

**The Constitutionality of Forensic DNA Databanks:
4th Amendment Issues**

David Winickoff, JD

[With update as of June 30, 2005 by Julie Park, ASLME Research Assistant]

INTRODUCTION

The most frequently raised constitutional argument against the DNA database statutes, and the most substantial one, is that obtaining a DNA sample and using the genetic information derived from the sample constitutes an unreasonable search and seizure.¹

The following memo aims to provide an overview of the important legal issues and discussions happening around the DNA databases with regard to the Fourth Amendment.

1. FOURTH AMENDMENT IN GENERAL

The Fourth Amendment guarantees “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. Amend. IV. The Amendment “guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the government or those acting at their direction.” *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 613 (1989).

The Supreme Court has stated clearly that all searches and seizures must be “reasonable.” See, e.g., *Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000). The Supreme Court has also stated that the test for what is reasonable is fact specific. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) and that the “permissibility of a particular search is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.” *Skinner*, 489 U.S. at 619 (quoting, *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

2. FOURTH AMENDMENT IN THE CRIMINAL LAW CONTEXT

In criminal cases, the Court has said that “we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment.” *Skinner*, 489 U.S. at 618. A search without a warrant is intrinsically unreasonable and unconstitutional unless one of the exceptions to the warrant requirement is demonstrated. *United States v. Place*, 462 U.S. 696, 701 (1983); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Payton v. New York*, 445 U.S. 573, 586 (1980).

A typical schematic diagram of the law of reasonable searches and seizures under the 4th Amendment looks something like this:

¹ Mark A. Rothstein and Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Databanks*, 67 BROOK. L. REV. 127, 132 (2001).

Table 1: Schematic Outline of Fourth Amendment Doctrine

<p style="text-align: center;">SCHEMATIC OUTLINE OF FOURTH AMENDMENT DOCTRINE</p> <p>1. Does the defendant/appellant have a 4th Amendment Right?</p> <ul style="list-style-type: none">a. was there government conduct? (if not, done)b. did the defendant have a reasonable expectation of privacy? (if not, done)<ul style="list-style-type: none">• Based on who they are?• Where they are? <p>2. If yes, did the police have a valid warrant? Warrants valid IF:</p> <ul style="list-style-type: none">a. issued by neutral and detached magistrate;b. based on probable cause established from facts submitted to magistrate by a gov't agent upon oath or affirmation; ANDc. particularly describe the place to be searched and items to be seized. <p>3. If the police did not have a valid warrant, did they make a valid warrantless search and seizure? Exceptions to warrant requirement:</p> <ul style="list-style-type: none">a. search incident to lawful arrest (only of "wingspan," may search belongings in order to "inventory them" Illinois v. Lafayette);b. automobile exception;c. plain view;d. consent;e. stop and frisk (IF "reasonable suspicion");f. "hot pursuit," "evanescent evidence," or other emergencies; <p style="text-align: center;">OR</p> <ul style="list-style-type: none">g. "special needs"/Administrative searches ← <u>Doctrinal Locus at Issue Here</u>
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3. FOURTH AMENDMENT CHALLENGES TO DNA DATABANK STATUTES

The common feature of the forensic DNA database statutes is that a category of individual is required to submit a blood sample so that the individual's DNA may be extracted from the sample and kept in a DNA index or databank. It is undisputed, and understood by all courts, that taking a blood sample constitutes a search under the Fourth Amendment requiring Constitutional scrutiny. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989); *Schmerber v.*

California, 384 U.S. 757, 767–68 (1966). Since the DNA Database Acts allow the government to withdraw blood samples from qualified offenders without a warrant, probable cause, or even individualized suspicion, Courts have had to consider whether and how these searches are justified in the light of previous Supreme Court doctrine.

The case law regarding the standards to be applied in searches that do not involve individualized suspicion, however, has undergone some evolution in recent years. To best understand the current state of the law and its impact on the disposition of future DNA databanking cases, it may be helpful to describe the non-individualized suspicion case law from a historical perspective.

DNA Databanking Cases can be usefully divided into two periods, with the Supreme Court’s decisions in the *Edmond* and *Ferguson* cases demarcating the two periods.

Period 1: Up to 2000

Until 2000, courts faced with deciding the Fourth Amendment challenges to DNA Databanking Statutes had two seemingly disparate strands of Supreme Court case law to apply. They could analyze whether the program fit within the “special needs” doctrine as had been most recently articulated in the *Von Raab* and *Skinner* cases (see discussion below). Or they could conduct a “balancing” analysis, without making any threshold inquiry into the existence of “special needs” as had seemingly been approved in *Sitz* (see discussion below).

A. Supreme Court’s “Special Needs” Doctrine Before 2000

[Much of this portion of the memo is taken from the recent but unpublished case, *Nicholas v. Goord*, 2003 WL 256774 (S.D.N.Y.2003) because it contains a clear and insightful summary of the special needs jurisprudence, as well as an interesting analysis of a DNA database statute under this doctrine. The author of this memo has edited this language, and provided schematic overviews, generated tables, and provided general organization. Any language from law review articles or other secondary literature has been cited.]

The “special needs” language was first adopted in a majority opinion in *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987), in which the Court upheld a suspicionless search of a probationer’s home.² It is important to note, however, that the search under review was one based on a regulation that permitted such searches only where there were “reasonable grounds” to believe the probationer harbored contraband. In *Griffin*, the Court reviewed some of its prior case law that permitted searches and seizures in the absence of a warrant or probable cause. It concluded that these cases -- upholding work-related searches of employees’ desks and “searches pursuant to a regulatory scheme” – fit within an exception to the warrant and probable cause requirement because the “special needs” presented in each rendered such a requirement impractical. The Court concluded that the supervision of probationers constituted a ““special need” of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large.” *Id.* at 875.”

² Note, however, that the language of special needs was first coined in Justice Blackmun’s concurrence in *New Jersey v. T.L.O.*, 469 U.S. 325, 355 (1985), in which the Court upheld a search on less than probable cause of a high school student on school grounds.

In 1989, the Court decided two non-individualized suspicion cases on the same day: *Skinner* and *Von Raab*. These cases reinforced the existence of a “special needs” threshold and also clarified that some balancing of interests was necessary to determine the validity of a program relying on such “special needs.”

[. . . .]

In *Von Raab*, the Court concluded that the need to deter and prevent use of drugs constituted “substantial interests” that presented a “special need.” *Id.* at 666. It went on to conclude that a warrant and probable cause requirement was impractical—based in part on the Government’s “compelling interest” in ensuring the integrity of its interdiction personnel, *id.* at 670, and the fitness of personnel carrying arms. *Id.* at 670-71. The Court balanced against this interest the intrusion in privacy resulting from a urine test, *id.* at 671-76, concluding that the Government’s interest “outweigh[ed]” the employees’ privacy interests. *Id.* at 677.

[. . . .]

Three later cases referenced the “special needs” analysis. One case invalidated a statute mandating drug testing for candidates for political office, *Chandler v. Miller*, 520 U.S. 305 (1997). The other two cases upheld drug testing through urinalysis for high school students participating in special activities: *Vernonia School Dist. 471 v. Acton*, 515 U.S. 646 (1995) (participants in interscholastic sports); and *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (participants in all school-sponsored extracurricular activities). In all of these cases, the Court seemed to assume that the searches and programs at issue fell outside “the normal need for law enforcement.” The cases conducted a Fourth Amendment “balancing” analysis; but the analysis was not simply to determine whether the warrant requirement was “impractical” (as had been suggested in *Von Raab* and *Skinner*) but also to determine whether the program was “reasonable and hence constitutional.” *Vernonia*, 515 U.S. at 665.”

B. Supreme Court’s “Balancing Test” Approach in Sitz

[. . .]

Nicholas v. Goord, at 6:

A different approach was taken in *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), decided the year after *Von Raab*. In *Sitz*, the Court was faced with deciding the constitutionality of a highway checkpoint program that sought to determine if drivers were drunk. Under the program, drivers showing signs of intoxication would be given further tests. If the tests and the officer’s observations suggested that the driver was intoxicated, an arrest would be made. The individuals challenging the program argued before the Supreme Court that a “balancing test” -- such as the one used in *Brown* -- should not apply and that *Von Raab* instead required that the government had to make a threshold showing of “some special governmental need ‘beyond the normal need’ for criminal law enforcement.” *Sitz*, 496 U.S. at 449-50.

Sitz rejected this argument, stating that the balancing test approved in *Martinez-Fuerte* (an early highway immigration checkpoint case) and *Brown* (a suspicionless stop of the individual in an alley) was effective and applied to the drunk driver highway checkpoint

program. *Sitz*, 496 U.S. at 450. The Court weighed the State's interest in such a program against the intrusion on the motorists stopped at the checkpoint. *Id.* at 450-453.

Additionally, the Court clarified that the third factor in the balancing test--which had been characterized by the lower court as the "effectiveness" of the program--should instead have addressed whether the program would "reasonably advance" the State's interest. *Id.* at 455. Balancing these interests, the Court upheld the drunk driver checkpoint program.

[. . .]” end quote.

C. Fourth Amendment Review of DNA Databank Statutes Prior to 2000

1. “Balancing Test” approach prior to 2000

For the most part, courts relied on the “balancing” analysis -- usually through direct invocation of *Sitz* -- to uphold the statute. Here is a non-exhaustive list of cases before 2000 using this approach:

Table 2: List of database cases using balancing approach prior to 2000

<p><u><i>Federal Courts</i></u></p> <p>Shaffer v. Saffle, 148 F.3d 1180 (10th Cir.1998) Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir.1996) Schlicher v. Peters 103 F.3d 940, 943 (10th Cir.1996) Rise v. Oregon, 59 F.3d 1556, 1560-62 (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) 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)</p> <p><u><i>State Courts¹</i></u></p> <p>Gaines v. Nevada, 116 Nev. 359, 998 P.2d 166, 171- 72 (Nev.2000) Johnson v. Commonwealth, 259 Va. 654, 529 S.E.2d 769, 779(Va.2000) Landry v. Attorney General, 429 Mass. 336 (Mass.1999) Doles v. State, 994 P.2d 315, 318-19 (Wyo.1999) Dial v. Vaughn, 733 A.2d 1, 6-7 (Pa.Comm. Ct.1999) Cooper v. Gammon, 943 S.W.2d 699, 704-05 (Mo.Ct.App.1997) Matter of Appeal in Maricopa County, 187 Ariz. 419 (Ariz.Ct.App.1996) People v. Calahan, 272 Ill.App.3d 293 (Ill.App.Ct.1995) People v. Wealer, 264 Ill.App.3d 6 (Ill.App.Ct.1994) State ex rel. Juvenile Dep't of Multnomah County v. Orozco, 129 Or.App. 148 (Or.Ct.App.1994)</p>

Most often, these cases analogize DNA sampling for identification purposes to taking fingerprints. In the earliest case to address the constitutionality of a state DNA testing statute, the Fourth Circuit in *Jones v. Murray* used a balancing approach to uphold the Virginia statute on the diminished privacy rights of convicted prisoners. When a person is arrested, the court reasoned, the arrestee's identity becomes a matter of government interest, and the arrestee must submit to fingerprinting whether or not the crime involved fingerprint evidence.

“The Ninth Circuit, in *Rise v. Oregon*, analogized taking DNA from a convicted offender to taking fingerprints, noting that, although taking fingerprints from a “free person” implicated privacy rights and required probable cause, this was not the case when fingerprints were routinely taken from arrestees for identification purposes during the booking process. Once convicted, the court reasoned, one's identity is a matter of state interest, and the offender “has lost any legitimate expectation of privacy in the identifying information derived from blood sampling.”

In *Landry v. Attorney General*, the Massachusetts Supreme Judicial Court held that taking a DNA sample is only minimally more intrusive than taking and storing fingerprints or photographs, and this minimal intrusion is only for the purpose of adding to a record of identity and is not a search for evidence. The *Landry* court reasoned that the convicted offender's low expectation of privacy in his identity was outweighed by the state's interest in preserving a permanent identification record of convicted offenders to resolve past and future crimes. Where the state has traditionally used fingerprints for this purpose, the court announced, it would now use DNA identification.”³

From *Nicholas v. Goord*, at 7:

Often in these cases, there was special emphasis on the fact that the population at issue consisted of prisoners, whom they viewed as having a lesser expectation of privacy. See, e.g., *Boling*, 101 F.3d at 1340; *Rise*, 59 F.3d at 1560; *Gaines*, 998 P.2d at 172-73.

[. . .]

These courts then have looked for and found justification for these intrusions. As *Rise* noted, there is an “overwhelming public interest in prosecuting crimes accurately” --an interest plainly served by the DNA databank. Weighing the governmental interest against the intrusiveness of the search, these courts concluded with little difficulty that the important governmental interest outweighed the minimal intrusion caused by the blood draw or other means of obtaining the DNA sample. Some of the “balancing” courts acknowledged the existence of the “special needs” doctrine and specifically noted that they were rejecting the application of that doctrine to the DNA indexing statutes. See, e.g., *Jones* at 307 n. 2; *Gilbert* at *4; *Gaines* at 171-72; *Landry* at 1092; *Doles* at 318-19; *Wealer* at 1135.”

2. “Special Needs” approach prior to 2000

Before Edmonds and Ferguson modified the “special needs” doctrine, three courts relied explicitly on “special needs” rather than the traditional balancing analysis:

Table 3: List of database cases using “special needs” doctrine prior to 2000

<p><u>Federal Courts</u></p> <p>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)</p> <p><u>State Courts</u></p> <p>State v. Olivas, 122 Wash.2d 73 (Wa.1993).</p>

From *Nicholas v. Goord*, 6-8, with editing:

Each of the "special needs" decisions also upheld the statute at issue. The opinion in *Olivas* contained little analysis of the application of the "special needs" doctrine, other than to review relevant case law and to adopt the district court decision in *Jones*, 763 F.Supp. 842 (W.D.Va.1991) (which had itself applied the "special needs" doctrine). *Olivas*, 856 P.2d at 1083-86. Shelton noted the many areas in which "special needs" had been found and concluded that the DNA indexing program passed muster because "it is not undertaken for the investigation of a specific crime." 934 F.Supp. at 1051.

In *Marcotte*, the Second Circuit ruled on the constitutionality of Connecticut's DNA indexing program, which required convicted sex offenders to submit blood samples for DNA extraction. *Marcotte*'s discussion of Supreme Court case law relied heavily on *Skinner* and *Von Raab* (and not at all on *Sitz*). 193 F.3d at 77-78. *Marcotte* concluded that the Supreme Court had applied the "special needs" doctrine "outside the criminal investigatory context" and, instead, in areas where it served "the maintenance of institutional security, public safety and order." *Id.* at 78. In the prison setting, the court noted, the "special needs" doctrine applied but need not be "tied directly to institutional concerns." *Id.* at 79. It pointed to the *Griffin* case, allowing searches of a probationer's home, and noted that the intensive supervision represented by these searches reduced recidivism and constituted a "special need" of the state. *Id.*

Marcotte observed that because there was a high rate of recidivism among sex offenders, DNA information was particularly useful in solving such crimes. *Id.* The court also pointed to the deterrent effect of the DNA statute. *Id.* Balanced against "this significant interest" was an intrusion (the blood draw) that it characterized as "minimal" and that involved no discretionary determinations. *Id.* at 79-80. The court also noted that the statute restricted access to the results and provided for expungement upon reversal or dismissal of the conviction. *Id.* at 80. Accordingly, the court upheld the statute.

Marcotte went on, however, to criticize in dictum the Fourth Amendment analysis articulated in part of the majority opinion in *Jones*. Specifically, the panel objected to *Jones*'s suggestion that prison inmates constitute a "separate category of cases to which the usual per se requirement of probable cause does not apply." *Id.* at 80 (quoting *Jones*, 962 F.2d at 307 n. 2). It approved, by contrast, the *Jones* dissenting opinion's view that the recidivism shown among violent offenders justified the DNA databank program-- but that the same could not be said of non-violent offenders. *Id.* at 81. The *Marcotte* panel concluded that the high rate of recidivism among sex offenders and the utility of DNA evidence in solving sex crimes allowed the Connecticut statute to "pass the 'special needs' balancing test." *Id.* at 82."

The Break: *Edmond* (2000) and *Ferguson* (2001)

From *Nicholas v. Goord*, at 8-9, with modifications:

The Supreme Court revisited the "special needs" doctrine in two cases -- *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) -- which have cast doubt on the availability of the "special needs" for upholding the Fourth Amendment constitutionality of the database statutes.

Edmond was a challenge to the constitutionality of an Indianapolis highway checkpoint program the primary purpose of which was the discovery and interdiction of illegal narcotics. Under the program, the police stopped a pre-determined number of vehicles for two to three minutes or less while asking the driver to produce a license and registration. A drug sniffing dog walked around the outside of the vehicle. 531 U.S. at 35. The program was seemingly identical in principle to the drunk-driving program upheld in *Sitz*, thus suggesting that the Court would have applied the traditional "balancing" analysis employed in that case.

Instead, *Edmond* analyzed the validity of the program under the Fourth Amendment quite differently from *Sitz*. The Court began by observing that "individualized suspicion of wrongdoing" is normally a requirement of a reasonable search and seizure. 531 U.S. at 37: "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." At 37. It then noted that suspicionless searches would be upheld where the program was designed to serve "special needs, beyond the normal need for law enforcement." *Id.* (citing, inter alia, *Von Raab* and *Skinner*). The opinion treated "searches for certain administrative purposes"--for example, inspections to ensure compliance with a city housing code--as falling within this category (e.g., border checkpoints for aliens upheld in the *Martinez-Fuerte* case, license and registration check in *Prouse*).

At issue in *Ferguson* was a program that authorized hospital staff to perform drug screens on urine samples from maternity patients who met certain criteria indicating a potential for drug use. If the patient refused to undergo drug treatment, the results of the test would be turned over to the police and might lead to arrest on charges such as drug possession or unlawful neglect of a child. The Court first noted that the program differed from prior drug testing cases (*Skinner*, *Von Raab*, *Chandler* and *Vernonia*) because of its secret nature and opined that patients have a greater expectation of privacy in the results of diagnostic tests. *Id.* at 78. As had been true in *Edmond*, *Ferguson* distinguished earlier "special needs" cases--in this instance, those allowing drug testing -- by noting that in those prior cases the needs advanced in each were "divorced from the State's general interest in law enforcement." *Id.* at 79. In the hospital program, by contrast, the "central and indispensable feature of the policy" was the use of law enforcement to coerce treatment. *Id.* at 80-81.

As in *Edmond*, *Ferguson* declined to "simply accept the State's invocation of a 'special need'" but instead "carried out a 'close review' of the scheme" in order to ascertain its "primary purpose." *Id.* at 81. Concluding that the primary purpose was "to generate evidence for law enforcement purposes," *id.* at 83 (emphasis omitted), the Court found that "this case simply does not fit within the closely guarded category of 'special needs.'" *Id.* at 84. *Ferguson* distinguished *Sitz* and *Martinez-Fuerte* on the ground that these cases involved "roadblock seizures, rather than 'the intrusive search of the body or the home.'" *Id.* at 83 n. 21 (citing *Edmond*, 531 U.S. at 54-55)."

End, *Nicholas v. Goord*.

Period 2: DNA Database Cases Post *Edmond* and *Ferguson*

Issues have been raised by the decisions in *Edmond* and *Ferguson* that significantly affect the analysis of DNA indexing statutes. Indeed, courts faced with Fourth Amendment challenges of DNA database statutes have been split as to the following three questions:

Table 4: Contested doctrinal questions in DNA database cases after 2000

1. Is a *Sitz*-style Fourth Amendment balancing still available in the absence of a threshold determination of “special needs”?
2. Can searches without individualized suspicion in order to construct forensic DNA Databanks be deemed constitutional under the “special needs” exception in the wake of *Edmond* and *Ferguson*?
3. If the answer to the first two questions is no, can any other doctrine be invoked to uphold the constitutionality of DNA database statutes?

A. Availability of traditional balancing

In the wake of *Edmond* and *Ferguson*, Federal and State courts are divided right now as to whether a traditional balancing test for reasonableness can be used without first qualifying for “special needs” analysis (see table 5 below). Out of the four circuit court cases that have examined the question after the *Edmond* and *Ferguson* decisions came, down, only one case, decided by the Fifth Circuit, has used the traditional balancing approach.⁴ Out of nine district court cases examined, however, three out of nine used this analysis in order to deny a Fourth Amendment challenge to the statute at issue (see table 5 below). The majority of cases either explicitly adopt the need for the “special needs” doctrine, or simply use it. This marks a major shift in the jurisprudence of DNA databanking statutes from the period before *Edmond*, in which the majority rule was to use *Sitz*-style balancing to uphold the statutes.

B. Availability of Special Needs

In the wake of *Edmond* and *Ferguson*, have courts deemed constitutional searches without individualized suspicion in order to construct forensic DNA Databanks under the “special needs” exception? As discussed above, *Edmond* noted that suspicionless searches would be upheld where the program was designed to serve “special needs, beyond the normal need for law enforcement.” *Id.* (citing, inter alia, *Von Raab* and *Skinner*). Under the reasoning of *Edmond* and *Ferguson*, a court must engage in a “close review” to determine the “primary purpose” of the statute or program it is analyzing under the “special needs” doctrine. If the court deems this

⁴ *Velasquez v. Woods*, 329 F.3d 420 (5th Cir.2003), decided on 8 May 2003.

primary purpose to be “normal law enforcement,” then the case falls out of the special needs doctrine.

Of the four Circuit Courts of Appeals to address this question, three courts decided that the “special needs” exception does apply to the DNA database statutes – i.e., that the primary purpose of the statutes lies outside the normal need for law enforcement. These cases cite deterrence of repeat criminals, and the goal of solving future crimes as significant factors that distinguish DNA databanks from the searches struck down in *Edmond* and *Ferguson* (see table 5 below).

There were six District Court cases decided since *Edmond* and *Ferguson* that examined the question of whether “special needs” was available. All of these District Court cases but one decided that the DNA database searches not only met the “special needs” threshold, but also were constitutional under the resulting balancing test.

C. The Ninth Circuit has recently held that neither general balancing nor “special needs” is available to uphold the constitutionality of the Federal DNA statute’s suspicion-less searches.

In contrast, the Ninth Circuit held in *U.S. v. Kincade* (2 October 2003) that the databanks did not carry out a “special need” outside of law enforcement. The majority in *Kincade* emphasized that blood draws constituted searches protected under the Fourth Amendment. They also denied the validity of the contention in other Circuits that parolees and convicts had, in a general sense, diminished expectations of privacy with respect to their blood. In order to make this argument, they distinguished precedent upholding other warrantless searches of prisoners as being for the limited and compelling purposes of institutional security and health of the prisoners. For these reasons, they held that a general balancing test under the “reasonableness” standard was not available.

Because “special needs” was also ruled out as an available exception to an individualized suspicion requirement, they ruled that the DNA Analysis Backlog Elimination Act (Federal DNA statute) under review was unconstitutional. The Ninth Circuit followed a District Court within its jurisdiction in this regard, *U.S. v. Miles* (31 October 2002).

One Circuit, the 10th, has decided a DNA database case since *Kincade* (*US v. Plotts*), and decided to follow – contrary to *Kincade* but in accord with a prior ruling in the Circuit -- that the “special needs” doctrine was applicable.

Table 5 on page 12 summarizes the Federal and State Supreme Court case law in this area that has been decided since the Edmond and Ferguson decisions.

**The Constitutionality of Forensic DNA Databanks
Fourth Amendment Issues – Update for 2004–2005**

Julie Park, ASLME Research Assistant

1. *United States v. Kincade*

After the Ninth Circuit declared the DNA Analysis Backlog Elimination Act of 2000 (DABEA) unconstitutional in *U.S. v. Kincade*, 345 F.3d 1095 (2003), the decision was vacated and the case was reheard en banc. *U.S. v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (en banc). In a plurality opinion, the en banc court upheld the constitutionality of the DADEA. Invoking *U.S. v. Knights*,

534 U.S. 112 (2001), the court applied a “totality of the circumstances” test to find the search “reasonable” given the substantially diminished expectation of privacy by the parolee, the minimally intrusive nature of blood sampling, and the important social interest furthered by the collection of DNA. *Id.* at 839. The court found that a special needs analysis was not required in determining the constitutionality of the statute. *Id.* at 832.

2. Other Recent Fourth Amendment Challenges

Of the four DNA databank challenges decided by U.S. Circuit Courts of Appeal in 2004–2005, all held that the statutes passed constitutional muster. Three of them, including *Kincade*, declined to use the special needs doctrine. The case of *U.S. v. Sczubelek*, 402 F.3d 175 (3d Cir. 2005), involved a challenge to the DABEA by a supervised releasee. There the court used a balancing approach similar to that in *Kincade*, finding that a diminished expectation of privacy did not outweigh the governmental interest.

Similarly, in *Groceman v. U.S. Dept. of Justice*, 354 F.3d 411, 413 (5th Cir. 2004), the court utilized a totality of the circumstances approach, upholding the DABEA against a 4th Amendment challenge by convicted felons, concluding that prison inmates have no expectation of privacy with regard to their identity.

In contrast, when faced with a similar claim by convicted felons, the Seventh Circuit chose to use the “special needs” doctrine in *Green v. Berge*, 354 F.3d 675, 679 (7th Cir., 2004), holding that the Wisconsin statute at issue withstood “constitutional attack under the firmly entrenched ‘special needs’ doctrine.”

These 2004-2005 cases have been added to Table5 on the following page.

Table 5: Federal and State Supreme Court Cases After *Edmond* and *Ferguson* (2000)

	Case	Class of Plaintiff	Statute Challenged	Successful?	Balancing	Special Needs	Substantial Discussion?
CIRCUIT COURTS	US v. Plotts 347 F.3d 873 (10 th Cir.) 22 Oct. 2003	General	28 U.S.C. § 1291	No	No, Follows Kimler	Yes	Nothing beyond Kimler
	US v. Kincade 345 F.3d 1095 (9th Cir.) 2 Oct. 2003	Parolee, but ruling not limited	DNA Analysis Backlog Elimination Act (DABEA) 2000	Yes, statute is unconstitutional	No	No	Yes – Statute deemed unconstitutional b/c no individualized suspicion.
	US v. Kimler 335 F.3d 1132 (10th Cir.) 7 July 2003	General	DABEA 2000	No	After S.N., conclusory	Yes	No
	Velasquez v. Woods 329 F.3d 420 (5th Cir.2003) 8 May 2003	Felon	Tex. Govt. Code § 411.148	No, aff'd dism'l frivolous	Yes	Yes	No
	U.S. v. Kincade, 379 F.3d 813 (9th Cir., 18 Aug. 2004) (en banc)	Supervised Releasee	DNA Analysis Backlog Elimination Act	No	Yes	No	Yes; special needs not necessary for supervised releasee
	Groceman v. US Dept of Justice, 354 F.3d 411 (5th Cir., 6 Jan. 2004) (per curiam)	Convicted felons	DNA Analysis Backlog Elimination Act	No	Yes	No	No
	U.S. v. Sczubelek, 402 F.3d 175 (3d Cir., 21 March 2005)	Supervised releasee	DNA Analysis Backlog Elimination Act	No	Yes	No	Yes
	Green v. Berge, 354 F.3d 675 (7th Cir., 9 Jan. 2004)	Convicted felons	Wisc. Statute § 165.76 et seq.	No	No	Yes	No
DISTRICT COURTS	Padgett v. Ferrero 294 F.Supp.2d 1338 (N.D.Ga) 10 Dec. 2003	Felons class	O.C.G.A. § 24-4-60	No	Yes	No	Follows Jones, rejects Kincade
	US v. Stegman 295 F.Supp.2d 542 (D.Md) 24 Nov. 2003	Supervised releasee	DABNEA 2000	No	Yes	No, follows Jones	Typical
	Vore v. Dep't of Justice 281 F.Supp.2d 1129 (D.Ariz) 8 Sept. 2003	Convicted Felon	DABNEA 2000	No	After S.N.	Yes	Typical
	Miller v. US Parole Comm'n 259 F.Supp.2d 1166 (D.Kan.) 15 April 2003	Parolee	Patriot Act 42 U.S.C.A. § 14135e	No	After S.N.	Yes	Yes

US v. Sczubelek 225 F.Supp2d 315 (D.Del.) 2 April 2003	Felon	DABEA 2000	No	After S.N.	Yes	Yes
Nicholas v. Goord 2003 WL 256774 (S.D.N.Y.) 6 Feb 2003	Felons class	N.Y. Exec. Law § 995	No	After S.N.	Yes	Yes
US v. Miles 228 F.Supp.2d 1130 (E.D.Cal) 31 Oct. 2002	Supervised Releasee	DABNEA 2000, 42 U.S.C. § 14135a(a)(2)	Yes	No	No	Yes, unconst'l b/c prim. purp. law enfrcmn't
US v. Reynard 220 F.Supp.2d 1142 (S.D.Cal) 26 Aug. 2002	Supervised Releasee	DABNEA 2000	No	After S.N.	Yes	Yes, non law enforcement purpose
Groceman v. US Dep't Justice	Convicted Armed Robbery	DABNEA 2000	No	Yes	No	No
STATE SUPREME COURTS						
State v. Martinez 78 P.3d 769 (Kan.) 31 Oct. 2003	Convicted burglary	K.S.A.2001 Supp. 21-2511	No	After S.N.	Yes	Yes