ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5156

LAMAR JOHNSON, **Appellant,**

v.

PAUL A. QUANDER, DIRECTOR OF THE COURT SERVICES AND OFFENDER SUPERVISION AGENCY, *et al.,* **Appellees.**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH L. WAINSTEIN,
United States Attorney.

MICHAEL J. RYAN,
JANE M. LYONS,
Assistant United States Attorneys.

C.A. No. 04-448

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties

The appellant is Lamar Johnson, plaintiff below. The appellees, defendants below, are Paul A. Quander and Michael Johnson, both of whom are employees of the Court Services and Offender Supervision Agency and sued exclusively in their official capacities. There are no intervenors or amici curiae.

Ruling Under Review

Appellant appeals from the Honorable Reggie B. Walton's March 21, 2005 Memorandum Opinion and Order granting appellees' motion to dismiss this case in its entirety. The decision is reported at Johnson v. Quander, 370 F. Supp. 2d 79 (D.D.C. 2005).

Related Cases

This case has not previously been before this Court. A similar challenge to the constitutionality of the same statutes at issue in this case is currently pending in the District Court in United States v. Antonio Jones, Criminal No. 01-202 (EGS).

Appellees disagree that the three cases identified by appellant are related within the meaning of the rule. First, based on a review of the docket, undersigned counsel is unaware that any of the issues here are also present in United States v. Rice, Criminal No. 01-20 (EGS). Second, to the extent that either Nicholas v. Goord or A.A. v. Attorney General for New Jersey is related to this case as appellant suggests, it can only be because every state in this country has passed similar DNA statutes and there appears to be no logical reason for appellant's limiting of that universe to the statutes enacted in New York and New Jersey. Moreover, appellees note that both Nicholas and A.A. are currently under appellate review.

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* Cases chiefly relied upon are marked with an asterisk.

STATUTES

MISCELLANEOUS

GLOSSARY

CODIS . . . . . Combined DNA Index System

DNA . . . . . deoxyribonucleic acid

FBI . . . . . Federal Bureau of Investigation

HIPAA . . . . . Health Insurance Portability and Accountability Amendments

ISSUES PRESENTED

In the opinion of Appellees, the following issues are presented:

1. Whether the District Court correctly held that the mandatory collection of a DNA sample from Mr. Johnson, while he was on supervised release for a conviction for unarmed robbery, pursuant to the DNA Backlog Elimination Act of 2000, 42 U.S.C. § 14135b, and the District of Columbia's implementation of that law, D.C. Code § 22-4151 (together the "DNA Acts"), did not violate the Fourth Amendment.

2. Whether the District Court appropriately dismissed as legally insufficient Mr. Johnson's claims that the DNA Acts violated his rights under the Fifth Amendment's due process provisions, the equal protection clause, and the *ex post facto* clauses.

3. Whether the District Court properly dismissed Mr. Johnson's claims against two federal officials acting in their official capacities under the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936, or the Convention on the Elimination of All Forms of Racial Discrimination because neither creates a private cause of action.

RELEVANT STATUTES

The relevant statutes, 42 U.S.C. § 14135b and D.C. Code § 22-4151, are set forth in the Addenda to the Brief for Appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEES

STATEMENT OF JURISDICTION

Appellants asserted jurisdiction in the District Court under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291.

COUNTER STATEMENT OF THE CASE

Each nucleated cell in the human body contains deoxyribonucleic acid (commonly known as "DNA") whose structure is unique and to that person, unless that individual has an identical twin. See generally Thomas M. Fleming, Annotation, Admissibility of DNA Identification Evidence, 84 A.L.R.4th 313 (1991). Modern scientific techniques allow people to be identified through their DNA. All fifty states and the federal government have enacted laws creating databanks of DNA samples collected from various criminal offenders. See

http://www.dnaresource.com (regularly-updated list of state DNA collection statutes) (last visited Nov. 15, 2005); 42 U.S.C. §§ 14131-35 (federal DNA collection statutes).

Appellant Lamar Johnson was convicted in District of Columbia Superior Court of two counts of unarmed robbery in December 2001, and was sentenced to one year of imprisonment and to two years of supervised release for each offense. JA 49. Based on that conviction, Mr. Johnson was subject to the mandatory collection of a sample of his DNA under the operation of the federal DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. § 14135b ("DNA Act"), and the District of Columbia's implementation of that law, D.C. Code § 22-4151. JA 49-50. Taken together, those statutes required Mr. Johnson's DNA to be collected and analyzed so that his genetic profile could be included in the Combined DNA Index System ("CODIS") maintained by the Federal Bureau of Investigation ("FBI"). Refusal to provide a DNA sample by a person covered by the statute is a misdemeanor. 42 U.S.C. § 14135b(a)(5).

In this action, Mr. Johnson challenges the legality of the federal and D.C. DNA collection statutes under an array of constitutional and other legal theories.[1] See JA 47-55. More specifically, Mr. Johnson contends that the mandatory DNA collection, analysis, and inclusion in a national database maintained by federal law enforcement violates 42 U.S.C. § 1983, the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 ("HIPAA"), as well as his rights under the Fourth, Fifth, and Sixth Amendments, the equal protection and *ex post facto* clauses of the United States Constitution. In addition, Mr. Johnson

[1] The DNA Act contains provisions that mirror 42 U.S.C. § 14135a which pertains to the collection of DNA from certain federal offenders and has withstood numerous constitutional challenges. For a comprehensive survey of the caselaw in this area, see Richard P. Shafer, "Validity, Construction, and Application of DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C.A. § 14135 et seq. and 10 U.S.C.A. § 1565," 187 A.L.R. Fed. 373 (2003).

attempts to assert a cause of action under the International Convention of the Elimination of All Forms of Racial Discrimination. Within this matrix of legal theories, appellant relies most heavily on the notion that DNA collection and permanent retention of a DNA profile constitutes a suspicionless search and seizure in violation of the Fourth Amendment.

Contrary to the tone struck by appellant in his brief that the District Court's opinion in this case broke new ground, the District Court followed a well blazed trail and did not strike a revolutionary blow to Fourth Amendment jurisprudence as appellant portrays. Indeed, constitutional challenges to similar DNA statutes brought across this country have uniformly failed, and the only current exceptions to that rule are not binding, unpersuasive, and currently under appellate review in other jurisdictions. As shown by the experience in other states -- the majority of which have enacted DNA collection statutes similar to the District of Columbia's and which were passed under the authority of an earlier federal DNA law-- the DNA Act and its District of Columbia counterpart are constitutional and otherwise legal, and the District Court properly dismissed this case.

A. Statutory Framework

The Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14132, originally authorized the FBI to create a national index of DNA to be collected from convicted offenders, crime scenes and victims, and unidentified human remains. That law has repeatedly been held to pass constitutional muster, but it omitted the District of Columbia from its coverage. Consequently, Congress passed another statute, the DNA Backlog Elimination Act of 2000, 42 U.S.C. § 14135 et seq., which mandated, among other things, the collection of a DNA sample from persons "convicted of a qualifying District of Columbia offense." Id. at § 14135b(a)(2). In

response, the government for the District of Columbia selected various criminal offenses which it deemed qualifying for DNA collection. D.C. Code § 22-4151. The District of Columbia included robbery among those offenses. Id. § 4151(27).

B. Factual and Procedural Background

Mr. Johnson was subject to the mandatory collection of a sample of his DNA under the operation of these laws because he was convicted in District of Columbia Superior Court of two counts of unarmed robbery in December 2001, and was sentenced to two years of supervised release. JA 49. Shortly before his term of probation was scheduled to expire, Mr. Johnson's probation officer requested that Mr. Johnson provide the required DNA sample through a simple blood draw. JA 50, 57, 64, 67. Mr. Johnson refused, and after the Superior Court for the District of Columbia was informed of his refusal, Mr. Johnson brought a complaint in federal court seeking to enjoin the collection of his DNA on the grounds that it was unlawful. JA 47-55, 64, 98. Subsequently, Mr. Johnson voluntarily agreed to provide a blood sample to be held pending the outcome of this litigation and his term of probation was terminated. See JA 181-83; JA 44 (Minute Entry Order dated April 13, 2004).

The government filed a motion to dismiss this case in July 2004 on the grounds that the claims asserted were deficient as a matter of law. JA 188. Mr. Johnson opposed that motion and filed a cross-motion for summary judgment including evidence from expert witnesses. JA 225-303. After briefing on the motions was completed, the District Court granted the government's motion to dismiss on March 21, 2005. JA 1.

C. The District Court's Decision

The District Court initially identified the federal statute's limits on the disclosure of genetic information from the national database and the criminal penalties associated with unlawful disclosures. JA 4-5. That perspective, coupled with fundamental notions about what this case is about and what it is not about, informed the Court's analysis. The District Court analyzed each of Mr. Johnson's claims both as they related to his status as a probationer and a person who had been discharged from probation. With respect to the Fourth Amendment, the District Court noted that, although courts had developed what can be thought of as two analytical frameworks, the results were overwhelmingly in favor of constitutionality:

> While the issue presented . . is one of first impression in this Circuit, many other Federal Circuit, Federal District and state courts throughout the country have weighed in on this issue and resoundingly concluded that the DNA Act and similar analogous statutes do not violate the Fourth Amendment's protection against unreasonable searches and seizures.

JA 9. Having examined the "special needs" analysis favored by some courts to uphold similar DNA laws, the District Court proceeded to utilize a reasonableness test based on the totality of the circumstances. JA 9-10. Those circumstances include both Mr. Johnson's privacy interest and the public interest. Id. at 11. Recognizing Mr. Johnson's diminished privacy interests as a probationer, the "compelling public interest" furthered by the DNA Acts, particularly in view of the potential to reduce the high rates of recidivism among probationers, among others, and the minimal physical intrusion occasioned by taking a blood sample, the District Court found the balance tipped heavily in favor of constitutionality. Id. at 12-14.

The District Court also rejected Mr. Johnson's myriad claims under the Fifth Amendment. Id. at 14-23. The District Court rejected the substantive due process claim because

the Fourth Amendment's prohibition against unreasonable searches and seizures specifically addressed the challenged conduct, and separate analysis under the Fifth Amendment was thus unnecessary. Id. at 15-16. Following the rejection of similar claims by the Ninth and Tenth Circuits, the District Court rejected the procedural due process claim, observing that the familiar criteria from Matthews v. Eldridge, 424 U.S. 319, 335 (1976), i.e., the private interest affected, the risk of erroneous deprivation, the likely value of additional procedures, and the government's interest, were satisfied here, in part because Mr. Johnson's criminal conviction provided much of the predicate for the deprivation and that his privacy interests were reduced while the government's interests were substantial. Likewise, the District Court denied Mr. Johnson's equal protection claim that the laws discriminate against him on the basis of his race not only because he failed to state a claim but also because the laws are rationally related to serving a compelling government interest. JA 21-24.

Once again following the clear lead of other federal appellate courts, the District Court rejected Mr. Johnson's claim that the DNA Acts violate the Ex Post Facto clause of Article I of the Constitution because they are not punitive either as written or applied. Id. at 24-31. The District Court relied on legislative intent evinced by the D.C. Council and carefully examined the factors enumerated in the Supreme Court's decision in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). JA at 26-30. The District Court proceeded to reject Mr. Johnson's claim under the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d ("HIPAA"), by finding no implied private cause of action under that statute. Id. at 31-33. Similarly, the District Court also determined that Mr. Johnson could not bring a claim under the

International Convention for the Elimination of All Forms of Racial Discrimination because the treaty is not self-executing. Id. at 33-35.

Finally, the District Court probed Mr. Johnson's contention that the completion of his term of probation restored his privacy interests so that his genetic profile should be protected or expunged.[2] Here, the District Court analyzed a recent decision from the Superior Court of New Jersey which "engraft[ed] a right of post-conviction expungement" on that state's DNA law "as an appropriate measure to save the law's constitutionality." Id. at 36, quoting A.A. v. Attorney General of New Jersey, Civil Action No. MER-L-346-04 (Dec. 22, 2004 N.J. Super. Ct. Law Div.).[3] Persuaded instead by the reasoning of United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (*en banc*), the District Court analogized the genetic information to fingerprints and sex offender registries which may be maintained and found that the privacy intrusion occasioned by maintaining genetic information in a national database with severe restrictions on the uses and disclosures of information was reasonable based on the competing interests. JA 35-42.

This appeal followed.

SUMMARY OF ARGUMENT

Like its 1994 predecessor authorizing the creation of a national DNA database for persons convicted of certain crimes, the extension of the law in 2000 to include people convicted in the District of Columbia is constitutional. The decisions Mr. Johnson relies on are unpersuasive. The laws do not constitute an impermissible search or seizure, there is no

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[2] Based on the interim relief agreed to by the parties, Mr. Johnson's genetic profile had not been added to CODIS at the time of the District Court's decision.

[3] Subsequent to the District Court's decision, the Appellate Division upheld the New Jersey's DNA Act in State v. O'Hagen, 881 A.2d 733 (N.J. Super. App. Div. Sept. 7, 2005).

unconstitutional invasion of privacy, and the statutes do not offend either equal protection or the *ex post facto* clause. Because neither the Health Insurance Portability and Accountability Amendments nor the Convention Against the Elimination of All Forms of Racial Discrimination contain any private right of action, the District Court properly dismissed this case in its entirety.

ARGUMENT

I. Standard of Review

This Court reviews the District Court's grant of a motion to dismiss de novo. Wilson v. Pena, 79 F.3d 154, 160 n.1 (D.C. Cir. 1996). Thus, in this case, this Court employs the same standard of review as the District Court. A motion to dismiss should not be granted "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). The well-pled factual allegations of the complaint must be presumed true. Taylor v. Federal Deposit Insurance Corp., 132 F.3d 753, 762 (D.C. Cir. 1997); National Treasury Employees Union v. United States, 101 F.3d 1423, 1430 (D.C. Cir. 1996); Kowal v. MCI Communications Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994). While plaintiff is entitled to all favorable inferences that can be drawn from those allegations, Warth v. Seldin, 422 U.S. 490, 501 (1975), the Court need not accept inferences drawn by plaintiff if such inferences are unsupported by the facts set out in the complaint. Kowal, 16 F.3d at 1276.

II. The DNA Acts Are Constitutional

It is by now well settled that a federal DNA database containing DNA confiscated from state offenders convicted of a wide array of offenses passes constitutional muster. All of the federal appellate courts to have considered the matter have agreed. Because the challenged

provision of the DNA Act represents a modest extension of previous federal law to include those convicted under the D.C. Code, the same reasoning which led other federal courts to find the forerunner statutes establishing DNA collection from states constitutional should persuade this Court to do likewise.

At the outset, it is worth recalling the words of Justice Holmes: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

A. The State of the Current Law Persuasively Favors Finding Constitutionality

The United States Court of Appeals for the Third Circuit recently pointed out that "[a] recent Attorney General report prepared for Congress indicates that at least seven deaths, 89 rapes, 14 rape/deaths, nine sexual assaults, 14 robberies, three assaults, one burglary, and several property crimes could have been prevented had a DNA sample been taken earlier." United States v. Sczubelek, 402 F.3d 175, 186 (3d Cir. 2005). Moreover, "to date, 143 people have been exonerated by DNA evidence, thirteen of whom were sentenced to death." Id. at 185 n.5.

Recognizing this, all 50 states and the federal government have adopted DNA collection statutes which, although not identical, are similar to each other and to the D.C. Code provision challenged here. See People v. Garvin, 812 N.E.2d 773 (Ill. App. 2003) (listing DNA statutes and cases from all 50 states). These statutes have been challenged in courts of numerous jurisdictions.[4] To date, every state and federal appellate court has been unanimous in holding

[4] See, e.g., United States v. Kimler, 335 F.3d 1132 (10th Cir.), cert. denied, 124 S. Ct. 945 (2003); Velasquez v. Woods, 329 F.3d 420 (5th Cir. 2003) (per curiam); Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir.) (upholding Oklahoma statute), cert. denied, 525 U.S. 1005 (1998); United States v. Plotts, 347 F.3d 873, 877 (10th Cir. 2003); Jones v. Murray, 962 F.2d 302, 307 (4th Cir.) (holding that Virginia DNA statute was constitutional as applied to violent as well as nonviolent convicted felons but not analyzing

these statutes to be constitutional legislative enactments. See, e.g., Sczubelek, 402 F.3d at 186 (upholding federal DNA law); United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (acknowledging the large number of courts that have upheld DNA testing statutes against Fourth Amendment challenges), cert. denied, __ U.S. __, 125 S. Ct. 1638 (March 21, 2005); Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005) (upholding Georgia DNA law); State v. Raines, 857 A.2d 19 (Md. App. 2004) (upholding Maryland DNA law and citing plethora of cases upholding DNA laws across the country). See also Robin Cheryl Miller, J.D., Validity, Construction, and Operation of State DNA Database Statutes, 76 A.L.R. 5th 239 (2005).

It is indisputable that Mr. Johnson is "faced with a tidal wave of authority against [his] position [because] [e]very court of review that has decided the issue has upheld the DNA testing

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under the "special needs" framework because it found that incarcerated inmates were a special category), Green v. Berge, 354 F.3d 675, 676-79 (7th Cir. 2004) (upholding Wisconsin statute); Groceman v. United States Dep't of Justice, 354 F.3d 411, 412-14 (5th Cir. 2004) (per curiam) (upholding federal DNA Act); Schlicher v. Peters, 103 F.3d 940, 943 (10th Cir. 1998) (upholding Kansas DNA law); Boling v. Romer, 101 F.3d 1336, 1339-40 (10th Cir. 1996) (sustaining Colorado's DNA collection statute); Velasquez v. Woods, 329 F.3d 420, 421 (5th Cir. 2003) (per curiam); Roe v. Marcotte, 193 F.3d 72, 76-82 (2d Cir. 1999) (upholding Connecticut DNA collection law); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995), cert. denied, 517 U.S. 1160 (1996); State v. Raines, 857 A.2d 19 (Md. Ct. App. 2004); People v. Hall, 816 N.E.2d 703, 710-14 (Ill. App. Ct. 2004); People v. Shreck, No. 02-CA-1413, 2004 WL 2137067 (Col. Ct. App. Sept. 23, 2004); State v. Surge, 94 P.3d 345 (Wash. Ct. App. 2004); State v. Steele, 802 N.E.2d 1127, 1132-37 (Ohio App. 2003); Gaines v. State, 998 P.2d 166, 171-73 (Nev.) (per curiam), cert. denied, 531 U.S. 856 (2000); State v. Martinez, 78 P.3d 769 (Kan. 2003); Landry v. Attorney General, 709 N.E.2d 1085, 1087-92 (Mass. 1999), cert. denied, 528 U.S. 1013 (2000); State v. Olivas, 856 P.2d 1076, 1083-86 (Wash. 1993); People v. Adams, 115 Cal. App. 4th 243, cert. denied, 125 S. Ct. 279 (2004); In re D.L.C., 124 S.W.3d 354 (Tex. App. 2003); Cooper v. Gammon, 943 S.W.2d 699, 705 (Mo. Ct. App. 1997); In re Maricopa County Juvenile Action, 930 P.2d 496, 500-01 (Ariz. Ct. App. 1996); State ex rel. Juvenile Dep't v. Orozco, 878 P.2d 432, 435-36 (Or. Ct. App. 1994); see also Padgett v. Ferrero, 294 F.Supp.2d 1338, 1342-44 (N.D. Ga. 2003) (upholding the Georgia DNA collection law);aff'd, 77 F.3d 1071 (8th Cir. 1996); Kruger v. Erickson, 875 F. Supp. 583, 588-89 (D. Minn. 1995) (upholding Minnesota's DNA collection law).

statute[s]." People v. Peppers, 817 N.E.2d 1152, 1155 (Ill. App. 2004). Appellees are aware of no case invalidating a DNA collection statute that is currently good law.[5]

B. An Appropriate Application of Either the "Totality of the Circumstances" Test or the "Special Needs Test" Supports the District Court's Decision.

The taking of a DNA sample for testing and permanent profile retention pursuant to the DNA Act is a "search" (albeit a minimal one) for purposes of the Fourth Amendment. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616 (1989).[6] In analyzing the Act under the Fourth Amendment, the District Court held that the Act's requirement of DNA submission could be sustained under either the so-called "special needs" exception to the warrant requirement or the totality-of-the-circumstances exception. The District Court found that the latter was "the more appropriate legal framework." JA 10. Under either test, the Acts do not violate the Fourth Amendment's prohibition against unreasonable search and seizure.

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[5] Appellees acknowledge that although it found New Jersey's law constitutional in part, the Superior Court of New Jersey has held that DNA profiles must be expunged from the state and federal systems for individuals who complete their terms of supervision, parole, or probation. See A.A. v. Attorney General, C.A. No. MER-L-0346-04 (N.J. Super. Ct. Law Div. Dec. 22, 2004). The persuasiveness of that decision is currently doubtful. After it came down, the Appellate Division of the Superior Court found the same law constitutional in State v. O'Hagen, 881 A.2d 733 (N.J. Super. Ct. App. Div. Sept. 7, 2005). In addition, the A.A. decision is now on appeal to the New Jersey Supreme Court which granted certification on November 10, 2005. Similarly, appellant's reliance on Doe v. Tankeske, 2005 WL 1220936 (D. Alaska May 18, 2005), is not illuminating for two reasons. First, the judgment available on Westlaw is bereft of analysis. Second, available information indicates that the decision is also under appellate review as of the filing of this brief.

[6] At least one federal court has found that the Fourth Amendment is not implicated in a similar case. Nicholas v. Goord, 2004 WL 1432533 (S.D.N.Y. 2004), cited in Brief for Appellant at 27. That case is currently under review by the United States Court of Appeals for the Second Circuit.

1. Totality of the Circumstances

The Fourth Amendment totality-of-the-circumstances test has been employed by a significant number of courts across the country in upholding DNA statutes. See United States v. Kincade, 379 F.3d 813, 831 (9th Cir. 2004) (cataloguing cases approving DNA testing under totality of circumstances test), cert. denied, __ U.S. __, 125 S. Ct. 1638 (2005). The same result should obtain here because under this test, the dispositive process is weighing the convicted offender's expectation of privacy in the DNA test against the District of Columbia's interests in collecting and permanently maintaining a DNA database.

On the privacy side of the equation, the District Court correctly accepted the overwhelming weight of authority that the intrusion of a DNA test is minimal.[7] There can be little question that obtaining DNA samples from all convicted offenders still serving their sentences and maintaining their DNA profiles at least temporarily is constitutionally justified. Relying upon Griffin v. Wisconsin, 483 U.S. 868 (1987) (upholding probation officer's warrantless search of probationer's apartment), and United States v. Knights, 534 U.S. 112 (2001) (upholding law-enforcement officer's warrantless search of the apartment of a probationer who, as an express part of his probation, was subject to warrantless search), the District Court noted that prisoners, probationers and parolees enjoy a lesser degree of liberty or privacy possessed by the average citizen. JA 12. As a result, the District Court concluded, certainly correctly, that obtaining a DNA sample from such a person, and maintaining it through his or her period of supervision, comports with both the objectives of the penal system and the curtailed privacy expectations. Thus, the District Court correctly concluded that the substantially diminished expectation of privacy that accompanies convicted offenders still

[7] Indeed, the Supreme Court has characterized the drawing of blood as "minimally intrusive." Skinner, 489 U.S. at 625 (blood tests are commonplace, safe, and "'do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity'").

serving their sentences dramatically influences the balancing equation and that DNA collection (and at least temporary retention) from this group of convicted offenders does not violate the Fourth Amendment's proscription against unreasonable searches because the "compelling public interest" in supervision, deterrence, and crime-solving "far outweigh[s]" the "diminished expectation of privacy." JA 13, citing Kincade, 379 F.3d at 839.

The critical flaw in Mr. Johnson's argument that his DNA profile cannot be maintained after his parole is his misguided assessment of the privacy interests of convicted offenders whose sentences have been completed. Mr. Johnson equates them together with "civilians" who have never been convicted of a crime. Br. for Appellant at 32-33. Mr. Johnson incorrectly concludes that what is reasonable under the Fourth Amendment for convicted felons still serving their sentences is unreasonable once the convicted criminal has paid his or her debt to society and has fully resumed civilian life. According to Mr. Johnson, when his period of supervision ended, his privacy expectations increased and were fully restored, and the District of Columbia's justifications for maintaining the DNA profile declined.

Mr. Johnson is simply wrong. As compared with the normal citizen on the street who has never been convicted of a crime, ex-offenders have a significantly reduced expectation of privacy. See Green v. Berge, 354 F.3d 675, 680 (7th Cir. 2004) (Easterbrook, J., concurring) (delineating "four major categories," - prisoners, persons on conditional release, felons whose terms have expired, and the general population who have never been convicted of a crime - with a continuum of differing Fourth Amendment privacy rights as to each). Mr. Johnson relies heavily on the lowest court in New Jersey's opinion in A.A.. On this point, the District Court explicitly criticized the A.A. decision: "This Court cannot buy in on the conclusion reached by the New Jersey Superior Court."

JA 36. The District Court cogently explained the ex-offenders maintain a reduced expectation of privacy in their identities even after the sentences have been completed:

> When an individual completes his or her sentence for a predicate offense, the diminished privacy interest is, to some extent, reclaimed. For example, a former offender's privacy right in his property and person that had been lost while incarcerated or on conditional release are restored. However, that individual does not regain in full, the privacy rights possessed by an individual who has never been convicted of a predicate offense. For example, despite having served their sentences, law enforcement officials routinely retain fingerprints of ex-offenders and even those arrested, and such fingerprints are entered into databases routinely used to help solve both past and future crimes.

JA 37-38.

The District Court is correct. The only persons who fall within the purview of the DNA Acts have been convicted of or found not guilty by reason of insanity of a crime. "A broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions . . . of those who have suffered a lawful conviction." McKune v. Lile, 536 U.S. 24, 36 (2002). "One need only think of Megan's law and its variations across the nation." Green, 354 F.3d at 680 (Easterbrook, J., concurring). Convicted criminals "likewise are subject to limits on ownership of weapons and participation including certain occupations (including law)." Id.

Convicted offenders, whether currently serving or finished serving their sentences, cannot reasonably contend that they have a right to keep their identities secret from the District of Columbia, whose paramount responsibility is to protect public safety. Courts have consistently held that convicted offenders and arrestees have no legitimate expectation of privacy in their identities. See Rise v. Oregon, 59 F.3d 1556, 1560 (9th Cir. 1995) ("[O]nce a person is convicted of one of the felonies included as predicate offenses under [the Oregon law], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information

derived from the blood sampling."), cert. denied, 518 U.S. 1160 (1996); Groceman v. United States Dep't of Justice, 354 F.3d 411, 412-14 (5th Cir. 2004) ("[P]ersons incarcerated after conviction retain no constitutional privacy interest against their correct identification.").[8]

Outweighing these interests are the powerful government interests advanced by the DNA Acts requiring collection and retention of genetic identifying information. On the public interest side, the District of Columbia's interests are monumental and remain undiminished once offenders complete their sentences or terms of supervision. As the United States Court of Appeals for the Third Circuit recently summarized:

> A DNA database promotes increased accuracy in the investigation and prosecution of criminal cases. It will aid in solving crimes when they occur in the future. Equally important, the DNA samples will help to exculpate individuals who are serving sentences of imprisonment for crimes they did not commit and will help to eliminate individuals from suspect lists when crimes occur. While the presence of Sczubelek's DNA in CODIS may inculpate him in the future, it may also exonerate him. The interest in accurate criminal investigations and prosecutions is a compelling interest that the DNA Act can reasonably be said to advance.

Sczubelek, 402 F.3d at 185. There are other public interests as well: the promotion of "the two primary goals of probation – rehabilitation and protecting society from future criminal violations." Knights, 534 U.S. at 119; Sczubelek, 402 F.3d at 186. Collection of DNA deters convicted offenders from committing additional crimes by making them aware that the government has identification information that can incriminate them in the event they commit another crime. The deterrent value of the DNA sample contributes positively to the convicted offender's rehabilitation in that it prevents his commission of more crimes. Moreover, in the event that deterrence fails and

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[8] See also People v. King, 82 Cal. App. 4th 1363, 1374 (Cal. App. 2000) ("As to convicted persons, there is no question but that the state's interest extends to maintaining a permanent record of identity to be used as an aid in solving past and future crimes, and this interest overcomes any privacy rights the individual might retain."), cert. denied, 532 U.S. 950 (2001).

the convicted offender does commit another crime, DNA sampling increases the likelihood that he or she will be apprehended promptly, before more offenses can be committed.

There are also other factors, in addition to the de minimis intrusion, appellant's reduced expectation of privacy, and the District of Columbia's substantial interests that support the reasonableness of the search under the totality analysis. By ensuring that the officials responsible for the DNA sample exercise no discretion in deciding to whom the DNA requirement applies, the DNA Acts protect against arbitrary or abusive enforcement. The absence of a warrant, probably cause, or individualized suspicion does not render the mandatory provision of DNA unreasonable because the DNA Acts ensure evenhanded application and punish unauthorized disclosures of information obtained from the samples. See Rise, 59 F.3d at 1561-62.

Therefore, based on the totality of the circumstances, this Court should affirm the District Court's determinations that the District of Columbia's monumental and compelling interests in a DNA database outweigh Mr. Johnson's minimal legitimate interest in privacy as a convicted offender, and that the DNA Act's requirement for permanent retention does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.

2. Special Needs

Although the District Court did not analyze the DNA Acts under the "special needs" doctrine (JA 10), they also satisfy that test. Generally speaking, under the "special needs" doctrine, special governmental interests "beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Skinner, 489 U.S. at 619. In "special needs" cases, the Supreme Court "employ[s] a balancing test that weigh[s] the intrusion on the individual's interest in privacy against the 'special needs' that support[] the program." Ferguson v. City of Charleston,

532 U.S. 67, 78 (2001). The doctrine requires the court to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989).

Multiple courts have upheld DNA statutes on the basis of "special needs," and appellant fails to cite a single opinion rejecting "special needs." See, e.g., Kincade, 379 F.3d at 830-31 (collecting the federal and state court decisions relying on the special needs analysis); United States v. Reynard, 220 F.Supp.2d 1142 (S.D. Cal. 2002) (combining with reasonableness analysis to find that the contribution to a more accurate criminal justice system and enhancing the ability to solve future crimes were special needs beyond the normal need for law enforcement).[9]

First, according to Mr. Johnson, the United States Supreme Court recently revisited the constitutionality of a warrantless search of a probationer in United States v. Knights, and disapproved of the "special needs" analysis. The Supreme Court did not disapprove of "special needs" in Knights. This reasoning misapprehends the impact of Knights on the special-needs doctrine.

As noted, in Knights the Supreme Court reviewed a warrantless search of the apartment of a probationer who, as an express part of his probation, was subject to warrantless search. The warrantless search of Knights' apartment occurred after a law-enforcement officer, as part of a vandalism investigation, observed suspicious activity at Knights' apartment and suspicious objects

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[9] See also State v. Steele, 802 N.E.2d 1127, 1135-37 (Ohio Ct. App. 2003), which persuasively harmonizes the special needs and the reasonableness balancing approaches by distinguishing the primary purpose of the DNA statute, "to fill and maintain a DNA database, a purpose distinct from the regular needs of law enforcement," from the ultimate purpose to "obtain[] a DNA sample from a person to assist law enforcement." Id. at 1136.

in plain view in the truck parked in the driveway. Knights, 534 U.S. at 115. The Supreme Court did not apply the special-needs doctrine because the search was conducted for normal law enforcement purposes, to discover and seize evidence of vandalism. Instead, the Court concluded that the particular search was reasonable when evaluated under the general Fourth Amendment totality-of-the-circumstances test. Id. at 122. Appellant's reliance on Knights is misplaced.

Second, Mr. Johnson argues that the special-needs analysis in Griffin now appears diminished or qualified by the decisions in Edmond and Ferguson. This reasoning is misguided because it does not take into account the distinctions between the programs struck down in City of Indianapolis v. Edmond, 531 U.S. 32, 42-43 (2000), and Ferguson v. City of Charleston, 532 U.S. 67, 78 (2001), and the DNA Acts.

In Edmond, the Supreme Court struck down a motor vehicle drug checkpoint program whose primary purpose was to discover and seize illegal drugs and prosecute the offenders, an ordinary law enforcement purpose. Edmond, 531 U.S. at 42-43. The program allowed police to stop a predetermined number of motorists on a public highway without a warrant and without probable cause. Id. at 35.

Likewise in Ferguson, the Supreme Court struck down a state hospital program that required non-consensual drug testing of all maternity hospital patients suspected of using cocaine for the purpose of detecting the presence of cocaine for possible criminal prosecution. Positive results were reported to police. Ferguson, 532 U.S. at 70-73. According to the Court, "[w]hile the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal." Id. at 83-84.

In its analysis of Edmond and Ferguson, the lower court failed to consider the key distinctions between the hospital drug testing and motor vehicle checkpoints and DNA testing. One critical distinction is that unlike the ordinary citizens subjected to searches in Edmond and Ferguson, the persons subject to DNA testing have been convicted of crime, adjudicated delinquent of an offense equivalent to a crime, or found not guilty by reason of insanity of a crime. Another critical distinction is that unlike the programs struck down in Edmond and Ferguson, the DNA Act is not one "whose primary purpose [is] to detect evidence of ordinary criminal wrongdoing." Edmond, 531 U.S. at 38.

Indeed, DNA testing, unlike vehicle searches and drug tests, would not reveal this information. The DNA samples in fact prove nothing "by themselves regarding whether a donor has committed a crime and therefore, do[] not detect ordinary criminal wrongdoing." State v. Martinez, 78 P.3d 769, 773 (Kan. 2003). Rather, the samples "merely offer the potential for solving crimes that have not yet occurred or crimes that have occurred but are not specifically being looked at when taking one's sample." Miller v. United States Parole Comm'n, 259 F.Supp.2d 1166, 1176 (D. Kan. 2003). It is "this distinction that removes the collection and cataloging of DNA information from the normal need for law enforcement." Martinez, 78 P.3d at 774. Thus, contrary to Mr. Johnson's analysis, DNA testing meets the "special needs" test set forth in Edmond and Ferguson.

Third, Mr. Johnson contends that the DNA Acts violate the Fourth Amendment because there is an absence of any reasonable suspicion that he is guilty of an unsolved or future crime. Using the special needs analysis, the Supreme Court and other courts have upheld warrantless searches conducted without probable cause where the government possessed individualized

suspicion. Griffin, 483 U.S. at 871 (probationer's search was carried out pursuant to state regulation requiring "reasonable grounds"); New Jersey v. T.L.O., 469 U.S. 325, 342 (1985) (holding that, in context of state's special need of preserving school discipline, a search of a student by school authorities is constitutional "where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school"). However, even in those cases, the Court did not hold that individualized suspicion is an element essential to the constitutionality of a special-needs search. Romo v. Champion, 46 F.3d 1013, 1019 n.3 (10th Cir. 1995), cert. denied, 516 U.S. 947 (1995).

The United States Supreme Court has made clear that individualized suspicion is not a constitutional prerequisite in all cases. United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976); Romo, 46 F.3d 1019. "[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." Skinner, 489 U.S. at 624; see also Martinez-Fuerte, 428 U.S. at 561 (stating that, while "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,]...the Fourth Amendment imposes no irreducible requirement of such suspicion").

Because the needs addressed by DNA statutes are clearly special, numerous courts - even after Edmond and Ferguson - have concluded that collecting DNA from convicted offenders and storing their DNA profiles in the Combined DNA Indexing System ("CODIS") serves special law-enforcement interests. See, e.g., Green v. Berge, 354 F.3d 675, 677-79 (7th Cir, 2004) (DNA collection is special need because it is not undertaken for investigation of specific crime); United States v. Kimler, 335 F.3d at 1146 (10th Cir. 2003) ("The DNA Act, while implicating the Fourth Amendment, is a reasonable search and seizure under the special needs exception to the Fourth Amendment's warrant requirement because the desire to build a DNA database goes beyond the

ordinary law enforcement need"), cert. denied, 540 U.S. 1083 (2003); Roe v. Marcotte, 193 F.3d 72, 79-82 (2d Cir. 1999) (DNA collection serves special need to combat recidivism by sex offenders). Recidivism is a special law enforcement problem which DNA databases help to address. State v. Steele, 802 N.E.2d 1127, 1132-37 (Ohio App. 1 Dist. 2003); State v. Surge, 94 P.3d 345 (Wash. Ct. App. 2004), review granted, 111 P.3d 1190(Wash. 2005). Thus, the DNA collection requirement is an integral part of a comprehensive law-enforcement effort to protect the public from convicted offenders by deterring them from committing additional offenses and, when deterrence fails, by holding them accountable for their crimes promptly via DNA identification.

For all the foregoing reasons, DNA collection, testing, and permanent retention under the federal and D.C. DNA Acts fit within the "special needs" doctrine.

III. Appellant's Other Constitutional Claims Are Equally Without Merit

A. The DNA Laws Do Not Violate The Ex Post Facto Clause

The *ex post facto* clause in Article I of the Constitution provides that, "No State shall . . . pass any . . . ex post facto Law." U.S. Const. Art. I, § 9, cl.3. This provision has been interpreted by the Supreme Court:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time that the act was committed, is prohibited as *ex post facto*.

Collins v. Youngblood, 497 U.S. 37, 42 (1990), quoting Beazell v. Ohio, 269 U.S. 167, 169-70 (1925). Thus, the essence of Mr. Johnson's challenge is that the DNA Act somehow raises the penalty for unarmed robbery from whatever the law provided when he acted or was convicted. Johnson v. United States, 529 U.S. 694, 699 (2000). Because the DNA Act and the D.C. Code

provision implementing it in the District of Columbia had not been passed at the time of his conviction, there is no dispute that the laws operate retroactively with regard to him. Significantly, because the DNA Act itself is not penal and does not impose any criminal punishment for past conduct, it cannot violate the *ex post facto* clause. See United States v. Stegman, 295 F.Supp.2d 542, 546-48 (D. Md. 2003); United States v. Sczubelek, 255 F. Supp. 2d 315 (D. Del. 2003) (DNA Backlog Elimination Act does not violate *ex post facto* clause in case of probationer convicted of bank robbery), aff'd. The legislative intent behind both the federal and the D.C. Code provision designating qualifying offenses both emphasize non-punitive purposes. The purpose of the DNA Act as applied to the District of Columbia is to reduce the backlog of DNA samples which have been collected but not analyzed or re-analyzed using more modern technology. H.R. Rep. 106-900(I), 2000 WL 1420163 *8 (Sept. 26, 2000). The purpose is to solve crimes and to protect the innocent. Id. at ** 8-10 (citing both the "public safety costs" of allowing offenders to go unidentified and risk committing additional crimes and "the [increased] risks of convicting an innocent person"). Id. at *10. The Report of the Council of the District of Columbia echoed these sentiments by stating that its purpose is to support the effort "to link evidence from crime scenes for which there are no suspects to DNA samples of convicted offenders on file in the system. See JA 209 (Council of the District of Columbia Report on Bill 14-63 (April 24, 2001)). The D.C. Council commented:

> Bill 14-63 is designed to reconcile two serious and competing considerations. First, the list of qualifying offenses must be broad enough to include all crimes likely to involve DNA evidence, and to assist law enforcement authorities to successfully identify and prosecute criminals. Second, the Committee must be mindful of the important privacy interests that are implicated by this legislation. . . . It is the Committee's view that there mere possibility that someone convicted of a property crime or low level felony may commit a more serious crime in the future is insufficient to justify the significant invasion of privacy at issue here. The Committee believes that Bill 14-63 strikes the appropriate balance between law enforcement purposes and individual privacy rights.

JA 214.[10] Accordingly, because the purpose of the challenged laws is not punitive, they do not violate the *ex post facto* clause.

To the extent that Mr. Johnson's challenge is that the existence of a sanction for failing to submit the DNA sample (either the potential revocation of his probation or possible conviction for the misdemeanor offense of failing to provide a sample) constitutes increased punishment, he would also fail.[11] First, even the potential revocation of his probation does not increase his punishment for the unarmed robbery convictions. While on probation, Mr. Johnson was required to obey all federal, state, and local laws and to comply with all instructions of his probation officer. Nothing about those conditions was frozen in time. In other words, Mr. Johnson, like any other person, should refrain from committing any existing crime and nothing about the DNA Acts increases the penalty for his unarmed robbery convictions. United States v. Stegman, 295 F.Supp.2d at 547. Likewise, the misdemeanor for failure to cooperate with the DNA collection is a criminal violation independent of Mr. Johnson's convictions, and Mr. Johnson has avoided prosecution for the

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[10] To the extent the DNA Acts imposed a new legal consequence on Mr. Johnson, it could not have upset his reliance interests or settled expectations to a degree sufficient to create an impermissible "retroactive effect. " Landgraf v. USI Film Products, 511 U. S. 244, 270 (1994) (stressing that *ex post facto* analysis is guided by considerations of "reasonable reliance" and "settled expectations"). From the day Mr. Johnson was sentenced, one condition of his supervision has been to refrain from violation of any law (federal, state, and local). Nothing about that condition excluded federal or D.C. laws enacted after sentencing. Thus, Mr. Johnson has known or should have known all along that his probation could be revoked for refusing to comply with subsequently enacted laws, like the DNA Acts.

[11] Because Mr. Johnson has been discharged from his period of supervised release, this aspect of his initial challenge appears to be either moot or not yet ripe. Mr. Johnson's provision of a blood sample pursuant to the Court's Order to resolve his motion for a preliminary injunction may render his challenge not ripe because he is not currently under any reasonable threat of prosecution.

misdemeanor by submitting his sample. Importantly, the law in the District of Columbia required his cooperation at the time he refused to provide a sample. Id. at 548.

Second, appellant may not challenge the DNA Act as impermissibly retroactive because it provides for the collection of a DNA sample based solely on his prior offense because the DNA Act is not penal in nature. Requiring convicted persons to provide blood samples for DNA testing has been held not to be punitive or violative of the *ex post facto* clause. Id. at 548. Moreover, as noted above, while the D.C. Council was clearly concerned about the privacy interests at stake in requiring DNA collection, the Supreme Court has "long recognized that the Double Jeopardy Clause [which turns on the same criminal punishment standard as the Ex Post Facto Clause] does not prohibit the imposition of all additional sanctions that could, in common parlance, be described as punishment . . . [but] protects only against the imposition of multiple criminal punishments for the same offense." Hudson v. United States, 522 U.S. 93, 98-99 (1997) (internal quotation marks and citations omitted; emphasis in original). The DNA Acts clearly do not impose criminal punishment. Id. at 99-100.

The test for distinguishing between civil and criminal penalties is set forth in Hudson, 522 U.S. at 99-100. The Court must first ask whether the legislature intended the statute to be civil or criminal. See Hudson, 522 U.S. at 99. If the legislature intended a civil penalty, the Court must go on to examine "whether the statutory scheme was so punitive either in purpose or effect . . . as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty." Id. (interior quotation marks and citations omitted). The burden of proof is high: "only the clearest proof will be sufficient to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Id. at 100. Mr. Johnson cannot meet that burden here. Cf. E.B. v.

Verniero, 119 F.3d 1077, 1099-1100 (3d Cir. 1997) ("Dissemination of information about criminal activity has always held the potential for substantial negative consequences for those involved in that activity. Dissemination of such information in and of itself, however, has never been regarded as punishment when done in furtherance of a legitimate governmental interest."), reh'g denied, 127 F.3d 298 (3d Cir. 1997), cert. denied, 522 U.S. 1109 (1998). In addition, "the mere presence of [a deterrent] purpose is insufficient to render a sanction criminal, as deterrence 'may serve civil as well as criminal goals.'" Hudson, 522 U.S. at 105 (quoting United States v. Ursery, 518 U.S. 267, 292 (1996)). In the present case, while the DNA Act may be expected to prevent future offenses, this serves the civil purpose of promoting public safety. "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' for double jeopardy [and ex post facto][12] purposes would severely undermine the Government's ability" to effectively protect the public against the risk of recidivism by convicted sex offenders. See Hudson, 522 U.S. at 105.

Accordingly, the District Court properly rejected Mr. Johnson's claim that the DNA Acts violate the *ex post facto* clause.

B. There is No Violation of Equal Protection

Mr. Johnson fares no better with an equal protection challenge because the law applies to everyone convicted of the specified offenses. In essence, the equal protection guarantee requires that similarly situated persons be treated similarly. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985). The Equal Protection Clause protects from "disparity in treatment . . . between classes of individuals whose situations are arguably indistinguishable." Ross v. Moffitt, 417 U.S. 606, 600 (1979). To bring an action under the Equal Protection Clause, a person must show that the

[12] The Hudson double jeopardy analysis applies under the *ex post facto* clause as well.

government has failed to "afford similar treatment to similarly situated persons." News America Pub., Inc. v. FCC, 844 F.2d 800, 809 (D.C. Cir. 1988). To the extent that there are meaningful differences between individuals, they are not similarly situated for equal protection purposes. City of Cleburne, 473 U.S. at 441. Thus, "[t]he threshold inquiry in evaluating an equal protection claim is . . . whether a person is similarly situated to those persons who allegedly received favorable treatment." Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia, 93 F.3d 910, 924 (D.C. Cir. 1996) (internal quotation omitted), cert. denied, 520 U.S. 1196 (1997).

Mr. Johnson cannot get over the threshold. There are meaningful differences between those persons in our society who have been convicted of crimes and those who have not. As a person placed on probation, Mr. Johnson was subject to being incarcerated and prisoners do not constitute a suspect class. See Nicholas v. Riley, 874 F. Supp. 10, 12 (D.D.C. 1995), aff'd 1995 WL 686227 (D.C. Cir. 1995), cert. denied, 517 U.S. 1158 (1996); see also United States v. Woods, 888 F.2d 653, 656 (10th Cir. 1989)(pre-sentence residents of halfway house are not a suspect class);cert. denied, 494 U.S. 1006 (1990); United States v. Cyrus, 890 F.2d 1245, 1248 (D.C. Cir. 1989) (rejecting argument that the criminal justice system in the United States discriminates against racial minorities in challenge to federal sentencing guidelines for powder and crack cocaine). The DNA Acts make no distinction of any kind in application to any group of people convicted of the qualifying offenses. The laws represent a rational choice and vindicate a substantial governmental interest. The Supreme Court has explained that this "rationally related" standard is extremely deferential:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional

> rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are plausible reasons for Congress' action, our inquiry is at an end. This standard of review is a paradigm of judicial restraint. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

FCC v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993) (internal quotation marks and citations omitted).

The DNA Acts easily meet the "rationally related" standard. The purpose of the DNA Acts is to promote public safety by protecting against the risk posed by offenders who might otherwise go unidentified. See JA 214 (Committee Report at 6). Accordingly, the D.C. Council's "plausible reasons" for enacting D.C. Code provision at issue bring the equal protection inquiry to an end. See Beach Communications, 508 U.S. at 313-14. Mr. Johnson's equal protection claim was properly dismissed as a matter of law.

C. Appellant's Substantive and Procedural Due Process Claims Under the Fifth Amendment Are Without Merit

The DNA Acts also do not violate the Due Process Clause of the Fifth Amendment. In Schmerber, the Supreme Court held that the extraction of blood by medical personnel in an acceptable environment is not offensive to the ordinary sense of justice and does not violate the Due Process Clause. Schmerber, 384 U.S. at 759-60 (citing Breithaupt v. Abram, 352 U.S. 432, 436-37 (1957)). At least one court considering a similar challenge to the taking of DNA samples from convicted offenders found no violation of due process based on the absence of a cognizable liberty interest. See, e.g., Miller, 259 F.Supp.2d at 1169-70. No hearing is necessary when the only requirement for giving a sample is conviction of a predicate offense. Miller, 259 F.Supp.2d at 1169

(citing Boling v. Romer, 101 F.3d 1336, 1341 (10th Cir. 1997), upholding constitutionality of a similar state statute). Because Mr. Johnson has been convicted of a predicate offense, Mr. Johnson's Fifth Amendment claims lack merit and were correctly dismissed.[13]

IV. Mr. Johnson's Statutory Claims And Other Arguments Also Fail As a Matter of Law

A. There is No Cause of Action Under HIPAA Or the International Convention for the Elimination of All Forms of Racial Discrimination

Principles of sovereign immunity counsel strongly against implying or creating causes of action against the government. See Lane v. Peña, 518 U.S. 187 (1996); United States v. Nordic Village, 503 U.S. 30 (1992); Clark v. Library of Congress, 750 F.2d 89, 101-02 (D.C. Cir. 1984); Cox v. Secretary of Labor, 739 F. Supp. 28, 30 (D.D.C. 1990); see also United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Mitchell, 445 U.S. 535, 538 (1980). Indeed, "private rights of action ... must be created by Congress." Alexander v. Sandoval, 532 U.S. 275, 286 (2001); see also Gonzaga Univ. v. Doe, 536 U.S. 273 (2002). Congress did not do so in the text of the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 ("HIPAA"), and it creates no private right of action. See Brock v. Provident America Ins. Co., 144 F.Supp.2d 652, 657 (N.D. Tex. 2001) (holding that HIPAA does not create a private right of action). Mr. Johnson has failed to identify any language in the HIPAA regarding suits for money damages or any

[13] Appellant has abandoned his claim for damages under 42 U.S.C. § 1983 by failing to advance any argument demonstrating any error below in the dismissal of that claim. Importantly, section 1983 does not apply to federal officials acting under color of federal law. Williams v. United States, 396 F.3d 412 (D.C. Cir. 2005) (holding that a federal official making an arrest pursuant to state law cannot be sued under § 1983 because his authority to act comes from Federal law not state law); see Heck v. Humphrey, 512 U.S. 472, 480 (1994) (stating that section 1983 provides access to a federal forum for claims of unconstitutional treatment at the hands of state officials).

other kind of relief against the federal government or its employees. As a result, there is no waiver of sovereign immunity and Mr. Johnson's claims are insufficient as a matter of law.

Mr. Johnson devotes only a single paragraph to his claim under the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), which was ratified by the United States in 1994. See State Dept., Treaties in Force 422-423 (June 1996). The CERD endorses "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." Annex to G.A. Res. 2106, 20 U.N. GAOR Res. Supp. (No. 14) 47, U.N. Doc. A/6014, Art. 2(2) (1965). Significantly, the CERD does not provide any private right of action and none exists because the CERD is not self-executing. Al Odah v. United States, 321 F.3d 1134, 1146-47 (D.C. Cir. 2003) (citations omitted), reversed on other grounds, Rasul v. Bush, 540 U.S. 1003 (2004); see Flores v. Southern Peru Copper Corp., 343 F.3d 140, 163 (2d Cir.2003) ("Self-executing treaties are those that 'immediate[ly] creat[e] rights and duties of private individuals which are enforceable and [are] to be enforced by domestic tribunals.' Non-self-executing treaties 'require implementing action by the political branches of government or ··· are otherwise unsuitable for judicial application.'"). In any event, Mr. Johnson's failure to develop the argument effectively concedes the issue here. See July 27, 2005 Order; City of Waukesha v. Environmental Protection Agency, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) (*per curiam*) (argument inadequately raised in opening brief is waived).

B. Mr. Johnson's Claims Involving Speculative Future Harms Are Not Ripe

Based on Mr. Johnson's admission that he has been convicted of a covered offense, the issue becomes a legal one, and is not factual. In arguing his case, Appellant improperly relies on

speculation, not fact, because even if there is a chance of "accidental database matches" (Brief for Appellant at 42), the potential, possible, speculative harms posed by the risk of either an accurate or inaccurate genetic profile being stored, retrieved, or disseminated is currently irrelevant because there is no such case or controversy between the parties in this case at the moment. Allen v. Wright, 468 U.S. 737, 750 (1984); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982); see Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 37 (1976). Beyond the actual extraction of blood, Mr. Johnson has failed to allege any concrete or particularized injury. His expert's questionable opinions concerning the reliability of DNA evidence generally and related matters are a red herring because Mr. Johnson has yet to allege or suffer any injury based on his DNA profile. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (holding that a plaintiff bears the burden of establishing standing and to meet the standing requirements of Article III, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."); Allen, 468 U.S. at 751. If a day dawns in the future where Mr. Johnson's DNA profile plays some as-yet unknown role in a criminal prosecution of him, he will presumably have ample opportunity then to present evidence and argument in support of whatever relief he may seek, including but not limited to a motion to suppress DNA evidence. Until then, any opinion would be improperly advisory. See Princeton Univ. v. Schmid, 455 U.S. 100, 103 (1982) (case must involve present, live controversy if court is to avoid advisory opinions).

CONCLUSION

Appellees respectfully submit that the District Court's decision should be affirmed.

KENNETH L. WAINSTEIN
United States Attorney

MICHAEL J. RYAN
Assistant United States Attorney

JANE M. LYONS
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Brief for Appellees has been made by mailing a copy thereof by first class United States mail, postage prepaid and marked for delivery to:

Todd A. Cox, Esq.
Timothy P. O'Toole, Esq.
Richard Schmechel, Esq.
Alison Flaum, Esq.
Public Defender Service for D.C.
633 Indiana Avenue, N.W.
Washington, D.C. 20004

on this ___th day of November, 2005.

JANE M. LYONS
Assistant United States Attorney
555 4th Street, N.W. - Room E4822
Washington, D.C. 20530
(202) 514-7161