

No. 02-30237

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LISA RENEE LUJAN,

Defendant-Appellant.

**On Appeal from the United States District Court for the District of Oregon,
No. CR 98-480-02-HA
Honorable Ancer L. Haggerty, Judge**

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION IN
SUPPORT OF APPELLEE AND SUPPORTING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT
(Rule 26.1)

The Criminal Justice Legal Foundation is a California nonprofit public benefit corporation. The corporation has no parents or stockholders.

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INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)¹ is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid efficient, and reliable determination of guilt and swift execution of punishment.

1. CJLF has written consent of all parties to file this brief.

The DNA Backlog Elimination Act of 2000 is part of the most important development in forensic sciences since fingerprinting. Like the fingerprinting of arrestees, the DNA typing of the felons subject to the DNA Act will protect the community, aid the felon's rehabilitation, and make the criminal justice system more accurate. Upholding the constitutionality of the Act is consistent with the interests CJLF was formed to protect, and hence CJLF has an interest in the case.

The issues involved are complex. CJLF believes that the authorities and argument in the attached brief, in addition to those submitted by the Government, will be helpful to the court in arriving at the correct decision in this case.

SUMMARY OF FACTS AND CASE

The defendant pled guilty to one count of unarmed bank robbery on May 10, 1999. *United States v. Lujan*, No. CR 98-480-02-HA (D. Or. July 9, 2002) in Appellant's Excerpt of Record ("ER") at 34. She was sentenced to 21 months in prison followed by 3 years of supervised release. *Ibid.* She was subject to standard supervised release conditions, including the condition that she not commit a crime. *See id.* at 35.

The DNA Analysis Backlog Elimination Act of 2000² ("DNA Act") was enacted on December 19, 2000. The act requires a DNA sample to be collected from individuals convicted of certain federal offenses who are serving their sentence in prison or on probation, parole, or supervised release.

2. Pub. L. No. 106-546, 114 Stat. 2726 (Dec. 19, 2000).

See 42 U.S.C. §§ 14135a(a)(1), (2). Failure to comply with the act is a Class A misdemeanor. *Id.* § 14135a(a)(5).

On January 28, 2002, the defendant was informed by her probation officer that she must submit to a blood test at his office for the purpose of DNA identification, *see* ER at 35, that the test would be conducted by a nurse and take no more than 15 minutes, and that failure to comply with the request is a misdemeanor that could lead to the revocation of her supervised release. *Ibid.* Defendant objected to the DNA testing on numerous grounds, including the Fourth Amendment prohibition against unreasonable searches and seizures. *See id.* at 36. On July 9, 2002, the District Court denied her motion. *Id.* at 44. On July 15, 2002, the defendant filed her notice of appeal. *Id.* at 46.

SUMMARY OF ARGUMENT

A panel of this Court has previously upheld the DNA testing of convicted criminals. Even if that decision does not control, there is no reason to decide differently in this case. Because there is a special need for identifying convicted criminals through their DNA, the DNA Act withstands Fourth Amendment scrutiny.

Ferguson v. Charleston, 532 U.S. 67 (2001) and *Indianapolis v. Edmond*, 531 U.S. 32 (2000) do not compel a different result. These cases regulate searches in which the immediate or primary purpose is to discover evidence of wrongdoing from the general public. They are motivated by a need to

prevent special needs searches from extending to the public at large and thus turning into a general authority to conduct suspicionless searches.

One way to control special needs searches is by limiting the search to those with a diminished expectation of privacy. This is common to most special needs searches. Persons who voluntarily engage in activity subject to intense government scrutiny, such as a heavily regulated industry, thereby reduce the expectation of privacy that society regards as reasonable. This also applies to individuals such as students who volunteer for sports. It also applies to those who choose to commit a serious crime.

By choosing to commit a crime those subject to the DNA Act have substantially reduced their privacy. Whether the punishment is prison or probation, the convicted criminal is entitled to far less privacy than the average citizen. Therefore, searches of probationers and other denizens of the penal system are not governed by *Ferguson* and *Edmond*.

The felons covered by the DNA Act pose a particular danger to society. The best predictor of future criminal conduct is prior criminality, as the ever-high recidivism rates show. The Supreme Court has recognized this danger and has upheld society's special need to supervise probationers through an expansive authority to search that would violate the Fourth Amendment if applied to the general public.

DNA fingerprinting serves the special needs of community safety and rehabilitation. DNA identification, like the fingerprinting of arrestees, protects the community by deterring escape through accurate identification. Its utility in solving past crimes provides a more complete assessment of the

danger posed by felons, and prevents the premature release of those posing an excessive risk to public safety. DNA's powerful identification also deters future crimes of those in the database, which protects the community and aids the felons' rehabilitation. Requiring individualized suspicion would hamstring the Act by needlessly limiting the database.

A balancing of the interests of society and the felons shows that the DNA Act is reasonable, and thus satisfies the special needs exception. Balanced against the compelling interest in the most important forensic development since fingerprinting is a privacy interest that approaches zero. The minimal privacy interest of those serving their sentences is further reduced by the pinprick intrusion of DNA testing. It is difficult to imagine a less intrusive act that is still a search. Like fingerprinting, the DNA Act satisfies the Fourth Amendment.

Even if the special needs exception does not apply, then the DNA Act is still valid under the Fourth Amendment totality of the circumstances test. A search that is reasonable after examining the relevant circumstances withstands Fourth Amendment scrutiny without regard to any particular test. The eminently reasonable DNA Act satisfies this standard.

ARGUMENT

In *Rise v. Oregon*, 59 F.3d 1556, 1564 (9th Cir. 1995), this Court upheld an Oregon law requiring anyone who had ever been convicted of murder or a sex offense to submit a blood sample for DNA testing. The Court found that even if the objective of the search was law enforcement it still satisfied

the Fourth Amendment. In light of the convicts' substantially diminished expectation of privacy, the minimal intrusiveness of blood testing, and the enormous benefit to society of maintaining DNA databanks of convicted murderers and sex offenders, the search satisfied the Fourth Amendment reasonableness standard. *See id.* at 1562. Because the statute in *Rise* involved a narrower class of crimes, *see id.* at 1561 (relying on recidivism rates of rapists and murderers), it may not control this case, but it still provides a useful template.

While the DNA Act covers a wider category of criminals, there is no reason to depart from the result in *Rise*. Time has proven that there is even a greater need to obtain criminals' DNA fingerprints. The Supreme Court's decisions in *Ferguson v. Charleston*, 532 U.S. 67 (2001) and *Indianapolis v. Edmond*, 531 U.S. 32 (2000) do not change the analysis. Certain passages in *Edmond* and *Ferguson*, if misconstrued, could cast unnecessary doubt on the constitutionality of the DNA Act. A proper understanding of the context of these cases, the special problems posed by convicted felons, and the general reasonableness of DNA fingerprinting, demonstrate the constitutionality of DNA fingerprinting convicted felons.

I. *Ferguson* and *Edmond* only regulate searches in which the immediate, primary purpose is to discover evidence of wrongdoing from the general public.

Reasonableness is the driving force behind Fourth Amendment analysis. From the Amendment's text³ to Supreme Court precedent, searches and seizures are judged by their reasonableness. *See Board of Education v. Earls*, 536 U.S. ___, 153 L. Ed. 2d 735, 743, 122 S. Ct. 2559, 2564 (2002). While individualized suspicion is the norm, and a search warrant is preferred, neither is indispensable. The Supreme Court has repeatedly held that "the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976); *see also Earls*, 153 L. Ed. 2d at 743, 122 S. Ct. at 2564. In certain contexts, like "safety and administrative regulations, a search unsupported by probable cause may be reasonable when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *Earls*, 153 L. Ed. 2d at 743, 122 S.Ct. at 2564 (internal quotation marks omitted).

The "special" component of the special needs search is to protect the general public from warrantless, suspicionless searches. This principle was explained recently in *Ferguson v. Charleston*, 532 U.S. 67 (2001) and *Indianapolis v. Edmond*, 531 U.S. 32 (2000). Each case invalidated a suspicionless search for criminal evidence from individuals with ordinary expectations of privacy. *Edmond* involved a highway checkpoint to interdict

3. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" U.S. Const., amend. IV.

illegal drugs, *see* 531 U.S. at 34, while *Ferguson* addressed a state hospital testing pregnant women for drugs without their consent. *See* 532 U.S. at 69-70. Both decisions stated that a search for general law enforcement purposes will not satisfy the special needs doctrine. *See id.* at 83-84; *Edmond*, 531 U.S. at 44. A complete understanding of these cases requires an analysis of what motivated these holdings—preventing special needs searches from invading the privacy of the general public. If the asserted special needs search cannot apply to the general public or a class with a similar expectation of privacy, then *Ferguson* and *Edmond* do not limit the state’s authority to search.

In *Edmond*, allowing a “general interest in crime control” to justify a roadblock “would do little to prevent such intrusions from becoming a routine part of American life.” 531 U.S. at 42. The *Ferguson* Court conveyed a similar rationale. “Because law enforcement involvement always serves some broader social purpose or objective, under respondents’ view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose.” *Ferguson*, 532 U.S. at 84. It is doubtful that this drug testing policy would even achieve the secondary goal of helping expectant mothers and their children. *See id.* at 84 n.23. If the secondary effects of law enforcement are a special need, then any search could be justified by that doctrine. The government must find some way to insulate the general public from the suspicionless search in order to come within the special needs doctrine.

Indianapolis attempted a similar argument in *Edmond*. The city claimed that the roadblock was valid because it served the “lawful secondary purposes of keeping impaired motorists off the road and verifying licenses and registrations.” 531 U.S. at 46. As in *Ferguson*, allowing a secondary interest to justify a search whose primary purpose was a general law enforcement interest would give the state an unlimited authority to search. “If this were the case, however, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check.” *Ibid*.

Context is thus a vital component of the special needs cases. An analysis of the reasons for the search and the facts surrounding it will determine whether the special needs doctrine is appropriate. Valid special needs searches typically occur where there is a diminished expectation of privacy in the parties being searched. Such searches have been upheld for students who participated in sports, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995), probationers, *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987), customs officials involved in drug interdiction, *Treasury Employees v. Von Raab*, 489 U.S. 656, 672 (1989), and employees “in an industry that is regulated pervasively to ensure public safety.” *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602, 627 (1989). Because a diminished expectation of privacy necessarily differs from the norm, a search made in that context cannot expand into a general authority to search.

The drivers in *Edmond* and the expectant mothers in *Ferguson* had the same expectation of privacy as the average citizen. In *Ferguson*, the

intrusion on privacy was exacerbated by the fact that the expectant mothers did not even know that they were being tested for drugs. *See* 532 U.S. at 78. Since they are no different than average citizens, there would be no logical limit to the special needs exception if the searches had been upheld. Although drivers have somewhat diminished privacy expectations, this only dispenses with the warrant requirement under the appropriate circumstances. *See Carroll v. United States*, 267 U.S. 132, 153 (1925). The state's authority would have extended to searches of all drivers had the search in *Edmond* been upheld.

The focus on consent in *Ferguson* emphasizes another way of validating suspicionless searches. If one voluntarily enters a situation in which privacy is compromised, then privacy is limited and the special needs exception is applicable. Thus participation in certain businesses well-known to be heavily regulated can uphold some warrantless regulatory searches. For instance, when a gun dealer “chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.” *United States v. Biswell*, 406 U.S. 311, 316 (1972). Therefore, warrantless regulatory searches made under this well-known authority are reasonable. *See id.* at 317. “Certain industries have such a history of government oversight that no reasonable expectation of privacy, see *Katz v. United States*, 389 U.S. 347, 351-352 (1967), could exist for a proprietor over the stock of such an enterprise when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal

of government regulation.” *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313 (1978).

This is not limited to heavily regulated industries. Participation in an activity or occupation that requires less privacy further limits the individual’s expectation of privacy, just like entry into a heavily regulated industry. School sports is one example. “There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to ‘go out for the team,’ they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.” *Vernonia*, 515 U.S. at 657.

A criminal conviction is another example. Being convicted of a crime places one in a system that requires substantial limits on privacy. *See, e.g., United States v. Knights*, 534 U.S. 112, 119-120 (2001) (probation); *Hudson v. Palmer*, 468 U.S. 517, 527 (1984) (prison). Entry into the penal system necessarily involves a substantial loss of privacy, and it is voluntary, since criminal liability is based on voluntary acts. *See* 1 W. LaFare & A. Scott, *Substantive Criminal Law* § 3.2(c), p.275 (1986). One who commits a crime has effectively chosen to lower his or her privacy just like students who participate in an athletic program or entrepreneurs who enter a heavily regulated business. But unlike school sports or regulated industries, committing a crime is illegitimate, making criminals even less deserving of any expectation of privacy that society is expected to entertain. “Just as other punishments for criminal convictions curtail an offender’s freedoms, a court granting probation may impose reasonable conditions that deprive the

offender of some freedoms enjoyed by law-abiding citizens.” *Knights*, 534 U.S. at 119.

The minimized privacy of those entering the penal system separates them from the general population. In this context, a search intended to find evidence of criminal conduct is valid under the special needs doctrine. *Griffin* invoked the special needs doctrine, *see* 483 U.S. at 875, in order to uphold a search that led to the probationer’s criminal conviction. *See id.* at 870. “A State’s operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents ‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.” *Id.* at 873-874. Thus, 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.’ ” *Id.* at 874 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)). By entering the heavily regulated probation system, Griffin lost any expectation of privacy that would have prevented the state from searching his house with less than probable cause. *Cf. id.* at 878 (dismissing probable cause requirement). The same is true for those subject to the DNA Act.

Griffin is still good law after *Edmond* and *Ferguson*. It was cited in *Knights*, *see* 534 U.S. at 118, 119, and was distinguished in *Ferguson*. *See Ferguson*, 532 U.S. at 79-80 n.15. While the *Ferguson* Court gave three reasons for distinguishing *Griffin*, for this case the most relevant is the final reason. “Finally, we agree with petitioners that *Griffin* is properly read as

limited by the fact that probationers have a lesser expectation of privacy than the public at large.” *Ibid. Ferguson and Edmond* simply do not apply where the circumstances have worked to limit the privacy of those being searched.

An examination of DNA fingerprinting will show that it does not threaten the general public. It is limited to a group of individuals who have a substantially diminished expectation of privacy and involves special needs closely tied to the penal system. *Ferguson and Edmond* are not innovations, and they are distinguishable from the DNA testing of convicted felons.

II. The dangers to society posed by convicted felons present a special need for identifying them through DNA fingerprinting.

The DNA Act provides for the DNA testing of individuals convicted of certain serious federal felonies. *See* 42 U.S.C. § 14135a. The offenses are limited to more serious felonies involving murder or other illegal homicides, *see id.* § 14135a(d)(1)(A), sex crimes, *see id.* § 14135a(d)(1)(B), offenses concerning “peonage or slavery,” *id.* § 14135a(d)(1)(C), kidnapping, *id.* § 14135a(d)(1)(D), offenses involving robbery or burglary, *id.* § 14135a(d)(1)(E), or attempts to commit the listed offenses. *Id.* § 14135a(d)(1)(G). It applies to those serving their sentences in prison, or on probation, parole or supervised release. *See id.* § 14135a(a). By virtue of their conviction for one or more of the listed felonies, individuals subject to the act demonstrate that they pose a special danger to society. This danger warrants the government securing an additional source of their identification through DNA fingerprinting.

A. The Danger.

A felony conviction separates the felon from the rest of society as a special danger to public order. Persons convicted of felonies are a small fraction of society, and those convicted of the felonies listed in the DNA Act are fewer still. In 1999, the total offense rate for violent felonies and burglaries was 1,294 per 100,000 population. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2000* p. 279 (2001) (Table 3.120). The actual number of convicted felons is much smaller. For instance, only 50% of violent crimes are cleared by arrest. *See id.* at 385 (Table 4.20). This number is further reduced by the need to obtain a guilty plea or conviction. Finally, since some people commit much more than one offense, the actual proportion of serious felons is much smaller than even the offense rate suggests.

The danger to society extends beyond the immediate conviction. Estimates of the recidivism rates for felony probationers range from 22% to 65%. *See* Benedict & Huff-Corzine, *Return to the Scene of the Punishment: Recidivism of Adult Male Property Offenders on Felony Probation, 1986-1989*, 34 *J. Res. Crime & Delinq.* 237, 238-239 (1997). Even at the lowest recidivism rate, felony probationers are much more dangerous to the community than the average citizen. If 22% of the general population were arrested for a felony over a 3-year period, this country would be a prison camp. Arrest figures reinforce this common sense conclusion. Since several of the recidivism studies took place in the mid-1980's, *see id.* at 238-239, amicus will use the 1986 arrest figures for the general population as a

comparison figure. In 1986, the arrest rate for the Federal Bureau of Investigation (FBI) “index” crimes (the combined arrest rates for 5 violent crimes and 4 property crimes) was 1,091.8 per 100,000 or 1.0918%. U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1987, p. 368 (1988). Assuming that no person is arrested for more than one index crime during any 3-year period at the 1986 rates, the lowest estimated recidivism rate for felony probationers, 22%, would still be more than 6 times this hypothetical arrest rate for the general population, while the high rate of 65% recidivism is over 19 times this arrest rate. The Supreme Court’s observation that “[t]he recidivism rate of probationers is significantly higher than the general crime rate,” *United States v. Knights*, 534 U.S. 112, 120 (2002), is an understatement, to put it mildly. Therefore, the state may focus on probationers and prisoners in a way it could not on ordinary citizens. *See id.* at 121; *Pell v. Procunier*, 417 U.S. 817, 826-827 (1974) (prisoners).

The Supreme Court has recognized the dangers posed by convicted felons and society’s special need to contain them through means that diminish their privacy. *See Griffin v. Wisconsin*, 483 U.S. 868, 873-874 (1987). Probation conditions were necessary to serve the vital interests of rehabilitation and protecting the community. *See id.* at 875. These interests required close supervision of the probationers by the state. “Supervision, then, is a ‘special need’ of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large.” *Ibid.* Society’s special needs necessarily reduces the convict’s privacy. For example, a

probation condition that one submit to searches by the probation officer, “significantly diminishe[s] [the probationer’s] reasonable expectation of privacy.” *Knights*, 534 U.S. at 119-120.

The present case highlights the minimal privacy interests of those serving their sentences. The testing of bodily fluids is commonplace in the penal system. Thus, drug testing is a “standard” probation condition. *See United States v. Granderson*, 511 U.S. 39, 43 (1994). A federal court has also upheld the mandatory testing of prisoners for HIV. *See Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir. 1989). The defendant in this case has already submitted to a drug testing condition without complaint. *See Appellant’s Opening Brief* at 7. One more test minimally intrudes upon any reasonable expectation of privacy. Serving a sentence for a serious felony conviction severely diminishes the expectation of privacy, and identifies one as presenting special danger to society. As in *Griffin*, this creates special needs for supervision and rehabilitation, which is satisfied by DNA fingerprinting.

B. The Need for Identification.

Placing the genetic fingerprints of the serious felons subject to the DNA Act in a national database helps to alleviate the special problems that these felons pose to society. DNA typing is a powerful forensic tool for placing someone at a crime scene or exonerating a suspect. It is now “a relatively mature and well studied forensic technology.” Imwinkelried & Kaye, *DNA Typing: Emerging or Neglected Issues*, 76 Wash. L. Rev. 413, 458 (2001). Like fingerprinting, it is much more effective at solving crimes than confessions or eyewitness identifications. *See id.* at 423. Its impact “on law

enforcement has been nothing short of revolutionary.” Cronan, *The Next Frontier for Law Enforcement: A Proposal for Complete DNA Databanks*, 28 Am. J. Crim. L. 119, 127 (2000). However, for crimes in which there is no clear suspect, the utility of DNA testing is limited by the size of the database of DNA fingerprints. *See id.* at 134; Tracy & Morgan, *Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?*, 90 J. Crim. L. & Criminology 635, 643 (2000). If there is no suspect available for testing and the perpetrator’s DNA is not in the database, then DNA typing is ineffective.

DNA typing is closely analogous to fingerprinting. *Cf. Rise v. Oregon*, 59 F.3d 1556, 1559-1660 (9th Cir. 1995) (DNA testing of prisoners is valid just like fingerprinting); *Jones v. Murray*, 962 F.2d 302, 306-307 (4th Cir. 1992) (same); *see also* Valdivieso, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 Geo. L. J. 1009, 1027-1028 (2002) (common form of DNA analysis for identification reveals little more information than fingerprinting or photo identification). The now universal practice of fingerprinting arrested suspects was first justified by society’s special need for identification.

“Such means for the identification of prisoners so that they may be apprehended in the event of escape, so that second offenders may be detected for purposes of proper sentence where conviction is had, and so that the government may be able to ascertain, as required by . . . the National Prohibition Act, whether the defendant has been previously convicted, are most important adjuncts of the enforcement of the criminal laws The slight interference with the person involved in finger printing seems to us one which must be borne in the common

interest.” *United States v. Kelly*, 55 F.2d 67, 68 (2d Cir. 1932) (A. Hand).

While there is debate concerning whether fingerprinting is a search, *see* 1 W. LaFave, *Search & Seizure* § 2.2(d), p. 434 and n.162 (3d ed. 1996), there is no doubt that fingerprinting upon arrest is constitutional if it is a search.

“Fingerprinting, as a routine part of the booking process, is justified by the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution, but there is no need for the government to establish any of these needs on a case-by-case basis.” 3 LaFave, § 5.3(c) at 131; *see also Rise v. Oregon*, 59 F.3d 1556, 1559-1560 (9th Cir. 1995).

“Thus, in the fingerprinting context, there exists a constitutionally significant distinction between the gathering of fingerprints from free persons to determine their guilt of an unsolved criminal offense and the gathering of fingerprints for identification purposes from persons within the lawful custody of the state.” *Rise*, 59 F.3d at 1560.

While we only have probable cause to believe that an arrestee is a threat, the threat posed by a convicted felon has been proved beyond a reasonable doubt. Guards, cells, razor wire, and snipers in watchtowers demonstrate society’s interest in keeping prisoners from escaping. *See Pell v. Procunier*, 417 U.S. 817, 826-827 (1974). Parole, probation, and supervised release raise similar concerns, making close supervision a necessary component of these punishments. *See Griffin*, 483 U.S. at 875. If the felon leaves the

community or jurisdiction without permission, then supervision is compromised and public safety is threatened. DNA fingerprinting's extra means of identification reduces the threat posed by escape from prison or supervised release. If a less dangerous arrestee can be fingerprinted, then so can the convicted felon. *See Rise*, 59 F.3d at 1559-1660; *Jones*, 962 F.2d at 307. Neither *Indianapolis v. Edmond*, 531 U.S. 32 (2000) nor *Ferguson v. Charleston*, 532 U.S. 67 (2001) change the analysis. *See supra* Part I.

DNA typing is also a powerful tool for solving unsolved crimes. This does not transform identification into a general law enforcement interest. Uncovering evidence of prior crimes gives authorities a more accurate picture of the felon's threat to the community. Before a felon is given an early release, an accurate assessment of his or her danger is imperative. Convict DNA databases have already exposed the previously hidden danger of certain probationers and prisoners, thus allowing them to be removed from society. For example, police could not solve the rape and murder of 76-year-old Leathia Taylor until semen on her body was entered into a state DNA database. A match was found with James Edward King, a rapist on parole. He was arrested, convicted of Ms. Taylor's murder, and sentenced to life without possibility of parole. *See Cronan, The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks*, 28 Am. J. Crim. L. 119, 120 (2000). In August 1979, 22-year-old Diane Gregory was found stabbed to death in her apartment in Mount Vernon, New York. *See C.J. Chivers, DNA Match Implicates Inmate in '79 Murder, Officials Say*, N.Y. Times, March 13, 2000, at B1. In 2000, Ms. Gregory's sister asked the

Mount Vernon City Council if DNA evidence could solve the murder. The crime scene contained copious amounts of blood, including some that belonged to the attacker. *See ibid.* Walter Gill had been a suspect at the time of the murders, but authorities lacked evidence to charge him or conduct a blood test. *See ibid.* In 2000, Gill was serving a sentence for robbery and his DNA was in New York's offender database. *See ibid.* DNA from blood on a sheet and pillowcase at the crime scene was found to match Gill's profile. *See ibid.*

In other cases, failure to test a convicted felon has allowed that person to be prematurely released and commit more crimes.

“Other proponents of expanding databases to include burglars cite the case of Isaac Jones. Jones was eventually charged with fifty-one rapes in New York City, but he was arrested only after a task force hunting for the assailant mistakenly gunned down an innocent man named Amadou Diallo, shooting him forty-one times. It was later learned that Jones had been paroled for robbery in 1993; if he had been tested at that time, he would have been caught after his first rape, preventing fifty future rapes and the shooting of Diallo.” Stevens, *Note: Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 Tex. L. Rev. 921, 947-948 (2001).

The special dangers posed by convicted serious felons justify taking the extra precaution of DNA fingerprinting.

DNA identification also serves rehabilitation and public safety by deterring future crimes. Having this powerful forensic weapon hanging over their heads will deter some felons from committing some crimes out of a fear of easy apprehension. *See Cronan*, 28 Am. J. Crim. L. at 149-150; W. Va.

Code § 15-2B-2. In addition to protecting the community, deterrence serves as a rough and ready aid to rehabilitation, since a felon who gives up crime for fear of being caught through DNA is also rehabilitated. DNA fingerprinting is simply another form of intense supervision that serves these special needs. *Cf. Griffin*, 483 U.S. at 875.

The special need for identification would be frustrated by requiring a warrant or individualized suspicion. *Cf. Treasury Employees v. Von Raab*, 489 U.S. 656, 664-668 (1989) (analyzing the compatibility of a warrant or probable cause with the special needs search). While successful identification of past crimes may result in prosecution, that does not invalidate the other special needs. DNA databases have significant economies of scale. The larger the universe of samples, the better chance at finding a match for a sample from a crime scene. *See supra* at 16-17. Requiring warrants and individualized suspicion would make it impossible to compile a DNA database. If the Act is to have any effect, it must be exempt from these requirements.

III. The DNA Act is reasonable after balancing the interests of society and the felons covered by the Act.

Once a special need is identified, the search or seizure is analyzed under the Fourth Amendment's general reasonableness test. The issue is whether the government's interest in dispensing with the warrant and probable cause is justified when balanced against "the interference with individual liberty" *Treasury Employees v. Von Raab*, 489 U.S. 656, 671 (1989). The considerable government interest in establishing a new means of identifying

convicted serious felons easily outweighs the minimal intrusion upon the convict's privacy.

As noted in Part II, the government has a keen interest in identifying convicted felons in order to protect the community and advance their rehabilitation. See *supra* Part II A. This interest is well-served by establishing a DNA database of convicted serious felons. See *supra* Part II B. Pitted against these formidable interests is the minimal invasion of the actual test and the convict's substantially diminished expectation of privacy.

DNA testing is minimally invasive. Blood testing, while a search, see *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616 (1989), is a small intrusion upon an individual's expectation of privacy. Blood tests are commonplace, and they pose minimal risks, trauma, or pain. See *Schmerber v. California*, 384 U.S. 757, 771 (1966). "*Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." *Winston v. Lee*, 470 U.S. 753, 762 (1985). The process for taking blood samples has evolved since *Schmerber*. Now "it is possible to withdraw blood from a fingertip with a device that leaves almost no trace and produces virtually no sensation." Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 Cornell J. L. & Pub. Pol'y 455, 477 (2001).

Any invasion of privacy is further reduced by the already diminished expectation of privacy of those subject to the DNA Act. Convicted felons, whether in prison or on some form of supervised release, have substantially diminished expectations of privacy due to their threat to safety and the nature

of their punishment. *See supra* at 15-16. Since examination of bodily fluids is already commonplace for members of the penal system, *see supra* at 16, the invasion of privacy from the DNA Act approaches zero.

A special needs search does not have to be justified by a compelling interest. *See Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995). While a search that is “relatively intrusive upon a genuine expectation of privacy” may require this level of interest, *see ibid.*, less intrusion requires less justification. Given the considerable societal interests in the DNA fingerprinting of convicted felons, and the minimal intrusion upon their privacy, the searches authorized by the DNA Act are reasonable, and therefore constitutional.

Common sense supports this conclusion. In *Davis v. Mississippi*, 394 U.S. 721, 728 (1969), the Supreme Court struck down a large scale detention, fingerprinting, and interrogation of African Americans. Noting that detention for fingerprinting was subject to Fourth Amendment constraints, *see id.* at 727, the high court also recognized that detention for fingerprinting might not require probable cause. *See id.* at 727-728. This conclusion was derived from the accuracy and unobtrusiveness of fingerprinting.

“Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person’s prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or

confessions and is not subject to such abuses as the improper line-up and the ‘third degree.’ Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time.” *Id.* at 727.

Davis concerned whether detention was legal. *See id.* at 724-725. The illegal detention invalidated the resulting fingerprinting. *See id.* at 728. Fingerprinting that is the product of an illegal stationhouse detention is suppressed under the Fourth Amendment exclusionary rule. *See Hayes v. Florida*, 470 U.S. 811, 815 (1985). These are close enough to arrests that they must be supported by probable cause. *Id.* at 816.

Arrestees have been fingerprinted in stationhouses for years without any successful Fourth Amendment challenge. *See supra* at 18. There is no reason to treat convicted serious felons any differently with regards to DNA testing. This was the reasoning of a panel of this circuit with respect to the testing of murderers and sex offenders in *Rise v. Oregon*, 59 F.3d 1556, 1559-1560 (9th Cir. 1995). DNA databanks of criminals are established in all 50 states and in the federal government. *See Alfaro v. Terhune*, 98 Cal. App. 4th 492, 505, 120 Cal. Rptr. 2d 197, 207 (2002). Until a recent decision from the Eastern District of California, *see United States v. Miles*, No. CR S-95-325-WBS (E.D. Cal. October 31, 2002), this practice had been universally upheld. *See Alfaro*, 98 Cal. App. 4th at 505, 120 Cal. Rptr. 2d at 207. There is no need to change.

IV. Even if the special needs exception does not apply, the DNA Act is reasonable and thus satisfies the Fourth Amendment.

It is not necessary to invoke the special needs exception to uphold the DNA Act. In *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995), the panel upheld the narrower Oregon law under a general reasonableness analysis. Similarly, in *United States v. Knights*, 534 U.S. 112 (2001), the Supreme Court chose not to apply the special needs case of *Griffin v. Wisconsin*, 438 U.S. 868 (1987) to a probation search, but instead looked to the reasonableness of the search under “ ‘the totality of the circumstances.’ ” See 534 U.S. at 118 (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)). *Knights* upheld a warrantless search of a probationer’s residence based upon reasonable suspicion and authorized by a probation condition. See 534 U.S. at 122. The present search, which involves a far lesser invasion of privacy and greater societal interests, is even more readily constitutional than the one unanimously upheld in *Knight*.

Establishing DNA databases of convicted criminals is reasonable upon examining all the relevant circumstances. It protects us from them while they are serving their sentences and after the sentences have run. “DNA has proven to be the most powerful forensic tool ever developed,” Rothstein & Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 Brook. L. Rev. 127, 157 (2001), and thus serves a compelling societal interest. It is more common at crime scenes than fingerprints, see Stevens, *Note: Arresting Crime: Expanding the Scope of DNA Databases in America*, 79 Tex. L. Rev. 921, 944 (2001), and is at least

as reliable. The invasion of privacy approaches zero. *See supra* at 22-23. While it may be used in criminal prosecutions, the Act's blanket approach to DNA testing minimizes traditional concerns of probable cause and reasonable suspicion. *See Treasury Employees v. Von Raab*, 489 U.S. 656, 667 (1989) ("Because the [Customs] Service does not make a discretionary determination to search based on a judgment that certain conditions are present, there are simply 'no special facts for a magistrate to evaluate' "); *accord Rise*, 59 F.3d at 1561-1562. If a special need was not present to justify genetic fingerprinting, then the sheer utility of it makes it reasonable under the Fourth Amendment. *See Kaye, The Constitutionality of DNA Sampling on Arrest*, 10 Cornell J. L. & Pub. Pol'y 455, 498 (2001). If this Court does not wish to engage in special needs analysis, the Fourth Amendment reasonableness will vindicate this essential part of modern public safety.

CONCLUSION

The decision of the District Court should be affirmed.

December 20, 2002

Respectfully submitted,

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Criminal Justice Legal Foundation

Form 8. Certificate of Compliance Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 02-30237.

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant And Attached to the Back of Each Copy of the Brief

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December 20, 2002
Date

Signature of Attorney or
Unrepresented Litigant

DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

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Executed on December 20, 2002, at Sacramento, California.

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