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MISCELLANEOUS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-50380

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

THOMAS CAMERON KINCADE,
Defendant-Appellant.

SUPPLEMENTAL EN BANC BRIEF FOR THE UNITED STATES

INTRODUCTION

Almost nine years ago, this Court upheld against a Fourth Amendment challenge a state law that mandates the collection of a DNA sample from prisoners and probationers who have been convicted of serious offenses. *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995), cert. denied, 517 U.S. 1160 (1996). Numerous other federal and state appellate courts, some of which relied on *Rise* as persuasive authority, see, *e.g.*, *Boling v. Romer*, 101 F.3d 1336, 1339-40 (10th Cir. 1996); *Gaines v. State*, 998 P.2d 166, 171-73 (Nev. 2000) (per curiam), likewise rejected Fourth Amendment challenges to comparable state DNA collection laws, see, *e.g.*, *Roe v. Marcotte*, 193 F.3d 72, 76-82 (2d Cir. 1999); *Jones v. Murray*, 962 F.2d 302, 305-08 (4th Cir. 1992); *Landry v. Attorney General*, 709 N.E.2d 1085, 1087-

92 (Mass. 1999); *State v. Olivas*, 856 P.2d 1076, 1083-86 (Wash. 1993).

Against this backdrop, Congress enacted the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. 14135 *et seq*. (the "DNA Act") (Addendum A), which requires, among other things, federal probation officers to collect the DNA of probationers, supervised releasees, and parolees (collectively "probationers") who have been convicted of a qualifying federal offense. 42 U.S.C. 14135a(a)(2); see 42 U.S.C. 14135a(d) (listing qualifying offenses). The Act makes cooperation from qualifying offenders in the provision of a DNA sample an express condition of supervised release, 42 U.S.C. 14135c, and makes failure to cooperate in providing a sample a misdemeanor offense, 42 U.S.C. 14135a(a)(5).

After the DNA sample is collected, the Probation Office must provide it to the FBI for analysis and entry into the Combined DNA Index System (CODIS), a system comprising the national, state, and local DNA databases and the computer linkages among them.[1] 42 U.S.C. 14135a(b). The DNA profile derived from the DNA sample serves as a 'genetic fingerprint' in that it uniquely identifies an

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[1] The national DNA identification index maintained by the FBI contains (1) DNA identification records of persons convicted of crimes; (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. 42 U.S.C. 14132(a).

individual, but it does not convey any other information about the person, such as physical or medical characteristics.[2] H.R. Rep.No. 106-900(I), 106th Cong., 2d Sess. (Sept. 26, 2000), at *27, *36. Strict confidentiality and federal privacy law protect against improper disclosure of the DNA record in CODIS. See 42 U.S.C. 14132(b)(3) (identifying limited purposes for which DNA sample and analyses may be disclosed); 42 U.S.C. 14135e(c) (providing criminal penalty for unauthorized disclosure or possession of DNA sample or analysis result).

Since the enactment of the DNA Act, federal and state appellate courts – with the exception of the panel decision in this case – have continued to reject constitutional challenges to DNA collection statutes, including the new federal law. See *Green v. Berge*, 354 F.3d 675, 676-79 (7th Cir. 2004) (upholding Wisconsin DNA law); *Groceman v. United States Dep't of Justice,* 354 F.3d 411, 412-14 (5th Cir. 2004) (per curiam) (upholding DNA collection from prisoners under federal DNA Act); *United States v. Plotts*, 347 F.3d 873, 877 (10th Cir. 2003) (upholding DNA collection from probationers under federal DNA Act); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir.) (same), cert. denied, 124

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[2] DNA records in the national DNA index contain only the following information: (1) an agency identifier for the agencies submitting the DNA profile; (2) the specimen identification number; (3) the DNA profile; and (4) the name of the DNA personnel associated with the DNA analysis. H.R. Rep. No. 106-900(I), at *27.

S. Ct. 945 (2003); *Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir. 2003) (rejecting Fourth Amendment challenge to Texas DNA law); *People v. Adams*, No. H024504, 2004 WL 119106 (Cal. Ct. App. Feb. 5, 2004) (upholding California DNA law); *In re D.L.C.*, Nos. 2-02-163-CV *et al.*, 2003 WL 22976095, at *8-*11 (Tex. App. Dec. 18, 2003) (rejecting juvenile probationers' challenge to Texas DNA law); *State v. Steele*, No. C-020693, 2003 WL 23018548, at *4-*10 (Ohio App. Dec. 12, 2003) (upholding Ohio DNA law); *State v. Martinez*, 78 P.3d 769 (Kan. 2003) (rejecting probationer's challenge to Kansas DNA law). Because the nonconsensual collection of DNA via a blood draw from a qualifying offender on supervised release is reasonable under the Fourth Amendment, this Court should likewise reject defendant's constitutional challenge here.

STATEMENT

Pursuant to the DNA Act, defendant's probation officer notified him in early 2002 that he was subject to the law's DNA collection requirement on account of his armed bank robbery conviction. ER 2. Defendant refused to provide a blood sample[3] on March 25, 2002, and April 16, 2002, explaining that

[3] The DNA Act itself does not require a blood sample. It directs the probation offices and Bureau of Prisons to "collect a DNA sample," 42 U.S.C. 14135a(a), and defines "DNA sample" to mean "a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out." 42 U.S.C. 14135a(c)(1). The FBI, however, considers blood to offer the most dependable

he would do so only if threatened with a significant prison sentence. ER 2. The probation office accordingly recommended that defendant's supervised release be revoked. On July 15, 2002, the district court rejected defendant's constitutional challenges to the DNA Act and found him in violation of the terms of his supervised release for refusing to follow the instructions of his probation officer. ER 26-37. The district court sentenced defendant to four months' imprisonment and two additional years of supervised release, but stayed the term of imprisonment pending appeal. *Id.* at 35-37. On April 14, 2003, however, the district court decided to lift the stay upon finding that defendant had tested positive for drugs. CR 89. After the government filed its petition for rehearing, it confirmed that defendant provided a DNA sample on July 23, 2003, while in the custody of the Bureau of Prisons.[4] See Addendum B.

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source of analyzable DNA.

[4] Defendant's challenge to the constitutionality of the DNA collection condition is not moot, however, because he is serving until August 24, 2004, the extended term of supervised release stemming from his refusal to comply with the DNA condition. See *United States v. Radmall*, 340 F.3d 798, 800 n.3 (9th Cir. 2003) ("should [defendant] succeed on appeal, the district court would have discretion to decrease the term of supervised release that he is currently serving"); *United States v. Verdin*, 243 F.3d 1174, 1178 (9th Cir. 2001).

ARGUMENT

I. THE SUPERVISED RELEASE CONDITION REQUIRING DEFENDANT TO PROVIDE A DNA SAMPLE IS REASONABLE UNDER THE FOURTH AMENDMENT'S TRADITIONAL TOTALITY-OF-THE-CIRCUMSTANCES TEST.

"The Fourth Amendment prohibits only unreasonable searches." *Bell v. Wolfish*, 441 U.S. 520, 558 (1979) (upholding visual body-cavity searches of pretrial detainees). In *United States v. Knights*, 534 U.S. 112 (2001), the Supreme Court upheld the search of a home, "the chief evil against which the wording of the Fourth Amendment is directed," *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972), despite the absence of a warrant or probable cause, because the target of the search was not an ordinary citizen but a probationer. The Court explained that "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118-19 (internal quotation marks omitted); see *United States v. Terry-Crespo*, No. 03-30085, 2004 WL 177860, at *5 (9th Cir. Jan. 29, 2004) ("The touchstone of our search and seizure jurisprudence remains the Fourth Amendment's textual requirement that any

search be 'reasonable,' a determination we make by weighing the competing interests of individual security and privacy with the need to promote legitimate governmental interests." (citing *Knights*)). The *Knights* totality-of-the-circumstances approach mirrors the approach this Court took in *Rise* when it upheld Oregon's DNA collection law. See 59 F.3d at 1559-62.

Requiring probationers to provide a DNA sample via a blood draw as a condition of their probation or supervised release, see 42 U.S.C. 14135a(a)(2), is reasonable under the totality-of-the-circumstances test set out in *Knights*. The blood draw constitutes a modest intrusion, probationers have a substantially reduced expectation of privacy, and the governmental interests the law serves are compelling. See *Rise*, 59 F.3d at 1559-62.

A. The Intrusion is Minimal.

1. A Blood Draw Constitutes a Modest Fourth Amendment Intrusion.

To be sure, "[t]he extraction of blood * * * to collect a DNA sample implicates Fourth Amendment rights," *Groceman*, 354 F.3d at 413, because the "physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989). The Supreme Court has

repeatedly recognized, however, that the physical intrusion worked by a blood draw does not "infringe significant privacy interests." *Id.* at 625. Indeed, in upholding suspicionless blood and urine testing of railroad employees, the Court in *Skinner* concluded that urine testing, which is a common condition of probation and to which defendant here does not object, presented "[a] more difficult question" than blood tests, because, by requiring the subject "to perform an excretory function traditionally shielded by great privacy," such tests "raise concerns not implicated by blood * * * tests." 489 U.S. at 626.[5]

The Supreme Court similarly observed in *Schmerber v. California*, 384 U.S. 757, 771 (1966), that blood testing is "commonplace" and "for most people * * * involves no risk, trauma, or pain," in the course of upholding the admission at the defendant's trial of the results of a nonconsensual blood test. The *Schmerber* Court relied on *Breithaupt v. Abram*, 352 U.S. 432 (1957), which

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[5] Defendant contends that *Skinner* is distinguishable on the ground that it "did not involve a law enforcement search but an employment search in a 'highly-regulated industry' in order to ensure safety of railway travel." Appellant's Opp. To Govt.'s Pet. For Reh'g And Reh'g En Banc ("Opp."), at 9. That distinction is without force. First, like railroad employees, probationers are "highly regulated." See, *e.g.*, *Green*, 354 F.3d at 680 (Easterbrook, J., concurring) (probationers "remain subject to substantial controls"). Second, the DNA test serves an important public safety goal just like the tests in *Skinner*. Finally, the blood tests in *Skinner* were actually more intrusive than the DNA test at issue here, because they "can reveal a host of private medical facts about an employee," 489 U.S. at 617, whereas the DNA test reveals nothing other than the offender's identity.

upheld a conviction obtained in part through the admission of the results of a blood test taken while the defendant was unconscious. The *Breithaupt* Court found that blood testing constitutes a "slight * * * intrusion * * * to which millions of Americans submit as a matter of course nearly every day." *Id.* at 439.[6]

2. Probationers Have a Substantially Diminished Expectation of Privacy.

The DNA collection requirement thus works only a modest Fourth Amendment intrusion on a class of individuals – probationers – whose privacy rights are "significantly diminished," *Knights*, 534 U.S. at 121, because probation is "a form of criminal sanction," and "[i]nherent in the very nature" of that sanction is that probationers "'do not enjoy the absolute liberty to which every

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[6] Defendant also seeks to distinguish these cases (Opp. at 9-10), contending that the blood was drawn on probable cause and did not involve a "forced" extraction of blood. But the level of suspicion does not affect the extent of the physical intrusion, which the Supreme Court has consistently identified as modest, and the drawing of blood was nonconsensual in both *Schmerber* and *Breithaupt*. Moreover, although blood is drawn from probationers without probable cause or individualized suspicion, the Supreme Court made clear in *Knights* that the government is justified in viewing probationers categorically as a continuing threat to public safety. 534 U.S. at 119-21. In addition, the blood draws in *Schmerber* and *Breithaupt* were searches for evidence of a crime, whereas the blood draw here is "for the purpose of adding to a record of identity." *Landry*, 709 N.E.2d at 1092. As such, the need for "probable cause or individual suspicion * * * is eliminated." *Ibid.* Cf. *Illinois v. Lidster,* 124 S. Ct. 885, 889 (2004) (distinguishing unconstitutional vehicle checkpoints designed to uncover evidence that motorist is committing drug crime from valid checkpoint designed to obtain information from motorist-witnesses regarding crime under investigation).

citizen is entitled.'" *Id.* at 119 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). See *Latta v. Fitzharris*, 521 F.2d 246, 251 (9th Cir. 1975) (en banc) (probationer's expectation of privacy is "severely diminished "). A court granting probation accordingly "may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Knights*, 534 U.S. at 119. Common conditions of probation include drug testing, visits by probation officers at any time, and physical searches of the probationer's home, person, and other property without a warrant or probable cause. See, *e.g.*, *Green*, 354 F.3d at 680 (Easterbrook, J., concurring) (probationers "remain subject to substantial controls").

3. Convicted Offenders and Arrestees Have no Legitimate Expectation of Privacy in their Identity.

Another factor weighing in favor of the reasonableness of the DNA collection condition is the fact that the only information obtained from the blood draw is the probationer's identity. As mentioned above, the DNA profile in CODIS uniquely identifies an individual, but does not contain any other information about the person, such as physical or medical characteristics. H.R. Rep. No. 106-900(I), at *27, *36; compare *Skinner*, 489 U.S. at 616-17 ("The ensuing chemical analysis of the [blood] sample to obtain physiological data is a

further invasion of the tested employee's privacy interests," for it "can reveal a host of private medical facts about an employee").

Convicted offenders cannot reasonably contend that they have a right to keep their identity secret from the State, whose paramount responsibility is to protect public safety. Courts, including this one, have consistently held that convicted offenders and even arrestees have no legitimate expectation of privacy in their identity. See *Rise*, 59 F.3d at 1560 ("[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."); *Groceman,* 354 F.3d at 413-14 ("[P]ersons incarcerated after conviction retain no constitutional privacy interest against their correct identification."); *Jones*, 962 F.2d at 306 (noting "universal approbation" of routine booking procedures and observing that "when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it.");[7] *People v. King*, 82 Cal. App. 4th 1363, 1374 (Cal. Ct. App. 2000) ("As to

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[7] In upholding law enforcement's authority to obtain fingerprints from individuals who have been arrested, Judge Augustus Hand observed:

> Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or

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."); cf. *Smith v. Doe*, 123 S. Ct. 1140, 1150-52 (2003) (upholding against ex post facto challenge Alaska Sex Offender Registration law that posts information about the offender on the Internet).

4. Federal Law Protects Against Misuse of the DNA Profile.

Federal law also strictly limits the use of the blood samples taken pursuant to the DNA Act, thereby preventing unwarranted intrusions. The DNA Identification Act of 1994, which authorized the creation of the national DNA index, permits the disclosure of DNA samples and analyses only (1) to criminal justice agencies for a law enforcement identification purpose; (2) in judicial proceedings if otherwise admissible; (3) for criminal defense purposes; and, if personally identifiable information is removed, (4) for a population statistics database, for identification research and protocol development purposes, or for

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> supposed violations of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.

United States v. Kelly, 55 F.2d 67, 69 (2d Cir. 1932).

quality control purposes. 42 U.S.C. 14132(b)(3). And the DNA Act provides criminal penalties for the unauthorized disclosure or possession of a DNA sample or DNA analysis result. 42 U.S.C. 14135e(c).

B. The Governmental Interests Served by the DNA Collection Condition Are Compelling and Related to the Purposes of Probation.

Balanced against this "minimal intrusion" on defendant's substantially diminished Fourth Amendment interests, *Rise*, 59 F.3d at 1560, are the compelling government interests advanced by the DNA collection requirement. "The development of DNA identification technology is one of the most important advances in criminal identification methods in decades." H.R. Rep. No. 106-900(I), at *9. In the absence of DNA collection and analysis, "killers, rapists, and other dangerous offenders who might be successfully identified through DNA matching remain at large to engage in further crimes against the public." *Id.* at 10. "In addition to these obvious public safety costs, the current inadequacies of the system also endanger the innocent. Promptly identifying the actual perpetrator of a crime through DNA matching exonerates any other persons who might wrongfully be suspected, accused, or convicted of the crime." *Ibid.* This Court has already identified the public interest in prosecuting crime accurately as "overwhelming," *Rise*, 59 F.3d at 1561, and the public interest in combating

recidivism "incontestable," *id.* at 1562. The *Rise* Court also concluded that a DNA database advances both of these interests. *Ibid.*

The DNA Act advances the same "overwhelming" public interest in prosecuting crimes accurately as the Oregon law and will assist more effectively in investigations of crimes likely to involve DNA than the original Oregon law, because the federal law covers a broader range of offenders. 42 U.S.C. 14135a(d) (covering convictions for *inter alia*, "[a]ny crime of violence"). Indeed, the legislative history to the DNA Act supports covering a broader range of convicts than the original Oregon law did in order to enhance the efficacy of the DNA database: the studies and individual cases discussed there demonstrate that many individuals who commit serious violent crimes such as murder and rape that are likely to yield DNA evidence have previously been convicted of only less serious crimes such as robbery or burglary. See H.R. Rep. No. 106-900(I), at *33-*35 (40% of Virginia offenders who were linked to sex crimes through DNA matching had no prior convictions for sexual or violent offenses; "52% of the offenders in Florida who were linked to crimes through DNA matching – in most cases a sexual assault or homicide – had burglary convictions in their criminal histories").[8]

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[8] In connection with the President's $1 billion DNA initiative, see www.usdoj.gov/nij/dnainitiative/initiative.html, the Department of Justice has proposed expanding the DNA collection law to cover all felons. See H.R. 3214,

The compelling government interests served by the DNA collection requirement are also closely related to the purposes probation is designed to serve. See *United States v. Jackson*, 189 F.3d 820, 824 (9th Cir. 1999) (conditions of supervised release have historically been regarded "as means to further the deterrent, protective, and rehabilitative goals of sentencing"); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 264-65 (9th Cir. 1975) (en banc) (evaluating probation condition to determine whether it serves "the dual objectives of rehabilitation and public safety"). The DNA collection condition deters probationers 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. And the deterrent value of the DNA sample contributes to the probationer's rehabilitation, to the extent it prevents his commission of more crimes. The supervised release condition also helps protect

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108th Cong. § 103(b) (2003); S1700, 108th Cong. § 103(b) (2003); S1828, 108th Cong. § 103(b) (2003). Thirty-two States, including Oregon, have already enacted legislation authorizing the collection of DNA samples from all persons convicted of felonies. It is "the proven value and importance of broad DNA sample collection in solving rapes, murders, and other serious crimes" that has spurred legislatures across the Nation to broaden the coverage of their DNA collection laws. *Advancing Justice Through DNA Technology: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 108th Cong. 15 (July 17, 2003) (statement of Sarah V. Hart, Director, National Institute of Justice).

public safety in the event deterrence fails and the probationer does commit another crime, because it increases the chance that he will be apprehended promptly, before he can commit even more offenses. The close fit between the purposes of probation and the DNA collection condition is further evidence of the reasonable nature of the requirement. See *Knights*, 534 U.S. at 119 (holding that search of probationer's home is reasonable in part because "the [home] search condition * * * furthers the two primary goals of probation–rehabilitation and protecting society from future criminal violations"). Compare *Springer v. United States*, 148 F.2d 411, 416 (9th Cir. 1945) (invalidating as an "unwarranted" invasion of the physical person a probation condition requiring convicted draft dodger to donate a pint of blood to the Red Cross).

C. The DNA Collection Condition is not Vulnerable to Abuse.

The absence of a warrant, probable cause, or individualized suspicion does not render the DNA condition unreasonable for the additional reason that the DNA Act ensures evenhanded application. See *Rise*, 59 F.3d at 1561-62. The DNA Act directs probation offices to collect a DNA sample from any probationer "who is, or has been, convicted of a qualifying Federal offense." 42 U.S.C. 14135a(a)(2). The DNA Act identifies the categories of offenses that trigger the DNA collection requirement, see 42 U.S.C. 14135a(d), and 28 C.F.R. § 28.2 sets out the complete

list of qualifying offenses as determined by the Attorney General. The DNA Act further provides that a probation office need not collect a sample from an individual whose DNA profile is already in CODIS, 42 U.S.C. 14135a(a)(3), and the Administrative Office of the United States Courts has directed probation offices not to collect a sample in that circumstance. See Addendum C. The Administrative Office has further directed probation offices to contract with a phlebotomist from a "responsible source" and to notify the qualifying offender of the DNA collection requirement and the consequences of a failure to comply. Addendum C at 2-4.

By ensuring that the probation officer responsible for collecting the blood sample exercises no discretion in deciding to whom the DNA collection requirement applies, the DNA Act protects against arbitrary or abusive enforcement. See *Rise*, 59 F.3d at 1562 ("By ensuring that blood extractions will not be ordered randomly or for illegitimate purposes, [the DNA collection law] fulfills a principal purpose of the warrant requirement."). Courts have repeatedly found reasonable probation search conditions that do not present an undue risk of harassment or intimidation. See, *e.g.*, *Latta*, 521 F.2d at 250 (approving probation condition that authorizes search of probationer's home by parole officer when officer reasonably believes that such search is necessary in performance of his

duties, including when officer harbors a "hunch" that probationer is engaged in illegal activity); *United States v. Monteiro*, 270 F.3d 465, 467-42 (7th Cir. 2001) (upholding condition of supervised release authorizing search of the probationer's person, residence, and vehicle "upon demand of any law enforcement officer," because the probationer "cannot point to any specific abuse that might ensue from this special condition"); *Owens v. Kelley*, 681 F.2d 1362, 1366-69 (11th Cir. 1982) (upholding probation condition similar to the one in *Monteiro* because condition does not authorize "intimidating and harassing search" for purposes unrelated to probation); *People v. Reyes*, 968 P.2d 445, 450 (Cal. 1998) (search of a probationer's person or property without individualized suspicion is "reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing"); but see *United States v. Guagliardo*, 278 F.3d 868, 873 (9th Cir. 2002) (upholding supervised-release condition authorizing "any search by law enforcement or probation officers" as long as search executed is "supported by reasonable suspicion"); *United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991) ("The permissible bounds of a probation search are governed by a reasonable suspicion standard."). Because the DNA collection condition – which requires the probationer to submit to a one-time blood draw by a phlebotomist – poses no threat of harassment or intimidation by law enforcement, the absence of

individualized suspicion should not alter the balance that tips decidedly in favor of its reasonableness.

D. *Edmond* and *Ferguson* have no Bearing on the Constitutionality of a Search of a Probationer.

Defendant contends (Opp. 14-15) that *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000), and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), preclude a finding that the supervised release condition is reasonable, because the search is conducted for law enforcement purposes and without individualized suspicion. As we have explained, however, see Pet. of the United States for Reh'g and Reh'g En Banc, at 8-16, those cases are inapposite because they involved searches of ordinary citizens. Carrying the restrictions the Supreme Court has imposed on searches of ordinary citizens over into searches of probationers would contravene the key holding in *Knights* that, given probationers' high rate of recidivism, the State's "interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may justifiably focus on probationers in a way that it does not on the ordinary citizen." 534 U.S. at 121 (upholding warrantless search of probationer's home conducted on reasonable suspicion).

Indeed, courts that have recognized the distinction the Supreme Court has drawn under the Fourth Amendment between individuals in the criminal justice

system and ordinary citizens have rejected the applicability of *Edmond* and *Ferguson* to DNA collection laws. As Judge Easterbrook has cogently explained, the *Kincade* panel majority "made a fundamental error when it applied the 'special need' approach of *Edmond* and *Ferguson* to persons on supervised release," because "*Knights*, which held that conditions of supervised release may be enforced without regard to whether they would be 'reasonable' as applied to the general population, was issued after *Edmond* and *Ferguson*." *Green*, 354 F.3d at 681; see *Kimler*, 335 F.3d at 1146 n.14 (rejecting applicability of *Edmond* and *Ferguson* to DNA condition of supervised release, because "'[a] broad range of choices that might infringe constitutional rights in free society fall within the expected conditions * * * of those who have suffered a lawful conviction.'") (quoting *McKune v. Lile*, 536 U.S. 24, 26 (2002)); *Adams*, 2004 WL 119106, at *10 (defendant's assertion that *Edmond* and *Ferguson* apply to DNA collection requirement "overlooks the fact that the class of persons subject to the Act is convicted criminals, not the general population").

Edmond and *Ferguson* are inapposite for the additional reason that they involved investigative searches designed to uncover evidence that the person searched was committing a crime. The search at issue here, however, is designed to obtain only reliable indicia of the probationer's identity, which can be used

against the probationer only to the extent independent evidence indicates that another crime has been committed. The Supreme Court's recent decision in *Illinois v. Lidster*, 124 S. Ct. 885 (2004), supports drawing this distinction. In the course of upholding a vehicle checkpoint designed to elicit information about a crime, the Court cabined *Edmond* by explaining that its rule prohibiting suspicionless searches serving the "general interest in crime control" did not apply "to every 'law enforcement' objective," and emphasized that *Edmond* involved searches designed to "reveal that *any given motorist has committed some crime.*" *Id.* at 889; see Opp. at 9-10 n.5 (blood draw for DNA profile "is not a search for evidence of a crime").

E. The Supreme Court has not Required Individualized Suspicion in Upholding Modest Fourth Amendment Intrusions under the Totality of the Circumstances.

Defendant seeks to minimize the significance of *Knights* by arguing (Opp. 7 n.4) that the search it approved was supported by reasonable suspicion. But in approving the search conducted there with reasonable suspicion, the Supreme Court did not set a constitutional floor below which searches of probationers cannot fall. In fact, the Court expressly reserved the question whether the probation condition, which authorized searches of Knights' home without any suspicion, was constitutional. *Knights*, 534 U.S. at 120 n.6. The Court's decision

not to reach that issue does not provide any logical basis for importing doctrine applicable to searches of ordinary citizens into the evaluation of the constitutionality of the DNA supervised release condition. Indeed, defendant's position on *Knights* mirrors the "dubious logic" the *Knights* Court itself rejected – namely, "that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it." 534 U.S. at 117.

The notion that individualized suspicion is a precondition to any law enforcement search, regardless of the degree of intrusion and the importance of the interests served, also runs contrary to the very nature of the approach the *Knights* Court applied, which calls for consideration of "all the circumstances of a search." 534 U.S. at 122. As the Supreme Court itself has recently stated, "for the most part *per se* rules are inappropriate in the Fourth Amendment context." *United States v. Drayton*, 536 U.S. 194, 201 (2002); see also *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (noting exceptions to the warrant requirement where "special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like" have "render[ed] a warrantless search or seizure reasonable").

The Supreme Court has never held as a rule that Fourth Amendment intrusions that serve law enforcement interests must be supported by reasonable suspicion, even when conducted on ordinary citizens. In fact, the Supreme Court

has stated that "the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding suspicionless seizures of motorists at Border Patrol checkpoint). Indeed, in *Lidster*, the Court rejected reading *Edmond* to preclude all suspicionless Fourth Amendment intrusions that serve law enforcement goals, observing that "special law enforcement concerns will sometimes justify highway stops without individualized suspicion." 124 S. Ct. at 889 (citing *Michigan Dept of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoint), and *Martinez-Fuerte*, *supra*).[9] The Court has also permitted routine suspicionless searches of individuals entering the United States, searches that advance the law enforcement interest in preventing smuggling. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

Thus, applying the traditional Fourth Amendment totality-of-the-circumstances balancing test, the Supreme Court has approved suspicionless searches and seizures that advance special law enforcement objectives in a

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[9] The *Rise* Court's citation to *Sitz* for the proposition that "the State may interfere with an individual's Fourth Amendment interests with less than probable cause and without a warrant if the intrusion is only minimal and is justified by law enforcement purposes," 59 F.3d at 1560, is thus consistent with the Supreme Court's present understanding of that decision, contrary to the suggestion of the *Kincade* panel majority. See 345 F.3d at 1107-08.

particularized manner that is not unduly intrusive. Those cases further support the constitutionality of the DNA condition because, like the law enforcement practices involved in them, the DNA collection requirement advances a special law enforcement interest (combating recidivism) in a particularized manner (targeting serious convicted offenders) that is not unduly intrusive. Compare *United States v. Tsai*, 282 F.3d 690, 694 (9th Cir. 2002) (strip search at border requires individualized suspicion because it is not routine).

This Court should therefore find on the totality of the circumstances that the DNA collection condition, see 42 U.S.C. 14135a(a)(2) and 14135c, does not violate the Fourth Amendment's prohibition of unreasonable searches. See, *e.g.*, *Rise*, 59 F.3d at 1562 (upholding Oregon's DNA collection law on the totality of the circumstances);[10] *Green*, 354 F.3d at 680 (Easterbrook, J., concurring) (because "DNA collection is less invasive than a search of one's home, and * * * may be helpful in solving crimes (and thus enforcing a condition of release), there is no problem under the fourth amendment").

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[10] As discussed previously, see Gov't Rule 28(j) Letter dated Dec. 1, 2003, the Oregon law applies to both prisoners and probationers, though *Rise* itself dealt with a challenge brought by prisoners. Although prisoners have an even lesser expectation of privacy than probationers, the difference is not sufficiently great to warrant a different outcome, especially because the blood-draw condition serves the purposes of probation.

II. THE DNA COLLECTION CONDITION IS ALSO CONSTITUTIONAL UNDER THE SPECIAL NEEDS DOCTRINE.

Alternatively, this Court should hold that the DNA collection condition is constitutional under the "special needs" doctrine. Under that 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*, 532 U.S. at 78. The special needs cases do not foreclose reliance on law enforcement interests in all circumstances. Instead, they refer to special interests "beyond the *normal* need for law enforcement," *Skinner*, 489 U.S. at 619 (emphasis added), or the "*general* interest in crime control," *Edmond*, 531 U.S. at 44 (emphasis added). See also *Lidster*, 124 S. Ct. at 889 (observing that some law enforcement objectives fall outside the "general interest in crime control").

As numerous courts have concluded, collecting DNA from serious convicted offenders and storing their DNA profiles in CODIS serves special law enforcement interests. See, *e.g.*, *Green* 354 F.3d at 677-79 (DNA collection is special need because it is not undertaken for investigation of specific crime);

Kimler, 335 F.3d at 1146 ("DNA database goes beyond the ordinary law enforcement need"); *Marcotte*, 193 F.3d at 79-82 (DNA collection serves special need to combat recidivism by sex offenders). Recidivism is a special law enforcement problem. See, *e.g.*, *Ewing v. California*, 538 U.S. 11, 26 (2003) ("Recidivism is a serious public safety concern in California and throughout the Nation. According to a recent report, approximately 67 percent of former inmates released from state prisons were charged with at least one 'serious' new crime within three years of their release."). CODIS will help law enforcement solve unresolved and future cases involving repeat offenders. In fact, CODIS has already aided more than 11,000 investigations. See www.fbi/hq/lab/codis/aidedmap.htm. The DNA collection requirement thus is in service of a regulatory regime designed 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.

CODIS also serves the special interest in exonerating the innocent by accurately identifying the perpetrator. Rapid identification of the perpetrator via use of the convicted offender database will substantially reduce the likelihood that

innocent persons will be wrongfully arrested, prosecuted and convicted.[11] See H.R. Rep. No. 106-900(I), at *10.

Similar to other special needs programs the Supreme Court has upheld, see, *e.g.*, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (approving random drug-testing of high school athletes); *Skinner, supra* (approving drug and alcohol testing of railroad employees); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (approving search of probationer's home without warrant or probable cause), the DNA Act targets a discrete class of individuals – convicted offenders – that presents special risks. And unlike the programs struck down in *Edmond* and *Ferguson*, the searches authorized by the DNA Act are not for the purpose of uncovering the commission of a crime, but rather, for the purpose of obtaining

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[11] The *Kincade* panel majority discounted the government's assertion that the law helps exonerate innocent persons, contending that a law authorizing voluntary DNA testing would serve the same purpose. 345 F.3d at 1112-13. But this point overlooks the fact that excluding a person as the source of DNA found in crime scene evidence does not necessarily exonerate the person, because the DNA may derive from some source other than the perpetrator of the crime. However, if there is an affirmative match to the databased DNA profile of a convicted offender, that result generally amounts to conclusive proof (when considered in conjunction with the other evidence in the case) that the DNA-matching offender is the actual perpetrator of the crime, and it clears everyone else who might otherwise be mistakenly suspected, accused, or convicted of the crime. Hence, the creation of databases containing DNA profiles derived from DNA samples that were involuntarily collected from convicted offenders unquestionably helps to protect the innocent in ways that voluntary case-by-case DNA testing alone cannot.

identification information that can be used in the event *independent evidence* demonstrates that a crime has been committed. See, *e.g.*, *State v. Martinez*, 78 P.2d 769, 774 (Kan. 2003) ("Like fingerprint and photograph identification information, the DNA information does not, in and of itself, detect or implicate any criminal wrongdoing. It is this distinction that removes the collection and cataloging of DNA information from the normal need for law enforcement."). There is a special need to obtain that identification information from convicted offenders and in particular from offenders on probation, because, as the Supreme Court held in both *Knights,* 534 U.S. at 120, and *Griffin*, 483 U.S. at 880, they are "more likely than the ordinary citizen to violate the law," and because the government has a special responsibility to monitor probationers and to detect promptly their commission of additional crimes.[12]

Moreover, a warrant or individualized suspicion requirement would obviously destroy the efficacy of the DNA Act. As *Knights* makes clear, 534 U.S. at 119-21, the government is justified in imposing conditions that intrude on

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[12] That the DNA profile obtained from the probationer has a crime-solving use that lasts beyond the period of supervision does not undercut the constitutionality of obtaining the DNA during the supervisory period, because there undoubtedly is a special need to obtain the sample at that time, and the continuing need to maintain the DNA profile outweighs any conceivable Fourth Amendment interest infringed by its retention. See Part I(A)(3), *supra*.

probationers' privacy based on the concern that all convicted offenders pose a recidivism risk, and the DNA collection requirement addresses that threat in a reasonable manner that renders the need for a warrant or individualized suspicion unnecessary to protect against abuse. See Part I(C), *supra*.

CONCLUSION

For the reasons stated above and in the government's rehearing petition and answering brief, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Supplemental En Banc Brief For The United States to be served this 19th day of February 2004 by first-class mail, postage prepaid, on the following:

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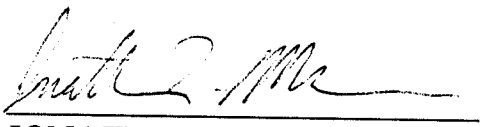

JONATHAN L. MARCUS
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CERTIFICATE OF COMPLIANCE

I certify that pursuant to this Court's order dated January 16, 2004, the foregoing Supplemental En Banc Brief For The United States is:

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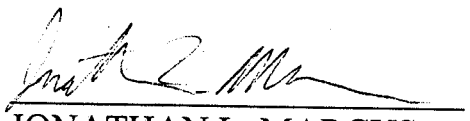

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Addendum A

Short Title of 1994 Acts note set out under section 13701 of this title and Tables.

Part X of Title I of the Omnibus Crime Control and Safe Streets Act of 1968, referred to in subsec. (c)(3), is Part X of Title I of Pub.L. 90-351, as added Pub.L. 103-322, Title XXI, § 210302(c)(1)(C), Sept. 13, 1994, 103 Stat. 2066, which is classified generally to subchapter XII-L (section 3796kk et seq.) of chapter 46 of this title.

CROSS REFERENCES

Certification of standards under this section by Director of FBI for Bureau of Justice Assistance funds used to develop DNA analysis capability, see 42 USCA § 3753.

DNA identification grant application to certify testing by DNA proficiency testing program meeting standards issued under this section, see 42 USCA § 3796kk-2.

LIBRARY REFERENCES

American Digest System

Corporations and special instrumentalities controlled by federal government, see United States ⇐53(1) et seq.

Powers and duties of federal officers, agents, and employees generally; disbursement of federal funds, see United States ⇐40, 41, 82(1) et seq.

Encyclopedias

Corporations and special instrumentalities controlled by federal government, see C.J.S. United States § 65 et seq.

Powers and duties of federal officers, agents, and employees generally; disbursement of federal funds, see C.J.S. United States §§ 38 et seq., 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 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 persons convicted of crimes;

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

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

(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 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, and DNA analysts, that undergo, at regular intervals of not to exceed 180 days, external proficiency testing by a DNA proficiency testing program meeting the standards issued under section 14131 of this title; and

(3) maintained by Federal, State, and local criminal justice agencies 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.

(Pub.L. 103–322, Title XXI, § 210304, Sept. 13, 1994, 108 Stat. 2069.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report Nos. 103–324 and 103–489, and House Conference Report No. 103–711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

LIBRARY REFERENCES

American Digest System

Corporations and special instrumentalities controlled by federal government, see United States ⇐53(1) et seq.

Powers and duties of federal officers, agents, and employees generally; disbursement of federal funds, see United States ⇐40, 41, 82(1) et seq.

Encyclopedias

Corporations and special instrumentalities controlled by federal government, see C.J.S. United States § 65 et seq.

Powers and duties of federal officers, agents, and employees generally; disbursement of federal funds, see C.J.S. United States §§ 38 et seq., 122 et seq.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].

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 persons convicted of crimes;

(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, and DNA analysts, that undergo semiannual external proficiency testing by a DNA proficiency testing program meeting the standards issued under section 14131 of this title; 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—

[See main volume for text of (A) to (D); (c)]

(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) 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 14132a and 14132b 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 14132a of this title.

(ii) A qualifying District of Columbia offense, as determined under section 14132b 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), a State shall promptly expunge from that index the DNA analysis of a person included in the index by that State if 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.

(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.

(As amended Pub.L. 106–113, Div. B, § 1000(a)(1) [Title I, § 120], Nov. 29, 1999, 113 Stat. 1535, 1501A–23; Pub.L. 106–546, § 6(b), Dec. 19, 2000, 114 Stat. 2733.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1999 Acts. Statement by President, see 1999 U.S. Code Cong. and Adm. News, p. 290.

2000 Acts. House Report No. 106–900, see 2000 U.S. Code Cong. and Adm. News, p. 2323.

Amendments

2000 Amendments. Subsec. (b)(1). Pub.L. 106–546, § 6(b)(1), inserted "(or the Secretary of Defense in accordance with section 1565 of Title 10)" following "criminal justice agency".

Subsec. (b)(2). Pub.L. 106–546, § 6(b)(2), struck ", at regular intervals of not to exceed 180 days," and inserted "semiannual".

Subsec. (b)(3). Pub.L. 106–546, § 6(b)(3), inserted "(or the Secretary of Defense in accordance with section 1565 of Title 10)" following "criminal justice agencies" in the matter preceding subparagraph (A).

Subsec. (d). Pub.L. 106–546, § 6(b)(4), added subsec. (d).

1999 Amendments. Subsec. (a)(4). Pub.L. 106–113 [§ 120], added par. (4).

LIBRARY REFERENCES

Law Review and Journal Commentaries

Prelude to a miss: A cautionary note against expanding DNA databanks in the face of scientific uncertainty. 20 Vt.L.Rev. 1057 (1996).

§ 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.

[See main volume for text of (B) and (C); (2); (b) and (c)]

(As amended Pub.L. 106–546, § 8(c), Dec. 19, 2000, 114 Stat. 2735.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–900, see 2000 U.S. Code Cong. and Adm. News, p. 2323.

Amendments

2000 Amendments. Subsec. (a)(1)(A). Pub.L. 106–546, § 8(c), struck ", at regular intervals of not to exceed 180 days," and inserted "semiannual".

§ 14135. Authorization of grants

(a) Authorization of grants

The Attorney General may make grants to eligible States for use by the State 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)).

(2) To carry out, for inclusion in such Combined DNA Index System, DNA analyses of samples from crime scenes.

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

(b) Eligibility

For a State to be eligible to receive a grant under this section, the chief executive officer of the State shall submit to the Attorney General an application in such form and

containing such information as the Attorney General may require. The application shall—

(1) provide assurances that the State 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 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 shall make, in using grant amounts to carry out DNA analyses of samples, as between samples specified in subsection (a)(1) and samples specified in subsection (a)(2); and

(5) specify that portion of grant amounts that the State shall use for the purpose specified in subsection (a)(3).

(c) Crimes without suspects

A State that proposes to allocate grant amounts under paragraph (4) or (5) of subsection (b) for the purposes specified in paragraph (2) or (3) of subsection (a) shall use such allocated amounts to conduct or facilitate DNA analyses of those samples that relate to crimes in connection with which there are no suspects.

(d) Analysis of samples

(1) In general

The plan 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 within the State; or

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

(2) Quality assurance standards

(A) The Director of the Federal Bureau of Investigation shall maintain and make available to States 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 for certain purposes

A grant for the purposes specified in paragraph (1) or (2) of subsection (a) may be made in the form of a voucher for laboratory services, which may be redeemed at a laboratory operated by a private entity approved by the Attorney General that satisfies quality assurance standards. The Attorney General may make payment to such a laboratory for the analysis of DNA samples using amounts authorized for those purposes under subsection (j).

(e) Restrictions on use of funds

(1) Nonsupplanting

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

(2) Administrative costs

A State 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 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 for such fiscal year; and

(2) a summary of the information provided by States receiving grants under this section.

(h) Expenditure records

(1) In general

Each State 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 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) as follows:

(1) For grants for the purposes specified in paragraph (1) of such subsection—

(A) $15,000,000 for fiscal year 2001;

(B) $15,000,000 for fiscal year 2002; and

(C) $15,000,000 for fiscal year 2003.

(2) For grants for the purposes specified in paragraphs (2) and (3) of such subsection—

(A) $25,000,000 for fiscal year 2001;

(B) $50,000,000 for fiscal year 2002;

(C) $25,000,000 for fiscal year 2003; and

(D) $25,000,000 for fiscal year 2004.

(Pub.L. 106–546, § 2, Dec. 19, 2000, 114 Stat. 2726.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–900, see 2000 U.S. Code Cong. and Adm. News, p. 2323.

References in Text

This Act, referred to in subsec. (e)(1), is the DNA Analysis Backlog Elimination Act of 2000, Pub.L. 106–546, Dec. 19, 2000, 114 Stat. 2726, which enacted this section, sections 14135a to 14135e of this title and section 1565 of Title 10; see Tables for complete classification.

Codifications

Section was enacted as part of the DNA Analysis Backlog Elimination Act of 2000 and not as part of the Violent Crime Control and Law Enforcement Act of 1994, which enacted this chapter.

Sense of Congress Regarding the Obligation of Grantee States to Ensure Access to Post-Conviction DNA Testing and Competent Counsel in Capital Cases

Pub.L. 106–561, § 4, Dec. 21, 2000, 114 Stat. 2791, provided that:

"(a) Findings.—Congress finds that—

"(1) over the past decade, deoxyribonucleic acid testing (referred to in this section as 'DNA testing') has emerged as the most reliable forensic technique for identifying criminals when biological material is left at a crime scene;

"(2) because of its scientific precision, DNA testing can, in some cases, conclusively establish the guilt or innocence of a criminal defendant;

"(3) in other cases, DNA testing may not conclusively establish guilt or innocence, but may have significant probative value to a finder of fact;

"(4) DNA testing was not widely available in cases tried prior to 1994;

"(5) new forensic DNA testing procedures have made it possible to get results from minute samples that could not previously be tested, and to obtain more informative and accurate results than earlier forms of forensic DNA testing could produce, resulting in some cases of convicted inmates being exonerated by new DNA tests after earlier tests had failed to produce definitive results;

"(6) DNA testing can and has resulted in the post-conviction exoneration of more than 75 innocent men and women, including some under sentence of death;

"(7) in more than a dozen cases, post-conviction DNA testing that has exonerated an innocent person has also enhanced public safety by providing evidence that led to the apprehension of the actual perpetrator;

"(8) experience has shown that it is not unduly burdensome to make DNA testing available to inmates in appropriate cases;

"(9) under current Federal and State law, it is difficult to obtain post-conviction DNA testing because of time limits on introducing newly discovered evidence;

"(10) the National Commission on the Future of DNA Evidence, a Federal panel established by the Department of Justice and comprised of law enforcement, judicial, and scientific experts, has urged that post-conviction DNA testing be permitted in the relatively small number of cases in which it is appropriate, notwithstanding procedural rules that could be invoked to preclude such testing, and notwithstanding the inability of an inmate to pay for the testing;

"(11) only a few States have adopted post-conviction DNA testing procedures;

"(12) States have received millions of dollars in DNA-related grants, and more funding is needed to improve State forensic facilities and to reduce the nationwide backlog of DNA samples from convicted offenders and crime scenes that need to be tested or retested using upgraded methods;

"(13) States that accept such financial assistance should not deny the promise of truth and justice for both sides of our adversarial system that DNA testing offers;

"(14) post-conviction DNA testing and other post-conviction investigative techniques have shown that innocent people have been sentenced to death in this country;

"(15) a constitutional error in capital cases is incompetent defense lawyers who fail to present important evidence that the defendant may have been innocent or does not deserve to be sentenced to death; and

"(16) providing quality representation to defendants facing loss of liberty or life is essential to fundamental due process and the speedy final resolution of judicial proceedings.

"(b) Sense of Congress.—It is the sense of Congress that—

"(1) Congress should condition forensic science-related grants to a State or State forensic facility on the State's agreement to ensure post-conviction DNA testing in appropriate cases; and

"(2) Congress should work with the States to improve the quality of legal representation in capital cases through the establishment of standards that will assure the timely appointment of competent counsel with adequate resources to represent defendants in capital cases at each stage of the proceedings.

Sense of the Congress Regarding the Obligation of Grantee States to Ensure Access to Post–Conviction DNA Testing and Competent Counsel in Capital Cases.

Pub.L. 106–546, § 11, Dec. 19, 2000, 114 Stat. 2735, provided that:

"(a) Findings.—Congress finds that—

"(1) over the past decade, deoxyribo-nucleic acid testing (referred to in this section as 'DNA testing') has emerged as the most reliable forensic technique for identifying criminals when biological material is left at a crime scene;

"(2) because of its scientific precision, DNA testing can, in some cases, conclusively establish the guilt or innocence of a criminal defendant;

"(3) in other cases, DNA testing may not conclusively establish guilt or innocence, but may have significant probative value to a finder of fact;

"(4) DNA testing was not widely available in cases tried prior to 1994;

"(5) new forensic DNA testing procedures have made it possible to get results from minute samples that could not previously be tested, and to obtain more informative and accurate results than earlier forms of forensic DNA testing could produce, resulting in some cases of convicted inmates being exonerated by new DNA tests after earlier tests had failed to produce definitive results;

"(6) DNA testing can and has resulted in the post-conviction exoneration of more than 75 innocent men and women, including some under sentence of death;

"(7) in more than a dozen cases, post-conviction DNA testing that has exonerated an innocent person has also enhanced public safe-

ty by providing evidence that led to the apprehension of the actual perpetrator;

"(8) experience has shown that it is not unduly burdensome to make DNA testing available to inmates in appropriate cases;

"(9) under current Federal and State law, it is difficult to obtain post-conviction DNA testing because of time limits on introducing newly discovered evidence;

"(10) the National Commission on the Future of DNA Evidence, a Federal panel established by the Department of Justice and comprised of law enforcement, judicial, and scientific experts, has urged that post-conviction DNA testing be permitted in the relatively small number of cases in which it is appropriate, notwithstanding procedural rules that could be invoked to preclude such testing, and notwithstanding the inability of an inmate to pay for the testing;

"(11) only a few States have adopted post-conviction DNA testing procedures;

"(12) States have received millions of dollars in DNA-related grants, and more funding is needed to improve State forensic facilities and to reduce the nationwide backlog of DNA samples from convicted offenders and crime scenes that need to be tested or retested using upgraded methods;

"(13) States that accept such financial assistance should not deny the promise of truth and justice for both sides of our adversarial system that DNA testing offers;

"(14) post-conviction DNA testing and other post-conviction investigative techniques have shown that innocent people have been sentenced to death in the United States;

"(15) a constitutional error in capital cases is incompetent defense lawyers who fail to present important evidence that the defendant may have been innocent or does not deserve to be sentenced to death; and

"(16) providing quality representation to defendants facing the loss of liberty or life is essential to fundamental due process and the speedy final resolution of judicial proceedings.

"(b) Sense of the Congress.—It is the sense of the Congress that—

"(1) Congress should condition forensic science-related grants to a State or State forensic facility on the State's agreement to ensure post-conviction DNA testing in appropriate cases; and

"(2) Congress should work with the States to improve the quality of legal representation in capital cases through the establishment of standards that will assure the timely appointment of competent counsel with adequate resources to represent defendants in capital cases at each stage of those proceedings."

§ 14135a. Collection and use of DNA identification information from certain Federal offenders

(a) Collection of DNA samples

(1) From individuals in custody

The Director of the Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of a qualifying Federal offense (as determined under subsection (d)) or a qualifying military offense, as determined under section 1565 of Title 10.

(2) From individuals on release, parole, or probation

The probation office responsible for the supervision under Federal law of an individual on probation, parole, or supervised release shall collect a DNA sample from each such individual who is, or has been, convicted of a qualifying Federal offense (as determined under subsection (d)) or a qualifying military offense, as determined under section 1565 of Title 10.

(3) Individuals already in CODIS

For each individual described in paragraph (1) or (2), if the Combined DNA Index System (in this section referred to as "CODIS") of the Federal Bureau of Investigation contains a DNA analysis with respect to that individual, or if a DNA sample has been collected from that individual under section 1565 of Title 10, the Director of the Bureau of Prisons or the probation office responsible (as applicable) may (but need not) collect a DNA sample from that individual.

(4) Collection procedures

(A) The Director of the Bureau of Prisons or the probation office responsible (as applicable) may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample.

(B) The Director of the Bureau of Prisons or the probation office, as appropriate, may enter into agreements with units of State or local government or with private entities to provide for the collection of the samples described in paragraph (1) or (2).

(f) Commencement of collection

Collection of DNA samples under subsection (a) shall, subject to the availability of appropriations, commence not later than the date that is 180 days after December 18, 2000.

(Pub.L. 106–546, § 3, Dec. 19, 2000, 114 Stat. 2728; Pub.L. 107–56, Title V, § 503, Oct. 26, 2001, 115 Stat. 364.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–900, see 2000 U.S. Code Cong. and Adm. News, p. 2323.

Codifications

Section was enacted as part of the DNA Analysis Backlog Elimination Act of 2000 and not as part of the Violent Crime Control and Law Enforcement Act of 1994, which enacted this chapter.

Amendments

2001 Amendments. Subsec. (d)(2). Pub.L. 107–56, § 503, rewrote par. (2), which formerly read: "The initial determination of qualifying Federal offenses shall be made not later than 120 days after December 19, 2000."

§ 14135b. Collection and use of DNA identification information from certain District of Columbia offenders

(a) Collection of DNA samples

(1) From individuals in custody

The Director of the Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of a qualifying District of Columbia offense (as determined under subsection (d)).

(2) From individuals on release, parole, or probation

The Director of the Court Services and Offender Supervision Agency for the District of Columbia shall collect a DNA sample from each individual under the supervision of the Agency who is on supervised release, parole, or probation who is, or has been, convicted of a qualifying District of Columbia offense (as determined under subsection (d)).

(3) Individuals already in CODIS

For each individual described in paragraph (1) or (2), if the Combined DNA Index System (in this section referred to as "CODIS") of the Federal Bureau of Investigation contains a DNA analysis with respect to that individual, the Director of the Bureau of Prisons or Agency (as applicable) may (but need not) collect a DNA sample from that individual.

(4) Collection procedures

(A) The Director of the Bureau of Prisons or Agency (as applicable) may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample.

(B) The Director of the Bureau of Prisons or Agency, as appropriate, may enter into agreements with units of State or local government or with private entities to provide for the collection of the samples described in paragraph (1) or (2).

(5) Criminal penalty

An individual from whom the collection of a DNA sample is authorized under this subsection who fails to cooperate in the collection of that sample shall be—

(A) guilty of a class A misdemeanor; and

(B) punished in accordance with Title 18.

(b) Analysis and use of samples

The Director of the Bureau of Prisons or Agency (as applicable) shall furnish each DNA sample collected under subsection (a) to the Director of the Federal Bureau of Investigation, who shall carry out a DNA analysis on each such DNA sample and include the results in CODIS.

(c) Definitions

In this section:

(1) The term "DNA sample" means a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out.

(2) The term "DNA analysis" means analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample.

(d) Qualifying District of Columbia offenses

The government of the District of Columbia may determine those offenses under the District of Columbia Code that shall be treated for purposes of this section as qualifying District of Columbia offenses.

(e) Commencement of collection

Collection of DNA samples under subsection (a) shall, subject to the availability of appropriations, commence not later than the date that is 180 days after December 19, 2000.

(f) Authorization of appropriations

There are authorized to be appropriated to the Court Services and Offender Supervision Agency for the District of Columbia to carry out this section such sums as may be necessary for each of fiscal years 2001 through 2005.

(Pub.L. 106–546, § 4, Dec. 19, 2000, 114 Stat. 2730.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–900, see 2000 U.S. Code Cong. and Adm. News, p. 2323.

Codifications

Section was enacted as part of the DNA Analysis Backlog Elimination Act of 2000 and not as part of the Violent Crime Control and Law Enforcement Act of 1994, which enacted this chapter.

§ 14135c. Conditions of release generally

If the collection of a DNA sample from an individual on probation, parole, or supervised release is authorized pursuant to section 14132a or 14132b of this title or section 1565 of Title 10, the individual shall cooperate in the collection of a DNA sample as a condition of that probation, parole, or supervised release.

(Pub.L. 106–546, § 7(d), Dec. 19, 2000, 114 Stat. 2734.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–900, see 2000 U.S. Code Cong. and Adm. News, p. 2323.

Codifications

Section was enacted as part of the DNA Analysis Backlog Elimination Act of 2000 and not as part of the Violent Crime Control and Law Enforcement Act of 1994, which enacted this chapter.

§ 14135d. Authorization of appropriations

There are authorized to be appropriated to the Attorney General to carry out this Act (including to reimburse the Federal judiciary for any reasonable costs incurred in implementing such Act, as determined by the Attorney General) such sums as may be necessary.

(Pub.L. 106–546, § 9, Dec. 19, 2000, 114 Stat. 2735.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–900, see 2000 U.S. Code Cong. and Adm. News, p. 2323.

References in Text

This Act, referred to text, is the DNA Analysis Backlog Elimination Act of 2000, Pub.L. 106–546, Dec. 19, 2000, 114 Stat. 2726, which enacted this section, sections 14135a to 14135e of

this title and section 1565 of Title 10. See Tables for complete classification.

Codifications

Section was enacted as part of the DNA Analysis Backlog Elimination Act of 2000 and not as part of the Violent Crime Control and Law Enforcement Act of 1994, which enacted this chapter.

§ 14135e. Privacy protection standards

(a) In general

Except as provided in subsection (b), any sample collected under, or any result of any analysis carried out under, section 14135, 14135a, or 14135b of this title may be used only for a purpose specified in such section.

(b) Permissive uses

A sample or result described in subsection (a) may be disclosed under the circumstances under which disclosure of information included in the Combined DNA Index System is allowed, as specified in subparagraphs (A) through (D) of section 14132(b)(3) of this title.

(c) Criminal penalty

A person who knowingly—

(1) discloses a sample or result described in subsection (a) in any manner to any person not authorized to receive it; or

(2) obtains, without authorization, a sample or result described in subsection (a),

shall be fined not more than $100,000.

(Pub.L. 106–546, § 10, Dec. 19, 2000, 114 Stat. 2735.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2000 Acts. House Report No. 106–900, see 2000 U.S. Code Cong. and Adm. News, p. 2323.

Codifications

Section was enacted as part of the DNA Analysis Backlog Elimination Act of 2000 and not as part of the Violent Crime Control and Law Enforcement Act of 1994, which enacted this chapter.

SUBCHAPTER X—MOTOR VEHICLE THEFT PREVENTION

§ 14171. Motor vehicle theft prevention program

NOTES OF DECISIONS

Evidence 1

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1. Evidence

Evidence was sufficient to link defendant to conspiracy to steal cars and auto parts; witness testified about numerous connections between defendant and member of the conspiracy and that, on occasions, both had approached him about stealing cars that they needed, pen registers recorded several hundred phone calls between the two, and there was evidence as to defendant's involvement in particular switch of vehicle identification numbers (VINs). U.S. v. Sarkisian, C.A.9 (Cal.) 1999, 197 F.3d 966.

SUBCHAPTER XIII—VIOLENT CRIME REDUCTION TRUST FUND

§ 14212. Repealed. Pub.L. 105–33, Title X, § 10204(b), Aug. 5, 1997, 111 Stat. 702

HISTORICAL AND STATUTORY NOTES

Section, Pub.L. 103–322, Title XXXI, § 310002, Sept. 13, 1994, 108 Stat. 2105, related to reduction in discretionary spending limits.

Addendum B

BP-S714.056 **NOTICE OF RELEASE AND ARRIVAL** CERTIFICATE
APR 03

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

Inmate Name	Reg No.: 01605-112 FBI No.: 291131VA9 _____: (Misc No.)	Institution/Address
Kincade, Thomas		Metropolitan Detention Center 535 N. Alameda Street Los Angeles, CA 90012

Release Date 07-23-2003	Release Method Full Term
Public Law Days	Supervision to follow release: (If yes, advise inmate of obligation to report for supervision) _X_ YES (_2_ years _0_ months) ____ NO

RELEASED TO: (Check one)

_X_ Community	____ Detainer
Transportation arranged to: Alhambra, CA (City and State) Method of transportation: MTA Bus (Name of commercial carrier, if applicable) Date of expected arrival at residence: 07-23-2003	Detaining Agency: N/A Agency Address: N/A

SUPERVISION JURISDICTION(s)

Sentencing District	District of Residence (for relocation cases)
Chief/Director: Robert M. Latta Supervision Agency: U.S. Probation Office District: Central California Address: 312 N. Spring Street 600 U.S. Courthouse Los Angeles, CA 90012 Phone: (213) 894-3600	Chief/Director: _____ Supervision Agency: _____ District: _____ Address: _____ Phone: ( ) _____

Address of proposed residence: Kincade, Thomas
820 N. Stoneman Ave.
Alhambra, CA 91801
(626) 281-6700

DNA STATUS

DNA sample required: _X_ YES ____ NO	If YES date sample taken 07-23-2003	DNA Number: LOSC0049

Obligation to Report for Supervision: If you were sentenced to, or otherwise required to serve, a term of supervision, this term begins immediately upon your discharge from imprisonment, and you are directed to report for supervision within 72 hours. If you are released from a detaining authority, you shall report for supervision within 72 hours after your release by the detaining authority. If you can not report for supervision in the district of your approved residence within 72 hours, you must report to the nearest U.S. Probation Office for instruction. Failure to obey the reporting requirements described above will constitute a violation of release conditions.

Inmate's Signature (file copy only)

Distribution: Inmate Central File (Section 5), Inmate, Chief Supervision Officer in Sentencing District, Chief Supervision Officer in District of Residence, and U.S. Parole Commission (if applicable)

(This form may be replicated via WP) This form replaces BP-S714 dtd FEB 03

Addendum C

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN M. HUGHES
Assistant Director

Office of Probation
and Pretrial Services

December 14, 2001

MEMORANDUM TO ALL CHIEF PROBATION OFFICERS

SUBJECT: Implementation of New Federal DNA Collection Requirements
(ACTION)

As we reported to you in a memorandum dated June 22, new federal legislation requires the collection of DNA from certain federal offenders who are currently on probation, parole, or supervised release. This memorandum provides further information and instructions on fulfilling the new requirement.

Although Congress has not provided funding for the judiciary to do DNA collection, the Director has decided that probation offices should begin collecting blood samples as soon as possible. We request that you start doing so, giving priority to those offenders whose terms of supervision expire before March 2002. To help get you started, we are airing on December 18 at 3 p.m. Eastern Time, a live Federal Judiciary Television Network (FJTN) broadcast on the probation officer's role in DNA collection. We also will be mailing an instructional videotape produced by the Federal Bureau of Investigation (FBI).

New DNA Collection Requirement

The new amendments to 18 U.S.C. § 3563(a), 18 U.S.C. § 3583(d), and 18 U.S.C. § 4209 require that, as a mandatory condition of probation, supervised release, and parole, an offender "cooperate in the collection of a DNA sample...if the collection of such sample is authorized pursuant to...the DNA Analysis Backlog Elimination Act of 2000."

The attachment provides a list of qualifying federal offenses and qualifying military offenses as determined by the Attorney General under the DNA Analysis Backlog Elimination Act of 2000. Please note that any offender who has a previous federal conviction for any of the qualifying offenses also qualifies for this requirement.

Instructions for Meeting Collection Requirements

The FBI requires that DNA be obtained from blood samples and has sent each district an initial supply of 20 blood collection kits. Additional kits are available upon request to the FBI. The FBI requires that fingerprints be taken when the blood is drawn as part of the identification process. Each kit contains a form to be completed at the time of the collection, with instructions on the back of the form.

Procurement of Services

When acquiring DNA testing services, you must follow procurement policies and procedures as outlined in the *Guide to Judiciary Policies and Procedures*, Volume I, Chapter 8. Specifically, if you do not anticipate that your annual requirement for DNA collection will exceed $2500, you do not have to obtain competitive bids. You simply select a responsible source to perform the testing at a fair and reasonable price, which should normally not exceed $50 per blood draw. If you expect the annual requirement to exceed $2500-- but be less than $25,000-- you must solicit three quotes to meet the competition requirements. If you are using GSA Schedule vendors, you may wish to solicit three GSA Schedule Quotes or review pricelists. For your convenience, a sample statement of work is available on the J-Net at http://jnet/adminservices/procur/dectrees/dna4.pdf. Please contact the Procurement Management Division at (202) 502-1330 if you need procurement assistance.

Payment for Services

We request that you keep very detailed and accurate records of your costs as we will be pursuing a reimbursable agreement with the Department of Justice. Please create a separate central file that contains a copy of each form sent to the FBI with the bill for service stapled to it. We have created BOC 2538 in fund 092000 for this initiative, and all bills should be paid from this BOC.

Suggested Procedures at Sentencing

The Judgment in a Criminal Case forms (AO 245B-245D) and the Conditions of Supervision form (Probation Form 7A) will eventually be revised to reflect this new mandatory condition of supervision. Until then, at the time of sentencing, the probation officer should recommend that the court impose the following condition of probation or supervised release, which is mandatory under the provisions of 18 U.S.C. §§ 3563(a)(9) and 3583(d) for those defendants convicted of qualifying offenses: "The defendant shall cooperate in the collection of DNA as directed by the probation officer."

When the offender commences supervision, the officer should follow the procedures for blood collection set out in the next section.

Suggested Procedures for Qualifying Offenders Under Supervision

For those defendants under supervision who have been convicted of a qualifying offense, it should not normally be necessary to amend the conditions of supervision to add the DNA collection condition. Failure to cooperate in collection is a Class A misdemeanor under 42 U.S.C. § 14135a(a)(5). Accordingly, it is a violation of the mandatory condition requiring compliance with the law (18 U.S.C. §S 3565(a)(1) and 3583(d)) and should be reported promptly to the court. If, however, the court should deem it helpful to have the additional incentive of a specific DNA collection condition, it could impose such a condition after a hearing under F.R.Crim.P. 32.1 or waiver.

When an officer identifies an offender on supervision as meeting the requirements for DNA collection, the officer should review the pre-release packet sent by the Bureau of Prisons to see if a "DNA Status Notification Form" was included in the packet. The Bureau of Prisons has begun sending these forms with the pre-release package for every offender meeting the requirements of the law. The form will indicate that the offender qualifies for the DNA requirement and will further indicate whether a sample was taken in the institution. If a sample was taken by the Bureau of Prisons, federal probation officers should note this in the chronological record but should not take an additional sample. If the offender did not submit a DNA sample while in custody, the officer continues with the process.

The officer must notify the offender of the new requirement. The officer must inform the offender that failure to cooperate is a Class A misdemeanor under 42 U.S.C. §14135a(a)(5) and punishable by a sentence of one year in prison and fines up to $100,000.

Once the officer notifies the offender of the requirement, the officer should schedule an appointment for the offender with the contract phlebotomist to draw the blood sample. You may wish to contract with a phlebotomist who will come to the probation office at specified times to draw the blood. This arrangement appears to be the most convenient for the probation officer to identify the offender and take fingerprints.

When the offender arrives for the scheduled appointment, the officer will open the FBI test kit and complete the "Request for National DNA Database Entry" form. The officer will take the offender's fingerprints as the form requires. The officer then will

escort the offender to the phlebotomist who will draw the blood. The officer will ensure that the phlebotomist completes and signs the form in the "Collection Information" section, initials the test tube, and places the test tube in the test kit appropriately.

The officer will make two copies of the form before placing the form in the test kit with the test tube and sealing the kit appropriately. One copy of the form is provided to the contracting officer to track the collection, and one copy is kept in the case file for future reference. The officer must ensure that the sealed kit is mailed to the FBI within 24 hours of the blood being drawn.

If you have any questions, please contact Nancy Beatty at 202-502-1649, or by email at AOHUBPO Beatty, Nancy or Nancy Beatty/DCA/AO/USCOURTS@USCOURTS.

John M. Hughes

Attachment

DNA ANALYSIS QUALIFYING OFFENSES UNDER PUBLIC LAW NO. 106-546

FEDERAL OFFENSE	MILITARY OFFENSE
Murder (18 U.S.C. § 1111)	**Murder** Article 118, UCMJ
Voluntary Manslaughter (18 U.S.C. § 1112)	**Voluntary Manslaughter** Article 119, UCMJ
Other Related Homicide Offenses (18 U.S.C. §§ 1113, 1114, 1116, 1118, 1119, 1120 and 1121)	N/A. Conduct otherwise covered by listed UCMJ offenses.
	Aggravated Assault (with a dangerous weapon or other means or force likely to produce death or grievous bodily harm) Article 128, UCMJ
	Aggravated Assault (in which grievous bodily harm was intentionally inflicted) Article 128, UCMJ
Federal Sex Offenses: **Sexual Abuse** (18 U.S.C. §§ 2241-2245); **Sexual exploitation or other abuse of children** (18 U.S.C. §§ 2251-2252); **Transportation for illegal sexual activity** (18 U.S.C. §§ 2421, 2422, 2423, 2425)	**Rape** Article 120, UCMJ **Carnal Knowledge** Article 120, UCMJ **Forcible Sodomy** Article 125, UCMJ **Sodomy With a Child** Article 125, UCMJ **Indecent Assault** Article 134, UCMJ **Indecent Acts With Another** Article 134, UCMJ

Attachment

	Indecent Acts or Liberties With a Child Article 134, UCMJ **Indecent Language to a Child** Article 134, UCMJ **Pandering (by compelling or by arranging or by receiving consideration for arranging)** Article 134, UCMJ Conviction for conduct described in Chapter 117, §§ 2421, 2422, 2423, 2425 of title 18, United States Code, when charged as Article 133 or 134, UCMJ, offenses. Conviction for conduct described in Chapter 110 §§ 2251, 2251A, 2252 of title 18, United States Code, when charged as Article 133 or 134, UCMJ, offenses
Peonage or Slavery (Chapter 77, title 18, United States Code)	Conviction for conduct described in Chapter 77 of title 18, United States Code, when charged as Article 133 or 134, UCMJ, offenses.
Kidnapping (as defined in 18 U.S.C.§ 3559 (c)(2)(E))	**Kidnapping** Article 134, UCMJ
Robbery and Burglary (18 U.S.C. §§ 2111-2114, 2116, 2118 and 2119)	**Robbery** Article 122, UCMJ **Burglary** Article 129, UCMJ **Housebreaking** Article 130, UCMJ
Violation of 18 U.S.C. § 1153 (re: Murder, Manslaughter, Kidnapping, Maiming, Sexual Abuse, Incest, Arson, Burglary, and Robbery) when committed within Indian Country.	N/A. Conduct otherwise covered by listed UCMJ offenses. **Maiming** Article 124, UCMJ **Arson** Article 126, UCMJ

Attempt to Commit Above Offenses	**Attempt to Commit Above Offenses** Article 80, UCMJ **Assault With Intent to Commit Murder, Rape, Voluntary Manslaughter, Robbery, Sodomy, Arson, Burglary, Housebreaking** Article 134, UCMJ **Solicitation of Another to Commit Above Offenses** Article 134, UCMJ
Conspiracy to Commit Above Offenses	**Conspiracy to Commit Above Offenses** Article 81, UCMJ
	Conviction for any conduct similar to the above offenses, any conduct which involves any form of sexual abuse, and any conduct of a sexual nature that involves a minor, when charged as an assimilative offense under Article 134, UCMJ
	Conviction for any conduct similar to the above offenses, any conduct which involves any form of sexual abuse, and any conduct of a sexual nature that involves a minor, when charged as conduct unbecoming an officer and a gentleman in violation of Article 133, UCMJ, or conduct that is prejudicial to good order and discipline or is service discrediting, under Article 134, UCMJ.