United States v. Kincade:

Constitutionality of Mandatory DNA Testing

by JOY HUANG*

I. Introduction

The discovery of Deoxyribonucleic Acid (DNA) not only revolutionized science, but also our criminal system. DNA is a molecule comprised of "two nucleotide strands coiled around each other and connected by rungs, like a twisted ladder," and carries a person's unique genetic information.[1] With the improvement of the DNA analysis processes, DNA has rapidly become valuable evidence to determine matches between DNA specimens left at a crime scene and DNA from criminal suspects. Virtually every jurisdiction in the United States has held that DNA identification evidence is admissible.[2]

II. Growth and Development of DNA Identification Databases

Much like current nationwide databases of fingerprints, state repositories of DNA genetic fingerprints of known criminals were developed to facilitate suspicion-less identification, or "cold hits."

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1. United States v. Kincade, 345 F.3d 1095, 1097 n.2 (9th Cir. 2003), *rev'd en banc*, 379 F.3d 813 (9th Cir. 2004).

2. PAUL C. GIANNELLI & EDWARD J. IMWINKELREID, SCIENTIFIC EVIDENCE § 18-5(A) (3d ed. 1999).

The Federal Violent Crime Control and Law Enforcement Act of 1994 authorized the Federal Bureau of Investigation ("FBI") to create a national database of DNA samples taken from convicted offenders, crime scenes and victims, and unidentified human remains.[3] As a result, the FBI established the Combined DNA Index System ("CODIS"), which allowed states and local forensics laboratories to exchange and compare DNA profiles electronically.[4] In so doing, a national DNA forensic team was created, with all fifty states "having enacted laws requiring convicted offenders to provide DNA samples for analysis and entry into the CODIS system."[5]

Without a federal law regulating the collection and organization of DNA samples, there were many gaps in the CODIS system; thus, Congress addressed the problem by passing the DNA Analysis Backlog Elimination Act of 2000 ("DNA Act") on December 19, 2000.[6] At the same time, Congress amended the supervised release statute to require all eligible defendants to comply with the DNA Act.[7] The DNA Act currently permits the FBI to take DNA samples from the individuals convicted of federal crimes of violence, robbery, and burglary, and authorizes the information gathered from the samples to be added to the CODIS system.[8] The DNA Act requires those in federal custody, on parole, on probation, or on supervised release to provide a DNA sample.[9] It also requires all such persons to submit to the nonconsensual withdrawal of blood by governmental authorities, as cooperation by qualifying individuals in the collection of the DNA sample is "a condition of that probation, parole, or supervised release."[10] Refusal to provide a DNA sample subjects an individual to a misdemeanor penalty.[11]

Once taken, the DNA sample is turned over to the FBI, which carries out an analysis and includes the results in CODIS.[12] The

3. *See* 42 U.S.C. § 14132 (2004).

4. *See* 42 U.S.C. § 14135 (2004).

5. Mark A. Rothstein et al., *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127, 131 (2001) (introducing the history of nationwide DNA databases).

6. *See* United States v. Reynard, 220 F. Supp. 2d 1142, 1149 n.4 (S.D. Cal. 2002) (outlining legislative history concerning gaps in CODIS coverage).

7. *See* 18 U.S.C. § 3583(d) (2004).

8. *See* 42 U.S.C. § 14135a (2004).

9. *See* § 14135a(a)(2).

10. *See* 42 U.S.C. § 14135c (2004).

11. *See* § 14135a(a)(5).

12. *See* § 14135a(b).

genetic markers contained in the DNA sample serve as a genetic fingerprint, uniquely identifying an individual, but they do not convey any other information about the person, such as physical or medical characteristics.[13] The only allowable use of the DNA samples taken pursuant to the DNA Act is for federal, state and local law enforcement to match DNA taken from a crime scene to DNA in the system to procure a suspect.[14]

III. Constitutional Challenges and Judicial Disagreement

While these databases have greatly improved law enforcement, the statutes forming them have not gone unchallenged. Nevertheless, other than *United States v. Miles*[15] and the first Ninth Circuit decision of *United States v. Kincade*,[16] all legal challenges to the state laws establishing DNA databanks, even those with broader scope, have been unsuccessful.[17] In fact, every other federal court to review DNA sampling laws has upheld these laws as constitutional.[18]

This note focuses specifically on *United States v. Kincade*. The case involves two successive Ninth Circuit Court decisions, beginning with the October 2, 2003 controversial decision by a three-judge panel, which deemed the DNA Act unconstitutional.[19] The decision was subsequently vacated and reheard by the Ninth Circuit sitting en banc, in which the Circuit Court affirmed Kincade's convictions and

13. United States v. Reynard, 220 F. Supp. 2d 1142, 1153 (S.D. Cal. 2002).

14. *See* 42 U.S.C. §§ 14132, 14135(c), 14135e (2004).

15. United States v. Miles, 228 F. Supp. 2d 1130 (E.D. Cal. 2002).

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

17. Rothstein, *supra* note 5, at 128 (discussing the general trend of cases dealing with DNA statutes).

18. *See* Roe v. Marcotte, 193 F.3d 72, 76-82 (2d Cir. 1999) (upholding Connecticut DNA sampling statute against Fourth Amendment challenge); Schlicher v. Peters, 103 F.3d 940, 943 (10th Cir. 1996) (upholding Kansas DNA sampling statute against Fourth Amendment challenge); Boling v. Romer, 101 F.3d 1336, 1339-40 (10th Cir. 1996) (upholding Colorado DNA sampling statute against Fourth Amendment challenge); Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995) (upholding Oregon's statute); Jones v. Murray, 962 F.2d 302, 305-08 (4th Cir. 1992) (upholding Virginia's DNA sampling statute against Fourth Amendment challenge); *Reynard*, 220 F. Supp. at 1142 (S.D. Cal. 2002) (upholding DNA Act against Fourth Amendment challenge); Shelton v. Gudmanson, 934 F. Supp. 1048, 1050-51 (W.D. Wis. 1996) (upholding Wisconsin DNA sampling statute against Fourth Amendment challenge); Kruger v. Erickson, 875 F. Supp. 583, 588-89 (D. Minn. 1995) (upholding Minnesota DNA sampling law against Fourth Amendment challenge); Ryncarz v. Eikenberry, 824 F. Supp. 1493, 1498-1500 (E.D. Wash. 1993) (upholding Washington DNA sampling statute against Fourth Amendment challenge).

19. *Kincade*, 345 F.3d at 1113.

found the DNA Act constitutional.[20] This note was originally written in the wake of the first controversial ruling by the Ninth Circuit decided in October of 2003, and it speculated as to the validity of the decision. Investigating how past courts dealt with the relevant Fourth Amendment issues surrounding suspicionless searches of parolees and subjecting the facts of *Kincade* to the various applicable constitutional Fourth Amendment tests, I concluded that the October 2003 Ninth Circuit decision should and would be vacated or overturned. These predictions were fulfilled when the case was vacated in August of 2004 by the Ninth Circuit sitting en banc, with the majority opinion applying substantially similar tests and addressing many of the concerns raised in the original Note.

However, what was not anticipated was the closeness of the 2004 decision: in an eleven-judge panel, five of the justices dissented. Instead of being yet another anomalous decision by the Ninth Circuit, the issues raised by *Kincade* were less clear cut and more closely contested than I expected. Between the justices, there was a fundamental struggle between different perceptions of the goals of the DNA Act and the breadth of the possible ramifications of upholding the Act as constitutional. The majority narrowly construed the application of the decision to parolees, finding deterrence of parolees from repeat offenses as one of the main goals of the DNA Act. The dissent, on the other hand, warned of the expansive potential use of Fourth Amendment exceptions as pretextual justifications for infringing the rights of all citizens. Despite the fact that virtually all courts in the United States are in agreement regarding the constitutionality of the DNA Act, there are still strong differences of judicial opinion as to issues surrounding the Act, even within the same Circuit.

Using *United States v. Kincade* as its focus, this note will explore the issues surrounding the DNA Act, and will speculate as to possible reasons why the Ninth Circuit is still much divided on the issue of mandatory DNA extractions of parolees. To better understand the majority and dissent's respective positions, this note begins with an overview of the constitutional law of Fourth Amendment searches with respect to blood extraction. This note will then outline the proper analysis a court should use to evaluate the constitutionality of statutes like the DNA Act, in requiring mandatory blood extractions from parolees. After providing an overview of the facts in *Kincade*,

20. United States v. Kincade, 379 F.3d 813, 839-840 (9th Cir. 2004).

this note will present my original analysis of the facts and the constitutionality of the DNA Act, while, at the same time, keeping in mind the Ninth Circuit's reasoning behind its 2003 ruling and relevant decisions by other courts. In particular, this note will explore the Ninth Circuit's prior decision of *Rise v. Oregon*,[21] which the Ninth Circuit overturned in their October 2003 decision but later reaffirmed in their August 2004 decision. Finally, this note will focus on the August 2004 decision by the Ninth Circuit sitting en banc, and explore the reasons behind the strong underlying tensions between the justices resulting in the close decision.

IV. The Fourth Amendment and the Forced Extraction of Blood as a Search

Applying to the states via the Fourteenth Amendment, [22] the Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures:

> The 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.[23]

The Supreme Court has interpreted the Fourth Amendment as establishing rules and presumptions that limit the government's ability to intrude upon matters of personal privacy.[24] What a person seeks to preserve as private is constitutionally protected, according to the Supreme Court in *Katz v. United States*.[25] The *Katz* standard requires that a person have a subjective expectation of privacy, and that this expectation be one that society would recognize as

21. 59 F.3d at 1556.

22. U.S. CONST. amend. XIV, § 1 (providing that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

23. U.S. CONST. amend. IV.

24. *See* Illinois v. McArthur, 531 U.S. 326, 330 (2001).

25. 389 U.S. 347, 352 (1967).

reasonable.[26] Thus, the Court has recognized that the Fourth Amendment is implicated whenever a government's search infringes upon an individual's reasonable expectation of privacy.[27]

The search at issue in *Kincade* involves the forced extraction of blood, mandated by the DNA Act for the collection of DNA samples to augment the nationwide DNA database. As the DNA Act does not prescribe any particular method for collecting DNA samples and as blood extraction is the standard method of gathering DNA, this note will focus solely on blood extraction, rather than inquiring into other possibly less intrusive methods.[28] The first inquiry a court must make is whether the forced extraction is a search under the Fourth Amendment, requiring constitutional scrutiny. The Supreme Court has determined that a compulsory blood extraction is a search, as it intrudes on the private sphere of the physical body and infringes upon an individual's "most personal and deep-rooted expectations of privacy."[29] The Court reaffirms this determination in *Schmerber v. California* by stating, "[blood] testing procedures plainly constitute searches of 'persons' . . . within the meaning of [the Fourth] Amendment."[30] In fact, the Court has "long recognized that a compelled intrusion into the body for blood" must be deemed a Fourth Amendment search.[31]

V. Proper Analysis to Determine Constitutionality of the Fourth Amendment Search

Not only are mandatory blood extractions in pursuant of the DNA Act Fourth Amendment searches, but they are also suspicionless searches. There is no "requirement that the sample be taken in order to aid in the investigation of a particular crime," nor is "suspicion that an individual will commit or has committed another offense" required.[32] A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing, and unconstitutional under the Fourth Amendment.[33] However, as "the

26. *Id.* at 361 (Harlan, J., concurring).
27. *Id.*
28. *See* 42 U.S.C. § 14135 (2004).
29. Winston v. Lee, 470 U.S. 753, 760 (1985).
30. 384 U.S. 757, 767 (1966).
31. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 603 (1989).
32. United States v. Kincade, 345 F.3d 1095, 1097 (9th Cir. 2003).
33. Chandler v. Miller, 520 U.S. 305, 308 (1997).

Fourth Amendment imposes no irreducible requirement"[34] of individualized suspicion, the Supreme Court has upheld searches in multiple contexts, despite a lack of individualized suspicion.[35] The Court has carved out a separate and limited exception, called the "special needs" exception, to be used for "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[36]

In determining the constitutionality of a suspicion-less search, a court would first need to look at the totality of the circumstances of the particular case.[37] Regarding the next step in the analysis, precedent has been inconsistent with some courts using the traditional balancing test under the Fourth Amendment,[38] and others relying exclusively on the "special needs" doctrine.[39] To evaluate the constitutionality of suspicion-less searches, the proper sequence of analysis courts currently use, and this note will use, is to begin with an analysis of the applicability of the "special needs" exception.[40] Only after the "special needs" analysis should a court then apply the traditional Fourth Amendment balancing test.[41]

Beginning with the "special needs" analysis, a court must answer

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34. United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976).

35. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664-65 (1995) (drug testing of high school student athletes); Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (suspicion-less sobriety automobile checkpoints); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (drug testing of federal customs officers who carry arms or who are involved in drug interdiction); *Skinner*, 489 U.S. at 633-34 (drug testing of railroad employees); *Martinez-Fuerte*, 428 U.S. at 543 (suspicion-less automobile checkpoints for illegal aliens).

36. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

37. Ohio v. Robinette, 519 U.S. 33, 34 (1996).

38. *See* Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996); Rise v. Oregon, 59 F.3d 1556, 1559 (9th Cir. 1995); Jones v. Murray, 962 F.2d 302, 307-08 (4th Cir. 1992); Kruger v. Erickson, 875 F. Supp. 583, 588-89 (D. Minn. 1995), *aff'd on other grounds*, 77 F.3d 1071 (8th Cir. 1996); Sanders v. Coman, 864 F. Supp. 496, 499 (E.D.N.C. 1994); Ryncarz v. Eikenberry, 824 F. Supp. 1493, 1498-99 (E.D. Wash. 1993); People v. Wealer, 636 N.E.2d 1129, 1135 (Ill. App. Ct. 1994); State v. Maas, 64 P.3d 382, 389 (Kan. 2003); Landry v. Attorney General, 709 N.E.2d 1085, 1093 (Mass. 1999); Cooper v. Gammon, 943 S.W.2d 699, 704-705 (Mo. Ct. App. 1997); State *ex rel.* Juvenile Dep't of Multnomah County v. Orozco (*In re* Orozco), 878 P.2d 432, 435-36 (Or. Ct. App. 1994); Dial v. Vaughn, 733 A.2d 1, 6-7 (Pa. Commw. Ct. 1999); Johnson v. Commonwealth, 529 S.E.2d 769, 779 (Va. 2000); Doles v. State, 994 P.2d 315, 318-19 (Wyo. 1999).

39. *See* Roe v. Marcotte, 193 F.3d 72, 79-82 (2d Cir. 1999); Shelton v. Gudmanson, 934 F. Supp. 1048, 1050-51 (W.D. Wis. 1996); State v. Olivas, 856 P.2d 1076, 1086 (Wash. 1993).

40. Liakis v. Goord, 689 N.Y.S.2d 595 (N.Y. 1999).

41. *Id.*

the question as to whether "special governmental needs beyond the normal need for law enforcement" exists.[42] To evaluate whether the "special needs" exception applies, a court first must determine the purpose of the statute. This determination has become more complicated after *City of Indianapolis v. Edmond*[43] and *Ferguson v. City of Charleston*,[44] two Supreme Court cases which arguably narrow the applicability of the "special needs" exception. *Edmond* and *Ferguson* involved searches pursuant to "special needs" in the law enforcement context, and the Court held the searches in both cases unconstitutional, as they impermissibly served law enforcement purposes.[45] After the Court's rulings of *Edmond* and *Ferguson*, the main contention with respect to searches in pursuant of augmenting national DNA databases is whether the suspicion-less search is conducted for law enforcement purposes. The exception's applicability depends on the careful definition of the DNA database statute's purpose, which can arguably be construed either way. If a court determines that a suspicion-less search was done for law enforcement purposes, the "special needs" exception does not apply and the search is unconstitutional, as individualized suspicion is required for any search or seizure done to assist law enforcement in the investigation or the solving of crimes.[46]

If the "special needs" exception does apply, the court still needs to evaluate the reasonableness of the search under the circumstances, as the Fourth Amendment only allows searches that are reasonable.[47] A court would evaluate the search under traditional Fourth Amendment analysis, assessing "on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[48] With respect to mandatory blood extractions for the purposes of DNA databases, nearly all courts have found suspicion-less extraction of DNA to be a reasonable search, as the privacy interests implicated by the search are minimal and an important governmental interest furthered by the intrusion would be placed in

42. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989).

43. 531 U.S. 32 (2000).

44. 532 U.S. 67 (2001).

45. *Edmond*, 531 U.S. at 47-8; *Ferguson*, 532 U.S. at 85-6.

46. *Ferguson*, 532 U.S. at 67; *Edmond*, 531 U.S. at 32.

47. Florida v. Jimeno, 500 U.S. 248, 250 (1991). *See also* Illinois v. McArthur, 531 U.S. 326, 330 (2001) (citing Texas v. Brown, 460 U.S. 730, 739 (1983)).

48. Wyoming v. Houghton, 526 U.S. 295, 300 (1999).

jeopardy by a requirement of individualized suspicion.[49] With respect to *Kincade*, the constitutionality of the search at issue depends on whether a court would find the mandatory blood extraction reasonable under the circumstances.

This note will perform its own analysis according to the steps delineated above, examining the facts of *Kincade* and the constitutionality of mandatory extractions of blood pursuant to the DNA Act. Many of the contentious issues, such as the definition of the DNA Act's purpose, were central to *Kincade*'s outcome and will be explored in detail.

VI. *United States v. Kincade*: Facts and Initial Ninth Circuit Ruling on October 2, 2003

"On September 1, 1993, Kincade pled guilty to one count of armed bank robbery and the use of a firearm."[50] On January 4, 1994, the District Court sentenced him to 97 months, which was to be followed by a three-year term of supervised release.[51] On August 4, 2000, Kincade was released from prison.[52] Pursuant to the DNA Act, the Probation Office ordered him to submit to a blood extraction for DNA analysis in March 2002.[53] Kincade was subject to the DNA Act because the felony armed bank robbery offense, to which he pled guilty, is one of the specified offenses covered by the Act.[54] Kincade refused to obey the order.[55] The failure "to cooperate in the collection of [a] sample" under the DNA Act is a class A misdemeanor.[56] The District Court rejected Kincade's Fourth Amendment constitutional challenge and found that his refusal to submit to the mandatory blood extraction ordered by the Probation Office constituted a violation of the terms of his supervised release.[57] The District Court sentenced Kincade to four months in custody for the violation and ordered that supervised release continue for an additional two-year term.[58]

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49. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 624 (1989).
50. United States v. Kincade, 345 F.3d 1095, 1098 (9th Cir. 2003).
51. *Id.*
52. *Id.*
53. *Id.*
54. 42 U.S.C. § 14135a(d)(1) (2004).
55. *Kincade*, 345 F.3d at 1098.
56. *See* § 14135a(a)(5)(A).
57. *Kincade*, 345 F.3d at 1098.
58. *Id.*

A three-judge panel of the Ninth Circuit reversed the District Court's ruling on October 2, 2003.[59] In a 2-1 decision, the Ninth Circuit held that mandatory DNA collection under the DNA Act: (1) violates an individual's right to privacy over one's body,[60] (2) requires individualized suspicion,[61] and (3) does not fall within the "special needs" doctrine because the DNA primarily serves a law enforcement interest.[62] Thus, the Ninth Circuit found the DNA Act unconstitutional.

VII. Applicability of the "Special Needs" Exception

A. The Development of the "Special Needs" Exception

As mentioned above, the Supreme Court has authorized searches in the absence of individualized suspicion of wrongdoing, even when bodily intrusion is involved.[63] Under the "special needs" exception, the typical warrant and probable cause requirements are relaxed, as the government need not have individualized suspicion of wrongdoing when conducting a search.[64] When "special needs" are alleged, courts must undertake a context specific inquiry to determine whether there are "special needs, beyond the normal need for law enforcement."[65]

The seminal case on the "special needs" exception is *Skinner v. Ry. Labor Executives' Ass'n*.[66] The Supreme Court upheld mandatory drug testing of railroad employees without a warrant, without probable cause, and without individualized suspicion.[67] The Court found that: the testing was minimally intrusive; the government employees' participation in the regulated industry lessened

59. *Id.* at 1113.

60. *Id.* at 1102.

61. *Id.* at 1103.

62. *Id.* at 1104.

63. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664-65 (1995) (drug testing of high school student athletes); Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (suspicion-less sobriety automobile checkpoints); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (drug testing of federal customs officers who carry arms or who are involved in drug interdiction); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 633-34 (1989) (drug testing of railroad employees); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (suspicion-less automobile checkpoints for illegal aliens).

64. Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

65. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

66. *See generally Skinner*, 489 U.S. at 602.

67. *Id.* at 634.

expectations of privacy; and the interest in public safety outweighed the privacy concerns of the individual employees.[68] The purpose of the regulation requiring the testing was not to assist in the prosecution of employees, but rather to further the government's special need to investigate accidents and to prevent injuries that could result if employees were impaired by drugs or alcohol.[69] Under the circumstances, the Court reasoned, requiring a warrant would not provide protection against arbitrary random government acts because the standardized testing regulations themselves left no facts for a neutral magistrate to evaluate.[70] Thus, in special needs cases, where administrative needs outweigh law enforcement needs, no particularized suspicion is needed as long as the search is minimally intrusive and the government interest is strong.[71] Like *Skinner*, many cases applying the "special needs" exception involve searches "conducted by officials other than the police, in situations where the government's purpose would be frustrated by requiring probable cause."[72] What becomes problematic is when the suspicion-less search is arguably tied to law enforcement purposes, as seen in *Edmond* and *Ferguson*.

The two recent cases, *City of Indianapolis v. Edmond*[73] and *Ferguson v. City of Charleston*,[74] refine the "special needs" exception. These cases involved regulatory schemes that were more closely related to law enforcement interests. In *Edmond*, the Indianapolis police used drug checkpoints, where motorists were briefly stopped for questioning while a drug sniffing dog and police officers inspected the vehicles.[75] The Court considered whether these checkpoints subjected motorists to seizure in violation of the Fourth Amendment.[76] The Court found that despite the effectiveness of the program, its only purpose was for detecting general criminal activity, impermissible without individualized suspicion.[77]

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68. *Id.* at 633-34.

69. *Id.* at 620-21.

70. *Id.* at 622.

71. *Id.* at 619.

72. Rothstein, *supra* note 5, at 138 (discussing situations where the government's purpose would be frustrated by probable cause).

73. 531 U.S. 32 (2000).

74. 532 U.S. 67 (2001).

75. *Edmond*, 531 U.S. at 35.

76. *Id.* at 34.

77. *Id.* at 41-42.

The Court in *Ferguson* further refined *Edmond*. At issue in *Ferguson* was the constitutionality of a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes.[78] Concerned about cocaine use by pregnant patients and having failed with programs that did not alleviate the problem, a public hospital in Charleston, South Carolina took stronger measures.[79] The hospital "began to order drug screens to be performed on urine samples from maternity patients who were suspected of using cocaine."[80] At first, the hospital merely used positive results for counseling and treatment.[81] Soon, the hospital offered its "cooperation in prosecuting mothers whose children tested positive for drugs at birth."[82] If a woman in labor tested positive for drugs, "the police were to be notified without delay and the patient promptly arrested."[83] If a pregnant woman not yet in labor tested positive, "the police were to be notified . . . only if the patient tested positive for cocaine a second time or if she missed an appointment with a substance abuse counselor."[84] A jury ruled in favor of the city.[85] On appeal, the Fourth Circuit affirmed under the "special needs" exception, finding the drug screens were searches for medical reasons, independent of an objective to help law enforcement.[86]

The Supreme Court reversed and distinguished *Ferguson* from previous cases, as "the central and indispensable feature of [Charleston's] policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment."[87] The Court acknowledged the city's argument that its "ultimate purpose [of] protecting the health of both the mother and child . . . is a beneficent one."[88] Yet, the Court was not persuaded and it carried out a "close review" of the program, looking at the "programmatic purpose" and whether the "purpose actually served"[89] is "ultimately

78. *Ferguson*, 532 U.S. at 69.
79. *Id.* at 70.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 72.
84. *Id.*
85. *Id.* at 74.
86. *Id.*
87. *Id.* at 80.
88. *Id.* at 81.
89. *Id.*

indistinguishable from the general interest in crime control."[90] While the ultimate goal of the program may have been to help women get off of drugs, the Court found the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal.[91] This was constitutionally unacceptable.

After *Edmond* and *Ferguson*, the government has an arguably harder task of showing some other significant government interest in the form of special needs beyond normal law enforcement to render the "special needs" exception applicable. There is no doubt that the government has a "special need" for ordering felons to provide DNA samples. A suspicion-based standard would render a meaningful DNA index system impossible because the government would need to have evidence of a fresh crime before a DNA sample could be obtained, "placing in jeopardy . . . important governmental interests."[92] However, no matter how dire the need for the statute, the "special need" cannot be for law enforcement purposes.[93]

The Ninth Circuit in *Kincade* construed that the DNA Act's purpose in obtaining DNA material for future use in a DNA databank is to help solve future crimes, which is an impermissible goal of general crime control.[94] Most courts addressing the issue of the constitutionality of statutes like the DNA Act do not agree with the Ninth Circuit's determination. One of the reasons for such differing judgments is the malleability of the meaning of the statute's "purpose."

B. Looking to the Ultimate Goal Rather than the Immediate Purpose

Justice Kennedy, concurring in the *Ferguson* case but disagreeing as to the rationale for the decision, illustrated how disparate results can be depending on which "purpose" a court chooses for constitutional analysis.[95] Justice Kennedy disagreed with the majority's fixation on the immediate purpose in *Ferguson*, and found the distinction between the ultimate goal and immediate purpose of the policy at issue "lacking in foundation" in special needs cases.[96]

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90. City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

91. *Ferguson*, 532 U.S. at 83-4.

92. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 624 (1989).

93. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

94. United States v. Kincade, 345 F.3d 1095, 1110 (9th Cir. 2003) *rev'd en banc*, 379 F.3d 813 (9th Cir. 2004).

95. *Ferguson*, 532 U.S. at 86-87.

96. *Id.* at 87.

Justice Kennedy pointed out that all of the Court's "special needs cases have turned upon . . . the policy's ultimate goal."[97]

Justice Kennedy provides three examples of special needs cases which would have resulted in different outcomes had the Court examined the immediate purpose rather than the ultimate goal.[98] In *Skinner v. Ry. Labor Executives' Ass'n*, addressed in detail above, if the Court had looked to immediate purposes, the Court would have identified the "special need" to be the collection of evidence of drug and alcohol use by railway employees. The Court, instead, identified the "special need" as the ultimate purpose of the government "regulating the conduct of railroad employees to ensure [railroad] safety."[99]

In *Treasury Employees v. Von Raab*, the Court reviewed the constitutionality of drug testing federal customs officers who carry arms or who are involved in drug interdiction.[100] Requiring the Court to look at the immediate purpose would have forced the Court to deem the gathering of evidence of drug abuse by prospective drug interdiction officers as the "special need."[101] Instead, the special needs the Court identified were the necessities "to deter drug use among those eligible for promotion to sensitive positions within the [US Customs] Service and to prevent the promotion of drug users to those positions."[102]

In *Vernonia Sch. Dist. 47J v. Acton*, the Court evaluated the constitutionality of conducting drug tests on high school student athletes.[103] Requiring the Court to look at the immediate purpose would have made the Court deem the purpose of gathering evidence of drug use by student-athletes as the relevant "need" for purposes of the "special needs" analysis.[104] Instead, the Court sustained the policy as furthering what would have been the policy's ultimate goal: "[d]eterring drug use by our Nation's schoolchildren," and particularly by student athletes, because "the risk of immediate physical harm to the drug user or those with whom he is playing his

97. *Id.*
98. *Id.*
99. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 620 (1989).
100. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
101. *Id.* at 666.
102. *Id.*
103. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).
104. *Id.* at 653.

sport is particularly high."[105]

As Justice Kennedy points out, the immediate purpose of a search policy is almost always to collect evidence.[106] Thus, looking to the immediate purpose of a statute does not uncover much about the need it serves, since gathering evidence in and of itself is clearly not a special need which a court would use to justify the search.[107]

As applied to *Kincade*, the Ninth Circuit in its 2003 decision read *Edmond* and *Ferguson* to hold that whenever "special needs" are at issue, the key inquiry for a reviewing court is the immediate purpose of the search.[108] The Ninth Circuit found the immediate purpose of the DNA Act was to further the goals of law enforcement.[109] Believing that the Fourth Amendment flatly prohibits all suspicionless searches made for "the purpose of 'detecting evidence of ordinary criminal wrongdoing,'" the Ninth Circuit in *Kincade* found the DNA Act violated the Fourth Amendment.[110] One cannot argue with the Ninth Circuit that the immediate purpose of the statute is to gather evidence to solve future and past crimes, clearly a law enforcement purpose.

However, one could apply Justice Kennedy's argument and maintain that courts should focus on the ultimate purpose of the DNA statute, as it is the only meaningful way of getting at the true "special needs" of the statute. There are many "ultimate purposes" of the DNA Act. As the text of the Act makes clear, the DNA Act's main purpose is not to prosecute the individual providing the DNA sample, but to fill a gap in the CODIS database.[111] Another ultimate purpose is to deter offenders who commit crimes with a high rate of recidivism.[112] The DNA Act also helps crack open unsolved crimes or "cold cases" and maintains a permanent identification record for identifying felons who may have otherwise changed their identity.[113] Moreover, the presence of the DNA databank improves the accuracy of criminal prosecutions,[114] and thus can help exonerate innocent

105. *Id.* at 661-62.
106. Ferguson v. City of Charleston, 532 U.S. 67, 87 (2001).
107. *Id.* at 87-88.
108. United States v. Kincade, 345 F.3d 1095, 1111-12 (9th Cir. 2003).
109. *Id.* at 1110-11.
110. *Id.* at 1115 (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 41 (2000)).
111. *See* 42 U.S.C. §§ 14135a(a)(2), 14135a(b) (2004).
112. Rothstein, *supra* note 5, at 143 (discussing the purposes of the DNA Act).
113. *Id.*
114. *Kincade*, 345 F.3d at 1103.

suspects.[115] These various purposes of the statute do not fall into the category of law enforcement, and if a court were to look at the ultimate purpose of the DNA Act, it would likely hold the "special need" exception applies.

C. The Immediate Purpose Test Might Not Apply to Parolees

Even if a court were to follow the Ninth Circuit and the majority in *Ferguson* and look to the immediate purpose of the statute, there still are other arguments against finding an impermissible law enforcement purpose. One can argue that *Edmond* and *Ferguson* are distinguishable from *Kincade*. *Edmond* did not involve the diminished Fourth Amendment rights of parolees. Rather, *Edmond* involved any ordinary citizen who happened to be traveling on a highway near Indianapolis. *Ferguson* also involved the Fourth Amendment rights of ordinary citizens rather than the reduced Fourth Amendment rights of parolees.

In *Griffin v. Wisconsin*, the Supreme Court made it clear that the "special needs" doctrine applied to parolees.[116] The Court recognized that parolees enjoy less constitutional protection than others, and that the Fourth Amendment permits "a degree of impingement upon privacy that would not be constitutional if applied to the public at large."[117] The Court then held that law enforcement could search a parolee's home without a warrant or even probable cause so long as it was conducted according to a valid regulation governing parolees.[118] For searches of parolees, the Supreme Court repeatedly has recognized that "[i]n assessing the governmental interest side of the balance, it must be remembered that 'the very assumption of the institution of probation' is that the [parolee] is more likely than the ordinary citizen to violate the law.'"[119] Even the Ninth Circuit has stated that "offenders enjoy a reduced expectation of privacy while on supervised release."[120]

As *Edmond* and *Ferguson* do not address the reduced Fourth Amendment rights of parolees, the "immediate purpose" test,

115. *Id.* at 1112.

116. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

117. *Id.* at 875.

118. *Id.* at 880. *See also* United States v. Knights, 534 U.S. 112, 121 (2001) (recognizing that parolees have less Fourth Amendment protection than law-abiding citizens, and that probation officer may search a parolee's home based upon reasonable suspicion).

119. *Knights*, 534 U.S. at 120 (quoting *Griffin*, 483 U.S. at 880).

120. United States v. Conway, 122 F.3d 841, 842 (9th Cir. 1997).

designed to protect law abiding citizens, arguably does not apply when parolees are involved. With this interpretation, there are no concerns about suspicion-less searches of law abiding citizens when the searches target only those in prison, on probation, or on supervised release, as such felons do not enjoy the "absolute liberty to which every citizen is entitled."[121]

However, one can argue that parolees still have a legitimate expectation of privacy in their bodies. Parolees' Fourth Amendment rights are less only to the extent that the regulation has a reasonable relation to a "legitimate penological interest" in depriving the felon of the full protections afforded by the Fourth Amendment.[122] Without a legitimate penological interest, parolees have the same Fourth Amendment rights as all other citizens. Examples of these interests are maintaining internal order and discipline in prison, assuring security by preventing unauthorized access to or escape from prison, and fostering rehabilitation and deterrence of crime.[123]

If a court followed *Ferguson* and the Ninth Circuit's 2003 decision in looking to the immediate purpose, a government interest in prosecuting crimes does not qualify as a legitimate penological interest in depriving the felon of all his Fourth Amendment rights. On the other hand, if a court looked to the ultimate purpose, which Justice Kennedy advocates, many purposes would qualify as legitimate penological interests, such as deterrence of crime to protect society from future criminal violations. Again, whether or not a parolee still has some Fourth Amendment protections with respect to mandatory blood extractions done in pursuant of the DNA Act depends upon whether a court would choose the immediate purpose or ultimate goal as the relevant purpose of the statute.

VIII. Traditional Fourth Amendment Analysis as to the Reasonableness of the Search

Assuming that the "special needs" exception applies, the search at issue still must be a reasonable search under the circumstances, and the next step for a court is to apply the traditional Fourth Amendment balancing test. As stated above, the reasonableness of a search is determined by balancing the individual's Fourth

121. Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

122. Turner v. Safley, 482 U.S. 78, 89 (1987).

123. *See* Pell v. Procunier, 417 U.S. 817, 822-27 (1974); Procunier v. Martinez, 416 U.S. 396, 420 (1974).

Amendment rights against "the promotion of legitimate governmental interests."[124]

A. The Level of Invasiveness of the Search

Beginning with an examination of the individual's rights, a court may want look at the invasiveness of the search to see how much the search intrudes on a person's privacy.[125] One could argue that the required "intrusion" to obtain a blood sample is very minimal.[126] The Supreme Court has stated that blood tests do not "infringe significant privacy interests,"[127] are not "an unduly extensive imposition,"[128] are "commonplace,"[129] and "would not be considered offensive by even the most delicate."[130] The Ninth Circuit itself has stated that the fact that "the gathering of DNA information requires the drawing of blood rather than inking and rolling a person's fingertips does not elevate the intrusion upon [one's] Fourth Amendment interests to a level beyond minimal."[131]

One can go as far as maintaining that the "intrusion" is virtually the same as taking a photograph, apart from the finger prick required to collect a sample. In fact, the Ninth Circuit in *Rise v. Oregon* has analogized DNA evidence to fingerprinting for identification purposes.[132] As DNA samples under the DNA Act are used solely to provide identification information,[133] and fingerprints also are "identifying marker[s] unique to the individual from whom the information is derived," the Ninth Circuit in *Rise* reasoned that the identification information from DNA samples is substantially the same as the identification information gathered from fingerprints.[134] Fingerprinting a convicted felon is not an unconstitutional search; thus, if the taking of one is permissible, the taking of the other is also constitutionally permissible.[135]

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124. Wyoming v. Houghton, 526 U.S. 295, 300 (1999).
125. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 618 (1989).
126. Rise v. Oregon, 59 F.3d 1556, 1560 (9th Cir. 1995).
127. *Skinner*, 489 U.S. at 625.
128. Winston v. Lee, 470 U.S. 753, 762 (1985).
129. Schmerber v. California, 384 U.S. 757, 771 (1966).
130. Breithaupt v. Abram, 352 U.S. 432, 436 (1957).
131. *Rise*, 59 F.3d at 1560.
132. *Id.* at 1559.
133. *See* 42 U.S.C. § 14135e(a) (2004).
134. *Rise*, 59 F.3d at 1559.
135. *See id.*; Landry v. Attorney General, 709 N.E.2d 1085 (Mass. 1999).

The analogy between fingerprints and DNA evidence, however, is not watertight. Fingerprinting and blood extraction for DNA samples are fundamentally very different, and these differences would weaken any attempt to analogize the two identification methods. Fingerprints are external and in public view, like voice or physical features, and there is no intrusive invasion of the body to acquire the fingerprint. Blood, on the other hand, is internal and requires an intrusion of the body to obtain a sample. The current standard practice of indefinitely retaining the felon's DNA sample further undercuts the analogy. Unlike fingerprints, the indefinite retention fosters the opportunity for misuse or abuse of the samples and opens the door for possible intrusions on the privacy of the individuals providing the samples.[136]

These concerns are not without workable solutions. The intrusive nature of blood extraction can be ameliorated by the advent of more efficient and less invasive techniques. The problem of potential abuses of complete DNA samples can be solved by more stringent standards of extracting only the identifying portions and disposing the rest of the information. As with the different ways courts have treated the taking of blood for identification purposes versus the taking of fingerprints,[137] it is clearly in the court's discretion to decide how large of a factor the intrusiveness of the blood extraction plays in the traditional Fourth Amendment balancing test.

B. The Parolee's Diminished Expectation of Privacy

As stated above, a parolee's privacy interest in his identity is severely diminished both by his status as a convicted felon as well as his status as a parolee.[138] It is up to a court to decide whether the parolee's expectation of privacy has diminished so much as to render a blood extraction reasonable. Courts that have addressed the issue of the constitutionality of DNA databases have held that the prisoner's rights are so diminished as to be a minimal factor in the balancing test, and thus, instead, focus on the government's interests.[139]

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136. Rothstein, *supra* note 5, at 156 (discussing the dangers of misusing DNA samples).

137. *See Rise*, 59 F.3d 1556; United States v. Kincade, 345 F.3d 1095 (9th Cir. 2003).

138. Griffin v. Wisconsin, 483 U.S. 868 (1987).

139. *See* Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996); *Rise*, 59 F.3d at 1559; Jones v. Murray, 962 F.2d 302, 307-308 (4th Cir. 1992); Kruger v. Erickson, 875 F. Supp. 583, 588-89 (D. Minn. 1995), *aff'd on other grounds*, 77 F.3d 1071 (8th Cir. 1996); Sanders v. Coman, 864 F. Supp. 496, 499 (E.D.N.C. 1994); Ryncarz v. Eikenberry, 824 F. Supp.

C. The Government's Legitimate Interests

As mentioned above, there are many legitimate government interests furthered by the DNA Act, such as increasing the efficiency of criminal investigations of crimes, solving crimes, and deterring recidivism.[140] Many courts reason that the convicted offender's low expectation of privacy in his identity is outweighed by the state's interest in preserving a permanent identification record of convicted offenders to resolve past and future crimes.[141] The Ninth Circuit in its October 2003 decision did not agree: the court found that the search constituted a "substantial intrusion on Kincade's legitimate expectation of privacy," and it was not convinced that the government's interests outweighed Kincade's personal privacy interests.[142]

IX. The 2003 Decision of United States v. Kincade Overturns Rise v. Oregon

Bearing in mind the above analyses and controversies, this note will now examine the case *Rise v. Oregon* in detail, which the Ninth Circuit in *Kincade* overturned in its October 2003 decision.[143] In *Rise*, felons challenged Oregon's DNA sampling law on Fourth Amendment grounds, an argument which the court rejected in finding the law constitutional.[144] The Ninth Circuit in *Rise* stated that DNA sampling requires a minimal intrusion for a blood sample, and "even in the law enforcement context," minimal intrusions upon a parolee's Fourth Amendment rights are permissible under certain circumstances.[145] The court argued that this is because parolees "do not have the same expectations of privacy in their identifying genetic information that 'free persons' have . . . and [have] lost any legitimate expectation of privacy in the identifying information derived from the

1493, 1498-99 (E.D. Wash. 1993); People v. Wealer, 636 N.E.2d 1129, 1135 (Ill. App. Ct. 1994); State v. Maas, 64 P.3d 382, 389 (Kan. 2003); *Landry*, 709 N.E.2d at 1085; Cooper v. Gammon, 943 S.W.2d 699, 704-705 (Mo. Ct. App. 1997); *In re* Orozco, 878 P.2d 432, 435-36 (Or. Ct. App. 1994); Dial v. Vaughn, 733 A.2d 1, 6-7 (Pa. Commw. Ct. 1999); Johnson v. Commonwealth, 529 S.E.2d 769, 779 (Va. 2000); Doles v. State, 994 P.2d 315, 318-19 (Wyo. 1999).

140. Roe v. Marcotte, 193 F.3d 72, 77-82 (2d Cir. 1999).

141. *See Landry*, 709 N.E.2d at 1092.

142. *Kincade*, 345 F.3d at 1102-03.

143. *Rise*, 59 F.3d at 1556.

144. *Id.* at 1559.

145. *Id.*

blood sampling."[146] The *Rise* court balanced the interests of the individual and society, and found that the societal interest in DNA sampling was extremely significant.[147] The *Rise* court found that not only would the Oregon DNA law help identify and prosecute perpetrators of future offenses, but it advanced "the overwhelming public interest in prosecuting crimes accurately[, as] DNA evidence can exculpate an accused just as effectively as it can inculpate him."[148] Balancing these considerations with felons' reduced privacy interests and the minimal Fourth Amendment intrusion of the DNA extraction, the *Rise* court concluded that the Oregon DNA law was "reasonable and therefore constitutional under the Fourth Amendment."[149]

A key issue in *Kincade* is whether or not *Rise* controls *Kincade*. One can argue that *Rise* does control *Kincade*, and under *Rise*, the DNA Act passes constitutional muster. Both cases involve parolee defendants and both statutes at issue are DNA database statutes that require DNA samples from felons. Not only are the facts and statutes similar, but one can also argue that the overwhelming public interest in creating a comprehensive nationwide DNA bank to improve the accuracy of criminal prosecutions is even stronger in *Kincade* than in *Rise*, which involved a DNA sampling law limited to Oregon felons. Society's concern for felon recidivism only enhances this already compelling interest.[150] Additionally, under the DNA Act, samples are collected in a uniform, non-discretionary manner, which prevents the DNA sampling from being subject to random or arbitrary acts of government agents. This further supports the constitutionality of the DNA Act.[151]

One can also argue that *Rise* does not control *Kincade*. *Rise* differs from *Kincade* in that the DNA Act covers a broader category of felons than the Oregon DNA sampling law, which focused on murderers and sex offenders.[152] Rise is also arguably inconsistent with Supreme Court authority, as its validity has been undermined by the subsequent Supreme Court decisions of *Edmond* and *Ferguson*.

146. *Id.* at 1560.

147. *Id.*

148. *Id.* at 1561.

149. *Id.* at 1562.

150. *See* United States v. Knights, 534 U.S. 112, 120 (2001).

151. *See, e.g.*, Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 672 n.2 (1989); *Rise*, 59 F.3d at 1561-62.

152. United States v. Miles, 228 F. Supp. 2d 1130 (E.D. Cal. 2002).

Thus, one can argue that *Rise* does not bind subsequent panels.[153] *United States v. Miles* supports this argument, and it is the only case, other than *Kincade*, which has held a statute mandating DNA samples for the CODIS database unconstitutional after *Edmond* and *Ferguson*.[154] In *Miles*, the Eastern District of California found the DNA Act satisfied no need beyond ordinary law enforcement, was not based on individualized suspicion, and, thus, was an unconstitutional general law enforcement search violating the Fourth Amendment.[155] The *Miles* court found that *Edmond* and *Ferguson* "effectively overruled *Rise*."[156] One could also arguably construe that *Edmond* and *Ferguson* essentially overturned or at least undercut all prior decisions that found DNA database statutes constitutional, as the principle of stare decisis may yield where prior decision's "underpinnings [have been] eroded by subsequent decisions" of the Supreme Court.[157]

Regardless of whether *Edmond* and *Ferguson* have fundamentally changed the law with respect to DNA databases and parolees, one can easily argue that *Miles* itself is not binding on *Kincade*. The facts in *Miles* are quite distinguishable from *Kincade*'s facts. In *Miles*, the offender was on supervised release for a non-qualifying offense under the requisite statute.[158] Kincade, on the other hand, was under supervision for his qualifying offense of armed bank robbery, and thus had more reason to expect he would be required to comply with conditions related to his qualifying offense. In *Miles*, the prosecution was trying to use a thirty year old conviction as Miles' qualifying offense, to which the *Miles* court responded by stating:

> Here . . . there is no connection between [the] defendant's current supervised release and his 1974 conviction for the qualifying offense . . . [h]aving fully served his sentence for that crime, defendant had an objectively reasonable expectation that after three decades the government would not be able to use

153. United States v. Montgomery, 150 F.3d 983, 998 (9th Cir. 1998). *See also Miles* 288 F.Supp. 2d at 1132-33; United States v. Reynard, 220 F.Supp. 2d 1142, 1166 n.29 (S.D. Cal. 2002) (stating that *Rise* does not completely control because it potentially conflicts with *Ferguson*).

154. *Miles*, 228 F.Supp. 2d at 1130.

155. *Id.*

156. *Id.* at 1135.

157. United States v. Gaudin, 515 U.S. 506, 521 (1995).

158. Miles, 228 F. Supp. 2d at 1132.

> that offense as a justification for invading his bodily integrity and obtaining his identifying information without some individualized suspicion of criminal wrongdoing.[159]

The facts and issues in *Kincade* do not deal with the whether someone in Miles' particular position is unconstitutionally searched by a DNA collection statute. Thus, *Miles* is distinguishable from *Kincade.*

Moreover, *Miles*, through one of the opinion's more problematic passages, highlights the argument that *Ferguson* and *Edmond* may not even apply to parolees, an argument also explored above. The court in *Miles* cited as a distinction, but without a difference, that the persons affected in *Ferguson* and *Edmond* were free citizens, and the persons affected by the DNA collection statute were convicted felons, in prison, on parole, or supervised release.[160] One could argue that this is in fact a distinction with a very important difference. As mentioned above, persons under parole are not free citizens and are in a considerably different position than the pregnant women or random motorists affected by the statutes at issue in *Ferguson* and *Edmond.* Parolees' privacy interests are diminished, and as a felon on parole for a felony conviction, parolees are not entitled to the same consideration as a free citizen without such criminal history and status.[161] Thus, as highlighted by the flawed passage in *Miles*, *Ferguson* and *Edmond* may change the way in which DNA collection challenges are analyzed, but they do not necessarily impose a requirement of individualized suspicion in cases where the "special needs" exception applies to DNA database statutes governing parolees.

X. Judicial Subjectivity

What drove the Ninth Circuit in *Kincade* to initially choose to disregard the overwhelming trend of courts to uphold such DNA database statutes as constitutional, and then barely reverse their decision with a close 6-5 judgment? Perhaps it is a reflection of the particular justices' stances on the extent the government can permissibly intrude on parolees' rights and the breadth of the DNA Act's applicability. These personal opinions motivate the justices to find justifications to support their positions, and the malleability of

159. *Id.* at 1138.

160. *Id.* at 1135.

161. Griffin v. Wisconsin, 483 U.S. 868, 875 (1987).

the Fourth Amendment analysis gives them the room to bolster their respective points of view. Fundamental divergences of opinion lead the justices to interpret and apply the law differently: construing the goal of the DNA Act as "deterrence of supervised releasees" or as getting "evidence of past crime,"[162] or interpreting the DNA Act as narrowly applying only to parolees versus fearing the Act's potential expansion to include every American citizen.[163] By juxtaposing the Ninth Circuit decisions of *Kincade* and *Rise* as well as the 2003 and 2004 *Kincade* decisions, one can see how individual standpoints of the justices can result in drastically different and closely contested outcomes, even within the same circuit court.

XI. Conclusion

Regardless of whatever internal motivations drove the individual justices' stances, the majority of the Ninth Circuit in its 2004 decision recognized that *Rise* still controls, given that *Rise* and *Kincade* are substantially similar and that *Rise*'s holding is consistent with all other cases, save one anomalous case. While the majority in the August 2004 opinion did not expressly articulate the ramifications of upholding the October 2003 decision, they likely recognized that striking down the DNA Act as unconstitutional would have likely resulted in widespread and destructive consequences. Scores of cases would have been overturned. The floodgates of litigation would have been opened. The CODIS would have essentially been rendered meaningless with the requirement of individualized suspicion of a specific criminal act for each felon before gathering a DNA sample is permitted. Many questions are still unresolved, such as the constitutionality of expanding the scope of law enforcement databanks. They will likely remain unresolved in the absence of a definitive ruling by the Supreme Court. Yet, faced with the DNA Act, binding precedent, and the facts before them, the Ninth Circuit's final decision was correct to uphold the DNA Act as constitutional.

162. United States v. Kincade, 379 F.3d 813, 841 n.2 (9th Cir. 2004).

163. *Id.* at 835-36.