A.A., by his parent and guardian B.A., AND JAMAAL W. ALLAH, Plaintiffs, v. ATTORNEY GENERAL OF NEW JERSEY, the NEW JERSEY DEPARTMENT OF CORRECTIONS, and MERCER COUNTY PROBATION SERVICES. Defendants.	SUPERIOR COURT OF NEW JERSEY MERCER COUNTY LAW DIVISION CIVIL ACTION DOCKET NO. _________________

BRIEF OF PLAINTIFFS

IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Plaintiffs A.A, a juvenile, though his parent and guardian B.A., and Jamaal W. Allah each seek preliminary injunctive relief prohibiting defendants the Attorney General of the State of New Jersey, the Department of Corrections, and Mercer County Probation Services, from extracting plaintiffs' blood or another biological sample for DNA testing pursuant to the DNA Database and Databank Act of 1994, N.J.S.A. 53:1-20.17, et seq. ("the DNA Act"). As this Court is aware, preliminary injunctive relief should be entered to preserve the status quo when the movant establishes (1) that he will suffer irreparable injury if the relief is denied; (2) that the relative hardships weigh in favor of granting the injunction; (3) that the claims are based upon settled legal rights or principles; and (4) that there is a reasonable probability of success on the merits. See Crowe v. DeGioia, 90 N.J. 132-34 (1982); see also R. 4:52-2 (permitting preliminary injunctive relief when immediate and irreparable injury will result). As demonstrated below, those requirements are met in this case: if the State is permitted to go forward with its DNA testing of plaintiffs, the plaintiffs' well-settled rights to privacy and bodily integrity will be irreparably harmed. Plaintiffs also have a reasonable likelihood of success on the merits because Article 1, Paragraph 7 of the New Jersey Constitution and the Fourth Amendment of the United States Constitution prohibit suspicionless searches for purposes of law enforcement investigation -- precisely the nature of the impermissible search authorized by the DNA Act. Finally, a temporary stay preserving the status quo to permit judicial review of plaintiffs' claims will harm no one. Accordingly, the Court should grant the preliminary injunctive relief.

STATEMENT OF FACTS

This action challenges the validity of the New Jersey DNA Act under the state and federal constitution. The DNA Act initially created a DNA database and databank program for adult sex offenders. Subsequent amendments expanded the DNA sampling program to include all adult and juvenile sex offenders, L. 1997, c. 136; violent offenders were also added, L. 2000, c. 118. The most recent amendment, effective on September 22, 2003, L. 2003, c. 183, has

brought within the DNA sampling program, "persons convicted or found not guilty by reason of insanity of any crime," requiring them "to submit blood or biological samples of DNA for DNA testing upon imprisonment or confinement" or "as a condition of their sentence" if no term of imprisonment is imposed. Statement to Assemb., No. 2617, Sen. Budget and Appropriations Comm. (May 15, 2003) (emphasis added). For individuals, such as plaintiffs, who were on probation or incarcerated on the effective date, the 2003 amendment requires that they "shall provide a DNA sample before termination of imprisonment [or] probation." N.J.S.A. 53:1-20.20(g).

The purpose of the DNA Act is "to establish a DNA Database containing blood or biological samples." N.J.S.A. 53:1-20.18. Pursuant to the DNA Act, "the results of the DNA profile of individuals in the State database shall be made available to local, State, or federal law enforcement agencies." N.J.S.A. 53:1-20.24. The statute makes clear that "DNA databanks are an important tool in criminal investigations and in deterring and detecting recidivist acts." N.J.S.A. 53:1-20.18. It aims to further the state's policy of assisting "federal, state, and local criminal justice and law enforcement agencies in the identification and detection of individuals who are the subjects of criminal investigations." Id.

Plaintiff A.A., now a fifteen-year-old minor, is subject to compulsory DNA sampling because he was sentenced on October 20, 2002 to eighteen months probation for an act occurring within his home, which if committed by an adult, would have constituted assault upon a law enforcement officer, in violation of N.J.S.A. 2C:12-1b(5). This incident arose from a then-undiagnosed mental health problem. A.A. has since been diagnosed, is receiving appropriate treatment, and is doing well in school and at home. Because he was on probation on the effective date of L. 2003, c. 183, A.A. was notified on September 22, 2003 that he was subject to DNA testing and that he would be notified of his testing date at a later time.

Plaintiff Jamal W. Allah is currently incarcerated at Midstate Correctional Facility in Wrightstown, New Jersey. He was sentenced on December 7, 2001 to concurrent terms of 5 to

10 years and 4 to 8 years for two drug-related offenses in violation of N.J.S.A. 2C:35-5(2) and 2C:35-5(3), respectively. Because he was incarcerated on the effective date of the 2003 Amendments, he is also subject to compulsory DNA sampling prior to his release.

DNA testing is imminent for both plaintiffs. The Attorney General has ordered A.A. to report by mid-February 2004 to the Mercer County Sheriff's Office to provide a biological sample for DNA analysis, an action that would irreversibly and irreparably harm A.A., including that his rights to privacy and bodily integrity under the state and federal constitutions would be violated. Similarly, Mr. Allah anticipates transitioning into a halfway house in early 2004, and will be required to submit a biological sample for DNA analysis at that time. The preliminary relief sought by plaintiffs will do no more than temporarily enjoin the State from extracting a biological sample for purposes of DNA analysis pending the final resolution of their claims on the merits, that is, a preliminary injunction will appropriately preserve the status quo so that this Court may fully and properly adjudicate their constitutional challenge; the requested relief will harm no one.

ARGUMENT

I. PLAINTIFFS HAVE WELL-SETTLED RIGHTS TO PRIVACY AND BODILY INTEGRITY UNDER THE NEW JERSEY AND FEDERAL CONSTITUTIONS.

Both Article I, Paragraph 7 of the New Jersey Constitution and the Fourth Amendment of the United States Constitution guarantee "the right of the people to be secure in their persons. against unreasonable searches and seizures." U.S. Const., amend. IV; N.J. Const., art. I, ¶7; see Schmerber v. California, 384 U.S. 757, 767 (1966); State v. Knight, 96 N.J. 461 (1922). "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusions by the State." Schmerber, 384 U.S. at 767; see also State v. Donis, 157 N.J. 44, 51 (1998) ("Underlying Art. 1, paragraph 7 is the premise that there is a zone of privacy

wherein all individuals expect that what they say or do will be protected from unreasonable government intrusion." (internal quotation marks omitted)).

These privacy protections are heightened with respect to the plaintiffs' claims under Article I, Paragraph 7 of the New Jersey Constitution, as the "New Jersey Supreme Court has continued to consider interpretations of the state constitutional rights provisions that are broader, or more protective of citizens, that the decisions of the United States Supreme Court interpreting the Federal Constitution," Robert F. Williams, The New Jersey State Constitution: A Reference Guide xix (1997), particularly with respect to search and seizure issues, see State v. Hempele, 120 N.J. 182, 196-97 (1990) (explaining the responsibility of New Jersey courts to determine the rights of citizens independently under the state constitution when confronting a decision under the Fourth Amendment that detracts from New Jersey's strong tradition of protecting privacy rights against unreasonable searches and seizures). See e.g., State v. Cooke, 163 N.J. 657, 666-67 (2000); State v. Pierce, 136 N.J. 184, 209 (1994) (refusing to adopt blanket rule permitting warrantless automobile searches incident to all arrests); Hempele, 120 N.J. at 195 (recognizing privacy interest in curbside garbage); State v. Novembrino, 105 N.J. 95, 145 (1987) (declining to establish good faith exception to exclusionary rule); State v. Hunt, 91 N.J. 338, 348 (1982) (finding privacy interest in telephone billing records); see also Marie L. Garibaldi, Remark--Conference on the Rehnquist Court: The Rehnquist Court and State Constitutional Law, 34 Tulsa L.J. 67, 82-83 (1998) (concluding that when there is a "discernible reason to interpret identical federal and state provisions differently" state courts should do to); Hon. Dennis J. Braithwaite, An Analysis of the "Divergence Factors": A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution, 33 Rut. L.J. 1 (2001) (urging primary reliance

upon interpretation of New Jersey Constitution rather than considering whether there is a basis for diverging from the federal approach).

Specifically at issue in this case is the well-established principle recognized by the New Jersey and United States Supreme Courts that a "compelled intrusion into the body for blood" is a search for purposes of Article I, Paragraph 7 and the Fourth Amendment. See State v. Ravotto, 169 N.J. 227, 236 (2001); In re J.G., 151 N.J. 565, 576 (1997) ("That the testing of blood . . . is a search within the meaning of the Fourth Amendment and Article I, Paragraph 7 is uncontroverted."); see also Schmerber, 343 U.S. at 768; Skinner v. Ry. Labor Executives Assoc. et al., 489 U.S. 602, 616 (1989) ("In light of our society's concern for the security of one's person, see, e.g., Terry v. Ohio, 392 U.S. 1, 9 (1968), it is obvious that this physical intrusion penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable."). The state and federal courts have also made clear that an individual's right to privacy in his or her bodily integrity encompasses searches that "entail a surgical intrusion into the body" as well as more noninvasive collections of other biological samples such as urine or breath-testing procedures. See, e.g, New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 151 N.J. 531, 543 (1997) (stating that urine test is subject to requirements of state and federal constitutions); In re J.G., 151 N.J. 565, 580 n.4 (1987) (noting that oral tests "would also be a search with the scope of the Fourth Amendment" and Article 1, Paragraph 7); Skinner, 489 U.S. at 616-617 (declaring that urine collection and breathalyzer tests "intrude upon expectations of privacy that society has long recognized as reasonable" and implicate "concerns about bodily integrity").

Beyond the privacy interest in bodily integrity violated by the compulsory collection of blood or biological sample, the "subsequent 'chemical analysis of the sample to obtain

physiological data is a further invasion'" of an individual's right to privacy, New Jersey Transit PBA Local 304, 151 N.J. at 560 (quoting Skinner, 489 U.S. at 616), as is the "potential for dissemination of the test results and any medical information obtained through testing," see New Jersey Transit PBA Local 304, 151 N.J. at 560. See also In re J.G., 151 N.J. at 580 ("Mandatory testing and disclosure of [test results] thus threaten privacy interests beyond the taking of the blood sample . . . ."); Rise v. Oregon, 59 F.3d 1556, 1559 (1995) (stating that to determine the reasonableness of DNA sampling "we examine separately the privacy interest implicated by the state's derivation and retention of identifying DNA information . . . and the interest in bodily integrity implicated by the physical intrusion necessary to obtain the sample"). The United States Supreme Court has made clear that individuals have a reasonable expectation of privacy in the results of analysis of their blood or urine because of its potential to reveal a "host of private medical facts." Skinner, 489 U.S. at 617.

The DNA analysis mandated by the New Jersey DNA Act similarly collects uniquely private information that is not normally held out to or received by the public. Unlike the reduced expectation of privacy an individual may have in external or public identifying characteristics such as fingerprints, visual images, or voice prints, individuals have a much keener privacy expectation with respect to their internal, biological traits. As one commentator has observed:

> [I]t cannot be said that DNA sampling, like the fingerprinting in Davis, involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Certain parts of one's genome -- those related to otherwise nonobvious disease states or behavioral characteristics -- are as much, if not more, a part of an individual's private life as are the hormones or other chemicals found in one's urine.
>
> [D.H. Kaye, The Constitutionality of DNA Sampling on Arrest, 10 Cornell J.L. & Pub. Pol'y 455, 482 (2001) (internal quotation marks and footnote omitted)).]

In sum, while a person has a lower privacy expectation in personal traits that "a person knowingly exposes to the public, even in his own home or office," see Katz v. United States, 389 U.S. 347, 351 (1967), or for the sound of his voice, see United States v. Dionisio, 410 U.S. 1, 14-15 (1973), the compulsory extraction of blood or biological sample and the ensuing DNA analysis intrude upon reasonable privacy expectations in bodily integrity. Accordingly, if they are to survive, these intrusions upon plaintiffs' well-settled rights to privacy and bodily integrity must satisfy the requirements of Article I, Paragraph 7 and of the Fourth Amendment for reasonable searches. For the reasons set forth below, they do not.

II. THE STATE AND FEDERAL CONSTITUTIONS PROHIBIT COMPULSORY EXTRACTION OF BLOOD OR OTHER BIOLOGICAL SAMPLE FOR DNA TESTING IN THE ABSENCE OF SOME DEGREE OF INDIVIDUALIZED SUSPICION

When the State seeks to intrude upon the rights to privacy and bodily integrity, the New Jersey and federal Constitutions require that officials justify the search as reasonable. In re J.G., 151 N.J. at 576-77 (stating that Article 1, Paragraph 7 "provides a separate state protection against unreasonable searches and seizures"); United States v. Knights, 534 U.S. 112, 118 (2001) ("The touchstone of the Fourth Amendment is reasonableness."). And, to satisfy this reasonableness requirement, a warrant based upon probable cause is constitutionally preferred for any investigative search conducted by law enforcement. Cooke, 163 N.J. at 664; State v. Hempele, 120 N.J. at 217. In the absence of a warrant based upon probable cause, the search is presumed invalid unless the State establishes that it falls within one of the recognized exceptions to the warrant requirement. Cooke, 163 N.J. at 664; Hempele, 120 N.J. at 217. Indeed, the very purpose of the warrant and probable cause requirement is the imposition of "limitations on search-and-seizure powers in order to prevent arbitrary and oppressive interference by

enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976); N.J. Transit PBA Local 304, 151 N.J. at 544.

To be sure, the New Jersey and United States Supreme Courts have recognized a limited exception to the warrant and probable cause requirement when a showing of individualized reasonable suspicion will establish the validity of the search in narrowly-defined circumstances. See, e.g., New Jersey Transit PBA Local 304151 N.J. at 544; see also Terry, 392 U.S. at 1 (permitting police officers to stop a suspect based on individualized suspicion that the person stopped may have been involved in criminal activity); State v. Davis, 104 N.J. 490, 505-08 (1986) (permitting investigatory stop when police officer had particularized suspicion of possible criminal activity by defendant). Yet even in these cases, some degree of individualized reasonable suspicion is required because the searches are conducted by law enforcement for investigative purposes rather than for informational purposes. See N.J. Transit PBA Local 304, 151 N.J. at 544.

Nor does the fact that the State may conduct such searches on an individual basis from every person during the course of an investigation relieve the State of satisfying the individualized suspicion requirement. Cf. Rise, 59 F.3d at 1570 (Nelson, J., dissenting) ("Blanket searches are unreasonable, however 'evenhanded' they may be, in the traditional criminal law enforcement context. . . . The ill that the Fourth Amendment prevents is not merely the arbitrariness of police discretion to single out individuals for attention, but also the unwarranted domination and control of the citizenry through fear of baseless but 'evenhanded' general police searches." (citing Ybarra v. Illinois, 444 U.S. 85, 91-91 n.4 (1979)). The State should not be able to use the DNA Act as a means to abrogate the privacy protections at the core of Article I, Paragraph 7 and of the Fourth Amendment and in the name of administrative

efficiency. Bell v. Wolfish, 441 U.S. 520, 595 (1979) (Stevens, J., dissenting) ("The easiest course for [law enforcement] officials is not always one that our Constitution allows them to take.").

Moreover, the State's legitimate and clearly expressed interest -- its desire for efficient and accurate criminal prosecutions -- however legitimate and important, does not render a suspicionless search reasonable. Indeed, in Schmerber, the United States Supreme Court emphasized the importance of a obtaining a warrant "for intrusions into the human body" because "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." Schmerber, 384 U.S. at 770; see also Ravotto, 333 N.J. at 253 ("[A] warrantless search mandating intrusion into the human body should be scrutinized very closely." (citing Schmerber, 383 U.S. at 770)).

Accordingly, the exception to the probable cause requirement based upon individualized reasonable suspicion only speaks to the degree of suspicion that the State must establish, and does not sanction investigative searches absent any individualized showing of wrongdoing. In particular, neither the New Jersey nor the United States Supreme Courts has ever approved the type of suspicionless searches at issue here, which are directed towards individuals for the purpose of investigating possible crimes, if any, committed by those individuals. See City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000) ("When law enforcement authorities pursue primarily general crime control purposes . . ., [searches] can only be justified by some quantum of individualized reasonable suspicion."); N.J. Transit PBA Local 304, 151 N.J. at 544; see also Illinois v. Lidster, __S.Ct.__, 2004 WL 5006 (Jan. 13, 2004) (distinguishing general crime control searches aimed at the target of investigation from "informational" searches to acquire

information about a crime committed by someone else). At a constitutional minimum, Article I, Paragraph 7 and the Fourth Amendment require individualized reasonable suspicion to justify any search for law enforcement investigative purposes. See N.J. Transit PBA Local 304, 151 N.J. at 544; see also State v. Smith, 134 N.J. 599, 616 (1994) (noting that New Jersey has a long tradition of requiring some quantum of individualized suspicion as a prerequisite to a constitutional search); Davis, 104 N.J. at 505-08; Edmond, 531 U.S. at 36 ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."). Most recently, the United States Supreme Court expressly declared in Edmond, 531 U.S. at 47, Ferguson v. City of Charleston, 532 U.S. 67 (2001), and Lidster that a search conducted for investigative purposes, such as the DNA sampling at issue in this case, must be supported by some measure of individualized suspicion. And, at the very least, individualized reasonable suspicion requires that the state present "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion" upon privacy expectations. Terry, 392 U.S. at 21.

The only instances in which the New Jersey or United States Supreme Courts have held that suspicionless searches withstand constitutional scrutiny have been the recent "special needs" cases, in which the Court has acknowledged a "closely guarded" corollary to the individualized reasonable suspicion standard, which itself is an exception to the general rule that a warrant based upon probable cause is required. See In re J.G., 151 N.J. at 578-80 (applying special need analysis to HIV testing of accused or convicted sex offenders); New Jersey Transit PBA Local 304, 151 N.J. at 556 (adopting special need analysis for determining constitutionality of employer's drug testing program). As set forth below, however, these special needs cases are limited to administrative or regulatory searches conducted for non-investigatory purposes, such

as drug-testing of employees and students for health and safety reasons. See infra 15-17. Because law enforcement investigation is the primary purpose of the DNA Act, however, that special needs doctrine is inapplicable here. Accordingly, Article I, Paragraph 7 and the Fourth Amendment require some showing of individualized suspicion to support the DNA sampling at issue in this case. Because the DNA Act requires no such showing, plaintiffs' challenge to the DNA Act under the state and federal constitutions has a reasonable likelihood of success.

(A) The DNA Act Authorizes Unconstitutional Suspicionless Searches for Investigative Purposes

The compulsory DNA testing required by the DNA Act is not implemented pursuant to any individualized suspicion. Rather, it is a suspicionless search expressly for the purpose of assisting law enforcement in its criminal investigation function. It does not, for example, does it concern compliance with judicially imposed probation conditions or with measures related to prison administration, or otherwise provide a basis to deviate from the probable cause requirement of Article I, Paragraph 7 and the Fourth Amendment. Because the State, however, has made no attempt to demonstrate probable cause for the DNA sampling of plaintiffs, or anyone else, the DNA Act is unconstitutional. Moreover, the suspicionless searches authorized under the DNA Act are unconstitutional even if the narrow exception for individualized reasonable suspicion is applied.

Law enforcement would be required to obtain a warrant based upon probable cause in order to compel DNA sampling from someone in the general public for purposes of investigating that individual as a criminal suspect. See New Jersey v. T.L.O., 469 U.S. 325, 351 (1985). As set forth above, probationers and prisoners, as well as the general public, have a reasonable expectation of privacy in their bodily integrity and dignity. And, the compelled extraction of blood or another biological sample, as well as the ensuing DNA analysis, constitute substantial

intrusions upon plaintiffs' right to privacy that exceed the constitutionally permissible infringement reasonably imposed upon a probationer or a prisoner.

While it is true that a probationer's status means that he may not "enjoy the absolute liberty to which every citizen is entitled," the resulting restrictions upon liberties allowed by courts have been closely linked to the court's authority to impose conditions of probation rather than upon the probationer's status alone. Knights, 483 U.S. at 119 (internal quotation marks omitted); see also State v. Maples, 346 N.J.Super. 408, 416 (2002) (adopting the scope of privacy protections for parolees set forth in Knights). In Knights, for example, the Supreme Court announced for the first time that law enforcement officials, rather than probation officers, could search a probationer's home upon a showing of individualized reasonable suspicion rather than probable cause. The Court emphasized repeatedly, however, that "a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens," that "the probation search condition" was a "salient circumstance," and that "the judge who sentenced Knights to probation determined that it was necessary to condition the probation on Knights' acceptance of the search provision." Knights, 534 U.S. at 118-19 (emphasis added); see also id. at 121 ("When an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer's significantly diminished privacy interest is reasonable." (emphasis added)). Thus, Knights upheld the search of a probationer based only upon individualized reasonable suspicion for either probation or law enforcement purposes. However, the Court's ruling was limited to cases in which judicially determined probation conditions justified the intrusion upon the probationer's privacy

expectation. And, even then, individualized reasonable suspicion -- such as is not mandated by the DNA Act -- is required.

Similarly, inmates do not shed all of their constitutional rights at the prison gate. See New Jersey State Parole Bd. v. Byrne, 93 N.J. 192 (1983). Infringements upon inmates' rights to privacy and bodily integrity are constitutionally justified only when searches are conducted pursuant to a warrant or for purposes related to prison management and safety rather than ordinary law enforcement investigation. See e.g., State v. Jackson, 321 N.J. Super. 365, 308 (1999) (holding unconstitutional a search that "was not remotely connected to any institutional security concerns" and which "was a pretext designed to permit the prosecutor to invade defendant's limited zone of privacy in order to bolster its case against the defendant"); see also Bell v. Wolfish, 441 U.S. 520, 599 (1979) (permitting strip searches of inmates on less than probable cause when the search is related to prison security).

In any event, searches pursuant to the DNA Act should be held to a probable cause standard based upon the law enforcement purposes underlying the development and maintenance of the DNA database. Individualized reasonable suspicion may suffice for a search which furthers the State's interest in supervising the probation system because the probation conditions give the probationer a lesser expectation of privacy and the state has a strong interest in the "twin goals" of probation: preventing recidivism and integrating the probationer back into the community. See Griffin v. Wisconsin, 483 U.S. 868, 875 (1987). Similarly, individualized reasonable suspicion justifies a search necessary for the efficient administration of a prison system. But as the State ventures farther and farther from these legitimate, noninvestigatory interests towards searches for the purpose of ordinary criminal investigation, the use of the individualized reasonable suspicion standard becomes increasingly questionable. These

concerns, combined with the heightened privacy interest in bodily integrity rather than in one's home or property, support holding the State's DNA sampling of probationers and prisoners to the probable cause standard. Accordingly, the DNA Act is unconstitutional because it authorizes suspicionless searches despite the requirement of Article I, Paragraph 7 and of the Fourth Amendment that the State show probable cause to justify the compulsory extraction of blood or biological sample for DNA analysis.

Even if sampling pursuant to the DNA Act is held to the individualized reasonable suspicion standard, however, such intrusions constitute unreasonable suspicionless searches in violation of Article I, Paragraph 7 and of the Fourth Amendment, each of which absolutely require that the State, at a minimum, show individualized reasonable suspicion to compel a probationer or inmate to submit to the forced extraction of blood for DNA testing. Cf. State v. Maples, 346 N.J. Super. 408 (2002) (holding that warrantless search of parole's home conducted pursuant to state regulation, requiring a parole officer to have both a reasonable suspicion of unlawful conduct and prior approval from a supervisor or exigent circumstances, satisfied state and federal constitutions because statute requires individualized reasonable suspicion before search is permitted). Plaintiffs acknowledge that some courts have found that the purpose of the DNA Act is to develop a DNA databank and not to further any particular criminal investigation.[1] This reasoning, however, simply divorces the collection of evidence from its analysis in a particular investigation. See United States v. Miles, 28 F.Supp.2d 1130, 1138 n.6 (E.D.Cal. 2002) ("It is intellectually dishonest to decouple the collection of information for use in [the DNA database] from the law enforcement purpose for which [the database] was created.").

[1] See, e.g., United States v. Sczubelek, 255 F.Supp.2d 315, 322 (D.Del.) aff'd 54 F.3d 771 (1995) (table order); Nicholas v. Goord, 2003 WL 256774, at *13 (S.D.N.Y., Feb. 6, 2003); Vore v. Dep't of Justice, 281 F.Supp.2d 1129, 1135 (D.Ariz. 2003); United States v. Reynard, 220 F. Supp.2d 1142, 1167-68 (S.D.Cal. 2002); Shelton v. Gudmanson, 934 F.Supp. 1048, 1051 (W.D.Wisc. 1996).

Moreover, whatever the nature of DNA testing programs in other states, there is no question that the purpose of the New Jersey DNA Act is to assist law enforcement in its criminal investigations. See infra 19-22. The databank itself is nothing more than an efficient tool for comparing the aggregate results of numerous individual searches to an aggregate collection of unsolved, pending, or even future criminal investigations. Cf. Lidster, 2003 WL 5006, at *3-5 (comparing unconstitutional generalized investigative search designed to uncover wrongdoing on behalf of any given subject of the investigation with constitutionally permissible informational search designed to acquire from subject information concerning wrongdoing on behalf of someone else).

In sum, Plaintiffs are reasonably likely to show that Article I, Paragraph 7 and the Fourth Amendment require the State to establish probable cause to justify the compulsory extraction of blood or biological sample for purposes of DNA sampling. Alternatively, and at the very least, they are reasonably likely to prevail on their claim that the State must show some quantum of individualized reasonable suspicion justifying the intrusion upon their rights to privacy and bodily integrity. Because the DNA Act instead authorizes suspicionless searches, it violates the state and federal constitution under either standard. For these reasons, Plaintiffs' constitutional challenge to the DNA Act is reasonably likely to prevail and a preliminary injunction is warranted.

(B) The Special Needs Exception is Inapplicable to DNA Sampling

The constitutionality of the DNA Act cannot be redeemed through application of the special needs doctrine because its express purpose is to assist law enforcement in its criminal investigation.. As discussed above, suspicionless searches are exceptions to the individualized reasonable suspicion requirement, which itself is a narrowly-defined exception to the warrant

and probable cause requirements. Suspicionless searches are therefore presumptively unconstitutional. Specifically, suspicionless searches are only allowed when "special needs, beyond the normal need for law enforcement" justify the intrusion. T.L.O., 469 U.S. at 351 (Blackmun, J., concurring); see also New Jersey Transit PBA Local 304, 151 N.J. at 556 (adopting special needs analysis). This restricted category of cases, however, has been limited to regulatory or administrative searches conducted for non-law enforcement purposes. See New Jersey Transit PBA Local 304, 151 N.J. at 545 ("Of particular relevance here, administrative searches of highly or pervasively regulated industries have been permitted without probable cause or individualized suspicion."); Tamburelli v. Hudson County Police Dep't, 326 N.J.Super. 551 (App. Div. 1999); Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (random drug testing of student-athletes); Treasury Employees v. Von Raab, 489 U.S. 656 (1989) (drug testing for U.S. Customs Service employees seeking transfers or promotions); Skinner v. Ry. Labor Executives Assoc., 489 U.S. 602 (1989) (drug and alcohol tests for railway employees involved in accidents or safety violations); New York v. Burger, 482 U.S. 691 (1987) (administrative inspection of premises of closely regulated business); Michigan v. Tyler, 436 U.S. 499 (1978) (administrative inspections of fire damaged building to determine cause of fire).

Following the United States Supreme Court's adoption of the special needs doctrine in Griffin v. Wisconsin, 483 U.S. 868, 875 (1987) (holding that supervision of the probation system 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'), some federal and state courts broadly interpreted Griffin and it progeny as permitting application of the doctrine without judicial inquiry into the "primary purpose" when the state proffered an administrative or other non-law enforcement reason for a search regime. Specifically, some federal and state courts upheld the

constitutionality of state or the federal DNA sampling statutes by finding "some other significant governmental interest" event though "the samples may later by used for law enforcement purposes." Roe v. Marcotte, 193 F.3d 72, 79 (2d Cir. 1999). In Edmond and Ferguson, however, the Supreme Court clarified its special needs analysis in a manner that precludes finding DNA sampling statutes constitutionally permissible pursuant to the special needs doctrine, and in a manner that forgoes any reliance upon earlier decisions upholding DNA sampling statutes under the Fourth Amendment.

In Edmond, the Supreme Court carefully defined its narrow category of special needs cases in considering a challenge to Indianapolis's highway checkpoint program involving suspicionless searches whose primary purpose was the discovery and interdiction of illegal drugs. The program was seemingly identical in principle to the drunk-driving program previously upheld by the Court in Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990). Lower federal courts had interpreted Sitz as permitting the application of a balancing test under traditional Fourth Amendment principles for a suspicionless law enforcement search. In Edmond, however, the Court clarified that Sitz was a special need case involving a program whose primary purpose was "clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highway" rather than "the ordinary enterprise of investigating crimes." Edmond, 531 U.S. at 39, 44. The Court then declared that in its prior administrative and regulatory search cases it had "never approved [a general program of suspicionless searches] whose primary purpose was to detect evidence of ordinary criminal wrongdoing." Id. at 41 (emphasis added). Thus, in Edmond, the Court focused on the Indianapolis program's primary purpose of apprehending narcotic offenders and refused to consider the secondary purposes of the Indianapolis program of keeping impaired motorists off the road, rejecting the approach of

lower courts interpreting Griffin and Sitz to permit application of the special needs exception absent rigorous inquiry into the program's primary purpose. The Court thus concluded that when law enforcement authorities pursue "primarily general crime control purposes," the State could only justify stops based upon "some quantum of individual suspicion." Id. at 47. See also New Jersey Transit PBA Local 304, 151 N.J. at 561 (emphasizing that the search at issue was permissible under the special needs doctrine because it was not "in any way designed to effectuate law enforcement purposes").

Later that same term in Ferguson, the Court reemphasized the need to closely scrutinize the primary purpose of a search regime. The Court considered a program that authorized hospital staff to conduct nonconsensual drug screens on urine samples from maternity patients who met certain criteria allegedly indicating a potential for drug use. The staff turned results over to the police if a patient who tested positive refused to undergo drug treatment. As in Edmond, the Court distinguished the program in Ferguson from its earlier special needs cases permitting drug testing on the grounds that in the prior cases the needs advanced by the State were "divorced from the State's general interest in law enforcement." Id. at 79. The Court declined to "simply accept the State's invocation of a 'special need'" and instead "carried out a 'close review' of the scheme" to ascertain its "primary purpose." Id. at 81 (emphasis omitted). The Court found that the hospital program's primary purpose was "to generate evidence for law enforcement purposes," id. at 83, and that "this case simply does not fit within the closely guarded category of 'special needs'." Id. at 84.

Although not involving DNA sampling statutes, the Court's clarification of its special needs doctrine in Edmond and Ferguson defines the scope of the Court's Fourth Amendment inquiry when the state attempts to justify a search under the special needs doctrine. Consistent

with the Court's analysis in Edmond and Ferguson, courts engage in a "close review" under the special needs doctrine to determine the "primary purpose" of the statute or program at issue. See United States v. Sczubelek, 255 F. Supp.2d 315, 322 (D.Del.) aff'd 54 F.3d 771 (3d Cir. 2003) (table order) (stating that in Edmond and Ferguson, the Court clarified that the special need to support a program was ascertained from the program's "primary purpose" and that such searches should be held unconstitutional when the generalized program was "designed to discover and produce evidence of particular criminal wrongdoing against specific persons.").

Upon a "close review" of the nature and purpose of the New Jersey DNA Act, its primary purpose is ordinary law enforcement investigation and that it cannot fall within the special needs doctrine under Art. 1, Paragraph 7 and the Fourth Amendment. To determine the "programmatic purpose" of searches pursuant to the Act, "we consider all the available evidence in order to determine the relevant primary purpose." Ferguson, 532 U.S. at 81. Here, the statutory language establishes that prototypical law enforcement purposes underlie the DNA searches in question. The legislative findings and declaration in the DNA act emphasize that the searches are intended to develop a DNA databank for the primary purpose of criminal investigations. As specifically stated in the statute's "Legislative findings and declaration:"

> The Legislature finds and declares that DNA databanks are an important tool in criminal investigations and deterring and detecting recidivists acts.. . . Moreover, it is the policy of this State to assist federal, state and local criminal justice and law enforcement agencies in the identification and detection of individuals who are the subjects of criminal investigations.
>
> [N.J.S.A. 53:1-20.18.]

See also id. at 53:1-10.37 ("Notwithstanding any other provision of law to the contrary, the Division of State Police in the Department of Law and Public Safety shall retain all DNA profile information biological samples taken from a convicted person pursuant to [the DNA Act] and

may use the profile information in the investigation and prosecution of other crimes."). New Jersey's DNA Act permits searches that are conducted in order to collect DNA evidence sample for the DNA databanks, so that those samples may be used in criminal investigations, to help solve crimes and prosecute the culprits, and to enable law enforcement to be more accurate and effective in achieving their law enforcement objectives. See Lidster, 2003 WL 5006, at *3 (describing the general investigatory nature of the unconstitutional search in Edmond as the following: "stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that *any given motorist has committed some crime*." (internal quotation marks omitted)).

Unlike the search regimes falling with the special needs doctrine, the DNA database does not have an equally or more important independent, non-law enforcement purpose, whose incidental or secondary impact may lead to criminal charges. See, e.g., New Jersey Transit PBA Local 304, 151 N.J. at 561; Ferguson, 532 U.S. at 84 n.20 (noting that for special needs cases "[t]he discovery of evidence of other violations would have been merely incidental to the purposes of the administrative search."). Cf. Veronia Sch. Dist. 47J, 515 U.S. at 646 (considering search whose primary purpose was ensuring the safety of voluntary student-athletes through random drug testing); Skinner, 489 U.S. at 602 (approving as a special need drug and alcohol testing for railway employees involved in accidents or safety violations in order to ascertain the cause of the accident and to assist in accident prevention). Rather, the DNA database's primary purpose is by its own terms to aid law enforcement in criminal investigation.

The DNA Act's legislative history also evidences that the program is intimately connected with ordinary law enforcement objectives. "According to the sponsor, expanding this State's DNA database will greatly enhance the ability of law enforcement to solve crimes."

Statement to Assemb., No. 2617, Sen. Budget and Appropriations Comm. (May 15, 2003); see also Statement to Assemb., No. 2617, Assemb. Appropriations Comm. (Feb. 3, 2003). Statements made by the legislative sponsors and the Executive when the 2003 amendments were enacted also highlight their understanding that the primary purpose of the statute is to aid criminal investigations. See Press Release, Office of the Att'y Gen.: Div. of Criminal Justice, McGreevy Signs Bill to Improve Use of DNA Evidence (Sept. 22, 2003), available at http://www.state.nj.us/lps/dcj/releases/2003/dna0922.htm ("'Violent criminals can be more easily identified and aggressively prosecuted with this formidable tool,' said Attorney General Harvey."); id. ("'An expanded DNA database will better enable law enforcement to solve crimes,' said Assemblyman Gordon Johnson (D-Bergen)."); id. ("'This new law will greatly expand the capabilities of our current DNA database to provide answers and solve crimes that would otherwise remain unsolved,' said Senator Joseph Coniglio (D-Bergen). ' . . . [T]he victims of unsolved crimes can be sure that New Jersey's police forces can use every tool at their disposal to solve these crimes'.").

Moreover, the Attorney General, New Jersey's chief law enforcement officer, N.J.S.A. 52:17B-4, is responsible for promulgating the "rules governing the procedures to be used in the submission, identification, analysis and storage of the DNA samples . . . submitted under this Act," N.J.S.A. 53:1-20.23, as well as fulfilling the "duty . . . to store, analyze, classify and file in the State database and with the FBI . . . the DNA record of identification," id. at 53:1-20.24. Even though health professionals outside of the Department of Corrections may initially collect the samples, see N.J.S.A. 53:1-20.22, law enforcement officers are "extensively involved" with DNA sampling program thereafter, similar to the involvement of police officers with the drug-testing of maternity patients held unconstitutional in Ferguson. See Ferguson, 432 U.S. at 82.

Nor as in Ferguson, is it of any consequence to the primary purpose of the search regime that law enforcement officials may not actually administer the extraction of the sample. See Ferguson, 532 U.S. at 81-82; see also Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment §10.10(e) (3d ed. 1996 & 2004 Supp.) (warning that the exercise of special authority to search probationers "should not be upheld when it appears that the probation or parole officer 'was nothing more than the agent, tool, or device of' the police.").

In light of the use of the DNA records to further pending criminal investigations, the State cannot maintain that the DNA Act has a primary purpose unrelated to law enforcement investigation. See Wolfish, 441 U.S. at 578 (Marshall, J., dissenting) ("Only by blinding itself to the facts . . . can the Court accept the Government's [non-law enforcement] rationale."). Accordingly, the special needs doctrine is inapplicable to the DNA Act.

III. INJUNCTIVE RELIEF IS NECESSARY TO PREVENT AN IMMEDIATE AND IRREPARABLE VIOLATION OF PLAINTIFFS' RIGHTS TO PRIVACY AND BODILY INTEGRITY

If the State is permitted to extract a biological sample from plaintiffs for purposes of DNA analysis, plaintiffs will suffer a substantial violation of their well-settled rights to privacy and bodily integrity, a violation that cannot be redressed by subsequent legal remedies. The only legal remedy available for violations of Article I, Paragraph 7 and the Fourth Amendment is the exclusion of unconstitutionally acquired incriminating evidence from a criminal proceeding, see State v. Valencia, 93 N.J. 126, 141 (1983), and this remedy is unlikely to be available for the plaintiffs or the vast majority of individuals subject to DNA sampling because investigators only match a small percentage of DNA samples to unsolved or future crimes. See also LaFave §1.12 ("'Recent case law makes clear that courts have the power to enjoin unconstitutional police practices. They are not always required to await criminal trials which may never materialize in

order to vindicate crucial constitutional rights'." (quoting Gomez v. Layton, 394 F.2d 764 (D.C.Cir. 1968)). For the remaining individuals who have been or will be subject to compulsory DNA testing, such as the plaintiffs, no adequate remedy exists for the violation of their rights to privacy and bodily integrity. Accordingly, preliminary injunctive relief should be granted to prevent an irreparable and immediate harm pending the outcome of plaintiffs' constitutional challenge.

IV. THE BALANCE OF EQUITIES WEIGHS IN FAVOR OF PRELIMINARY INJUNCTIVE RELIEF BECAUSE THE STATE WILL SUFFER NO HARM AND PLAINTIFFS WILL BE SHIELDED FROM IRREPARABLE INJURY.

The balance of equities weighs heavily in favor of preliminary injunctive relief because the defendants will suffer no harm should an injunction issue for a number of reasons. First, the defendants have available adequate constitutionally permissible identification traits for plaintiffs that may be used in past, pending, and future criminal investigations. The state has successfully investigated crimes by relying upon this identification and will not be impeded in its inquiries by a lack of plaintiffs' DNA analysis. Second, many criminal defendants may consent to DNA testing in hopes of exoneration and their DNA samples may be entered into state and federal databases without raising constitutional concerns. Finally, the state retains its existing authority to subject plaintiffs to compulsory DNA sampling and analysis based upon a showing of individualized suspicion.

This lack of harm to the defendants is strongly outweighed by the impermissible intrusion upon the plaintiffs' rights to privacy, bodily integrity, and dignity that are protected under Article I, Paragraph 7 and the Fourth Amendment, as discussed above. In sum, the State's compulsory extraction of blood or other biological sample for DNA testing, as well as the DNA analysis itself, constitute unreasonable searches under Article I, Paragraph 7 of the New Jersey

Constitution and the Fourth Amendment of the United States Constitution because they are conducted for law enforcement investigative purposes absent any showing of individualized reasonable suspicion. Plaintiffs motion for a preliminary injunction should therefore be granted.

CONCLUSION

For the foregoing reasons, Plaintiffs A.A., by his parent and guardian B.A., and Jamaal Allah respectfully request that this Court enter a preliminary injunction preventing the Attorney General of the State of New Jersey, the New Jersey Department of Corrections, and Mercer County Probation Services from taking any measures to extract a biological sample from A.A. or Mr. Allah for purposes of DNA analysis pending the outcome of the constitutional challenge raised in this case.

Respectfully submitted,

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