IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

*

UNITED STATES OF AMERICA

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v. **Criminal Case No.: CCB-97-0126**

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JOHN STEGMAN

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MOTION TO DISMISS NOTICE OF VIOLATION OF CONDITIONS OF SUPERVISED RELEASE

John Stegman, through counsel, Jeffrey E. Risberg and Elisa A. Long, respectfully requests that this Court dismiss the Petition for Revocation of Supervised Release filed on April 26, 2002. Mr. Stegman denies that he has failed to follow any lawful instruction of his probation officer and denies that he committed another crime in violation of federal law by refusing to submit to the taking of a blood sample for DNA analysis. Neither the apparent authority for his probation officer's instruction that he submit a DNA sample—the DNA Analysis Backlog Elimination Act of 2000—nor the conditions of Mr. Stegman's supervised release imposed on August 1, 1997 lawfully require him to do so. As argued below, the DNA Analysis Backlog Elimination Act violates the *ex post facto* clause, the Fourth Amendment, the separation of powers doctrine, and the double jeopardy clause.

I. Factual and Procedural Background

On June 11, 1997, Mr. Stegman pleaded guilty to two counts of aiding and abetting a false statement during the attempted acquisition of a firearm in violation of 18 U.S.C. § 922(a)(6) and 18 U.S.C. § 2(a). The conduct underlying the guilty plea occurred in February and March of 1997. On August 1, 1997, this Court sentenced Mr. Stegman to a term of 63 months of imprisonment, and, upon release, to a term supervised release for three years. In addition to the standard conditions of supervised release, the Court imposed a special condition requiring Mr. Stegman to participate in

substance abuse evaluation and treatment as deemed appropriate by his probation officer and a special condition prohibiting Mr. Stegman from possessing a firearm.[1]

Mr. Stegman was released from imprisonment on September 21, 2001 and began serving his term of supervised release. On March 11, 2002, William F. Henry, Chief U.S. Probation Officer for the District of Maryland, sent Mr. Stegman a letter notifying him that a new federal law enacted in December of 2000 required him to submit a blood sample for DNA analysis and fingerprints.[2] On March 18, 2002, the probation officer assigned to supervise Mr. Stegman, Sharon A. Jacobs, sent Mr. Stegman a letter referencing the March 11, 2002 letter from Henry, and instructed Mr. Stegman to submit a blood specimen on March 28, 2002.[3] On March 27, 2002, counsel for Mr. Stegman, Jeffrey E. Risberg, sent a letter to Probation Officer Jacobs notifying her that Mr. Stegman would not comply with her order and that he would challenge the validity and lawfulness of the order before this Court.[4] This Motion to Dismiss details that challenge to the DNA Act.

On April 26, 2002, Probation Officer Jacobs filed a Notice of Violation, alleging that Mr. Stegman failed to follow the instructions of his probation officer and that Mr. Stegman committed another crime in violation of federal law by refusing to submit a blood sample.[5]

Mr. Stegman was previously convicted of the federal offense of bank robbery in 1982.[6]

II. Argument

Probation Officer Jacobs' apparent authority for ordering Mr. Stegman to submit to blood sampling is the DNA Analysis Backlog Elimination Act of 2000 ("DNA Act"), 42 U.S.C. § 14131 *et seq*. The DNA Act provides that the probation office responsible for the supervision of an individual on supervised release "shall collect a DNA sample from each such individual who is, or

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[1] Mr. Stegman's 1997 Judgment in a Criminal Case is attached as Exhibit A.
[2] The letter from William F. Henry to John Stegman is attached as Exhibit B.
[3] A copy of the letter from Sharon A. Jacobs to John Stegman is attached as Exhibit C.
[4] A copy of the letter from Jeffrey E. Risberg to Sharon A. Jacobs is attached as Exhibit D.
[5] The Notice of Violation is attached as Exhibit E.
[6] Mr. Stegman's presentence report for his firearms offense, which includes the bank robbery conviction in his criminal history, is attached as Exhibit F.

has been, convicted of a qualifying Federal offense . . . ." 42 U.S.C. § 14135a(a)(2). The scope of the "qualifying Federal offenses" is broad: murder, voluntary manslaughter, kidnapping, crimes of violence, and any offenses relating to homicide, sexual abuse, sexual exploitation of children, peonage, slavery, robbery, and burglary are included, regardless of when the offenses occurred. 42 U.S.C. § 14135a(d). Significantly, the firearms offenses for which Mr. Stegman is currently on supervised release are not "qualifying Federal offenses." However, in the Notice of Violation, Probation Officer Jacobs states that "it was determined" that Mr. Stegman's 1982 federal bank robbery conviction is a "qualifying Federal offense" included in 42 U.S.C. § 14135a(d). *See* Exhibit E.

The DNA Act further requires that an individual on supervised release cooperate in the collection of a DNA sample as a condition of supervised release. 42 U.S.C. § 14135c. Congress amended the statute setting forth the required conditions of supervised release to mandate that each court order, as an explicit condition of any newly imposed supervised release, that the defendant cooperate in the collection of a DNA sample if collection of the sample is authorized under the DNA Act. 18 U.S.C. § 3583(d).

In addition, the DNA Act authorizes the probation office to forcibly obtain a DNA sample if an individual refuses to cooperate. 42 U.S.C. § 14135a(a)(4) (providing that a probation office may use "such means as are reasonably necessary to detain, restrain, and collect a DNA sample"). Finally, the DNA Act creates a new federal crime carrying a maximum penalty of one year of incarceration for failing to cooperate in the collection of a DNA sample. 42 U.S.C. § 14135a(a)(5).

As explained more fully below, the DNA Act violates the *ex post facto* clause, as applied to Mr. Stegman's firearms offenses, and as applied to Mr. Stegman's 1982 federal conviction for bank robbery. In addition, the DNA Act violates the Fourth Amendment's prohibition on unreasonable searches and seizures, the separation of powers doctrine, and the double jeopardy clause, all in violation of the United States Constitution.

A. The DNA Act Violates the *Ex Post Facto* Clause.

1. Application of the DNA Act to Mr. Stegman's Firearms Offenses Violates the *Ex Post Facto* Clause.

The application of the DNA Act to Mr. Stegman's firearms offenses violates the *ex post facto* clause of the United States Constitution because it operates retroactively and increases the punishment for his crimes beyond that available at the time his offenses were committed. *See California Dept. of Corrections v. Morales*, 514 U.S. 499, 506-07 n.3 (1995); *Collins v. Youngblood*, 497 U.S. 37, 42 (1990); *Plyler v. Moore*, 129 F.3d 728, 733-34 (4th Cir. 1997). Mr. Stegman committed the firearms offenses, for which he is currently under supervision, in February and March of 1997. Congress enacted the DNA Act more than three years later, in December of 2000. Pub.L. 106-546, Dec. 19, 2000, 114 Stat. 27328.

With respect to retroactivity, the plain language of the provisions of the DNA Act relating to supervised release indicates Congress' unmistakable intent to apply such provisions to individuals currently on supervised release regardless of when their offenses occurred.[7] As a result, the provisions encompass not only an individual on supervised release who is under supervision for a "qualifying offense" committed prior to the enactment of the DNA Act, but also an individual on supervised release who is under supervision for an offense which is not a "qualifying offense" but who has been convicted in the past, prior to the enactment of the DNA Act, of a "qualifying offense." 42 U.S.C. § 14135a(2); 18 U.S.C. § 3583(d). Here, the Probation Office apparently does not allege that Mr. Stegman's firearms offenses are "qualifying offenses." Rather, it alleges that his 1982 bank robbery conviction is the "qualifying offense" that triggers the DNA sampling requirement. *See* Exhibit E.

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[7] Pursuant to the DNA Act, the Probation Office shall collect a DNA sample from any individual on supervised release "who is, or has been, convicted of a qualifying Federal offense . . . ." 42 U.S.C. § 14135a(a)(2).

Not only does the DNA Act operate retroactively, it also increases the punishment for Mr. Stegman's crimes beyond that available at the time his offenses were committed. As the Supreme Court has recently made clear, sanctions imposed for violating a term of supervised release are considered punishment for the initial offense, not a new penalty. *Johnson v. United States*, 529 U.S. 694, 699-701 (2000). Therefore, it is the sanction imposed for failing to submit the DNA sample, not the forced extraction of the DNA sample itself, that constitutes the "increased punishment" in this context. *Cf. Fender v. Thompson*, 883 F.2d 303, 306 (4th Cir. 1989) ("[S]tatutes enacted or amended after a prisoner was sentenced cannot be applied to alter the conditions of or revoke his or her preexisting parole eligibility– notwithstanding that the conduct purportedly triggering application of the statute occurred after the enactment").

The law in effect at the time of Mr. Stegman's offenses did not allow a court to impose a condition of supervised release requiring submission of a DNA blood sample. Indeed, in the "Background and Need for the Legislation" section of the DNA Act, Congress asserted that the DNA Act addresses "the absence of legal authority for DNA samples to be collected from persons convicted of Federal crimes . . . ." *DNA Analysis Backlog Elimination Act of 2000*, H.R.Rep. 106-900(I) at *8 (106th Congr., 2nd Session, 2000). Congress justified the need for the DNA Act in part because, while the Violent Crime Control and Law Enforcement Act of 1994 authorized the FBI to create a national index of DNA samples, it did not authorize the taking of samples from persons convicted of federal crimes. *Id*. The Department of Justice also determined that the Antiterrorism and Effective Death Penalty Act of 1996, which contained a provision authorizing the FBI to include federal crimes in the national index of DNA samples, was "insufficient to provide it with the legal authority to collect samples from convicted Federal offenders." *Id.* at *8-9.

Because the DNA Act operates retroactively and increases the punishment for Mr. Stegman's firearms offenses by effectively adding a condition of supervised release, the violation of which exposes Mr. Stegman to punishment by the Court, it violates the *ex post facto* clause. See

United States v. Maxwell, 285 F.3d 336, 342 (4th Cir. April 8, 2002) (acknowledging that "terms and conditions of supervised release are a substantial imposition on a person's liberty").

2. Application of the DNA Act to Mr. Stegman's Prior Federal Offense Violates the *Ex Post Facto* Clause.

The DNA Act provides that the probation office responsible for the supervision of an individual on supervised release "shall collect a DNA sample from each such individual who is, *or has been*, convicted of a qualifying Federal offense . . . ." 42 U.S.C. § 14135a(a)(2) (emphasis added). While the firearms offenses for which Mr. Stegman is currently under supervision are not "qualifying Federal offenses," as defined at 42 U.S.C. § 14135a(d), the probation office contends that Mr. Stegman's prior federal bank robbery conviction constitutes a "qualifying Federal offense." Mr. Stegman's prior federal conviction was based upon conduct that occurred more than 20 years ago, in 1982.

The application of the DNA Act to Mr. Stegman based upon conduct which occurred well before its enactment violates the *ex post facto* clause. *See California Dept. of Corrections*, 514 U.S. at 506-07 n.3; *Collins*, 497 U.S. at 42. As explained above, the DNA Act applies retroactively and provides courts with the authority (for the first time) to require DNA samples from persons convicted of federal crimes. H.R.Rep. 106-900(I) at *8-9. In this context, as distinguished from the supervised release context discussed above, it is the forced extraction of the DNA sample itself that constitutes the "increased punishment."

The DNA statute contains provisions that are unquestionably penal in nature. First, the DNA Act establishes a new federal offense for failure to submit the DNA sample. 42 U.S.C. § 14135a(a)(5). The offense is a Class A misdemeanor and punishable by a maximum term of imprisonment of one year. *Id*. Second, the DNA Act requires the FBI to expunge from the index the DNA analysis of an individual whose qualifying federal offense has been overturned. 42 U.S.C.

§ 14132(d).[8] Third, the statute authorizes the forcible extraction of the sample from an unwilling defendant. 42 U.S.C. § 14135a(a)(4). Finally, failure to comply with a probation officer's instruction to submit the DNA sample may result in a revocation of probation or supervised release and the attending post-revocation sanctions which may include incarceration or the imposition of more onerous supervision conditions.[9]

Applying the DNA Act to Mr. Stegman based upon his prior federal offense violates the *ex post facto* clause. The DNA Act of 2000 increases the punishment for Mr. Stegman's prior federal offense beyond that available at the time his offense was committed in 1982.

B. The DNA Act Violates the Fourth Amendment.

In authorizing the forced extraction of blood and the use of the genetic and physiological information derived from the blood sample, the DNA Act violates the Fourth Amendment's prohibition on unreasonable searches and seizures. The DNA Act authorizes a warrantless search and seizure in the absence of individualized suspicion or probable cause, and the search and seizure do not fall within any of the exceptions to the warrant requirement, specifically the "special needs" exception. The Act as applied to Mr. Stegman is distinguishable from Virginia's DNA Act as applied to incarcerated felons, thus the Fourth Circuit's opinion in *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992), upholding a Virginia statute on Fourth Amendment grounds, is not controlling.

1. The DNA Act Authorizes Searches and Seizures Without Individualized Suspicion.

Under well-established Supreme Court precedent, the taking of a blood sample is a bodily intrusion that constitutes a search or seizure within the scope of the Fourth Amendment. *Skinner v.*

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[8]Notably, as the Department of Justice has acknowledged, no such similar provision exists with respect to fingerprints. H.R.Rep. 106-900(I) at *38-39 (Letter from DOJ).

[9] This Court need not engage in the "intent-effects" balancing test, which courts utilized to determine whether a statute is penal in nature, because Congress's intent to create a new federal criminal offense is unmistakeable. *See, e.g., United States v. O'Neal*, 190 F.3d 115, 121-25 (4th Cir. 1999).

Railway Labor Executives' Ass'n, 489 U.S. 602, 616 (1989); *Schmerber v. California*, 384 U.S. 757, 767-68 (1966). The Supreme Court has also recognized that the government further infringes upon Fourth Amendment privacy interests when it chemically analyzes bodily fluids to obtain physiological and genetic data. *See Skinner*, 489 U.S. at 616. Where the Supreme Court has permitted government infringement upon bodily integrity, it has done so either because law enforcement possessed some degree of individualized suspicion of wrongdoing or because the search was justifiable as an exception to the warrant requirement. *See Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (holding that the taking of fingernail scrapings was reasonable where the police had probable cause to believe that the suspect committed a murder and the evidence was subject to destruction); *Schmerber*, 384 U.S. at 767 (holding that a warrant was required for a blood test in the absence of exigent circumstances).

The DNA Act authorizes invasive searches involving bodily intrusion and the use of physiological and genetic data without individualized suspicion of wrongdoing. Unlike a fingerprint, which reveals "unique patterns of loops and whorls," a DNA sample "is the information-containing blueprint of human life." Rothstein, Mark, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 Brooklyn L. Rev. 127, 156 (2001). A minute DNA sample can be used to extract vast amounts of personal information related to heredity, genetic history, disease resistance, drug use, physical and mental characteristics, and paternity. *Id.*; *see Skinner*, 489 U.S. at 617 ("It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic.").

The DNA Act provides that the DNA samples from federal offenders are included in a national databank maintained and accessed by federal, state, and local criminal justice agencies. 42 U.S.C. § 14132. Although the DNA Act contains "privacy protection standards, 42 U.S.C. § 14133(b), breaches of these standards are likely given the fact that the results of a DNA sample may

be shared with countless criminal justice agencies at all levels of government, with criminal defendants, and with participants in court proceedings. *Id.*[10]

The invasive searches and seizures authorized by the DNA Act are not justified as exceptions to the warrant requirement, and notwithstanding the Fourth Circuit's opinion in *Jones*, 962 F.2d at 302, the government's interests in general crime control at stake do not outweigh the considerable intrusion upon Mr. Stegman's privacy rights.

2. *Jones v. Murray* is Not Controlling.

In *Jones*, 962 F.2d at 302, six inmates challenged a Virginia statute requiring convicted felons serving sentences of incarceration to submit blood samples for DNA analysis. The Fourth Circuit rejected the inmates' Fourth Amendment challenge, holding that "the Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken from *incarcerated* felons for the purposes of identifying them." *Id.* at 306-07 (emphasis added). The Court explained that its holding turned on its consideration of cases involving the Fourth Amendment rights of prison inmates as comprising a separate category of cases to which the usual *per se* requirement of probable cause does not apply. *Id.* at 307. As a result, the Court declined to address the "special needs" exception to the warrant requirement. *Id*. The Court then undertook a balancing of the intrusion upon the inmates' privacy rights and the government's interest in obtaining the blood sample to determine whether the search was reasonable. The Fourth Circuit found that the "minor intrusion" caused by the taking of a blood sample was outweighed by Virginia's interest "in determining inmates' 'identification characteristics specific to the person' for improved law

[10]The "Quality Assurance Standards for Forensic DNA Testing Laboratories," issued by the FBI, effective October 1, at Standard 7.2, requires laboratories to "retain or return a portion of the evidence sample or exhibit or extract." No standard sets forth to whom the evidence sample may be released or in what other manner it might be utilized. The Standards issued to forensic laboratories by the FBI do not set forth procedures for protecting from improper use the blood sample of the convicted offender. See also "Quality Assurance Standards for Convicted Offender DNA Databasing Laboratories," effective April 1, 1999.

enforcement." *Id*. at 307.

Jones is not controlling for at least two reasons: First, Mr. Stegman's privacy interests are more significant that the inmates' in *Jones,* thus the intrusion upon Mr. Stegman's privacy interests outweighs the government's interest in obtaining and analyzing the DNA sample for purposes of general crime control . Second, the suspicionless search and seizure required by the DNA Act are not justified under the "special needs" exception to the warrant requirement.

a. Mr. Stegman's Privacy Interests Are More Significant than the Inmates' in *Jones*.

Unlike the plaintiffs in *Jones,* Mr. Stegman is not a prison inmate, and the Fourth Circuit's opinion makes abundantly clear that its holding that a finding of probable cause or individualized suspicion is unnecessary turns upon its separate categorization of prison inmates for Fourth Amendment purposes. *Id.* at 307 n.2 n.2; *see Sanders v. Coman*, 864 F.Supp. 496, 499 (E.D.N.C. 1994) (citing *Jones* as establishing that "*inmates* have no protected Fourth Amendment interest regarding the drawing of blood for DNA sampling") (emphasis added).[11] In sharp contrast to the prison inmates in *Jones* who were incarcerated for offenses for which a DNA sample was required under the Virginia DNA statute, Mr. Stegman is a citizen who has fully served the sentence for his apparent "qualifying Federal offense" of bank robbery. With respect to his offense of bank robbery, Mr. Stegman's civil rights, including his Fourth Amendment rights, have been fully restored for nearly twelve years.[12] Accordingly, as to any "qualifying Federal offense," Mr. Stegman's privacy interests are substantially similar to those of a free citizen, and the DNA Act's intrusion upon those interests is not outweighed by the government's interest in obtaining and analyzing a DNA blood

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[11] The DNA Act as applied is unlike state DNA statutes that have been upheld on Fourth Amendment grounds because it requires DNA collection from persons who are not in custody. *E.g., Roe v. Marcotte*, 193 F.3d 72 (2nd Cir. 1999) (upholding a Connecticut DNA statute as applied to inmates); *Schlicher v. Peters*, 103 F.3d 940 (10th Cir. 1996) (upholding a Kansas DNA statute as applied to state prisoners); *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996) (upholding a Colorado DNA statute as applied to an inmate based upon the " inmate's diminished privacy rights"); *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995) (upholding an Oregon DNA statute as applied to inmates).

[12] Certain well-established exceptions exist, *e.g.*, the right to vote.

sample from him for purposes of general crime control.[13]

b. The Suspicionless Search and Seizure Are Not Justified by the "Special Needs" Exception.

Because of these distinctions between *Jones* and the instant case, and in the absence of a finding of probable cause or reasonable suspicion, the search and seizure of Mr. Stegman must be justified by some exception to the warrant requirement. One of the exceptions is the "special needs" exception which applies when the government has a "special need" beyond the normal need for law enforcement where the requirement of probable cause or individualized suspicion would be impractical. *E.g., Skinner*, 489 U.S. 602 (finding "special need" for drug testing of railway employees); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (finding "special need" for drug testing of customs officers); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) (finding "special need" for drug testing of high school students participating in athletics). In considering the reasonableness of these searches, the Supreme Court has considered the governmental interest involved, the nature of the intrusion, the privacy expectations of the object of the search, and the manner in which the search is carried out. *See, e.g., Shelton v. Gudmanson,* 934 F.Supp. 1048, 1050-51 (W.D. Wisc. 1996).

Although several courts have upheld state DNA statutes under the "special needs" exception,[14] two recent Supreme Court decisions cast doubt on the continuing validity of the

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[13] Although Mr. Stegman is under supervision for his firearms offenses, the *Jones* Court recognized that the Fourth Amendment rights of individuals under the supervision of a probation officer are not compromised in the same way as the Fourth Amendment rights of individuals in custody. *Id.* at 306; *see United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 591(2001) ("[A] court granting probation may impose *reasonable* conditions that deprive the offender of *some* freedoms enjoyed by law-abiding citizens.") (emphasis added). As a result, the intrusion upon Mr. Stegman's privacy interests as a supervised releasee is not outweighed by the government's interest in obtaining and analyzing a DNA sample for general crime control.

[14] *E.g., Roe v. Marcotte*, 193 F.3d 72 (2nd Cir. 1999) (upholding a Connecticut DNA statue as applied to incarcerated sex offenders under the "special needs" exception); *Shelton*, 934 F.Supp. at 1051 (upholding a Wisconsin DNA statute as applied to incarcerated sex offender under the "special needs" exception); *State v. Olivas*, 856 P.2d 1076 (Wash. 1993) (upholding a Washington DNA statute as applied to incarcerated sex offenders and violent offenders under the "special needs" exception).

application of the "special needs" exception to DNA statutes. In those two cases, the Supreme Court struck down as unconstitutional warrantless search or seizure practices that were not justified by probable cause or individualized suspicion. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding that drug tests of state hospital obstetrics patients were unconstitutional); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding that narcotics checkpoints violated the Fourth Amendment).

Crucial to both *Ferguson* and *Edmond* was the fact that the primary purpose of the drug testing and the narcotics checkpoint was a general interest in crime control. *See Ferguson*, 532 U.S. at 85-86 ("The stark and unique fact that characterizes this case is that Policy M-7 was designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and could be admissible in subsequent criminal prosecutions."); *Edmond*, 531 U.S. at 48 ("Because the primary purpose of the Indianapolis checkpoint is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment.). The Supreme Court explained, "We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends." *Edmond*, 531 U.S. at 43. Accordingly, policies or programs in which the primary government interest is one of general crime control do not involve "special needs" in which the usual Fourth Amendment rule does not apply. *Id.* At 38. [15]

Since the primary purpose of the DNA Act is general crime control and the furtherance of law enforcement interests, much like the primary purpose of the drug testing policy in *Ferguson* and the narcotics checkpoint in *Edmond*, the Act does not satisfy a "special need" of government and thus violates the Fourth Amendment.

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[15] *See, e.g.* "Statement for the Record of Dwight E. Adams, Assistant Director Laboratory Division, Federal Bureau of Investigation on the FBI's CODIS Program" before the Senate Judicial Committee Subcommittee on Crime and Drugs, May 14, 2002 (http:www.fbi.gov/congress/congress2/adams051402.html) ("One of the underlying concepts behind the development of CODIS was to create a database of a state's convicted offender profiles and use it to solve crimes for which there are no suspects.").

Moreover, the government's general interest in crime control is substantially outweighed by the significant infringement on individuals' privacy interests occasioned by the capabilities of DNA testing, and the DNA Act's broad scope, its application to non-incarcerated individuals, and its expansive list of "qualifying federal offenses," which includes crimes for which the convicted person has completed the sentence. As a result, the DNA Act violates the Fourth Amendment's prohibition on unreasonable searches and seizures by authorizing a warrantless search and seizure, the search and seizure do not qualify as exceptions to the warrant requirement, and the government's interest is outweighed by the intrusion upon individuals' privacy rights.

C. The DNA Act Violates the Separation of Powers Doctrine

The DNA Act's requirement that probation officers collect DNA samples from individuals on probation, parole, and supervised release violates the separation of powers doctrine. Probation officers are judicial officers who provide information to and perform advisory and supervisory functions at the request of the court. *See* 18 U.S.C. § 3603 (listing duties of probation officers); *Frad v. Kelly*, 302 U.S. 312, 318 (1937) ("[P]robation is a system of tutelage under the supervision and control of the court which has jurisdiction over the convicted defendant"); *United States v. Johnson*, 935 F.2d 47, 49-50 (4th Cir. 1991) (holding that prior to the implementation of the sentencing guidelines, "[p]robation officers were regarded as an extension of the court who provided the sentencing judge with a wide range of information about the defendant and the offense;" holding that after the implementation of the sentencing guidelines, "a probation officer continues to be a neutral, information-gathering agent of the court"); *United States v. Belgard*, 894 F.2d 1092, 1097-99 (9th Cir. 1990) (recognizing that a probation officer's duty is to provide the court with information about offenders). As a general rule, "executive or administrative duties of a nonjudicial nature" may not be imposed upon judicial officers. *Morrison v. Olson*, 487 U.S., 654, 677 (1988). As the Supreme Court has explained, "The purpose of this limitation is to help ensure the independence of the

Judicial Branch and to prevent the Judiciary from encroaching into areas reserved for the other branches." *Id.* at 677-78 (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980)); *see Miller v. French*, 530 U.S. 327, 341-42 (2000) ("While the boundaries between the three branches are not 'hermetically sealed,' the Constitution prohibits one branch from encroaching upon the central prerogatives of another") (internal citations omitted).

The DNA Act disregards this fundamental doctrine by deeming probation officers "adjunct law enforcement officers," imposing executive and administrative duties that are traditionally performed by the executive branch on them. *See Lo-Ji Sales v. New York,* 442 U.S. 319, 327 (1979). Specifically, the DNA Act mandates that probation agents conduct seizures of evidence and deliver that evidence to law enforcement crime laboratories for the purpose of general crime control. 42 U.S.C. 14131 *et seq*. This imposition of executive and administrative duties cannot withstand constitutional scrutiny. *See United States v. Turner,* 203 F.3d 1010, 1014 (7th Cir. 2000) ("[W]e . . . suggest to district judges, U.S. Attorneys, and probation officers that steps be taken to prevent the perception that probation officers are 'surrogate prosecutors.'"); *Johnson*, 935 F.2d at 49-50 ("[A] probation officer . . . [is] not an agent of the prosecution"); *Belgard*, 894 F.2d 1097-99 (acknowledging that a probation officer's duties do not include prosecuting offenders).

Pursuant to the DNA Act, probation officers improperly exceed their roles as employees of the court system much as the town justice exceeded his role in *Lo-Ji Sales*, 442 U.S. at 321-23. In *Lo-Ji Sales*, the town justice accompanied the police and members of the local prosecutor's office to an adult bookstore while they executed a search warrant for particular items. During the execution of the search warrant, the justice reviewed other items in the store, including films and magazines, in an effort to determine if any of them were possessed in violation of law and subject to seizure. *Id.* The Supreme Court held that the doctrine of separation of powers was violated when a judicial officer "allowed himself to become a member . . . of [a] search party which was essentially a police operation" and was "one with the police and prosecutors in the executive seizure . . . ." *Id.* at 327-

28.

Like the town justice in *Lo-Ji Sales*, under the provisions of the DNA Act, probation officers become members of a "police operation" and work hand-in-hand with law enforcement in seizing evidence. In assigning such a role to probation agents, Congress has violated the separation of powers doctrine.

D. The DNA Act Violates the Double Jeopardy Clause.

The DNA Act violates the double jeopardy clause because it causes defendants to be punished anew for crimes for which they have already been convicted and sentenced. *See United States v. Ursery*, 518 U.S. 267, 273 (1996) ("The [Double Jeopardy] Clause serves the function of preventing both "successive punishments and . . . successive prosecutions" and prohibits the government from "punishing twice, or attempting a second time to punish criminally for the same offense.") (internal citations omitted). The "primary purpose" of the double jeopardy clause is "to preserve the finality of judgments." *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) (quoting *Crist v. Bretz*, 437 U.S. 28 (1978)). Moreover, the double jeopardy clause prevents a sentence from being increased once a defendant has begun to serve it. *E.g., United States v. Bello*, 767 F.2d 1065, 1069 (4th Cir. 1985) (explaining that "an increase in punishment after service has commenced constitutes a multiple punishment for the same offense, which the Double Jeopardy Clause prohibits").

Having once been convicted and sentenced for a crime that occurred twenty years ago, and having served completely the sentence for that crime, Mr. Stegman cannot be punished again for that crime. The prohibition on double jeopardy is violated if Mr. Stegman's 1982 conviction for bank robbery is deemed a "qualifying Federal offense" under the DNA Act, triggering the requirement that he now submit a DNA sample. Such treatment of his bank robbery conviction would utterly disregard Mr. Stegman's legitimate expectation of finality in his sentence. *See DiFrancesco*, 449

U.S. at 128.

In addition, a requirement that Mr. Stegman to submit a DNA sample as part of his sentence for his firearms offenses, a sentence he began serving in 1997 and continues to serve today, similarly runs afoul of the double jeopardy clause. *See Bello*, 767 F.2d at 1069.

III. Conclusion

Twenty years ago John Stegman was convicted of bank robbery. His sentence has been fully discharged. The Congress has now determined that he must be punished anew by compelling him to be searched and a sample of his blood seized, and analyzed for DNA under threat of revocation of his supervised release or even new prosecution.

For all the reasons detailed above, this Court should find the DNA Analysis Backlog Elimination Act of 2000 unconstitutional on its face and as applied to Mr. Stegman, and dismiss the petition.

Respectfully Submitted,

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for the District of Maryland

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of June, 2002, a copy of the foregoing Motion to Dismiss Petition for Violation of Conditions of Supervised Release with Exhibits was delivered to: Jonathan Mastrangelo, Assistant United States Attorney, Office of the United States Attorney, 101 West Lombard Street, 6625 U.S. Courthouse, Baltimore, Maryland 21201.

_____
JEFFREY E. RISBERG
Assistant Federal Public Defender

_____
ELISA LONG
Assistant Federal Public Defender