

United States District Court,  
S.D. New York.

Jason B. Nicholas, John Lewis, Philip Rabenbauer, Frank Solimine, Robert Pacini, Chester Flanders, Bennie Bates, Lymond Stephenson, Alvaro Sanchez, Luis Mejia, Cecil Barrow, and Dominic Deruggiero, Plaintiffs,

v.

Glenn S. Goord, Commissioner, New York State Department of Correctional Services; Katherine Lapp, Director, New York State Division of Criminal Justice Services; Medilabs, Inc.; and Jessica Walsh, Medical Technician, Defendants.

No. 01Civ.7891(RCC)(GWG).

Feb. 6, 2003.

*REPORT AND RECOMMENDATION*

Gorenstein, Magistrate J.

The plaintiffs in this matter--all convicted felons in New York State prisons--have brought this suit challenging the constitutionality of a New York State statute requiring that a sample of Deoxyribonucleic Acid ("DNA") be taken from each of them and retained as part of a DNA index or database. The plaintiffs assert that the Fourth Amendment bars New York's DNA indexing program. Their suit, brought under 42 U.S.C. § 1983, names as defendants Glenn Goord, Commissioner of the New York State Department of Correctional Services; and Katherine Lapp, Director of the New York State Division of Criminal Justice Services (the "State defendants"). It also names as defendants the company that performs the testing for the DNA index and an employee of that company who drew blood from certain of the plaintiffs, Medilabs, Inc. and Jessica Walsh (hereinafter, "the private defendants").

The plaintiffs have moved for a preliminary injunction. Both sets of defendants have cross-moved for judgment dismissing the complaint. For the reasons stated below, the defendants' motions should be granted and the case dismissed.

*I. BACKGROUND*

*A. Facts*

No two individuals (except for identical twins) have the same DNA. *See generally* Thomas M. Fleming, Annotation, *Admissibility of DNA Identification Evidence*, 84 A.L.R.4th 313 at § 2[b] (1991). In addition, an individual's DNA is the same in every nucleated cell in the body and remains the same throughout life. *Id.* Thus, DNA makes possible the identification of a specific person "to the practical exclusion of all others"

through an analysis of the DNA contained in a cell from that person's body. *Id.*

All fifty states have enacted some form of statute requiring the maintenance of a DNA databank or index, *see* Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 Wake Forest L.Rev. 767, 771 n. 12 (1999) (citing statutes), as has the federal government. 42 U.S.C. § § 14131-35. In general, these statutes mandate the extraction of DNA from blood or other tissue samples taken from individuals convicted of felonies in order to maintain information about these individuals' DNA in the databank. In 1994, the New York State Legislature enacted the first version of its statute, which required that individuals convicted of certain assault, homicide, rape and other offenses after January 1, 1996, must provide blood samples to allow for the extraction of the DNA information. 1994 N.Y. Laws, ch. 737, § § 1, 3. The statute also provided that DNA records contained in the index could be released only in limited situations, mandated the expungement of the record if the conviction was reversed and established penalties for unauthorized disclosure of information contained in the records. *Id.*, § 1.

In 1999, the statute was amended in several ways. First, the legislature expanded the list of offenses to include attempted murder, kidnaping, arson, burglary, any violent felony and certain drug and theft offenses. N.Y. Exec. Law § 995(7)(a)-(b). All of these designated offenses are felonies. The statute also increased the penalty for unauthorized disclosure or use of the DNA records. *Id.* § 995-f. Finally, it eliminated the requirement that the DNA be taken through a blood sample. *Id.* § 995-c(3). The new statute was made applicable to any person convicted of a designated offense on or after December 1, 1999. It also applied to persons convicted of some of the offenses (including the offenses for which plaintiffs were convicted) prior to the effective date where the sentence imposed as a result of the conviction had not yet been completed. 1999 N.Y. Laws, ch. 560, § 9.

A newspaper article that plaintiffs have attached to their motion for a preliminary injunction states that "since the law took effect in December 1999, [New York State] has collected 82,000 samples from convicted offenders and registered 53 matches for previously unsolved crimes." Kevin Flynn, *Felon's DNA Evidence Leads To His Arrest in a 1999 Rape*, N.Y. Times, May 15, 2001, at B3 (reproduced in Notice of Motion for a Preliminary Injunction, filed August 23, 2001 ("Motion for Injunction"), Ex. 4).

The plaintiffs in this case are all convicted felons whose convictions place them within the ambit of the New York statute. Complaint, filed August 23, 2001 ("Complaint"), ¶ ¶ 3, 9. With the exception of two plaintiffs, Chester Flanders and Cecil Barrow, each has been convicted of a homicide offense. *Id.*, ¶ 9. Plaintiffs John Lewis, Alvaro Sanchez and Luis Mejia have not yet been required to submit their DNA for inclusion in the index and seek to bar the State from doing so. *Id.* The remaining plaintiffs have each had blood samples taken for inclusion in the index and seek to have the information regarding their DNA expunged. While the plaintiffs do not so allege in their complaint, it is clear from the New York State Department of Correctional Service identification numbers they have provided that each was convicted prior to the 1994 enactment of the statute. Thus the DNA indexing program did not apply to them until the 1999 amendments.

The complaint alleges that the DNA indexing statute violates the plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures. Complaint, ¶¶ 1, 18. The complaint seeks monetary damages as well as declaratory and injunctive relief. *Id.* at 6-7.

### B. *Procedural History*

The complaint was filed *pro se* on August 23, 2001. On January 17, 2002, the private defendants answered and, on the same date, the State defendants moved to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). Plaintiffs' motion for a preliminary injunction was docketed on February 6, 2002, although it bears a file-stamped date of August 23, 2001 (Docket # 15).

After review of the papers, the Court sought the appointment of counsel for the plaintiffs. In response to that request, Alexander A. Reinert, Esq., filed a notice of appearance on May 8, 2002. Following a conference held on June 12, 2002, Mr. Reinert chose not to amend the complaint or the motion for preliminary injunction but instead to rely on the plaintiffs' previously-filed papers. Mr. Reinert filed a memorandum of law opposing the motion to dismiss on June 26, 2002. On July 29, 2002, the private defendants moved for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). In September 2002, Mr. Reinert submitted additional papers opposing the defendants' motions.

### C. *Law Applicable to Motions to Dismiss and for Judgment on the Pleadings*

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is evaluated under the same standard as a motion to dismiss under Rule 12(b)(6). See *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir.) (citing *Ad-Hoc Comm. of Baruch Black and Hispanic Alumni Ass'n v. Bernard M. Baruch College*, 835 F.2d 980, 982 (2d Cir.1987)), *cert. denied*, 513 U.S. 816 (1994). On a motion to dismiss under Fed.R.Civ.P. 12(b)(6), all allegations contained in the complaint are taken as true and all inferences are drawn in the plaintiff's favor. See *Papasan v. Allain*, 478 U.S. 265, 283, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1058 (2d Cir.1993), *cert. denied*, 513 U.S. 822, 115 S.Ct. 86, 130 L.Ed.2d 38 (1994); *Hertz Corp. v. City of New York*, 1 F.3d 121, 125 (2d Cir.1993), *cert. denied*, 510 U.S. 1111 (1994). Dismissal is appropriate only where it appears beyond doubt that a plaintiff can prove no set of facts in support of a claim that would entitle the plaintiff to relief. *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 267 (2d Cir.2002) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). In deciding a Rule 12(b)(6) motion, a court may consider only those matters contained in the complaint, documents attached to the complaint, and matters of which the court may take judicial notice. See *Valmonte v. Bane*, 18 F.3d 992, 998 (2d Cir.1994); *Kramer v. Warner, Inc.*, 937 F.2d 767, 773 (2d Cir.1991); *CIBC Bank and Trust Co. (Cayman) Ltd. v. Banco Cent. do Brasil*, 886 F.Supp. 1105, 1108 (S.D.N.Y.1995).

### D. *Claims under 42 U.S.C. § 1983*

To state a claim under 42 U.S.C. § 1983, a plaintiff "must allege (1) that the conduct complained of was committed by a person acting under color of state law, and (2) that such conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States." Dwyer v. Regan, 777 F.2d 825, 828 (2d Cir.1985), *modified on other grounds*, 793 F.2d 457 (2d Cir.1986); accord Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); Dwares v. City of New York, 985 F.2d 94, 98 (2d Cir.1993). Section 1983 does not in and of itself create any substantive rights; rather the plaintiff must demonstrate a violation of an independent federal constitutional or statutory right. See, e.g., Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). The defendants do not dispute that the complaint alleges they were acting under color of state law. Accordingly, the only issue is whether the plaintiffs have alleged the violation of a constitutional right.

## II. DISCUSSION

### A. Law Governing Fourth Amendment Claims

Plaintiffs have essentially one claim: that their constitutional rights were violated when their "blood and DNA was involuntarily extracted from them and placed in the State's DNA identification index, in the absence of a warrant, probable cause or individualized and reasonable suspicion to believe they committed a crime for which their blood or DNA could be used to prosecute them." Complaint, ¶ 18. Defendants do not contest that the taking of DNA samples from plaintiffs against their will constitutes a search and seizure implicating the Fourth Amendment. See State Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss, dated January 17, 2002 ("State Def. Mem."), at 8; Private Defendants' Memorandum of Law in Support of Defendants' Motion for Judgment on the Pleadings, dated July 26, 2002 ("Private Def. Mem."), at 7. Nor could they. While the drawing of blood has been characterized as "minimally intrusive," see, e.g., Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624-26, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); Winston v. Lee, 470 U.S. 753, 762, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985); Schmerber v. California, 384 U.S. 757, 771, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), "it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." Skinner, 489 U.S. at 616.

To say that a search or seizure has occurred, however, is only the first step in the inquiry for the Constitution "does not proscribe all searches and seizures, but only those that are unreasonable." Id. at 618-619 (citations omitted). In some instances where a search is not made pursuant to a warrant supported by probable cause, the search may nonetheless be found reasonable if it falls within an exception to the warrant requirement and is supported by "some quantum of individualized suspicion." United States v. Martinez-Fuerte, 428 U.S. 543, 560, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). But even individualized suspicion is not always necessary to support a finding that a search or seizure was reasonable. See id. at 560-61; see also Skinner, 489 U.S. at 624

("individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable"); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989) ( "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance").

Obviously, the DNA indexing program at issue here does not rely on individualized suspicion. The case law regarding the standards to be applied in searches that do not involve individualized suspicion, however, has undergone some evolution in recent years. To best understand the current state of the law and its impact on the disposition of this case, we will describe the non- individualized suspicion case law from a historical perspective. We will divide our consideration into a discussion of (1) Supreme Court cases decided prior to the Second Circuit's decision in Roe v. Marcotte, 193 F.3d 72 (2d Cir.1999)--the only Second Circuit case to have considered a DNA indexing statute; (2) lower court cases analyzing DNA indexing statutes, including the Second Circuit's decision in Marcotte; and (3) the Supreme Court's post- Marcotte decisions. We will then analyze the constitutionality of New York's indexing statute.

#### B. *Relevant Supreme Court Case Law Prior to the 1999 Decision in Roe v. Marcotte*

Prior to 1999, the Supreme Court considered a number of governmental programs or regulations that included as a component a search or seizure in the absence of individualized suspicion. In the 1976 case of Martinez-Fuerte, for example, the Court upheld the suspicionless stop of cars at an immigration checkpoint. The Court found that the constitutionality of the seizure there turned on a balancing of the interests involved. See 428 U.S. at 556-564; accord Brown v. Texas, 443 U.S. 47, 50-51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) ("Consideration of the constitutionality of [seizures less intrusive than an arrest] involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.") (suspicionless stop of individual in an alleyway near a "high drug problem area" violated the Fourth Amendment). Subsequently, in Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), the Court "balanced the public interest against the individual's Fourth Amendment interests," id. at 657, to strike down a discretionary, suspicionless stop of a vehicle to conduct a driver's license and vehicle registration check. In dictum, however, the Court indicated that it would have approved a stop that involved the questioning of *all* oncoming traffic, id. at 663--that is, without any discretion on the part of the officer--apparently on the ground that such a stop would serve the State's interest in ensuring that licensing and registration requirements were being observed.

Several years later, a Supreme Court opinion for the first time expressed the concept that, in the cases of a search or seizure without probable cause, a court should conduct a balancing of interests only in those "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." The phrase was first used in Justice Blackmun's concurring opinion in New Jersey v. T.L.O., 469 U.S. 325, 351, 105 S.Ct. 733, 83 L.Ed.2d 720

(1985), in which the Court upheld a search on less than probable cause of a high school student on school grounds. The "special needs" language was subsequently adopted in a majority opinion in Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), in which the Court upheld a suspicionless search of a probationer's home (though one based on a regulation that permitted such searches only where there were "reasonable grounds" to believe the probationer harbored contraband, *id.* at 871). In *Griffin*, the Court reviewed some of its prior case law that permitted searches and seizures in the absence of a warrant or probable cause. *Id.* at 873. It concluded that these cases--upholding work-related searches of employees' desks and "searches pursuant to a regulatory scheme"--fit within an exception to the warrant and probable cause requirement because the "special needs" presented in each rendered such a requirement impractical. *Id.* Consistent with these decisions, it concluded that the supervision of probationers constituted a " 'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Id.* at 875. The Court then proceeded to conclude that the warrant requirement would be impracticable--considering, as part of this analysis, the delays inherent in obtaining a warrant and the fact that a probable cause requirement would reduce the deterrent effect of a surprise search. *Id.* at 876. The Court did not conduct any weighing or balancing of interests, as was traditionally required under a Fourth Amendment analysis.

In 1989, the Court decided two non-individualized suspicion cases on the same day: Skinner, 489 U.S. at 602 and Von Raab, 489 U.S. at 656. The reasoning of these cases reinforced the existence of a "special needs" threshold and also made clear that some balancing of interests was required to determine the validity of a program relying on such "special needs."

*Skinner* upheld federal regulations that permitted drug and alcohol testing of railroad employees following an accident or where an employee had violated certain safety rules. The Court in *Skinner* referred in its analysis to the balancing test articulated in *Prouse*--that is, that the permissibility of a particular practice raising Fourth Amendment issues is " 'judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests .'" ' 489 U.S. at 619 (quoting *Prouse*, 440 U.S. at 654). It noted that in "most criminal cases," the "balance" was struck in favor of the warrant and probable cause requirement. *Id.* It further noted, however, that the "special needs" cases constituted an exception to this rule and that, where such special needs exist, the Court "balance[s] the governmental and privacy interests" to determine if the warrant and probable cause requirements are practical. *Id.* The Court concluded that the Government's interest in regulating the conduct of railroad employees to ensure safety constituted such a "special need." *Id.* at 620. It then went on to decide whether the magnitude of the Government's interest justified the privacy intrusion. *Id.* at 621. After finding that a warrant requirement was impractical, *id.* at 621-24, the Court concluded that a probable cause or reasonable suspicion requirement would also be impractical. *Id.* at 624-33. In conducting this analysis, the Court considered whether the facts presented constituted circumstances where "the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Id.* at 624. The Court

upheld the regulations.

*Von Raab* performed a similar analysis with respect to Customs regulations that mandated the drug testing of employees carrying firearms, handling classified material, or working in areas involving the interdiction of drugs. 489 U.S. at 660-61. The results could not be used for a prosecution of the employees without consent. Id. at 666. The Court summarized the applicable legal principle as follows:

where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

489 U.S. at 665-66. The Court concluded that the need to deter and prevent use of drugs constituted "substantial interests" that presented a "special need." Id. at 666. It went on to conclude that a warrant and probable cause requirement was impractical--based in part on the Government's "compelling interest" in ensuring the integrity of its interdiction personnel, id. at 670, and the fitness of personnel carrying arms. Id. at 670-71. The Court balanced against this interest the intrusion in privacy resulting from a urine test, id. at 671-76, concluding that the Government's interest "outweigh[ed]" the employees' privacy interests. Id. at 677.

Three later cases referenced the "special needs" analysis. Two upheld drug testing through urinalysis for high school students participating in special activities: *Vernonia School Dist. 471 v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (participants in interscholastic sports); and *Bd. of Educ. of Indep. School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (participants in all school-sponsored extracurricular activities). The other case invalidated a statute mandating drug testing for candidates for political office. *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997). In each case, the Court apparently assumed that the programs fell outside "the normal need for law enforcement." The cases conducted a Fourth Amendment "balancing" analysis; but the analysis was not simply to determine whether the warrant requirement was "impractical" (as had been suggested in *Von Raab* and *Skinner*) but also to determine whether the program was "reasonable and hence constitutional." *Vernonia*, 515 U.S. at 665; accord *Earls*, 122 S.Ct. at 2565 (following *Vernonia*'s balancing test); *Chandler*, 520 U.S. at 318 ("special need for drug testing must be substantial--important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion").

A somewhat different tack was taken in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), decided the year after *Von Raab*. In *Sitz*, the Court was faced with deciding the constitutionality of a highway checkpoint program that sought to determine if drivers were intoxicated. Under the program, drivers showing signs of intoxication would be given further tests and, if the "field tests and the officer's observations suggest[ed] that the driver was intoxicated, an arrest would be made." Id. at 447. The individuals challenging the program argued before the Supreme Court that a "balancing test"--such as the one used in *Brown*--should not apply and that *Von Raab*

instead required that the government had to make a threshold showing of "some special governmental need 'beyond the normal need' for criminal law enforcement." Sitz, 496 U.S. at 449-50.

*Sitz* rejected this argument, stating that the balancing test approved in *Martinez-Fuerte* (the highway immigration checkpoint case) and *Brown* (the suspicionless stop of the individual in an alley) was still effective and applied to the drunk driver highway checkpoint program. Sitz, 496 U.S. at 450. The Court proceeded to weigh the State's interest in such a program against the intrusion on the motorists stopped at the checkpoint. *Id.* at 450-453. Additionally, the Court clarified that the third factor in the balancing test--which had been characterized by the lower court as the "effectiveness" of the program--should instead have addressed whether the program "reasonably ... advance[d]" the State's interest. *Id.* at 455. Balancing these interests, the Court upheld the drunk driver checkpoint program.

### C. Lower Court Cases Considering DNA Indexing Statutes, including *Roe v. Marcotte*

Beginning in 1989, and continuing over the next nine years, every state began enacting DNA indexing statutes. 34 Wake Forest L.Rev. at 774-75. The common feature of these statutes is that a category of individual--at a minimum, an individual convicted of some kind of felony--is required to submit a blood sample so that the individual's DNA may be extracted from the sample and kept in a DNA index or databank. *See id.* Invariably, the purpose of the DNA databank is to assist criminal law enforcement: the theory is that if a piece of evidence linked to some crime contains identifiable DNA, the DNA databank will be searched to determine if a contributor has that DNA profile.

Following the enactment of these statutes, a number of court challenges were mounted attacking them on Fourth Amendment as well as other grounds.<sup>1</sup> Courts faced with deciding the Fourth Amendment challenges had two seemingly disparate strands of Supreme Court case law to apply. They could analyze whether the program fit within the "special needs" doctrine as had been most recently articulated in *Von Raab* and *Skinner*. Or they could conduct a "balancing" analysis, without making any threshold inquiry into the existence of "special needs" as had seemingly been approved in *Sitz*.

For the most part, courts relied on the straightforward "balancing" analysis-- usually through direct invocation of *Sitz* itself or other Fourth Amendment cases that applied a balancing test. Each court considering a DNA indexing statute under the balancing test upheld the statute. *See Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir.), *cert. denied*, 525 U.S. 1005, 119 S.Ct. 520, 142 L.Ed.2d 431 (1998); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir.1996); *Schlicher v.(NFN) Peters, I & I*, 103 F.3d 940, 943 (10th Cir.1996); *Rise v. Oregon*, 59 F.3d 1556, 1560-62 (9th Cir.1995), *cert. denied*, 517 U.S.

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<sup>1</sup>*See* Robin Cheryl Miller, Annotation, *Validity, Construction, and Operation of State DNA Database Statutes*, 76 A.L .R.5th 239, § § 3, 5, 8-9, 13-15 (2000) (citing cases making challenges, *inter alia*, on Fourth Amendment, Ex Post Facto, due process and Eighth Amendment grounds). The New York statute, in fact, has been upheld under First Amendment, Eighth Amendment and due process challenges. *See Yusov v. Martinez*, 2000 WL 1593387 (S.D.N.Y. Oct.24, 2000).

1160, 116 S.Ct. 1554, 134 L.Ed.2d 656 (1996); Jones v. Murray, 962 F.2d 302, 307-08 (4th Cir.), cert. denied, 506 U.S. 977, 113 S.Ct. 472, 121 L.Ed.2d 378 (1992); Kruger v. Erickson, 875 F.Supp. 583, 588- 89 (D.Minn.1995), aff'd on other grounds, 77 F.3d 1071 (8th Cir.1996); Gilbert v. Peters, 1994 WL 369643, at \*4-\*6 (N.D.Ill. June 28, 1994), rev'd on other grounds, 55 F.3d 237 (7th Cir.1995); Sanders v. Coman, 864 F.Supp. 496, 499 (E.D.N.C.1994); Ryncarz v. Eikenberry, 824 F.Supp. 1493, 1498-99 (E.D.Wash.1993); Gaines v. Nevada, 116 Nev. 359, 998 P.2d 166, 171- 72 (Nev.), cert. denied, 531 U.S. 856, 121 S.Ct. 138, 148 L.Ed.2d 90 (2000); Johnson v. Commonwealth, 259 Va. 654, 529 S.E.2d 769, 779(Va.), cert. denied, 531 U.S. 981, 121 S.Ct. 432, 148 L.Ed.2d 439 (2000); Landry v. Attorney General, 429 Mass. 336, 709 N.E.2d 1085, 1091-92 (Mass.1999), cert. denied, 528 U.S. 1073, 120 S.Ct. 785, 145 L.Ed.2d 663 (2000); Doles v. State, 994 P.2d 315, 318-19 (Wyo.1999); Dial v. Vaughn, 733 A.2d 1, 6-7 (Pa.Comm. Ct.1999); Cooper v. Gammon, 943 S.W.2d 699, 704-05 (Mo.Ct.App.1997); Matter of Appeal in Maricopa County Juvenile Action Numbers JV-512600 and JV-512797, 187 Ariz. 419, 930 P.2d 496, 500-01 (Ariz.Ct.App.1996); People v. Calahan, 272 Ill.App.3d 293, 208 Ill.Dec. 532, 649 N.E.2d 588, 591-92 (Ill.App.Ct.1995); People v. Wealer, 264 Ill.App.3d 6, 201 Ill.Dec. 697, 636 N.E.2d 1129, 1135 (Ill.App.Ct.1994); State ex rel. Juvenile Dep't of Multnomah County v. Orozco, 129 Or.App. 148, 878 P.2d 432, 435-36 (Or.Ct.App.1994).

Typically these courts determined that the drawing of a blood sample constitutes a minimal intrusion, Rise, 59 F.3d at 1560; Jones, 962 F.2d at 307--sometimes with a special emphasis on the fact that the population at issue consisted of prisoners, whom they viewed as having a lesser expectation of privacy. See, e.g., Boling, 101 F.3d at 1340; Rise, 59 F.3d at 1560; Gaines, 998 P.2d at 172-73. The courts then looked to the justification for the search. As Rise noted, there is an "overwhelming public interest in prosecuting crimes accurately," 59 F.3d at 1561 (emphasis omitted)--an interest plainly served by the DNA databank. Weighing the governmental interest against the intrusiveness of the search, these courts concluded with little difficulty that the important governmental interest outweighed the minimal intrusion caused by the blood draw or other means of obtaining the DNA sample. Some of the "balancing" courts acknowledged the existence of the "special needs" doctrine and specifically noted that they were rejecting the application of that doctrine to the DNA indexing statutes. See, e.g., Jones, 962 F.2d at 307 n. 2; Gilbert, 1994 WL 369643, at \*4; Gaines, 998 P.2d at 171-72; Landry, 709 N.E.2d at 1092; Doles, 994 P.2d at 318-19; Wealer, 201 Ill.Dec. 697, 636 N.E.2d at 1135.

Three courts relied explicitly on the "special needs" doctrine rather than the traditional balancing analysis: Roe v. Marcotte, 193 F.3d 72, 79-82 (2d Cir.1999); Shelton v. Gudmanson, 934 F.Supp. 1048, 1050-51 (W.D.Wis.1996); and State v. Olivas, 122 Wash.2d 73, 856 P.2d 1076, 1086 (Wa.1993). Each of the "special needs" decisions also upheld the statute at issue. The opinion in Olivas contained little analysis of the application of the "special needs" doctrine, other than to review relevant case law and to adopt the district court decision in Jones, 763 F.Supp. 842 (W.D.Va.1991) (which had itself applied the "special needs" doctrine). Olivas, 856 P.2d at 1083-86. Shelton noted the many areas in which "special needs" had been found and concluded that the DNA

indexing program passed muster because "it is not undertaken for the investigation of a specific crime." 934 F.Supp. at 1051.

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

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

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

#### D. *Post-Marcotte Supreme Court Case Law*

##### 1. *Edmond and Ferguson*

Had there been no further case law developments, this Court would have applied the legal principles articulated in *Marcotte* to the New York State DNA indexing statute. Subsequent to the *Marcotte* decision, however, the Supreme Court revisited the "special needs" doctrine in two cases: *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), and *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001). As described further below, these cases have cast doubt on at least one aspect of *Marcotte*'s application of the "special needs" doctrine.

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

Instead, *Edmond* analyzed the validity of the program under the Fourth Amendment quite differently from *Sitz*. The Court began by observing that "individualized suspicion of wrongdoing" is normally a requirement of a reasonable search and seizure. 531 U.S. at 37. It then noted that suspicionless searches would be upheld where the program was designed to serve "special needs, beyond the normal need for law enforcement." *Id.* (citing, *inter alia*, *Von Raab* and *Skinner* ). The opinion treated "searches for certain administrative purposes"--for example, inspections to ensure compliance with a city housing code--as falling within this category. *Id.* Falling also into this category were the border checkpoints for aliens upheld in *Martinez-Fuerte* and the license and registration check that *Prouse* approved in *dictum*. *Id.* at 37-38. *Edmond* concluded that none of these cases involved a "program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Id.* at 38. It interpreted the *Sitz* case as involving a program that was "clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways." *Id.* at 39. Thus *Edmond* found a "difference in the Fourth Amendment significance of highway safety interests and the general interest in crime control." *Id.* at 40.

In analyzing the Indianapolis checkpoint, *Edmond* concluded that-- even if the program had the effect of ridding the roads of unsafe drivers--the checkpoint had the "primary purpose" of interdicting illegal narcotics. *Id.* at 41-42. The Court viewed its previous case law on checkpoints, however (including *Sitz* ), as not approving any checkpoint or other program "whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Id.* at 41. The Court refused to consider the Indianapolis program's secondary purpose of keeping impaired motorists off the road and verifying licenses and registrations. *Id.* at 46-47. It thus concluded that where law enforcement authorities pursue "primarily general crime control purposes," stops could only be justified by individual suspicion. *Id.* at 47.

Later in the same term, the Court decided *Ferguson*. At issue there was a program that authorized hospital staff to perform drug screens on urine samples from maternity patients who met certain criteria indicating a potential for drug use (such as no prenatal care or preterm labor without obvious cause). 532 U.S. at 72. If the patient refused to undergo drug treatment, the results of the test would be turned over to the police and might lead to arrest on charges such as drug possession or unlawful neglect of a child. *Id.* at 72-73. In analyzing the program, the Court first noted that the program differed from prior drug testing cases (*Skinner*, *Von Raab*, *Chandler* and *Vernonia* ) because of its secret nature and opined that patients have a greater expectation of privacy in the results

of diagnostic tests. *Id.* at 78. As had been true in *Edmond*, *Ferguson* distinguished earlier "special needs" cases--in this instance, those allowing drug testing--by noting that in those prior cases the needs advanced in each were "divorced from the State's general interest in law enforcement." *Id.* at 79. In the hospital program, by contrast, the "central and indispensable feature of the policy" was the use of law enforcement to coerce treatment. *Id.* at 80-81. As in *Edmond*, *Ferguson* declined to "simply accept the State's invocation of a 'special need'" but instead "carried out a 'close review' of the scheme" in order to ascertain its "primary purpose." *Id.* at 81. Concluding that the primary purpose was "to generate evidence for law enforcement purposes," *id.* at 83 (emphasis omitted), the Court found that "this case simply does not fit within the closely guarded category of 'special needs.'" *Id.* at 84. *Ferguson* distinguished *Sitz* and *Martinez-Fuerte* on the ground that these cases involved "roadblock seizures, rather than 'the intrusive search of the body or the home.'" *Id.* at 83 n. 21 (citing *Edmond*, 531 U.S. at 54-55).

## 2. *How Edmond and Ferguson Have Changed the Law Applied in the DNA Indexing Cases*

At least two issues have been raised by the decisions in *Edmond* and *Ferguson* that significantly affect the analysis of DNA indexing statutes: (1) whether traditional Fourth Amendment balancing is available in the absence of a threshold determination of "special needs" and (2) what purposes of a DNA indexing statute are relevant for determining "special needs."

*a. Availability of traditional balancing.* It appears that--apart from cases involving some level of individualized suspicion--*Edmond* and *Ferguson* allow no room for a classic Fourth Amendment "balancing" analysis except in those cases meeting the "special needs" threshold. Thus, *Edmond* and *Ferguson* may be read to require that DNA indexing statutes must be analyzed solely in accordance with the "special needs" doctrine. If this reading is correct, *Edmond* and *Ferguson* have cast doubt on the analysis employed by the vast majority of the cases upholding DNA databanks (specifically, all of the cases using a pure balancing test cited in section II.C above)--even if they do not necessarily alter the results these cases reached.

The use of the "special needs" threshold test is consistent with the Second Circuit's reasoning in *Marcotte*, which was one of the few cases to analyze a DNA indexing statute under the "special needs" doctrine rather than simply applying a traditional Fourth Amendment balancing test. Accordingly, this Court will examine the DNA indexing statute solely in accordance with the "special needs" doctrine.

*b. Determining primary purpose.* The second significant change is that, under the reasoning of *Edmond* and *Ferguson*, a court must engage in a "close review" to determine the "primary purpose" of the statute or program it is analyzing under the "special needs" doctrine. See *Ferguson*, 532 U.S. at 81; accord *Edmond*, 531 U.S. at 46-47. This principle represents a departure from *Marcotte*, which engaged in no such review. In fact, *Marcotte* identified at least two purposes of the DNA indexing statute: the solving of crimes--which it found applicable in part based on the recidivism rate of sex offenders

and the utility of DNA evidence in solving sex crimes--and the deterrent effect of the program. 193 F.3d at 79. The deterrent effect was characterized as the "more important[ ]" purpose. *Id.* These purposes taken together were used to validate the existence of a "special need." *Id.* Under *Edmond* and *Ferguson*, however, it is plain that this analysis cannot stand and that a court must instead determine the statute's "primary" purpose.

#### E. Analysis of the New York Indexing Statute

##### 1. Is there a "special need"?

To determine the constitutionality of New York's DNA indexing program under the Fourth Amendment, the first question that must be answered is whether the program constitutes a "special need, beyond the normal need for law enforcement."

*a. The primary purpose of the statute.* As noted, to answer this question we must determine the "primary purpose" of the New York's DNA indexing statute. *See Ferguson, 532 U.S. at 81; Edmond, 531 U.S. at 46-47*. The defendants' briefs have suggested a number of purposes: 1) to "make law enforcement's investigative capabilities more efficient and effective and allow suspects to be either identified or exonerated early in the investigative process;" 2) "improving the criminal justice process and enhancing public safety;" 3) "advancing the overwhelming public interest in ascertaining and apprehending the actual perpetrators of crimes;" 4) "exculpating the innocent;" 5) "detering crime;" and 6) "identifying human remains." *See* State Def. Mem. at 12; Private Def. Mem. at 9. At bottom, the first three of these purposes ultimately relate to the single purpose of solving crimes. To the extent the exculpation purpose reflects the ability of the DNA index to identify suspects accurately, that purpose too is part of the function of solving crimes. To the extent the exculpation purpose is based on the fact that an investigation may use an individual's DNA from the index to exonerate that individual, this cannot seriously be considered the primary purpose of the statute as such an individual could simply consent to having his or her DNA extracted. The remaining two purposes--identifying human remains and discouraging recidivism-- are logically separate from the function of solving crimes and we must consider whether they qualify as the "primary" purpose.

To determine the "primary" purpose of the statute, we engage in a "close review," *Ferguson, 532 U.S. at 81*, of New York State's DNA indexing program. Based on this review, it is beyond question that the primary purpose of the statute is to solve crimes--specifically, through the maintenance of a database that would permit the accurate identification and conviction of criminals. The statute itself provides that samples be analyzed "only for those markers having value for law enforcement identification purposes." N.Y. Exec. Law § 995-c(5). A legislative report states that

[t]he DNA Identification Index has greatly enhanced the law enforcement and judicial systems' ability to accurately and quickly identify and convict criminals ... This legislation is also an integral part of the effort to expand the national DNA identification index, which will enhance law enforcement officials' ability to solve inter-state crimes, and capture repeat offenders as well as those who have committed

crimes in other parts of the country.

Budget Report on Bills (reproduced in Declaration of John Knudsen, dated January 17, 2002 ("Knudsen Decl."), Ex. D), at 2. The memorandum in support of the bill issued by the New York State Senator who introduced the measure lauds the DNA databank's ability to "make law enforcement's investigative capabilities more efficient and effective." Introducer's Memorandum in Support ("Intro.Mem.") (reproduced in Knudsen Decl., Ex. D), at 4-5. The legislative history of both the 1994 enactment and the 1999 amendments consists largely of memoranda of parties supporting the measure who almost universally hail its ability, as New York State's Attorney General put it with respect to the 1994 enactment, to "provide positive identification of those who have committed violent crimes." Memorandum of Attorney General G. Oliver Koppell, dated July 20, 1994 (reproduced in Knudsen Decl., Ex. B), at 1. These materials are devoid of references to identifying human remains and discouraging recidivism. Indeed, the defendants do not even contest that the maintenance of the index to solve crimes was the "primary" purpose of the statute.

Thus, unlike *Marcotte*, 193 F.3d at 79, this Court will not consider the argument that the existence of the DNA databank by itself discourages convicted felons from committing new violent acts--that is, the deterrence argument. See also *Olivas*, 856 P.2d at 1085 (detering recidivism is a "special need" justifying the DNA indexing statute). The immediate and primary purpose of New York's statute has nothing to do with this function. Instead, its primary purpose is to create a DNA database to assist in solving crimes should the investigation of such crimes permit resort to DNA testing of evidence.

*b. Whether the primary purpose reflects a need "beyond the normal need for law enforcement."* The more difficult question is whether this purpose reflects a special governmental need "beyond the normal need for law enforcement," *Von Raab*, 489 U.S. at 665, or outside "the general interest in crime control." *Edmond*, 531 U.S. at 41-42. The plaintiffs' position is a simple one: the solving of crimes is a law enforcement purpose that is inseparable from the government's general interest in crime control. Thus, in their view, because the statute does not require individualized suspicion, it is unconstitutional. Unquestionably, this argument has much surface appeal. But a close consideration of the Supreme Court's "special needs" case law reflects that it has not necessarily barred the program at issue in this case.

Only two Supreme Court cases have held that a program fell within the ambit of the "normal need for law enforcement" or "ordinary crime control" and thus failed the "special needs" threshold test: *Ferguson* and *Edmond*. Both cases involved programs in which a search was undertaken to produce evidence that the searched individual had committed a particular crime (of drug use or possession in each instance)--or to threaten the individual with the potential for prosecution for having committed that crime. The significance of this common element is that the investigation of an identifiable crime--typically through the gathering of evidence--is a core law enforcement activity. It is perhaps the quintessential law enforcement activity. For this sort of law enforcement function, we have a longstanding tradition of requiring either probable cause or individualized suspicion before law enforcement authorities are permitted to conduct the

proposed search or seizure. Indeed, the presumption in such a situation is that there must be either a warrant or probable cause. Case law has permitted something less than a warrant or probable cause only in limited instances.

Obviously, obtaining a DNA sample for a databank is within the scope of law enforcement, broadly defined, and certainly has a relationship to the solving of crimes. But the primary purpose of collecting samples for the databank is not for the State to determine that a particular individual has engaged in some specific wrongdoing. Unlike a blood or urine sample that may contain traces of drugs, the samples of blood for the DNA databank prove nothing by themselves regarding whether the donor has committed a crime. Indeed, because DNA evidence is available only in a very limited number of criminal investigations, it is unlikely that any particular DNA sample in the index will ever be used. Furthermore, based on its reference to the recidivism rate of felons, *see* Intro. Mem. at 4, it was apparently the expectation of the New York State legislature that the data bank's primary utility would not be to investigate past crimes but to maintain information available to solve future crimes. *See id.* ("When one considers the fact that over 40% of felony offenders return to State prison within three years of their initial release, it is only logical to require all such persons to submit a DNA sample for our State's DNA Databank to be searched whenever DNA is recovered from a crime scene.").

For these reasons, it is difficult to say that the DNA databank program is one "whose primary purpose [is] to detect evidence of ordinary criminal wrongdoing." *Edmond*, 531 U.S. at 38. The DNA samples in fact provide no evidence in and of themselves of criminal wrongdoing. They merely offer the potential that some very small percentage may be relevant to solving a crime that in all likelihood has not even been committed at the time of the search. Thus *Shelton*, in holding that the Wisconsin DNA indexing program constituted a "special need" beyond normal law enforcement, noted that the sampling was not undertaken "for the investigation of a specific crime." 934 F.Supp. at 1051. This distinction was also adverted to in the New York case that upheld the New York State DNA indexing program. *See Kellogg v. Travis*, 188 Misc.2d 164, 167-78, 728 N.Y.S.2d 645 (Sup.Ct.N.Y.Co.2001) (noting the sample was not taken "to investigate whether plaintiff committed a particular crime but rather for the State's DNA identification index for all designated offenders"), *aff'd*, 298 A.D.2d 323, 750 N.Y.S.2d 12 (1st Dep't 2002). In other words, the State does not seek to gather DNA evidence to investigate any identifiable crime. Indeed, the sample will likely never be used at all and, if it is ever used, may occur in connection with a crime that had not even happened at the time of the sampling.

While in discussing the "special needs" doctrine, *Edmond* refers to the "uncover[ing of] evidence of ordinary criminal wrongdoing," 531 U.S. at 42, and *Ferguson* refers to "generat[ing] evidence for law enforcement purposes," 532 U.S. at 83 (emphasis omitted), in each instance the search was to provide evidence of an identifiable criminal act. The opinion in *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997)-- the case striking down drug testing for political candidates--foreshadowed this distinction when it defined "special needs" as involving needs other than crime "detection." *Id.* at 314. The word "detection" suggests that the evidence at issue will

prove some specific crime has occurred. A DNA sample, however, does not by itself show that the donor has committed any crime.

Notably, the threshold determination of "special needs" does not require a court to examine whether a program involves "law enforcement," as plaintiffs appear to assume. Instead, it asks whether the program is beyond the "normal" need for law enforcement. *Griffin*, 483 U.S. at 873 (emphasis added); see also *Von Raab*, 489 U.S. at 666 (referring to the "ordinary" needs of law enforcement). For the reasons just stated, the purpose for which the databank has been instituted is not a "normal" or "ordinary" purpose of law enforcement.

Normally, the Court would have looked to *Marcotte* for guidance in conducting this "special needs" analysis. Because it preceded *Edmond* and *Ferguson*, however, *Marcotte* is of limited value. *Marcotte* identified a number of purposes of the Connecticut DNA indexing statute instead of identifying a single "primary" purpose as is now required by *Ferguson*. It is of some comfort, however, that--while it does not represent a holding--the *Marcotte* opinion includes among the purposes that would justify the existence of a "special need" the "important governmental interest in solving both past and future crimes." 193 F.3d at 79.

Two cases have been decided since *Edmond* and *Ferguson* that have discussed in any detail the applicability of the "special needs" test to a DNA indexing program: *United States v. Reynard*, 220 F.Supp.2d 1142 (S.D.Cal.2002); and *United States v. Miles*, 228 F.Supp.2d 1130 (E.D.Cal.2002).<sup>2</sup> *Reynard* is consistent with the above analysis. In *Reynard*, an individual on supervised release challenged the constitutionality of the federal DNA indexing statute. The court assumed, as we have here, that the "special needs" exception was the only test to be applied to determine the validity of the program under the Fourth Amendment. *Id.* at 1165. It concluded that "the creation of a more accurate criminal justice system" and the ability of law enforcement agencies to "solve future crimes that have not yet been committed" were purposes that went "beyond the normal need for law enforcement." *Id.* at 1168. It upheld the statute after balancing the intrusiveness of the search against the "diminished" expectation of privacy of the individuals on supervised release.

The other case is *Miles*, which held that the federal DNA indexing statute violated the Fourth Amendment. 228 F.Supp.2d 1130. *Miles* arose in the context of a supervised releasee who had refused to submit to a DNA test. *Miles* noted that *Rise* would have

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<sup>2</sup> *Kellogg v. Travis*, 188 Misc.2d 164, 728 N.Y.S.2d 645 (Sup.Ct.N.Y.Co.2001), was decided after *Edmond* and *Ferguson* but it contains little analysis of "special needs." Nonetheless, it upheld the constitutionality of the New York DNA indexing statute against Fourth Amendment and other constitutional challenges. Another post-*Ferguson* case, *Groceman v. United States Dep't of Justice*, 2002 WL 1398559 (N.D.Tex. June 26, 2002), relied entirely on lower court cases that had engaged in a "balancing" analysis--particularly *Jones* and *Rise*--and explicitly rejected the "special needs" analysis used in *Marcotte*. *Id.* at \*3 n. 2. *Groceman* concluded that the Government's interest in indexing felons and solving past and future crimes outweighed "the minor intrusion of collecting blood from inmates...." *Id.* at \*4. *Groceman* makes no mention of either *Edmond* or *Ferguson*, the latter of which was decided more than a year before the *Groceman* opinion issued.

controlled its disposition, except for the intervention of *Edmond* and *Ferguson*, which "effectively overruled *Rise*." *Id.* at 1135. Reviewing Supreme Court case law, *Miles* concluded that no case had upheld a "suspicionless search of inmates, probationers, or supervisees where the justification of the search was primarily law enforcement." *Id.* at 1137. As to the purpose of the statute, *Miles* concluded that "gathering evidence to be used in solving and prosecuting crimes ... is clearly a law enforcement purpose." *Id.* at 1139. The court also rejected as law enforcement purposes the Government's two other justifications--exonerating the innocent and reducing recidivism--as collateral to the statute's true purpose. *Id.* at 1139-40. Because *Miles* found that the "immediate purpose" of the program was to gather evidence for use in investigating and prosecuting crime, and because it found this to be "primarily" a "general law enforcement" purpose, it held the statute unconstitutional. *Id.* In the end, *Miles* rests on that court's judgment that the purpose of creating a DNA index to solve even future crimes represents a normal law enforcement purpose. For the reasons just described, however, this Court concludes that the DNA indexing statute has a purpose unlike any other that has been before the Supreme Court and one that does not constitute a "normal" need of law enforcement.

## 2. "Special Needs" Balancing

Even where a court concludes that a statute or program qualifies as a "special need, beyond the normal need for law enforcement," the reasonableness of the intrusion must still be evaluated through a balancing analysis. Under the *Von Raab* formulation, a court must evaluate whether the special need "justif [ies] departure from the ordinary warrant and probable-cause requirements." *Von Raab*, 489 U.S. at 666. While case law has stated that a court must determine whether it is "impractical" to require a warrant or some level of individualized suspicion, *id.* at 665-66, the question of "impracticality" does not fully describe the scope of the inquiry. If it did, no further discussion of a DNA indexing statute would be necessary since it is not only "impractical" to require a warrant or some individualized suspicion, it is logically impossible.

Instead, case law appears to address the validity of a program instituted pursuant to "special needs" by "conduct[ing] a fact-specific balancing of the intrusion on the [plaintiffs'] Fourth Amendment rights against the promotion of legitimate governmental interests." *Earls*, 122 S.Ct. at 2565. Thus, in *Earls* and *Vernonia*, the Supreme Court assumed that the need to drug test the students represented a "special need[ ], beyond the normal need for law enforcement," *Earls*, 122 S.Ct. at 2564-65; *Vernonia*, 515 U.S. at 653, and then went on to consider the students' privacy interests, *Earls*, 122 S.Ct. at 2565-66; *Vernonia*, 515 U.S. at 654-57, the character of the intrusion complained of, *Earls*, 122 S.Ct. at 2566-67; *Vernonia*, 515 U.S. at 658- 660, and the "nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them." *Earls*, 122 S.Ct. at 2567; accord *Vernonia*, 515 U.S. at 660. After considering all these factors, a court determines whether the policy or program is, in the words of *Vernonia*, "reasonable and hence constitutional." 515 U.S. at 665. In other words, the inquiry is not merely whether the warrant and probable cause requirements are "impractical" but whether the governmental interest sufficiently outweighs the privacy interest to render the search "reasonable."

*a. The plaintiffs' privacy interests and the character of the intrusion.* The Supreme Court has characterized the drawing of blood as "minimally intrusive." *See, e.g., Skinner*, 489 U.S. at 624-26. The New York State statute now permits the sample to be taken by an even less intrusive means, such as a cotton swab of the inside of the mouth. *See N.Y. Exec. Law § 995-c(3)* (eliminating language from 1994 version that required sample to be taken from blood and providing that any sample "appropriate for testing" may now be accepted); *see also* Intro. Mem. at 1-2.

Apart from the physical intrusion, of course, is an additional sort of intrusion: the exposure of the personal and highly private information reflected in an individual's DNA. To consider this aspect of the intrusion, however, we begin by focusing on the plaintiffs' status as incarcerated convicted felons. The issue of the status of the plaintiffs is an important one, reflected repeatedly in Supreme Court case law. In *Skinner*, for example, the Court's decision rested in part on the fact that a railroad employee had already "consent[ed] to significant restrictions in his freedom of movement where necessary for ... employment." 489 U.S. at 624-25. In *Ferguson*, the Court took pains to note that the search allowed in *Griffin* was based at least in part on "the fact that probationers have a lesser expectation of privacy than the public at large." *Ferguson*, 532 U.S. at 79 n. 15; *see Griffin*, 483 U.S. at 875 (noting the existence of a "'special need' of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large"); *see also Von Raab*, 489 U.S. at 679 (customs employees "enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions"). In *Vernonia*, the Court noted that student athletes, who share communal showers, have a diminished expectation of privacy resulting from that circumstance. 515 U.S. at 657.

A convicted felon's expectation of privacy in the identifying information contained in his or her DNA is particularly weak compared with those of other individuals. Indeed, convicted felons should be entitled to almost no expectation that their identities will remain secret. *See, e.g., Rise*, 59 F.3d at 1560 (noting the identity of a person convicted of a felony is a matter of public interest and the prisoner loses an expectation of privacy in his identity); *Jones*, 962 F.2d at 306 ("when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it."); *accord Gaines*, 998 P.2d at 172. The limited information contained in DNA also minimizes the privacy invasion, as has been made clear with respect to fingerprints. In *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), the Supreme Court noted that "[f]ingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detection be employed repeatedly to harass any individual, since the police need only one set of each person's prints." *Id.* at 727. DNA information too provides no information of any apparent utility to law enforcement other than identification; nor is any additional usage permitted by the statute. All convicted felons are already routinely photographed and fingerprinted. The State keeps photographic and fingerprint records of these individuals indefinitely precisely for the purpose of solving past and future crimes. The addition of DNA identification thus does not materially increase the pre-existing

invasion of these individuals' privacy interests.

An additional circumstance diminishes the plaintiffs' privacy interests. In cases involving suspicionless searches, the individuals searched typically had some control over the circumstances that occasioned the search. In *Vernonia*, the Court noted that student athletes who wish to avoid drug testing could choose not to participate in sports. 515 U.S. at 657. Here, the plaintiffs had control over the circumstances that led to the search: specifically, the decision whether or not to commit a felony. Because their felonies predated the enactment of the statute, these particular plaintiffs were unaware of this specific consequence of committing a felony. Nonetheless, the extraction of DNA is insignificant in comparison with the seizures that occur as a well-known consequence of committing a felony--in particular, imprisonment. Persons committing a felony have placed themselves in a situation where they are aware that (if caught) they will be subjected to far more significant searches and seizures than a mere revelation of their DNA. For this reason, the privacy interest of an individual who has committed a serious crime is entitled to much less weight than the privacy interest of an individual who has not. It is reasonable to expect individuals in this category to make information about themselves available to assist the criminal justice system that they had so seriously flaunted at some previous time. This is not to say, of course, that felons permanently forfeit all Fourth Amendment privacy expectations. But the State's targeting of this group derives directly from the fact that members of this group have committed serious crimes. As will be discussed below, because of the incidence of recidivism, the obtaining of identification markers from this group is of genuine and great interest to the State.<sup>3</sup>

Of some significance too is that plaintiffs in this case are currently prisoners. While the statute is applicable to non-incarcerated felons who were convicted of certain offenses, *see* 1999 N.Y. Laws, ch. 560, § 9, the plaintiffs in this case do not fall into this category. For this reason, their status makes it unnecessary to determine whether the application of this statute to non-incarcerated felons poses any additional Fourth Amendment barrier. Prisoners are in a special position because, of all convicted felons, they are actually being subjected to the most significant restriction on their liberty imaginable. Thus, some case law has adverted to the special status of prisoners in this regard as reflecting a diminished expectation of privacy. *See, e.g., Boling*, 101 F.3d at 1340; *Rise*, 59 F.3d at 1559-60; *Jones*, 962 F.2d at 306; *Gaines*, 998 P.2d at 172; *Landry*, 709 N.E.2d at 1092. While *Marcotte* in *dictum* rejected any consideration of this factor, 193 F.3d at 81-82 (suggesting that inmates forfeit their Fourth Amendment rights only to the extent

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<sup>3</sup> There are numerous other consequences to committing a felony in New York State, such as the civil disabilities that render felons ineligible, *inter alia*, to engage in some kinds of employment, vote, serve on a jury or hold certain public positions. *See* N.Y. Elec. Law § 5-106(2)-(5) (voting); N.Y. Surr. Ct. Proc. Act Law § 707(1)(d) (service as fiduciaries); N.Y. Jud. Law § 510(3) (jury service); N.Y. Alco. Bev. Cont. Law § 102(2) (employment in liquor stores); N.Y. Exec. Law § 130 (licensure as notary public); N.Y. Penal Law § 265.01(4), 400.00(1) (prohibition against possession of rifle or shotgun or obtaining license); N.Y. Real Prop. Law § 440-a (licensure as real estate brokers or salespersons); N.Y. Gen. Bus. Law § 74(2) (licensure as security guards and private investigators); *see generally North Carolina v. Rice*, 404 U.S. 244, 247 n. 1, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (describing civil disability statutes); *see also Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974) (upholding statute barring felons from voting).

necessary "for reasons of safety and orderly administration of prison facilities"), this *dictum* is in tension with a recent Second Circuit ruling that a search of a prisoner's cell may be undertaken even for purposes unrelated to prison administration. See Willis v. Artuz, 301 F.3d 65, 69 (2d Cir.2002) ("a convicted prisoner's loss of privacy rights can be justified on grounds other than institutional security") (citing Benjamin v. Fraser, 264 F.3d 175, 187 n. 10 (2d Cir.2001)).

The DNA indexing statute's intrusiveness is ameliorated by its provisions that provide for expungement in the event a conviction is reversed. N.Y. Exec. Law § 995-c(9). Further, the statute limits the uses to which the DNA record may be put, *id.* at § 995-d, and provides criminal penalties for any person who intentionally discloses a record to an unauthorized individual or agency. *Id.* at § 995-f. These factors lessen the intrusiveness of the program. See Marcotte, 193 F.3d at 80 (noting that the Connecticut DNA statute employed similar safeguards which "ensure[d] ... the intrusion is minimal").

Finally, the intrusiveness of the program is diminished by the blanket approach to sampling mandated by the DNA indexing statute. *Skinner* notes that the warrant requirement was instituted to protect against the "random or arbitrary" acts of government agents. 489 U.S. at 622. Thus, *Skinner* emphasized "the minimal discretion vested in those charged with administering" the drug testing program it approved in that case. *Id.* *Vernonia* too notes that sometimes "testing based on 'suspicion' of [wrongful activity] would not be better but worse" than suspicionless testing. 515 U.S. at 664. In the case of a DNA indexing statute, "[b]y ensuring that blood extractions will not be ordered randomly or for illegitimate purposes," such a statute "fulfills a principal purpose of the warrant requirement." Rise, 59 F.3d at 1562.

*b. The governmental interest and the efficacy of the program.* The minimal intrusiveness of the statute must be weighed against the "nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." Vernonia, 515 U.S. at 660. The public interest in having identifying information regarding convicted felons available for use in criminal investigations is obviously of great concern to society. *see, e.g., Rise*, 59 F.3d at 1561 (noting "overwhelming public interest in prosecuting crimes accurately") (emphasis omitted), and has not been contested by plaintiffs. While plaintiffs have questioned the accuracy of the reference in the statute's legislative history to a 40% recidivism rate among convicted felons, *see* Intro. Mem. at 4-5, anyone experienced in the criminal justice system--or, more specifically, anyone who regularly reads rap sheets--can attest that individuals incarcerated for felonies frequently have had prior experience with the criminal justice system, including prior felony convictions. Indeed, plaintiffs' own motion for a preliminary injunction attaches a study from the New York State Department of Correctional Services indicating that approximately 48% of felony offenders are either re-committed to prison or are returned for a violation for parole. *See* Motion for Injunction, Ex. 12 (Table 6). Of course, if we were to test the statistical effectiveness of the program, we would not look to the recidivism rate among felons *per se* but rather to the number of crimes that can be predicted to be solved as a result of the information available in the DNA databank. With respect to this issue, the legislative history states that Virginia has been requiring DNA samples of all convicted felons since

1989. Governor's Program Bill Memorandum # 31, N.Y. State Legislative Annual 1999 at 329. With 10,000 convicted felons in its database, Virginia was able to identify offenders "in more than 30 previously unsolved rapes and murders." *Id.*

However, it is not essential to the constitutionality of the program for the State to prove that there is a particular rate of recidivism for felons or that the program will result in law enforcement being able to solve some specific number of future crimes. The consideration of the "effectiveness" of a program challenged on Fourth Amendment grounds was "not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Sitz*, 496 U.S. at 453. Instead, a court must consider only whether the program "reasonably ... advance[s]" the State's interest. *Id.* at 455. The roadside blockade approved in *Martinez-Fuerte* resulted in illegal aliens being found in only one one-thousandth of the vehicles passing through the checkpoint. *See Sitz*, 496 U.S. at 455. Of the cars actually stopped, only one in 200 had illegal aliens. *Id.*; *see also Von Raab*, 489 U.S. at 673 (no more than five out of 3,600 customs service employees tested positive for drugs). Here, the potential for DNA evidence to solve crimes is certainly not speculative or theoretical. That it is actually being used to solve crimes is not even contested by plaintiffs. Case law is replete with DNA evidence being admitted in criminal prosecutions. *See 84 A.L.R.4th 313* at § § 5-6 (citing cases). The DNA indexing program's potential for solving even some very small number of crimes is sufficient to support the government's strong interest in the continued operation of the databank.

*c. Summary.* Taking into account all of the factors considered above--the decreased expectation of privacy to be accorded convicted felons who are incarcerated, the minimal intrusiveness of the sampling, and the extremely strong governmental interest in solving crimes--New York State's DNA indexing program does not violate the Fourth Amendment.

### III. CONCLUSION

For the above reasons, the defendants' motions to dismiss should be granted.

#### *PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION*

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have ten (10) days from service of this Report to file any objections. *See also Fed.R.Civ.P. 6(a), (e)*. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with copies sent to the Honorable Richard C. Casey, 500 Pearl Street, New York, New York 10007, and to the undersigned at 40 Centre Street, New York, New York 10007. Any request for an extension of time to file objections must be directed to Judge Casey. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. *See Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).