**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

**UNITED STATES OF AMERICA**

**vs.** **CASE NO: 3:02-Cr-200-J-20MCR**

**PATRICE HURN**
_____/

**DEFENDANT HURN'S OPPOSITION TO DNA SAMPLE COLLECTION**

COMES NOW the defendant, PATRICE HURN, by and through the undersigned attorney, and opposes the collection of DNA being demanded by the United States Probation Office in its letter to Hurn dated September 26, 2005, a copy of which is attached hereto.

Hurn opposes collection of her DNA and seeks an order from this Court directing the United States Probation Office to cease and desist from any further effort to collect her DNA.

The DNA collection is purportedly being sought under authority of 42 USC § 14135a. The statute as applied to Hurn is unconstitutional and in violation of federal law for the following reasons:

**Ex Post Facto Violation**

The statute authorizes probation officers to collect DNA samples from persons on federal supervised release supervision, 42 U.S.C. § 14135a(a)(2), resulting in the person being threatened with violation of probation for failure to "cooperate." The authorization for this was added to 42 U.S.C. § 14135a(a)(2) by the euphemistically labeled "Justice for All Act of 2004," Public Law 108-405, effective October 30, 2004.

18 U.S.C. § 3583(d), as amended by Public Law 106-546, the DNA Analysis Backlog Elimination Act of 2000, effective December 19, 2000, authorized this Court at the time of Hurn's sentencing, to include as a condition of probation or supervised release, a requirement that she submit to collection of a DNA sample as a condition of her supervised release, *if such collection was authorized by the DNA Analysis Backlog Elimination Act of 2000.*

As the DNA statute read at the time of Hurn's offense and sentencing, collection of her DNA was *not authorized*, because her offense of conviction, 18 U.S.C. § 1920, was not within the ambit of offense for which the collection of DNA was authorized under the 2000 edition of the statute. It was the 2004 amendment which purported to add all federal felony offenses to the DNA collection authority.

But Hurn was sentenced and her judgment recorded in this case on June 20, 2003 for offenses allegedly committed in 2001 and 2002. Hurn was placed on

supervision subject to specific terms and conditions of supervision at that time, that is, June 2003. Hurn's judgment was upheld on direct appeal and has not been modified by this Court.

And yet this statute is purporting, in effect, to add a term and condition to this Court's order of supervised release after the sentence is final and by virtue of application of a statute which was not enacted until after Hurn's alleged offense. [1] This Court was not authorized to impose DNA collection as a condition of supervision under the statute in effect on the date in question and such a condition cannot be unilaterally added to her terms of supervision after the fact by virtue of a subsequently enacted statute.

We know that this is what is being done because the letter from probation attached hereto says so, and expressly threatens Hurn with a violation proceeding if she fails to cooperate. Violation proceedings can subject a defendant to additional imprisonment.

This results in a violation of the Ex Post Facto provision of the United States Constitution. To quote the Eleventh Circuit:

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[1] Hurn's judgment recites that the date of the three alleged offenses was August 2001, September 2001, and January 2002.

> The Ex Post Facto Clause[2] prohibits a state from enacting statutes which "make more burdensome the punishment for a crime, after its commission." *United States v. De La Mata,* 266 F.3d 1275, 1286 (11th Cir.2001). To prevail in an Ex Post Facto Clause challenge concerning changes in parole procedures, a prisoner "must show that as applied to his own sentence the law created a significant risk of increasing his punishment." *Garner v. Jones,* 529 U.S. 244, 255, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000).

*Rogers v. Nix*, 2005 WL 2090202, *2 (11th Cir. 2005).

Therefore, the application of 42 U.S.C. § 14135a to Hurn on these facts is unconstitutional.

A term or condition of supervision cannot be added after the sentence is imposed; a probationer cannot be violated for failing to do that which the person was not required to do at the time sentence was imposed; a subsequently enacted statute cannot be applied to increase a person's punishment for an offense committed if at all prior to enactment of the statute.

This Constitutional protection is incorporated in 18 U.S.C. § 3582, which

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[2] United States Constitution, Article I, Section 9, Clause 3, and Section 10, Clause 1.

provides, in pertinent part:

> (b) Effect of finality of judgment.--Notwithstanding the fact that a sentence to imprisonment can subsequently be--
> (1) modified pursuant to the provisions of subsection (c);
> (2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or
> (3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;
> a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.
> (c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--
> (1) in any case--
> (B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and
> (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Likewise, 18 U.S.C. § 3583 does not permit modification of a term of supervised release except in the case of a voluntary modification consented to by the defendant or a modification after a revocation hearing and finding of a material violation of a term or condition of supervision.

**Prohibited Retroactive Application of Subsequently Enacted Statute**

The application of subsequently enacted § 14135a to Hurn's case has an impermissible retroactive effect. The subsequently enacted DNA sampling requirement imposes a new duty or obligation on Hurn which carries serious consequences. The DNA Identification Act of 1994, part of the Violent Crime Control and Law Enforcement Act of 1994, authorized the Federal Bureau of Investigation to create an index of DNA samples from persons convicted of crimes. DNA Identification Act of 1994, § 210304(a), Pub.L. No. 103-332, 108 Stat. 1796. The DNA Analysis Backlog Elimination Act of 2000 ("2000 DNA Act") authorized the collection of DNA samples from a limited class of federal prisoners, parolees, and probationers, which did not include Hurn. DNA Analysis Backlog Elimination Act of 2000, §§ 3, Pub.L. No. 106-546, 114 Stat. 2726 (2000) (codified at 42 U.S.C. § 14135a). The 2000 DNA Act authorized the collection of a DNA sample from persons convicted of a limited number of offenses, including murder, sexual abuse, sexual exploitation or abuse of children, and robbery or burglary. *Id.* The Justice For All Act of 2004 ("2004 DNA Act") amended 42 U.S.C. § 14135a to expand the list of qualifying offenses for collection of DNA samples to include any felony, any offense under chapter 109A of Title 18, any crime of violence, and any attempt or conspiracy to commit any of those offenses. Justice For All Act of 2004, § 203,

Pub.L. No. 108-405, 118 Stat. 2260 (codified at 42 U.S.C. 14135a(d)).

The Supreme Court has explained that "the presumption against retroactive legislation is deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.,* 511 U.S. 244, 265, 114 S.Ct. 1483, 1496, 128 L.Ed.2d 229 (1994). In determining whether a statute is impermissibly retroactive, courts must look to (1) whether Congress has expressly prescribed the statute's proper reach, and, if not, (2) whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. *Id.* at 280, 114 S.Ct. at 1505.

Clearly as applied to Hurn the 2004 DNA Act imposes new duties with respect to a transaction that is already completed, therefore it may not be retroactively applied to Hurn.

**Violation of Fourth Amendment**

Hurn finally argues that 42 U.S.C. § 14135a violates her Fourth Amendment rights. The statute purports to authorize probation officers to detain persons who refuse to "cooperate" in the collection of DNA samples. 42 U.S.C. § 14135a(4)(A):

> The Director of the Bureau of Prisons or the probation office responsible (as applicable) may use or authorize the use of such means as are

reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample.

This bumps right up against the Fourth Amendment, which protects persons from unreasonable searches and seizures except upon probable cause that a crime has been committed. American citizens were historically noted for their love of freedom and independence. The Constitution of a freedom loving people does not permit detention of persons who refuse to "cooperate."

**Conclusion**

Therefore, the United States Probation Office's application of the statute to Hurn, on the facts of her case, is in violation of the Ex Post Facto Clause and the Fourth Amendment to the Constitution of the United States, in violation of 18 U.S.C. § 3582 and 3583, and Hurn is entitled to an order from this Court directing the United States Probation Office to cease and desist all further efforts to collect her DNA.

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

**___s/William Mallory Kent_____**
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**CERTIFICATE OF SERVICE AND OF FILING**

I hereby certify that a true and correct copy of the foregoing was served electronically on John J. Sciortino, Assistant United States Attorney, Office of the United State Attorney, 300 North Hogan Street, Suite 700, Jacksonville, Florida 32202, on this the28th day of September, 2004.

_____s/ William Mallory Kent_____
William Mallory Kent