

**Criminal Law**—Special Needs Test Applies to Fourth Amendment Analysis of DNA Backlog Elimination Act—*United States v. Weikert*, 421 F. Supp. 2d 259 (D. Mass. 2006)

The DNA Backlog Elimination Act of 2000 (DNA Act) requires convicted felons to submit DNA samples to law enforcement for entry into the Combined DNA Index System Database (CODIS).<sup>1</sup> The Fourth Amendment protects individuals from searches that are deemed unreasonable.<sup>2</sup> In *United States v. Weikert*<sup>3</sup> the United States District Court for the District of Massachusetts considered whether the DNA Act violated the Fourth Amendment.<sup>4</sup> The district court held that the State's lack of special need to obtain DNA precluded extraction of a sample, absent individualized suspicion of criminal conduct.<sup>5</sup>

In December of 2001, Leo Weikert was released from prison after serving a sentence for cocaine trafficking and escaping custody.<sup>6</sup> After his release, the probation office notified Weikert of its intent to take a DNA sample for entry into CODIS.<sup>7</sup> In November of 2005, Weikert requested a preliminary injunction to prevent the probation office from taking his DNA sample, arguing that the DNA Act violated his Fourth Amendment rights by subjecting him to a suspicionless search.<sup>8</sup> The government filed an opposition to Weikert's motion and requested that the court revoke his supervised release.<sup>9</sup>

Whether the DNA Act violated Weikert's Fourth Amendment right to be free from unreasonable searches and seizures was a matter of first impression for the Massachusetts District Court.<sup>10</sup> In applying the appropriate standard for

---

1. See 42 U.S.C. § 14135a (2000) (codifying DNA Act); see also *United States v. Weikert*, 421 F. Supp. 2d 259, 261 (D. Mass. 2006) (outlining purpose of CODIS).

2. U.S. CONST. amend. IV (protecting individuals from unreasonable searches and seizures).

3. 421 F. Supp. 2d 259 (D. Mass. 2006).

4. See *id.* at 261 (framing question before court).

5. See *id.* at 265 (articulating court's holding).

6. *Id.* at 260-61 (D. Mass. 2006) (identifying Weikert's previous convictions). After a Texas Court imprisoned Weikert for cocaine trafficking, he escaped from custody. *Id.* at 261. Weikert was convicted for escaping from the Texas prison and a Massachusetts District Court judge sentenced him to an additional eight months imprisonment and two years of supervised release upon his discharge. *Id.*

7. 421 F. Supp. 2d at 261 (noting probation office's intention to comply with DNA Act). The Federal Bureau of Investigation (FBI) operates CODIS, a database that stores DNA collected from convicted felons. See *id.*

8. *Id.* at 261 (explaining Weikert's challenge to mandatory extraction of DNA sample). The Fourth Amendment of 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 . . . ." U.S. CONST. amend. IV.

9. 421 F. Supp. 2d at 261 (noting government's response to Weikert's motion).

10. See *id.* (acknowledging lack of binding precedent on issue). The court recognized that several federal circuit courts and state courts had already determined the constitutionality of the DNA Act, but that the First Circuit had yet to do so. *Id.*

deciding preliminary injunction motions, the court assessed Weikert's likelihood of success on the merits.<sup>11</sup> Specifically, the court employed a "special needs" analysis to determine whether the DNA Act serves a special need distinct from traditional law enforcement.<sup>12</sup> Reasoning that the mandated DNA extraction from convicted felons does not serve a sufficient special need, the court held that the DNA Act violated Weikert's Fourth Amendment rights.<sup>13</sup>

In response to the increased use of DNA identification technology, Congress passed the DNA Act to help states control the extensive backlog of unanalyzed DNA samples.<sup>14</sup> The DNA Act allows police to take DNA samples from crime scenes and convicted felons and catalogue the samples into CODIS.<sup>15</sup> CODIS is a massive central database that houses DNA profiles from federal, state, and territorial DNA collection programs.<sup>16</sup> Courts have upheld the constitutionality of the DNA Act and similar legislation with the sole exception of *United States v. Weikert*.<sup>17</sup>

---

11. See *id.* (articulating standard courts must apply to motion for preliminary injunction). The party seeking a preliminary injunction must show that

- (i) proponent has a likelihood of success on the merits; (ii) irreparable harm is likely to occur if the injunction is not granted; (iii) the harm likely to occur to the plaintiff in the absence of an injunction outweighs any hardship that would be inflicted on the other party by an injunction; and (iv) the public interest will not be adversely affected by the injunction.

*Id.*

12. See *id.* at 264 (identifying "special needs" test as appropriate standard).

13. 421 F. Supp. 2d at 265 (noting database's purpose to assist in solving crimes and rejecting purpose as insufficient special need).

14. See H.R. REP. NO. 106-900(I), at 7-9 (2000) (articulating purpose, background, and need for legislation); see also GREG W. STEADMAN, SURVEY OF DNA CRIME LABORATORIES, BUREAU OF JUST. STAT. SPECIAL REP., 1998 (Feb. 2000) (pointing out need for federal assistance). The report submitted to Congress estimated that sixty-nine percent of publicly operated forensic crime labs across the country had at least 6,800 unprocessed DNA cases and an additional 287,000 unprocessed convicted offender DNA samples. See STEADMAN, *supra* note 14; see also *Miller v. U.S. Parole Comm'n*, 259 F. Supp. 2d 1166, 1176 (D. Kan. 2003) (explaining purposes of DNA collection include solving crime and lowering recidivism rates).

15. See *United States v. Kincade*, 379 F.3d 813, 819 (9th Cir. 2004) (detailing mechanics of CODIS).

16. See H.R. REP. NO. 106-900(I), at 8 (2000) (describing development of CODIS program between federal and state law enforcement); see also Federal Bureau of Investigation, National DNA Index System, <http://www.fbi.gov/hq/lab/codis/national.htm> (last visited Mar. 22, 2007) (distinguishing offender's index and forensic index). Law enforcement officials use the data stored in CODIS to "(i) match one forensic crime scene sample to another forensic crime scene sample; and (ii) match evidence obtained at the crime scene to a particular offender's profile, thereby allowing the FBI to monitor the criminal activity of known offenders." 421 F. Supp. 2d at 262.

17. See *Nicholas v. Goord*, 430 F.3d 652, 672 (2d Cir. 2005) (upholding New York's DNA statute as applied to prisoners); *United States v. Sczubelek*, 402 F.3d 175, 187 (3d Cir. 2005) (holding DNA Act constitutional as applied to individual on supervised release); *Padgett v. Donald*, 401 F.3d 1273, 1282 (11th Cir. 2005) (affirming Georgia DNA statute applies to prisoners); *United States v. Kincade*, 379 F.3d 813, 840 (9th Cir. 2004) (holding application of DNA Act to individual on supervised release constitutional); *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) (holding state DNA statute as applied to prisoners); *Groceman v. U.S. Dep't of Justice*, 354 F.3d 411, 414 (5th Cir. 2004) (upholding constitutionality of DNA Act as applied to prisoners); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003) (upholding DNA Act as applied to

Circuit courts have applied two distinct tests to determine the constitutionality of the DNA Act: the special needs test and the general Fourth Amendment balancing test, which weighs the interests of the government against those of the individual.<sup>18</sup> The United States Supreme Court has repeatedly applied the special needs test, which is a more stringent standard than the general Fourth Amendment balancing test, to assess the constitutionality of suspicionless searches.<sup>19</sup> The special needs test is a two-part test in which the court first asks whether the statute serves a special need distinct from that of traditional law enforcement; the court then weighs the government's interest against the intrusion on the individual's privacy interest.<sup>20</sup> Three recent Supreme Court decisions resolved the circuit split on whether to apply the special needs test or the general Fourth Amendment balancing test.<sup>21</sup> In *Illinois v. Lidster*,<sup>22</sup> *Ferguson v. City of Charleston*,<sup>23</sup> and *Indianapolis v. Edmond*,<sup>24</sup> the Court asserted that law enforcement cannot engage in suspicionless searches because such searches are an infringement on

---

individual on supervised release); *Boling v. Romer*, 101 F.3d 1336, 1341 (10th Cir. 1996) (upholding Colorado's statute requiring convicted sex offenders to provide DNA samples before release); *Jones v. Murray*, 962 F.2d 302, 311 (4th Cir. 1992) (holding Virginia's pre-DNA Act statute constitutional). Until *Weikert*, no state in the First Circuit, nor the First Circuit itself, had ever heard a case challenging the constitutionality of the DNA Act. 421 F. Supp. 2d at 261.

18. See *New Jersey v. T.L.O.*, 469 U.S. 325, 351-52 (1985) (Blackmun, J., concurring) (outlining special needs test). Justice Blackmun explained that where the public interest was best served by a lesser standard, the Court should depart from its warrant and probable cause requirement. *Id.* at 351. Such a departure would only be applicable in "exceptional circumstances in which special needs, beyond the normal needs of law enforcement, would make the warrant and probable cause requirement impracticable." *Id.*; see also *Nicholas v. Goord*, 430 F.3d 652, 667 (2d Cir. 2005) (applying special needs test instead of general Fourth Amendment balancing test); *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) (employing more stringent special needs test over general Fourth Amendment balancing test); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003) (choosing to apply stricter special need test).

19. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 83 (2001) (applying special needs test to urinalysis program); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-40 (2000) (employing special needs test in analyzing drug trafficking checkpoint program); *Chandler v. Miller*, 520 U.S. 305, 313 (1997) (adopting special needs test in examining Georgia's electoral candidate drug testing statute).

20. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 830 (2002) (requiring fact-specific balancing as second step in special needs test); *Nicholas v. Goord*, 430 F.3d 652, 664 n.22 (2d Cir. 2005) (explaining steps in applying special needs test); *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 231 (2d Cir. 2004) (noting balancing of interests necessary if special need present).

21. See *Illinois v. Lidster*, 540 U.S. 419, 426-27 (2004) (holding checkpoint constitutional because directed towards obtaining information from public); *Ferguson v. City of Charleston*, 532 U.S. 67, 84-86 (2001) (holding urinalysis program unconstitutional because directed towards generating evidence for law enforcement purposes); *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (holding checkpoint program unconstitutional because it served no need beyond traditional law enforcement purposes). The difference between the checkpoints in *Lidster* versus *Edmond* was that the checkpoint in *Lidster* was only for gathering information and not investigating any motorist of a crime. *Illinois v. Lidster*, 540 U.S. 419, 423 (2004). The *Edmond's* checkpoint, however, was for the discovery and confiscation of illegal narcotics. *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000).

22. 540 U.S. 419 (2004).

23. 532 U.S. 67 (2001).

24. 531 U.S. 32 (2000).

the individual's Fourth Amendment rights unless the search serves a special need beyond traditional law enforcement purposes.<sup>25</sup> While the Supreme Court has yet to consider the constitutionality of the DNA Act, the Court's recent decisions have created a framework for applying a special needs test where law enforcement has conducted a suspicionless search.<sup>26</sup>

Courts define the special need for collecting convicts' DNA in several different ways.<sup>27</sup> In distinguishing the Court's holdings in *Edmond* and *Ferguson*, which struck down suspicionless searches for lack of a special need, the Second and Seventh Circuits reasoned that DNA collection itself satisfied a special need because it serves the purpose of retrieving more reliable identification evidence.<sup>28</sup> Thus, not every law enforcement purpose renders the DNA Act unconstitutional so long as the purpose goes beyond traditional law enforcement needs.<sup>29</sup> After finding a special need, courts must weigh the

---

25. See *Illinois v. Lidster*, 540 U.S. 419, 423 (2004) (holding search must serve special need and distinguishing holding in *Edmond*); see also *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (instructing courts applying special needs test to look at immediate objective of search); Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under The Fourth Amendment? What Should (and Will) The Supreme Court Do?*, 34 J.L. MED. & ETHICS 165, 176 (2006) (explaining searches indistinguishable from general interest in crime control are unconstitutional); Christopher Mebane, Note, *Rediscovering the Foundation of the Special Needs Exception to the Fourth Amendment in Ferguson v. City of Charleston*, 40 HOUS. L. REV. 177, 196-97 (2003) (explaining evaluating immediate objective of special needs search protects from abuse of special needs doctrine). But see *Ferguson v. City of Charleston*, 532 U.S. 67, 87-89 (2001) (Kennedy, J., concurring) (stating majority's distinction between immediate and ultimate purpose lacked foundation); *id.* at 98-100 (Scalia, J., dissenting) (criticizing majority's distinction between drug testing policy's immediate and ultimate goal in *Ferguson* decision). See generally Barbara J. Prince, Note, *The Special Needs Exception to the Fourth Amendment and How It Applies to Government Drug Testing of Pregnant Women: The Supreme Court Clarifies Where the Lines Are Drawn in Ferguson v. City of Charleston*, 35 CREIGHTON L. REV. 857 (2002) (examining evolution of special needs doctrine and how *Ferguson* departs from precedent).

26. See *Illinois v. Lidster*, 540 U.S. 419, 423 (2004) (noting searches without individualized suspicion unconstitutional absent special circumstances); *Ferguson v. City of Charleston*, 532 U.S. 67, 82-84 (2001) (departing from previous special needs precedent by examining immediate purpose rather than policy's ultimate purpose); *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (holding suspicionless search of vehicle, absent special need, violates Fourth Amendment).

27. See *Nicholas v. Goord*, 430 F.3d 652, 667 (2d Cir. 2005) (finding assistance of law enforcement in solving crimes and deterring recidivism as database's primary purpose); *Green v. Berge*, 354 F.3d 675, 677 (7th Cir. 2004) (declaring collection of reliable felon identification evidence as primary purpose of Wisconsin's DNA statute); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003) (explaining desire to build DNA database goes beyond traditional law enforcement need).

28. See *Nicholas v. Goord*, 430 F.3d 652, 668 (2d Cir. 2005) (stating collection of DNA does not determine whether individual engaged in criminal conduct); *Green v. Berge*, 354 F.3d 675, 677 (7th Cir. 2004) (recognizing special need in primary purpose of obtaining reliable proof of felon's identity). *Contra Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (reasoning mandatory drug testing for prosecutorial purposes does not constitute special need); *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (reasoning investigation of whether vehicle's occupants engaging in criminal activity does not constitute special need).

29. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 449-50 (1990) (stating law enforcement purpose falls into special need exception if beyond ordinary law enforcement purpose); see also *Miller v. U.S. Parole Comm'n*, 259 F. Supp. 2d 1166, 1176-77 (D. Kan. 2003) (asserting DNA collection beyond ordinary law enforcement purpose because not used to investigate specific wrongdoing).

convicted felon's expectation of privacy against the public's interest.<sup>30</sup> The convict's privacy interests are an increasing concern given that DNA samples, due to the increase in sophisticated technology, can now reveal more information than ever before.<sup>31</sup>

In *United States v. Weikert*, the court applied the special needs test and held that the DNA Act was unconstitutional when applied to individuals on supervised release.<sup>32</sup> After reviewing the Supreme Court's Fourth Amendment analysis regarding suspicionless searches in *Lidster*, *Ferguson*, and *Edmond*, the district court applied the special needs test and held that a sufficient need—justifying law enforcement's forced extraction of a DNA sample—did not exist.<sup>33</sup> The court reasoned that the government's purpose in collecting DNA samples from convicted felons was to determine whether the searched individual had committed a crime.<sup>34</sup> The court noted that Weikert's privacy interest outweighed the government's interest in whether a special need existed because law enforcement could access sensitive information for improper reasons.<sup>35</sup>

In light of the Supreme Court's application of the special needs test to suspicionless searches, the district court correctly applied the special needs analysis to determine the constitutionality of the DNA Act.<sup>36</sup> The court erred, however, when it applied the Supreme Court's reasoning from *Edmond* and

---

30. Compare *Griffin v. Wisconsin*, 483 U.S. 868, 874-75 (1987) (maintaining individuals on probation or supervised release enjoy only conditional freedom), with *United States v. Sczubelek*, 402 F.3d 175, 184-85 (3d Cir. 2005) (articulating government's compelling interest in collecting DNA identification of convicts outweighs convict's privacy rights).

31. See Maclin, *supra* note 25, at 169 (identifying possible privacy concerns); see also Federal Bureau of Investigation, National DNA Index System, <http://www.fbi.gov/hq/lab/codis/national.htm> (last visited Mar. 22, 2007) (detailing maintenance guidelines); Gilbert J. Villaflor, *Capping The Government's Needle: The Need To Protect Parolee's Fourth Amendment Privacy Interests From Suspicionless DNA Searches in United States v. Kincade*, 38 LOY. L.A. L. REV. 2347, 2363 (2005) (recognizing improper and discriminatory use of genetic information as serious issue in workplace). But see *Nicholas v. Goord*, 430 F.3d 652, 670 (2d Cir. 2005) (arguing privacy concerns do not outweigh government's strong interests in public safety).

32. 421 F. Supp. 2d at 266-71 (setting forth special needs test standard and holding).

33. *Id.* at 263 (stating *Edmond*, *Ferguson*, and *Lidster* decisions led court to apply special needs test); *id.* at 265 (articulating court's holding). The district court justified its rejection of the government's special needs argument by extending the holdings of *Edmond*, *Ferguson*, and *Lidster* to the facts. *Id.*

34. *Id.* at 265 (rejecting government's argument that creation of database justified DNA Act). Senior District Court Judge Robert Keeton criticized *Nicholas v. Goord*, stating that the Second Circuit incorrectly characterized the government's purpose by finding a special need did exist. *Id.* at 265.

35. *Id.* at 270 (holding DNA Act violates Fourth Amendment regardless of special need status). The court was motivated by recent studies that suggest "junk DNA" does, in fact, contain genetic information. *Id.* "Junk DNA" is non-genic stretches of DNA not presently recognized as being responsible for trait coding. *Id.* The fact that DNA information is held indefinitely also motivated the court's decision. *Id.*

36. See 421 F. Supp. 2d at 263-65 (justifying adoption of more stringent special needs test); see also *Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (applying special needs standard to checkpoint designed to obtain information about fatal highway accident); *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (employing special needs standard in analyzing urinalysis program designed to generate evidence for law enforcement); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37-42 (2000) (utilizing special needs test to examine checkpoint program aimed at impeding drug trafficking).

*Ferguson* to the facts in *Weikert*.<sup>37</sup> In both *Edmond* and *Ferguson*, the Court held that the suspicionless searches did not serve a special need because law enforcement used interrogation and threats of prosecution for the purpose of general crime control.<sup>38</sup> Unlike the plaintiffs in *Edmond* and *Ferguson*, *Weikert* was not under interrogation or investigation for any specific crime, and therefore his sample was not sought for a prosecutorial purpose.<sup>39</sup> The extraction of a DNA sample is more analogous to the suspicionless search in *Lidster*, where the Court upheld the search because it was designed to retrieve information from the public, not to prosecute a crime.<sup>40</sup>

The primary purpose of the DNA Act is to collect reliable identification information.<sup>41</sup> The collection and creation of a federal DNA database goes beyond the needs of traditional law enforcement because law enforcement does

---

37. See *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (explaining case did not fall into special needs category because program threatened arrest and prosecution); *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (limiting holding to where suspicionless searches pursue general crime control).

38. See *Ferguson v. City of Charleston*, 532 U.S. 67, 82-84 (2001) (reasoning threats of prosecution and law enforcement involvement as rationale for finding no special need); *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000) (refusing to sanction checkpoint because improper to interrogate vehicle's occupants without individualized suspicion); see also *Prince*, *supra* note 25, at 910 (concluding immediate objective test critical in determining whether law enforcement involvement justifies special need).

39. See *Nicholas v. Goord*, 430 F.3d 652, 668-69 (2d Cir. 2005) (noting samples may assist law enforcement but alone do not provide evidence of criminal wrongdoing); *Green v. Berge*, 354 F.3d 675, 678 (7th Cir. 2004) (taking DNA samples from inmates for identification purposes does not constitute investigation of specific crime); see also *Mebane*, *supra* note 25, at 197-98 (stating Justice Kennedy erroneously applied immediate objective test at each stage of special needs analysis). Adoption of the immediate objective test in special needs search context, rather than examining the policy's ultimate objective that will always serve a greater societal purpose, serves to prevent courts from circumventing the foundational question of whether the suspicionless search has a law-enforcement related purpose. *Id.* at 196-98. Without examining the immediate objective, suspicionless searches could be conducted under the guise of a special needs exception, but have a general law-enforcement purpose. The Second Circuit in *Goord* read *Edmond* and *Ferguson* to require suspicionless searches serve an immediate objective distinct from general law enforcement. *Nicholas v. Goord*, 430 F.3d 652, 663 (2d Cir. 2005). The Seventh Circuit in *Green* also acknowledged the need to make a distinction between the primary and ultimate purpose to determine whether a special needs exception is justified. *Green v. Berge*, 354 F.3d 675, 678-80 (7th Cir. 2004). But see *Ferguson v. City of Charleston*, 532 U.S. 67, 97-98 (2001) (Kennedy, J., concurring) (refuting Court's distinction between immediate objective and ultimate goal). Kennedy argues that, historically, special needs cases have turned on the policy's ultimate goals, not the immediate purpose of gathering evidence. *Id.* at 87. Kennedy observes that the "immediate purpose of a search policy will [will almost] always be to obtain evidence." *Id.* While this statement is true, the majority in *Ferguson* noted that in previous special needs cases the Court has never upheld the collection of evidence for criminal law enforcement purposes. *Id.* at 83.

40. See *Illinois v. Lidster*, 540 U.S. 419, 427-28 (2004) (holding checkpoint constitutional because directed towards obtaining information from public). In *Lidster*, the stop's primary purpose was not to determine whether a vehicle's occupants were committing a crime, but to garner information regarding an accident. *Id.* at 423. While the Court acknowledged that the checkpoint had a law enforcement objective—to elicit information to apprehend a hit-and-run driver—it stated that not "every law enforcement objective" would violate the Fourth Amendment. *Id.* at 423-24.

41. See *Nicholas v. Goord*, 430 F.3d 652, 668 (2d Cir. 2005) (identifying primary purpose as creating DNA database for identification of felons); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003) (holding creation of DNA database goes beyond traditional law enforcement need). *Contra* 421 F. Supp. 2d at 265 (finding primary purpose is to solve crimes).

not employ the database to investigate specific crimes; rather they use it as a more reliable mechanism to accurately identify convicted felons.<sup>42</sup> The DNA Act departs from traditional law enforcement because it operates proactively to assist in solving crimes that have either yet to occur or have yet to undergo active investigation.<sup>43</sup> In *United States v. Weikert*, the district court ignored the DNA Act's immediate objective of obtaining reliable proof of felons' identities and mistakenly looked solely at the DNA Act's ultimate objective of solving crimes.<sup>44</sup>

Finally, the *Weikert* court erred in finding that the felon's privacy interest outweighed the public's interest in taking his DNA sample once he has committed a felony.<sup>45</sup> Weikert's status as a parolee diminished any privacy interest he enjoyed.<sup>46</sup> The privacy concerns that the district court hypothesized have not come to fruition, and if there are concerns that law enforcement will use DNA for improper purposes, the district court failed to articulate why the courts would be unable to address such an abuse of power.<sup>47</sup> Curiously, the *Weikert* court did not criticize the safeguards of the CODIS program as inadequate.<sup>48</sup>

In *Weikert*, the district court considered whether the DNA Act, as applied to

---

42. See *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (stating law enforcement purpose falls into special need exception if beyond ordinary law enforcement needs); *Nicholas v. Goord*, 430 F.3d 652, 668 (2d Cir. 2005) (finding DNA indexing distinct from traditional law enforcement purposes); *Green v. Berge*, 354 F.3d 675, 678 (7th Cir. 2004) (distinguishing *Edmond* from court's holding because Wisconsin DNA law does not search for "evidence"); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003) (explaining desire to build DNA database goes beyond traditional law enforcement needs).

43. *Miller v. U.S. Parole Comm'n*, 259 F. Supp. 2d 1166, 1176-77 (D. Kan. 2003) (arguing DNA collection goes beyond ordinary law enforcement purposes because not investigating specific wrongdoing).

44. See *Ferguson v. City of Charleston*, 532 U.S. 67, 83-84 (2001) (urging courts applying special needs test to look at immediate objective instead of ultimate purpose); *Miller v. U.S. Parole Comm'n*, 259 F. Supp. 2d 1166, 1176 (D. Kan. 2003) (identifying ultimate goals of DNA Act as solving crime and lowering rate of recidivism).

45. See *United States v. Sczubelek*, 402 F.3d 175, 184-86 (3d Cir. 2005) (articulating government's interest in receiving DNA samples from felons); *United States v. Kincade*, 379 F.3d 813, 838-39 (9th Cir. 2004) (highlighting society's overwhelming interest in identifying convicts and ensuring parolees comply with release requirements). Weikert's DNA provides Massachusetts with a more reliable means to accurately identify Weikert, and the sample is also a potential mechanism which may exculpate him from crimes in the future. 421 F. Supp. 2d at 266-67. Further, individuals on supervised release cannot expect to keep information regarding their physical identity from government records. *Id.* at 267.

46. See *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1985) (stating individuals on probation or supervised release enjoy only conditional freedom); *Padgett v. Donald*, 401 F.3d 1273, 1279 (11th Cir. 2005) (asserting probationers do not enjoy absolute liberty similar to law-abiding citizens).

47. See *United States v. Kincade*, 379 F.3d 813, 837 (9th Cir. 2004) (emphasizing confidence in courts to adequately handle unregulated disclosures of CODIS material). *But see* *Maclin*, *supra* note 25, at 169-70 (identifying possible privacy concerns in cataloguing convicts' DNA); *Villaflor*, *supra* note 31, at 2363 (acknowledging mishandling of genetic information could bring severe ramifications).

48. See 421 F. Supp. 2d at 266-68 (failing to state why courts would be unable to handle misappropriation of genetic information); Federal Bureau of Investigation, National DNA Index System, <http://www.fbi.gov/hq/lab/codis/national.htm> (last visited Mar. 22, 2007) (providing CODIS maintenance guidelines).

supervised parolees, was constitutional. The court held that the DNA Act violated the Fourth Amendment rights of parolees on supervised release because no special need existed beyond traditional law enforcement. In rendering its decision, the court failed to recognize the statute's immediate objective to determine whether a special need existed, and gave too much weight to privacy concerns that have never materialized. The court's holding gives priority to a convict's expectation of privacy over public safety and will ultimately hamper law enforcement officials from keeping our streets safe from violent offenders.

*Patrick Driscoll*