# Comment

## *United States v. Kincade* – Justifying the Seizure of One's Identity

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*It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.*[1]

*Privacy erodes first at the margins, but once eliminated, its protections are lost for good, and the resultant damage cannot be undone.*[2]

In May 2002, Thomas Kincade, on supervised release for armed robbery, refused to provide a DNA sample subject to a mandate of the DNA Analysis Backlog Elimination Act of 2000 (DNA Act).[3] In refusing to comply with the order, Kincade argued the DNA Act was an unconstitutional violation of his Fourth Amendment rights.[4] The district court found the DNA Act to be constitutional and consequently found Kincade to be in violation of the terms of his probation.[5] In a decision of a three-judge panel of the Ninth Circuit Court of Appeals, the district court decision was reversed.[6] In its decision, the Ninth Circuit viewed the DNA collection authorized by the DNA Act as falling outside the "special needs exception" of the Fourth Amendment, and thus determined it to be an unconstitutional

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1. Kyllo v. United States, 533 U.S. 27, 33-34 (2001).

2. United States v. Kincade ("Kincade I"), 345 F.3d 1095, 1113-14 (9th Cir. 2003), *rev'd en banc*, 379 F.3d 813 (9th Cir. 2004).

3. United States v. Kincade ("Kincade II"), 379 F.3d 813, 820 (9th Cir. 2004).

4. *Id.* at 821.

5. *Id.*

6. *Kincade I*, 345 F.3d at 1096.

search within the meaning of the Fourth Amendment.[7] In a rehearing *en banc*, a plurality of the Ninth Circuit reversed itself, holding that the DNA Act was indeed constitutional within the purview of the Fourth Amendment under a "totality of the circumstances" analysis.[8]

The internal struggle of the Ninth Circuit Court of Appeals personifies the difficulties courts face in dealing with the constitutionality of the searches mandated under the DNA Act. This Comment uses the holdings in the two *Kincade* decisions to illustrate the pitfalls of Fourth Amendment jurisprudence as applied to the DNA Act searches, and to address the issues at work in the struggle between individual rights under the Fourth Amendment and the use of DNA in the criminal justice system. Part I provides a four-part overview of the pertinent subject areas. First, Part I.A presents an overview of the history and importance of DNA. Part I.B provides a discussion of the federal and state legislation in the area of DNA collection and analysis. Part I.C gives an overview of the Supreme Court's Fourth Amendment jurisprudence. Finally, Part I.D provides a look at how courts have decided the issue of DNA collection and analysis as an unconstitutional seizure. Part II then describes and analyzes *Kincade* in detail, examining the holdings of the three-judge panel decision as well as the decision of the *en banc* rehearing. Using the three-judge panel decision as a model, Part III argues the Ninth Circuit misapplied the balancing test required in the analysis of warrantless searches under the Fourth Amendment in its *en banc* rehearing. This Comment concludes that when the Fourth Amendment test is properly applied, the DNA collection and analysis authorized by the DNA Act represent an unconstitutional seizure under the Fourth Amendment.

## I. DNA, THE FOURTH AMENDMENT, AND THE STRUGGLE BETWEEN THE TWO

In order to analyze the struggle between DNA collection and the Fourth Amendment, it is critical to understand the issues involved. First, it is important to understand DNA and its role in human identification. Second, an understanding of the current DNA legislation is key to recognizing to what limits the regulations attempt to reach. Third, a history of the

7. *Id.*

8. *Kincade II*, 379 F.3d at 832, 839.

Court's Fourth Amendment jurisprudence is essential to forming a baseline understanding of the analysis the Court uses in deciding Fourth Amendment issues. Finally, a look at how courts have applied the Fourth Amendment analysis to the DNA Act provides an opportunity to see how the courts have struggled to adopt a consistent approach.

## A. THE VALUE OF DNA

### 1. The Early History of DNA[9]

Friedrich Miescher first discovered deoxyribonucleic acid (DNA) in 1869 in cell nuclei extracted from fish sperm.[10] Following this early discovery, researchers determined that DNA was a main component of chromosomes, suggesting a possible role for DNA as genetic material.[11] However, DNA was considered "chemically uninteresting," monotonous and uniform, and researchers subsequently dismissed DNA as a simple cell-building material incapable of carrying genetic information.[12]

In 1944, Oswald Avery made an important discovery that changed how the scientific world viewed DNA. Building on the work of Frederick Griffith and his discovery of the genetic transformation phenomenon, Avery discovered that DNA was the information-carrying substance responsible for the transformation.[13] By isolating DNA as the transforming agent, Avery provided the first conclusive evidence that DNA is the substance of genes.[14] In 1953, James Watson and Francis Crick, inspired by Avery's work and the work of other DNA

9. This overview provides a very brief history of DNA. For a more comprehensive look at the discovery of DNA, see generally MAHLON HOAGLAND, DISCOVERY: THE SEARCH FOR DNA'S SECRETS (Houghton Mifflin Co. 1981), and JOSEPH LEVINE & DAVID SUZUKI, THE SECRET OF LIFE: REDESIGNING THE LIVING WORLD 13-14 (WGBH 1993).

10. *See* HOAGLAND, *supra*, note 9, at 9; LEVINE & SUZUKI, *supra* note 9, at 13-14. Sources cannot agree on Miescher's name or place of origin. Compare HOAGLAND, *supra* (crediting German biochemist Friedrich Miescher with the discovery of DNA) *to* LEVINE & SUZUKI, *supra* (crediting Swiss researcher Johann Miescher with the discovery).

11. *See* LEVINE & SUZUKI, *supra* note 9, at 14; MAXIM D. FRANK-KAMENETSKII, UNRAVELING DNA 10 (VCH Publishers, Inc. 1993).

12. *See* FRANK-KAMENETSKII, *supra* note 11, at 10; HOAGLAND, *supra* note 9, at 12; LEVINE & SUZUKI, *supra* note 9, at 14.

13. *See* FRANK-KAMENETSKII, *supra* note 11, at 11; HOAGLAND, *supra* note 9, at 18-22.

14. *See* FRANK-KAMENETSKII, *supra* note 11, at 11.

pioneers,[15] proposed the double helix model as the structure of DNA.[16] The Watson-Crick model of DNA's structure was immediately accepted with wide acclaim and has since been considered "the biggest event in biology since Darwin."[17]

2. Understanding the Components of DNA

As Watson and Crick discovered, the DNA molecule is comprised of two strands of nucleotides coiled into a twisted ladder or double helix.[18] Each nucleotide contains the sugar deoxyribose, a phosphate group, and one of four bases—guanine (G), cytosine (C), thymine (T), and adenine (A).[19] The DNA molecule's two strands of nucleotides fit together so that the deoxyribose and phosphate molecules form two backbones while the bases create complementary pairs—AT, TA, GC and CG.[20] These complementary base pairs connect the backbones like rungs of a ladder.[21] Each of a human's forty-six chromosomes consists of these base pairs in a specific order.[22] With a cell containing six billion base pairs, the number of permutations or sequences is nearly immeasurable.[23] Thus, it is easy to see how genetic individuality is possible.[24]

Each sequence of three bases codes for one of twenty amino acids.[25] The amino acids are then linked together to form proteins.[26] The DNA instructions provided by these sequences

15. Watson and Crick benefited from the work of Rosalind Franklin, Maurice Wilkins, and Erwin Chargaff, among others. *See* FRANK-KAMENETSKII, *supra* note 11, at 13; HOAGLAND, *supra* note 9 at 103-04; LEVINE & SUZUKI, *supra* note 9, at 16-17.

16. LEVINE & SUZUKI, *supra* note 9, at 16.

17. *See* HOAGLAND, *supra* note 9, at 99-100.

18. *See* LEVINE & SUZUKI, *supra* note 9, at 16; ELIZABETH L. MARSHALL, THE HUMAN GENOME PROJECT: CRACKING THE CODE WITHIN US 17 (Franklin Watts 1996); NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE FUTURE OF FORENSIC DNA TESTING: PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP 10 (Nov. 2000) [hereinafter FUTURE OF FORENSIC DNA TESTING].

19. *See* FRANK-KAMENETSKII, *supra* note 11, at 13; LEVINE & SUZUKI, *supra* note 9, at 16.

20. *See* FRANK-KAMENETSKII, *supra* note 11, at 13; HOAGLAND, *supra* note 9, at 111; LEVINE & SUZUKI, *supra* note 9, at 16-17.

21. *See* HOAGLAND, *supra* note 9, at 110-11.

22. *See* FUTURE OF FORENSIC DNA TESTING, *supra* note 18, at 9-10.

23. *See id.* at 10.

24. *See id.*

25. *See* MARSHALL, *supra* note 18, at 17, 19.

26. *See id.* at 17.

of bases can create over 50,000 different kinds of proteins, with each protein requiring various numbers of amino acids.[27] A gene is a length of DNA that acts as a blueprint containing all of the information needed to build a specific protein.[28] Alternative forms of a gene are called alleles, which express different variations of the genetic trait.[29] Each gene resides in a specific location (locus) on a specific chromosome.[30] In any given population of people, there are typically more than two alleles for each locus.[31]

Genes make up only a small fraction of the entire DNA molecule.[32] Approximately ninety-seven percent of DNA has no known function, and is often referred to as "junk DNA."[33] These nongenic regions of DNA exhibit the same variability as genes and thus are useful for identification purposes.[34]

3. How DNA is Used in Identification

While a variety of genetic identification systems exist today, the use of short tandem repeats (STRs) has proven to be an efficient and powerful system.[35] STRs are repeated DNA sequences dispersed throughout a chromosome.[36] The STRs typically consist of repeated sequences of three to five base pairs, with seven to fifteen alleles per locus.[37] The small size of the STRs makes them suitable for polymerase chain reaction, a process that amplifies a small quantity of DNA into any desired amount.[38] Thus, only a small sample of DNA, extracted from any number of sources including saliva, hair follicles, blood and

27. *See id.* at 19-20.
28. *See id.* at 20.
29. *See* FUTURE OF FORENSIC DNA TESTING, *supra* note 18, at 11.
30. *See id.*
31. *See id.*
32. *See id.* at 12.
33. *See id.*
34. *See id.*; *see also* Brief of Amicus Curiae Electronic Privacy Information Center in Support of Appellant, Thomas Cameron Kincade, Urging Reversal at 3, United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (No. 02-50380) [hereinafter EPI Brief]; Motion for Leave to File Brief of Amicus Curiae in Support of Defendant/Appellant at 10, United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (No. 02-50380) [hereinafter PAI Brief].
35. *See* FUTURE OF FORENSIC DNA TESTING, *supra* note 18, at 17-18.
36. *See id.* at 17.
37. *See id.*
38. *See id.* at 17-18.

semen,[39] is needed to create a genetic profile.[40]

The power of the STR identification system comes in the ability to analyze multiple STRs simultaneously.[41] This process of multiplexing leads to greater identification results; with a sample of thirteen STR loci, the match probability is nearly one in 575 trillion.[42] The Federal Bureau of Investigation (FBI) has identified a specific set of thirteen STR loci to serve as a core set of loci used in DNA identification.[43] The FBI policy assumes that if the match probability is "substantially less than the reciprocal of the U.S. population, then it can be stated with 'reasonable scientific certainty' that a particular individual is the source of the DNA sample."[44]

## B. HARNESSING DNA THROUGH LEGISLATION

### 1. Federal Legislation

Recognizing the value of DNA to aid in criminal investigations, Congress enacted the Violent Crime Control and Law Enforcement Act of 1994.[45] This Act allowed the establishment of a national DNA index system to store DNA identification records and DNA analyses.[46] Pursuant to this Act, the FBI implemented the Combined DNA Index System (CODIS).[47] CODIS is a distributed database comprised of three hierarchical tiers—local, state, and national.[48] The National DNA Index System (NDIS) is the highest level of the CODIS hierarchy and enables laboratories participating at the state and local levels to exchange and compare DNA profiles at a national level.[49] According to the FBI's mission, CODIS was

39. *See id.* at 15, 17.
40. *See id.* at 17-18.
41. *See* FUTURE OF FORENSIC DNA TESTING, *supra* note 18, at 18, 40.
42. *See id.* at 18-19, 41.
43. *See id.* at 19, 40.
44. *Id.* at 25.
45. Pub. L. No. 103-322, § 210,304, 108 Stat. 1796, 2069 (codified as 42 U.S.C. § 14,132 (1994)).
46. *See id.*; FBI, THE FBI'S COMBINED DNA INDEX SYSTEM PROGRAM: CODIS 1, *at* http://www.fbi.gov/hq/lab/codis/brochure.pdf [hereinafter CODIS BROCHURE] (last visited Mar. 25, 2005).
47. *See* H.R. REP. NO. 106-900, pt. 1, at 8 (2000); *Codis: Mission Statement & Background*, *at* http://www.fbi.gov/hq/lab/codis/program.htm (last visited Mar. 25, 2005).
48. CODIS BROCHURE, *supra* note 46, at 1.
49. *Id.*

designed to "blend[] forensic science and computer technology into an effective tool for solving violent crimes."[50]

The language of the Violent Crime Control and Law Enforcement Act of 1994 proved to be limiting, however, because while it authorized the creation of the database, it did not authorize the taking of samples from persons convicted of federal crimes.[51] In order to rectify this deficiency, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (ADEPA) authorizing the FBI to expand CODIS to include federal crimes and crimes committed in the District of Columbia.[52] Nonetheless, the deficiency remained, as the Department of Justice determined that ADEPA was not sufficient to provide the FBI with the legal authority to collect samples from convicted federal offenders.[53]

The FBI submitted a report to Congress in 1998 requesting that Congress enact a statute granting authority to "allow the taking of DNA samples from persons committing Federal crimes of violence, robbery, and burglary, or similar crimes" and to include these samples in CODIS.[54] In response to that request, Congress enacted the DNA Analysis Backlog Elimination Act of 2000 (DNA Act).[55] The stated purpose of the DNA Act was to "authorize a new program of Federal assistance to States to enable them to clear their backlogs of DNA samples . . . [and to] fill a gap in the system by authorizing collection, analysis, and indexing of DNA samples from persons convicted of Federal crimes . . . ."[56]

Under the DNA Act, individuals who have been convicted of certain qualifying federal crimes and who are in custody, on release, parole, or probation must provide a DNA sample to federal authorities.[57] While the Act allows a "tissue, fluid, or other bodily sample" as a permissible DNA sample,[58] the FBI considers DNA information derived from blood samples to be

50. *Id.*

51. H.R. REP. NO. 106-900, pt. 1, at 8.

52. Pub. L. No. 104-132, § 811(a)(2), 110 Stat. 1214, 1312 (1996).

53. H.R. REP. NO. 106-900, pt. 1, at 9.

54. *Id.*

55. Pub.L. No. 106-546, 114 Stat. 2726 (codified as 42 U.S.C. §§ 14135-14135(e), 10 U.S.C. § 1565 (2000)).

56. H.R. REP. NO. 106-900, pt. 1, at 8; *see* Nancy Beatty Gregoire, *Federal Probation Joins the World of DNA Collection,* 66 FED. PROBATION 30, 30 (2002).

57. 42 U.S.C. § 14135a(a)(1)-(2) (2000).

58. *Id.* § 14135a(c)(1).

more reliable and thus requires those individuals subject to the DNA Act to submit to blood sampling.[59] Any individual who fails to cooperate in the collection of a DNA sample will be guilty of a class A misdemeanor and punished accordingly.[60]

As originally enacted, the qualifying federal offenses under the DNA Act included murder, voluntary manslaughter, sexual abuse, child abuse, kidnapping, robbery, burglary, and any attempt or conspiracy to commit any such crimes.[61] With the enactment of the Antiterrorism Act of 2001,[62] the definition of qualifying offenses was amended and expanded to include acts of terrorism and any crime of violence.[63] The complete list of qualifying federal offenses found at 28 C.F.R. § 28.2 comprises a broad list of crimes including resisting arrest, interference with an aviation flight crew member or flight attendant, computer fraud, and persuading or enticing any individual to travel across state lines to engage in prostitution.[64] With this recent amendment, a wider net is cast to include more individuals under the reach of the DNA Act. Furthermore, there is current interest in expanding CODIS to include persons convicted of lesser crimes and arrestees.[65]

2. State Legislation

Legislation has also occurred at the state level. In order to benefit from the advantages of CODIS, all fifty states have enacted statutes requiring convicted offenders to provide DNA samples for analysis and entry in CODIS.[66] The crimes that prompt the requirement to provide a DNA sample vary from state to state.[67] All fifty states require samples from persons convicted of sex crimes and murder.[68] In addition, forty-seven

59. *See* Beatty Gregoire, *supra* note 56, at 31.

60. 42 U.S.C. § 14135a(a)(5).

61. *See id*. § 14135a(d)(1); H.R. REP. NO. 106-900, pt. 1, at 4.

62. Pub.L. No. 107-56, § 503, 115 Stat. 272, 364 (2001).

63. *See* 42 U.S.C. § 14135a(d)(2).

64. *See* 28 C.F.R. § 28.2 (2004).

65. FUTURE OF FORENSIC DNA TESTING, *supra* note 18, at 35.

66. *See* H.R. REP. NO. 106-900, pt. 1, at 8; Virna M. Manuel, *State DNA Data Base and Data Bank Expansion Laws: Is it Time for California to Expand Its DNA Data Base Law to Include All Convicted Felons?*, 31 W. ST. U. L. REV. 339, 340 (2004).

67. *See* H.R. REP. NO. 106-900, pt. 1, at 8.

68. *See* Manuel, *supra* note 66, at 340; DNARESOURCE.COM, STATE DNA DATABASE LAWS: QUALIFYING OFFENSES (as of June 2004), *at* http://www.dnaresource.com/Table%20of%20State%20DNA%20Laws%20-

states require DNA samples for all violent crimes, and thirty-four states require samples for all felonies.[69] Some states have further expanded the reach of the DNA laws to include collection of DNA samples from certain misdemeanors.[70]

### C. THE FOURTH AMENDMENT JURISPRUDENCE

The Fourth Amendment guarantees that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[71]

The main purpose of the Fourth Amendment is to protect the privacy and security of individuals against invasions by the government.[72] The central task in analyzing such invasions is to assess the reasonableness of the particular invasion,[73] for "[w]hat the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."[74] Determining the reasonableness of the invasion focuses on the "totality of the circumstances"[75] and depends on a balance between the public interest and the individual's personal interest in privacy.[76]

Typically, procurement of a warrant properly supported by probable cause ensures that the government's invasion during

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%202004.pdf [hereinafter *DNA Resource*] (last visited Mar. 25, 2005).

69. *See DNA Resource*, *supra* note 68.

70. DNARESOURCE.COM, ALL FELON DNA DATABASE EXPANSION BILLS THAT HAVE PASSED, *at* http://www.dnaresource.com/New_Folder/DNA/Recently%20Passed%20DNA%20Bills.doc (last visited Mar. 25, 2005) (listing a bill passed in Washington expanding its DNA database to include certain misdemeanors); *see* PAI Brief, *supra* note 34, at 15.

71. U.S. CONST. amend. IV.

72. *See* Terry v. Ohio, 392 U.S. 1, 9 (1968); Camara v. Mun. Ct. of S.F., 387 U.S. 523, 528 (1967).

73. *See Terry*, 392 U.S. at 19; *see also* Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977); United States v. Rabinowitz, 339 U.S. 56, 66 (1950) ("The relevant test is . . . whether the search was reasonable. That criterion in turn depends upon the facts and circumstances--the total atmosphere of the case.").

74. Elkins v. United States, 364 U.S. 206, 222 (1960); *see also Rabinowitz*, 339 U.S. at 65 ("The mandate of the Fourth Amendment is that the people shall be secure against unreasonable searches.").

75. United States v. Knights, 534 U.S. 112, 118 (2001).

76. *See Mimms*, 434 U.S. at 109; *see also* Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 FORDHAM L. REV. 329, 348-49 (2002) (providing an overview of the Court's reasonableness balancing approach in various contexts).

a search will be deemed "reasonable."[77] In these situations, authorities must formally demonstrate to a neutral magistrate that probable cause exists to justify the search and seizure and convince the magistrate that a warrant be issued to conduct the search.[78] However, the Court has been willing to relax the requirement prescribed by the Warrant Clause. The Court has recognized that certain "exigent circumstances" or other special considerations may exist which make it impracticable to obtain a warrant.[79] In these circumstances, the test of reasonableness turns not on the existence of a warrant, but rather on the existence of individualized suspicion or a "special need" to justify the search.

1. Individualized Suspicion

The Court has allowed several exceptions that permit law enforcement to execute a search without first obtaining a warrant. For example, police may execute a search of a person and the area in which the person is found while in the process of a lawful arrest[80] or may perform a pat-down of individuals so long as there is a reasonable suspicion of potential danger.[81] While the Court has been willing to overlook the warrant requirement in these situations, the Court generally requires some level of individualized suspicion to justify a search.[82]

*United States v. Knights*[83] serves as a good example of the Court's application of the balancing test required to determine reasonableness of a warrantless search. In *Knights*, Mark James Knights was on probation for a drug offense.[84] Shortly after Knights was placed on probation, a Pacific Gas & Electric (PG&E) transformer and Bell Communications vault were set

77. *See* Payton v. New York, 445 U.S. 573, 586 (1980) (stating that searches and seizures without a warrant are presumptively unreasonable).

78. *See* Groh v. Ramirez, 540 U.S. 551, 557-58 (2004); *Terry*, 392 U.S. at 20.

79. *See Payton*, 445 U.S. at 586-87 n.25.

80. *See* Chimel v. California, 395 U.S. 752, 762 (1969).

81. *See Terry*, 392 U.S. at 24-25.

82. *See* Brown v. Texas, 443 U.S. 47, 51 (1979) ("[W]e have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity"); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (stating there must be "at least articulable and reasonable suspicion" to justify stopping a vehicle and detaining the driver).

83. 534 U.S. 112 (2001).

84. *Id*. at 114.

on fire, causing nearly $1.5 million worth of damage.[85] The incident was one of more than thirty acts of vandalism to PG&E facilities, and Knights was long believed to be linked to the incidences.[86] After the arson, a sheriff's deputy drove past Knights's residence and spotted the truck of Steven Simoneau, a friend of Knights's also suspected in the PG&E incidences, parked outside Knights's home.[87] The sheriff's deputy decided to set up surveillance at Knights's home.[88] During the surveillance, he observed Shimoneau leaving Knights's apartment and discarding what the deputy believed to be pipe bombs.[89] After searching the back of Simoneau's truck and discovering numerous suspicious materials, the sheriff decided to conduct a search of Knights's home.[90] In the course of the search, the sheriff found "a detonation cord, ammunition, . . . and a brass padlock stamped 'PG & E.'"[91] Knights was arrested and indicted for conspiracy to commit arson, possession of an unregistered destructive device, and for being a felon in possession of ammunition.[92] Knights moved to suppress the evidence obtained during the search.[93] The district court granted the motion to suppress, and the court of appeals affirmed on the grounds the search was for investigatory rather than probationary purposes.[94] The California Supreme Court reversed, rejecting the distinction between investigatory and probationary purposes and upholding all searches performed pursuant to a probation condition.[95]

The United States Supreme Court granted certiorari and held that the search of Knights's apartment was reasonable under the Fourth Amendment "totality of the circumstances" approach.[96] In so holding, the Court first recognized that it was unnecessary to determine "the constitutionality of a suspicionless search because the search in this case was

85. *Id*.
86. *Id.* at 114-15.
87. *Id.* at 115.
88. *Id.*
89. *Knights,* 534 U.S. at 115.
90. *Id.*
91. *Id*.
92. *Id*. at 116.
93. *Id*.
94. *Id.*
95. *Knights,* 534 U.S. at 116.
96. *Id.* at 118 (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)).

supported by reasonable suspicion."[97] With an acknowledgement of the existence of suspicion, the Court turned to the reasonableness balancing test to assess the degree to which the search intrudes upon an individual's privacy against the degree to which the search promotes legitimate governmental interests.[98] Recognizing the government's interest in the functioning of the probation institution and the special concerns associated with probationers, the Court determined the balance of the governmental interests against the privacy interests justified the search based on reasonable suspicion.[99]

The Court, in reaching its decision, discussed the concept of individualized suspicion, stating

> [t]he degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable . . . . Although the Fourth Amendment ordinarily requires the degree of probability embodied in the term "probable cause," a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable . . . . 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 interests is reasonable.[100]

Thus, the Court made clear that this warrantless search was reasonable under the Fourth Amendment, not as a suspicionless search, but as a search supported by reasonable individualized suspicion.[101]

2. Suspicionless Searches

In addition to these exceptions based on individualized suspicion, the Court has also allowed limited categories of searches conducted without individualized suspicion and without the typical warrant and probable cause requirement. These suspicionless searches have been categorized as "special needs" searches whose primary purpose serves a need beyond

97. *Id.* at 120 n.6.

98. *Id.* at 118-19 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

99. *See id.* at 120-21.

100. *Id.* at 121 (internal citations omitted).

101. *See Knights*, 534 U.S. at 122.

the normal need for law enforcement.[102] These "special needs" searches have included airport searches,[103] administrative searches,[104] searches of probationers' homes,[105] certain highway checkpoints,[106] and drug testing for athletes[107] and employees.[108]

Two recent Supreme Court decisions emphasize the significance of the non-law enforcement motive of valid suspicionless searches. In *City of Indianapolis v. Edmond*,[109] the Court addressed the constitutionality of a highway checkpoint established to interdict illegal drugs.[110] Under the program, Indianapolis officers randomly stopped a predetermined number of motorists at each roadside checkpoint.[111] Once the driver was stopped, the officers would approach the car, request the driver's license and registration, perform a visual inspection of the car's interior, and walk a narcotics-detection dog around the outside of the vehicle.[112] Two of the drivers stopped under the program filed suit

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102. *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (J. Blackmun, concurring) (allowing an exception to the warrant requirement "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . . .").

103. *See, e.g.*, Chandler v. Miller, 520 U.S. 305, 323 (1997) (citing searches at airports and entrances of federal buildings as reasonable).

104. *See, e.g.*, Camara v. Mun. Ct. of S.F., 387 U.S. 523, 534 (1967) (referring to the municipal area inspection at issue as one of a class of "administrative searches.").

105. *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987) (recognizing the operation of a probation system as presenting special needs beyond that of normal law enforcement). While the search at issue in *Griffin* involved a warrantless search of a probationer's home supported by reasonable suspicion, the Court nonetheless identified the operation of a state probation system as a special need, warranting a departure from the usual Fourth Amendment warrant and probable cause requirements surrounding the home. *See Griffin*, 438 U.S. at 871, 873-74 (distinguishing Payton v. New York, 445 U.S. 573, 586 (1980)).

106. *See, e.g.*, Michigan Dep't. of State Police v. Sitz, 496 U.S. 444, 455 (1990).

107. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995) (allowing program subjecting student athletes to random drug testing).

108. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989) (upholding drug test of U.S. Customs officials).

109. City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

110. *Id.* at 34.

111. *Id.* at 35.

112. *Id*.

claiming the checkpoints violated the Fourth Amendment.[113] The Court agreed with the motorists, explaining that the Court had never approved of a highway checkpoint program "whose primary purpose was to detect evidence of ordinary criminal wrongdoing."[114] In reaching this decision, the Court distinguished *Edmond* from previous checkpoint cases by focusing on the *purpose* of the checkpoint.[115] Contrasting the *Edmond* checkpoint from checkpoints furthering a non "crime control" purpose,[116] the Court explained that "[w]ithout drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life."[117] The Court declined to suspend the requirement of individualized suspicion, noting the Court was "particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends."[118]

In *Illinois v. Lidster*,[119] the Court was once again faced with the constitutionality of roadway checkpoints.[120] After a bicyclist was hit and killed by a drunk driver, local police set up roadblocks in order to pass out flyers and solicit information about the accident.[121] While approaching the checkpoint, Robert Lidster swerved and nearly hit one of the officers.[122]

113. *Id*. at 36.

114. *Id*. at 38.

115. *See Edmond,* 531 U.S. at 40.

116. *Id*. at 41-42. In analyzing the *Edmond* checkpoint, the Court discussed its decisions in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). *Id.* at 34, 38-39. In *Sitz*, the Court endorsed a highway sobriety checkpoint, emphasizing the gravity of the drunk driving problem and the State's interest in curbing the problem. *Sitz*, 496 U.S. at 451. In *Martinez-Fuerte*, the Court determined stops for brief questioning at border patrol checkpoints were consistent with the Fourth Amendment. *Martinez-Fuerte*, 428 U.S. at 566-67. In *Edmond*, the Court characterized these past decisions as validating checkpoints "designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety," and not designed for the primary purpose of uncovering ordinary criminal wrongdoing. *Edmond*, 531 U.S. at 41-42.

117. *Edmond*, 531 U.S. at 42.

118. *Id.* at 43.

119. 540 U.S. 419 (2004).

120. *See id*. at 421.

121. *See id*. at 422.

122. *See id.*

Smelling alcohol, the officers detained Lidster, performed a sobriety test, and arrested him.[123] Lidster was later convicted of driving while under the influence.[124] Lidster challenged the checkpoint as an illegal search, claiming the use of the checkpoint was a violation of his Fourth Amendment rights.[125] Relying on the Court's decision in *Edmond*, the Illinois Supreme Court held the checkpoint to be an unconstitutional violation of the Fourth Amendment.[126]

The United States Supreme Court disagreed, distinguishing the *Edmond* checkpoint from the *Lidster* checkpoint.[127] The Court once again purported to focus on the purpose of the checkpoint. The Court reasoned that while the purpose of the *Edmond* checkpoint was to detect whether the vehicle occupants were committing a crime, the purpose of the *Lidster* checkpoint was not to determine whether the person stopped had committed a crime, but merely to obtain information from the public at large about the hit and run.[128] Under this "solicitation of information" reasoning, the Court judged the reasonableness of the checkpoint, taking into consideration "the gravity of the public concerns served by the seizure, the degree to which the seizure advance[d] the public interest, and the severity of the interference with individual liberty."[129] Balancing the gravity of the public concern in the criminal investigation and the significant advancement of this concern against the minimal level of intrusion involved in the search, the Court declared the checkpoint to be constitutional.[130]

While these cases both involved roadway checkpoints, taken together, it is possible to gain some insight into the Court's "special needs" analysis. In contrast to the reasonableness inquiry associated with individualized suspicion searches, the Court will first examine the purpose of

123. *See id*.
124. *See id*.
125. *Lidster*, 540 U.S. at 422.
126. *See id.* at 422-23.
127. *See id.* at 423.
128. *Id.* at 423-24. The Court viewed the "information-seeking stop" as an event that does not involve individualized suspicion of the driver being questioned, and considered the brief stop to be unlikely to induce anxiety or prove intrusive. *Id.* at 425.
129. *Id.* at 427 (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)).
130. *See id.* at 427-28.

the particular search to establish whether the search is one that falls under the "special needs" exception. In making this determination, the Court will reject any general law enforcement purpose as a legitimate special need; if a general law enforcement purpose is involved, individualized suspicion is required. Next, once a search is deemed to involve a special need, the Court performs a balancing of the public needs against the interference with individual liberty. This framework provides some guidance when faced with evaluating suspicionless searches.[131]

### D. THE IMPACT OF DNA SAMPLING ON THE FOURTH AMENDMENT

In *Schmerber v. California*,[132] the United States Supreme Court held that the government's compelled intrusion into a person's body for the purpose of drawing blood is properly deemed a search under the Fourth Amendment.[133] While the drawing of blood has been deemed minimally intrusive,[134] the Court has recognized that the physical intrusion involved in penetrating the skin to draw blood infringes upon a reasonable expectation of privacy that implicates the Fourth Amendment.[135] Thus, the compulsory extraction of blood for DNA collection and analysis under the DNA Act is a search within the meaning of the Fourth Amendment.[136] From there,

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131. *See also* Jonathan Kravis, Comment, *A Better Interpretation of "Special Needs" Doctrine After Edmond and Ferguson*, 112 YALE L.J. 2591 (2003). Kravis summarizes the special needs doctrine by stating:

> In determining whether a warrantless search falls under the special needs exception, the court asks, "What is the primary purpose to which the government intends to put the results of the search?" If the answer is simply, "to generate evidence for law enforcement purposes," then the exception does not apply. If, however, the government can plausibly argue that it needs the search results primarily for something other than criminal prosecution, then the special needs exception applies.

*Id*. at 2593-94.

132. 384 U.S. 757 (1966).

133. *Schmerber*, 384 U.S. at 767-68; *see* Sandra J. Carnahan, *The Supreme Court's Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database*, 83 NEB. L. REV. 1, 7-8 (2004).

134. *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 625 (1989); *Schmerber*, 384 U.S. at 771.

135. *See Skinner*, 489 U.S. at 616 ("[I]t is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable.").

136. *See* Carnahan, *supra* note 133, at 7 ("All courts interpreting the

the analysis turns to the determination of the reasonableness of DNA collection and analysis as a search.

Several circuit courts, district courts, and state courts have had the opportunity to wrestle with the question of reasonableness in performing compulsory DNA collection.[137] The courts have often relied on different analytical approaches[138] and have often come to contradictory results.[139] The following two cases are representative of the analysis courts have used when faced with the issue.

In *Groceman v. United States Department of Justice*,[140] Jeffrey and Bradley Groceman were arrested for armed robbery and conspiracy to commit armed robbery.[141] The Grocemans filed suit to enjoin the collection of their DNA samples.[142] In affirming the dismissal of the suit, the Fifth Circuit began its analysis by looking at the reasonableness of the DNA collection. Instead of first identifying the purpose of the DNA collection or looking for individualized suspicion, the court immediately focused on reasonableness balancing.[143] Weighing the "legitimate government interest in using DNA to investigate crime" against the prisoners' "diminished privacy rights" and the collection's "minimal intrusion," the court decided the DNA collection was reasonable under the Fourth Amendment.[144] The court relied heavily on the prisoners' diminished expectation of privacy and stated that courts "may consider the totality of circumstances, including a person's status as an inmate or probationer, in determining whether his reasonable

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constitutionality of . . . DNA Statutes recognize the well-settled principle that involuntary taking of blood from a person constitutes a search under the Fourth Amendment.").

137. *See*, *e.g.*, Richard P. Shafer, *Validity, Construction, and Application of DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C.A. §§ 14135 et seq. and 10 U.S.C.A. § 1565*, 187 A.L.R. Fed. 373 (2003) [hereinafter DNA ALR].

138. *Compare* United States v. Kimler, 335 F.3d. 1132, 1146 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003) (viewing the DNA collection as falling under the "special needs" exception), *with* Groceman v. United States Dep't of Justice, 354 F.3d 411, 413-14 (5th Cir. 2004) (applying the balancing test to determine reasonableness).

139. *Compare Kimler*, 335 F.3d at 1146 (upholding the DNA sampling as constitutional), *with* United States v. Miles, 228 F. Supp. 2d 1130, 1134-41 (E.D. Cal. 2002) (invalidating the DNA collection statute as unconstitutional).

140. 354 F.3d 411 (5th Cir. 2004).

141. *See id.* at 412.

142. *See id.*

143. *See id*.

144. *Id*. at 413.

expectation of privacy is outweighed by other factors."[145]

In *United States v. Reynard*,[146] John Reynard, on supervised release for armed robbery, was informed that he was required to cooperate with the DNA collection process mandated by the DNA Act.[147] Reynard declined to comply with the order and his probation officer petitioned to have Reynard's probation revoked.[148] Reynard filed a motion to dismiss the revocation petition, raising several arguments including the argument that the DNA Act mandated an unconstitutional search within the meaning of the Fourth Amendment.[149]

Analyzing the issue of constitutionality under the Fourth Amendment, the court noted that the DNA Act requires a search without probable cause or individualized suspicion.[150] Thus, the court reasoned that the key issue was to determine whether the DNA Act fell within the "special needs exception" to the Fourth Amendment.[151] To determine if the search fell within the special needs exception, the court first looked at whether the purpose of the search went beyond the normal need of law enforcement.[152] Reynard argued that the purpose of the DNA Act was to aid in criminal investigations and consequently fell outside the special needs exception.[153] The government contended that the purpose of the DNA Act was not merely to aid in normal law enforcement purposes, but rather "to create a more complete national DNA database to increase the accuracy of the criminal justice system."[154] The court agreed with the government, finding that the DNA Act authorized searches that went beyond the normal need for law enforcement.[155]

Finding that the search fell within the special needs exception, the court turned to balancing the interests involved in the case at hand. The court balanced four factors: "(1) the expectations of privacy held by persons subject to the search;

145. *Id*.
146. 220 F. Supp. 2d 1142 (S.D. Cal. 2002).
147. *See id.* at 1146.
148. *See id.*
149. *See id.* at 1146-47.
150. *See id.* at 1165.
151. *Id.*
152. *See Reynard*, 220 F. Supp. 2d at 1165.
153. *See id.* at 1166-67; DNA ALR, *supra* note 137, at 381.
154. *Reynard,* 220 F. Supp. 2d at 1167.
155. *See id*. at 1168.

(2) the degree of intrusion into these persons' privacy interests; (3) the public's interest in allowing such searches; and (4) the likelihood that such searches will advance this interest."[156] The court determined that the supervised releasees had a diminished expectation of privacy and enjoyed only conditional liberty; the blood draw authorized by the DNA Act represented only a minimal intrusion; the public had a significant interest in the accuracy of the criminal justice system; and the searches authorized by the DNA Act were legitimately related to the public's interest.[157] Accordingly, the court found the searches authorized by the DNA Act to be reasonable searches falling within the special needs exception of the Fourth Amendment.[158]

Comparing these two cases, it is apparent the balancing test is the main component in the analysis of DNA collection under the Fourth Amendment. However, the courts disagree as to how the analysis should begin. While the *Groceman* court looks past the need for individualized suspicion or a "special need," the court in *Reynard* begins its discussion with this initial inquiry.[159] The Supreme Court has not yet provided guidance with respect to the proper analysis of DNA collection under the Fourth Amendment, and has not yet addressed the validity and constitutionality of the state and federal DNA collection statutes as suspicionless searches under the Fourth Amendment.

## II. THE NINTH CIRCUIT ENTERS THE FRAY – *UNITED STATES V. KINCADE*

The Ninth Circuit Court of Appeals has had two opportunities to decide whether the searches authorized by the DNA Act are unconstitutional under the Fourth Amendment. In its first decision, the three-judge panel held that the searches were unconstitutional because they failed to fall within the special needs exception of the Fourth Amendment.[160] In a rehearing *en banc*, the Ninth Circuit reversed its position, deciding that the searches were

156. *Id*. at 1165 (citing Rise v. Oregon, 59 F.3d 1556, 1562 (9th Cir. 1995)).

157. *See id.* at 1168-69.

158. *See id.* at 1169.

159. *See* Groceman v. United States Dep't of Justice, 354 F.3d 411, 412 (5th Cir. 2004); *Reynard*, 220 F. Supp. 2d at 1165.

160. United States v. Kincade ("Kincade I"), 345 F.3d 1095 (9th Cir. 2003), *rev'd en banc*, 379 F.3d 813 (9th Cir. 2004).

constitutional under a totality of the circumstances analysis.[161]

A. STATEMENT OF THE FACTS

On July 20, 1993, Thomas Kincade robbed a bank using a firearm in violation of 18 U.S.C. §§ 22113 and 924(c).[162] He subsequently pleaded guilty to the charges and was sentenced to prison for ninety-seven months, to be followed by a three-year term of supervised release.[163] After his release from prison, Kincade started his supervised release on August 4, 2000.[164] According to the terms of his release, Kincade was directed to participate in a substance abuse program, to not commit another federal, state, or local crime, and to follow the instructions of his probation officer.[165] In September 2000, and again in May 2001, Kincade submitted urine samples that tested positive for cocaine.[166] Upon his request, he was placed in a residential substance abuse treatment program from June through October 2001.[167]

In March 2002, pursuant to the DNA Act, Kincade's probation officer ordered him to submit a blood sample for DNA analysis.[168] When Kincade refused, his probation officer suggested he contact an attorney for advice and explained that Kincade would have an opportunity to submit a sample on April 16, 2002, if he changed his mind.[169] Kincade later informed the Probation Office that he did not intend to comply with the order and subsequently did not appear to provide the DNA sample on April 16.[170] Faced with this refusal, Kincade's probation officer informed the district court of the refusal and recommended revocation of Kincade's supervised release and re-incarceration.[171] At a hearing held on July 15, 2002, Kincade objected to the order to submit a blood sample on the

161. *See* United States v. Kincade ("Kincade II"), 379 F.3d 813 (9th Cir. 2004).

162. *See id*. at 820.

163. *See* Appellant's Opening Brief at 2, United States v. Kincade, 345 F.3d 1095 (9th Cir. 2003), *rev'd en banc*, 379 F.3d 813 (9th Cir. 2004) (No. 02-50380), 2002 WL 32181458.

164. *See id*. at 2-3.

165. *See Kincade II*, 379 F.3d at 820.

166. *See id*.

167. *See* Appellant's Opening Brief at 3.

168. *See Kincade II*, 379 F.3d at 820.

169. *See id.*

170. *See id*.

171. *See id*. at 820-21.

basis that the DNA Act was unconstitutional under the Fourth Amendment.[172] The district court found the statute to be constitutional and thus found Kincade to be in violation of the terms of supervised release for having refused to comply with the order.[173] The court sentenced Kincade to four months in custody for the violation and ordered all conditions of supervised release to continue for two years following his release.[174]

B. *KINCADE I*

Beginning its analysis with the conclusion that the taking of blood from a parolee constitutes a search for Fourth Amendment purposes, the court turned to the question of whether this search requires individualized suspicion.[175] Following the Supreme Court's decision in *Knights*, the court applied the "totality of the circumstances" test and concluded that the search required a level of reasonable suspicion in order to be deemed reasonable under the Fourth Amendment.[176] Balancing the individual's interest in privacy against the public's interest in promoting legitimate government purposes, the court found the search to be a substantial intrusion on Kincade's reasonable expectation of privacy.[177] While the court recognized that Kincade's expectations of privacy were diminished due to his status as a releasee, the court refused to accept the notion that this status completely eliminated any interest in privacy.[178] Turning to the government's interest, the court focused on the government's express interest in the search: "to prevent, solve, and prosecute future crimes, and to complete the CODIS database."[179] The court was particularly mindful that unlike the interest in supervising parolees during the finite period of parole at issue in *Knights*, the interest asserted in this case went well beyond the parole period, as the DNA would be permanently stored in CODIS.[180]

172. *See* Appellant's Opening Brief at 3, 7-8.
173. *See id.* at 3, 8.
174. *See id.*
175. *See id.* at 8.
176. *See* United States v. Kincade ("Kincade I"), 345 F.3d 1095, 1102 (9th Cir. 2003), *rev'd en banc*, 379 F.3d 813 (9th Cir. 2004).
177. *See id.*
178. *See id.*
179. *Id.* at 1103.
180. *See id.*

Characterizing this purpose as furthering the "overwhelming public interest in creating a comprehensive nationwide DNA bank that will improve the accuracy of criminal prosecutions for generations to come," the court concluded that this government interest did not outweigh Kincade's interest in privacy.[181] The court recognized that in performing this balancing, it could not, under the controlling authority of the Supreme Court, authorize suspicionless searches performed for law enforcement purposes.[182] The court correctly reasoned, "[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."[183] Thus, balancing the present factors, the court concluded that under the general principles of the Fourth Amendment, individualized suspicion was required to conduct searches pursuant to the DNA Act.[184]

The court acknowledged that the above discussion would normally end the analysis since it had never been asserted that the searches performed under the DNA Act were done so based on individualized suspicion.[185] However, the court was faced with the government's next assertion that the searches mandated under the DNA Act fell within the category of special needs exceptions recognized under the Fourth Amendment.[186] The court acknowledged that with the special needs exception, "searches that would otherwise violate the Fourth Amendment for lack of probable cause or individualized suspicion are deemed constitutionally permissible because they serve 'special needs, *beyond the normal need for law enforcement*.'"[187] The court further characterized the special needs searches as those "conducted for purposes other than the solving and punishing of crime."[188] To support the position that special needs searches are those searches performed outside of the normal needs of law enforcement, the court relied on the Supreme

181. *Id*.
182. *See Kincade I*, 345 F.3d at 1103.
183. *Id*.
184. *See id*. at 1104.
185. *See id*.
186. *See id*.
187. *Id.* at 1105 (alteration in original) (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000)).
188. *Kincade I,* 345 F.3d at 1105.

Court decision in *Edmond*.[189] The Ninth Circuit focused on the Court's refusal to extend the special needs exceptions to searches whose primary purpose was to pursue general crime control ends and to detect evidence of criminal wrongdoing.[190] The court noted that *Edmond* "make[s] plain that a regime of suspicionless searches is constitutionally impermissible" if designed to serve a law enforcement purpose.[191]

The government attempted to counter the court's reliance on *Edmond* by arguing that the Ninth Circuit's decision in *Rise v. Oregon*[192] should control.[193] In its *Rise* decision, the court had held a state DNA statute to be constitutional based on a "totality of the circumstances" analysis.[194] The *Rise* court upheld the statute although the search had been performed without individualized suspicion and in pursuit of law enforcement purposes.[195]

The court rejected the government's support of *Rise*, explaining that *Rise* had been based on Supreme Court precedent that has since been repudiated in *Edmond*.[196] Ignoring the "special needs" label attached to the *Edmond* decision and the "totality of the circumstances" label attached to *Rise*,[197] the court reiterated the Supreme Court's stance that

189. *See id.* at 1105-06. The court also relied on the Supreme Court's decision in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), as reaffirming the decision in *Edmond*. *See id.* at 1106.

190. *See id.* at 1106.

191. *Id.* at 1110.

192. 59 F.3d 1556 (9th Cir. 1995).

193. *See Kincade I*, 345 F.3d at 1107.

194. *See Rise,* 59 F.3d at 1561, 1564.

195. *See id.* at 1559 ("Even in the law enforcement context, the State may interfere with an individual's Fourth Amendment interests with less than probable cause and without a warrant if the intrusion is only minimal and is justified by law enforcement purposes.").

196. *See Kincade I,* 345 F.3d at 1108. The decision in *Rise* was premised on the Supreme Court decision in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990). The *Rise* court interpreted the *Sitz* decision to stand for the proposition that suspicionless searches were justified even if performed for general law enforcement purposes. *See Kincade I*, 345 F.3d at 1108. The Court in *Edmond* clarified that the *Sitz* searches were justified as searches to prevent the threat to highway safety posed by drunk drivers, not as searches to further a general crime investigation purpose. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 39 (2000).

197. The dissent attempted to discount the majority's comparison between *Rise* and *Edmond* by suggesting that *Edmond* was a special needs case while *Rise* was determined solely based on the totality of the circumstances analysis. *See Kincade I,* 345 F.3d at 1108 n.25. The majority rejected this argument, stating "[t]he fact that *Rise* (which permits suspicionless searches related to

individualized suspicion is required when searches are conducted in furtherance of general law enforcement purposes.[198] Because *Rise* was based on a Supreme Court interpretation that was no longer accepted, the court concluded that the precedential effect of *Rise* was limited.[199] More importantly, the court reasoned that if it were to follow *Rise*, it "would be acting in disregard of controlling Supreme Court doctrine."[200]

Following the special needs analysis, the court proceeded to determine the purpose behind the search authorized by the DNA Act.[201] The court first turned to the government's asserted purposes: "to help law enforcement solve unresolved and future cases, and to increase accuracy in the criminal justice system."[202] The court pointed out that the government's own stated purpose is the promotion of general law enforcement.[203] Further, the court looked at the purpose of the DNA Act as stated in legislative history.[204] The court specifically took note of the Department of Justice's own assurance that the "existing legal rules for the DNA identification system generally ensure that DNA samples and indexed information will be used *solely for law enforcement identification purposes*."[205] The court concluded that the record overwhelmingly indicated the suspicionless searches mandated by the DNA Act were performed to further a general law enforcement purpose.[206]

The government attempted to distinguish the "ultimate objective" of law enforcement and the "immediate purpose" of filling the CODIS system the DNA Act searches sought to accomplish.[207] The court rejected this distinction, stating that if either the overall objective or the immediate purpose evinces

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law enforcement) conflicts with *Edmond* . . . (which prohibit[s] such searches) does not depend on what label we attach to the searches conducted in *Rise*." *Id.*

198. *See id*.

199. *See id*. at 1108.

200. *Id*.

201. *See id*. at 1110.

202. *Id*.

203. *See Kincade I*, 345 F.3d at 1110.

204. *See id*.

205. *Id*. at 1111 (alteration in original) (quoting H.R. REP. NO. 106-900, pt. 1, at 25 (2000)).

206. *See id*.

207. *See id*. at 1111-12.

a law enforcement purpose, the special needs doctrine does not apply.[208] In rejecting the argument, the court stated "[t]he purpose of these searches is no more to put samples into CODIS than is the purpose of finger-printing to place cards into index files."[209]

The government further attempted to argue that the DNA Act searches served to exonerate the innocent.[210] While the court recognized this as a commendable, "benign" purpose, the court refused to believe that the existence of a benign motive could eviscerate the overall law enforcement objective served.[211] The court succinctly summarized the impact of the search on Kincade by stating:

> Whatever benign secondary purposes these searches may happen to serve, the primary purpose is to provide law enforcement officials, both at the state and federal level, with information about individuals that can be used to identify them as criminals and to prosecute them for their crimes. Kincade, should he be subjected to such a search, in effect will have been compelled to provide evidence with respect to any and all crimes of which he may be accused, for the rest of his life. Kincade has completed his sentence, and the court has ordered a term of supervised release for three years. *The forced extraction of his blood with the subsequent categorization of his DNA would affect him for the rest of his life.* Thus, he is entitled to the protection afforded by the Fourth Amendment.[212]

Thus, the court held that the forced blood extractions performed pursuant to the DNA Act violated the Fourth Amendment as suspicionless searches mandated for law enforcement purposes.[213] In rendering its decision, the court viewed the DNA Act as representing an alarming trend of procedures that were working to whittle away the privacy and dignity of citizens by small imperceptible steps.[214] The court cautioned, "[t]aken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man's life at will."[215]

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208. *See id*. at 1112.
209. *Kincade I,* 345 F.3d at 1112.
210. *See id.*
211. *See id*.
212. *Id*. at 1113 (emphasis added).
213. *See id.* at 1113.
214. *See id.*
215. *Kincade I,* 345 F.3d at 1113. (quoting Osborn v. United States, 385 U.S. 323, 343 (1966) (Douglas, J., dissenting)).

C. *KINCADE II*

On rehearing, the court opened its discussion with a review of the DNA Act and the identification process associated with the CODIS system.[216] The court noted two ways in which CODIS could be used: (1) to allow law enforcement to match forensic samples from one crime scene to forensic samples from another crime scene, and (2) to allow law officials to match the forensic crime scene evidence to offender profiles.[217] The court acknowledged that CODIS "serves as a potent tool for monitoring the criminal activity of known offenders,"[218] and data contained within CODIS had aided in over 16,000 criminal investigations nationwide.[219]

The court then turned to an overview of the Supreme Court's Fourth Amendment jurisprudence.[220] After outlining the Court's handling of warrantless searches under the reasonable suspicion and special needs regimes, the plurality[221] turned its focus to the Supreme Court's specific analysis in several cases, including *Edmond* and *Knights*.[222] The court of appeals acknowledged the Supreme Court's emphasis on the non-law enforcement objectives of permissible suspicionless searches in the *Edmond* decision.[223] However, the plurality characterized *Knights* as a possible limitation to the Supreme Court's position on searches sustained under the special needs exception.[224] After having just categorized warrantless searches as requiring either reasonable suspicion or a special need, the plurality compared *Knights* and *Edmond* under one larger category of warrantless searches.[225] The court narrowly

216. *See* United States v. Kincade ("Kincade II"), 379 F.3d 813, 816-20 (9th Cir. 2004).

217. *See id.* at 819.

218. *Id.* at 819-20.

219. *See id.* at 820.

220. *See id*. at 821.

221. The plurality consisted of five judges, including Judge O'Scannlain who authored the opinion. Judge Gould concurred, advocating the special needs theory, and thus provided the sixth vote necessary to reverse the three-judge panel decision. Five judges dissented. *See id.* at 842-43 n.1 (Reinhardt, C.J., dissenting).

222. *See Kincade II,* 379 F.3d at 824-32. Two other cases the court discussed were *Griffin v. Wisconsin*, 483 U.S. 868 (1987), and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). *See id.*

223. *See id.* at 826.

224. *See id*. at 827.

225. *See id*. at 828.

construed *Knights* as allowing warrantless searches conducted for law enforcements purposes to be analyzed under a totality of the circumstances analysis rather than the special needs doctrine.[226] The court rejected any suggestion that the difference between the analysis used in *Edmond* and the analysis used in *Knights* turned on the existence of reasonable individualized suspicion. Instead, the plurality viewed the special needs doctrine as triggered not by the absence of individualized suspicion, but by the absence of a warrant.[227]

Furthermore, the court focused on the special circumstances of conditional release presented in *Knights*. The court characterized the *Knights* decision as having "left unresolved the question whether special needs analysis controlled suspicionless searches of probationers."[228] Thus, the court suggested that *Knights* represented the "possibility that conditional releasees' diminished expectations of privacy may be sufficient" to justify a search without relying on the special needs doctrine.[229]

Bolstered by its interpretation of *Knights* and its decision in *Rise*, the plurality, "[w]hile not precluding that the federal DNA Act could satisfy a special needs analysis," determined that the totality of the circumstances analysis was the proper approach for resolving the issue at hand.[230] The first step of the plurality's analysis was to note the limited rights and freedoms allowed parolees and conditional releasees.[231] The court observed that the restrictions placed on parolees and conditional releasees were due in part to the high rate of recidivism and to the overall goal of protecting the community while the releasees are reintegrated into society.[232] In addition, the court suggested the important purposes of the parole system justify the parole authorities' interest in invading the privacy of supervised parolees.[233] The court summarized its view by explaining:

> such a severe and fundamental disruption in the relationship between the offender and society, along with the government's concomitantly

226. *See id.* at 828-30.
227. *See id.* at 829.
228. *Kincade II,* 379 F.3d at 830.
229. *Id.* at 832.
230. *Id.*
231. *Id.* at 833.
232. *Id.* at 833-34.
233. *Id*. at 834.

> greater interest in closely monitoring and supervising conditional releasees, is in turn sufficient to sustain suspicionless searches of his person . . . even in the absence of some non-law enforcement "special need" . . . .[234]

After justifying its use of the totality of the circumstances approach in the absence of individualized suspicion or a special need, the court turned to analyze the reasonableness of the DNA Act's compulsory DNA profiling.[235] Performing the balancing required to evaluate the totality of the circumstances, the court first looked at the extent to which the DNA profiling interferes with the privacy interests of individuals subject to the Act.[236] In analyzing the intrusiveness of the mandated profiling, the plurality focused on two aspects of the profiling. First, the court observed that blood tests are commonplace and routine in everyday life.[237] Coupled with the fact that qualified offenders under the Act have been subject to much more severe searches, the court reasoned, "the DNA Act's compelled breach of their bodily integrity is all the less offensive."[238] Second, the plurality argued the information obtained from the DNA profile—the individual's identity—is limited and is information to which a qualified offender can claim no right.[239] While the court recognized that the DNA could potentially be used to cull more private information about the individual outside of merely establishing his identity, the court refused to look beyond the asserted purpose and use of the DNA Act and the CODIS system.[240] Thus, the court concluded that as implemented, the profiling mandated by the DNA Act acts as minimally intrusive, both as a bodily intrusion as well as a source of personal information.[241]

Turning to the public interests aspect of the balancing test, the court offered several important interests furthered by the DNA Act. First the plurality suggested society has an "overwhelming interest" in ensuring parolees comply with the

234. *Kincade II*, 379 F.3d at 835.
235. *Id.* at 836.
236. *Id.*
237. *Id.*
238. *Id.* at 837.
239. *Id.* The plurality referred to the blood sample as establishing "only a record of the defendant's identity." *Id.* (emphasis added).
240. *Kincade II*, 379 F.3d at 838.
241. *Id.*

requirements of release.[242] In addition, the plurality noted the deterrent effect of the testing supports society's "enormous interest" in reducing recidivism.[243] Further, the court submitted that the DNA profiling provides closure to victims of past crimes. The court surmised that the combined weight of these interests was "monumental."[244]

The court also returned to its discussion of the purposes of the parole and conditional release programs. Focusing on the deterrent nature of the profiling, the court suggested the mandated profiling could help to "steer conditional releasees toward law-abiding lives as productive members of our society."[245] The court further advanced the idea that the profiling reduces the crimes committed during limited release, thus helping to protect society.[246]

Consequently, considering the conditional releasee's diminished expectations in privacy and the balancing of the minimal intrusion of blood sampling against the significant societal interests in DNA collection, the court concluded the mandated DNA profiling was reasonable under the totality of the circumstances.[247] Therefore, the court determined there was no violation of Kincade's Fourth Amendment rights.[248]

## III. WHY THE NINTH CIRCUIT HAD IT RIGHT THE FIRST TIME

In reaching its *en banc* decision in *Kincade*, the Ninth Circuit joined its sister circuits in holding that the searches mandated under the DNA Act do not violate the Fourth Amendment.[249] However, in doing so, the Ninth Circuit misinterpreted Supreme Court Fourth Amendment jurisprudence. The second *Kincade* decision represents a strained attempt by the Ninth Circuit to find justification for compulsory DNA collection. The Ninth Circuit should have left its first *Kincade* decision untouched as it represents an accurate and well-reasoned analysis of the true

242. *Id.*
243. *Id.* at 839.
244. *Id.*
245. *Id.*
246. *Kincade II*, 379 F.3d at 839.
247. *Id.*
248. *Id.* at 840.
249. *See id.* at 839.

unconstitutionality of the searches mandated by the DNA Act.

### A. THE PROPER ANALYSIS OF WARRANTLESS SEARCHES

As demonstrated by the Supreme Court decisions in *Knights* and *Sitz*, and as closely applied by the Ninth Circuit in its first *Kincade* decision (*Kincade I*), warrantless searches can be analyzed in one of two ways under the Fourth Amendment. Like *Knights*, a warrantless search can be supported by individualized suspicion, or, like *Sitz*, a warrantless search can be justified by a special need outside of a normal need for law enforcement. In *Kincade I*, the Ninth Circuit accurately recognizes that the searches mandated under the DNA Act fail to satisfy either of these methods; there is no individualized suspicion to support the search nor is there a special need beyond that of law enforcement.

However, in the second *Kincade* decision (*Kincade II*), the Ninth Circuit completely dismisses this initial inquiry required by Fourth Amendment precedent. Instead, the court in essence substitutes the "special circumstances of conditional releasees" for a finding of a special need or individualized suspicion.[250] This departure from Supreme Court precedent is without support.[251]

The Ninth Circuit attempts to justify the departure by relying on its past decision in *Rise*, and by characterizing *Knights* as a potential deviation from the usual treatment of warrantless searches under the special needs doctrine. These justifications are without merit. First, as explained in *Kincade I*, the Ninth Circuit decision in *Rise* was based on an incorrect interpretation of a past Supreme Court decision.[252] In fact, *Edmond* later specifically recharacterized the decision on which *Rise* was based, effectively diminishing any persuasive authority *Rise* may have.[253] By relying on *Rise*, the plurality

250. *See id.* at 844 (Reinhardt, J., dissenting).

251. *But see* Bonnie L. Taylor, *Storing DNA Samples of Non-Convicted Persons & The Debate Over DNA Database Expansion*, 20 T.M. COOLEY L. REV. 509, 516 (2003) (listing "diminished privacy rights of prisoners" as one alleged constitutional basis for validating DNA collection). The author identifies two federal appellate cases and a state case recognizing this basis; no Supreme Court support is offered. *Id.* at 519-521.

252. *See also* Appellant's Opening Brief at 18-20, United States v. Kincade, 345 F.3d 1095 (9th Cir. 2003), *rev'd en banc*, 379 F.3d 813 (9th Cir. 2004) (No. 02-50380), 2002 WL 32181458. *But see* Appellee's Brief at 12-14, *Kincade* (No. 02-50380), 2002 WL 32181457.

253. *See* Appellant's Opening Brief at 21-22.

ignores the more authoritative precedential effect of *Edmond*.

Second, the plurality's reading of *Knights* is incorrect. As made clear in *Knights*, the Court was justified in applying the reasonableness balancing test because of the existence of individualized suspicion. The plurality attempts to suggest that the analysis employed in *Knights* is more a function of the probationary status of the individual involved, rather than a function of any individualized suspicion that may have existed.[254] There is no support for this reading of *Knights*.

The Supreme Court has emphasized in *Edmond* that when general crime control purposes are involved, a finding of individualized suspicion is necessary to justify the search.[255] The *Knights* decision does not discount this theory. *Knights* is not a departure from the special needs doctrine, but is instead simply an example of a warrantless search supported by individualized suspicion. While the probationary status involved in *Knights* may inform the balancing test, it does not, and should not act as a replacement for the individualized suspicion or special need required to justify warrantless searches.

1. The Search Mandated by the DNA Act is Not Supported by Individualized Suspicion or a Special Need

Because of its reliance on *Rise* and the incorrect reading of *Knights*, the plurality avoided the task of properly analyzing the DNA Act search under the Fourth Amendment. If the plurality in *Kincade II* had correctly applied the Supreme Court's methodology for analyzing warrantless searches, the court would have easily concluded that the search mandated by the DNA Act fails as one lacking individualized suspicion. This matter is undisputed as there has been no attempt to characterize the DNA collection as a search performed under the suspicion the individual has committed a crime.[256] Under

254. *See also* Appellee's Brief at 18-19.

255. *See also Kincade II*, 379 F.3d at 855 (Reinhardt, J., dissenting) ("In short, the Court has never, ever, upheld a regime of suspicionless searches based on the government's desire to pursue ordinary law enforcement objectives.").

256. *See* Appellant's Opening Brief at 8. "[S]ince the law applies only to convicted felons, the person whose blood is taken has committed some offense at some point; but that is an offense for which he has already been convicted and sentenced and does not justify further investigation." *Id.* at 8 n.5; *see also* Carnahan, *supra* note 133, at 7 ("[W]hen the government extracts DNA for CODIS, it does so absent any level of individual suspicion, and for purposes

the Fourth Amendment, the only alternative justification for a warrantless search would be a finding of a special need. While the plurality declined to analyze the search under the special needs doctrine,[257] this approach was urged by the concurrence.[258] Regardless, the DNA Act search also fails under the special needs doctrine.

While the special needs doctrine is often used to justify searches by non-law enforcement officials, as discussed in *Edmond* and *Lidster*, the special needs doctrine can also apply to searches performed by law enforcement officers. However, any law enforcement search performed without a warrant and without individualized suspicion will be closely scrutinized to determine if a special need beyond normal law enforcement exists. The line between a normal law enforcement need and a special need can often be blurred, leaving courts with little clear guidance.

Yet the analyses in *Edmond* and *Lidster* appear to provide one clear guideline: in the absence of emergency circumstances,[259] a suspicionless search performed to gain information about the individual being searched serves a normal law enforcement need and cannot be justified under special circumstances. It seems clear that if the checkpoint in *Lidster* had been set up to ask motorists about their own whereabouts on the day of the bicycle accident, rather than simply to solicit information about the accident, the Court would have likely struck it down as a search furthering normal law enforcement needs.

It may be argued that the comparison between the checkpoints in *Edmond* and *Lidster* is a distinction without a difference. In both cases, the law enforcement officers are performing criminal investigations, an obvious legitimate law enforcement need.[260] However, it may be possible to view the *Lidster* decision as revealing an important distinction between

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unconnected to any specific crime.").

257. *Kincade II*, 379 F.3d at 832.

258. *Id.* at 840-41 (Gould, J., concurring).

259. The Court in *Edmond v. City of Indianapolis*, 531 U.S. 32 (2000) concedes "there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control." *Edmond*, 531 U.S. at 44.

260. *See* Carnahan, *supra* note 133, at 38 n.96 ("*Lidster* seems to contradict the reasoning of *Edmond* in that *Lidster* sets precedent for the detention of persons under the special needs exception for what seemingly is a law enforcement purpose.").

the crimes investigated in the two checkpoints—in *Lidster*, the officers were questioning non-suspects to investigate a *past crime*, while the officers in *Edmond* were attempting to collect information from possible suspects for potential *future prosecution*. This distinction between netting individuals for future crimes and merely garnering information for past crimes could be viewed as a critical difference between a general crime control purpose and a special need beyond normal law enforcement.

Applying these guidelines to the DNA Act mandated search, it is unmistakable that the search is conducted to gain information about the individual being searched, not unlike the search in *Edmond*. Further, like *Edmond*, the information obtained through the search is only used for the investigation and prosecution of future crimes. Even if it can be argued the information can be used in order to exonerate the individual,[261] that does not negate the fact that the search is designed to obtain information from the offender that will be used in solving future crimes.[262] Comparing the similarities between the search performed in *Edmond* and the search mandated by the DNA Act, it is easy to classify these searches as those performed to further normal law enforcement needs.

Many courts have attempted to justify the DNA Act searches under the special need of creating a national DNA database to aid the criminal justice system.[263] Yet as the United States Supreme Court has stated, "[b]ecause law enforcement involvement always serves some broader social purpose or objective . . . virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment."[264] Moreover, this

261. *See* Appellee's Brief at 23, *Kincade* (No. 02-50380) ("And CODIS will serve the even more important interest of exonerating the innocent . . .").

262. *See* Carnahan, *supra* note 133, at 38 n.96 ("[T]he primary purpose of the DNA extraction would be to investigate whether any other crimes might have been committed by that person, as well as to store the DNA for crime-solving purposes in the event that person might commit a crime in the future.").

263. *See, e.g.*, Green v. Berge, 354 F.3d 675, 679 (7th Cir. 2004); United States v. Kimler, 335 F.3d. 1132, 1146 (10th Cir. 2003), *cert. denied*, 540 U.S. 1083 (2003); Miller v. United States Parole Comm'n, 259 F. Supp. 2d 1166, 1177 (D. Kan. 2003); *see also* Appellee's Brief at 21.

264. Ferguson v. City of Charleston, 532 U.S. 67, 84 (2001).

stated justification to create a national database fails on its face because the database is designed to *aid the criminal justice system*. The legislative history repeatedly confirms the collection and storage of DNA analyses will be used for law enforcement criminal identification purposes.[265] There seems to be no greater definition of "normal law enforcement need" than something that aids and improves the law enforcement criminal identification process. Additionally, as the majority in *Kincade I* recognized, law enforcement officials have no particular special need to complete a database anymore than they have a special need to index and file fingerprints. It is the information contained *within* the database, not the database itself, which aids in criminal investigations. DNA collection, with or without a database, serves the normal need of law enforcement.[266]

Others have attempted to justify the DNA Act searches as furthering the special need of monitoring probationers and conditional releasees within the probation system.[267] Supreme Court precedent recognizing the special needs of the probation system supports this argument. The thrust of the argument is that if other searches performed during the probation period have been upheld under the special needs theory, the searches performed pursuant to the DNA Act should also qualify under the theory.[268]

However, this view of the DNA collection mandated under the DNA Act is too myopic. While the blood extraction may deter crimes committed during the probationary period and may aid in the monitoring of probationers and conditional releasees, these benefits are merely incidental to the main purpose and overall aim of the DNA Act to provide an effective tool to aid criminal investigations. Legislative history clearly supports the conclusion that the objective of the DNA Act was to grant the FBI authority to collect DNA samples from qualified offenders in order to improve the efficiency of the criminal justice system. There is nothing in the legislative history to suggest the purpose of the DNA Act was to improve the probation system.

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265. *See* H.R. REP. NO. 106-900(I), at 27 (2000).

266. *See Ferguson*, 532 U.S. at 84 n.20 ("In none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes.").

267. *See Kincade II*, 379 F.3d at 840-41 (Gould, J., concurring).

268. *Id*.

Furthermore, even if it could be argued that the DNA collection does serve the special need of aiding the administration of the probation system, there is then no justification for the retention of the DNA samples beyond the probation period. If CODIS and the DNA Act were truly designed to deter crime and monitor probationers during the probationary period, the DNA samples should ultimately be expunged from the database at the end of probation. Clearly, expunging DNA samples from CODIS runs counter to the true goal of the system. Therefore, the argument that the DNA collection serves a special need as a probationary search fails to fully justify the DNA Act searches.

Thus, none of the arguments presented is sufficient to support the contention that the DNA Act searches are conducted pursuant to a special need beyond the normal need for law enforcement. With no individualized suspicion and no special need, the searches authorized by the DNA Act fail to clear the first threshold of Fourth Amendment analysis. Consequently, as recognized in the *Kincade I* decision, the searches are properly classified as warrantless, suspicionless searches in violation of the Fourth Amendment.[269]

### B. CORRECTLY BALANCING THE INTERESTS INVOLVED

While the analysis of the DNA collection mandated under the DNA Act is properly terminated at the point where there is no finding of individualized suspicion or a special law enforcement need, it is valuable to look at the balancing of the individual privacy interests and the public interests at stake. Upon close inspection, even if the search satisfied the initial inquiry in the Fourth Amendment analysis, the results of the balancing test make clear the individual privacy interests outweigh the public interests.

#### 1. The Intrusion on Privacy is not Insignificant

The Ninth Circuit in *Kincade II* offers several reasons to support its conclusion that the individual privacy interests implicated by the DNA Act searches are not substantial. The reasons include the diminished expectations of privacy of

269. *See* Debra A. Herlica, *DNA Databanks: When Has A Good Thing Gone Too Far?*, 52 SYRACUSE L. REV. 951, 973 (2002) (concluding DNA databanks do not pass constitutional muster based on current Supreme Court jurisprudence).

probationers and conditional releasees, the minimal intrusion of the needle prick, and the limited information obtained from the DNA sample.

The probationer's diminished expectation of privacy is a concept that finds support in many Supreme Court decisions.[270] Indeed, numerous searches are predicated on the fact the constitutional rights of prisoners and probationers are reduced while sentences are being served.[271] At the same time, it is well recognized that once the sentence has been served and the individual is released back into society, the individual's privacy rights are restored.[272] Consequently, while there may be a diminished expectation of privacy when the blood is drawn, there is no continued diminished expectation of privacy to justify the ongoing maintenance of the DNA sample. The Ninth Circuit in *Kincade II* looks too narrowly at the exact moment when the sample is taken and completely ignores the fact the sample is retained long after the offender has been reintegrated into society. Because of the long-term effect of the DNA collection, the probationer's expectation of privacy is not as diminished as the plurality suggests.

As to the intrusion involved with the DNA collection, the plurality dismisses the taking of blood as something commonplace and routine. The Supreme Court itself has described the taking of blood as a routine part of everyday life.[273] While this may be true, the routine nature of a needle prick in no way minimizes the level of intrusion involved in DNA collection. It is simply not enough to end the inquiry at the point the needle hits the skin. Rather, it is critical to look at what is done with the information once it is obtained. When the view of the intrusion is expanded beyond the needle prick, it is easy to recognize how significant the intrusion truly is.

In essence, the blood extraction for DNA analysis and

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270. *See Griffin*, 483 U.S. at 874 (viewing probationers and parolees as enjoying only conditional liberty); McKune v. Lile, 536 U.S. 24, 37 (2002) (recognizing the limitation on prisoners' and probationers' privileges and rights is needed in order to grant federal and state officials the authority necessary to properly administer prisons and the probation system).

271. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 526 (1983) (viewing searches of prisoners' cells as reasonable under the Fourth Amendment due to the lack of any expectation of privacy on the part of the prisoners).

272. *See Kincade II*, 379 F.3d at 841-42 (Gould, J. concurring) (recognizing that once the offender has paid his debt to society, privacy interests are once again restored).

273. Breithaupt v. Abram, 352 U.S. 432, 436 (1957).

collection involves two separate intrusions.[274] The first is a concededly, minimal intrusion—that of a needle prick. And as new technology is introduced, this initial intrusion required to collect DNA may become even more minimal.[275] It could be argued that the taking of DNA in a non-intrusive way does not implicate the Fourth Amendment.[276] Thus, it becomes increasingly important to focus on the second, more significant intrusion involved—the analysis of the sample collected and the permanent maintenance of the individual's identity in a national database. Upon close examination, this constant record of one's identity is seen as imposing an indefinite and prolonged intrusion on the individual's privacy. Such an intrusion acts as a permanent labeling of the individual; the DNA information stored within the database forever marks the individual as a convicted felon. This labeling runs counter to the ultimate penal system goal to reintroduce the felons as productive members of society. In considering the overall level of intrusion involved in a blood extraction, courts should not overlook this second intrusion; to do so would be to trivialize the intrusion and reduce it to that of only a needle prick.

Finally, the Ninth Circuit attempts to minimize the amount of information obtained through DNA collection by dismissing the analysis as gathering "only" the individual's identity. This argument finds significant support among courts that analogize the taking of a DNA sample to the taking of fingerprints.[277] Several courts rationalize that where fingerprints were once used for identification purposes, DNA identification could now be used.[278] Moreover, since the retention and reuse of fingerprints and photographs has been permitted as a means of identifying individuals, courts have concluded the similar retention and reuse of DNA profiles is

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274. Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127, 137 (2001) (recognizing an intrusion when the skin is pierced and a further intrusion when bodily fluids undergo analysis).

275. *Id*. at 142, 144.

276. Rothstein & Carnahan, *supra* note 274, at 145.

277. *See, e.g.*, Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992), *cert. denied*, 506 U.S. 977 (1992); Rise v. Oregon, 59 F.3d 1556, 1559 (9th Cir. 1995).

278. Rothstein & Carnahan, *supra* note 274, at 146 (citing Landry v. Attorney General, 709 N.E.2d 1085, 1092 (Mass. 1999), *cert. denied*, 528 U.S. 1073 (2000)).

likewise permitted.[279] Because offenders are considered to have a reduced expectation of privacy in their identities, courts argue it is reasonable to take and retain DNA profiles for identification purposes.[280]

This characterization of DNA as a mere source of one's identity, similar to a fingerprint or photograph, is disingenuous and inaccurate.[281] To say that DNA simply establishes an individual's identity would be equivalent to saying a Social Security Number merely represents an individual's identity. With the increase of identity theft, it is clear this classification of a Social Security Number as a mere form of identification is too constrained. Similarly, classifying DNA as a simple form of identification completely overlooks the power and value of DNA.

A DNA profile supplies more than an individual's identity. While a fingerprint provides only a "two-dimensional representation[] of the physical attributes of our fingertips,"[282] or a "unique pattern[] of loops and whorls,"[283] DNA can provide information on an individual's race, ethnicity, genetic defects, predisposition to diseases and certain behaviors, and familial relationships.[284] While the DNA collected and stored is considered "junk DNA," there is the possibility that as technological and scientific advances are made, this DNA will be revealed to contain significant personal information.[285] Scientific researchers are already finding that this "junk DNA" may actually hold the key to understanding diseases like heart attacks, cancer, and strokes.[286]

Another significant distinction between fingerprints and DNA profiles is that while the use of fingerprints is limited, the potential use of DNA beyond simple identification purposes is limitless. The real possibility exists that the DNA samples

279. *See, e.g.*, Taylor, *supra* note 251, at 523-24.

280. Rothstein & Carnahan, *supra* note 274, at 145.

281. *See* Taylor, *supra* note 251, at 542 (dismissing the fingerprinting analogy as "too simplistic and cut-and-dry").

282. Taylor, *supra* note 251, at 534 (quoting American Civil Liberties Union, Testimony Before the National Commission on the Future of DNA Evidence (Mar. 1, 1999) (statement of Barry Steinhardt), *at* http://www.ojp.usdoj.gov/nij/dnamtgtrans4/trans-l.html (last visited Apr. 4, 2005)).

283. Rothstein & Carnahan, *supra* note 274, at 156.

284. *See* EPI Brief, *supra* note 34, at 6-8; PAI Brief, *supra* note 34, at 11.

285. EPI Brief, *supra* note 34, at 7; Taylor, *supra* note 251, at 534.

286. PAI Brief, *supra* note 34, at 17-18.

collected and stored under the DNA Act will be exploited for purposes beyond the original law enforcement purpose.[287] This possibility for exploitation is magnified by the fact there is "no clear overall policy as to what happens to the DNA sample" after the DNA profiles are added to CODIS.[288] Even the FBI recognizes the potential value of the CODIS database and the possibility of its use for research purposes.[289] While the DNA identification system features "strict privacy protections,"[290] this does not eliminate the fact the potential for exploitation exists.

Thus, properly considered, the searches are neither a minimal intrusion nor a mere attempt to establish an individual's identity. Contrary to the Ninth Circuit's finding in *Kincade II*, the searches mandated under the DNA Act significantly impose on an individual's privacy interests.

2. The Public Interests are not as Monumental as the Ninth Circuit Portrayed

Looking at the public interest side of the balance, the plurality quickly concluded that the public interests furthered by the DNA Act's objectives were monumental and overwhelming. The plurality based its conclusion on the public's interest in ensuring compliance within the parole and conditional release system, reducing recidivism, and solving crimes. While these interests are legitimate public concerns, the court provides no support in its conclusion that these interests rise to the level of "overwhelming" and "monumental."

Reducing recidivism is a recognized legitimate interest, but it is unclear how the collection of DNA and the maintenance of the CODIS database are linked to this goal. If statistics could bear out the fact that certain offenders are deterred by the DNA collection, the reduction of recidivism could properly be viewed as an important interest furthered by the DNA Act.[291] However, as the DNA database is expanded to include the profiles of offenders of lesser crimes, the correlation between reducing recidivism and collecting DNA becomes more tenuous. The expansion of the database appears to be driven more by an

287. *Id*, at 12; Rothstein & Carnahan, *supra* note 274, at 156.
288. FUTURE OF FORENSIC DNA TESTING, *supra* note 18, at 36.
289. *Id*.
290. H.R. REP. NO. 106-900(I), at 27 (2000).
291. *See* Rothstein & Carnahan, *supra* note 274, at 155.

interest to collect more DNA profiles and less by an interest in reducing recidivism. It is not enough to say the collection of DNA leads to the reduction of recidivism. Without statistics to support this broad assertion, the goal of reducing recidivism cannot be correctly used as an interest furthered by the DNA Act.[292]

Furthermore, to what lengths are we willing to go to reduce recidivism? The intrusion of an individual's civil liberties should be the last resort in reaching this goal. There must be alternative methods for reducing recidivism and deterring crime. The failure of the penal system to reduce recidivism is no excuse to intrude on individual privacy. It is quite likely that while the public may be interested in reducing recidivism, the public would be less inclined to approve of the DNA Act's method of achieving that goal.

The interest in solving crimes is certainly a legitimate public concern, an interest that could readily be considered overwhelming. However, if solving crime is such an overwhelming interest, would it be better served if even more DNA samples were stored in CODIS? It is difficult to characterize the current interest in the DNA samples of qualified offenders as "overwhelming" when this interest could be furthered by greater expansion of the coverage of the DNA Act. Some states are already moving towards greater expansion of similar DNA statutes by requiring misdemeanors to provide samples. It is conceivable to think that soon all persons would be required to provide a DNA sample.[293] Even the Department of Justice has recognized the possibility of expanding the database to include the general public.[294] Once the privacy of the public is implicated and threatened, the interest in supporting the overall objective is reduced.

Moreover, there is a concern that the public may become desensitized to the intrusiveness of DNA collection.[295] With the rapid expansion CODIS from sex offenders and violent felons to broader classes of offenders, the public may be completely unaware of the potential dangers and implications of the

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292. *Id.* at 158 ("[I]t is incumbent upon those advocating an expansion of police powers to demonstrate how substantial public interests in deterrence and justice are fostered by expanded DNA data banks.").

293. Taylor, *supra* note, 251, at 543.

294. FUTURE OF FORENSIC DNA TESTING, *supra* note 18, at 35-36.

295. Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 WAKE FOREST L. REV. 767, 770 (1999).

database expansion.[296] Therefore, in order to accurately weigh the public interest in solving crime, it is necessary for the courts to consider the possible implications the DNA Act will have on the public.

As a result of the proper inquiry into the privacy interests and the public interests at stake in furthering the objectives of the DNA Act, it is apparent that the individual privacy interests bear great weight in the balancing. Consequently, with individual privacy interests outweighing public interests, the searches authorized under the DNA Act are patently unreasonable and violative of the Fourth Amendment.[297]

## CONCLUSION

The Ninth Circuit in its *Kincade* decisions ultimately found the searches authorized under the DNA Analysis Backlog Elimination Act of 2000 to be constitutional under the Fourth Amendment. To reach that result, the court applied the totality of the circumstances analysis and found the public interests in furthering the objectives of the Act outweighed the individual interest in privacy compromised by the Act.

On closer analysis, it appears the Ninth Circuit misapplied and misinterpreted Supreme Court Fourth Amendment jurisprudence in order to reach its result. The court ignored the Fourth Amendment threshold inquiry into the existence of individualized suspicion or a special need, and instead justified its analysis on the diminished expectations of probationers' privacy. This blatant disregard for concrete precedential guidelines results in an erosion of the individual rights protected by the Fourth Amendment. Further, the court's trivialization of individual privacy interests signals an alarming trend in the balancing of private interests against public interests.

Most importantly, in reaching its *en banc* decision in *Kincade* and realigning itself with all of the state and federal appellate courts that have addressed the issue of DNA collection, the Ninth Circuit missed a significant opportunity.

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296. *Id.*

297. *But see* Martha L. Lawson, *Personal Does Not Always Equal "Private": The Constitutionality of Requiring DNA Samples from Convicted Felons and Arrestees*, 9 WM. & MARY BILL RTS. J. 645, 646 (2001) (arguing the government's interest in mandatory testing outweighs individual's privacy interests).

If it had allowed its decision in *Kincade I* to stand, it would have signaled to the Supreme Court that further guidance is needed to resolve the constitutionality of the DNA Act. Instead, the Ninth Circuit perpetuated the incorrect belief that DNA collection is constitutional under the Fourth Amendment. Until the Supreme Court guidance comes, it will be increasingly critical for courts faced with DNA Act challenges to stay true to the existing Fourth Amendment jurisprudence. It will be vital for the courts to remain mindful of the proper balance between valid public concerns and individual privacy interests when evaluating the reasonableness of intrusions. If not, the result may be irreparable damage to individual privacy protections.