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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

NO. CR-09-2075-EFS-1
CR-09-2075-EFS-2

v.

LANCE FRANK (1) and
JOHNATHON FRANK (2),

Defendants.

**AMENDED¹ ORDER DENYING THE
GOVERNMENT'S MOTION TO COMPEL
DNA SAMPLES**

A pretrial conference occurred in the above-captioned matter on February 8, 2010, in Richland. Both Defendants were present and represented by counsel of record. Assistant United States Attorney James Goeke appeared. Before the Court was the Government's Motion to Compel DNA Samples (Ct. Rec. [96](#)).² The Court listened to argument by counsel and then ordered counsel to jointly file the hearing exhibits, which were discovery documents provided by the U.S. Attorney's Office to Defendants.

¹ This order amends typographical errors including page 3, line 10.

² The Government prudently brought the issue of 42 U.S.C. § 14135a(a)(1)(A)'s constitutionality to the Court by filing this motion. Other agencies of the Executive Branch would be well-advised to follow this example.

1 (Ct. Rec. 107.) The Court now summarizes the content of these exhibits
2 in order to establish what the United States possesses to support the
3 indicted charges, particularly on the issue of identity of Defendants as
4 participants in the altercation.³ The asserted basis for taking buccal
5 swabs to obtain DNA samples is the need to identify those involved in the
6 altercation, which resulted in Daniel Simmons' death.

7 The alleged incident occurred on July 19, 2009. Mr. Simmons was
8 killed during an altercation with two or more members of the Frank
9 family. Several eye witnesses in the neighborhood gave statements to the
10 investigating agencies, including both the Yakima County Sheriff's Office
11 and the Federal Bureau of Investigation; the officers prepared reports.
12 Both Defendants were arrested, given *Miranda* warnings and gave
13 statements. In summary, there was a history of confrontation between Mr.
14 Simmons and the Frank family. As recently as the morning of July 19,
15 2009, Mr. Simmons and Johnathon Frank had fought. Later that evening,
16 Johnathon Frank and at least one of his uncles, Lance, went down the
17 street armed with bats and met Mr. Simmons, who was accompanied by his
18 friend Mr. Weston.⁴ Mr. Weston had cautioned Mr. Simmons not to go out

19
20 ³ By summarizing these documents (Ct. Rec. 107), the Court neither
21 makes a finding about the accuracy, reliability, or admissibility of the
22 information contained therein, nor a determination of whether it supports
23 any charge against Defendants or whether this information, without more,
24 could prove the guilt of either Defendant beyond a reasonable doubt of
25 any crime.

26 ⁴ There are conflicting reports about whether other members of the

1 because he believed Mr. Simmons was too intoxicated; but when Mr. Simmons
2 grabbed a bat and a shovel, Mr. Weston went with him and took Mr.
3 Simmons' shovel. Within minutes, Mr. Simmons had his bat taken by Lance
4 Frank, who hit him with a bat, knocking him to the ground. Versions
5 conflict as to what followed. Some witnesses reported that Johnathon
6 Frank hit Mr. Simmons in the face with a shovel after he was knocked to
7 the ground by Lance Frank. Johnathon Frank admits kicking Mr. Simmons
8 once in the neck, where it meets the back, when he was on the ground.
9 Lance Frank said he saw that happen but that both he and Johnathon Frank
10 hit Mr. Simmons in the head with a bat. Buccal swabs were taken from Mr.
11 Weston; blood at the location of Mr. Simmons' body was also swabbed; Mr.
12 Simmons' clothing was recovered. Both Defendants were arrested,
13 indicted, and remain in custody pending trial.

14 With this summary, the Court turns to the issue of whether 42 U.S.C.
15 § 14135a(a)(1)(A) (2006) (hereinafter, also referred to as "the 2006 DNA
16 Act") is constitutional as it applies to "those facing charges." Section
17 14135a(1)(A) states:

18 The Attorney General may, as prescribed by the Attorney General
19 in regulation, collect DNA samples from individuals who are
20 arrested, facing charges, or convicted or from non-United
21 States persons who are detained under the authority of the
22 United States. The Attorney General may delegate this function
23 within the Department of Justice as provided in section 510 of
Title 28, and may also authorize and direct any other agency of
the United States that arrests or detains individuals or
supervises individuals facing charges to carry out any function
and exercise any power of the Attorney General under this
section.

24 42 U.S.C. § 14135(a)(1)(A) (2006); *see also* 28 C.F.R. § 28.12; 18 U.S.C.
25 § 3142 (requiring an individual seeking release pending trial to

26 _____
Frank family were involved.

1 cooperate in collection of a DNA sample);⁵ 42 U.S.C. § 14135a(a)(5)
2 (2006) (criminalizing a failure to cooperate in collection of a DNA
3 sample).

4 The Ninth Circuit has addressed the constitutionality of a buccal
5 swab for DNA evidence of individuals seeking parole or on supervised
6 release. In *United States v. Kincade*, the Court addressed the
7 constitutionality of the DNA Analysis Backlog Elimination Act of 2000
8 ("the 2000 DNA Act"), which permitted DNA sampling of individuals
9 convicted of, and on supervised release for, qualifying federal offenses;
10 the issue was "whether the Fourth Amendment permits compulsory DNA
11 profiling of certain conditionally-released federal offenders in the
12 absence of individualized suspicion that they have committed additional
13 crimes." 379 F.3d 813, 816 (9th Cir. 2004). Three years later, in
14 *United States v. Kriesel*, the Ninth Circuit addressed the
15 constitutionality of the 2004 Justice for All Act ("the 2004 DNA Act"),
16 which amended the 2000 DNA Act by expanding the definition of "qualifying
17 Federal offense" to include all felonies, as it applied to an individual
18 on supervised release. 508 F.3d 941 (9th Cir. 2007). Then, in 2009, the

19
20 ⁵ The Court is aware that the Ninth Circuit heard oral argument
21 regarding the constitutionality of 18 U.S.C. § 3142's compelled-DNA-swab
22 requirement in order to obtain pretrial release in *United States v. Pool*,
23 on December 7, 2009. 645 F. Supp. 2d 903 (E. D. Cal. 2009) (magistrate
24 judge order), 2009 WL 2152029 (E.D. Cal. July 15, 2009) (district judge
25 order).
26

1 Ninth Circuit heard *Friedman v. Boucher*, a 42 U.S.C. § 1983 action by a
2 state defendant on pretrial detainer against state law enforcement
3 officers for violation of his Fourth Amendment right against an
4 unreasonable seizure resulting from a forcible, warrantless,
5 suspicionless buccal swab for the purpose of investigating cold case
6 files unrelated to the pending charge against him. 580 F.3d 847 (9th
7 Cir. 2009).

8 With this general DNA case law overview, the Court now delves into
9 the details of each of these cases, beginning with *Kincade*. As mentioned
10 above, *Kincade* addressed the constitutionality of the 2000 DNA Act, which
11 provided:

12 (a) Collection of DNA samples

13 (1) From individuals in custody

14 The Director of the Bureau of Prisons shall collect a DNA
15 sample from each individual in the custody of the Bureau
16 of Prisons who is, or has been, *convicted of a qualifying
17 Federal offense* (as determined under subsection (d)) or a
18 qualifying military offense, as determined under section
19 1565 of Title 10.

17 (2) From individuals on release, parole, or probation

18 The probation office responsible for the supervision under
19 Federal law of an individual on probation, parole, or
20 supervised release shall collect a DNA sample from each
21 such individual who is, or has been, *convicted of a
22 qualifying Federal offense* (as determined under subsection
23 (d)) or a qualifying military offense, as determined under
24 section 1565 of Title 10.

22 42 U.S.C. § 14135a(a)(1)(A) (2000) (emphasis added). After a lengthy
23 discussion of Fourth Amendment basic jurisprudence, the Ninth Circuit
24 examined the exceptions to the Fourth Amendment's warrant requirement.
25 It noted that the "special needs" test articulated in *New Jersey v.*
26 *T.L.O.*, 469 U.S. 325, 351 (1985), is generally applied to "searches

1 conducted for important non-law enforcement purposes in contexts where
2 adherence to the warrant-and-probable cause requirement would be
3 impracticable." *Kincade*, 379 F.3d at 823. After noting that the Supreme
4 Court had left unresolved the question of "whether special needs analysis
5 controlled the suspicionless searches of probationers at all," the Ninth
6 Circuit turned its attention to whether the appropriate test to be
7 applied to suspicionless, warrantless searches of conditionally-released
8 federal offenders was the "totality of the circumstances" test. *Id.* at
9 830. After extensive analysis, it concluded it was, saying,

10 We believe that such a severe and fundamental disruption in the
11 relationship between the offender and society, along with the
12 government's concomitantly greater interest in closely
13 monitoring and supervising conditional releasees, is in turn
14 sufficient to sustain suspicionless searches of his person and
15 property - even in the absence of "special needs"- at least
16 where such searches meet the Fourth Amendment touchstone of
17 reasonableness as gauged by the totality of the circumstances.

18 *Id.* at 835. Without determining whether the "special needs" test would
19 sustain the constitutionality of the 2000 DNA Act, the five-judge
20 plurality applied the "totality of the circumstances" test to the 2000
21 DNA Act, which it held constitutional. The governmental interests
22 identified were 1) ensuring that parolees comply with release conditions,
23 2) lessening recidivism among conditional releasees, and 3) bringing
24 closure to victims of past crimes by helping solve crimes. *Id.* at 838-
25 39. These interests were balanced with "the well-established principle
26 that parolees and other conditional releasees are not entitled to the
full panoply of rights and protections possessed by the general public."
Id. at 833. The plurality stated:

In light of conditional releasees' substantially diminished
expectations of privacy, the minimal intrusion occasioned by
blood sampling, and the overwhelming societal interests so

1 clearly furthered by the collection of DNA information from
2 convicted offenders, we must conclude that compulsory DNA
3 profiling of qualified federal offenders is reasonable under
4 the totality of the circumstances.

5 *Id.* at 839.⁶ Because *Kincade* involved the 2000 DNA Act as it applied to
6 qualifying federal offenders on parole, probation, or supervised release,
7 rather than the 2006 DNA Act as it applies to a person facing charges, it
8 is of assistance only in its general discussion of Fourth Amendment
9 jurisprudence and its use of the "totality of the circumstances" test.⁷

10 In *Kriesel*, the Ninth Circuit held that the 2004 Justice for All

11 ⁶ Judge Gould concurred in the result but did not concur in the
12 plurality's use of the "totality of the circumstances" test preferring
13 use of the "special needs" test which he believed lead to the same result
14 albeit on different precedent. *Kincade*, 379 F.3d at 840. This Court
15 believes that, although the concurring opinion utilized the special needs
16 test, it supports the holding in the instant case because the identified
17 special need of "monitoring convicts on supervised release and deterring
18 their possible recidivism" is absent for individuals facing charges. *Id.*
19 at 840-42.

20 ⁷ Although the Ninth Circuit said in a parenthetical that those
21 arrested and booked into state custody lack a privacy interest to DNA-
22 derived personal identification being obtained from a blood sample, that
23 parenthetical is truly dicta because the constitutionality of requiring
24 DNA samples from arrestees was not at issue, and this Court gives this
25 parenthetical no consideration in its analysis. See *Kincade*, 379 F.3d
26 at 837.

1 Act, which expanded coverage of the 2000 DNA Act to require DNA samples
2 from all convicted felons on supervised release, was constitutional. 508
3 F.3d 941, 946 (9th Cir. 2007). The Ninth Circuit applied the "totality
4 of the circumstances" test of reasonableness as approved in *Samson v.*
5 *California*, 547 U.S. 843 (2006).⁸ The Ninth Circuit concluded that
6 convicted felons on supervised release have diminished privacy interests
7 in the collection of their DNA for the purpose of identification. *Id.* at
8 948. However, the Ninth Circuit limited its holding to the case before
9 it, emphasizing that its ruling did "not cover DNA collection from
10 arrestees or non-citizens detained in the custody of the United States,
11 who are required to submit to DNA collection by the 2006 DNA Act." *Id.*
12 at 948; see 42 U.S.C. § 14135a(a)(1)(A) (2006). *Kriesel* held that the
13 2004 amendment to the DNA act, which included those convicted of "any
14 felony," was constitutional "because the government's significant
15 interests in identifying supervised releasees, preventing recidivism, and
16 solving past crimes outweigh the diminished privacy interests that may be
17 advanced by a *convicted felon* currently serving a term of supervised
18 release." *Id.* at 950 (emphasis added).

19 In *Friedman*, the issue did not involve the 2000 DNA Act or
20 amendments thereto as the basis for the compelled buccal swab. 580 F.3d
21 847. Rather, in this § 1983 civil action, the Ninth Circuit denied state

22 ⁸ In *Samson*, the Supreme Court applied the "totality of the
23 circumstances" reasonableness test to uphold a state law providing that,
24 as a parole condition, the parolee must agree to be subject to a
25 suspicionless and warrantless search or seizure by a parole officer.
26 *Samson*, 547 U.S. at 848.

1 law enforcement agents qualified immunity because they violated a
2 pretrial detainee's clearly-established Fourth Amendment right to be free
3 from an unreasonable search and seizure by obtaining a DNA sample from
4 him without a warrant. *Id.* at 858-59. The Ninth Circuit first ruled
5 that the "special needs" exception to the Fourth Amendment's warrant
6 requirement did not permit the buccal swab of Mr. Friedman because the
7 "special needs" exception applies only where the search is "conducted for
8 important *non-law enforcement purposes* in contexts where adherence to the
9 warrant-and-probable cause requirement would be impracticable." *Id.* at
10 853 (quoting *Kincade*, 379 F.3d at 823 (emphasis added)). Because the
11 asserted reason for the buccal swab was investigation of "cold case"
12 files, it was for a classic law enforcement purpose; therefore, the
13 "special needs" exception did not apply. *Id.* After ruling that a
14 Montana statute did not permit the Nevada authorities to obtain a buccal
15 swab for DNA, it turned to the reasonableness requirement of the Fourth
16 Amendment. Distinguishing *Kincade* and *Kriesel*, because they involved
17 convicted felons on supervision, parole, or probation in whose
18 re-integration and supervision society had a significant interest, the
19 Ninth Circuit held:

20 The warrantless, suspicionless, forcible extraction of a DNA
21 sample from a private citizen violates the Fourth Amendment.
22 The actions of the officers were not justified under the
23 "special needs" exception, reliance on extraterritorial
24 statute, or on general Fourth Amendment principles. The search
25 and seizure of Friedman's DNA violated the Constitution.

26 *Id.* at 858. Although the majority in *Friedman* did not explicitly use the
"totality of the circumstances" test, its Fourth Amendment reasonableness
analysis was the practical equivalent because it balanced the
government's interest against individual privacy interests.

1 With these cases and Fourth Amendment principles in mind, the Court
2 rejects the application of the "special needs" test because the
3 identified needs here are for classic law enforcement purposes. As the
4 Ninth Circuit in *Kriesel* said:

5 Taking our cue from *Samson*, we reaffirm that the "touchstone of
6 the Fourth Amendment is reasonableness," [*Samson*, 547 U.S. at
7 855 n.4] . . . , and adopt the "general Fourth Amendment
8 approach," which "examin[es] the totality of the circumstances
9 to determine whether a search is reasonable." *Id.* at [848]
10 (quoting *United States v. Knights*, 534 U.S. 112, 118, 122 S.
11 Ct. 587, 151 L. Ed. 2d 497 (2001) (internal quotation marks
omitted). "Whether a search is reasonable 'is determined by
assessing, on the one hand, the degree to which it intrudes
upon an individual's privacy, and on the other, the degree to
which it is needed for the promotion of legitimate governmental
interests.'" *Id.* (quoting *Knights*, 534 U.S. at 118-19, 122 S.
Ct. 587).

12 508 F.3d at 947.

13 Here, in determining whether it is reasonable in the totality of the
14 circumstances to compel buccal swabs for DNA, it is critical to remember
15 the status of the Franks - they are presumed innocent. Those presumed
16 innocent have an undeniably greater expectation of privacy than the
17 supervised releasees in *Kincade* and *Kriesel*. See *Herrera v. Collins*, 506
18 U.S. 390, 398 (1993) ("A person when first charged with a crime is
19 entitled to a presumption of innocence, and may insist that his guilt be
20 established beyond a reasonable doubt."). A presumed-innocent individual
21 facing charges is more similar to a "free person" than a convicted
22 individual. And as the Supreme Court has recognized, "the drawing of
23 blood from free persons generally requires a warrant supported by
24 probable cause to believe that the person has committed a criminal
25 offense and that his blood will reveal evidence relevant to that
26 offense." *Schmerber v. California*, 384 U.S. 757, 768-71 (1966).

1 Although the taking of a buccal sample is a minimal intrusion, see *United*
2 *States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005) (“[T]he intrusion
3 of a blood test is minimal.”), the privacy concerns attenuated with the
4 information that a DNA sample provides, and the recording of such
5 information in CODIS,⁹ are significant.¹⁰ And it is not only the dissents
6 in *Kincade* and *Kriesel* that discuss the concerns about misuse of the DNA
7 profiles of convicted felons on supervised release maintained in CODIS;
8 Judge Gould in his concurring opinion in *Kincade* expressed similar
9 concerns, albeit in the context of continued storage of DNA of those who
10 completed their supervised release, noting:

11 In our age in which databases can be “mined” in a millisecond
12 using super-fast computers, in which extensive information can,
or potentially could, be gleaned from DNA (even “junk” DNA

13
14 ⁹ The Federal Bureau of Investigation maintains a Combined DNA
15 Index System (CODIS). 42 U.S.C. § 14132(a)-(b).

16 ¹⁰ The Court notes that obtaining a DNA buccal sample differs from
17 obtaining a handwriting, voice, or fingerprint sample. It is clearly
18 established that handwriting, voice, and fingerprint samples can be
19 compelled. *United States v. Dionisio*, 410 U.S. 1, 8 (1973). This is
20 because these items have “previously been exposed to the public at large”
21 and therefore the individual’s privacy is not being exposed. *Id.* at 14.
22 The Supreme Court has distinguished these samples from a blood sample,
23 which is not regularly exposed to the public at large and requires a
24 bodily intrusion. *Id.* at 14-15. The Court finds a buccal DNA swab is
25 akin to a blood sample because it requires a bodily intrusion to obtain
26 information that is not regularly exposed to the public at large.

1 currently used) and in which this data can easily be stored and
2 shared by governments and private parties would-wide, the
3 threat of a loss of privacy is real, even if we cannot yet
4 discern the full scope of the problem.

5 *Kincade*, 379 F.3d at 842. Even the majority in *Kriesel*, though comforted
6 by the criminal penalties for misuse in the DNA Act, recognized that
7 "concerns about DNA samples being used beyond identification purposes are
8 real and legitimate." 508 F.3d at 948. Further, all of these genuine
9 concerns about the disastrous impact that misuse of collected DNA
10 material would have were expressed in the context of *those convicted of*
11 *a felony*. How much more weighty are these concerns when they involve the
12 potential misuse of DNA collected from those *who are presumed innocent*:
13 "[n]o amount of statutory protection of the sample will undo the taint of
14 an unconstitutional search to obtain such information." *United States v.*
15 *Mitchell*, --- F. Supp. 2d ---, 2009 WL 5551383, *12 (W.D. Pa. Nov. 6,
16 2009).

17 These weighty concerns are now balanced with the governmental
18 interests. Here, although Defendants are detained pretrial, the
19 Government has not asserted any penological interest to support a
20 compulsory DNA sample, nor is there any obvious penological interest.
21 *Cf. Bull v. City & County of San Francisco*, --- F.3d ---, 2010 WL 431790
22 (9th Cir. Feb 9, 2010) (finding jail's policy of strip searching all
23 arrestees for drugs and contraband reasonable because of the serious,
24 ongoing problems with drugs, weapons, and other contraband being smuggled
25 into jail facilities). In addition, the Government has not identified an
26 emergent need for the DNA evidence, nor is there an obvious emergent

1 need.¹¹ *Cf. Schmerber*, 384 U.S. at 768-71 (finding a compulsory blood
2 draw reasonable in order to determine the blood alcohol level of a
3 hospitalized individual charged with driving while intoxicated). In
4 fact, the only interest asserted by the Government is the identification
5 of Defendants. As the stipulated hearing exhibits demonstrate, the
6 Government's identification interest is nonexistent because 1) witnesses
7 to the alleged assault identified Defendants; 2) one Defendant, after
8 receiving *Miranda* rights, admitted using a bat to hit the victim; and 3)

9
10 ¹¹ This district's case statistics for September 30, 2007, to
11 September 30, 2008, show that a conviction is obtained in almost 99
12 percent of this district's criminal cases. Administrative Office of the
13 U.S. Courts, *Judicial Business of the United States Courts: 2008 Annual*
14 *Report of the Director*, pp. 256 & 259, tables D-6 & D-7 (2008). Of the
15 385 criminal cases that were pursued by the Government, 381 resulted in
16 a conviction. *Id.* Accordingly, the conviction rate for that time period
17 is 98.9 percent. For that same time period, the average time between
18 filing and disposition of a felony was nine months. *Id.* p. 256, table
19 D-6. Therefore, in almost 99 percent of the pursued cases, the
20 Government obtained DNA information on average nine months after the
21 individual was charged. It is appropriate to require the Government to
22 wait this short period of time to ensure that the constitutional rights
23 of the four individuals acquitted of the charges are protected because
24 the presumption of innocence and the privacy interest of an innocent
25 person in his genetic code far outweighs the general governmental need
26 to use DNA for identification.

1 the other Defendant, after receiving *Miranda* rights, admitted kicking the
2 victim. The Court determines this legitimate governmental interest does
3 not outweigh the expectation of privacy enjoyed by an individual facing
4 charges: individuals who are presumed innocent. The Court finds the
5 presumed-innocent status of an individual facing charges critical and the
6 following *Friedman* analysis useful:

7 Neither the Supreme Court nor this Court has ever ruled that
8 law enforcement officers may conduct suspicionless searches on
9 pretrial detainees for reasons other than prison security.
10 Indeed, as the Supreme Court stated emphatically in *Schmerber*
11 [*v. California*]: "The interests in human dignity and privacy
12 which the Fourth Amendment protects forbid any such intrusions
13 on the mere chance that desired evidence might be obtained."
14 384 U.S. [757,] 769-70, 86 S.Ct. 1826 [(1966)]. In contrast to
15 the government's position in this case, which would endorse
16 routine, forcible DNA extraction, the Court concluded: "The
17 importance of informed, detached and deliberate determinations
18 of the issue whether or not to invade another's body in search
19 of evidence of guilt is indisputable and great." *Id.* at 770, 86
20 S.Ct. 1826.

21 . . .
22 We have also carefully confined administrative searches at
23 detention facilities to those reasonably related to security
24 concerns. . . . Neither the Supreme Court nor our court has
25 permitted general suspicionless, warrantless searches of
26 pre-trial detainees for grounds other than institutional
security or other legitimate penological interests. Thus, there
is no support for the government's contention that *Friedman's*
status as a pre-trial detainee justifies forcible extraction of
his DNA.

580 F.3d at 856-57.

Accordingly, after balancing the interests of individuals facing
charges against the government's legitimate interests, the Court
concludes that 42 U.S.C. § 14135(a)(1)(A)'s compulsory DNA sampling of
those facing charges is unreasonable; this section as it applies to
individuals facing charges facially violates the Fourth Amendment. See
United States v. Mitchell, - F. Supp. 2d -, 2009 WL 5551383 (W.D. Pa.
Nov. 6, 2009) ("[Section] 14135a, and its accompanying regulations,

1 requiring a charged defendant to submit a DNA sample for analysis and
2 inclusion in CODIS without independent suspicion or a warrant
3 unreasonably intrudes on such defendant's expectation of privacy and is
4 invalid under the Fourth Amendment to the United States Constitution.");
5 *cf. Haskell v. Brown*, --- F.3d ---, 2009 WL 5062184 (N.D. Cal. Dec. 23,
6 2009) (determining that the moving arrestees failed to sufficiently show
7 that they are entitled to a preliminary injunction of a California
8 statute allowing mandatory DNA sampling of felony arrestees because
9 arrestees have a lesser privacy interest than the general population and
10 DNA buccal sampling is a form of identification similar to
11 fingerprinting).¹² Therefore, the Government may not rely on this statute
12 as it applies to these Defendants, and the Government's motion is denied.
13 Because a warrant exception does not apply, if the Government seeks to
14 obtain Defendant's DNA pretrial, the Government must comply with the
15 Fourth Amendment's Warrant Clause by "demonstrat[ing] probable cause to
16 a neutral magistrate and thereby convinc[ing] him to provide formal
17 authorization to proceed with a search by issuance of a particularized

18 ///

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22 ¹² See also Eric May, "Who's Next? The Continued Expansion of DNA
23 Databases in *United States v. Kincade*, 43 No. 1 Crim. Law Bulletin Art.
24 6 (Winter 2007); "Constitutional Law - Fourth Amendment - Ninth Circuit
25 Upholds Collection of DNA from Parolees. - *United States v. Kincade*, 379
26 F.3d 813 (9th Cir. 2004) (en banc), 118 Harv. L. Rev. 818 (Dec. 2004).

1 warrant."¹³ *Kincade*, 379 F.3d at 822; see also LMR 1(a)(2); Fed. R. Crim.
2 P. 41.

3 For the above-given reasons, **IT IS HEREBY ORDERED:** the Government's
4 Motion to Compel DNA Samples (**Ct. Rec. 96**) is **DENIED**.

5 **IT IS SO ORDERED.** The District Court Executive is directed to enter
6 this Order and to provide copies to all counsel.

7 **DATED** this 10th day of March 2010.

8
9 s/Edward F. Shea
EDWARD F. SHEA
10 United States District Judge
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21 ¹³ Because Defendants have already been indicted, evidence relating
22 to the instant charges against these Defendants cannot be gathered by
23 grand jury subpoena. See *United States v. Moss*, 756 F.2d 329, 332 (4th
24 Cir. 1985); *United States v. Furrow*, 125 F. Supp. 2d 1170 (C.D. Cal.
25 2000). Furthermore, Federal Rule of Criminal Procedure 17(c) is not a
26 discovery device. *United States v. Nixon*, 418 U.S. 683, 700 (1974).