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## Will There Be a Freeze on Cold Hits? Safeguarding the Constitutionality of DNA Collection Statutes

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### Acknowledgements

I would like to thank my parents, Barbara and Richard Magid, my sisters, Carol and Diane, and Professor Robson for all of their help and support.

# WILL THERE BE A FREEZE ON COLD HITS? SAFEGUARDING THE CONSTITUTIONALITY OF DNA COLLECTION STATUTES

*Ellen Ruth Magid\**

## INTRODUCTION

DNA<sup>1</sup> solved the case of a seventy-eight year old grandmother, who was raped and strangled to death in her home.<sup>2</sup> Ten years after her death, a match in the state's DNA databank revealed that the grandmother's assailant was Millous Temple, who was serving time in prison for molesting two of his grandchildren.<sup>3</sup> Temple's DNA matched the DNA collected from the grandmother's crime scene, resulting in a "cold hit."<sup>4</sup>

In a different case, DNA exonerated Clyde Charles from a rape conviction after he spent over a decade in prison pleading his innocence.<sup>5</sup> DNA has become a powerful tool in solving crimes and exonerating the innocent. The Combined DNA Index System ("CODIS") has produced approximately 5,000 cold hits nationwide by matching offender profiles with samples from unsolved crimes.<sup>6</sup> A recent study showed that over one hundred rapes could have been prevented if every state had started collecting DNA in 1990.<sup>7</sup>

This note discusses the growing debate over which analytical

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<sup>1</sup> DNA is the popular term for deoxyribonucleic acid. See *infra* Part I: DNA Background/Perspective.

<sup>2</sup> The state law requires compulsory DNA collection from certain convicted offenders. MINN. STAT. ANN. § 609.117 (2004).

<sup>3</sup> Lisa Donovan, *Police: DNA Solves Woman's 1994 Killing*, PIONEER PRESS, Aug. 13, 2004, at 1B, available at <http://www.twincities.com>.

<sup>4</sup> A "cold hit" occurs when a DNA database matches the DNA of a known offender with DNA collected from the scene of an unsolved crime. See *infra* Part I: DNA Background/Perspective.

<sup>5</sup> *The Case For Innocence: Synopsis*, FRONTLINE (2000), at <http://www.pbs.org/wgbh/pages/frontline/shows/case/etc/synopsis.html> (last visited Dec. 17, 2004).

<sup>6</sup> Cindy Van Auken, *Collecting DNA Samples May Become As Common As Fingerprinting*, WACO HERALD-TRIBUNE, at <http://www.wacotrib.com/news/newsfd/auto/feed/news/2002/08/04/1028476418.04019.6528.1547.html> (last visited Dec. 17, 2004).

<sup>7</sup> Mark Hansen, *DNA Study Shows What Might Have Been: Crimes Could Have Been Prevented With More Sampling, DOJ Survey Says*, 3 No. 16 A.B.A. J. E-REPORT 5, at 1 (2004) [hereinafter *DNA Study*].

approach the courts should apply when addressing the constitutionality of DNA collection statutes. Currently, every court in the United States deciding whether the Fourth Amendment prohibits the collection of DNA samples from qualifying convicted felons for entry in state and federal DNA indexing systems has found that the collection does not violate the Fourth Amendment as an unreasonable search and seizure.<sup>8</sup> However, these courts are split on which analytical method to apply in upholding these statutory DNA searches.<sup>9</sup> This note will examine the *United States v. Kincade*<sup>10</sup> decision as well as other recent decisions that take alternative approaches to resolving whether the DNA statutes violate the Fourth Amendment.<sup>11</sup>

On rehearing en banc in *United States v. Kincade*, the court reversed an earlier decision of the panel,<sup>12</sup> and found that the collection of DNA samples from qualifying convicted felons pursuant to the DNA Analysis Backlog Elimination Act of 2000 (“DNA Act”)<sup>13</sup>

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<sup>8</sup> See, e.g., *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004) (upholding state DNA statute under the special needs exception); *Groceman v. United States Dep’t of Justice*, 354 F.3d 411 (5th Cir. 2004) (upholding federal DNA Act under the totality of the circumstances approach); *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003) (upholding federal DNA Act under the special needs exception); *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999) (upholding state DNA statute under the special needs exception); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992) (upholding state DNA statute under the totality of the circumstances approach); *Nicholas v. Goord*, No. 01 Civ. 7891, 2003 WL 256774 (S.D.N.Y. Feb. 6, 2003) (upholding state DNA statute under the special needs exception); *Padgett v. Ferrero*, 294 F. Supp. 2d 1338 (N.D. Ga. 2003) (upholding state DNA statute under totality of the circumstances analysis); *State v. Steele*, 802 N.E.2d 1127 (Ohio Ct. App. 2003), *appeal denied*, 809 N.E.2d 32 (Ohio 2004) (upholding state DNA statute under the special needs exception); *State v. Martinez*, 78 P.3d 769 (Kan. 2003) (upholding state DNA statute under the special needs exception); *United States v. Stegman*, 295 F. Supp. 2d 542 (D. Md. 2003) (upholding federal DNA statute under the totality of the circumstances approach).

<sup>9</sup> See *id.*

<sup>10</sup> 379 F.3d 813 (9th Cir. 2004).

<sup>11</sup> There are two basic analyses that the courts have adopted in deciding this issue: the basic Fourth Amendment reasonableness test, which examines the totality of the circumstances (see *infra* Part III) and the special needs exception to the Fourth Amendment’s warrant requirement, which inquires whether there is a special need beyond the ordinary law enforcement purpose (see *infra* Part IV).

<sup>12</sup> A three-judge panel in the Ninth Circuit Court of Appeals struck down the DNA Analysis Backlog Elimination Act of 2000, holding that the DNA Act violated the Fourth Amendment because the collection of DNA samples constituted “suspicionless searches with the objective of furthering law enforcement purposes.” *United States v. Kincade*, 345 F.3d 1095, 1113 (9th Cir. 2003), *rev’d en banc*, 379 F.3d 813 (9th Cir. 2004). Appellee’s motion for rehearing en banc was argued on March 23, 2004. *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004).

<sup>13</sup> Pub. L. No. 106-546, 114 Stat. 2726; 42 U.S.C.A. § 14135a (West 2004).

was constitutional under the Fourth Amendment.<sup>14</sup> The court reaffirmed its 1995 decision in *Rise v. Oregon*,<sup>15</sup> in which it had applied the traditional Fourth Amendment totality of the circumstances test in upholding the constitutionality of a state DNA statute.<sup>16</sup>

Part I of this paper will discuss the DNA Act,<sup>17</sup> CODIS, DNA profiling, and “cold hits.” Part II will review the *United States v. Kincade* decision.<sup>18</sup> Part III will review the *Kincade* court’s use of the totality of the circumstances test and consider the effectiveness of this approach. Part IV will examine the use of the special needs exception to the Fourth Amendment’s warrant requirement. This section will also discuss the impact of two important Supreme Court decisions, *City of Indianapolis v. Edmond*<sup>19</sup> and *Ferguson v. City of Charleston*,<sup>20</sup> including their effect on subsequent cases that apply the special needs doctrine to validate the constitutionality of the DNA Act. Part V will offer an alternative approach to DNA collection through standard police booking procedures, which would effectively circumvent the contested Fourth Amendment issue at hand.

#### I: DNA BACKGROUND/PERSPECTIVE

Deoxyribonucleic acid (DNA) is much like an individual’s own personal barcode<sup>21</sup> or “the blueprint of life.”<sup>22</sup> “[It] is the fundamental building block for an individual’s entire genetic makeup. It is a component of virtually every cell in the human body, and a person’s DNA is the same in every cell.”<sup>23</sup> No two individuals have the same DNA except for identical twins,<sup>24</sup> which is why DNA test-

<sup>14</sup> 379 F.3d 813, 840 (9th Cir. 2004).

<sup>15</sup> 59 F.3d 1556 (9th Cir. 1995).

<sup>16</sup> *Kincade*, 379 F.3d at 831-32. The traditional Fourth Amendment test balances the totality of the circumstances to determine the reasonableness of a particular search. The following factors are considered: the individual’s privacy interests, the level of intrusion, and the government’s interest in the search. *Id.*

<sup>17</sup> Pub. L. No. 106-546, 114 Stat. 2726; 42 U.S.C.A. § 14135a (West 2004).

<sup>18</sup> 379 F.3d 813 (9th Cir. 2004).

<sup>19</sup> 531 U.S. 32 (2000).

<sup>20</sup> 532 U.S. 67 (2001).

<sup>21</sup> Ann Meeker-O’Connell, *How DNA Evidence Works*, at <http://science.howstuffworks.com/dna-evidence.htm> (last visited Oct. 28, 2004).

<sup>22</sup> HENRY C. LEE, PH.D. & FRANK TIRNADY, *BLOOD EVIDENCE* 3 (Perseus Publishing 2003).

<sup>23</sup> NAT’L INST. OF JUSTICE, *USING DNA TO SOLVE COLD CASES* 5 (July 2002), available at <http://www.ncjrs.org/pdffiles1/nij/194197.pdf>. See RON FRIDELL, *DNA FINGERPRINTING: THE ULTIMATE IDENTITY* 20 (Franklin Watts 2001); LEE, *supra* note 22, at 4.

<sup>24</sup> NAT’L INST. OF JUSTICE, *supra* note 23. See LEE, *supra* note 22, at 4.

ing or “profiling” has become such a powerful tool in solving crimes.<sup>25</sup> When police evidence technicians canvass a crime scene, they search for a suspect’s blood, saliva, semen, hair, and skin cells, which are all sources of DNA that may link a perpetrator to a crime.<sup>26</sup> After the samples are collected, scientists extract the DNA at a lab to determine the DNA profile and to see if there is a match from a known suspect. If no known suspect’s profile is identified, the sample can then be transmitted to state and national databanks for comparisons.<sup>27</sup>

The DNA Act provides that “[t]he probation office responsible for the supervision under the 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 or a qualifying military offense.”<sup>28</sup> Qualifying federal offenses include homicides, sexual offenses, kidnapping, robbery, and burglary, as well as conspiracy to commit any of these offenses.<sup>29</sup> Failure of an individual to cooperate in the collection of a DNA sample is a misdemeanor offense<sup>30</sup> and the supervising probation office is authorized to restrain or detain, if necessary, any individual who refuses to cooperate in the collection of a DNA sample.<sup>31</sup> Additionally, the Act requires:

[t]he director of the Bureau of Prisons or the probation office responsible (as applicable) shall furnish each DNA sample collected . . . to the Director of the Federal Bureau of Investigation, who shall carry out a DNA analysis on each such DNA sample and include their results in CODIS.<sup>32</sup>

CODIS, the Combined DNA Index System, is a national index of DNA samples maintained by the Federal Bureau of Investigation (FBI), which “blends forensic science and computer technology

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<sup>25</sup> Minnesota Department of Public Safety: Bureau of Criminal Apprehension Forensic Science Laboratory, *Guide to DNA Analysis*, at <http://www.dps.state.mn.us/bca/lab/documents/DNAbroc03.pdf> (last visited Nov. 3, 2004). See Federal Bureau of Investigation, *Combined D.N.A. Index System (CODIS) Home Page*, at <http://www.fbi.gov/hq/lab/codis/index1.htm> (last visited Nov. 15, 2004); LEE, *supra* note 22, at vii; FRIDELL, *supra* note 23, at 67 (discussing violent crime).

<sup>26</sup> FRIDELL, *supra* note 23, at 66.

<sup>27</sup> Michael Zeigler, *DNA “Cold Hits” Put Freeze on Felons*, DEMOCRAT AND CHRONICLE, Oct. 20, 2003, available at <http://www.DemocratandChronicle.com>. See FRIDELL, *supra* note 23, at 68.

<sup>28</sup> 42 U.S.C. § 14135a(a)(2) (West 2004).

<sup>29</sup> *Id.* § 14135a(d).

<sup>30</sup> *Id.* § 14135a(a)(5).

<sup>31</sup> *Id.* § 14135a(4)(A).

<sup>32</sup> *Id.* § 14135a(b).

into an effective tool for solving violent crimes.”<sup>33</sup> All fifty states and the federal government have statutes authorizing the collection and databank storage of DNA samples of certain convicted felons.<sup>34</sup> The CODIS system has been successful in producing “cold hits,” resulting “when the DNA profile from an unsolved crime sample matches an offender in an offender databank.”<sup>35</sup>

## II: THE *UNITED STATES V. KINCADE* DECISION

The Ninth Circuit is not the first court to address the constitutionality of the federal DNA Act or similar state DNA statutes. A majority of the circuits have reviewed Fourth Amendment challenges to the state and federal DNA collection statutes, but remain split in their Fourth Amendment analyses.<sup>36</sup> On rehearing *United States v. Kincade* en banc in a six-five split decision, the Ninth Circuit upheld the DNA Act.<sup>37</sup> In *Kincade*, the court reaffirmed its reasoning from *Rise v. Oregon*<sup>38</sup> and “its reliance on a totality of the circumstances analysis to uphold compulsory DNA profiling of convicted offenders” in accord with the requirements of the Fourth Amendment.<sup>39</sup>

Thomas Kincade, who pled guilty to armed bank robbery, refused to submit a blood sample for DNA analysis.<sup>40</sup> Kincade

<sup>33</sup> Federal Bureau of Investigation, *Combined D.N.A. Index System (CODIS) Home Page*, at <http://www.fbi.gov/hq/lab/codis/index1.htm> (last visited Dec. 17, 2004). See NAT'L INST. OF JUSTICE, *supra* note 23.

<sup>34</sup> See Phillip B.C. Jones, *Arresting Developments in DNA Typing*, at [http://forensic-evidence.com/site/Biol\\_Evid/BioEvid\\_dna\\_jones.html](http://forensic-evidence.com/site/Biol_Evid/BioEvid_dna_jones.html) (last visited Nov. 4, 2004); Mark Ballard, *A Time of Growth For DNA Databases*, NAT'L L.J., June 6, 2003, at <http://www.law.com/jsp/article.jsp?id=1052440832766> (last visited Dec. 21, 2004).

<sup>35</sup> California Department of Justice, *Cold Hit Statistics*, at <http://coldhit.doj.ca.gov/dna/stats.asp> (last visited Nov. 4, 2004). See LEE, *supra* note 22, at 291.

<sup>36</sup> See *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) (upholding the DNA collection statutes under the special needs doctrine); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083, (2003) (same); *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999) (same). *But cf.* *Groceman v. United States Dep't of Justice*, 354 F.3d 411, 413 (5th Cir. 2004) (upholding the DNA collection statutes under the traditional Fourth Amendment totality of the circumstances test); *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995) (same); *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992) (same).

<sup>37</sup> *United States v. Kincade*, 379 F.3d 813, 817 (9th Cir. 2004) (citing 42 U.S.C. § 14135a); Pub. L. No. 106-546, 114 Stat. 2726 (2000).

<sup>38</sup> 59 F.3d 1556 (9th Cir. 1995) (upholding the constitutionality of the state DNA statute under the traditional Fourth Amendment balancing test). Since the state and federal DNA collection statutes are so similar in language and content, the courts have applied the same standards for both.

<sup>39</sup> *Kincade*, 379 F.3d at 832.

<sup>40</sup> *Id.* at 820-21. Robbery is a qualifying offense under 42 U.S.C.A. § 14135a(d)(1)(E) (West 2004).

claimed that it was a suspicionless search violative of his Fourth Amendment rights.<sup>41</sup> In reviewing this same issue, several courts have upheld the constitutionality of the DNA collection statutes under the special needs exception to the Fourth Amendment's warrant requirement.<sup>42</sup> However, other courts have upheld these statutes by applying a pure Fourth Amendment totality of the circumstances test.<sup>43</sup> While not rejecting the special needs analysis, the court in *Kincade* relied on its precedent, *Rise v. Oregon*,<sup>44</sup> and applied the traditional Fourth Amendment totality of the circumstances test.<sup>45</sup> In upholding the Oregon DNA collection statute, the court in *Rise* had followed the totality of the circumstances approach used in *United States v. Knights*,<sup>46</sup> which based its decision on the following factors: the reduced expectation of privacy, the degree of intrusion, and the likelihood of advancing the public interest.<sup>47</sup>

In a concurring opinion, Judge Gould affirmed the majority's opinion but believed the court should have applied the special needs analysis rather than the totality of the circumstances test.<sup>48</sup> Noting the stronger precedent under the special needs theory, Judge Gould suggested that the Supreme Court would uphold the compulsory collection of DNA samples under the special needs

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<sup>41</sup> *Id.* at 821.

<sup>42</sup> *See, e.g.*, *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004) (finding that Wisconsin's state DNA statute comports with the Fourth Amendment under the special needs doctrine); *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003) (finding that the collection of DNA for the federal DNA databank, CODIS, is reasonable under the special needs exception to the Fourth Amendment); *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999) (finding that the Connecticut DNA statute fell within the special needs exception to the Fourth Amendment). *See infra* Part IV: Special Needs Doctrine.

<sup>43</sup> *See, e.g.*, *Groceman v. United States Dep't of Justice*, 354 F.3d 411, 413 (5th Cir. 2004) (finding that the collection of DNA from convicted federal felons is constitutional after considering circumstantial factors such as inmate status and relinquishment of privacy rights for identification purposes); *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) (finding that the Virginia DNA databanks do not violate the Fourth Amendment because the Commonwealth's interest in preventing felony recidivism outweighed the minimal intrusion of taking a DNA sample); *United States v. Stegman*, 295 F. Supp. 2d 542, 550 (D. Md. 2003) (finding that the DNA Act of 2000 is reasonable under the Fourth Amendment); *Padgett v. Ferrero*, 294 F. Supp. 2d 1338, 1344 (N.D. Ga. 2003) (finding that the identification of convicted felons is a legitimate state interest which justifies the minimal intrusion of those convicted felons who have diminished privacy rights).

<sup>44</sup> 59 F.3d 1556 (9th Cir. 1995).

<sup>45</sup> *Kincade*, 379 F.3d at 831-32.

<sup>46</sup> 534 U.S. 112 (2001).

<sup>47</sup> *Rise*, 59 F.3d at 1562. *See infra* Part III: Totality of the Circumstances Approach: The Traditional Fourth Amendment Balancing Test.

<sup>48</sup> *Kincade*, 379 F.3d at 840 (Gould, J., concurring).

doctrine.<sup>49</sup> The deterrent effect of the DNA program would serve “the special needs of a supervised release system” with the goal of preventing future crimes.<sup>50</sup> Moreover, Judge Gould opined that “any use of the CODIS database to solve past crimes is incidental to the special and forward-looking penological need that justifies the program.”<sup>51</sup>

Five judges dissented in *Kincade*,<sup>52</sup> addressing their concern for “the dangers inherent in allowing the government to collect and store information about its citizens in a centralized place.”<sup>53</sup> The strong dissent criticized the plurality’s totality of the circumstances approach, as well as the special needs doctrine favored by the concurring judge, in upholding the constitutionality of the DNA Act.<sup>54</sup> The dissent warned that upholding the DNA Act under either of these two Fourth Amendment analyses, especially the totality of the circumstances test, threatened the traditional safeguards of the Fourth Amendment, which is designed to protect citizens against arbitrary and invasive government actions.<sup>55</sup>

### III: TOTALITY OF THE CIRCUMSTANCES APPROACH: THE TRADITIONAL FOURTH AMENDMENT BALANCING TEST

The touchstone of the Fourth Amendment is always “reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.”<sup>56</sup> An essential purpose of the Fourth Amendment is to protect and safeguard the privacy interests of individuals who are subject to searches and seizures against arbitrary government intrusions.<sup>57</sup> Although the Fourth Amendment generally requires probable cause, reasonable suspicion may be constitutionally sufficient in limited circumstances where the diminished privacy rights are outweighed by a legitimate governmental interest.<sup>58</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Judges Reinhardt, Pregerson, Kozinski, Wardlaw, and Hawkins. *Id.* at 842, 871, 875.

<sup>53</sup> *Id.* at 843.

<sup>54</sup> *Kincade*, 379 F.3d at 851, 854.

<sup>55</sup> *Id.*

<sup>56</sup> *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

<sup>57</sup> *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 621-22 (1989). See *Treasury Employees v. Von Raab*, 489 U.S. 656, 672 (1989) (finding that drug testing customs employees did not constitute an arbitrary or oppressive search); *Kincade*, 379 F.3d at 851.

<sup>58</sup> *United States v. Knights*, 534 U.S. 112, 121 (2001).

Although searches under the DNA collection statutes implicate Fourth Amendment concerns, federal and state courts nonetheless have upheld these statutes, based upon the reasonableness of the totality of the circumstances. In applying this traditional Fourth Amendment test, the courts weigh several factors: “an inmate’s diminished privacy rights, the minimal intrusion involved, and the legitimate government interest in using DNA to investigate [and solve past and future] crime[s].”<sup>59</sup> In upholding the constitutionality of the DNA Act, the court in *Kincade* balanced “the degree to which DNA profiling interferes with the privacy interests of qualified federal offenders against the significance of the public interests served by such profiling.”<sup>60</sup> *Kincade* upheld the constitutionality of the suspicionless searches authorized by the DNA Act under the totality of the circumstances test, even in the absence of non-law enforcement special needs.<sup>61</sup>

The court in *Kincade* justified its avoidance of the Fourth Amendment’s suspicion requirement through its interpretation of *United States v. Knights*.<sup>62</sup> According to the plurality in *Kincade*, *Knights* left open the question of whether suspicionless searches of probationers, conducted for law enforcement purposes, are constitutional under the Fourth Amendment.<sup>63</sup> As such, the court found that:

[S]uch a severe and fundamental disruption in the relationship between the offender and society, along with the government’s concomitantly greater interest in closely monitoring and super-

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<sup>59</sup> *Groceman v. United States Dep’t of Justice*, 354 F.3d 411 (5th Cir. 2004) (affirming *Velasquez v. Woods*, 329 F.3d 420 (5th Cir. 2003), in which the court applied these factors to determine the reasonableness of DNA collection). See *Green v. Berge*, 354 F.3d 675, 677 (7th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003), cert. denied, 540 U.S. 1083 (2003); *Roe v. Marcotte*, 193 F.3d 72, 80 (2d Cir. 1999); *Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992); *United States v. Sczubelek*, 255 F. Supp. 2d 315, 323 (D. Del. 2003); *Padgett v. Ferrero*, 294 F. Supp. 2d 1338, 1344-45 (N.D. Ga. 2003).

<sup>60</sup> *Kincade*, 379 F.3d at 836.

<sup>61</sup> *Id.* at 835.

<sup>62</sup> *Id.* at 827 (citing *United States v. Knights*, 534 U.S. 112 (2001) (finding that the warrantless search of a probationer’s apartment did not violate the Fourth Amendment because the search was supported by reasonable suspicion and authorized by a condition of probation)).

<sup>63</sup> *Id.* at 830. However, it is important to note that *Knights* did not involve a suspicionless search of a probationer. The officer’s search in *Knights* was supported by reasonable suspicion. *Id.* at 829. As courts have only upheld suspicionless searches under the special needs doctrine where a program serves a non-law enforcement purpose, the dissent in *Kincade* criticized the plurality’s totality of the circumstances approach, arguing it completely dodged the Fourth Amendment’s suspicion requirement. *Id.* at 860 (Reinhardt, J., dissenting).

vising conditional releasees, is in turn sufficient to sustain suspicionless searches of his person and property even in the absence of some non-law enforcement “special need” – at least where such searches meet the Fourth Amendment touchstone of reasonableness as gauged by the totality of the circumstances.<sup>64</sup>

Only in limited circumstances, when there is a non-law enforcement special need, has the court upheld suspicionless searches.<sup>65</sup>

### 1. Expectation of Privacy

*Katz v. United States* established the principle that the Fourth Amendment implicitly protects an individual’s expectation of privacy.<sup>66</sup> The Court held that “the Fourth Amendment protects people, not places. What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection . . . [b]ut what [an individual] seeks to preserve as private . . . may be constitutionally protected.”<sup>67</sup> Subsequently, the Supreme Court has identified certain instances where an individual may have a reduced expectation of privacy. Employees of regulated industries have a reduced expectation of privacy due to the need to ensure safety, even with respect to personal searches.<sup>68</sup> Individuals on probation also have a diminished expectation of privacy.<sup>69</sup> “Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled.”<sup>70</sup> As such, “a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens.”<sup>71</sup>

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<sup>64</sup> *Id.* at 835.

<sup>65</sup> *Id.* at 862 (Reinhardt, J., dissenting). The large dissent in *Kincade* criticized the plurality’s interpretation of *Knights* and its totality of the circumstances analysis where a suspicionless law enforcement search was at issue. *Id.* at 860-61.

<sup>66</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>67</sup> *Id.* at 351 (citation omitted).

<sup>68</sup> See, e.g., *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 627 (1989) (upholding blood, urine, and breathalyzer searches of railway employees to ensure safety). See also *Treasury Employees v. Von Raab*, 489 U.S. 656, 671 (1989) (upholding urine searches of United States Customs employees to ensure safety and the integrity of the United States borders).

<sup>69</sup> See *United States v. Knights*, 534 U.S. 112 (2001); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (holding that a warrantless search of a probationer’s home by a probation officer per se satisfies the Fourth Amendment because the probationer is under custody and such status subjects him to particular regulations which condone such searches).

<sup>70</sup> *Knights*, 534 U.S. at 119 (citations and internal quotations omitted).

<sup>71</sup> *Id.* (internal quotations omitted). See *Griffin*, 483 U.S. at 874-75 (stating that restrictive probation conditions serve a rehabilitative as well as a public safety function).

In weighing this factor, the *Kincade* court held that Kincade's status as a parolee subjected him to a lesser expectation of privacy,<sup>72</sup> thereby notably distinguishing his search from the searches invalidated in *City of Indianapolis v. Edmond*<sup>73</sup> and *Ferguson v. City of Charleston*.<sup>74</sup> The pregnant women subjected to drug testing in *Ferguson*<sup>75</sup> and the motorists stopped at drug checkpoints in *Edmond* were free citizens<sup>76</sup> who enjoyed a greater expectation of privacy than Kincade, a convicted felon on parole.<sup>77</sup> Because convicted felons do not enjoy the same privacy rights as free citizens, searches that involve minimal intrusions and which are based upon legitimate governmental interests will survive Fourth Amendment implications.

## 2. Level of Intrusion

The Supreme Court has upheld suspicionless searches that intrude upon an individual's bodily integrity when they are reasonable searches requiring minimal intrusion.<sup>78</sup> Kincade, a parolee, was required to submit a blood sample for entry into CODIS, the federal DNA database, pursuant to the DNA Act.<sup>79</sup> Citing *Schmerber v. California*,<sup>80</sup> the court stressed that blood testing has become routine and commonplace in our everyday life, therefore amounting to only a minimal intrusion of the body.<sup>81</sup>

Other courts have also recently found that the bodily intrusion of taking a blood or saliva sample results in only a minor intru-

<sup>72</sup> United States v. Kincade, 379 F.3d 813, 833 (9th Cir. 2004). See *Knights*, 534 U.S. 112 (2001); *Griffin*, 483 U.S. at 875 (probationers "do not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special probation restrictions.").

<sup>73</sup> 531 U.S. 32 (2000).

<sup>74</sup> 532 U.S. 67 (2001).

<sup>75</sup> See *id.* at 71.

<sup>76</sup> See *Edmond*, 531 U.S. at 35.

<sup>77</sup> *Kincade*, 379 F.3d at 820.

<sup>78</sup> In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the Court approved blood and urine tests and breathalyzers and in *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), the Court held that urine samples were reasonable searches. However, it is important to note that both of these cases involved non-law enforcement suspicionless searches upheld under the special needs doctrine.

<sup>79</sup> *Kincade*, 379 F.3d at 820-21. See 42 U.S.C.A. § 14135a(a) (West 2004) which specifies the procedure for collecting DNA samples, but does not specify the type of DNA sample required. However, § 14135(a)(c)(1) defines the term "DNA sample" as "a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out." There is no requirement that the sample must be a blood extraction.

<sup>80</sup> 384 U.S. 757 (1966). The *Schmerber* opinion notes that the quantity of blood taken is minimal and for the majority of individuals "the procedure involves virtually no risk, trauma, or pain." *Id.* at 771.

<sup>81</sup> *Kincade*, 379 F.3d at 836-37.

sion.<sup>82</sup> Buccal swabbing has gained recent popularity over blood tests because it requires much less intrusion than taking a blood sample.<sup>83</sup> A buccal swab is taken by gently swabbing the inside of the cheek to collect epithelial cells,<sup>84</sup> which is a nonintrusive and painless procedure.<sup>85</sup>

### 3. Governmental Interest

Courts addressing the constitutionality of statutes which require the collection of DNA samples from qualifying convicted felons have offered several governmental interests for permitting these suspicionless searches: the government's "special need" to fill the CODIS system with DNA samples from qualifying convicted felons,<sup>86</sup> obtaining reliable and accurate identification of convicted felons,<sup>87</sup> and using DNA to investigate and solve crimes.<sup>88</sup> Courts

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<sup>82</sup> See *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) (finding that "[t]he intrusion on the plaintiffs' limited privacy interest is far less than that on unsuspecting pregnant women in a hospital but otherwise free of state custody"); *Roe v. Marcotte*, 193 F.3d 72, 80 (2d Cir. 1999) (finding that the state's DNA statute provided adequate safeguards to ensure minimal intrusion); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1997) (holding DNA collection was minimal intrusion and therefore reasonable search and seizure in light of inmate's reduced privacy rights); *Padgett v. Ferrere*, 294 F. Supp. 2d 1338, 1342 (N.D. Ga. 2003) (finding that taking a DNA sample is a minimal intrusion and "not significantly greater than taking fingerprints or a photograph"). See also *United States v. Sczubelek*, 255 F. Supp. 2d 315, 323 (D. Del. 2003) (noting that the minimal intrusion of taking blood has "become an accepted part of daily life").

<sup>83</sup> See LEE, *supra* note 22, at 16.

<sup>84</sup> The buccal cells found in the cheek area are highly concentrated with DNA. *Frequently Asked Questions About DNA Testing*, at <http://www.dnatestingcentre.com/FAQ.htm> (last visited Dec. 17, 2004).

<sup>85</sup> There is no difference in the accuracy of test results between blood samples and buccal swabbing because "DNA is the same in all nucleated cells of a person's body." See *Genetic Identity Frequently Asked Questions*, at <http://genetic-identity.com/FAQ/faq.html> (last visited Oct. 26, 2004).

<sup>86</sup> This interest will benefit the public as well as the defendants who submit their DNA samples. See *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003) (finding that the need to build a DNA databank fits within the special needs doctrine "because the desire to build a DNA database goes beyond the ordinary law enforcement need"); *Sczubelek*, 255 F. Supp. at 323 (finding that the searches pursuant to the DNA Act fall with the special needs doctrine).

<sup>87</sup> See *Green*, 354 F.3d at 679 (finding an important state interest in obtaining reliable identification of convicted felons); *Padgett*, 294 F. Supp. at 1342; *United States v. Stegman*, 295 F. Supp. 2d 542, 548 (D. Md. 2003) (citing *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992) (finding that there is a governmental interest in creating an identification record of convicted felons for the purpose of resolving past and future crimes)).

<sup>88</sup> *Groceman v. United States Dep't of Justice*, 354 F.3d 411, 413-14 (5th Cir. 2004). See *Sczubelek*, 255 F. Supp. 2d at 323 (finding that one of the ultimate goals of the DNA Act is to solve past and future crimes); *Roe v. Marcotte*, 193 F.3d 72, 82 (2d Cir. 1999) (upholding the state's DNA statute under the special needs doctrine due to

have held that these legitimate governmental interests of the DNA Act outweigh the minimal intrusion of taking a DNA sample on a parolee's reduced privacy interests.<sup>89</sup> The court in *Kincade*, citing *Rise*, held that once a person is convicted of a qualifying offense under the DNA Act, his/her identity becomes a matter of state interest.<sup>90</sup> The court further stressed that the searches authorized under the DNA Act serve society's "overwhelming interest" in deterring future crime and reducing recidivism.<sup>91</sup>

#### 4. Critique of the Totality of the Circumstances Test

The strong dissent in *Kincade* argued that under the totality of the circumstances test applied by the plurality, *all* Americans who have a reduced expectation of privacy would be susceptible to compulsory DNA extractions for entry into a DNA databank.<sup>92</sup> The dissent's primary concern with the totality of the circumstances analysis is that the Fourth Amendment's requirement of suspicion is completely ignored.<sup>93</sup> The overriding principle of the Fourth Amendment requires a government official to have some quantum of individualized suspicion to search an individual in order to obtain evidence of ordinary criminal wrongdoing.<sup>94</sup> The dissent in *Kincade* stressed the danger of the plurality's willingness to uphold a suspicionless law enforcement search under the totality of the circumstances approach: "Under such an approach, all of us would inevitably have our liberty eroded when our privacy interests are balanced against the 'monumental' interests of law enforcement."<sup>95</sup>

The premise of the totality of the circumstances test is to guide

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the high rate of recidivism among sexual offenders and DNA's usefulness in solving crimes); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1997) (finding that the government has a legitimate interest in investigating and prosecuting crimes).

<sup>89</sup> See *Groceman*, 354 F.3d at 413-14 (federal DNA Act); *Jones*, 962 F.2d at 307 (Virginia statute).

<sup>90</sup> *United States v. Kincade*, 379 F.3d 813, 837 (9th Cir. 2004) (citing *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995)).

<sup>91</sup> *Id.* at 838-39.

<sup>92</sup> *Id.* at 844. The dissent offers a list of citizens who have a reduced expectation of privacy: "attendees of public high schools or universities, persons seeking to obtain driver's licenses, applicants for federal employment, or persons requiring any form of federal identification, and those who desire to travel by airplane . . . [as well as] citizens in the Armed Forces." *Id.*

<sup>93</sup> *Id.* at 860-61. The dissent noted the plurality's inability to cite "a single case that has applied the totality of the circumstances test to a regime of suspicionless searches," suggesting that there are none. *Id.* at 862.

<sup>94</sup> *Id.* at 864.

<sup>95</sup> *Id.*

the courts in determining whether probable cause or reasonable suspicion exists. When there is reasonable suspicion to conduct a search, the courts balance the intrusion of privacy rights against a legitimate governmental interest. The purpose behind this balancing test is to determine whether the suspicion is constitutionally sufficient to conduct the search. For these reasons, the dissent objected to the use of the balancing test in determining the constitutionality of the DNA Act because no suspicion to search, reasonable or not, ever exists at the time the DNA is collected.

#### IV: SPECIAL NEEDS DOCTRINE

Currently, the Second, Seventh, and Tenth Circuits, along with several other district and state courts, have upheld the constitutionality of state and federal DNA statutes under the special needs doctrine.<sup>96</sup> Although these courts conceded that the collection of DNA constituted a suspicionless search, they concluded that the DNA collection did not violate the Fourth Amendment because it served a non-law enforcement purpose.<sup>97</sup>

The special needs exception to the Fourth Amendment permits suspicionless searches, in limited instances, where a program serves a non-law enforcement purpose. Two recent Supreme Court decisions, *City of Indianapolis v. Edmond*<sup>98</sup> and *Ferguson v. City of Charleston*,<sup>99</sup> reiterate the special needs doctrine first laid out in Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.*<sup>100</sup> Under the special needs doctrine, "searches that would otherwise

<sup>96</sup> *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) (state DNA statute); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003) (federal DNA Act); *Roe v. Marcotte*, 193 F.3d 72, 82 (2d Cir. 1999) (state DNA statute); *Vore v. United States Dep't of Justice*, 281 F. Supp. 2d 1129, 1137 (D. Ariz. 2003) (federal DNA Act); *Miller v. U.S. Parole Comm'n*, 259 F. Supp. 2d 1166, 1175-78 (D. Kan. 2003) (federal DNA Act); *United States v. Sczubelek*, 255 F. Supp. 2d 315, 323 (D. Del. 2003) (federal DNA Act); *United States v. Reynard*, 220 F. Supp. 2d 1142, 1169 (S.D. Cal. 2002) (federal DNA Act); *State v. Martinez*, 78 P.3d 769 (Kan. 2003) (state DNA statute); *State v. Steele*, 802 N.E.2d 1127, 1137 (Ohio Ct. App. 2003), *appeal denied*, 809 N.E.2d 32 (Ohio 2004) (state DNA statute); *In re D.L.C.*, 124 S.W.3d 354, 373 (Tex. App. 2003) (state DNA statute); *State v. Olivas*, 856 P.2d 1076, 1085-86 (Wash. 1993) (state DNA statute).

<sup>97</sup> The dissent in *Kincade* noted that the special needs analysis used to uphold DNA statutes undermined the safeguards of the Fourth Amendment to the same extent as the plurality's totality of the circumstances approach. See *United States v. Kincade*, 379 F.3d 813, 844, 854 (9th Cir. 2004).

<sup>98</sup> 531 U.S. 32 (2000).

<sup>99</sup> 532 U.S. 67 (2001).

<sup>100</sup> *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The Court held that school officials may conduct warrantless searches of a student's person and property as long as reasonable suspicion exists to conduct the search. *Id.* at 347.

violate the Fourth Amendment for lack of probable cause or individualized suspicion are deemed constitutionally permissible because they serve 'special needs, beyond the normal need for law enforcement.'<sup>101</sup>

In determining whether a search qualifies under the special needs exception, the court will first consider the primary purpose of the program. If the primary purpose serves a need beyond the normal need for law enforcement, the court will weigh the governmental interests against the individual's privacy interests to determine whether the government's need for a suspicionless search outweighs the intrusion into an individual's expectation of privacy.<sup>102</sup>

A. *Primary Purpose under the Special Needs Doctrine*

According to the Supreme Court decisions in *Edmond* and *Ferguson*, suspicionless searches will not be exempted from ordinary Fourth Amendment requirements if the primary purpose of the program serves general law enforcement needs.<sup>103</sup> In *Edmond*, the Supreme Court clarified an earlier decision, *Michigan Department of State of Police v. Sitz*, in which the Court upheld the constitutionality of a highway sobriety checkpoint program.<sup>104</sup> Under this checkpoint program, police officers stopped motorists briefly, without any suspicion, to check for signs of intoxication.<sup>105</sup> In reaching its conclusion, the Supreme Court found that although the program served a law enforcement need, the immediate objective of promoting highway safety weighed heavily in favor of finding the sobriety checkpoint program constitutional.<sup>106</sup>

The Court in *Edmond* struck down the city's drug interdiction checkpoints finding that the primary purpose did not serve a special need beyond the normal need for law enforcement.<sup>107</sup> The

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<sup>101</sup> *United States v. Kincade*, 345 F.3d 1095, 1113 (9th Cir. 2003), *rev'd en banc*, 379 F.3d 813 (9th Cir. 2004). See *Edmond*, 531 U.S. at 37; *Ferguson*, 532 U.S. at 78.

<sup>102</sup> *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). In *Skinner*, the Court determined that the primary purpose of the suspicionless search was to promote railroad safety. *Id.* at 620-24. After concluding that the purpose went beyond the normal need of law enforcement, the Court conducted a Fourth Amendment balancing test, finding that the government's interest in promoting public safety justified the minimal intrusion of the search at issue absent a warrant or any individualized suspicion. *Id.*

<sup>103</sup> *Edmond*, 531 U.S. at 41; *Ferguson*, 532 U.S. at 82-84.

<sup>104</sup> *Edmond*, 531 U.S. at 39 (citing *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990)).

<sup>105</sup> *Id.* at 447.

<sup>106</sup> *Id.* at 451; *Edmond*, 531 U.S. at 39.

<sup>107</sup> *Edmond*, 531 U.S. at 48.

Court distinguished this checkpoint from the one upheld in *Sitz* by reiterating that the primary purpose of the checkpoint program upheld in *Sitz* was to reduce the “immediate hazard” posed by drunk drivers<sup>108</sup> and that the Court “had never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”<sup>109</sup> Although *Sitz* clearly involved law enforcement purposes, the Supreme Court noted in *Edmond* that it had upheld the constitutionality of the checkpoint at issue in that case because the *primary* objective of the program was to promote highway safety.<sup>110</sup> The Supreme Court distinguished *Edmond* from *Sitz*, finding that the checkpoint set up to interdict illegal narcotics served the primary purpose of gathering evidence of ordinary criminal wrongdoing and therefore required individualized suspicion under the Fourth Amendment.<sup>111</sup>

The Supreme Court in *Ferguson* warned that “[t]he extensive entanglement of law enforcement cannot be justified by reference to legitimate needs.”<sup>112</sup> The Court held that although drug rehabilitation was the ultimate goal of secretly testing pregnant women for drugs, the program could not be upheld since the immediate objective was to generate evidence for law enforcement purposes.<sup>113</sup> The Court’s opinions in *Edmond* and *Ferguson* made a distinction between a program’s primary or immediate purpose and its ultimate objective.<sup>114</sup> “Because law enforcement involvement always serves some broader social purpose or objective, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose.”<sup>115</sup>

The Supreme Court’s focus on the primary purpose potentially leaves room for a secondary purpose of general crime control. In *Edmond*, the Court did not decide whether a checkpoint with a primary purpose of checking and verifying licenses and registration with a secondary purpose of interdicting narcotics would

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<sup>108</sup> *Id.* at 39.

<sup>109</sup> *Id.* at 41.

<sup>110</sup> *See id.* at 41-42.

<sup>111</sup> *Id.* The Court distinguished the approved checkpoint programs with the program in *Edmond* and found that since the program in *Edmond* did not serve the primary purpose of policing the border or ensuring roadway safety, it could not be upheld. Note, however, that all of these programs serve law enforcement purposes; the difference is whether the law enforcement purpose is primary or ancillary.

<sup>112</sup> *Ferguson*, 532 U.S. at 83 n.20.

<sup>113</sup> *Id.* at 82-3.

<sup>114</sup> *Id.* at 84; *Edmonds*, 531 U.S. at 42.

<sup>115</sup> *Ferguson*, 531 U.S. at 84.

qualify under the special needs doctrine.<sup>116</sup> In applying these Supreme Court decisions, it would appear that if the primary purpose of a program serves general law enforcement needs, it will be struck down; whereas if the law enforcement purpose is ancillary, the program may survive.<sup>117</sup>

### 1. Primary Purpose of the DNA Act

To determine whether a suspicionless search fits within the special needs doctrine, courts must first identify its primary purpose. Recent decisions in both the state and federal courts within the Second,<sup>118</sup> Third,<sup>119</sup> Fourth,<sup>120</sup> Fifth,<sup>121</sup> Seventh,<sup>122</sup> and Tenth<sup>123</sup> Circuits have held that the “immediate objective” of state and federal DNA statutes is to fill the DNA databanks with DNA samples from qualifying offenders for identification purposes while its “ultimate goal” is to solve past and future crimes.<sup>124</sup> These courts contend that the goal of filling CODIS goes beyond the ordinary purpose of law enforcement and therefore fits within the special needs exception of the Fourth Amendment. The courts’ interpretation of the DNA Act’s primary purpose is consistent with the Act’s legislative history, which contains a congressional finding that “[t]he development of DNA identification technology is one of the most important advances in criminal identification methods

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<sup>116</sup> *Edmond*, 531 U.S. at 47 n.2.

<sup>117</sup> *See, e.g.*, *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990). *See also* *Skinner v. Railway Labor Executives’ Ass’n.*, 489 U.S. 602 (1989) (finding that the primary purpose of drug testing railroad employees was to promote railway safety); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (finding that drug testing United States Customs Service employees served the primary purpose of ensuring the safety and integrity of the Nation’s borders); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (finding that the primary purpose of the border checkpoints operated by law enforcement agents was to protect the nation’s borders); *United States v. Sczubelek*, 255 F. Supp. 2d 315, 320 (D. Del. 2003) (stating that primary purpose may not be ordinary law enforcement, but a non-ordinary law enforcement purpose might qualify).

<sup>118</sup> *See, e.g.*, *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999); *Nicholas v. Goord*, No. 01 Civ. 7891, 2003 WL 256774, at \*12 (S.D.N.Y. Feb. 6, 2003).

<sup>119</sup> *See, e.g.*, *Sczubelek*, 255 F. Supp. 2d at 323.

<sup>120</sup> *See, e.g.*, *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992); *United States v. Stegman*, 295 F. Supp. 2d 542 (D. Md. 2003).

<sup>121</sup> *See, e.g.*, *Groceman v. United States Dep’t of Justice*, 354 F.3d 411, 413 (5th Cir. 2004) (recognizing a “legitimate government interest in using DNA to investigate crime”).

<sup>122</sup> *See, e.g.*, *Green v. Berge*, 354 F.3d 675, 677 (7th Cir. 2004).

<sup>123</sup> *See, e.g.*, *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003).

<sup>124</sup> *See* *United States v. Kincade*, 379 F.3d 813, 840-41 n.2 (9th Cir. 2004) (Gould, J., concurring).

in decades.”<sup>125</sup> Moreover, through the DNA Act, Congress provided federal assistance to enable states to eliminate the backlogs of DNA samples which have not yet been analyzed or entered into the databanks.<sup>126</sup> During the proceedings and debates of the 106th Congress, Senator Kohl stated that the DNA Act “will help police use modern technology to solve crimes and prevent repeat offenders from committing new ones.”<sup>127</sup>

DNA has been used since the 1980s to positively identify and exclude suspects of crimes.<sup>128</sup> While the ultimate goal is to aid law enforcement, its immediate purpose is to create a more reliable identification system.<sup>129</sup> Studies show that poor funding is the primary reason the DNA databanks are underused.<sup>130</sup> The goal of the DNA Act is to reduce the backlog, so that law enforcement agencies can make better use of this modern identification system.

## 2. Ordinary Law Enforcement Purpose

The special needs exception of the Fourth Amendment’s warrant requirement is satisfied if the law enforcement purpose goes beyond the ordinary need for law enforcement.<sup>131</sup> There is discrepancy among the circuits over the meaning of “ordinary law enforcement purpose.” Several courts have held that filling CODIS or a similar state DNA databank with DNA samples serves a purpose beyond the normal need for law enforcement.<sup>132</sup> However,

<sup>125</sup> H.R. REP. NO. 106-900, pt. 1, at 9 (2000).

<sup>126</sup> *Id.* at 18. See Nancy B. Gergoire, *Federal Probation Joins the World of DNA Collection*, 66 FED. PROBATION 30 (June 2002).

<sup>127</sup> 146 Cong. Rec. S11647 (daily ed. Dec. 6, 2000).

<sup>128</sup> Steve Irsay, *Cold Hits v. Civil Liberties: The Looming Debate Over Privacy and the DNA Databases*, at [http://courttv.com/news/forensics/dna\\_anniv/databases.html](http://courttv.com/news/forensics/dna_anniv/databases.html) (last modified Apr. 24, 2003).

<sup>129</sup> The DNA Act establishes a grant program that assists states in funding their DNA analyses in order to help reduce the current backlogs. As such, the Act promotes the growth of DNA databanks as a more efficient identification system. See H.R. Res. 900, 106th Cong. § 7 (1999); Stephanie Ward, *A Roadblock for DNA-Testing Drive: 9th Circuit Panel Rules Federal Law Unconstitutional*, 2 No. 40 A. B.A. J. E-REPORT 1 (Oct. 10, 2003) (quoting an attorney with the Criminal Justice Legal Foundation, who remarked that DNA testing “is an excellent way to identify people”).

<sup>130</sup> Hansen, *DNA Study*, *supra* note 7.

<sup>131</sup> See *Miller v. United States Parol Comm’n*, 259 F. Supp. 2d 1166, 1176 (D. Kan. 2003).

<sup>132</sup> See, e.g., *Roe v. Marcotte*, 193 F.3d 72, 79 (2d. Cir. 1999) (concluding that Connecticut’s DNA databank statute fell within the special needs exception because studies show a high rate of recidivism among sexual offenders and DNA’s capability of solving crimes); *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004) (finding that obtaining reliable proof of a felon’s identity pursuant to Wisconsin’s DNA databank statute serves a need beyond the ordinary need of law enforcement); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003) (concluding

some courts have found that although searches under state and federal DNA statutes serve ordinary law enforcement purposes, they nevertheless comport with the Fourth Amendment.<sup>133</sup> *Kincade's* dissent criticized the application of the special needs doctrine to uphold the DNA Act and instead found that the statute served an ordinary law enforcement purpose, arguing that the Supreme Court has never upheld suspicionless searches in programs that serve a general interest in law enforcement.<sup>134</sup>

However, the Supreme Court has found special needs beyond normal law enforcement that justify suspicionless searches, such as the supervision of regulated industries,<sup>135</sup> implementation of border and sobriety checkpoints,<sup>136</sup> supervision of probationers,<sup>137</sup> and the operation of schools<sup>138</sup> and prisons.<sup>139</sup> In these examples,

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that the creation of a DNA database goes “beyond the ordinary law enforcement need”); *Nicholas v. Goord*, No. 01 Civ. 7891, 2003 WL 256774, at \*14 (S.D.N.Y. Feb. 6, 2003) (finding that DNA collection is not a “normal” or “ordinary” law enforcement purpose); *United States v. Sczubelek*, 255 F. Supp. 2d 315, 323 (D. Del. 2003) (finding that “the use of probation officers, instead of law enforcement, suggests Congress’ intent to isolate this area from the responsibility of ordinary law enforcement”); *State v. Steele*, 802 N.E.2d 1127, 1136-37 (Ohio Ct. App. 2003), *appeal denied*, 809 N.E.2d 32 (Ohio 2004) (finding that collecting DNA samples for a state databank for the purpose of creating a more accurate criminal justice system serves a need beyond the ordinary need of law enforcement); *Miller*, 259 F. Supp. 2d at 1176 (finding that the primary purpose of the DNA Act is to build a DNA databank, not to gather evidence of a specific crime, serving a need beyond the ordinary need of law enforcement).

<sup>133</sup> See, e.g., *Groeman v. United States Dep’t of Justice*, 354 F.3d 411, 413 (5th Cir. 2004) (finding that convicted felons have diminished privacy rights and therefore DNA collection does not violate the Fourth Amendment); *Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992) (concluding that the accuracy of DNA identification and the state’s legitimate interest in the identity of convicted felons justifies the minor intrusion of privacy); *United States v. Stegman*, 295 F. Supp. 2d 542 (D. Md. 2003) (upholding the decision in *Jones* that the government’s interest in having DNA identification on convicted felons outweighs the minimal intrusion).

<sup>134</sup> *United States v. Kincade*, 379 F.3d 813, 854-55 (9th Cir. 2004) (Reinhardt, J., dissenting) (citing, among others, *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000) and *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001)).

<sup>135</sup> See, e.g., *Skinner v. Railway Labor Executives’ Ass’n.*, 489 U.S. 602, 620 (1989) (finding that special needs justified regulating the conduct of railroad employees to ensure railway safety). See also *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (finding that special needs justified drug testing United States Customs Service employees to ensure the safety and protection of the U.S. borders).

<sup>136</sup> See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding border checkpoints to ensure national safety); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding sobriety checkpoints to promote highway safety).

<sup>137</sup> See *Griffin v. Wisconsin*, 483 U.S. 868 (1987). See also *United States v. Lifshitz*, 363 F.3d 173, 181 (2d Cir. 2004) (finding that under the “special needs” doctrine, “searches for probationary purposes will be upheld if authorized by a law that is in itself reasonable”).

<sup>138</sup> See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls*, 536 U.S. 822, 824 (2002) (upholding a school drug testing policy based on the gov-

the Court has permitted suspicionless searches without a showing of probable cause or a warrant because they involve programs or activities “not designed to serve the ordinary needs of law enforcement.”<sup>140</sup> Instead, the Supreme Court found that all of these programs served needs beyond the ordinary duties and expectations of police officers.

### 3. DNA Collection: Ordinary Law Enforcement?

The primary objective of collecting DNA samples serves a law enforcement purpose. However, according to the Second, Seventh, and Tenth Circuits, along with several state supreme courts and federal district courts, collecting DNA samples goes beyond the ordinary need for law enforcement because “it is not undertaken for the investigation of a specific crime.”<sup>141</sup> Police officers are not forensic scientists who can analyze DNA samples;<sup>142</sup> the CODIS system serves a need outside the realm of ordinary law enforcement and therefore fits within the special needs doctrine. In *Skinner*, the Court upheld the drug testing of railway employees “not to assist in the prosecution of employees, but rather to prevent accidents and casualties.”<sup>143</sup> Similarly, the Supreme Court will likely find that the purpose of the DNA Act is to fill the gaps in

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ernment’s interest in preventing and deterring childhood drug use). *See also* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>139</sup> *See, e.g., Bell v. Wolfish*, 441 U.S. 520 (1979) (finding that the governmental interest in “maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees” justified the body cavity inspections of inmates after “contact visits” under the special needs doctrine). *See also* *Dunn v. White*, 880 F.2d 1188, 1196 (10th Cir. 1989) (upholding blood testing of inmates for Acquired Immune Deficiency Syndrome (AIDS) in order to control and prevent the spread of AIDS in prison).

<sup>140</sup> *Treasury Employees v. Von Raab*, 489 U.S. 656, 679 (1989). *See Skinner v. Railway Labor Executives’ Ass’n.*, 489 U.S. 602 (1989).

<sup>141</sup> *Green*, 354 F.3d at 678 (quoting *Shelton v. Gudmanson*, 934 F. Supp. 1048, 1050-51 (D. Wisc. 1996)). *See* *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003); *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999); *Vore v. Dept of Justice*, 281 F. Supp. 2d 1129 (D. Ariz. 2003); *Miller v. U.S. Parole Comm’n*, 259 F. Supp. 2d 1166 (D. Kan. 2003); *United States v. Sczubelek*, 255 F. Supp. 2d 315, 325 (D. Del. 2003); *United States v. Reynard*, 220 F. Supp. 2d 1142 (S.D. Cal. 2002); *State v. Martinez*, 78 P.3d 769 (Kan. 2003); *State v. Steele*, 802 N.E.2d 1127, 1136 (Ohio Ct. App. 2003), *appeal denied*, 809 N.E.2d 32 (Ohio 2004).

<sup>142</sup> In most cases, the probation officers make arrangements with laboratories that collect the DNA samples. The police officers, themselves are generally not collecting the samples. *See* H.R. REP. NO. 106-900, pt. 1, at 18 (2000). *See also Sczubelek*, 255 F. Supp. 2d at 323 (stating that the use of probation officers to carry out the DNA Act reflects Congress’ intent to separate this responsibility from ordinary law enforcement).

<sup>143</sup> *Skinner v. Railway Labor Executives’ Ass’n.*, 489 U.S. 602, 620-21 (1989).

CODIS, not to gather evidence for the law enforcement authorities.<sup>144</sup> Thus, if law enforcement gathers evidence, it is merely incidental and not the primary motive of the DNA Act or similar state DNA collection statutes. Studies show that there is a high rate of recidivism among violent felons.<sup>145</sup> The CODIS system enables law enforcement to accurately identify these violent individuals, which will result in a safer society.<sup>146</sup>

The DNA Act should be distinguished from the programs in *Edmond* and *Ferguson* where evidence was gathered to determine whether a particular individual had committed a specific criminal act.<sup>147</sup> A DNA sample does not generate evidence of any specific crime or wrongdoing;<sup>148</sup> rather, it offers “reliable proof of a felon’s identity.”<sup>149</sup>

Although the law enforcement aspects of the DNA Act are entangled in its ultimate objective, as in *Edmond* and *Ferguson*, the DNA Act is more closely related to the border and sobriety checkpoint programs upheld in *United States v. Martinez-Fuerte*<sup>150</sup> and *Michigan Department of State Police v. Sitz*.<sup>151</sup> The Court upheld these programs even though they served law enforcement purposes, reasoning that because the primary purposes served special need beyond ordinary law enforcement, the secondary law enforcement purposes could survive.<sup>152</sup>

Based on the history in the lower courts, it seems likely that the Supreme Court will uphold the DNA Act and similar state DNA collection statutes because their *primary* purpose is to fill the DNA indexing system with DNA samples in order to solve future

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<sup>144</sup> See *Groceman v. United States Dep’t of Justice*, 354 F.3d 411, 413-14 (5th Cir. 2004) (recognizing the importance of correct identification of inmates through DNA sample collection as has been done through fingerprinting); *Green*, 354 F.3d at 677; *Kimler*, 335 F.3d at 1146; *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999); *Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992); *Nicholas v. Goord*, No. 01 Civ. 7891, 2003 WL 256774, at \*13 (S.D.N.Y. Feb. 6, 2003); *Sczubelek*, 255 F. Supp. 2d at 317 (D. Del. 2003); *United States v. Stegman*, 295 F. Supp. 2d 542 (D. Md. 2003).

<sup>145</sup> See FRIDELL, *supra* note 23, at 67. See also *Marcotte*, 193 F.3d at 82.

<sup>146</sup> See FRIDELL, *supra* note 23, at 67.

<sup>147</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (where police officers stopped motorists to discover the presence of drugs, which produced evidence that a specific driver had engaged in illegal drug trafficking); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (where the drug test results of pregnant women were handed over to law enforcement, thereby inculcating certain women of specific criminal wrongdoing).

<sup>148</sup> See *Nicholas*, 2003 WL 256774, at \*13; *Green*, 354 F.3d at 678.

<sup>149</sup> *Green*, 354 F.3d at 678.

<sup>150</sup> 428 U.S. 543 (1976).

<sup>151</sup> 496 U.S. 444 (1990).

<sup>152</sup> See *infra*, Part IV (A) (1).

crimes.<sup>153</sup> DNA is the most reliable form of identification in our modern time<sup>154</sup> and serves a need beyond ordinary law enforcement. Although the ancillary purposes of the DNA Act may serve ordinary law enforcement needs, particularly investigating and prosecuting crimes, the Supreme Court will likely uphold the DNA collection statutes because their *immediate* and *primary* objective is to build a reliable identification system of federally convicted felons through the use of DNA.

*B. Fourth Amendment Balancing Test: Totality of the Circumstances*

If a court finds that the primary purpose of a search goes beyond the ordinary need for law enforcement, it must next conduct a traditional Fourth Amendment totality of the circumstances balancing test. This test weighs the intrusion on an individual's privacy interest against the government's special need that supported the program.<sup>155</sup> The court must consider whether the government's interest in filling the CODIS system with DNA samples justifies intrusions on the diminished privacy rights of qualifying convicted felons. Courts upholding federal and state DNA statutes using the special needs doctrine have found that the government's need to fill CODIS and obtain reliable and accurate identification of convicted felons coupled with the minimal intrusion of taking a DNA sample outweigh a probationer's diminished privacy rights.

V: AN ALTERNATIVE APPROACH: COLLECT DNA SAMPLES THROUGH BOOKING

The standard police "booking" procedures could be the answer to the debate over the constitutionality of federal and state DNA collection statutes, since these procedures are exempt from the usual requirements of the Fourth Amendment. "[R]easonable

<sup>153</sup> See, e.g., *Groceman v. United States Dep't of Justice*, 354 F.3d 411 (5th Cir. 2004); *Green*, 354 F.3d at 677; *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003), cert. denied, 540 U.S. 1083, (2003); *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999); *Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992); *Nicholas*, 2003 WL 256774, at \*12; *Sczubelek*, 255 F. Supp. 2d at 317 (D. Del. 2003); *United States v. Stegman*, 295 F. Supp. 2d 542, 545-46 (D. Md. 2003).

<sup>154</sup> H.R. REP. NO. 106-900, pt. 1, at 9 (2000). The House Report noted that "[t]he development of DNA identification technology is one of the most important advances in criminal identification methods in decades."

<sup>155</sup> See *Ferguson*, 532 U.S. 67, 78 (2001); *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 620-24 (1989); *Miller v. U.S. Parole Comm'n*, 259 F. Supp. 2d 1166, 1177 (D. Kan. 2003) (following the Fourth Amendment balancing test employed in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), requiring that the search be reasonable).

police procedures, performed to effectuate a governmental interest, other than the discovery of incriminating evidence, do not constitute a search within the meaning of the Fourth Amendment [a]nd they do not become a search merely because in the course of these activities, evidence is discovered.”<sup>156</sup> An individual in lawful custody may be required to submit to photographing and fingerprinting as a part of the routine identification process.<sup>157</sup> Where there is a legitimate governmental interest in the positive identification of a person arrested or charged with a crime, fingerprinting is the typical method used for obtaining reliable identification of the accused.<sup>158</sup> Courts have upheld other reasonable methods for securing an individual’s identification, such as photographs,<sup>159</sup> handwriting exemplars,<sup>160</sup> and measurements taken under the Bertillon system.<sup>161</sup>

DNA collection should be added to the standard police “booking” procedures because it is the most reliable form of identification known today, surpassing the capability of fingerprinting with its ability to solve unsolvable crimes.<sup>162</sup> The DNA samples of qualifying convicted felons would be collected for entry into state and federal DNA databanks for identification purposes only; any “cold

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<sup>156</sup> *United States v. Laub Baking Co.*, 283 F. Supp. 217, 225 (D. Ohio 1968).

<sup>157</sup> *See, e.g., Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) (finding that a person in lawful custody must submit to photographing and fingerprinting); *Napolitano v. United States*, 340 F.2d 313, 314 (1st Cir. 1965) (taking an individual’s fingerprints is a “universally standard procedure, and no violation of constitutional rights”); *Laub Baking Co.*, 283 F. Supp. at 225 (fingerprinting arrested individuals or those formally charged with a crime does not constitute a search or seizure within the meaning of the Fourth Amendment); *United States v. Amorosa*, 167 F.2d 596, 599 (3d Cir. 1948) (finding that the photograph of the defendant taken at the time of his arrest was part of the routine identification process).

<sup>158</sup> *Laub Baking Co.*, 283 F. Supp. at 225.

<sup>159</sup> *See Mabry v. Kettering*, 122 S.W. 115 (Ark. 1909) (holding that photographs of accused persons may be used for identification purposes). *See also Bartella v. McFeeley*, 152 A. 17 (N.J. Ch. 1930) (holding that police may lawfully photograph an arrestee without consent).

<sup>160</sup> *See Dist. Att’y of Kings County v. Angelo G.*, 371 N.Y.S.2d 127, 130 (N.Y. App. Div. 1975) (holding that forcing a free person to give handwriting exemplars does not constitute a search or seizure within the meaning of the Fourth Amendment).

<sup>161</sup> *See Downs v. Swann*, 73 A. 653, 654 (Md. 1909). The Bertillon system involves photographing and fingerprinting an individual, as well as taking measurements of the individual’s head, height, age, color, and pedigree to be preserved on record for police use. *See also Bartella*, 152 A. 17 (holding that police may lawfully take an arrestee’s measurements without consent).

<sup>162</sup> More and more prosecutors rely on DNA evidence to solve crimes. *See FRIDELL, supra* note 23, at 64; *LEE, supra* note 22, at 291 (referring to DNA analysis as “revolutionary technology” that has “solved countless crimes, including cold cases”).

hits” retrieved by the databank would be merely incidental and would not constitute a search.

The hesitancy in instituting DNA collection as a part of the booking process is parallel to the initial caution of taking fingerprints at the time of arrest. However, courts quickly began to accept and recognize fingerprinting procedures as standard practice since they were the most reliable form of identification at the time.<sup>163</sup> In a case decided in the early 1900’s, the court addressed the growing need for a more efficient means of an accused person’s identification:

The populous communities which now exist, and the modern facilities for swift and frequent communication and rapid transit, afford hitherto unknown facilities for evading arrest or fleeing from justice, which should be offset in the public interest by providing the agencies, charged with the duty of preserving the public peace and arresting persons reasonably suspected of the commission of crimes, with the most efficient means of detecting and identifying them . . . .<sup>164</sup>

Currently, few states have implemented laws requiring DNA collection at the time of arrest.<sup>165</sup> Virginia, Louisiana, and Texas are pioneers of this movement, enacting “arrestee testing” legislation, which makes DNA collection part of the booking process for people arrested for violent crimes.<sup>166</sup> A few states have recently passed less comprehensive legislation that includes DNA collection in their state’s booking procedures in certain limited circumstances.<sup>167</sup> Other states have proposed “arrestee testing” legislation.<sup>168</sup>

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<sup>163</sup> See Phillip B.C. Jones, *Arresting Developments in DNA Typing*, at [www.forensic-evidence.com/site/Biol\\_Evid/BioEvid\\_dna\\_jones.html](http://www.forensic-evidence.com/site/Biol_Evid/BioEvid_dna_jones.html) (last visited Nov. 4, 2004).

<sup>164</sup> *Downs v. Swann*, 73 A. 653, 655 (Md. 1909).

<sup>165</sup> *E.g.*, VA. CODE ANN. § 19.2-310.2:1 (Michie 2004); LA. REV. STAT. ANN. § 15:609 (West 2004); TEX. GOV’T CODE ANN. § 411.1471(b).

<sup>166</sup> VA. CODE ANN. § 19.2-310.2:1 (Michie 2004) (“Every person arrested for the commission or attempted commission of a violent felony . . . or a violation or attempt to commit a violation . . . or shall have a sample of his saliva or tissue taken for DNA analysis to determine identification characteristics specific to the person.”); LA. REV. STAT. ANN. § 15:609 (West 2004) (“A person who is arrested for a felony or other specified offense . . . shall have a DNA sample drawn or taken at the same time he is fingerprinted pursuant to the booking procedure.” § 15:609(A)(1). Pursuant to section 601(A)(2), the DNA sample requirement also applies to juveniles arrested for a felony-grade delinquent act.); TEX. GOV’T CODE ANN. § 411.1471(b) (“After a defendant . . . is indicted or waives indictment, the court in which the case is pending shall require the defendant to provide to a law enforcement agency one or more specimens for the purpose of creating a DNA record.”).

<sup>167</sup> See Auken, *supra* note 6.

<sup>168</sup> N.Y. State S., S5099, Reg. Sess. 2003-2004 (May 16, 2003); Colorado, SB 03-128,

Like fingerprinting, DNA collection would not constitute a Fourth Amendment search or seizure; the sample would not be taken for investigative purposes. Rather, the sample would be taken to secure a reliable form of identification of an individual who has been arrested or charged with a crime. As with fingerprinting, securing the sample would involve an administrative process and would not become a search for potentially incriminating evidence. Our government has a legitimate interest in obtaining the most reliable identification of individuals charged with crimes and should have the authority to secure DNA samples from such persons, as it is the most reliable form of identification in modern society.

#### CONCLUSION

The collection of DNA samples pursuant to federal and state DNA collection statutes will likely be upheld by the Supreme Court using the special needs doctrine or affirmed as a standard booking procedure. Because of the tremendous benefits and results of these DNA databanks, the courts are willing to circumvent the stringent standards of the Fourth Amendment.<sup>169</sup> DNA is a useful way to identify people and experts and attorneys predict that the databanks will deter criminals from committing more crimes.<sup>170</sup> The Supreme Court decisions in *Edmond* and *Ferguson* left many loopholes in the special needs doctrine for suspicionless searches to be upheld under programs and activities which serve law enforcement purposes. In light of the number of crimes prevented and solved through the use of local, state, and federal DNA databanks, the Supreme Court will likely uphold the collection of DNA from qualifying convicted offenders favoring law enforcement interests over prisoners' rights.<sup>171</sup>

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64th Gen. Assem., 1st Reg. Sess. (Co. 2003); and Arizona, HB 2674, 45th Leg., 2d Reg. Sess. (Ariz. 2002).

<sup>169</sup> See Mark Hansen, *Courts Consider DNA Databanks*, 90 A.B.A. J. 41 (May 2004) [hereinafter *Courts*].

<sup>170</sup> See Mark Hansen, *DNA Dragnet*, 90 A.B.A. J. 38 (May 2004). See also Mike McKee, *9th Circuit Scoffs at Forced DNA Testing*, 229 THE LEGAL INTELLIGENCER 4, at [http://www.law-forensic.com/cfr\\_dna\\_backlog\\_8.htm](http://www.law-forensic.com/cfr_dna_backlog_8.htm) (Oct. 6, 2003).

<sup>171</sup> See Hansen, *Courts*, *supra* note 169.