT
SUBCHAPTER IX--STATE AND LOCAL LAW ENFORCEMENT
PART A--DNA IDENTIFICATION

➞§ 14135. Debbie Smith DNA Backlog Grant Program

(a) Authorization of grants

The Attorney General may make grants to eligible States or units of local government for use by the State or unit of local government for the following purposes:

(1) To carry out, for inclusion in the Combined DNA Index System of the Federal Bureau of Investigation, DNA analyses of samples taken from individuals convicted of a qualifying State offense (as determined under subsection (b)(3) of this section).

(2) To carry out, for inclusion in such Combined DNA Index System, DNA analyses of samples from crime scenes, including samples from rape kits, samples from other sexual assault evidence, and samples taken in cases without an identified suspect.

(3) To increase the capacity of laboratories owned by the State or by units of local government to carry out DNA analyses of samples specified in paragraph (1) or (2).

(4) To collect DNA samples specified in paragraph (1).

(5) To ensure that DNA testing and analysis of samples from crimes, including sexual assault and other serious violent crimes, are carried out in a timely manner.

(b) Eligibility

For a State or unit of local government to be eligible to receive a grant under this section, the chief executive officer of the State or unit of local government shall submit to the Attorney General an application in such form and containing such information as the Attorney General may require. The application shall, as required by the Attorney General--

(1) provide assurances that the State or unit of local government has implemented, or will implement not later than 120 days after the date of such application, a comprehensive plan for the expeditious DNA analysis of samples in accordance with this section;

(2) include a certification that each DNA analysis carried out under the plan shall be maintained pursuant to the privacy requirements described in section 14132(b)(3) of this title;

(3) include a certification that the State or unit of local government has determined, by statute, rule, or regulation, those offenses under State law that shall be treated for purposes of this section as qualifying State offenses;

(4) specify the allocation that the State or unit of local government shall make, in using grant amounts to carry out DNA analyses of samples, as between samples specified in subsection (a)(1) of this section and samples specified in subsection (a)(2) of this section;

(5) specify that portion of grant amounts that the State or unit of local government shall use for the purpose

specified in subsection (a)(3) of this section;

(6) if submitted by a unit of local government, certify that the unit of local government has taken, or is taking, all necessary steps to ensure that it is eligible to include, directly or through a State law enforcement agency, all analyses of samples for which it has requested funding in the Combined DNA Index System.

(7) specify that portion of grant amounts that the State or unit of local government shall use for the purpose specified in subsection (a)(4) of this section.

(c) Formula for distribution of grants

(1) In general

The Attorney General shall distribute grant amounts, and establish appropriate grant conditions under this section, in conformity with a formula or formulas that are designed to effectuate a distribution of funds among eligible States and units of local government that--

(A) maximizes the effective utilization of DNA technology to solve crimes and protect public safety; and

(B) allocates grants among eligible entities fairly and efficiently to address jurisdictions in which significant backlogs exist, by considering--

(i) the number of offender and casework samples awaiting DNA analysis in a jurisdiction;

(ii) the population in the jurisdiction; and

(iii) the number of part 1 violent crimes in the jurisdiction.

(2) Minimum amount

The Attorney General shall allocate to each State not less than 0.50 percent of the total amount appropriated in a fiscal year for grants under this section, except that the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands shall each be allocated 0.125 percent of the total appropriation.

(3) Limitation

Grant amounts distributed under paragraph (1) shall be awarded to conduct DNA analyses of samples from casework or from victims of crime under subsection (a)(2) of this section in accordance with the following limitations:

(A) For fiscal year 2005, not less than 50 percent of the grant amounts shall be awarded for purposes under subsection (a)(2) of this section.

(B) For fiscal year 2006, not less than 50 percent of the grant amounts shall be awarded for purposes under subsection (a)(2) of this section.

(C) For fiscal year 2007, not less than 45 percent of the grant amounts shall be awarded for purposes under subsection (a)(2) of this section.

(D) For fiscal year 2008, not less than 40 percent of the grant amounts shall be awarded for purposes under subsection (a)(2) of this section.

(E) For fiscal year 2009, not less than 40 percent of the grant amounts shall be awarded for purposes under subsection (a)(2) of this section.

(d) Analysis of samples

(1) In general

A plan pursuant to subsection (b)(1) of this section shall require that, except as provided in paragraph (3), each DNA analysis be carried out in a laboratory that satisfies quality assurance standards and is--

(A) operated by the State or a unit of local government; or

(B) operated by a private entity pursuant to a contract with the State or a unit of local government.

(2) Quality assurance standards

(A) The Director of the Federal Bureau of Investigation shall maintain and make available to States and units of local government a description of quality assurance protocols and practices that the Director considers adequate to assure the quality of a forensic laboratory.

(B) For purposes of this section, a laboratory satisfies quality assurance standards if the laboratory satisfies the quality control requirements described in paragraphs (1) and (2) of section 14132(b) of this title.

(3) Use of vouchers or contracts for certain purposes

(A) In general

A grant for the purposes specified in paragraph (1), (2), or (5) of subsection (a) of this section may be made in the form of a voucher or contract for laboratory services, even if the laboratory makes a reasonable profit for the services.

(B) Redemption

A voucher or contract under subparagraph (A) may be redeemed at a laboratory operated on a nonprofit or for-profit basis, by a private entity that satisfies quality assurance standards and has been approved by the Attorney General.

(C) Payments

The Attorney General may use amounts authorized under subsection (j) of this section to make payments to a laboratory described under subparagraph (B).

(e) Restrictions on use of funds

(1) Nonsupplanting

Funds made available pursuant to this section shall not be used to supplant State or local government funds, but shall be used to increase the amount of funds that would, in the absence of Federal funds, be made available from State or local government sources for the purposes of this Act.

(2) Administrative costs

A State or unit of local government may not use more than 3 percent of the funds it receives from this section for administrative expenses.

(f) Reports to the Attorney General

Each State or unit of local government which receives a grant under this section shall submit to the Attorney General, for each year in which funds from a grant received under this section is expended, a report at such time and in such manner as the Attorney General may reasonably require, which contains--

(1) a summary of the activities carried out under the grant and an assessment of whether such activities are meeting the needs identified in the application; and

(2) such other information as the Attorney General may require.

(g) Reports to Congress

Not later than 90 days after the end of each fiscal year for which grants are made under this section, the Attorney General shall submit to the Congress a report that includes--

(1) the aggregate amount of grants made under this section to each State or unit of local government for such fiscal year;

(2) a summary of the information provided by States or units of local government receiving grants under this section; and

(3) a description of the priorities and plan for awarding grants among eligible States and units of local government, and how such plan will ensure the effective use of DNA technology to solve crimes and protect public safety.

(h) Expenditure records

(1) In general

Each State or unit of local government which receives a grant under this section shall keep records as the Attorney General may require to facilitate an effective audit of the receipt and use of grant funds received under this section.

(2) Access

Each State or unit of local government which receives a grant under this section shall make available, for the purpose of audit and examination, such records as are related to the receipt or use of any such grant.

(i) Definition

For purposes of this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

(j) Authorization of appropriations

Amounts are authorized to be appropriated to the Attorney General for grants under subsection (a) of this section as follows:

(1) $151,000,000 for fiscal year 2005;

(2) $151,000,000 for fiscal year 2006;

(3) $151,000,000 for fiscal year 2007;

(4) $151,000,000 for fiscal year 2008; and

(5) $151,000,000 for fiscal year 2009; and

(k) Use of funds for accreditation and audits

The Attorney General may distribute not more than 1 percent of the grant amounts under subsection (j) of this section--

(1) to States or units of local government to defray the costs incurred by laboratories operated by each such State or unit of local government in preparing for accreditation or reaccreditation;

(2) in the form of additional grants to States, units of local government, or nonprofit professional organizations of persons actively involved in forensic science and nationally recognized within the forensic science community--

(A) to defray the costs of external audits of laboratories operated by such State or unit of local government, which participates in the National DNA Index System, to determine whether the laboratory is in compliance with quality assurance standards;

(B) to assess compliance with any plans submitted to the National Institute of Justice, which detail the use of funds received by States or units of local government under this Act; and

(C) to support future capacity building efforts; and

(3) in the form of additional grants to nonprofit professional associations actively involved in forensic science and nationally recognized within the forensic science community to defray the costs of training persons who conduct external audits of laboratories operated by States and units of local government and which participate in the National DNA Index System.

(l) Use of funds for other forensic sciences

The Attorney General may award a grant under this section to a State or unit of local government to alleviate a backlog of cases with respect to a forensic science other than DNA analysis if the State or unit of local government--

(1) certifies to the Attorney General that in such State or unit--

(A) all of the purposes set forth in subsection (a) of this section have been met;

(B) a significant backlog of casework is not waiting for DNA analysis; and

(C) there is no need for significant laboratory equipment, supplies, or additional personnel for timely DNA processing of casework or offender samples; and

(2) demonstrates to the Attorney General that such State or unit requires assistance in alleviating a backlog of cases involving a forensic science other than DNA analysis.

(m) External audits and remedial efforts

In the event that a laboratory operated by a State or unit of local government which has received funds under this Act has undergone an external audit conducted to determine whether the laboratory is in compliance with standards established by the Director of the Federal Bureau of Investigation, and, as a result of such audit, identifies measures to remedy deficiencies with respect to the compliance by the laboratory with such standards, the State or unit of local government shall implement any such remediation as soon as practicable.

Current through P.L. 109-76 (excluding P.L. 109-59, 109-74) approved 09-29-05

END OF DOCUMENT

Effective: October 30, 2004

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 136--VIOLENT CRIME CONTROL AND LAW ENFORCEMENT
SUBCHAPTER IX--STATE AND LOCAL LAW ENFORCEMENT
PART A--DNA IDENTIFICATION

➡§ 14136. DNA training and education for law enforcement, correctional personnel, and court officers

(a) In general

The Attorney General shall make grants to provide training, technical assistance, education, and information relating to the identification, collection, preservation, analysis, and use of DNA samples and DNA evidence by--

(1) law enforcement personnel, including police officers and other first responders, evidence technicians, investigators, and others who collect or examine evidence of crime;

(2) court officers, including State and local prosecutors, defense lawyers, and judges;

(3) forensic science professionals; and

(4) corrections personnel, including prison and jail personnel, and probation, parole, and other officers involved in supervision.

(b) Authorization of appropriations

There are authorized to be appropriated $12,500,000 for each of fiscal years 2005 through 2009 to carry out this section.

Current through P.L. 109-76 (excluding P.L. 109-59, 109-74) approved 09-29-05

END OF DOCUMENT

Effective: October 30, 2004

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 136--VIOLENT CRIME CONTROL AND LAW ENFORCEMENT
SUBCHAPTER IX--STATE AND LOCAL LAW ENFORCEMENT
PART A--DNA IDENTIFICATION

➡§ 14136e. Kirk Bloodsworth Post-Conviction DNA Testing Grant Program

(a) In general

The Attorney General shall establish the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program to award grants to States to help defray the costs of post-conviction DNA testing.

(b) Authorization of appropriations

There are authorized to be appropriated $5,000,000 for each of fiscal years 2005 through 2009 to carry out this section.

(c) State defined

For purposes of this section, the term " State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

Current through P.L. 109-76 (excluding P.L. 109-59, 109-74) approved 09-29-05

END OF DOCUMENT

ADDENDUM E

DC ST § 22-4151

District of Columbia Official Code 2001 Edition Currentness
Division IV. Criminal Law and Procedure and Prisoners.
Title 22. Criminal Offenses and Penalties. (Refs & Annos)
Subtitle III-A. Dna Testing.
Chapter 41B. Dna Sample Collection.

→§ 22-4151. Qualifying offenses.

The following criminal offenses shall be qualifying offenses for the purposes of DNA collection under the DNA Analysis Backlog Elimination Act of 2000, approved December 19, 2000 (Pub. L. No. 106-546; 114 Stat. 2726):

(1) § 22-301 (arson);

(2) § 22-302 (burning of one's own property with intent to defraud or injure another);

(3) § 22-303 (malicious burning, destruction, or injury of another's property);

(4) § 22-401 (assault with intent to kill, rob, or poison, or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse);

(5) § 22-402 (assault with intent to commit mayhem or with dangerous weapon);

(6) § 22-404.01 (aggravated assault);

(7) § 22-405 (assault on member of police force, campus or university special police, or fire department using a deadly or dangerous weapon);

(8) § 22-406 (mayhem or maliciously disfiguring);

(9) § 22-1101 (cruelty to children);

(10) § 22-1312(b) (lewd, indecent, or obscene acts (knowingly in the presence of a child under the age of 16 years));

(11) § 22-801 (burglary);

(12) § 22-1901 (incest);

(13) § 22-2201 (certain obscene activities involving minors);

(14) § 22-3102 (sexual performances using minors);

(15) § 22-2001 (kidnapping);

(16) § 22-2101 (murder in the first degree);

(17) § 22-2102 (murder in the first degree -- obstructing railroad);

(18) § 22-2103 (murder in the second degree);

(19) § 22-2105 (voluntary manslaughter only);

(20) § 22-2106 (murder of a law enforcement officer);

(21) § 22-2704 (abducting, enticing, or harboring a child for prostitution);

(22) § 22-2705 (pandering; inducing or compelling an individual to engage in prostitution);

(23) § 22-2706 (compelling an individual to live life of prostitution against his or her will);

(24) § 22-2708 (causing spouse to live in prostitution);

(25) § 22-2709 (detaining an individual in disorderly house for debt there contracted);

(26) Forcible rape, carnal knowledge or statutory rape as these offenses were proscribed until May 23, 1995 by § 22-4801;

(27) § 22-2801 (robbery);

(28) § 22-2802 (attempted robbery);

(29) § 22-2803 (carjacking);

(30) Indecent acts with children as this offense was proscribed until May 23, 1995 by § 22-3801(a);

(31) Enticing a child as this offense was proscribed until May 23, 1995 by § 22-3801(b);

(32) Sodomy as this offense was proscribed until May 23, 1995 by § 22- 3802(a);

(33) § 22-3002 (first degree sexual abuse);

(34) § 22-3003 (second degree sexual abuse);

(35) § 22-3004 (third degree sexual abuse);

(36) § 22-3005 (fourth degree sexual abuse);

(37) § 22-3006 (misdemeanor sexual abuse) where the offense is committed against a minor;

(38) § 22-3008 (first degree child sexual abuse);

(39) § 22-3009 (second degree child sexual abuse);

(40) § 22-3010 (enticing a child);

(41) § 22-3013 (first degree sexual abuse of a ward);

(42) § 22-3014 (second degree sexual abuse of a ward);

(43) § 22-3015 (first degree sexual abuse of a patient or client);

(44) § 22-3016 (second degree sexual abuse of a patient or client);

(45) § 22-3018 (attempts to commit sexual offenses);

(45A) § 22-3152(1) (act of terrorism);

(45B) § 22-3154 (manufacture or possession of a weapon of mass destruction);

(45C) § 22-3155 (use, dissemination, or detonation of a weapon of mass destruction) and;

(46) Attempt or conspiracy to commit any of the offenses listed in paragraphs (1) through (45C) of this section.

CREDIT(S) (Nov. 3, 2001, D.C. Law 14-52, § 2, 48 DCR 5934; Oct. 26, 2001, D.C. Law 14-42, § 22, 48 DCR 7612; Oct. 17, 2002, D.C. Law 14-194, § 158, 49 DCR 5306.)

HISTORICAL AND STATUTORY NOTES

Effect of Amendments

D.C. Law 14-42, in par. (37), substituted "(misdemeanor sexual abuse) where the offense is committed against a minor;" for "(misdemeanor sexual abuse);".

D.C. Law 14-194 made a nonsubstantive change in par. (45); added pars, ((45A), (45B), and (45C); and in par. (46), substituted "par. (45C)" for "par. (45)".

Emergency Act Amendments

For temporary (90 day) addition of section, see § 2 of DNA Sample Collection Emergency Act of 2001 (D.C. Act 14-77, June 18, 2001, 48 DCR 5938).

D.C. Law 14-42, § 23, amended par. (37) of D.C. Act 14-77.

For temporary (90 day) addition of section, see § 2 of DNA Sample Collection Congressional Review Emergency Act of 2001 (D.C. Act 14-130, September 25, 2001, 48 DCR 9095).

Legislative History of Laws

Law 14-52, the "DNA Sample Collection Act of 2001", was introduced in Council and assigned Bill No. 14-63, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on May 1, 2001, and JUne 5, 2001, respectively. Signed by the Mayor on June 15, 2001, it was assigned Act No. 14-76 and transmitted to both Houses of Congress for its review. D.C. Law 14-52 became effective on November 10, 2001.

Law 14-194, the "Omnibus Anti-Terrorism Act of 2002", was introduced in Council and assigned Bill No. 14-373, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on April 9, 2002, and May 7, 2002, respectively. Signed by the Mayor on June 3, 2002, it was assigned Act No. 14-380 and transmitted to both Houses of Congress for its review. D.C. Law 14-194 became effective on October 17, 2002.

DC CODE § 22-4151

Current through July 25, 2005

END OF DOCUMENT

ADDENDUM F

42 U.S.C.A. § 1320d-2

Effective: August 21, 1996

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XI. General Provisions, Peer Review, and Administrative Simplification (Refs & Annos)
Part C. Administrative Simplification

➡§ 1320d-2. Standards for information transactions and data elements

(a) Standards to enable electronic exchange

(1) In general

The Secretary shall adopt standards for transactions, and data elements for such transactions, to enable health information to be exchanged electronically, that are appropriate for--

(A) the financial and administrative transactions described in paragraph (2); and

(B) other financial and administrative transactions determined appropriate by the Secretary, consistent with the goals of improving the operation of the health care system and reducing administrative costs.

(2) Transactions

The transactions referred to in paragraph (1)(A) are transactions with respect to the following:

(A) Health claims or equivalent encounter information.

(B) Health claims attachments.

(C) Enrollment and disenrollment in a health plan.

(D) Eligibility for a health plan.

(E) Health care payment and remittance advice.

(F) Health plan premium payments.

(G) First report of injury.

(H) Health claim status.

(I) Referral certification and authorization.

(3) Accommodation of specific providers

The standards adopted by the Secretary under paragraph (1) shall accommodate the needs of different types of health care providers.

(b) Unique health identifiers

(1) In general

The Secretary shall adopt standards providing for a standard unique health identifier for each individual, employer, health plan, and health care provider for use in the health care system. In carrying out the preceding sentence for each health plan and health care provider, the Secretary shall take into account multiple uses for identifiers and multiple locations and specialty classifications for health care providers.

(2) Use of identifiers

The standards adopted under paragraph (1) shall specify the purposes for which a unique health identifier may be used.

(c) Code sets

(1) In general

The Secretary shall adopt standards that--

(A) select code sets for appropriate data elements for the transactions referred to in subsection (a)(1) of this section from among the code sets that have been developed by private and public entities; or

(B) establish code sets for such data elements if no code sets for the data elements have been developed.

(2) Distribution

The Secretary shall establish efficient and low-cost procedures for distribution (including electronic distribution) of code sets and modifications made to such code sets under section 1320d-3(b) of this title.

(d) Security standards for health information

(1) Security standards

The Secretary shall adopt security standards that--

(A) take into account--

(i) the technical capabilities of record systems used to maintain health information;

(ii) the costs of security measures;

(iii) the need for training persons who have access to health information;

(iv) the value of audit trails in computerized record systems; and

(v) the needs and capabilities of small health care providers and rural health care providers (as such providers are defined by the Secretary); and

(B) ensure that a health care clearinghouse, if it is part of a larger organization, has policies and security procedures which isolate the activities of the health care clearinghouse with respect to processing information in a manner that prevents unauthorized access to such information by such larger organization.

(2) Safeguards

Each person described in section 1320d-1(a) of this title who maintains or transmits health information shall maintain reasonable and appropriate administrative, technical, and physical safeguards--

(A) to ensure the integrity and confidentiality of the information;

(B) to protect against any reasonably anticipated--

(i) threats or hazards to the security or integrity of the information; and

(ii) unauthorized uses or disclosures of the information; and

(C) otherwise to ensure compliance with this part by the officers and employees of such person.

(e) Electronic signature

(1) Standards

The Secretary, in coordination with the Secretary of Commerce, shall adopt standards specifying procedures for the electronic transmission and authentication of signatures with respect to the transactions referred to in subsection (a)(1) of this section.

(2) Effect of compliance

Compliance with the standards adopted under paragraph (1) shall be deemed to satisfy Federal and State statutory requirements for written signatures with respect to the transactions referred to in subsection (a)(1) of this section.

(f) Transfer of information among health plans

The Secretary shall adopt standards for transferring among health plans appropriate standard data elements needed for the coordination of benefits, the sequential processing of claims, and other data elements for individuals who have more than one health plan.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XI, § 1173, as added Aug. 21, 1996, Pub.L. 104-191, Title II, § 262(a), 110 Stat. 2024.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. House Report No. 104-496 and House Conference Report No. 104- 736, see 1996 U.S. Code Cong. and Adm. News, p. 1865.

Prior Provisions

A prior section 1173 of Act Aug. 14, 1935, c. 531, Title XI, as added Oct. 25, 1977, Pub.L. 95-142, § 5(l)(1), 91 Stat. 1191, and amended Dec. 5, 1980, Pub.L. 96-499, Title IX, § 923(e), 94 Stat. 2628, was classified to section 1320c-22 of this title prior to its omission in the general revision of part B of this subchapter by Pub.L. 97-248, Title I, § 143, Sept. 3, 1982, 96 Stat. 382.

Recommendations With Respect to Privacy of Certain Health Information

Section 264 of Pub.L. 104-191 provided that:

42 U.S.C.A. § 1320d-2

"(a) In general.--Not later than the date that is 12 months after the date of the enactment of this Act [Aug. 21, 1996], the Secretary of Health and Human Services shall submit to the Committee on Labor and Human Resources and the Committee on Finance of the Senate and the Committee on Commerce and the Committee on Ways and Means of the House of Representatives detailed recommendations on standards with respect to the privacy of individually identifiable health information.

"(b) Subjects for recommendations.--The recommendations under subsection (a) shall address at least the following:

"(1) The rights that an individual who is a subject of individually identifiable health information should have.

"(2) The procedures that should be established for the exercise of such rights.

"(3) The uses and disclosures of such information that should be authorized or required.

"(c) Regulations.--

"(1) In general.--If legislation governing standards with respect to the privacy of individually identifiable health information transmitted in connection with the transactions described in section 1173(a) of the Social Security Act (as added by section 262) [subsec. (a) of this section] not enacted by the date that is 36 months after the date of the enactment of this Act [Aug. 21,1996], the Secretary of Health and Human Services shall promulgate final regulations containing such standards not later than the date that is 42 months after the date of the enactment of this Act. Such regulations shall address at least the subjects described in subsection (b).

"(2) Preemption.--A regulation promulgated under paragraph (1) shall not supercede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed under the regulation.

"(d) Consultation.--In carrying out this section, the Secretary of Health and Human Services shall consult with--

"(1) the National Committee on Vital and Health Statistics established under section 306(k) of the Public Health Service Act (42 U.S.C. 242k(k)); and

"(2) the Attorney General."

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13181

<Dec. 20, 2000, 65 F.R. 81321>

TO PROTECT THE PRIVACY OF PROTECTED HEALTH INFORMATION IN OVERSIGHT INVESTIGATIONS

By the authority vested in me as President of the United States by the Constitution and the laws of the United States of America, it is ordered as follows:

Section 1. Policy.

It shall be the policy of the Government of the United States that law enforcement may not use protected health information concerning an individual that is discovered during the course of health oversight activities for unrelated civil, administrative, or criminal investigations of a non-health oversight matter, except when the balance of relevant factors weighs clearly in favor of its use. That is, protected health information may not be so used unless the public interest and the need for disclosure clearly outweigh the potential for injury to the patient, to the physician-patient relationship, and to the treatment services. Protecting the privacy of patients' protected health information promotes

trust in the health care system. It improves the quality of health care by fostering an environment in which patients can feel more comfortable in providing health care professionals with accurate and detailed information about their personal health. In order to provide greater protections to patients' privacy, the Department of Health and Human Services is issuing final regulations concerning the confidentiality of individually identifiable health information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) [Pub.L. 104-191, Aug. 21, 1996, 110 Stat. 1936; see Tables for complete classification]. HIPAA applies only to "covered entities," such as health care plans, providers, and clearinghouses. HIPAA regulations therefore do not apply to other organizations and individuals that gain access to protected health information, including Federal officials who gain access to health records during health oversight activities.

Under the new HIPAA regulations, health oversight investigators will appropriately have ready access to medical records for oversight purposes. Health oversight investigators generally do not seek access to the medical records of a particular patient, but instead review large numbers of records to determine whether a health care provider or organization is violating the law, such as through fraud against the Medicare system. Access to many health records is often necessary in order to gain enough evidence to detect and bring enforcement actions against fraud in the health care system. Stricter rules apply under the HIPAA regulations, however, when law enforcement officials seek protected health information in order to investigate criminal activity outside of the health oversight realm.

In the course of their efforts to protect the health care system, health oversight investigators may also uncover evidence of wrongdoing unrelated to the health care system, such as evidence of criminal conduct by an individual who has sought health care. For records containing that evidence, the issue thus arises whether the information should be available for law enforcement purposes under the less restrictive oversight rules or the more restrictive rules that apply to non-oversight criminal investigations.

A similar issue has arisen in other circumstances. Under 18 U.S.C. 3486, an individual's health records obtained for health oversight purposes pursuant to an administrative subpoena may not be used against that individual patient in an unrelated investigation by law enforcement unless a judicial officer finds good cause. Under that statute, a judicial officer determines whether there is good cause by weighing the public interest and the need for disclosure against the potential for injury to the patient, to the physician-patient relationship, and to the treatment services. It is appropriate to extend limitations on the use of health information to all situations in which the government obtains medical records for a health oversight purpose. In recognition of the increasing importance of protecting health information as shown in the medical privacy rule, a higher standard than exists in 18 U.S.C. 3486 is necessary. It is, therefore, the policy of the Government of the United States that law enforcement may not use protected health information concerning an individual, discovered during the course of health oversight activities for unrelated civil, administrative, or criminal investigations, against that individual except when the balance of relevant factors weighs clearly in favor of its use. That is, protected health information may not be so used unless the public interest and the need for disclosure clearly outweigh the potential for injury to the patient, to the physician-patient relationship, and to the treatment services.

Sec. 2. Definitions.

(a) "Health oversight activities" shall include the oversight activities enumerated in the regulations concerning the confidentiality of individually identifiable health information promulgated by the Secretary of Health and Human Services pursuant to the "Health Insurance Portability and Accountability Act of 1996," as amended.

(b) "Protected health information" shall have the meaning ascribed to it in the regulations concerning the confidentiality of individually identifiable health information promulgated by the Secretary of Health and Human Services pursuant to the "Health Insurance Portability and Accountability Act of 1996," as amended.

(c) "Injury to the patient" includes injury to the privacy interests of the patient.

Sec. 3. Implementation.

(a) Protected health information concerning an individual patient discovered during the course of health oversight activities shall not be used against that individual patient in an unrelated civil, administrative, or criminal

investigation of a non-health oversight matter unless the Deputy Attorney General of the U.S Department of Justice, or insofar as the protected health information involves members of the Armed Forces, the General Counsel of the U.S. Department of Defense, has authorized such use.

(b) In assessing whether protected health information should d be used under subparagraph (a) of this section, the Deputy Attorney General shall permit such use upon concluding that the balance of relevant factors weighs clearly in favor of its use. That is, the Deputy Attorney General shall permit disclosure if the public interest and the need for disclosure clearly outweigh the potential for injury to the patient, to the physician-patient relationship, and to the treatment services.

(c) Upon the decision to use protected health information under subparagraph (a) of this section, the Deputy Attorney General, in determining the extent to which this information should be used, shall impose appropriate safeguards against unauthorized use.

(d) On an annual basis, the Department of Justice, in consultation with the Department of Health and Human Services, shall provide to the President of the United States a report that includes the following information:

(i) the number of requests made to the Deputy Attorney General for authorization to use protected health information discovered during health oversight activities in a non-health oversight, unrelated investigation;

(ii) the number of requests that were granted as applied for, , granted as modified, or denied;

(iii) the agencies that made the applications, and the number of requests made by each agency; and

(iv) the uses for which the protected health information was authorized.

(e) The General Counsel of the U.S. Department of Defense will comply with the requirements of subparagraphs (b), (c), and (d), above. The General Counsel also will prepare a report, consistent with the requirements of subparagraphs (d)(i) through (d)(iv), above, and will forward it to the Department of Justice where it will be incorporated into the Department's annual report to the President.

Sec. 4. Exceptions.

(a) Nothing in this Executive Order shall place a restriction on the derivative use of protected health information that was obtained by a law enforcement agency in a non-health oversight investigation.

(b) Nothing in this Executive Order shall be interpreted to place a restriction on a duty imposed by statute.

(c) Nothing in this Executive Order shall place any additional limitation on the derivative use of health information obtained by the Attorney General pursuant to the provisions of 18 U.S.C. 3486.

(d) This order does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, the officers and employees, or any other person.

WILLIAM J. CLINTON

THE WHITE HOUSE,

LAW REVIEW COMMENTARIES

The inadequacy of HIPAA's privacy rule: The plain language notice of privacy practices and patient understanding. Marie C. Pollio, 60 N.Y.U. Ann. Surv.Am. L. 579 (2004).

Hippocrates to HIPAA: A foundation for a federal physician-patient privilege. Ralph Ruebner, Leslie Ann Reis, 77 Temp. L. Rev. 505 (2004).

The vulnerability of HIPAA regulations to First and Fourth Amendment attack: An addendum to "evolving constitutional privacy doctrines affecting healthcare enterprises". Andrew S. Krulwich, Bruce L. McDonald, 56 Food & Drug L.J. 281 (2001).

LIBRARY REFERENCES

American Digest System

Health 526 to 532.

Key Number System Topic No. 198H.

NOTES OF DECISIONS

Generally 1

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1. Generally

Procedure for obtaining authority to use medical records in litigation, created by Health Insurance Portability and Accountability Act (HIPAA) regulations, is purely procedural in nature and does not create federal physician-patient or hospital-patient privilege. Northwestern Memorial Hosp. v. Ashcroft, C.A.7 (Ill.) 2004, 362 F.3d 923. Witnesses 212

Statute requiring the United States Department of Health and Human Services to adopt rules "to ensure the integrity and confidentiality of [health] information," cannot be construed to codify a federal physician-patient privilege. Lovato v. Burlington Northern and Santa Fe Ry. Co., D.Colo.2001, 200 F.R.D. 448, reversed 201 F.R.D. 509.

2. Delegation of authority

Health Insurance Portability and Accountability Act (HIPAA) did not impermissibly delegate the legislative function in authorizing Department of Health and Human Services (HHS) to promulgate the "Privacy Rule"; HIPAA provided general policy, described agency in charge of applying that policy, and set boundaries for reach of that agency's authority. South Carolina Medical Ass'n v. Thompson, C.A.4 (S.C.) 2003, 327 F.3d 346, certiorari denied 124 S.Ct. 464, 2003 WL 21714043. Constitutional Law 62(10); Health 105

3. State evidentiary privileges

Supersession clause of privacy provisions of Health Insurance Portability and Accountability Act (HIPAA), stating that if state law imposes more stringent medical-records privilege than Act's regulations then state law governs, does not impose state evidentiary privileges on suits to enforce federal law; state can enforce more-stringent privilege in suits in state court to enforce state law and in suits in federal court where state law supplies rule of decision. Northwestern Memorial Hosp. v. Ashcroft, C.A.7 (Ill.) 2004, 362 F.3d 923. Federal Courts 416

42 U.S.C.A. § 1320d-2

END OF DOCUMENT

42 U.S.C.A. § 1320d-3

Effective: August 21, 1996

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XI. General Provisions, Peer Review, and Administrative Simplification (Refs & Annos)
Part C. Administrative Simplification

➡§ 1320d-3. Timetables for adoption of standards

(a) Initial standards

The Secretary shall carry out section 1320d-2 of this title not later than 18 months after August 21, 1996, except that standards relating to claims attachments shall be adopted not later than 30 months after such date.

(b) Additions and modifications to standards

(1) In general

Except as provided in paragraph (2), the Secretary shall review the standards adopted under section 1320d-2 of this title, and shall adopt modifications to the standards (including additions to the standards), as determined appropriate, but not more frequently than once every 12 months. Any addition or modification to a standard shall be completed in a manner which minimizes the disruption and cost of compliance.

(2) Special rules

(A) First 12-month period

Except with respect to additions and modifications to code sets under subparagraph (B), the Secretary may not adopt any modification to a standard adopted under this part during the 12-month period beginning on the date the standard is initially adopted, unless the Secretary determines that the modification is necessary in order to permit compliance with the standard.

(B) Additions and modifications to code sets

(i) In general

The Secretary shall ensure that procedures exist for the routine maintenance, testing, enhancement, and expansion of code sets.

(ii) Additional rules

If a code set is modified under this subsection, the modified code set shall include instructions on how data elements of health information that were encoded prior to the modification may be converted or translated so as to preserve the informational value of the data elements that existed before the modification. Any modification to a code set under this subsection shall be implemented in a manner that minimizes the disruption and cost of complying with such modification.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XI, § 1174, as added Aug. 21, 1996, Pub.L. 104-191, Title II, § 262(a), 110 Stat.

2026.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. House Report No. 104-496 and House Conference Report No. 104- 736, see 1996 U.S. Code Cong. and Adm. News, p. 1865.

42 U.S.C.A. § 1320d-3, 42 USCA § 1320d-3

Current through P.L. 109-76 (excluding P.L. 109-59, 109-74) approved 09-29-05

END OF DOCUMENT

42 U.S.C.A. § 1320d-4

Effective: August 21, 1996

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XI. General Provisions, Peer Review, and Administrative Simplification (Refs & Annos)
Part C. Administrative Simplification

➞§ 1320d-4. Requirements

(a) Conduct of transactions by plans

(1) In general

If a person desires to conduct a transaction referred to in section 1320d-2(a)(1) of this title with a health plan as a standard transaction--

(A) the health plan may not refuse to conduct such transaction as a standard transaction;

(B) the insurance plan may not delay such transaction, or otherwise adversely affect, or attempt to adversely affect, the person or the transaction on the ground that the transaction is a standard transaction; and

(C) the information transmitted and received in connection with the transaction shall be in the form of standard data elements of health information.

(2) Satisfaction of requirements

A health plan may satisfy the requirements under paragraph (1) by--

(A) directly transmitting and receiving standard data elements of health information; or

(B) submitting nonstandard data elements to a health care clearinghouse for processing into standard data elements and transmission by the health care clearinghouse, and receiving standard data elements through the health care clearinghouse.

(3) Timetable for compliance

Paragraph (1) shall not be construed to require a health plan to comply with any standard, implementation specification, or modification to a standard or specification adopted or established by the Secretary under sections 1320d-1 through 1320d-3 of this title at any time prior to the date on which the plan is required to comply with the standard or specification under subsection (b) of this section.

(b) Compliance with standards

(1) Initial compliance

(A) In general

Not later than 24 months after the date on which an initial standard or implementation specification is adopted or established under sections 1320d-1 and 1320d-2 of this title, each person to whom the standard or implementation specification applies shall comply with the standard or specification.

(B) Special rule for small health plans

In the case of a small health plan, paragraph (1) shall be applied by substituting "36 months" for "24 months". For purposes of this subsection, the Secretary shall determine the plans that qualify as small health plans.

(2) Compliance with modified standards

If the Secretary adopts a modification to a standard or implementation specification under this part, each person to whom the standard or implementation specification applies shall comply with the modified standard or implementation specification at such time as the Secretary determines appropriate, taking into account the time needed to comply due to the nature and extent of the modification. The time determined appropriate under the preceding sentence may not be earlier than the last day of the 180-day period beginning on the date such modification is adopted. The Secretary may extend the time for compliance for small health plans, if the Secretary determines that such extension is appropriate.

(3) Construction

Nothing in this subsection shall be construed to prohibit any person from complying with a standard or specification by--

(A) submitting nonstandard data elements to a health care clearinghouse for processing into standard data elements and transmission by the health care clearinghouse; or

(B) receiving standard data elements through a health care clearinghouse.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XI, § 1175, as added Aug. 21, 1996, Pub.L. 104-191, Title II, § 262(a), 110 Stat. 2027.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. House Report No. 104-496 and House Conference Report No. 104- 736, see 1996 U.S. Code Cong. and Adm. News, p. 1865.

Extension of Deadline for Covered Entities Submitting Compliance Plans

Pub.L. 107-105, § 2, Dec. 27, 2001, 115 Stat. 1003, provided that:

"(a) In general.--

"(1) Extension.--Subject to paragraph (2), notwithstanding section 1175(b)(1)(A) of the Social Security Act (42 U.S.C. 1320d-4(b)(1)(A)) and section 162.900 of title 45, Code of Federal Regulations, a health care provider, health plan (other than a small health plan), or a health care clearinghouse shall not be considered to be in noncompliance with the applicable requirements of subparts I through R of part 162 of title 45, Code of Federal Regulations, before October 16, 2003.

"(2) Condition.--Paragraph (1) shall apply to a person described in such paragraph only if, before October 16, 2002, the person submits to the Secretary of Health and Human Services a plan of how the person will come into compliance with the requirements described in such paragraph not later than October 16, 2003. Such plan shall be

a summary of the following:

"(A) An analysis reflecting the extent to which, and the reasons why, the person is not in compliance.

"(B) A budget, schedule, work plan, and implementation strategy for achieving compliance.

"(C) Whether the person plans to use or might use a contractor or other vendor to assist the person in achieving compliance.

"(D) A timeframe for testing that begins not later than April 16, 2003.

"(3) Electronic submission.--Plans described in paragraph (2) may be submitted electronically.

"(4) Model form.--Not later than March 31, 2002, the Secretary of Health and Human Services shall promulgate a model form that persons may use in drafting a plan described in paragraph (2). The promulgation of such form shall be made without regard to chapter 35 of title 44, United States Code [44 U.S.C.A. § 3501 et seq.] (commonly known as the 'Paperwork Reduction Act').

"(5) Analysis of plans; reports on solutions.--

"(A) Analysis of plans.--

"(i) Furnishing of plans.--Subject to subparagraph (D), the Secretary of Health and Human Services shall furnish the National Committee on Vital and Health Statistics with a sample of the plans submitted under paragraph (2) for analysis by such Committee.

"(ii) Analysis.--The National Committee on Vital and Health Statistics shall analyze the sample of the plans furnished under clause (i).

"(B) Reports on solutions.--The National Committee on Vital and Health Statistics shall regularly publish, and widely disseminate to the public, reports containing effective solutions to compliance problems identified in the plans analyzed under subparagraph (A). Such reports shall not relate specifically to any one plan but shall be written for the purpose of assisting the maximum number of persons to come into compliance by addressing the most common or challenging problems encountered by persons submitting such plans.

"(C) Consultation.--In carrying out this paragraph, the National Committee on Vital and Health Statistics shall consult with each organization--

"(i) described in section 1172(c)(3)(B) of the Social Security Act (42 U.S. C. 1320d-1(c)(3)(B)); or

"(ii) designated by the Secretary of Health and Human Services under section 162.910(a) of title 45, Code of Federal Regulations.

"(D) Protection of confidential information.--

"(i) In general.--The Secretary of Health and Human Services shall ensure that any material provided under subparagraph (A) to the National Committee on Vital and Health Statistics or any organization described in subparagraph (C) is redacted so as to prevent the disclosure of any--

"(I) trade secrets;

"(II) commercial or financial information that is privileged or confidential; and

"(III) other information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

"(ii) Construction.--Nothing in clause (i) shall be construed to affect the application of section 552 of title 5, United States Code [5 U.S.C.A. § 552] (commonly known as the 'Freedom of Information Act"), including the exceptions from disclosure provided under subsection (b) of such section.

"(6) Enforcement through exclusion from participation in Medicare.--

"(A) In general.--In the case of a person described in paragraph (1) who fails to submit a plan in accordance with paragraph (2), and who is not in compliance with the applicable requirements of subparts I through R of part 162 of title 45, Code of Federal Regulations, on or after October 16, 2002, the person may be excluded at the discretion of the Secretary of Health and Human Services from participation (including under part C or as a contractor under sections 1816, 1842, and 1893) in title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.).

"(B) Procedure.--The provisions of section 1128A of the Social Security Act (42 U.S.C. 1320a-7a) (other than the first and second sentences of subsection (a) and subsection (b)) shall apply to an exclusion under this paragraph in the same manner as such provisions apply with respect to an exclusion or proceeding under section 1128A(a) of such Act [42 U.S.C.A. § 1320a-7a].

"(C) Construction.--The availability of an exclusion under this paragraph shall not be construed to affect the imposition of penalties under section 1176 of the Social Security Act (42 U.S.C. 1320d-5).

"(D) Nonapplicability to complying persons.--The exclusion under subparagraph (A) shall not apply to a person who--

"(i) submits a plan in accordance with paragraph (2); or

"(ii) who is in compliance with the applicable requirements of subparts I through R of part 162 of title 45, Code of Federal Regulations, on or before October 16, 2002.

"(b) Special rules.--

"(1) Rules of construction.--Nothing in this section shall be construed--

"(A) as modifying the October 16, 2003, deadline for a small health plan to comply with the requirements of subparts I through R of part 162 of title 45, Code of Federal Regulations; or

"(B) As modifying--

"(i) the April 14, 2003, deadline for a health care provider, a health plan (other than a small health plan), or a health care clearinghouse to comply with the requirements of subpart E of part 164 of title 45, Code of Federal Regulations; or

"(ii) the April 14, 2004, deadline for a small health plan to comply with the requirements of such subpart.

"(2) Applicability of privacy standards before compliance deadline for information transaction standards.--

"(A) In general.--Notwithstanding any other provision of law, during the period that begins on April 14, 2003, and ends on October 16, 2003, a health care provider or, subject to subparagraph (B), a health care clearinghouse, that transmits any health information in electronic form in connection with a transaction described in subparagraph (C) shall comply with the requirements of subpart E of part 164 of title 45, Code of Federal Regulations, without regard to whether the transmission meets the standards required by part 162 of such title.

"(B) Application to health care clearinghouses.--For purposes of this paragraph, during the period described in subparagraph (A), an entity that processes or facilitates the processing of information in connection with a transaction described in subparagraph (C) and that otherwise would be treated as a health care clearinghouse shall be treated as a health care clearinghouse without regard to whether the processing or facilitation produces (or is required to produce) standard data elements or a standard transaction as required by part 162 of title 45, Code of Federal Regulations.

"(C) Transactions described.--The transactions described in this subparagraph are the following:

"(i) A health care claims or equivalent encounter information transaction.

"(ii) A health care payment and remittance advice transaction.

"(iii) A coordination of benefits transaction.

"(iv) A health care claim status transaction.

"(v) An enrollment and disenrollment in a health plan transaction.

"(vi) An eligibility for a health plan transaction.

"(vii) A health plan premium payments transaction.

"(viii) A referral certification and authorization transaction.

"(c) Definitions.--In this section [this note]--

"(1) the terms 'health care provider', 'health plan', and 'health care clearinghouse' have the meaning given those terms in section 1171 of the Social Security Act (42 U.S. C. 1320d) and section 160.103 of title 45, Code of Federal Regulations;

"(2) the terms 'small health plan' and 'transaction' have the meaning given those terms in section 160.103 of title 45, Code of Federal Regulations; and

"(3) the terms 'health care claims or equivalent encounter information transaction', 'health care payment and remittance advice transaction', 'coordination of benefits transaction', 'health care claim status transaction', 'enrollment and disenrollment in a health plan transaction', 'eligibility for a health plan transaction', 'health plan premium payments transaction', and 'referral certification and authorization transaction' have the meanings given those terms in sections 162.1101, 162.1601, 162.1801, 162.1401, 162.1501, 162.1201, 162.1701, and 162.1301 of title 45, Code of Federal Regulations, respectively."

LIBRARY REFERENCES

American Digest System

Health 526 to 532.

Key Number System Topic No. 198H.

NOTES OF DECISIONS

Privileged communications 1

42 U.S.C.A. § 1320d-4

1. Privileged communications

Insurer's attorney's ex parte communications with physician who supervised resident's examination of insured, on consultative referral, in insured's action seeking benefits under disability policy based on alleged inability to work due to tinnitus, violated Health Insurance Portability and Accountability Act (HIPAA), since there was no protective order safeguarding insured's privacy, and thus formal discovery was required. Crenshaw v. Mony Life Ins. Co., S.D.Cal.2004, 318 F.Supp.2d 1015. Attorney And Client 32(12)

42 U.S.C.A. § 1320d-4, 42 USCA § 1320d-4

Current through P.L. 109-76 (excluding P.L. 109-59, 109-74) approved 09-29-05

END OF DOCUMENT

42 U.S.C.A. § 1320d-5

Effective: August 21, 1996

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XI. General Provisions, Peer Review, and Administrative Simplification (Refs & Annos)
Part C. Administrative Simplification

➡§ 1320d-5. General penalty for failure to comply with requirements and standards

(a) General penalty

(1) In general

Except as provided in subsection (b) of this section, the Secretary shall impose on any person who violates a provision of this part a penalty of not more than $100 for each such violation, except that the total amount imposed on the person for all violations of an identical requirement or prohibition during a calendar year may not exceed $25,000.

(2) Procedures

The provisions of section 1320a-7a of this title, (other than subsections (a) and (b) and the second sentence of subsection (f)) shall apply to the imposition of a civil money penalty under this subsection in the same manner as such provisions apply to the imposition of a penalty under such section 1320a-7a of this title.

(b) Limitations

(1) Offenses otherwise punishable

A penalty may not be imposed under subsection (a) of this section with respect to an act if the act constitutes an offense punishable under section 1320d-6 of this title.

(2) Noncompliance not discovered

A penalty may not be imposed under subsection (a) of this section with respect to a provision of this part if it is established to the satisfaction of the Secretary that the person liable for the penalty did not know, and by exercising reasonable diligence would not have known, that such person violated the provision.

(3) Failures due to reasonable cause

(A) In general

Except as provided in subparagraph (B), a penalty may not be imposed under subsection (a) of this section if--

(i) the failure to comply was due to reasonable cause and not to willful neglect; and

(ii) the failure to comply is corrected during the 30-day period beginning on the first date the person liable for the penalty knew, or by exercising reasonable diligence would have known, that the failure to comply occurred.

(B) Extension of period

(i) No penalty

The period referred to in subparagraph (A)(ii) may be extended as determined appropriate by the Secretary based on the nature and extent of the failure to comply.

(ii) Assistance

If the Secretary determines that a person failed to comply because the person was unable to comply, the Secretary may provide technical assistance to the person during the period described in subparagraph (A)(ii). Such assistance shall be provided in any manner determined appropriate by the Secretary.

(4) Reduction

In the case of a failure to comply which is due to reasonable cause and not to willful neglect, any penalty under subsection (a) of this section that is not entirely waived under paragraph (3) may be waived to the extent that the payment of such penalty would be excessive relative to the compliance failure involved.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XI, § 1176, as added Aug. 21, 1996, Pub.L. 104-191, Title II, § 262(a), 110 Stat. 2028.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. House Report No. 104-496 and House Conference Report No. 104- 736, see 1996 U.S. Code Cong. and Adm. News, p. 1865.

LIBRARY REFERENCES

American Digest System

Health 526 to 532.

Key Number System Topic No. 198H.

42 U.S.C.A. § 1320d-5, 42 USCA § 1320d-5

Current through P.L. 109-76 (excluding P.L. 109-59, 109-74) approved 09-29-05

END OF DOCUMENT

42 U.S.C.A. § 1320d-6

Effective: August 21, 1996

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XI. General Provisions, Peer Review, and Administrative Simplification (Refs & Annos)
Part C. Administrative Simplification

➡§ 1320d-6. Wrongful disclosure of individually identifiable health information

(a) Offense

A person who knowingly and in violation of this part--

(1) uses or causes to be used a unique health identifier;

(2) obtains individually identifiable health information relating to an individual; or

(3) discloses individually identifiable health information to another person,

shall be punished as provided in subsection (b) of this section.

(b) Penalties

A person described in subsection (a) of this section shall--

(1) be fined not more than $50,000, imprisoned not more than 1 year, or both;

(2) if the offense is committed under false pretenses, be fined not more than $100,000, imprisoned not more than 5 years, or both; and

(3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than $250,000, imprisoned not more than 10 years, or both.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XI, § 1177, as added Aug. 21, 1996, Pub.L. 104-191, Title II, § 262(a), 110 Stat. 2029.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. House Report No. 104-496 and House Conference Report No. 104- 736, see 1996 U.S. Code Cong. and Adm. News, p. 1865.

LAW REVIEW COMMENTARIES

Hungry, hungry HIPAA: When privacy regulations go too far. Comment, 31 Fordham Urb. L.J. 1483 (2004).

42 U.S.C.A. § 1320d-6

LIBRARY REFERENCES

American Digest System

Health 532.

Records 31.

Key Number System Topic Nos. 198H, 326.

NOTES OF DECISIONS

Discovery 1
Private right of action 2

1. Discovery

Ohio Legal Rights Service (OLRS) was "health oversight agency" able to secure from care providers health records of mental patients, under exception to general medical records nondisclosure provision of Health Insurance Portability and Accountability Act (HIPAA); OLRS was state agency, authorized by federal and state law to enforce civil rights laws for which health information was relevant, was charged with protecting and advocating rights of mentally ill persons, and had authority to investigate abuses, and existence of other state agencies with similar responsibilities did not change result. Ohio Legal Rights Service v. Buckeye Ranch, Inc., 2005, 365 F.Supp.2d 877. Health 257

Health Insurance Portability and Accountability Act (HIPAA) provided more stringent standards than New York law for protection of patient health care information in ex parte communication between opposing party's attorney and patient's health care provider, and therefore preempted New York law. Bayne v. Provost, 2005, 359 F.Supp.2d 234. States 18.15

Insurer's attorney's ex parte communications with physician who supervised resident's examination of insured, on consultative referral, in insured's action seeking benefits under disability policy based on alleged inability to work due to tinnitus, violated Health Insurance Portability and Accountability Act (HIPAA), since there was no protective order safeguarding insured's privacy, and thus formal discovery was required. Crenshaw v. Mony Life Ins. Co., S.D.Cal.2004, 318 F.Supp.2d 1015. Attorney And Client 32(12)

2. Private right of action

Provision of Health Insurance Portability and Accountability Act (HIPAA) prohibiting disclosure of individually identifiable health information did not create private cause of action; statute did not contain any language conferring privacy rights upon specific class of persons, but rather focused on regulating persons with access to individuals' health information, and HIPAA created specific means of enforcing statute. University of Colorado Hosp. v. Denver Pub. Co., D.Colo.2004, 340 F.Supp.2d 1142. Action 3

42 U.S.C.A. § 1320d-6, 42 USCA § 1320d-6

Current through P.L. 109-76 (excluding P.L. 109-59, 109-74) approved 09-29-05

42 U.S.C.A. § 1320d-6

END OF DOCUMENT

42 U.S.C.A. § 1320d-7

Effective: August 21, 1996

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XI. General Provisions, Peer Review, and Administrative Simplification (Refs & Annos)
Part C. Administrative Simplification

➡§ 1320d-7. Effect on State law

(a) General effect

(1) General rule

Except as provided in paragraph (2), a provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of this title, shall supersede any contrary provision of State law, including a provision of State law that requires medical or health plan records (including billing information) to be maintained or transmitted in written rather than electronic form.

(2) Exceptions

A provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of this title, shall not supersede a contrary provision of State law, if the provision of State law--

(A) is a provision the Secretary determines--

(i) is necessary--

(I) to prevent fraud and abuse;

(II) to ensure appropriate State regulation of insurance and health plans;

(III) for State reporting on health care delivery or costs; or

(IV) for other purposes; or

(ii) addresses controlled substances; or

(B) subject to section 264(c)(2) of the Health Insurance Portability and Accountability Act of 1996, relates to the privacy of individually identifiable health information.

(b) Public health

Nothing in this part shall be construed to invalidate or limit the authority, power, or procedures established under any law providing for the reporting of disease or injury, child abuse, birth, or death, public health surveillance, or public health investigation or intervention.

(c) State regulatory reporting

Nothing in this part shall limit the ability of a State to require a health plan to report, or to provide access to,

information for management audits, financial audits, program monitoring and evaluation, facility licensure or certification, or individual licensure or certification.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XI, § 1178, as added Aug. 21, 1996, Pub.L. 104-191, Title II, § 262(a), 110 Stat. 2029.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1996 Acts. House Report No. 104-496 and House Conference Report No. 104- 736, see 1996 U.S. Code Cong. and Adm. News, p. 1865.

References in Text

Section 264(c)(2) of the Health Insurance Portability and Accountability Act of 1996, referred to in subsec. (a)(2)(B), is section 264(c)(2) of Pub.L. 104-191, Title II, Aug. 21, 1996, 110 Stat. 2033, which is set out as a note under section 1320d-2 of this title.

LIBRARY REFERENCES

American Digest System

Health 526 to 532.

States k18.79.

Key Number System Topic Nos. 198H, 360.

NOTES OF DECISIONS

1. Ripeness

Challenge to section of Health Insurance Portability and Accountability Act (HIPAA) providing for preemption of state laws unless they were "more stringent" than HIPAA was ripe, considering fitness of issues for judicial decision and hardship to parties of withholding court consideration. South Carolina Medical Ass'n v. Thompson, C.A.4 (S.C.) 2003, 327 F.3d 346, certiorari denied 124 S.Ct. 464, 540 U.S. 981, 157 L.Ed.2d 371. Federal Courts 13

2. Vagueness

Section of Health Insurance Portability and Accountability Act (HIPAA) providing for preemption of state laws unless they were "more stringent" than HIPAA was not impermissibly vague in violation of Due Process Clause; regulations were sufficiently definite to give fair warning as to what would be considered "more stringent" state privacy law. South Carolina Medical Ass'n v. Thompson, C.A.4 (S.C.) 2003, 327 F.3d 346, certiorari denied 124 S.Ct. 464, 540 U.S. 981, 157 L.Ed.2d 371. Constitutional Law 278.1; Health 105

3. Ex parte communications

42 U.S.C.A. § 1320d-7

Defendants in civil rights suit arising when state troopers removed homebound patient on report from home health care provider that he was suicidal were entitled to qualified protective order that was consistent with Health Insurance Portability and Accountability Act (HIPAA), but which permitted them to conduct ex parte pretrial interview with home health care provider about patient's medical history and condition, subject to restriction prohibiting defendants from disclosing information for any reason other than litigation; order would also recite that interview was not at request of patient and was for purpose of assisting in defense of lawsuit. Bayne v. Provost, 2005, 359 F.Supp.2d 234. Federal Civil Procedure 1271

42 U.S.C.A. § 1320d-7, 42 USCA § 1320d-7

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END OF DOCUMENT

42 U.S.C.A. § 1320d-8

Effective: August 21, 1996

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 7. Social Security (Refs & Annos)
Subchapter XI. General Provisions, Peer Review, and Administrative Simplification (Refs & Annos)
Part C. Administrative Simplification

➡§ 1320d-8. Processing payment transactions by financial institutions

To the extent that an entity is engaged in activities of a financial institution (as defined in section 3401 of Title 12), or is engaged in authorizing, processing, clearing, settling, billing, transferring, reconciling, or collecting payments, for a financial institution, this part, and any standard adopted under this part, shall not apply to the entity with respect to such activities, including the following:

(1) The use or disclosure of information by the entity for authorizing, processing, clearing, settling, billing, transferring, reconciling or collecting, a payment for, or related to, health plan premiums or health care, where such payment is made by any means, including a credit, debit, or other payment card, an account, check, or electronic funds transfer.

(2) The request for, or the use or disclosure of, information by the entity with respect to a payment described in paragraph (1)--

(A) for transferring receivables;

(B) for auditing;

(C) in connection with--

(i) a customer dispute; or

(ii) an inquiry from, or to, a customer;

(D) in a communication to a customer of the entity regarding the customer's transactions, payment card, account, check, or electronic funds transfer;

(E) for reporting to consumer reporting agencies; or

(F) for complying with--

(i) a civil or criminal subpoena; or

(ii) a Federal or State law regulating the entity.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XI, § 1179, as added Aug. 21, 1996, Pub.L. 104-191, Title II, § 262(a), 110 Stat. 2030.)

HISTORICAL AND STATUTORY NOTES

42 U.S.C.A. § 1320d-8

Revision Notes and Legislative Reports

1996 Acts. House Report No. 104-496 and House Conference Report No. 104- 736, see 1996 U.S. Code Cong. and Adm. News, p. 1865.

RESEARCH REFERENCES

Encyclopedias

Am. Jur. 2d Insurance § 552, Legislation on Preexisting Conditions; Portability; Renewability.

Am. Jur. 2d Insurance § 1059, Discrimination Based on Health or Physical Condition.

42 U.S.C.A. § 1320d-8, 42 USCA § 1320d-8

Current through P.L. 109-76 (excluding P.L. 109-59, 109-74) approved 09-29-05

END OF DOCUMENT

ADDENDUM G

Office of the High Commissioner for Human Rights

International Convention on the Elimination of All Forms of Racial Discrimination

Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965

***entry into force* 4 January 1969, in accordance with Article 19**

status of ratifications declarations and reservations

monitoring body

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of Al l Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,

Have agreed as follows:

PART I

Article I

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial

discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case en tail as a con sequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organizations which are based on

ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating

prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

PART II

Article 8

1. There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of this Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5.

(a) The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee;

(b) For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

6. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties. (amendment (see General Assembly resolution 47/111 of 16 December 1992); status of ratification)

Article 9

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention:

(a) within one year after the entry into force of the Convention for the State concerned; and

(b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.

2. The Committee shall report annually, through the Secretary General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

Article 10

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

3. The secretariat of the Committee shall be provided by the Secretary General of the United Nations.

4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 11

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.

3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

4. In any matter referred to it, the Committee may call upon the States Parties

concerned to supply any other relevant information.

5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

Article 12

1.

(a) After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention;

(b) If the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States parties to the dispute or of a State not Party to this Convention.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission.

5. The secretariat provided in accordance with article 10, paragraph 3, of this Convention shall also service the Commission whenever a dispute among States Parties brings the Commission into being.

6. The States parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States parties to the dispute in accordance with paragraph 6 of this article.

8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the States concerned to supply any other relevant information.

Article 13

1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.

2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission.

3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention.

Article 14

1. A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Any State Party which makes a declaration as provided for in paragraph I of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.

3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.

4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.

5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.

6.

(a) The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any

provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent. The Committee shall not receive anonymous communications;

(b) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

7.

(a) The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged;

(b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

8. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.

9. The Committee shall be competent to exercise the functions provided for in this article only when at least ten States Parties to this Convention are bound by declarations in accordance with paragraph I of this article.

Article 15

1 . Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 14 December 1960, the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies.

2.

(a) The Committee established under article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies;

(b) The Committee shall receive from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and

objectives of this Convention applied by the administering Powers within the Territories mentioned in subparagraph (a) of this paragraph, and shall express opinions and make recommendations to these bodies.

3. The Committee shall include in its report to the General Assembly a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.

4. The Committee shall request from the Secretary-General of the United Nations all information relevant to the objectives of this Convention and available to him regarding the Territories mentioned in paragraph 2 (a) of this article.

Article 16

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

PART III

Article 17

1. This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 18

1. This Convention shall be open to accession by any State referred to in article 17, paragraph 1, of the Convention. 2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 19

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 20

1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

Article 21

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary General.

Article 22

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Article 23

1. A request for the revision of this Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 24

The Secretary-General of the United Nations shall inform all States referred to in article 17, paragraph 1, of this Convention of the following particulars:

(a) Signatures, ratifications and accessions under articles 17 and 18;

(b) The date of entry into force of this Convention under article 19;

(c) Communications and declarations received under articles 14, 20 and

23;

(d) Denunciations under article 21.

Article 25

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States belonging to any of the categories mentioned in article 17, paragraph 1, of the Convention.

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