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November 3, 2003

VIA FACSIMILE AND FEDERAL EXPRESS

Honorable Joseph E. Irenas
United States District Judge
Mitchell H. Cohen Federal Building &
United States Courthouse
1 John F. Gerry Plaza
Camden, New Jersey 08101

Re: Forchion v. Barlett, et al.
Civ. A. No. 02-4942

Dear Judge Irenas:

Please accept this letter brief in lieu of a more formal submission on behalf of *amicus curiae* the American Civil Liberties Union of New Jersey (“ACLU-NJ”) in support of plaintiff Robert Edward Forchion’s motion for a preliminary injunction prohibiting officers of the Probation Services Division from extracting plaintiff’s blood or other 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.* As Your Honor is well aware, in order to prevail on a preliminary injunction, a moving party must show:

(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured *pendente lite* if relief is not granted. Moreover, . . . the district court should take into

Honorable Joseph E. Irenas

November 3, 2003

Page 2

account . . . (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.

Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994) (quoting *Del. River Port. Auth. v. Transamerican Trailer Transp., Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974)). For the reasons set forth below and in Mr. Forchion's *pro se* motion, plaintiff satisfies this standard in the present case.

The DNA Database and Databank Act of 1994 ("the DNA Act"), N.J.S.A. 53:1-20.17, *et seq.*, initially created a DNA database and databank program for adult sex offenders. Subsequent amendments expanded the DNA sampling program to include adult and juvenile sex offenders, P.L. 1997, c.136; violent offenders were also added, P.L. 2000, c.118. The most recent amendments, enacted in September 2003, have included within the DNA sampling program, "persons convicted or found not guilty by reason of insanity of *any* crime" and requires them "to submit blood or biological samples of DNA for DNA testing upon imprisonment or confinement" as well as submitting samples "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). 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.

Honorable Joseph E. Irenas

November 3, 2003

Page 3

SUMMARY OF ARGUMENT

The forced extraction of blood or other biological sample from probationers and its subsequent analysis pursuant to the New Jersey DNA Act are suspicionless searches that violate the Fourth Amendment's prohibition against unreasonable searches, and irreparably harm those, like plaintiff whose constitutional rights have been violated. Moreover, because its primary purpose is ordinary law enforcement, the DNA Act does not fall within the "special needs" exception to the Fourth Amendment's requirement of individualized suspicion for administrative and other non-law enforcement searches. Accordingly, plaintiff's motion for a preliminary injunction should be granted.

ARGUMENT

1. THE COMPULSORY EXTRACTION OF BLOOD OR OTHER BIOLOGICAL SAMPLES AND ENSUING THE DNA ANALYSIS CONSTITUTE SEARCHES SUBJECT TO THE STRICTURES OF FOURTH AMENDMENT.

The Fourth Amendment guarantees "the right of the people to be secure in their persons. against unreasonable searches and seizures." U.S. Const. Amend. IV; *see Schmerber v. California*, 384 U.S. 757, 767 (1966). "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 ("[T]he security of one's privacy against arbitrary intrusion by the police [is] at the core of the Fourth Amendment and basic to a free society." (internal quotation marks omitted)). Specifically, the Supreme Court has long recognized that a "compelled intrusion into the body for blood" is a search for purposes of the Fourth Amendment. *Schmerber*, 384 U.S. at

Honorable Joseph E. Irenas

November 3, 2003

Page 4

768; *Skinner v. Ry. Labor Executives Assoc. et al.*, 489 U.S. 602, 616 (“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.”); *see also Schmerber*, 384 U.S. at 772 (“The integrity of an individual’s person is a cherished value of our society.”). The Supreme Court has also made clear that an individual’s reasonable privacy expectation in his or her bodily integrity includes searches which “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 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 “ensuing chemical analysis of the sample to obtain physiological data is a further invasion” of an individual’s reasonable privacy expectations. *Skinner*, 489 U.S. at 616; *see also 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”), *overruled by United States v. Kincade*, __F.3d__, 2003 WL 22251374 (9th Cir., Oct. 2, 2003) (holding that the compulsory extraction of blood from a parolee for DNA testing is constitutional only when

Honorable Joseph E. Irenas

November 3, 2003

Page 5

justified by individualized reasonable suspicion). In *Skinner*, the Court 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 perceived 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 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)). Thus 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), it is clear that the compulsory extraction of blood or biological sample and the ensuing DNA analysis intrude upon reasonable privacy expectations in bodily integrity. Accordingly, in order to pass constitutional muster,

Honorable Joseph E. Irenas

November 3, 2003

Page 6

these intrusions must satisfy the requirements under the Fourth Amendment for reasonable searches. For the reasons set forth below, they do not.

2. THE FOURTH AMENDMENT PROHIBITS COMPULSORY EXTRACTION OF BLOOD OR OTHER BIOLOGICAL SAMPLE FOR DNA SAMPLING IN THE ABSENCE OF INDIVIDUALIZED REASONABLE SUSPICION.

(a) PROBABLE CAUSE IS REQUIRED FOR INVESTIGATIVE SEARCHES OF PROBATIONERS BY LAW ENFORCEMENT.

When the government seeks to intrude upon privacy expectations in bodily integrity, the Fourth Amendment requires that the state justify its search as reasonable. *Knights*, 534 U.S. at 118 (“The touchstone of the Fourth Amendment is reasonableness.”). And, to satisfy the Fourth Amendment’s reasonableness requirement, the state must generally justify its search with a showing of probable cause, whether or not that search is conducted pursuant to a warrant. Indeed, the very purpose of the probable cause requirement of the Fourth Amendment is the imposition of “limitations on search-and-seizures 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).

In upholding the Fourth Amendment’s safeguards against arbitrary and abusive investigative methods, the Supreme Court has never approved the type of suspicionless searches at issue here for purposes of law enforcement, *see Edmond*, 531 U.S. 32, 47 (2000) (“When law enforcement authorities pursue primarily general crime control purposes . . . , [searches] can only

Honorable Joseph E. Irenas

November 3, 2003

Page 7

be justified by some quantum of individualized reasonable suspicion.”). On the other hand, it has recognized a limited exception to the probable cause requirement when a showing of individualized reasonable suspicion will satisfy the Fourth Amendment. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 36 (2000) (“A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”). This deviation from the probable cause standard “satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable.” *United States v. Knights*, 534 U.S. 112, 121 (2001) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). The Supreme Court has described this “totality of the circumstances” balancing test as “assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999); *see also Knights*, 534 U.S. at 118-19.

This exception to the probable cause requirement, however, only speaks to the degree of suspicion that the government must establish, and does not sanction searches absent any individualized showing of wrongdoing. At a constitutional minimum, the Fourth Amendment requires individualized reasonable suspicion to justify any search for law enforcement purposes. Most recently, the Supreme Court expressly declared in *Edmond* and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), that a search conducted for law enforcement purposes, such as the DNA sampling at issue in this case, must be supported by “some quantum of individualized suspicion.” *Edmond*, 531 U.S. at 47; *see also id.* at 41 (“We have never approved [a program

Honorable Joseph E. Irenas

November 3, 2003

Page 8

mandating suspicionless searches] whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”). 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; *see also United States v. Baker*, 221 F.3d 438 (3d Cir. 2000) (requiring ““specific facts” giving rise to a reasonable suspicion of a parole violation to justify parole officers’ search of parolee’s car).

The only instances in which the Court has held that suspicionless searches withstand constitutional scrutiny have been its recent “special needs” cases, in which the Supreme Court has acknowledged a “closely guarded” corollary to the individualized reasonable suspicion standard, which itself is an exception to the general rule that the Fourth Amendment requires probable cause. *See id.* at 37. As set forth below, however, these special needs cases are limited to administrative or regulatory searches conducted for non-law enforcement purposes, such as drug-testing of employees and students for health and safety reasons. *See infra p. ___*. Because law enforcement is the primary purpose of the DNA Act, however, that special needs doctrine is inapplicable here. Accordingly, the Fourth Amendment requires some showing of individualized reasonable suspicion to support the DNA sampling at issue in this case. Because the DNA Act requires no such showing, plaintiff’s Fourth Amendment challenge to the statute has a reasonable likelihood of success.

Honorable Joseph E. Irenas

November 3, 2003

Page 9

**(b) THE DNA ACT VIOLATES THE FOURTH
AMENDMENT'S PROBABLE CAUSE REQUIREMENT
FOR INVESTIGATIVE SEARCHES.**

Of course, the compulsory DNA testing required by the DNA Act is obviously not implemented pursuant to any individualized suspicion. Rather, it is clearly a suspicionless search and equally clearly has its purpose to further criminal law enforcement. As such, it implicates the fundamental protections of the Fourth Amendment. Nor does it any concern for ensuring compliance with judicially imposed probation conditions, or otherwise provide a basis to deviate from the Fourth Amendment's probable cause rule. These factors require that the state's justification for the search be determined under the probable cause rule for law enforcement searches. Accordingly, because the state has made no attempt to demonstrate probable cause for the DNA sampling of plaintiff, 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.

It is unquestionable that 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.¹

See New Jersey v. T.L.O., 469 U.S. 325, 351 (1985). As set forth above, probationers, as well as

¹ Amicus notes that on October 27, 2003, the United States District Court for the District of Alaska relied upon the Ninth Circuit's decision in *Kincade* to issue a temporary restraining order prohibiting the state from collecting DNA samples through saliva swabs from convicted sex offenders who have completed their sentences and are no longer on parole or probation. *See Judge Bars DNA Sampling From Sex Offenders*, Anchorage Daily News, Oct. 27, 2003, at B1. In its order, the court recognized that DNA sampling of people who are now essentially part of the "general public" requires the state to first obtain a warrant and to show there is probable cause to believe a crime has been committed and that the search will yield evidence of the crime. *Id.* A probationer who is searched for purposes unrelated to his probation conditions is similarly positioned and retains his full privacy expectations in bodily integrity and private biological information. .

Honorable Joseph E. Irenas

November 3, 2003

Page 10

the general public, have a reasonable expectation of privacy in their bodily integrity and dignity. As a result, the compelled extraction of blood or biological sample, as well as the ensuing DNA analysis, constitute a substantial intrusion upon Forchion's legitimate expectation of privacy that exceeds the constitutionally permissible infringement reasonably imposed upon a probationer.

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). 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 "the probation search condition" was a "salient circumstance," that "a court granting probation may impose *reasonable conditions* that deprive the offender of some freedoms enjoyed by law-abiding citizens," 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

Honorable Joseph E. Irenas

November 3, 2003

Page 11

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 required by the DNA Act -- is required.

In any event, searches pursuant to the DNA Act should be held to a probable cause standard based upon the involvement of law enforcement in development and maintaining the DNA database. Individualized reasonable suspicion suffices 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 United States v. Hill*, 967 U.S. F.2d 902, 908-09 (1992). But as the state ventures farther and farther from this legitimate interest towards searches incident to ordinary criminal investigation, the use of the individualized reasonable suspicion standard becomes increasingly questionable. As Professor LaFare has cautioned, *Knights* use of the individualized reasonable suspicion balancing test in cases involving law enforcement searches of probationers (rather than probationary searches), has significant consequences for Fourth Amendment protections:

Because *Knights* purports to be utilizing "our general Fourth Amendment approach" and *not* a "special need" analysis, it can only be assumed that what the Court has to say in *Knights* has more general application as to the Court's interpretation of the Fourth Amendment in other cases in which the basic question is, as in *Knights*, whether the two fundamental protections of the

Honorable Joseph E. Irenas

November 3, 2003

Page 12

Amendment -- the warrant and probable cause requirements -- are applicable.

Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, §10.10 (3d ed. 1996 & 2004 Supp.). Professor LaFave warns that if lower courts expand *Knights* beyond the circumstances of the case, the government could justify the search of any person without probable cause based upon a balancing of the government's interest in preventing crime and the statistical likelihood that a particular class of people will commit crimes. *Id.* 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 to the Fourth Amendment's probable cause standard.

Accordingly, the DNA Act is unconstitutional because it authorizes suspicionless searches despite the Fourth Amendment's requirement that the state show probable cause to justify the compulsory extraction of blood or biological sample for DNA analysis.

**(c) THE DNA ACT VIOLATES THE FOURTH AMENDMENT
EVEN UNDER THE INDIVIDUALIZED REASONABLE
SUSPICION EXCEPTION TO THE PROBABLE CAUSE
REQUIREMENT.**

Even if sampling pursuant to the DNA Act is held to the individualized reasonable suspicion standard, however, such intrusion constitutes an unreasonable suspicionless searches in violation of the Fourth Amendment. Recently, in *United States v. Kincade*, __F.3d__, 2003 WL 22251374 (9th Cir., Oct. 2, 2003), the Ninth Circuit applied *Knights's* individualized reasonable suspicion test to hold that the federal DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C.

Honorable Joseph E. Irenas

November 3, 2003

Page 13

§14135a, a statute analogous to the New Jersey DNA Act, violates the Fourth Amendment. The Ninth Circuit concluded “that reasonable suspicion must exist before the government may compel parolees to submit to the extraction of blood from their bodies contrary to their wishes.” *Kincade*, ___F.3d___, 2003 WL 22251374, at *4 (9th Cir., Oct. 2, 2003). The court found that the search “constitutes a substantial intrusion on Kincade’s legitimate expectation of privacy” in his own body. *Id.* With respect to Kincade’s status as a parolee,² the court acknowledged that this “status *reduces* the expectation of privacy that would otherwise be considered reasonable; however, while parolees enjoy lesser Fourth Amendment rights than other citizens, their rights are not *extinguished*.” *Id.* The court then found that this privacy interest was not outweighed by the government’s express interest in the search: “to prevent, solve, and prosecute future crimes, and to complete the [federal DNA] database.” *Id.* at *5. Finally, the court took into account the Supreme Court’s language in *Edmond* which required a minimum of individualized suspicion for law enforcement searches, and concluded that “[w]hile weighing these interests could affect the degree of suspicion or cause required to conduct such searches, it could not serve to eliminate the requirement of individualized suspicion entirely.” *Id.* at *6.³ The court held that “compulsory

² “[T]here is ‘no constitutional difference between probation and parole for purposes of the fourth amendment.’” *United States v. Hill*, 967 F.2d 902, 909 (3d Cir. 1992) (quoting *United States v. Harper*, 928 F.2d 894, 896 n.1 (9th Cir. 1991)).

³ In *Edmond* the Supreme Court clarified that its decision in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), did not sanction a suspicionless law enforcement search, an interpretation of *Sitz* that a number of lower courts had relied upon in upholding DNA sampling statutes. In *Kincade*, the Ninth Circuit overruled its decision in *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995), which had relied upon on such a misinterpretation of *Sitz*. See *Kincade*, 2003 WL 22251374, at *9 (“*Rise* was premised on the understanding that the searches it endorsed were law enforcement searches conducted for the primary purpose of controlling crime; we assumed that *Sitz* also involved such searches, and followed what we believed to be *Sitz*’s example, concluding that searches for law enforcement purposes could proceed even absent individualized suspicion.”). The Ninth Circuit listed nine state

Honorable Joseph E. Irenas

November 3, 2003

Page 14

extraction of blood for a law enforcement purposes” is reasonable only if the search is supported by individualized reasonable suspicion.. *Id.*

The decision in *Kincade* comports with the well-established rule that even under the totality of the circumstances balancing testing, the Fourth Amendment requires that, at a minimum, the government must show individualized reasonable suspicion to compel a probationer to submit to the forced extraction of blood for DNA testing. And, under the balancing analysis for individualized suspicion cases, the substantial intrusion upon the probationer’s twofold privacy expectations of bodily integrity and private biological information is not outweighed by the government’s interest in efficient administrative of criminal investigations. Specifically, the intrusion upon Forchion’s expectations of privacy and bodily integrity here outweigh the Legislature’s express purpose for the extraction of blood and DNA analysis: “to establish a DNA database containing blood or other biological samples.” N.J.S.A. 53:1-20.18. The statute explains that such “DNA databanks are an important tool in criminal investigations and in deterring and detecting recidivist acts.” *Id.* The DNA Act 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.* The Senate Budget and Appropriations Committee Statement to the 2003 amendments explain that “[a]ccording to the sponsor, expanding this State’s DNA database will

cases as well as ten federal Court of Appeals and district court decisions that relied to some extent upon its now-repudiated analysis in *Rise* to uphold DNA sampling statutes. *Id.* at *9 & n. 26-27.

Honorable Joseph E. Irenas

November 3, 2003

Page 15

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. (February 3, 2003) (containing identical language).

The state’s interest is both legitimate and clearly expressed: it is a desire for efficient and accurate criminal prosecutions. However legitimate and important, though, it does not render a suspicionless search reasonable. Indeed, in *Schmerber*, the Supreme Court emphasized the importance of 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. As the Ninth Circuit concluded in *Kincade*, “the Government’s desire to complete a comprehensive data bank” and its “interest in solving and prosecuting crimes more efficiently” simply does not “outweigh [plaintiff’s] reasonable expectations of privacy in his body.” *Kincade*, 2003 WL 22251374, at *5.

While 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,⁴ this reasoning simply divorces the collection of evidence from its analysis in a particular investigation. The databank itself is nothing more than an efficient tool for comparing the aggregate results of numerous individual

⁴ *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*, ___ F.Supp.2d ___, 2003 WL 22128803, at *5 (D.Ariz., Sept. 8, 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).

Honorable Joseph E. Irenas

November 3, 2003

Page 16

searches to an aggregate collection of unsolved, pending, or even future criminal investigations.⁵ Were the state to gather this evidence on an individual basis from every person, there would be no question that law enforcement would be subject to the Fourth Amendment's warrant and probable cause requirements. *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 the Fourth Amendment 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.").

⁵ Professor Kaye describes this process:

[I]f a database of trace evidence DNA genotypes from unsolved crimes is in place, a new arrestee's genotype can be compared to those genotypes. This can be called a one-to-many database query in that one arrestee's DNA record is compared to the many records in the database of trace evidence. A "hit" could result in continued pretrial detention, prosecution, and conviction for the unsolved crime. Second, even if no unsolved-crime database exists, the arrestee's genotype can be included in a database of DNA records of arrestees. DNA found at a crime scene or on a victim in an unsolved case could be analyzed and compared to all the potential offender records. This can be called a many-to-one query in that the many arrestee records are compared to the one trace evidence genotype. A "hit" in the arrestee database could help solve the new case.

See Kaye, at 501-02 (footnote omitted).

Honorable Joseph E. Irenas

November 3, 2003

Page 17

In sum, plaintiff is reasonably likely to show that the Fourth Amendment requires the government 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, he is reasonably likely to prevail on his claim that, as the Ninth Circuit held in *Kincade*, the state must show some quantum of individualized reasonable suspicion justifying the intrusion upon reasonable expectation of privacy in bodily integrity and private information. Because the DNA Act instead authorizes suspicionless searches, it violates the Fourth Amendment under either standard. For these reasons, plaintiff's Fourth Amendment challenge to the DNA Act is reasonably likely to prevail.

3. 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. As discussed above, suspicionless searches are exceptions to the individualized reasonable suspicion requirement, which itself is a narrowly-defined exception to the Fourth Amendment's probable cause requirement. 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) (emphasis added); *see Edmond*, 531 U.S. at 37. This restricted category of cases involves only regulatory or administrative searches conducted for non-law enforcement purposes. *See, e.g., Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student-athletes); *Treasury Employees v. Von Raad*, 489 U.S. 656 (1989)

Honorable Joseph E. Irenas

November 3, 2003

Page 18

(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) (warrantless 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).

After the 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'), the lower courts broadly interpreted *Griffin* and its progeny as permitting application of the doctrine without judicial inquiry into a "primary purpose" when the state proffered an administrative or other non-law enforcement reason for a search regime. Specifically, a number of federal and state courts upheld the constitutionality of DNA sampling statutes based upon misinterpretation of Supreme Court precedent.⁶ In *Edmund* 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 precedent upholding DNA sampling statutes.

⁶ See, e.g., *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999) (stating that special needs exception applies "if defendants can show *some other* significant governmental interest" even though "the samples may later be used for law enforcement purposes"); *State v. Olivas*, 856 P.2d 1076, 1086 (Wa. 1993).

Honorable Joseph E. Irenas

November 3, 2003

Page 19

In *Edmond*, the Supreme Court further delineated the narrow category of special needs cases when it considered 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 *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). Lower federal court 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). Notably, 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

Honorable Joseph E. Irenas

November 3, 2003

Page 20

government could only justify stops based upon “some quantum of individual suspicion.” *Id.* at 47.

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 government 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* sets forth the scope of the court’s inquiry when the state attempts to justify a search under the special needs doctrine. Consistent with the Court’s inquiry in *Edmond* and *Ferguson*, courts engage in a “close review” under the special needs doctrine to

Honorable Joseph E. Irenas

November 3, 2003

Page 21

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.”).⁷

Upon a “close review” of the nature and purpose of the New Jersey DNA Act, it is clear that its primary purpose is ordinary law enforcement and that it cannot fall within the special needs doctrine. “In determining the ‘programmatic purpose’ of searches pursuant to the Act, ‘we

⁷ Only nine courts, in addition to the Ninth Circuit in *Kincade*, have addressed the constitutionality of federal or state DNA sampling statutes after the Supreme Court’s decision in *Edmond* and *Ferguson*. The District Court for the Eastern District of California in *United States v. Miles*, 228 F.Supp.2d 1130 (E.D. Cal. 2002), engaged in independent analyses of the Supreme Court’s recent Fourth Amendment decisions and held that the DNA sampling statutes were unconstitutional. Four other federal district courts discussed *Edmond* and *Ferguson*, but reached a contrary conclusion on the merits. *See United States v. Sczubelek*, 255 F.Supp.2d 315 (D.Del.) *aff’d* 54 F.3d 771 (3d Cir. 1995) (table order); *Nicholas v. Goord*, 2003 WL 256774 (S.D.N.Y., Feb. 6, 2003) (same); *Vore v. Dep’t of Justice*, ___F.Supp.2d___, 2003 WL 22128803 (D.Ariz., Sept. 8, 2003) (same); *United States v. Reynard*, 220 F. Supp.2d 1142 (S.D.Cal. 2002) (same). In these cases, the district courts reasoned that the development of a DNA database was not “ordinary” law enforcement because the state was not investigating individuals for a specific crime but simply developing a database of DNA samples. *See, e.g., Reynard*, 220 F.Supp.2d at 1168; *Sczubelek*, 255 F. Supp.2d at 322-23; *Vore*, 2003 WL 22128803, at *5; *Nicholas*, 2003 WL 256774, at *13. The Ninth Circuit rejected this reasoning in *Kincade* as “wholly unpersuasive.” *Kincade* 2003 WL 22251374, at *9. “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.” *Miles*, 228 F.Supp.2d at 1138 n.6; *see also Kincade*, 2003 WL 22251374, at *10 (stating that the “government contends, rather disingenuously, that the forced extraction of blood samples from *Kincade* and others similarly situated does not serve a law enforcement purpose.”); *see also id.* at *12 (“The purpose of these searches is no more to put samples into [the DNA database] than is the purpose of fingerprinting to place cards into index files.”).

The remaining post-*Edmond/Ferguson* decisions uphold the constitutionality of DNA sampling statutes under various standards, and, in most cases, do so with little to no analysis. *See United States v. Plotts*, ___F.3d___, 2003 WL 22407418 (10th Cir., Oct. 22, 2003); *United States v. Kilmer*, 335 F.3d 1132 (10th Cir. 2003); *Velasquez v. Woods*, 329 F.3d 420 (5th Cir. 2003); *Miller v. U.S. Parole Comm’n*, 259 F. Supp.2d 1166 (D.Kan. 2003); *Groceman v. U.S. Dep’t of Justice*, 2002 WL 1398559 (N.D.Tex., Jun. 26, 2002).

Honorable Joseph E. Irenas

November 3, 2003

Page 22

consider all the available evidence in order to determine the relevant primary purpose’.” *Kincade*, 2003 WL 22251374, at *11 (quoting *Ferguson*, 532 U.S. at 81). Here, the statutory language “establishes that prototypical law enforcement purposes underlie the DNA searches in question.” *Id.* 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. *See* N.J.S.A. 53:1-20.18 (stating that “DNA databanks are an important tool in criminal investigations and in deterring and detecting recidivist acts” and that “[i]t is the policy of this States 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”). Similar to the federal statute held unconstitutional in *Kincade*, 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.” *Kincade*, 2003 WL 22251374, at *11.

Unlike the search regimes falling with the Supreme Court’s special needs doctrine, the DNA database does not have an equally, if not more, important independent, non-law enforcement purpose, whose incidental or secondary impact may lead to criminal charges. *See*, *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.*, 515 U.S. at 646 (considering search whose primary purpose

Honorable Joseph E. Irenas

November 3, 2003

Page 23

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.⁸ Thus, the statute itself states in the "Legislative findings and declaration" that:

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.").

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."

⁸ While the DNA Act does identify a list of eight possible uses of the DNA test results, including some that are not law enforcement related such as "[f]or research, administrative and quality control purposes" or "[f]or the development of a population base," N.J.S.A. 53:1-20.21, it is clear from the legislative history that the *primary* purpose of the testing is to assist past, current, and future criminal investigations.

Honorable Joseph E. Irenas

November 3, 2003

Page 24

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 branch 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’.”).

The implementation of the program similarly indicates that it is fulfilling its sponsors’ aim of assisting in the investigation of currently pending unsolved crimes. The *New York Times* reported, for example, that:

The Essex County prosecutor said on Wednesday that her office would begin to look at a 10-year backlog of unsolved sexual assault cases in Newark in which there is biological evidence in the hope of solving the cases through DNA analysis. . . . Mr. Laurino

Honorable Joseph E. Irenas

November 3, 2003

Page 25

said he expected the effort to identify the unsolved Newark cases to begin immediately with the retrieval of biological evidence from those cases. He said he expected the examination to be completed by the end of this year.

Newark Sex Assaults to be Rechecked Using DNA, N.Y. Times, Oct. 9, 2003, at ___.

Moreover, the Attorney General, New Jersey's chief law enforcement officer, N.J.S.A. 52:17B-4, is responsible for 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 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; *also* LaFave, §10.10(e) (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."); *see also Shea v. Smith*, 966 F.2d 127 (3d Cir. 1992) ("The proper question is whether the parole officer used her authority to help the police evade the fourth amendment's warrant requirement or whether the parole officer

Honorable Joseph E. Irenas

November 3, 2003

Page 26

cooperated with the police to achieve her own legitimate objectives.” (quoting *United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991)).

In light of the uncontestable use of the DNA records to further pending criminal investigations, the government cannot maintain that the DNA Act has a primary non-law enforcement purpose. *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 need doctrine is inapplicable to the DNA Act.

4. INJUNCTIVE RELIEF IS THE ONLY REMEDY TO PROTECTION PETITIONER’S FOURTH AMENDMENT RIGHTS

As a general rule, “to show irreparable harm a plaintiff must ‘demonstrate potential harm which cannot be redressed by a legal or equitable remedy following a trial.’” *Acierno*, 40 F.3d at 653 (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989)). Here, plaintiff will suffer a substantial invasion of his reasonable expectation of privacy in his bodily integrity and private life that cannot be redressed by subsequent legal remedies. *See, e.g., Lewis v. Kugler*, 446 F.2d 1343, 1350 (3d Cir. 1971) (“Persons who can establish that they are being denied their constitutional rights are entitled to relief, and it can no longer be seriously contended that an action for money damages will serve adequately to remedy unconstitutional searches and seizures.” (footnotes omitted)). The only legal remedy available, the exclusion of unconstitutionally acquired incriminating evidence from a criminal proceeding, is highly unlikely to be available for the plaintiff or the vast majority of individuals subject to DNA

Honorable Joseph E. Irenas

November 3, 2003

Page 27

sampling because investigators only match a small percentage of DNA samples to unsolved or future crimes. *See*, 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 plaintiff, no adequate remedy exists for the violation of their Fourth Amendment rights.

Further, 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 plaintiff 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 plaintiff’s 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 a probationer to compulsory DNA sampling and analysis based upon a showing of individualized suspicion.

Finally, the public interest weighs in favor of a preliminary injunction in this case. There is always a clear public interest “in not having the State engage in conduct that results in an ongoing violation of federal constitutional rights.” *Doe v. Lee*, 2001 WL 536730, *8 (D.Conn.

Honorable Joseph E. Irenas

November 3, 2003

Page 28

2001); *see also Planned Parenthood, et al. v. Verniero, et al.*, 41 F.Supp.2d, 478 (D.N.J. 1998) *aff'd* 220 F.3d 127 (3d Cir. 2000); *Favia v. Ind. Univ. of Penn.*, 812 F.Supp. 578 (W.Pa. 1993) *aff'd* 7 F.3d 332 (3d Cir. 1993) (“The public has a strong interest in the prevention of any violation of constitutional rights.”). Here, the compulsory DNA sampling and analysis of plaintiff pursuant to the DNA Act would constitute an impermissible intrusion upon his reasonable privacy expectations in bodily integrity and dignity that are protected under the Fourth Amendment.

In sum, the government’s compulsory extraction of blood or other biological sample for DNA testing, as well as the DNA analysis itself, constitutes an unreasonable search under the Fourth Amendment because it is conducted for law enforcement purposes absent any showing of individualized reasonable suspicion. Plaintiff’s motion for a preliminary injunction must therefore be granted.

Respectfully submitted,

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Honorable Joseph E. Irenas

November 3, 2003

Page 29

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