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SCANNED  
DATE: 11/14/05  
BY: M.S.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES )  
 )  
 v. )  
 )  
 LEO A. WEIKERT, Jr. )  
 )

Cr. No

99-10299-REK

**MEMORANDUM OF LAW IN SUPPORT OF MR. WEIKERT'S  
MOTION FOR AN ORDER ENJOINING THE GOVERNMENT  
FROM OBTAINING HIS DNA**

The United States Probation Office, without a warrant, probable cause, or individualized suspicion of any kind, has ordered that defendant, Leo Weikert ("Mr. Weikert"), a non-violent, federal supervised releasee, submit a blood sample for DNA extraction as a condition of his release pursuant to the DNA Backlog Elimination Act of 2000 and its subsequent 2004 amendments. Mr. Weikert now seeks a preliminary injunction prohibiting the government from obtaining his DNA information while the parties litigate the constitutionality of the Act.

**RELEVANT BACKGROUND**

In December 2000, Congress passed the DNA Backlog Elimination Act of 2000 ("DNA Act"), which originally required persons who had committed "qualifying offenses" (mostly of violent and/or sexual felonies) to submit their DNA for entry into the Combined DNA Index System Database ("CODIS"). In the fall of 2004, Congress expanded the list of "qualifying offenses" to include any felony. 42 U.S.C. §14135a(d)(1) (2004). The Act now requires that all persons in federal custody who have been convicted of any felony submit to a blood draw for DNA extraction and for entry

into the CODIS. A person serving a term of supervised release is considered to be in federal custody for purposes of the DNA Act.

The Act's purpose is law enforcement. The blood is drawn at the behest and control of the Probation Office or the Director of the Bureau of Prisons and then sent directly to the FBI. The FBI analyses the DNA and inputs it into the CODIS. The purpose of the CODIS database is to solve crimes. See 146 Congressional Record H8572-01, H8575-6. The CODIS database is designed to match DNA contributors to DNA from crime scenes. Id. The Probation Office is charged with collecting a DNA sample from each individual guilty of a "qualifying offense." 42 U.S.C. §14135a(d). The Probation Office may use "reasonable means to detain, restrain, and collect samples from a person who refuses to give a sample voluntarily." 42 U.S.C. 14135a(a)(4)(A).

The Probation Office has notified Mr. Weikert of its intent to seek his DNA through a blood sample. Mr. Weikert is currently serving a term of supervised release. In 1990, Mr. Weikert pleaded guilty to one count of Conspiracy to Possess Cocaine with Intent To Distribute, a non-violent offense. Mr. Weikert served his prison sentence and has been on supervised release for almost one year. Mr. Weikert's supervised release is scheduled to terminate in 2009. Submitting a DNA sample was not a condition of his supervised release order.

Mr. Weikert's scheduled blood draw has been temporarily re-scheduled while he seeks clarification of the constitutionality of this Act. He has been, is presently, and will continue to be, in full compliance with his probation officer's requirements. If, however, this Court does not grant Mr. Weikert's requested injunction, he will be forced to provide his blood for DNA extraction or else be found to have violated the terms of his release.

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## ARGUMENT

The suspicionless, warrantless forced extraction of Mr. Weikert's blood and the DNA from that blood constitutes an impermissible intrusion into his privacy interests in his body, physiology, chemical make-up, and genetic information in violation of the Fourth Amendment. For the following reasons, Mr. Weikert respectfully requests that the government be enjoined from obtaining this information.<sup>1</sup>

**A. Mr. Weickert Is Likely to Succeed on the Merits of His Claim that the DNA Act Violates the Fourth Amendment.**

There are four factors to be weighed to determine if a preliminary injunction should issue:

- (1) likelihood of success on the merits; (2) the potential for irreparable harm [to the movant] if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the non-movant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest, Wine and Spirit Retailers, Inc. v. Rhode Island, 418 F.3d 36, 46 (1<sup>st</sup> Cir. 2005),

Oftentimes, however, if the movant can satisfy the first prong, the "remaining factors become matters of idle curiosity." New Comm Wireless Services, Inc. v. SprintCom, Inc. 287 F.3d 1, 9 (1<sup>st</sup> Circuit 2002).

Here, Mr. Weikert is likely to succeed on the merits of his claim that the DNA Act requires searches without a warrant, probable cause, or individualized suspicion, in violation of the Fourth Amendment.

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<sup>1</sup> The First Circuit has yet to address the constitutionality of the DNA Act as it applies to supervised releasees. Other circuits have upheld the DNA Act, although on varying grounds and rationales. See United States v. Sczubelek, 402 F.3d 175 (3<sup>rd</sup> Circuit 2005) (collecting and discussing cases).

1. Because the DNA Act requires both blood draws and DNA analysis without a warrant, probable cause, or individualized suspicion, it is unreasonable under the Fourth Amendment.

The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .” A blood sample constitutes a search under the Fourth Amendment. Skinner v. Railway Labor Executives’ Association, 489 U.S. 602 (1989). In addition, any “chemical analysis of the sample” necessary “to obtain physiological data” constitutes an additional search under the Fourth Amendment. Id. at 616.

The Supreme Court has consistently and clearly stated that all searches must be “reasonable.” City of Indianapolis v. Edmond, 531 U.S. 32, 45 (2000). The reasonableness of a search is determined by a fact-specific inquiry, U.S. v. Montoya de Hernandez, 473 U.S. 531, 537 (1985), which balances “an individual’s privacy” against “the degree to which the search is needed for the promotion of legitimate governmental interests.” US v. Knights, 534 U.S. 112, 119 (2001). The Supreme Court typically “strike[s] this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment.” Skinner, 489 U.S. at 618. Thus, as a general rule, searches conducted without warrants supported by probable cause are unreasonable and unconstitutional. U.S. v. Place, 462 U.S. 696 (1983); Katz v. U.S., 389 U.S. 347 (1967).

Even searches “that may lawfully be conducted without a warrant” must usually be based on probable cause. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985). And in those restrictive circumstances in which “reasonable suspicion” has been deemed constitutionally “reasonable” under the Fourth Amendment, there is still the requirement

that such suspicion be individualized. *Id.* at 340-341. For example, in 2001 the Supreme Court upheld a search of a probationer's home when it was based on reasonable and individualized suspicion as well as established conditions of probation. United States v. Knights, 534 U.S. 112 (2001).

Here the DNA Act requires both a blood sample and a DNA sample from qualifying individuals, like Mr. Weikert, without a warrant, without probable cause, and without any individualized suspicion. Mr. Weikert is not in prison<sup>2</sup>. Mr. Weikert is not a parolee<sup>3</sup>. Mr. Weikert is an individual on federal supervised release and maintains an expectation of privacy. This expectation extends to the integrity of his body. "Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required when intrusions into the human body are concerned." . . . Schmerber v. California, 384 U.S. 757, 770 (1965). Indeed, because of "[t]he interests in human dignity and privacy which the Fourth Amendment protects," the law disallows "any such [bodily] intrusions on the mere chance that desired evidence might be obtained." *Id.* Where, like here, there is no warrant, no emergency, and no suspicion, individualized or otherwise, of the person being searched for law enforcement purposes,

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<sup>2</sup> But even if Mr. Weikert was "a prisoner, who has no legitimate expectation of privacy in his cell, Hudson v. Palmer, 468 U.S. 517, 526 (1984)," he would still "retain[] an expectation of privacy in his body unless there is reasonable cause to violate his bodily integrity...." US. V. Kincade, 345 F.3d 1095, 1102, footnote 20 (2003) (emphasis added). Performing an intrusive search on a prisoner's body requires some level of suspicion, but here the search is wholly suspicionless.

<sup>3</sup> After release from prison "[t]he expectation of privacy of a parolee . . . is even greater." Kincade 1095 at 1102, footnote 20. Mr. Weikert's expectation of privacy as a supervised releasee is thus even greater than that of parolees. Unlike individuals on supervised release, parolees did not serve out their full sentence and so the state has greater interests in monitoring them.

the search is clearly being conducted “on the mere chance that evidence might be obtained.” *Id.* Thus, the DNA Act’s requirement of a blood draw cannot stand.

In addition to his reasonable expectation of privacy in the integrity of his body, Mr. Weikert possesses a reasonable expectation of privacy in his blood and DNA. This material contains the most intimate physiological information about Mr. Weikert, and his child, that anyone may ever know. In order to obtain Mr. Weikert’s DNA information, the blood drawn pursuant to the first intrusion must be further processed by the FBI in order to have the DNA extracted. It is only by using highly specialized equipment and methods, such as short tandem repeats (STR) and polymerase chain reactions (PCR), that anything of meaning can be deduced from the blood, including Mr. Weikert’s DNA. Taking actions that expose concealed portions of an item produce new invasions of privacy and thus constitute new searches under the Fourth Amendment. See Arizona v. Hicks, 480 U.S. 321, 324 (1987); see also Kyllo v. United States, 533 U.S. 27 (2001) (using equipment designed to enhance sensory perception is a search under the Fourth Amendment).

In contrast to the serious privacy interests at issue here, the governmental interest in obtaining Mr. Weikert’s blood and DNA is no different from its general interest in investigating crime. In fact, the exclusive purpose of the DNA collection for CODIS is law enforcement. See 146 Congressional Record H8572-01, H8575-6. To assuage Congress’ doubts about other possible uses for the DNA information collected under the DNA Act, “the Department of Justice assured the House Committee that ‘existing legal rules for the DNA identification systems generally ensure that DNA samples and indexed

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information will be used *solely for law enforcement identification purposes.*” Kincade (quoting DNA Act House Report, at 8-11, 23-27, 32-36 (2000)) (emphasis in original).

Given the privacy interests at stake on the one hand, and the simple governmental interest in law enforcement on the other, the searches required by the DNA Act are unreasonable. Even if it were reasonable to permit the government to avoid the requirements of a warrant and probable cause, “[t]he Supreme Court has never struck the Fourth Amendment balance in favor of a law enforcement intrusion that was not based on some level of individualized suspicion.” United States v. Sczubelek, 402 F.3d 175 (3<sup>rd</sup> Cir. 2005). Indeed, all of the searches authorized in the cases cited herein were advanced and carried out with, at the least, a minimum level of individualized suspicion. Additionally, the searches served to secure possibly evanescent evidence. Here, there is no individualized suspicion and the interests served are classic law enforcement needs to collect information that is neither changeable nor evanescent. Mr. Weikert may have a diminished expectation of privacy while on supervised release, but no case law exists for the proposition that he has been stripped of the Fourth Amendment’s protections altogether.

Nor can the searches required by the DNA Act be justified as a means of properly identifying individuals. Obtaining DNA is not like obtaining a fingerprint. Among other distinctions, there is a fundamental difference in the level of intrusion necessary to conduct an internal as opposed to external search of a person’s body. The further a search intrudes upon an area considered fundamentally private such as a person’s body, the greater the governmental need must be to compel such an intrusion. Silverman v. United States, 365 U.S. 505 (1961). Thus, although all searches raise dignitary issues, a

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search under the skin, into the body, and then into the blood, is an intrusion of much greater magnitude than fingerprinting. Moreover, even if the level of intrusion were similar, the Fourth Amendment prohibits the government from obtaining even fingerprints for criminal investigation purposes without a warrant or probable cause. Hayes v. Florida, 470 U.S. 811, 814 (1985).

Perhaps most disturbingly, forcing Mr. Weikert to provide his DNA to the government will result in intrusions not only on his privacy rights, but on his daughter's as well. "[B]ecause DNA characteristics are transmitted intergenerationally, it is quite possible to identify a person who is a relative of the person contributing the DNA sample." Kincade at footnote 7 (quoting from National Committee for the Future of DNA Evidence., National Institute of Justice, U.S. Department of Justice, The Future of Forensic DNA Testing, November 2000) (hereinafter, "Future of DNA Evidence"). Through the extraction of Mr. Weikert's DNA, the government will possess genetic information about Mr. Weikert's daughter. Mr. Weikert's daughter has an expectation of privacy in her DNA equivalent to any other person's expectation of privacy in their DNA. Society is willing to recognize an almost sacrosanct quality to individuals' DNA information. Obtaining her genetic information pursuant to a warrantless search of her genetic material through her father's without the least bit of individualized suspicion trades constitutional protections for constitutional exceptions. Mr. Weikert's daughter does not have a diminished expectation of privacy. She should be able to maintain the sanctity of her own biological, physiological and possibly medical information, all of which her father's DNA may offer up.

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Although the government may contend that the genetic information gathered for CODIS purposes is from so-called “junk DNA” sites, recent studies have shown, unsurprisingly, that the gathered DNA may in fact have coding properties. The Unseen Genome: Gems Among the Junk, Scientific American, November 2003. Put simply, the genetic information the FBI is gathering, marking, and storing is supposedly unimportant. Thus far our capacity to gather copious genetic information has far outstripped our capacity to understand it, as is the case with many new technologies. Chakrabarty v. United States, 477 U. S. 303 (1980).

A search occasioned by the procurement of another individual’s DNA cannot be countenanced constitutionally by stacking successive exceptions to the 4<sup>th</sup> amendment on top of one another. Indeed, the DNA Act compels a progressive degradation of individuals’ privacy rights by not requiring the government to simultaneously increase its rationale for the search as the search infringes and intrudes on socially accepted areas of heightened privacy rights, such as physical intrusions into the body and DNA. Where, on one side of the equation there is an individual who is not suspected in any crime, who has been dutiful on supervised release, who maintains a reasonable expectation of privacy in his genetic material, and who has not been served with a warrant (not to mention his child, who has a reasonable expectation of privacy in her own genetic information), the government cannot prevail.

2. Because the DNA Act serves only law enforcement purposes, it cannot be upheld under the “special needs” exemption.

The special needs exemption to the warrant requirement cannot save the DNA Act. That exception was first fully articulated in Griffin v. Wisconsin. 438 U.S. 868

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(1987)<sup>4</sup>. In Griffin the Court upheld a warrantless search of a probationer's home in part because there were special needs sufficiently removed from law enforcement purposes to justify entry and search. The Court also found that the search in Griffin was based on reasonable suspicion and recognized the important need to preserve possibly evanescent evidence. Id.

Two years later, in Skinner, the Court upheld a search consisting of a blood draw, stressing that the facts of the case presented "special needs beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." Skinner at 620. Skinner involved authorization for the government to obtain blood without a warrant from certain federal employees who held sensitive and discrete safety positions immediately following accidents. Id. at 621. The Court reasoned that on balance where there was reasonable suspicion, the information sought was potentially evanescent, and the search results would not be turned over to law enforcement without consent, the search met the "special needs" exception. Id. at 620-624.

The Skinner Court cautioned that the special needs exception was for use in "limited circumstances" where "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion. . . ." Id. at 624. Such a circumstance was found to exist in Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990), where, applying the totality of the circumstances

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<sup>4</sup> "Special needs" originated in a Justice Blackmun concurrence in New Jersey v. T.L.O., 469 U.S. 325, 355 (1985). There the Court upheld a search based on less than probable cause (but more than generalized suspicion) of a high school student on school grounds, by school personnel, in order to gather information for use by non-law enforcement personnel.

test, the Court upheld highway sobriety checkpoints specifically because they served other immediate and legitimate state interests beyond simply law enforcement.

Since Skinner, the Supreme Court has been careful to ensure that the special needs exception does not swallow the rule. In 1997, the Court struck down a Georgia law requiring candidates for elected public office to submit to urine tests. Chandler v. Miller, 520 U.S. 305 (1997). Georgia argued that its law was constitutional based on a special need beyond law enforcement in having drug free elected officials. After the Eleventh Circuit upheld the law, the Supreme Court rejected the special needs argument and struck down the law as violative of the Fourth Amendment, reiterating the need for suspicion and a warrant before performing a search. Id.

Again, in 2000 and 2001, the Supreme Court struck down two programmatic search regimes despite the assertion of special needs beyond normal law enforcement. City of Indianapolis v. Edmonds, 531 U.S. 32 (2000); Ferguson v. City of Charleston, 532 U.S. 67 (2001). In Edmonds, Indianapolis established road checkpoints to interdict illegal drug transportation. Although the stop at issue lasted for only two to three minutes while officers ran the motorist's information and a narcotics dog circled the car, there was no individualized suspicion and the Court refused to uphold the search, finding that there were no special needs other than the regular need for law enforcement. Edmonds, 531 at 34.

Similarly, in Ferguson the Court struck down searches conducted on pregnant mothers in a state hospital whose blood work was turned over to law enforcement. Ferguson, 532 U.S. at 70. The special need asserted by the state was for the health and safety of the unborn, as well as the mothers. The Court recognized this was a very grave

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need but held that the “gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.” Ferguson at 86, quoting Edmonds at 42-43. Instead, the Court stressed the need to ascertain and closely scrutinize the “primary purpose” of the program. Id. at 81. After finding the primary purpose of the hospital program was to “generate evidence for law enforcement purposes” the Court decided the searches did “not fit within the closely guarded category” known as special needs. Id. at 83-84. As Justice Kennedy reiterated in his concurrence, “traditional warrant and probable cause requirements are waived in our previous [special needs] cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes.”

As discussed above, the explicit purpose of the DNA Act is law enforcement. The government’s rationale for the blood draw is “to prevent, solve, and prosecute future crimes, and to complete the CODIS database.” United States v. Kincade, 345 F.3d 1095, 1103 (9<sup>th</sup> Cir. 2003) (*en banc* hearing granted and decision overturned at 379 F.3d 813) . The blood draw is sent directly to the FBI for analysis and entry into the CODIS database. The material is then permanently on file for use by federal, state, and local law enforcement. Thus, unlike the blood draws at issue in Skinner, the DNA Act’s requirements of suspicionless searches are specifically designed for classic law enforcement purposes – the gathering of evidence for use in solving crimes, past, present, and future. As such, the Act cannot withstand constitutional scrutiny based on the special needs doctrine because there are no “special needs” for this information.

**B. Mr. Weikert Satisfies the Other Three Requirements For the Injunction As Well.**

In addition to demonstrating that he is likely to succeed on the merits of his claim, Mr. Weikert satisfies the other three requirements for obtaining a preliminary injunction as well. He will be irreparably harmed if his motion is denied, and the balance of relevant impositions favors issuing the injunction, as does the public interest.

1. Mr. Weikert (and His Daughter) Will Suffer Irreparable Harm Without the Injunction.

The mere act of an unconstitutional search, especially when visited upon the body itself, is an irreparable harm. “A Fourth Amendment Violation is ‘fully accomplished’ by the illegal search or seizure and no exclusion or administrative proceeding can ‘cure the invasion of the defendant’s rights which he has already suffered. . . .’” Pennsylvania v. Scott, 524 U.S. 357, 362 (1997) (quoting United States v. Leon, 468 U.S. 897, 906 (1984)). This Court will not be able to undo the intrusion into Mr. Weikert’s body if he is forced to submit to the blood draw, nor will it be able to undo the damage to Mr. Weikert’s (and his daughter’s) privacy interests caused by the government’s extraction of his genetic information.

2. The Balance of Relevant Impositions Is Decidedly In Mr. Weikert and His Daughter’s Favor.

No expungement or redaction or removal of information from the CODIS database will “cure” the Constitutional violation. As just noted, the harm is complete when the constitutional failing occurs. Scott, at 362. Nor will it guarantee that the information will not be improperly used again in the future

In 1990 Mr. Weikert pled guilty to one count of Conspiracy to Possess Cocaine with Intent To Distribute. It was a non-violent offense. He has been on supervised release for almost one year. Submitting to a DNA sample was not part of his ordered

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supervised release. Mr. Weikert has reintegrated himself into his community. Requiring him to give up his DNA would be an extreme imposition as it involves not only the physical intrusion of the needle into and under the skin, but then also the releasing of his most private physiological information.

Further, another relevant imposition if the injunction is not granted, is on Mr. Weikert's daughter. Her dignity, privacy, trust, and sense of security will be infringed, if not deracinated. Her genetic information will be possessed by the federal government and she will have been stripped of her privacy without a warrant, without probable cause, or even individual suspicion.

In contrast, the only "imposition" that an injunction will impose on the government will be to require it to develop some suspicion of criminal behavior on the part of an individual before it will be permitted to obtain that individual's blood or DNA. To the extent that could be considered an imposition at all, it is one that the Fourth Amendment requires.

3. There Is No Impact On The Public If The Injunction Is Granted To Mr. Weikert and His Daughter.

Mr. Weikert is on supervised release. He has, and will continue to, abide by all the terms of his supervised release. His crime was a non-violent crime. He has reestablished himself in the community. There would be no negative effect on the public if this injunction were granted. To the contrary, the public's interest in ensuring that our government comports itself within bounds of the Constitution will be furthered by issuing the requested injunction.

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## CONCLUSION

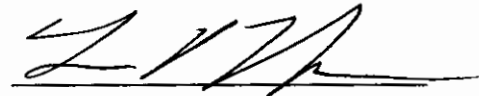
It does not require Orwellian references to see that the wholly elastic standard the government is employing to justify these searches is, in fact, equally applicable to anyone who enters or interacts with the public sphere, at any time, for any purpose. If a person is in public their reasonable expectation of privacy is thereby reduced – minimally perhaps, but reduced nonetheless – and therefore the government may, because the need is legitimate and compelling, take a DNA sample. In an airport, a train terminal, on interstate highways, or national seashores. When obtaining a driver's license, a gun permit, a state health plan. While this Act applies only to "qualifying individuals," the constitutional analysis of the Act is germane to all. By paying obeisance to law enforcement needs over loyalty to the Constitution, we diminish the former and destroy the latter.

The Supreme Court has never in our country's history approved of disregarding the Fourth Amendment solely to justify a regular law enforcement search, especially when balanced against an individual's most prized, intimate, and private possession- the genetic code of his child's body and his own. For all of the foregoing reasons, Mr. Weikert respectfully requests that this Court enjoin the government from obtaining either his blood or his DNA.

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Mr. Weikert respectfully requests a hearing on this matter.

Respectfully submitted,  
**Leo J. Weikert,**  
By His Attorney,



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Date: November 16, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the  
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