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NOTE

DANGEROUS BALANCE: THE NINTH CIRCUIT'S VALIDATION OF EXPANSIVE DNA TESTING OF FEDERAL PAROLEES

INTRODUCTION

For many, having blood drawn is simply part of a routine doctor's visit. However, for parolees, such as Thomas Kincade, their blood is drawn not for medical purposes, but rather to extract DNA.¹ The DNA and the identifying information are then loaded into a database, which law enforcement officers search every time they attempt to solve a crime with DNA evidence.² If the parolee refuses, he or she faces misdemeanor charges, revocation of release, and more prison time.³

In *United States v. Kincade*, a sharply divided Ninth Circuit, sitting *en banc*, held that mandatory blood testing of parolees under certain circumstances is not an unreasonable search and seizure and, thus, does not violate the Fourth Amendment to the Constitution of the United States.⁴ While courts have considered constitutional challenges to both state and federal DNA testing statutes, the majority of these cases

¹ See *infra* notes 13 to 24 and accompanying text.

² *Id.*

³ See *infra* note 24 and accompanying text.

⁴ *United States v. Kincade*, 379 F.3d 813, 840 (9th Cir. 2004). The *Kincade* opinion and this casenote treat the terms parole, probation, and supervised release similarly. *Id.* at 816-17 & n.2 ("Our cases have not distinguished between parolees, probationers, and supervised releasees for Fourth Amendment purposes.").

concerned inmates, not parolees.⁵ Although the *Kincade* decision followed other court decisions in approving DNA testing, unlike the other courts that have considered this issue, the *Kincade* court's analysis could be used overbroadly, in violation of Fourth Amendment privacy rights.⁶

Despite the utility of DNA databases in solving violent crimes, such databases should not infringe upon an ordinary citizen's constitutionally protected privacy rights. This Note asserts that while the outcome of the Ninth Circuit decision in *U.S. v. Kincade* was virtually inevitable, the standard the court applied is overbroad and should be applied narrowly as precedent.

Part I provides a background of federal DNA testing legislation, the Fourth Amendment implications of DNA testing and two DNA testing cases leading up to the *U.S. v. Kincade* decision.⁷ Part II analyzes the plurality and dissenting opinions of the *U.S. v. Kincade* decision.⁸ Part III argues that the plurality's balancing test has a potential for inappropriate application.⁹ Finally, Part IV concludes that the *Kincade* balancing test should be narrowly applied as precedent after a meaningful balancing of interests, and not as a façade for ever-expanding government interests.¹⁰

I. BACKGROUND

DNA testing by law enforcement officials for purposes of solving or investigating crimes is considered a search and seizure protected by the Fourth Amendment.¹¹ However, in *U.S. v. Kincade*, the Ninth Circuit affirmed the constitutionality of

⁵ See, e.g., *Roe v. Marcotte*, 193 F.3d 72, 74 (2d Cir. 1999); *Jones v. Murray*, 962 F.2d 302, 303 (4th Cir. 1992); *Groceman v. United States Dept. of Justice*, 354 F.3d 411, 412 (5th Cir. 2004); *Green v. Berge*, 354 F.3d 675, 676 (7th Cir. 2004); but see *United States v. Kimler*, 335 F.3d 1132, 1144 (10th Cir. 2003).

⁶ *United States v. Kincade*, 379 F.3d 813, 840 (9th Cir. 2004); see also *infra* notes 113 to 154 and accompanying text.

⁷ See *infra* notes 11 to 63 and accompanying text.

⁸ See *infra* notes 64 to 112 and accompanying text.

⁹ See *infra* notes 113 to 154 and accompanying text.

¹⁰ See *infra* note 155 and accompanying text.

¹¹ *United States v. Miles*, 228 F. Supp. 2d 1130, 1134 (E.D. Cal. 2002) (citing *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 615-16 (1989)); see also U.S. Const. amend. IV.

DNA searches performed pursuant to a federal statute, the DNA Analysis Backlog Elimination Act of 2000.¹²

A. THE DNA ANALYSIS BACKLOG ELIMINATION ACT

The DNA Analysis Backlog Elimination Act (hereinafter, “DNA Act”) provides the federal government with authority to gather DNA samples from people who have been convicted of certain federal crimes, such as murder and sex crimes.¹³ The DNA Act also created authority for federal, state and local law enforcement to collect, analyze, and store samples in a DNA database called the Combined DNA Index System (hereinafter, “CODIS”) from persons convicted of certain federal crimes.¹⁴ The DNA Act also funds federal, state, and local law enforcement’s efforts to process DNA samples collected from crime scenes that have the potential to yield important evidence for law enforcement.¹⁵

The DNA Act requires federal offenders, convicted of certain offenses, to submit to mandatory DNA testing.¹⁶ The original version of the DNA Act required testing of persons convicted of the following crimes: murder, manslaughter, homicide, sexual abuse, peonage and slavery, kidnapping, robbery or burglary, incest, arson, and attempt or conspiracy to commit any of the listed felonies.¹⁷ However, the USA PATRIOT Act, passed in October 2001, amended the DNA Act by expanding

¹² *United States v. Kincade*, 379 F.3d 813, 840 (9th Cir. 2004); DNA Analysis Backlog Elimination Act, Pub. L. No. 106-546, § 3, 114 Stat. 2726 (2000).

¹³ 42 U.S.C. § 14135a(a)(1), (d)(1) (2001). The list of qualifying crimes was changed in October 2004. See 42 U.S.C. § 14135a(d)(1) (2004). For more discussion regarding this change, see *infra* notes 16 to 19 and 133 to 144 and accompanying text.

¹⁴ H.R. Rep. No. 106-900 (I), at 8 (2000). CODIS contains DNA profiles from every state, including samples taken from persons convicted of qualifying crimes, samples from crime scenes, and samples provided by families of missing persons. *Id.* CODIS aids law enforcement nationwide by linking crime scenes together to aid investigations, and matching crime scenes to perpetrators. *Kincade*, 379 F.3d at 819-20. For current CODIS statistics, see *NDIS Statistics*, available at <http://www.fbi.gov/hq/lab/codis/clickmap.htm>. (last visited Feb. 14, 2005). Convicted offender profiles in CODIS as of December 2004 number 2,038,470 and forensic profiles number 93,956. *Id.* In California, offender profiles number 244,704, and forensic profiles number 6,673, and 930 investigations were aided as of December 2004. *Id.*

¹⁵ H.R. Rep. No. 106-900 (I), at 8 (2000).

¹⁶ *Kincade*, 379 F.3d at 816-817 (citing Nancy Beatty Gregoire, *Federal Probation Joins the World of DNA Collection*, 66 Fed. Probation 30, 30-32 (2002); 42 U.S.C. § 14135a(a)(1) (2001)).

¹⁷ 42 U.S.C. § 14135a(d) (2000).

the list of qualifying offenses to include two additional broad categories: “crimes of violence” and “Federal crimes of terrorism.”¹⁸ A conviction of any of the listed crimes subjects one to testing, whether while in custody of the Bureau of Prisons (hereinafter, “BOP”), or after release.¹⁹

Unlike previous statutory attempts requiring DNA testing from individuals convicted of crimes, this statute extends its reach to individuals *after* their release from the prison system.²⁰ For those inmates released before the BOP implemented nationwide testing in 2002, the DNA Act requires that they now submit to testing at the request of their parole officer.²¹ Although only specific crimes require an individual to be tested, there is no requirement that the ex-offender be on release from prison for his or her original qualifying offense to be subject to mandatory testing.²² For example, a person convicted of a qualifying offense who is currently on parole or probation for a second, non-qualifying crime, is still subject to testing.²³ Furthermore, non-compliance with a request for testing carries a misdemeanor penalty, which can serve as a basis for revocation of release.²⁴

¹⁸ 42 U.S.C. § 14135a(d)(2)(a), (b) (2001). A “crime of violence” is defined as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 U.S.C. § 16(a), (b) (2004). A “Federal crim[e] of terrorism” is an offense, committed in conjunction with specified crimes, “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.” 18 U.S.C. § 2332b(g)(5)(a) (2002); *see also Kincade*, 379 F.3d at 846-848; *see* U.S.A. PATRIOT Act, Pub. L. No. 107-56, § 503, 115 Stat 272, 364 (2001).

¹⁹ 42 U.S.C. § 14135a(a)(1)-(2) (2004). The BOP takes blood samples from qualifying incarcerated individuals pursuant to the DNA Act. Nancy Beatty Gregoire, *Federal Probation Joins the World of DNA Collection*, 66 Fed. Probation 30, 30 (2002).

²⁰ 42 U.S.C. § 14135a(a)(1)-(2) (2004); H.R. Rep. No. 106-900 (I), at 8-9 (2000).

²¹ Nancy Beatty Gregoire, *Federal Probation Joins the World of DNA Collection*, 66 Fed. Probation at 30 (2002).

²² 42 U.S.C. § 14135a(a)(2) (2001).

²³ *Id.*; *see also, e.g., United States v. Miles*, 228 F. Supp. 2d 1130, 1133 (E.D. Cal 2002).

²⁴ 42 U.S.C. § 14135a(a)(5) (2004) (“An individual from whom the collection of a DNA sample is authorized under this subsection who fails to cooperate in the collection of that sample shall be guilty of a class A misdemeanor; and punished in accordance with Title 18.”); *see also* United States Sentencing Commission, Guidelines Manual § 7B1.3(a)(1) (2004), available at <http://www.ussc.gov/2004guid/g12004.pdf> (last visited Feb. 14, 2005).

B. FOURTH AMENDMENT IMPLICATIONS OF THE DNA ACT

The U.S. Supreme Court has long held “that taking a blood sample constitutes a search [of a person] under the Fourth Amendment.”²⁵ The Fourth Amendment delineates every person’s right to be free from “unreasonable searches and seizures” of their body, property, and homes.²⁶ For a search to be considered reasonable, it must be supported by probable cause that there is “evidence of a crime or illegal goods at the place to be searched.”²⁷ Ordinarily, a warrant is evidence of, and supported by probable cause.²⁸ However, in certain situations where procuring warrants are impractical, an exception to the warrant requirement may justify a search.²⁹

1. *Exceptions to the Warrant Requirement*

One line of exceptions to traditional Fourth Amendment analysis consists of searches conducted pursuant to special needs.³⁰ Special needs searches accomplish “important non-law enforcement purposes” in situations where warrants are im-

²⁵ See *Miles*, 228 F. Supp. 2d at 1134 (citing *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602, 616 (1989)).

²⁶ U.S. Const. amend. IV; see also, e.g., *Schmerber v. California* 384 U.S. 757, 767 (1966) (“The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”).

²⁷ U.S. Const. amend. IV; Wayne R. LaFave, Jerold H. Israel, Nancy J. King, *Criminal Procedure* § 3.3(a), 141 (4th ed. 2004); Myron Moskowitz, *Cases and Problems in Criminal Procedure: The Police* 3 (4th ed. 2004).

²⁸ LaFave, Israel, King, *supra*. To obtain a warrant, law enforcement officers submit affidavits to a magistrate judge stating facts or evidence supporting the conclusion that a search is likely to lead to evidence helpful to an investigation. *Kincade*, 379 F.3d at 822.

²⁹ *Kincade*, 379 F.3d at 822; see also Jonathan Kravis, Case Comment: A Better Interpretation of “Special Needs” Doctrine after *Edmond* and *Ferguson*, 112 Yale L.J. 2591, 2598 (June 2003) (“[W]hether or not the maintenance of a DNA database for the purpose of exonerating innocent persons is properly characterized as law-enforcement-related, that benefit simply cannot be achieved without a regime of warrantless searches. If the government had to obtain a warrant before conducting DNA Act searches, the CODIS database would likely fail. The government would not be able to establish probable cause for the vast majority of the searches, and would not go to the trouble of getting so many warrants even if it could. The warrantless searches mandated by the DNA Act are not merely law enforcement shortcuts. Rather, they are a necessary precondition to the maintenance of a DNA database . . .”).

³⁰ *Kincade*, 379 F.3d at 822-24. Two other exceptions are exempted areas and administrative searches. *Id.* Exempted area searches include searches at borders and airports; administrative searches “include[] inspections of closely regulated businesses.” *Id.*

practical.³¹ Non-law enforcement entities, such as employers, school authorities, or probation officers, usually conduct special needs searches pursuant to public health and safety objectives.³² For example, sobriety tests are considered an acceptable special need that is exempted from warrant and probable cause requirements.³³

Courts have also made an exception to Fourth Amendment search requirements by applying a balancing test, which compares the searchee's expectation of privacy against the public policy behind the particular search.³⁴ The United States Supreme Court's holdings in *Schmerber v. California* and *Winston v. Lee* concerned bodily intrusions, which the Court analyzed with a balancing test.³⁵

2. *Schmerber v. California*

In *Schmerber v. California*, the United States Supreme Court held that a blood extraction implicated, but did not violate, the Fourth Amendment.³⁶ In *Schmerber*, a police officer ordered a doctor to draw blood from a suspect involved in a drunken driving accident.³⁷ The Court balanced the intrusion of the blood draw against the need to collect evidence of the blood alcohol level of the suspect.³⁸ The Court held that because the driver's blood alcohol level would decrease before the officer could secure a warrant, the police officer did not act unreasonably in requiring a blood draw before procuring a warrant.³⁹ The Court cautioned, however, that the holding in *Schmerber*

³¹ *Id.* at 823.

³² *Id.*; William E. Ringel, Searches, Seizures, Arrests and Confessions § 10.13 (2004), WL.

³³ 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 5.4(c), 208 (4th ed. 2004) (discussing *Fink v. Ryan*, 174 Ill. 2d 302, 308 (Ill. 1996)). The *Fink* court held that because "Illinois has a special need to suspend the licenses of chemically impaired drivers and to deter others from driving while chemically impaired," sobriety tests are acceptable to fulfill that special need. *Id.*

³⁴ *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967) (stating that the "need to search" is balanced "against the invasion which the search entails.").

³⁵ *Schmerber v. California*, 384 U.S. 757, 770-71 (1966); *Winston v. Lee*, 470 U.S. 753, 766 (1985).

³⁶ *Schmerber*, 384 U.S. at 767, 772.

³⁷ *Id.* at 758.

³⁸ *Id.* 770-71.

³⁹ *Id.*

did not to permit “more substantial intrusions, or intrusions under other conditions.”⁴⁰

3. *Winston v. Lee*

The United States Supreme Court’s holding in a later case, *Winston v. Lee*, balanced a surgical intrusion against the need for preserving evidence of a crime.⁴¹ In *Winston*, a suspect in an attempted robbery was shot by his intended victim.⁴² The Commonwealth of Virginia attempted to force the suspect to undergo surgery to recover the bullet from his body, which the Commonwealth wanted to use it as evidence against the suspect.⁴³ The Court granted the suspect injunctive relief to prevent the Commonwealth from forcing him to undergo anesthesia and surgery.⁴⁴

In granting the injunction, the Court noted that “[a] compelled surgical intrusion into an individual’s body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be ‘unreasonable’ even if likely to produce evidence of a crime.”⁴⁵ The search was unreasonable because the Commonwealth’s interest in the bullet did not outweigh the privacy intrusion brought on by surgically removing the bullet lodged in the suspect’s chest.⁴⁶

Despite the fact that the searches in both *Schmerber* and *Winston* were conducted pursuant to the government’s assertion of a need to collect evidence and solve crimes, the *Winston* court found that the surgical intrusion was much greater than the intrusion of *Schmerber*’s blood extraction, and could not pass Fourth Amendment muster.⁴⁷ *Schmerber* and *Winston* thus laid the groundwork for challenges to DNA testing legislation in *Rise v. Oregon* and *United States v. Miles*.⁴⁸

⁴⁰ *Id.* at 772.

⁴¹ *Winston*, 470 U.S. at 766.

⁴² *Id.* at 755-56.

⁴³ *Id.* at 757, 767.

⁴⁴ *Id.* at 757-58, 767.

⁴⁵ *Id.* at 759.

⁴⁶ *Id.* at 766.

⁴⁷ *Id.*

⁴⁸ *Rise v. State of Oregon*, 59 F. 3d 1556 (9th Cir. 1995), *cert. denied*, 517 U.S. 1160 (1996); *United States v. Miles*, 228 F. Supp. 2d 1130 (E.D. Cal. 2002).

C. CHALLENGES TO DNA TESTING LEGISLATION: PRIVACY VS. GOVERNMENT INTERESTS

1. *Rise v. State of Oregon: privacy expectation of inmates*

In *Rise v. State of Oregon*, the prison inmate plaintiffs challenged an Oregon law that is similar to the DNA Act in the U.S. District Court for the District of Oregon.⁴⁹ The law requires DNA testing of persons convicted of sex offenses or murder.⁵⁰ The district court upheld the Oregon DNA testing law under a special needs analysis.⁵¹ The Ninth Circuit affirmed the district court's decision, but instead of using a special needs test, employed a balancing test, weighing law enforcement needs against the minimal intrusion of a blood extraction, which the court said was "substantially the same as . . . fingerprinting."⁵²

The dissent in *Rise* disagreed with the majority's use of the balancing test.⁵³ Citing *Schmerber v. California*, the dissent found that a blood extraction, unlike fingerprinting in the booking process, was not sufficiently "routine" to justify the privacy intrusion.⁵⁴ According to the dissent, the DNA extraction in *Rise* could not be constitutional because *Schmerber's* holding required individualized suspicion.⁵⁵

2. *United States v. Miles: Privacy expectation of parolees*

In a subsequent case, *United States v. Miles*, the U.S. District Court for the Eastern District of California limited the *Rise* balancing test in a successful Fourth Amendment challenge to the DNA Act.⁵⁶ In *Miles*, the defendant committed armed robbery, a qualifying felony, in 1974.⁵⁷ When the DNA

⁴⁹ *Rise*, 59 F. 3d at 1558.

⁵⁰ *Id.*

⁵¹ *Id.* at 1559.

⁵² *Id.* (citing *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) (stating that "it is elementary that a person in lawful custody may be required to submit to . . . fingerprinting . . . as part of routine identification processes.")).

⁵³ *Rise*, 59 F. 3d at 1564 (Nelson, J., dissenting).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1565 (Nelson, J., dissenting).

⁵⁶ *United States v. Miles*, 228 F. Supp. 2d 1130, 1141 (E.D. Cal. 2002). The government did not appeal this decision to the Ninth Circuit. *Id.*

⁵⁷ *Id.* at 1132.

Act was passed in 2000, the defendant was on supervised release for a different non-qualifying felony, possession of a firearm by a convicted felon.⁵⁸ He argued that requiring him to submit to testing violated the Fourth Amendment because the government had no evidence of probable cause except for his original conviction, thirty years prior.⁵⁹

The district court agreed with the defendant, and did so by distinguishing *Rise*.⁶⁰ Someone on parole for a different crime thirty years after his qualifying conviction, the district court reasoned, does not have a sufficiently lowered expectation of privacy to tip the balance in favor of the government's interest in DNA testing.⁶¹ Therefore, the privacy interests of a convicted person on release were greater thirty years after the offense than closer in time to the original offense.⁶² Even though *Rise* only requires a conviction to lessen a person's reasonable expectation of privacy, *Miles* requires that the conviction be contemporaneous with the government's DNA-testing need for the balance of interests to tip in favor of the government.⁶³

II. *UNITED STATES V. KINCADE* DECISION

A year after the *Miles* court found parolees could not be constitutionally subjected to DNA testing, a Northern District of California court was faced with a parolee's DNA testing challenge in *United States v. Kincade*.⁶⁴

A. FACTS AND PROCEDURAL HISTORY

Thomas Kincade committed bank robbery with a firearm in July 1993.⁶⁵ Kincade pled guilty and was sentenced to 97 months in prison and three years of supervised release.⁶⁶ After serving his sentence, he was released from prison in August of

⁵⁸ *Id.*

⁵⁹ *Id.* at 1134.

⁶⁰ *Id.* at 1138, 1141.

⁶¹ *Id.* at 1138.

⁶² *Id.*

⁶³ *Rise v. State of Oregon*, 59 F. 3d 1556, 1562 (9th Cir. 1995), *cert. denied*, 517 U.S. 1160 (1996); *Miles*, 228 F. Supp. 2d at 1141.

⁶⁴ *Miles*, 228 F. Supp. 2d at 1141; *United States v. Kincade*, 379 F.3d 813, 820-21 (9th Cir. 2004).

⁶⁵ *Kincade*, 379 F.3d at 820.

⁶⁶ *Id.*

2000.⁶⁷ The conditions of his release contained a requirement that he abide by the directives of his probation officer and “refrain from committing another Federal, state or local crime.”⁶⁸

Kincade’s bank robbery conviction is a qualifying offense for blood testing under the DNA Act.⁶⁹ However, he was released from custody before passage of the DNA Act, and before the BOP implemented testing.⁷⁰ In March of 2002, Kincade’s parole officer requested a blood sample for testing.⁷¹ Kincade refused to submit to testing.⁷² Kincade’s refusal provided a basis for revocation of his parole.⁷³

At his revocation hearing, Kincade challenged the validity of the DNA Act on several grounds, including violation of the Fourth Amendment.⁷⁴ The district court disagreed and revoked his parole, but stayed the sentence while the Ninth Circuit expedited his appeal.⁷⁵ Pending appeal, Kincade committed an additional violation of the conditions of his supervised release by testing positive for drug use.⁷⁶ Following this violation, the district court judge lifted the stay on Mr. Kincade’s sentence.⁷⁷ Once Kincade was imprisoned, and in custody of the BOP, he was forced to submit to DNA testing.⁷⁸ However, he continued his constitutional challenge to the DNA Act.⁷⁹

On appeal, Kincade asserted “a privacy expectation in his body, bodily fluids and DNA.”⁸⁰ He also argued that no probable cause existed to justify the intrusion because he was not

⁶⁷ *Id.*

⁶⁸ *United States v. Kincade*, 345 F.3d 1095, 1098 (9th Cir. 2003).

⁶⁹ *United States v. Kincade*, 379 F.3d 813, 820 (9th Cir. 2004).

⁷⁰ *Id.* Kincade was released in August, but the DNA Act was not passed until later that same year, in December of 2000. *Id.*; see also DNA Analysis Backlog Elimination Act, Pub. L. No. 106-546, 114 Stat. 2726 (2000).

⁷¹ *Kincade*, 379 F.3d at 820.

⁷² *Id.*

⁷³ *Id.* at 821.

⁷⁴ *Id.* Kincade also challenged the DNA Act on grounds that it violated the Ex Post Facto Clause, separation of powers, and the Due Process Clause. *Id.*

⁷⁵ *United States v. Kincade*, 345 F.3d 1095, 1098-99 & n.10 (9th Cir. 2003); *United States v. Kincade*, 379 F.3d 813, 821 (9th Cir. 2004). If the court had not stayed the sentence, Kincade would have immediately been subjected to testing once in custody of the BOP. *Id.*

⁷⁶ *United States v. Kincade*, 379 F.3d 813, 821 (9th Cir. 2004).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Opening Br. for Appellant at 22, *United States v. Kincade*, 2002 WL 32181458 (9th Cir. 2002) (No. 02-50380).

under suspicion for a crime when his parole officer requested a blood sample.⁸¹ He argued that the special-needs exception could not apply because the DNA Act has a clear law enforcement purpose of solving crimes.⁸² This purpose is, therefore, in direct conflict with the requirement that special needs be for a non-law enforcement purpose.⁸³ Kincade did not argue against a balancing-test exception on appeal.⁸⁴

A three-judge panel for the Ninth Circuit held that the DNA Act violated Kincade's Fourth Amendment rights.⁸⁵ After noting the general rule that reasonable searches are supported by probable cause, the Ninth Circuit panel employed a three-part analysis.⁸⁶ First, the court analyzed the Fourth Amendment implications of DNA testing, and rejected the *Rise* holding that found no difference between fingerprinting and blood extractions.⁸⁷ Second, the court decided that DNA testing of parolees could not satisfy a constitutional balancing test without reasonable suspicion that the parolee had committed an additional crime.⁸⁸ Third, the court rejected the idea that a special-needs exception could apply to DNA testing, because the purpose of the DNA Act was to acquire "evidence for future criminal investigations," a clear law enforcement purpose.⁸⁹

The majority of the panel viewed the forced extraction of Kincade's blood and subsequent categorization of his DNA as an unwarranted privacy invasion.⁹⁰ For that reason, the court held the DNA Act unconstitutional.⁹¹ However, the dissent cited the *Rise* balancing test as binding precedent and argued that the United States Supreme Court's decision in *Knights*

⁸¹ *Id.*

⁸² *Id.* at 21-22.

⁸³ *Id.* at 22.

⁸⁴ See generally, Opening Br. for Appellant, *United States v. Kincade*, 2002 WL 32181458 (9th Cir. 2002) (No. 02-50380).

⁸⁵ *United States v. Kincade*, 345 F.3d 1095, 1096 (9th Cir 2003).

⁸⁶ *Id.* at 1096, 1101.

⁸⁷ *Id.* at 1100-01.

⁸⁸ *Id.* at 1102 (citing *United States v. Knights*, 534 U.S. 112, 118-19 (2001)). The United States Supreme Court's holding in *Knights* required reasonable suspicion to search a probationer's home. *Id.* See also *infra* notes 115 to 119 and accompanying text.

⁸⁹ *Kincade*, 345 F.3d at 1101, 1112.

⁹⁰ *Id.* at 1113-14 ("Privacy erodes first at the margins, but once eliminated, its protections are lost for good, and the resultant damage cannot be undone") (quoting Alexander Solzhenitsyn, *Cancer Ward* 192 (Nicholas Bethell & David Burg trans., Modern Library 1995) (1968)).

⁹¹ *Kincade*, 345 F.3d at 1113.

supported the application of a balancing test because parolees have a lessened expectation of privacy.⁹² In response to a petition for rehearing filed by the Department of Justice shortly after the court issued the decision, the Ninth Circuit issued an order stating that the Ninth Circuit judges would rehear Mr. Kincade's appeal en banc.⁹³

B. EN BANC NINTH CIRCUIT DECISION

Judge Diarmuid O'Scannlain, who authored the dissent in the original *Kincade* opinion, wrote the Ninth Circuit's *en banc* decision.⁹⁴ Judge Ronald Gould concurred in the decision, offering a different analysis.⁹⁵ Judge Stephen Reinhardt, who had written the original opinion, led the dissent.⁹⁶

1. *The Plurality*

Five judges, forming a plurality, held that DNA testing of parolees under the DNA Act was constitutional under a balancing test similar to the test espoused in *Rise*.⁹⁷ The plurality began by acknowledging the "advance of technology" and its implications for Fourth Amendment privacy rights.⁹⁸ Then, disagreeing with the original panel decision, the plurality cited *Rise v. Oregon* as binding precedent for application of a balancing test to approve blood testing of persons with a lowered expectation of privacy, even though *Rise* concerned inmates, not parolees.⁹⁹ Kincade's status as a parolee was enough of a privacy-expectation reduction to justify the intrusion.¹⁰⁰

⁹² *Id.* at 1114, 1116 (O'Scannlain, J., dissenting).

⁹³ *United States v. Kincade*, 354 F.3d 1000, 1000 (9th Cir. 2004); *cf.* Pet. of the United States for Reh'g and for Reh'g En Banc, *United States v. Kincade* (No. 02-50380) (2003), available at http://www.epic.org/privacy/kincade/us_pet.pdf (last visited Feb. 14, 2005).

⁹⁴ *United States v. Kincade*, 379 F.3d 813, 816 (9th Cir. 2004).

⁹⁵ *Id.* at 840.

⁹⁶ *Id.* at 842.

⁹⁷ *Id.* at 839 & n.39.

⁹⁸ *Id.* at 821 (*citing* *Kyllo v. U.S.*, 533 U.S. 27, 33-34 (2001)).

⁹⁹ *Kincade*, 379 F.3d 837 (*citing* *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995), *cert. denied*, 517 U.S. 1160 (1996) (holding that "[o]nce a person is convicted of one of the felonies included as predicate offenses under [Oregon's DNA testing statute], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling.")).

¹⁰⁰ *Kincade*, 379 F.3d 839.

The panel also found that compelling policy interests outweighed Kincade's reasonable expectations of privacy.¹⁰¹ The overwhelming purpose of parole is to protect the public from victimization by preventing recidivism, through rehabilitation.¹⁰² The increased ability to identify criminals with the help of a DNA database creates a deterrent effect because criminals are aware they could be easily identified by leaving DNA evidence at a crime scene.¹⁰³ Thus, the plurality reasoned that DNA extraction, on balance, was constitutional because of Kincade's lowered expectation of privacy, and the public interest in creating a comprehensive DNA database.¹⁰⁴ Judge Gould concurred in the opinion, but would have justified the reach of the DNA statute to Kincade with the special-needs exception.¹⁰⁵

2. *The Dissent*

The dissent, following the original Ninth Circuit *Kincade* decision, argued that DNA testing must follow the traditional Fourth Amendment search-and-seizure requirements.¹⁰⁶ Because of the strict Fourth Amendment standards of individualized suspicion and reasonableness, the dissent rejected the application of a balancing test.¹⁰⁷ The balancing test was unemployable, the dissent reasoned, because it was too easy to tip the balance of interests in favor of the government.¹⁰⁸

The dissent reasoned that under the plurality's balancing test, essentially anyone with a reduced expectation of privacy is potentially subject to a blood extraction for CODIS.¹⁰⁹ Given the expansion of the qualifying crimes covered by the DNA Act, it seems likely that the scope of people subject to blood testing

¹⁰¹ *Id.* at 838.

¹⁰² *Id.* at 839.

¹⁰³ *Id.* at 839 & n.38 (citing *Rise*, 59 F.3d at 1561) (noting that DNA identification can "absolve the innocent just as easily as it can inculcate the guilty.")

¹⁰⁴ *Kincade*, 379 F.3d at 839.

¹⁰⁵ *Id.* at 840-42 (Gould, J., concurring). Judge Gould disagreed with the application of the balancing test, finding the special needs exception to be a more proper analysis. *Id.* at 842. Noting the plurality's reluctance to apply a special needs test, Judge Gould reasoned that the deterrent effect of a DNA database "serves the special needs" of a probation system. *Id.*

¹⁰⁶ *Id.* at 844 (9th Cir. 2004) (Reinhardt, J., dissenting).

¹⁰⁷ *Id.* at 861 & n.21 (Reinhardt, J., dissenting).

¹⁰⁸ *Id.* at 849-50, 861 (Reinhardt, J., dissenting).

¹⁰⁹ *Id.* at 844 (Reinhardt, J., dissenting).

could similarly grow.¹¹⁰ Just as convicted criminals have a lower expectation of privacy, so do people attending public educational institutions, people traveling on airplanes and people applying for driver's licenses or federal employment.¹¹¹ A lowered expectation of privacy, when evaluated as one side of a simple balancing test, could lead to DNA testing of an ever-expanding group of citizens, not limited to parolees who have committed particularly heinous crimes.¹¹² The *Kincade* holding likely sets a standard for future Ninth Circuit court decisions.

III. A CRITIQUE OF THE *KINCADE* BALANCING TEST

The *Kincade* plurality was confident that when future DNA testing affects the rights of law-abiding citizens, as opposed to "lawfully adjudicated criminals," the courts would "respond appropriately."¹¹³ But the expansion of caselaw allowing invasive searches of parolees and the growth of government interests in DNA testing citizens not yet convicted of crimes suggests that ordinary citizens' privacy rights are already in danger.¹¹⁴ *Kincade* could easily be used as a rubber-stamp for government interests. Because of this potential, future court decisions should narrowly apply the *Kincade* balancing test, and not use it as a façade or pretense for building overbroad DNA databases. The test should be limited to persons convicted of, and on parole for, violent crimes, as it was in *Kincade*, so that government interests do not automatically outweigh the privacy interests of the individual.

A. CASELAW ALLOWING PAROLEE SEARCHES: LOWERING STANDARDS

The stretching of the logic of the balancing test through the caselaw of *United States v. Knights*, *Rise v. Oregon*, and *United States v. Kincade*, indicates the potential for an overbroad application of the *Kincade* balancing test.

¹¹⁰ *Id.* at 849 (Reinhardt, J., dissenting).

¹¹¹ *Id.* at 844 (Reinhardt, J., dissenting) ("[A]ny person who experiences a reduction in his expectation of privacy . . . would be susceptible to having his blood sample extracted and included in CODIS . . .").

¹¹² *Id.*

¹¹³ *Id.* at 838.

¹¹⁴ See, e.g., *infra* notes 115 to 154 and accompanying text.

1. United States v. Knights: “Reasonable Suspicion” Required for Probationers

In *Knights*, the United States Supreme Court held that a “reasonable suspicion” standard of criminal activity, rather than the higher standard of probable cause, could justify the search of a probationer's home because the probation system's interests outweighed the probationer's privacy interests.¹¹⁵ The probation system's interests in *Knights* were “rehabilitation” and preventing recidivism.¹¹⁶ The Court found that the probationer's status as a probationer lessened his privacy interests.¹¹⁷ Because of this, the balance tipped in favor of the government.¹¹⁸ However, *Knights* did not decide whether a probationer could be searched without “reasonable suspicion.”¹¹⁹

2. Rise v. Oregon: DNA Search of Inmates Approved, No Suspicion Necessary

In *Rise*, the Ninth Circuit extended the *Knights* logic to allow blood testing of inmates, and eliminated the requirement of “reasonable suspicion.”¹²⁰ The court used a balancing test to approve DNA blood testing for inmates convicted of murder or sexual offenses.¹²¹ The government interests in *Rise* were “preventing recidivism” and maintaining a DNA database to “identif[y] and prosecut[e]” criminals.¹²² Two factors limited the inmates' privacy interests.¹²³ First, the inmates had a reduced expectation of privacy because of their status as convicted felons, as opposed to free persons.¹²⁴ Second, the court found the intrusion too minimal to offend their lessened privacy interests.¹²⁵ Thus, the court disregarded the *Knights* rule and al-

¹¹⁵ United States v. Knights, 534 U.S. 112, 121-22 (2001).

¹¹⁶ *Id.* at 119.

¹¹⁷ *Id.* at 119-20.

¹¹⁸ *Id.* at 121.

¹¹⁹ United States v. Kincade, 345 F.3d 1095, 1102 (9th Cir. 2003).

¹²⁰ Rise v. State of Oregon, 59 F.3d 1556, 1562 (9th Cir. 1995), *cert. denied*, 517 U.S. 1160 (1996).

¹²¹ *Rise*, 59 F.3d at 1561.

¹²² *Id.* at 1562.

¹²³ *Id.* at 1559-62.

¹²⁴ *Id.* at 1560.

¹²⁵ *Id.* at 1559.

lowed DNA searches of convicted incarcerated felons without any level of suspicion of new criminal activity.¹²⁶

3. *Kincade en banc logic: DNA Search of Parolee's Approved*

In *Kincade en banc*, the court held that a parolee's reduced expectation of privacy could subject him to DNA blood testing.¹²⁷ As in *Rise*, the government's interests were defined as preventing recidivism and solving future crimes.¹²⁸ The parolee's interests were determined according to the *Rise* standard of minimal intrusion and lowered expectation of privacy.¹²⁹ Following this analysis, the *Kincade* court found that blood testing did not constitute a major privacy violation because of the minimal intrusion.¹³⁰ Moreover, parolees' expectations of privacy are limited because they are under supervision and subject to strict restrictions while they finish their sentences outside of confinement.¹³¹ Therefore, in *Kincade*, the balance of interests tipped again in favor of the government.¹³²

The progression of caselaw from *Knights* through *Kincade en banc* indicates that where there is diminished expectation of privacy and a balancing test is applied, the government interest will outweigh privacy interests. Given this demonstrated expansion of allowable searches from a lowered threshold of suspicion in *Knights* to simply a reduced expectation of privacy of parolees in *Kincade*, there is potential for further expansion of allowable DNA searches.

B. GOVERNMENT INTERESTS EXPANDING: NOT JUST VIOLENT CRIMINALS

DNA-testing legislation has expanded to include more crimes since its inception. This growth of legislation illustrates the expansion of the government's goals in connection with DNA databases beyond the original goals. The *Kincade* balanc-

¹²⁶ *Id.* at 1562.

¹²⁷ *United States v. Kincade*, 379 F.3d 813, 839 (9th Cir. 2004).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 836.

¹³¹ *Id.* at 834.

¹³² *Id.* at 839.

ing test should be used with this expansion in mind to prevent the erosion of privacy interests.

The original purpose of federal DNA testing was to create a database of offenders who were the “worst of the worst.”¹³³ Murders and rapists were the top priority for DNA testing.¹³⁴ CODIS was created to house identifying information for sex offenders, and persons convicted of “Federal crimes of violence, robbery and burglary.”¹³⁵ The original version of the DNA Act limited the original qualifying crimes accordingly, and included murder, sexual abuse, slavery, kidnapping, robbery, and burglary.¹³⁶ However, the government’s priorities have since grown.

As the *Kincade en banc* dissent discussed, the USA PATRIOT Act expanded the list of qualifying crimes.¹³⁷ This expansion means that certain nonviolent offenders are now subject to DNA testing. While several serious crimes, such as aircraft hijacking were added to the list of qualifying crimes, less serious offenses are now subject to DNA testing.¹³⁸ Some of these qualifying crimes include crimes such as harboring illegal aliens,¹³⁹ egg-product-inspection interference,¹⁴⁰ possession of an unregistered firearm,¹⁴¹ voter-registration coercion,¹⁴² and impeding “enforcement officer” inspections of fishing vessels.¹⁴³ The government’s revision of the list of qualifying crimes to include nonviolent offenses confirms the potential for more re-

¹³³ H.R. Rep. No. 106-900 (I), at 10 (2000).

¹³⁴ *Id.*

¹³⁵ *Id.* at 9.

¹³⁶ 42 U.S.C. § 14135a(d) (2000).

¹³⁷ U.S.A. PATRIOT Act, Pub. L. No. 107-56, § 503, 115 Stat 272, 364 (2001).

¹³⁸ *Id.* See 42 U.S.C. § 14135a(d)(2) (2001) for the DNA Act as amended by the U.S.A. PATRIOT Act. The amendment lists any offense committed under 18 U.S.C. § 2332b(g)(5)(a) (2002), or “Federal crime[s] of terrorism” as offenses that qualify for testing. *Id.* Aircraft hijacking is one such crime. *Id.*; see also 18 U.S.C. § 32 (2005).

¹³⁹ 8 U.S.C. § 1324 (2005), cited in 28 C.F.R. § 28.2 (2004) (current version at 28 C.F.R. § 28.2 (2005)). 28 C.F.R. § 28.2 is the Federal Regulation that lists offenses subject to DNA testing. *Id.* The 2004 version of this regulation listed several crimes subject to DNA testing. *Id.* The current version, as amended in January 2005 now states that any felony qualifies for testing. *Id.*

¹⁴⁰ 21 U.S.C. § 1041(b) (2005), cited in 28 C.F.R. § 28.2 (2004) (current version at 28 C.F.R. § 28.2 (2005)).

¹⁴¹ 26 U.S.C. § 5861(d) (2005), cited in 28 C.F.R. § 28.2 (2004) (current version at 28 C.F.R. § 28.2 (2005)).

¹⁴² 42 U.S.C. § 1973gg-10(1), cited in 28 C.F.R. § 28.2 (2004) (current version at 28 C.F.R. § 28.2 (2005)).

¹⁴³ 16 U.S.C. § 773e(a)(3), cited in 28 C.F.R. § 28.2 (2004) (current version at 28 C.F.R. § 28.2 (2005)).

visions. The DNA database is no longer limited to violent offenders.

Expanding government interests are also evidenced by an October 2004 amendment to the DNA Act that requires DNA testing for all persons convicted of felonies. The “Justice for All Act of 2004” amended the DNA Act’s list of qualifying felonies to “any felony.”¹⁴⁴ This amendment provides funding and authority for law enforcement agencies to collect DNA from any person convicted of a felony.

Further, not all felonies are violent. Generally, a felony is any crime punishable by over a year in prison.¹⁴⁵ For example, *malum prohibitum* property crimes such as embezzlement, false pretenses, or passing bad checks could carry penalties of more than one year in prison, depending on the nature of the crime.¹⁴⁶ History thus suggests that the list of qualifying crimes could continue to grow along with the government’s growing interests in DNA databases.

C. LOWERED PRIVACY INTERESTS AND PRESUMPTION OF GUILT

The DNA Act currently applies to lawfully adjudicated convictions only.¹⁴⁷ However, recent legislation on the federal and state level allows persons not yet convicted to be tested and included in DNA databases.¹⁴⁸

¹⁴⁴ Justice For All Act, Pub. L. No. 108-405, § 203, 118 Stat. 2260, 2270 (2004); see also 28 C.F.R. § 28.2 (2005).

¹⁴⁵ Wayne R. LaFave, *Criminal Law* § 1.6(a), 30 (3d ed. 2000).

¹⁴⁶ Theft, for example, carries a base level of 7, which the United States Sentencing Guidelines suggest 0-6 years imprisonment. See United States Sentencing Commission, *Guidelines Manual* §§ 2B1.1(a)(1), 5A tbl. (2004), available at <http://www.ussc.gov/2004guid/gl2004.pdf> (last visited Feb. 14, 2005). *Malum prohibitum* is defined as “[a]n act that is crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.” BLACK’S LAW DICTIONARY 435 (2d Pocket ed. 2001).

¹⁴⁷ See 42 U.S.C. § 14135(a)(a)(1) (2004) (stating that the DNA Act applies to persons who “[are], or ha[ve] been, convicted of a qualifying Federal offense”) (*emphasis added*).

¹⁴⁸ See, e.g., California’s Proposition 69, where the voters approved DNA testing for some arrestees. 2004 Cal. Legis. Serv. Prop. 69 § 3 (West) (amending Cal. Penal Code § 296 (West 2004)); see also Easy Voter Guide re: Proposition 69, available at <http://www.easyvoter.org/california/nextelection/2004-general/3-69.html> (last visited Feb. 14, 2005).

1. *Equal Justice for Some?*

The Equal Justice for All Act, which amended DNA Act's qualifying crime list to include all felonies, changed the types of allowable state DNA profiles in CODIS.¹⁴⁹ States may now include DNA samples of persons indicted in state court proceedings in the federal DNA database.¹⁵⁰ While indictees' cases are, by definition, not yet lawfully adjudicated, there could be a temptation to treat indictees as having a lowered expectation of privacy.¹⁵¹ This could thus subject persons not convicted of crimes to the losing side of the balancing test.

2. *California Plans to DNA Test Arrestees and Juveniles*

California's Proposition 69, which was approved by voters in November of 2004, requires DNA testing of all felony arrestees as well as juvenile offenders in California.¹⁵² While those persons not convicted or found not guilty of any crime may request expungement of their DNA record, the process requires applying to the trial court for a discretionary expungement – most likely people will not bother with it.¹⁵³

The *Kincade* dissent feared that the balancing test was too weak a standard.¹⁵⁴ Only time will tell if, like the push for testing at indictment and arrest, persons not associated with criminal behavior will be singled out for testing. Given the expansion of government interests over time, the testing of free citizens may not be too far-fetched.

IV. CONCLUSION: THE PARADE OF HORRIBLES?

With this push for DNA database expansion, every citizen's privacy rights are in danger. Under a broad application of the *Kincade* balancing test, it appears that where a dimin-

¹⁴⁹ Justice For All Act, Pub. L. No. 108-405, § 203, 118 Stat. 2260, 2270 (2004).

¹⁵⁰ *Id.*

¹⁵¹ An indictee is "[a] person who has been . . . officially charged with a crime." BLACK'S LAW DICTIONARY 344 (2d Pocket ed. 2001).

¹⁵² See 2004 Cal. Legis. Serv. Prop. 69 § 3 (West) (amending Cal. Penal Code § 296 (West 2004)); cf. Easy Voter Guide, *supra* note 148.

¹⁵³ See 2004 Cal. Legis. Serv. Prop. 69 § 9 (West) (amending Cal. Penal Code § 299 (West 2004)); cf. Easy Voter Guide, *supra* note 148.

¹⁵⁴ United States v. Kincade, 379 F.3d 813, 844 (9th Cir. 2004) (Reinhardt, J., dissenting).

ished expectation of privacy exists, it will be outweighed by the government's interest in taking and storing one's DNA. As the dissent fears, this diminished expectation of privacy could affect more than just parolees. A balancing test is too simple, amorphous, and subjective a standard to allow it to be applied without care. The plurality assured us in *Kincade* that courts would recognize when the "parade of horrors" began.¹⁵⁵ But while our rights slowly erode, we may not even notice. For some, like people on parole for relatively *de minimus* offenses who have a more serious felony in their distant past, it has already begun.

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¹⁵⁵ *Id.* at 838.

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