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# Striking a Balance: Why Ohio's Felony-Arrestee DNA Statute is Unconstitutional and Ripe for Legislative Action

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# **STRIKING A BALANCE: WHY OHIO'S FELONY-ARRESTEE DNA STATUTE IS UNCONSTITUTIONAL AND RIPE FOR LEGISLATIVE REVISION**

BRENDAN HEIL\*

I. INTRODUCTION .....	530
II. DNA STATUTES AND THE FOURTH AMENDMENT .....	533
A. <i>The Fourth Amendment, Article I, § 14, and DNA Samples as Searches</i> .....	535
1. The Fourth Amendment and Article I, § 14 .....	535
2. Ohio's DNA Statute: Multiple and Potentially Endless Searches .....	536
B. <i>Totality of the Circumstances vs. Special Needs Doctrine</i> .....	538
1. The Totality of the Circumstances Test and Post Conviction DNA Statutes .....	538
2. The Special Needs Doctrine and Post Conviction DNA Statutes .....	540
C. <i>Application of Fourth Amendment Tests to Arrestee DNA Statutes</i> .....	542
1. Totality of Circumstances Test .....	542
2. Special Needs Doctrine .....	548
3. <i>Anderson v. Commonwealth</i> and the Fingerprint Analogy .....	549
4. <i>State v. Emerson</i> and a Person's Reasonable Expectation of Privacy in a DNA Profile .....	550
III. WHY OHIO'S FELONY-ARRESTEE DNA STATUTE IS UNCONSTITUTIONAL IN ITS CURRENT FORM .....	552
A. <i>Ohio's Felony Arrestee Statute: Impact and Types of Searches Implicated</i> .....	552
1. Impact of Ohio's Felony-Arrestee Statute .....	552
2. Analyzing Ohio's Felony-Arrestee	

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DNA Statute as Involving Three Types of Searches.....	554
B. <i>Application of the Totality of the Circumstances Test</i> .....	555
C. <i>Application of the Special Needs Doctrine</i> .....	557
D. <i>Ohio's Expungement Process Not a Solution</i> .....	557
IV. PROPOSED CHANGES TO OHIO'S ALL-ARRESTEE DNA STATUTE .....	559
A. <i>Proposed Judicial and Legislative Solutions</i> .....	559
1. Proposed Judicial Solutions: Expanding the Exceptions to the Warrant Requirement .....	559
2. Proposed Legislative Solution: Delaying the Addition of the Sample to the Database .....	561
B. <i>Automatic Expungement as the Best Solution</i> .....	562
C. <i>Proposed Statutory Language</i> .....	563
V. CONCLUSION.....	564

## I. INTRODUCTION

Charles and Patricia Geiger never thought they would have to spend a night in jail, but on March 1, 2011 that is exactly what happened.<sup>1</sup> The couple was arrested and Charles charged with felonious assault from a hit and run incident with an off-duty Cleveland Police officer.<sup>2</sup> The incident occurred when the officer approached an SUV that had made an illegal U-turn; the SUV responded by speeding off, hitting and injuring the officer.<sup>3</sup> The Geigers were questioned and eventually arrested based on the officer's eyewitness identification of Mr. Geiger as the driver and his statement that the license plate number of the vehicle involved matched that of the Geigers.<sup>4</sup> Based on this evidence, the couple was arrested that evening of March 1, 2011 and spent over twenty hours in jail before finally being released on bail.<sup>5</sup> The only problem is, at the time of the incident, neither of the Geigers were in the area.<sup>6</sup> Charles Geiger was eating dinner at a local restaurant with his daughter, an event

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<sup>1</sup> Leila Atassi, *Still No Apology for Lakewood Couple After 20 Hours in Jail for Crime They Did Not Commit*, PLAIN DEALER (Apr. 20, 2011, 12:10 PM), [http://blog.cleveland.com/metro/2011/04/still\\_no\\_apology\\_for\\_lakewood.html](http://blog.cleveland.com/metro/2011/04/still_no_apology_for_lakewood.html).

<sup>2</sup> Michael Sangiacomo, *Former Lakewood School Board Member Accused of Assaulting a Cleveland Police Officer*, PLAIN DEALER (Mar. 4, 2011, 9:58 PM), [http://blog.cleveland.com/metro/2011/03/former\\_lakewood\\_school\\_board\\_m.html](http://blog.cleveland.com/metro/2011/03/former_lakewood_school_board_m.html).

<sup>3</sup> Atassi, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

that was captured on a security camera.<sup>7</sup> Multiple witnesses swore that Mrs. Geiger's SUV was not in the officer's vicinity that evening.<sup>8</sup> After this evidence came to light, the police stopped their investigation and the Prosecutor's Office moved to dismiss the pending charges against Charles Geiger.<sup>9</sup>

Because their ordeal occurred before July 1, 2011, the Geigers' nightmare ended with nothing more than bad memories and residual animosity over their unfortunate time in jail.<sup>10</sup> Under Ohio's new felony-arrestee DNA statute, however, the Geigers' ordeal would not have ended with dismissal of the charges.<sup>11</sup> Instead, during the booking process, Mr. Geiger would have been required to submit to a DNA collection procedure and his DNA specimen would have been added to the state's DNA database.<sup>12</sup> Once his DNA profile was in the database, it would be subject to almost unlimited searches, and the only recourse available to Mr. Geiger would be the pursuit of a lengthy record sealing process.<sup>13</sup> The bottom line is, because of the arresting police department's error, the government would permanently retain Geiger's DNA sample.<sup>14</sup> The Geigers' case is sadly not unique, as tens of thousands of Ohio's over 300,000 annual felony arrestees will never be convicted.<sup>15</sup>

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<sup>7</sup> See Leila Atassi, *Surveillance Video that Cleared Geiger*, PLAIN DEALER (Apr. 8, 2011, 4:35 PM), [http://videos.cleveland.com/plain-dealer/2011/04/surveillance\\_video\\_that\\_cleared.html](http://videos.cleveland.com/plain-dealer/2011/04/surveillance_video_that_cleared.html).

<sup>8</sup> Atassi, *supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012). July 1, 2011 is when the felony-arrestee portion of the statute took effect.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Mrs. Geiger was charged with obstructing justice which, under current Ohio law, is a misdemeanor. OHIO REV. CODE ANN. § 2921.32 (LexisNexis 2013). Therefore, during her booking process, she would not have been required to submit to a DNA specimen collection procedure.

<sup>13</sup> OHIO REV. CODE ANN. § 2953.52 (LexisNexis 2012).

<sup>14</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

<sup>15</sup> In 2009, Ohio reported 302,529 arrests for violent and property crimes to the Federal Bureau of Investigation (FBI). OFFICE OF CRIMINAL JUSTICE SERVS., OHIO DEP'T OF PUB. SAFETY, OHIO CRIMINAL JUSTICE STATISTICS 32 (2010). The FBI also estimates the total number of such crimes in Ohio, with the estimates for the last 10 years never dipping below 400,000. Uniform Crime Reporting Statistics, FED. BUREAU OF INVESTIGATION, <http://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (select "Ohio" for part (a); "Number of violent crimes" and "Number of property crimes" for part (b); and "2000 to 2010" for part (c); then select "Get Table" button). Ohio does not keep statistics of the disposition of felony arrests, but in states such as California, where such statistics are kept, the conviction rate varied from 67.5 to 71.0 percent. ATT'Y GEN. OF CAL., ADULT FELONY ARREST DISPOSITIONS 2000-2005 (2006), available at <http://ag.ca.gov/cjsc/publications/candd/cd05/tabs/2005Table39.pdf>. A study of New York City's arrests and dispositions found that over 40 percent of those arrested were never prosecuted. VERA INST. OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS (Malcolm Feeley ed., rev. ed. 1980).

Increasing law enforcement's ability to obtain DNA evidence is one of the recent trends in legislation across the country.<sup>16</sup> The importance of DNA evidence in solving crimes has led to a nationwide increase in felony-arrestee DNA statutes.<sup>17</sup> Felony-arrestee DNA statutes require the arresting law enforcement agency to take a DNA sample from every person arrested for a felony as part of the booking procedure.<sup>18</sup> Ohio has recently joined this national trend, and in an attempt to increase the number of samples in its DNA database, has authorized the collection of DNA from all felony arrestees.<sup>19</sup>

This Note argues that Ohio's felony-arrestee DNA statute violates Article I, section 14 of the Ohio Constitution and the Fourth Amendment to the United States Constitution.<sup>20</sup> The initial physical swab and the subsequent database searches of an arrestee's DNA sample, while the arrestee is in custody or being prosecuted, do not violate the Fourth Amendment.<sup>21</sup> However, the inclusion of an innocent person's DNA in Ohio's DNA database, subject to repeated searches over time, violates both the Ohio and federal constitutional protections against unreasonable searches.<sup>22</sup> Broadly written DNA statutes trample people's civil rights, and more carefully drawn legislation could meet the same law enforcement goals.<sup>23</sup> The legislature should revise Ohio's felony-arrestee statute, balancing law enforcement's interest in solving crimes with the civil liberties of arrestees.

Part II of this Note explains the background of the Ohio DNA statute and the broader nationwide trend of statutes designed to increase DNA databases. Part III explores the relevant precedents and the protections available under the Fourth Amendment of the United States Constitution and the Ohio Constitution. Part IV shows that under the Ohio Supreme Court's current understanding of Article I, § 14 and the Fourth Amendment, the felony-arrestee statute is unconstitutional. Part V proposes a revision of the statute that both cures the law of its constitutional defects and provides law enforcement officials with a constitutional and effective way to

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<sup>16</sup> 2011 DNA Database Legislation, DNAResource.com (Jan. 21, 2012), <http://www.cqstatetrack.com/texis/viewrpt/main.html?event=495bdbf6ba>.

<sup>17</sup> DNAResource.com, STATE THAT HAVE PASSED ARRESTEE DNA DATABASE LAWS (Sept. 2011), available at <http://www.dnaresource.com/documents/ArresteeDNALaws-2011.pdf> (sic).

<sup>18</sup> The moniker "felony-arrestee" refers generally to statutes requiring all felony arrestees, instead of those requiring samples from specific offenders, all arrestees, or convicted felons. See Ashley Eiler, *Arrested Development: Reforming the Federal All-Arrestee DNA Collection Statute to Comply with the Fourth Amendment*, 79 GEO. WASH. L. REV. 1201, 1206-07 (2011) (discussing the growth in felony arrestee statutes); Robert Berlet, *A Step Too Far: Due Process and DNA Collection in California After Proposition 69*, 40 U.C. DAVIS L. REV. 1481, 1494-95 (2007) (explaining the expansion of California's DNA sampling from a few specific felonies to any felony arrestee).

<sup>19</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

<sup>20</sup> OHIO CONST. art. I, § 14; U.S. CONST. amend. IV.

<sup>21</sup> See *infra* Part III.B.

<sup>22</sup> See *infra* Part III.B.

<sup>23</sup> 42 U.S.C.S. § 14135 (LexisNexis 2012) (federal statute providing funding to states to update DNA statutes).

increase Ohio's DNA database while safeguarding the rights of innocent Ohio citizens.

## II. DNA STATUTES AND THE FOURTH AMENDMENT

On July 1, 2011, Ohio joined twelve other states that currently take DNA samples from all felony arrestees.<sup>24</sup> With the passage of Senate Bill (SB) 77 in July 2010, the Ohio legislature revised the DNA collection statute to require that the arresting law enforcement agency take a DNA sample from all felony arrestees over the age of eighteen.<sup>25</sup>

Ohio created a DNA database in 1995.<sup>26</sup> Since its creation, the database has been expanded to include DNA samples from juvenile offenders, convicted felons, sex offenders, and some violent felony offenders.<sup>27</sup> Under current Ohio law, the arresting law enforcement agency is required to take a DNA sample from all felony arrestees as part of the booking procedure.<sup>28</sup> These samples are processed into profiles and turned over to the Bureau of Criminal Identification and Investigation (BCII) to be added to Ohio's DNA database.<sup>29</sup> The profiles and samples will be retained and subject to repeated comparisons with future samples from crime scenes or other subjects as part of an investigation.<sup>30</sup>

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<sup>24</sup> OHIO REV. CODE ANN. § 2901.07(B)(1) (LexisNexis 2012); ALA. CODE § 36-18-25 (LexisNexis 2012); ALASKA STAT. § 44.41.035 (2013); CAL. PENAL CODE § 296.1 (Deering 2013); COLO. REV. STAT. § 16-23-103 (2012); FLA. STAT. ANN. § 943.325 (LexisNexis 2013); KAN. STAT. ANN. § 21-2511 (2012); LA. REV. STAT. ANN. § 15:609 (2013); N.M. STAT. ANN. § 29-3-10 (LexisNexis 2012); N.D. CENT. CODE § 31-13-03 (2013); S.C. CODE ANN. § 23-3-620 (2013); S.D. CODIFIED LAWS § 23-5A-5 (2012) (stating “[a]ny person who is convicted or adjudicated delinquent for a qualifying offense,” where all qualifying offenses are defined in § 23-5A-1); VT. STAT. ANN. tit. 20, § 1933 (2013).

<sup>25</sup> S.B. 77, 128th Gen. Assemb., Reg. Sess. (Ohio 2010). The new statutory language reads:

On and after July 1, 2011, a person who is eighteen years of age or older and who is arrested on or after July 1, 2011, for a felony offense shall submit to a DNA specimen collection procedure administered by the head of the arresting law enforcement agency. The head of the arresting law enforcement agency shall cause the DNA specimen to be collected from the person during the intake process at the jail, community-based correctional facility, detention facility or law enforcement agency office or station to which the arrested person is taken after the arrest.

OHIO REV. CODE ANN. § 2901.07(B)(1) (LexisNexis 2012).

<sup>26</sup> S.B. 5, 121st Gen. Assemb., Reg. Sess. (Ohio 1995) (codified at OHIO REV. CODE ANN. § 109.573 (LexisNexis 2012)).

<sup>27</sup> OHIO REV. CODE ANN. §§ 109.573, 313.08, 2152.74, 2901.07 (LexisNexis 2012). (dealing with the collection of DNA specimens, but for this Note the focus will be on the felony-arrestee DNA statute in § 2901.07).

<sup>28</sup> OHIO REV. CODE ANN. § 2901.07(B)(1) (LexisNexis 2012).

<sup>29</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

<sup>30</sup> OHIO REV. CODE ANN. § 109.573 (LexisNexis 2012).

All fifty states and the federal government have some sort of DNA database.<sup>31</sup> All of the databases include samples from convicted offenders and those on probation.<sup>32</sup> Exactly half of the states take samples from murder arrestees and those arrested for sex crimes.<sup>33</sup> A majority of states include juvenile offenders' samples in a database.<sup>34</sup>

The addition of each of these groups to the DNA databases was not without legal challenges.<sup>35</sup> Although the United States Supreme Court has never ruled on the constitutionality of these additions, the federal circuit courts have upheld the federal DNA statute's requirement of sampling from convicted offenders and parolees.<sup>36</sup> State courts have also generally found post-conviction DNA sampling to be constitutional.<sup>37</sup> Ohio is no exception, and the Ohio courts have upheld the additions of DNA samples from convicted offenders and juvenile offenders.<sup>38</sup>

The success of DNA evidence has resulted in a push for new legislation to expand the number of samples included in databases.<sup>39</sup> A great deal of the legislation deals with the administration of growing databases.<sup>40</sup> In 2011, five states proposed new legislation requiring samples from all felony arrestees, while another six states proposed legislation expanding the number of qualifying offenses that require a DNA sample.<sup>41</sup> The proliferation of DNA databases and the increase of

<sup>31</sup> "All fifty states have enacted DNA database statutes and courts have almost uniformly held that they do not violate the Fourth Amendment." *State v. Steele*, 802 N.E.2d 1127, 1133 (Ohio Ct. App. 2003) (citing *Gaines v. State*, 998 P.2d 166 (Nev. 2000)); *Doles v. State*, 994 P.2d 315, 318 (Wyo. 1999); *Landry v. Att'y. Gen.*, 709 N.E.2d 1085 (Mass. 1999).

<sup>32</sup> DNAResource.com, STATE DNA DATABASE LAWS QUALIFYING OFFENSES (Sept. 2011), available at <http://www.dnaresource.com/documents/statequalifyingoffenses 2011.pdf>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See, e.g., *United States v. Weikert*, 504 F.3d 1, 3 (1st Cir. 2007).

<sup>36</sup> See, e.g., *United States v. Amerson*, 483 F.3d 73 (2d Cir. 2007); *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005); *United States v. Conley*, 453 F.3d 674 (6th Cir. 2006); *United States v. Hook*, 471 F.3d 766 (7th Cir. 2006); *United States v. Kraklio*, 451 F.3d 922 (8th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (en banc); *Banks v. United States*, 490 F.3d 1178 (10th Cir. 2007).

<sup>37</sup> See, e.g., *State v. Norman*, 660 N.W.2d 549 (N.D. 2003).

<sup>38</sup> *In re Nicholson*, 724 N.E.2d 1217, 1221 (Ohio Ct. App. 1999) (holding that the taking of a juvenile offender's DNA does not violate the Fourth Amendment); *State v. Steele*, 802 N.E.2d 1127, 1137 (Ohio Ct. App. 2003) (holding that the taking of a blood sample from a convict without individualized suspicion did not violate the Fourth Amendment under the special needs test).

<sup>39</sup> See, e.g., S.B. 268, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (amending OHIO REV. CODE ANN. § 2901.07 to require that persons indicted for a felony submit to DNA collection procedures when they are arraigned, and requiring courts to order those persons either arrested or indicted for a felony who did not submit to a DNA collection procedure to do so).

<sup>40</sup> 2009 Miscellaneous DNA Legislation, DNAResource.com (Jan. 21, 2012), <http://www.cqstatetrack.com/texis/viewrpt/main.html?event=495bd5e512a>.

<sup>41</sup> West Virginia, Mississippi, Iowa, Georgia, and Connecticut have proposed sampling from all felony arrestees, while New Jersey, New York, North Carolina, Indiana, Illinois, and

legislation allowing the taking of DNA samples without a warrant or individualized suspicion have led to inevitable court challenges.<sup>42</sup> On July 30, 2012, the United States Supreme Court stayed the decision in *King v. State*, a Maryland Court of Appeals decision holding Maryland's felony-arrestee statute unconstitutional.<sup>43</sup> On November 9, 2012, the Supreme Court granted the writ of certiorari, and oral arguments were held February 26, 2013.<sup>44</sup>

Ohio courts will likely have to determine whether Ohio's statute conforms to the Ohio Constitution and the Fourth Amendment of the United States Constitution. This Note describes why Ohio courts should find the statute unconstitutional, and encourages the Ohio legislature to adopt a solution that balances law enforcement's interest in effectively solving crime with a person's reasonable expectation of privacy.

#### A. The Fourth Amendment, Article I, § 14, and DNA Samples as Searches

##### 1. The Fourth Amendment and Article I, § 14

The Fourth Amendment to the United States Constitution protects people from government intrusions that amount to unreasonable searches and seizures.<sup>45</sup> The modern understanding of the protections guaranteed by the Fourth Amendment is based on whether or not the intrusion violates the subject's reasonable expectation of privacy.<sup>46</sup> The test for reasonableness has two parts: (1) the individual has a subjective expectation of privacy; and (2) the expectation is recognized as objectively reasonable by society.<sup>47</sup> The Ohio Supreme Court has determined that

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Hawaii have legislation expanding the number of qualifying offenses. *2011 DNA Database Legislation*, DNARESOURCE.COM (Jan. 21, 2012), <http://www.cqstatetrack.com/texis/viewrpt/main.html?event=495bdbf6ba>.

<sup>42</sup> For federal circuit courts, see Haskell v. Brown, 677 F. Supp. 2d 1187 (N.D. Cal. 2009), *aff'd sub nom.* Haskell v. Harris, 669 F.3d 1049 (9th Cir. 2012); United States v. Pool, 621 F.3d 1213 (9th Cir. 2010); United States v. Frank, No. CR-09-2075-EFS-1, 2010 U.S. Dist. LEXIS 32542, at \*1 (E.D. Wash. Apr. 1, 2010); United States v. Mitchell, 652 F.3d 387 (3d Cir. 2011) (en banc); United States v. Thomas, No. 10-CR-6172CJS, 2011 U.S. Dist. LEXIS 45333 (W.D.N.Y Feb. 14, 2011). For state court cases, see *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006); Anderson v. Commonwealth, 650 S.E.2d 702 (Va. 2007); People v. Buza, 129 Cal. Rptr. 3d 753 (Ct. App. 2011), *petition for review granted by* 262 P.3d 854 (Cal. 2011).

<sup>43</sup> Maryland v. King, 133 S. Ct. 1 (2012).

<sup>44</sup> King v. State, 42 A.3d 549 (Md. 2012), *cert. granted*, 133 S. Ct. 594 (2012).

<sup>45</sup> U.S. CONST. amend. IV states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>46</sup> Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>47</sup> *Id.*

Article I, section 14 of the Ohio Constitution does not provide any further protections than what is provided under the Fourth Amendment.<sup>48</sup>

The protections guaranteed by the Fourth Amendment and the Ohio Constitution only apply to government intrusions that amount to searches or seizures.<sup>49</sup> Arrestee DNA statutes involve a two-part search.<sup>50</sup> The first is the physical bodily intrusion to collect the actual DNA sample.<sup>51</sup> The second is an informational search when the DNA profile is created, added to the DNA database, and compared to other DNA samples.<sup>52</sup> It is on this second part that courts focus their analysis when determining the constitutionality of arrestee DNA statutes.<sup>53</sup>

## 2. Ohio's DNA Statute: Multiple and Potentially Endless Searches

Arrestee DNA statutes create a scheme that requires multiple searches.<sup>54</sup> Under Ohio's statutory scheme, the taking of a DNA sample by law enforcement happens as part of the booking procedure.<sup>55</sup> The arresting law enforcement agency takes a sample by buccal swab and sends it to the BCII.<sup>56</sup> The sample is then analyzed and compared to the current collection of samples in the DNA database.<sup>57</sup> The sample will also be added to the DNA database for comparison to samples collected in the future.<sup>58</sup>

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<sup>48</sup> State v. Robinette, 685 N.E.2d 762, 766-67 (Ohio 1997). This is not a surprising decision, as Article I, section 14 of the Ohio Constitution differs from the Fourth Amendment by only one word.

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

OHIO CONST. art. I, § 14.

<sup>49</sup> U.S. CONST. amend. IV; OHIO CONST. art. I, § 14.

<sup>50</sup> See, e.g., People v. Buza, 129 Cal. Rptr. 3d 753, 760 (Ct. App. 2011), *petition for review granted by* 262 P.3d 854 (Cal. 2011) ("The collection of the DNA sample, however, is only the first part of the search authorized by the DNA Act; the second occurs when the DNA sample is analyzed and a profile created for use in state and federal DNA databases.").

<sup>51</sup> *Buza*, 129 Cal. Rptr. 3d at 760 ("Courts have routinely held that the collection of DNA by means of a blood test is a minimal intrusion into an individual's privacy interest in bodily integrity.").

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* ("The latter search is the true focus of our analysis and the analyses of other courts that have considered the validity of the DNA statutes.").

<sup>54</sup> Eiler, *supra* note 18, at 1209.

<sup>55</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

<sup>56</sup> A buccal swab is the use of a cotton-tipped applicator to collect cheek cells from the inside of the subject's mouth, which is a good source of DNA. *Questions & Answers About Buccal Swabs*, NAT'L MARROW DONOR PROGRAM (Mar. 16, 2006), [http://www.lssu.edu/campuslife/documents/buccal\\_swab\\_qa\\_032306.pdf](http://www.lssu.edu/campuslife/documents/buccal_swab_qa_032306.pdf).

<sup>57</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

<sup>58</sup> *Id.*

The United States Supreme Court has held that the forcible compulsion to collect blood samples is a search under the Fourth Amendment.<sup>59</sup> The taking of a breath sample is also a search.<sup>60</sup> The Ohio Supreme Court has stated that bodily intrusions for “blood, breath and urine testing ‘must be deemed Fourth Amendment searches.’”<sup>61</sup> The taking of a buccal swab is arguably less intrusive than the taking of a blood sample on the spectrum of bodily intrusions, but is more intrusive than administering a breath test.<sup>62</sup> Although the issue of buccal cheek swabs as searches has never been decided in Ohio, the weight of commentators, other courts, and precedent as to other search methods strongly points to the conclusion that it would also be considered a search.<sup>63</sup>

In addition to the initial swab search, a second search occurs each time a new DNA profile is created and compared to the existing DNA profiles in the database.<sup>64</sup> An individual has an objectively reasonable privacy interest in the genetic information that each profile contains.<sup>65</sup> The information that can be gleaned from one’s DNA profile includes information about diseases and propensity for certain behavioral traits, and can even reveal private information about the individual’s genetically-related family members.<sup>66</sup> Society has an objectively reasonable expectation of privacy in DNA samples, because by its very nature an individual’s sample reveals a wealth of information about other individuals not legally included in the DNA database.<sup>67</sup>

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<sup>59</sup> Schmerber v. California, 384 U.S. 757, 767 (1966).

<sup>60</sup> Skinner v. Ry. Labor Execs. Ass’n, 489 U.S. 602, 614 (1989).

<sup>61</sup> State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers’ Comp., 780 N.E.2d 981, 986 (Ohio 2002) (citing *Skinner*, 489 U.S. at 618).

<sup>62</sup> Eiler, *supra* note 18, at 1210.

<sup>63</sup> *Id.*; People v. Buza, 129 Cal. Rptr. 3d 753, 760 (Ct. App. 2011), *petition for review granted* by 262 P.3d 854 (Cal. 2011); *Ohio AFL-CIO*, 780 N.E.2d at 986.

<sup>64</sup> Eiler, *supra* note 18, at 1209 (arguing that the federal statute creates “three distinct phases that constitute searches under the Fourth Amendment”).

<sup>65</sup> United States v. Kincade, 379 F.3d 813, 865-66 (9th Cir. 2004) (en banc) (Reinhardt J., dissenting) (criticizing the majority’s reliance on the physical intrusion rather than considering the information obtained from the search).

<sup>66</sup> *Id.*; see also D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL’Y 455, 481-82 (2001); Tracey Maclin, *Is Obtaining an Arrestee’s DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. MED. & ETHICS 165, 169-170 (2006). In fact, states have begun to recognize what potentially valuable resources partial matches based on familial relationships are. See, e.g., CAL. DEP’T OF JUSTICE, DNA PARTICLE MATCH (CRIME SCENE DNA PROFILE TO OFFENDER) POLICY (Apr. 1999), available at <http://www.dnaresource.com/documents/CAfamilialpolicy.pdf>.

<sup>67</sup> Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offender’s Kin*, 34 J.L. MED & ETHICS 248, 249 (2006). The federal database attempts to remedy this issue by only including “junk DNA” profiles which are intended to limit the amount of personal information available while still being able to uniquely identify a particular person. However, junk DNA can already yield evidence of a person’s race, sex, geographic or ethnic origins, genetic family relationships, and is believed to contain a wealth of information relating to one’s personal behavioral traits and medical information. Eiler, *supra*

The structure of the DNA statute creates the possibility that exonerated or innocent people would be subject to repetitive privacy intrusions over the course of their lifetime and beyond, merely for having the misfortune of participating in the standard booking procedure of Ohio.<sup>68</sup>

*B. Totality of the Circumstances vs. Special Needs Doctrine*

1. The Totality of the Circumstances Test and Post Conviction DNA Statutes

Federal and state courts have almost unanimously upheld the taking of DNA samples from convicted felons and parolees.<sup>69</sup> Courts upholding the sampling of convicted offenders and parolees have differed on the correct test to apply. Some courts apply the totality of the circumstances test, while others apply the special needs exception.<sup>70</sup> The Sixth Circuit Court of Appeals is unique in that it determined that the federal post-conviction DNA statute satisfied both tests, and thus, it will be the focus of this discussion.<sup>71</sup>

The totality of the circumstances test is a balancing test that the Supreme Court has applied to determine the validity of warrantless searches under the Fourth Amendment.<sup>72</sup> The reasoning behind the totality of the circumstances test is based

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note 18, at 1211-12; Jennifer K. Wagner, *Out with the “Junk DNA” Phrase*, 58 J. FORENSIC SCI. 1 (2012); Simon A. Cole, *Is the “Junk” DNA Designation Bunk?*, 102 NW. U. L. REV. COLLOQUY 54, 57 (2007), available at <http://www.law.northwestern.edu/lawreview/Colloquy/2007/23/LRColl2007n23Cole.pdf>; Justin Gillis, *Genetic Code of Mouse Published; Comparison with Human Genome Indicates “Junk DNA” May be Vital*, WASH. POST, Dec. 5, 2002, at A1. See W. Wayt Gibbs, *The Unseen Genome: Gems Among the Junk*, 289 SCI. AM. 46 (2003), for a more detailed discussion of junk DNA.

<sup>68</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

<sup>69</sup> Twelve federal circuit courts that have heard cases dealing with post conviction DNA statutes have upheld them as constitutional. *United States v. Weikert*, 504 F.3d 1, 3 (1st Cir. 2007); *United States v. Conley*, 453 F.3d 674, 679-81 (6th Cir. 2006); *United States v. Kraklio*, 451 F.3d 922, 924-25 (8th Cir. 2006); *Johnson v. Quander*, 440 F.3d 489, 498 (D.C. Cir. 2006); *Nicholas v. Goord*, 430 F.3d 652, 666 (2d Cir. 2005); *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005); *Padgett v. Donald*, 401 F.3d 1273, 1278 (11th Cir. 2005); *United States v. Kincade*, 379 F.3d 813, 832 (9th Cir. 2004) (en banc); *Green v. Berge*, 354 F.3d 675, 678 (7th Cir. 2004); *Groceman v. U.S. Dep’t of Justice*, 354 F.3d 411, 413 (5th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003); *Jones v. Murray*, 962 F.2d 302, 305 (4th Cir. 1992). State courts, including Ohio, have also upheld post-conviction DNA statutes. See, e.g., *State v. Steele*, 802 N.E.2d 1127 (Ohio Ct. App. 2003).

<sup>70</sup> See *Conley*, 453 F.3d at 679, 681 (upholding the taking of a probationer’s DNA under both the special needs doctrine and the totality of the circumstances approach); see also *Kincade*, 379 F.3d at 832 (applying the totality of the circumstances test); *Goord*, 430 F.3d at 667 (applying the special needs doctrine).

<sup>71</sup> *Conley*, 453 F.3d at 679, 681.

<sup>72</sup> The balancing test first appeared in *Camera v. Mun. Court of San Francisco*, 387 U.S. 523, 536-537 (1967) (stating that a balancing test is the best way to determine if a search is reasonable). For the test applied to warrantless criminal searches, see *United States v. Knights*, 534 U.S. 112, 118-22 (2001) (upholding the warrantless search of a probationer’s home when law enforcement suspected that probationer was involved in arson-related crimes because the state’s interest in searching the home outweighed the probationer’s diminished expectation of privacy) and *Samson v. California*, 547 U.S. 843, 852-53 (2006) (upholding

on the reasonableness requirement of the Fourth Amendment.<sup>73</sup> The court weighs the person's reasonable expectation of privacy and the intrusiveness of the government's incursion against the legitimate government interest in effective law enforcement.<sup>74</sup>

A number of state and federal courts have applied this test to statutes requiring a DNA sample from convicted felons or those on supervised release.<sup>75</sup> In making this determination, one factor in particular the courts have relied on is that offenders have a lower expectation of privacy than innocent individuals.<sup>76</sup> The courts then weigh the offender's lowered expectation of privacy and the minimally intrusive nature of the sampling against the government's interest in solving future crimes.<sup>77</sup>

In *United States v. Conley*, the Sixth Circuit applied the totality of the circumstances test in upholding the federal post-conviction DNA statutes as applied to a parolee.<sup>78</sup> The court first rejected the petitioner's assertion that the statute was unconstitutional because the Fourth Amendment required some individualized suspicion for a warrantless search.<sup>79</sup> The court determined that individualized suspicion was not required for a search to be reasonable under the Fourth Amendment.<sup>80</sup> The court reasoned that as a probationer, the petitioner had a "greatly reduced expectation of privacy."<sup>81</sup> The court, weighing the reduced expectation of privacy against the government's interest in identification of convicted felons and the minimal intrusion involved in blood sampling, found the search reasonable.<sup>82</sup>

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law enforcement's stop and search of a parolee without individualized suspicion because of a parolee's diminished expectation of privacy and the state's substantial interest in supervising parolees).

<sup>73</sup> "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search 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.'" *Knights*, 534 U.S. at 118-19 (2001) (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

<sup>74</sup> *Mich. State Police Dep't v. Sitz*, 496 U.S. 444, 455 (1990) (holding that the Fourth Amendment does not always require a warrant or probable cause if the intrusion is only minor and supported by a compelling government interest in law enforcement).

<sup>75</sup> For federal circuit courts using the totality of the circumstances approach to analysis sampling from offenders, see, e.g., *Conley*, 453 F.3d at 681. For state courts applying the same method, see *Johnson v. Commonwealth*, 529 S.E.2d 769 (Va. 2000); *Doles v. State*, 994 P.2d 315 (Wyo. 1999); *In re Maricopa*, 930 P.2d 496, 500-01 (Ariz. 1997).

<sup>76</sup> See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

<sup>77</sup> *State v. Steele*, 802 N.E.2d 1127, 1134 (Ohio Ct. App. 2003) (citing *Gaines v. State*, 998 P.2d 166 (Nev. 2000)); *Landry v. Att'y. Gen.*, 709 N.E.2d 1085 (Mass. 1999).

<sup>78</sup> *Conley*, 453 F.3d at 680-81.

<sup>79</sup> *Id.* at 677.

<sup>80</sup> *Id.* (citing *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 624 (1989)).

<sup>81</sup> *Id.* at 680.

<sup>82</sup> *Id.* at 680-81.

Ohio courts have applied this test in upholding a statute requiring DNA samples from juvenile offenders convicted of gross sexual imposition.<sup>83</sup> The Ohio appellate court compared the diminished constitutional rights of the juvenile probationer and the minimal intrusion of drawing blood with the government's legitimate interest in deterring future sex offenders and solving other crimes.<sup>84</sup> The court held that the search was reasonable because it was minimally intrusive and justified by the government's legitimate "interest in keeping a DNA data bank."<sup>85</sup>

## 2. The Special Needs Doctrine and Post Conviction DNA Statutes

The "special needs" doctrine is an exception to the warrant requirement for when the circumstances render "the warrant or probable cause requirement impractical."<sup>86</sup> The Supreme Court has upheld "certain regimes of suspicionless searches where the program was designed to serve 'special needs, beyond the normal need for law enforcement.'"<sup>87</sup> The special needs doctrine involves a two-part inquiry: the court must determine (1) whether the statute presents a valid special need and then (2) balance the individual's privacy interest with the special need of the government.<sup>88</sup> In determining whether the government has a valid special need, the critical inquiry is whether or not the search in question is simply to further ordinary law enforcement objectives.<sup>89</sup> Therefore, unless there is something more than a "general interest in crime control" to justify the search, the "special needs" doctrine will not apply.<sup>90</sup> If there is a valid special need, the court must then balance the individual's privacy interest with the special need of the government to determine if the search violates the Fourth Amendment.<sup>91</sup>

The Sixth Circuit Court of Appeals also applied the "special needs" doctrine to uphold the post conviction DNA statute in *Conley*.<sup>92</sup> The court found three valid special needs of the government beyond general law enforcement: (1) obtaining reliable proof of a felon's identity, (2) deterring convicted felons from committing

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<sup>83</sup> *In re Nicholson*, 724 N.E.2d 1217 (Ohio App. Ct. 1999).

<sup>84</sup> *Id.* at 1221.

<sup>85</sup> *Id.*

<sup>86</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

<sup>87</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (invalidating a roadside check point for the purpose of detecting illegal drugs) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding random drug testing program for student-athletes)); *Treasury Emps. v. Von Raab*, 489 U.S. 656 (1989) (upholding drug testing for government employees seeking promotions or transfers to certain positions); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602 (1989) (upholding drug testing for railway employees involved in accidents or in violation of safety regulations).

<sup>88</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 78-81 (2001); *Edmond*, 531 U.S. at 37.

<sup>89</sup> *Edmond*, 531 U.S. at 41.

<sup>90</sup> *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 659 (1979)).

<sup>91</sup> *State v. Steele*, 802 N.E.2d 1127, 1137 (Ohio Ct. App. 2003) (citing *Ferguson*, 532 U.S. 67 and *Edmond*, 531 U.S. 32).

<sup>92</sup> *United States v. Conley*, 453 F.3d 674, 677-79 (6th Cir. 2006).

additional crimes, and (3) protecting communities.<sup>93</sup> The court then weighed the special needs of the government “in obtaining Conley’s DNA” and found the needs outweighed “her greatly reduced expectation of privacy as a convicted felon.”<sup>94</sup>

In *State v. Steel*, the Court of Appeals of Ohio for the First District applied the “special needs” doctrine to uphold the constitutionality of an Ohio law requiring the collection of a DNA sample from convicted offenders.<sup>95</sup> The court determined that the DNA statute had two purposes beyond normal law enforcement: (1) increasing the accuracy of the criminal justice system and (2) the solving of future crimes not yet committed.<sup>96</sup> The court then evaluated the statute by balancing the intrusion into the individual’s privacy interest and a probationer’s diminished expectation of privacy with the previously stated special needs.<sup>97</sup> The court determined that the taking of a DNA sample was reasonable even without individualized suspicion under the special needs exception to the Fourth Amendment.<sup>98</sup>

*Conley* and *Steele* are examples of why the use of the special needs doctrine to analyze DNA statutes in general is problematic.<sup>99</sup> Courts have listed some of the following purposes as beyond those of normal law enforcement: (1) determining the identity of felons, (2) deterring future crimes, (3) protecting communities, (4) improving accuracy in the criminal justice system, and (5) solving future crimes.<sup>100</sup> The problem is that protecting communities, deterring future crimes, and solving future crimes are exactly what law enforcement agencies are designed to do.<sup>101</sup> The other two special needs proposed involve properly identifying convicted felons.<sup>102</sup> Identifying felons may appear on its face to be separate from “normal law enforcement purposes,” but the identification of felons serves one primary purpose: solving crimes.<sup>103</sup> Solving crimes is a general law enforcement purpose.<sup>104</sup> The use of the special needs doctrine in these cases is an example of courts wanting to uphold a useful crime-solving tool while rigidly adhering to precedent. The end result is a

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<sup>93</sup> *Id.* at 679.

<sup>94</sup> *Id.*

<sup>95</sup> *Steele*, 802 N.E.2d at 1137. The law in question is actually an earlier incarnation of the current felony-arrestee DNA statute that required sampling only from convicted offenders.

<sup>96</sup> *Id.* at 1136.

<sup>97</sup> *Id.* at 1137.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*; *Conley*, 453 F.3d 674.

<sup>100</sup> *Steele*, 802 N.E.2d at 1136; *Conley*, 453 F.3d at 679.

<sup>101</sup> See, e.g., *Division of Police*, CITY OF LAKEWOOD, OHIO, <http://onelakewood.com/PublicSafety/Police/> (last visited Mar. 26, 2013) (explaining what police departments are designed for, as described in the City of Lakewood, Ohio’s Police Departments Missions statement).

<sup>102</sup> *Steele*, 802 N.E.2d at 1136; *Conley*, 453 F.3d at 679.

<sup>103</sup> The court in *Steele* actually admitted that some of what it described as valid “special-need searches . . . may ultimately be used for law enforcement purposes.” *Steele*, 802 N.E.2d at 1136.

<sup>104</sup> See cases cited *supra* note 87.

misapplication of the special needs doctrine, which in its current form cannot be used to uphold convicted offender DNA statutes.<sup>105</sup>

### C. Application of Fourth Amendment Tests to Arrestee DNA Statutes

The previous decisions dealt with DNA statutes as applied to convicted felons or parolees; Ohio's felony-arrestee statute is broader because it applies to all persons arrested for a felony.<sup>106</sup> Early applications of the Fourth Amendment to arrestee DNA statutes found both state and federal courts holding that the special needs doctrine does not apply, and instead analyzed the statutes under the totality of the circumstances test.<sup>107</sup> The Ninth and Third Federal Circuits and the Supreme Court of Virginia have all upheld arrestee DNA statutes as constitutional.<sup>108</sup> State courts in California, Maryland, and Minnesota and some federal district courts have held arrestee DNA statutes to be unreasonable violations of the Fourth Amendment under the totality of the circumstances test.<sup>109</sup>

#### 1. Totality of Circumstances Test

*United States v. Mitchell*, *People v. Buza*, *Haskell v. Harris*, and *King v. State* are all examples of how courts applying the totality of the circumstances test have reached different outcomes.<sup>110</sup> In *United States v. Mitchell*, the Third Circuit Court of Appeals upheld the federal all-arrestee DNA statutes as constitutional when applied to a person arrested for "possession with intent to distribute cocaine."<sup>111</sup> Mitchell objected to the government's attempt to collect a DNA sample after his indictment, claiming that the statute violated the Fourth Amendment's prohibition on

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<sup>105</sup> John D. Biancamano, Note, *Arresting DNA: The Evolving Nature of DNA Collection Statutes and their Fourth Amendment Justifications*, 70 OHIO ST. L.J. 619, 655-59 (2009).

<sup>106</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

<sup>107</sup> See, e.g., *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (en banc); *People v. Buza*, 129 Cal. Rptr. 3d 753, 760 (Ct. App. 2011), *petition for review granted by* 262 P.3d 854 (Cal. 2011); *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 780 N.E.2d 981, 986 (Ohio 2002).

<sup>108</sup> See *Mitchell*, 652 F.3d 387; *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012); *Anderson v. Commonwealth*, 650 S.E.2d 702 (Va. 2007) (holding that DNA sampling from all felony arrestees based on probable cause was not a violation of the Fourth Amendment).

<sup>109</sup> See *United States v. Frank*, No. CR-09-2075-EFS-1, 2010 U.S. Dist. LEXIS 32542, at \*1 (E.D. Wash. Apr. 1, 2010) (denying government's motion to compel DNA samples); *Buza*, 129 Cal. Rptr. 3d 753 (holding that taking a DNA sample from all felony arrestees as part of the booking process was a violation of the Fourth Amendment); *King v. State*, 42 A.3d 549 (Md. 2012) (holding that Maryland's felony-arrestee DNA law is unconstitutional as applied to an arrestee, never convicted of the crime of arrest, whose sample was used to convict him of a previous rape); *In re Welfare of C.T.L., Juvenile*, 722 N.W.2d 484, (Minn. Ct. App. 2006) (holding that taking a DNA sample from a juvenile arrestee prior to conviction was a violation of the Fourth Amendment).

<sup>110</sup> *Mitchell*, 652 F.3d 387; *Buza*, 129 Cal. Rptr. 3d 753; *Haskell*, 669 F.3d 1049; *King*, 42 A.3d 549.

<sup>111</sup> *Mitchell*, 652 F.3d at 389.

unreasonable searches.<sup>112</sup> The district court found that “Mitchell’s status as an arrestee and a pretrial detainee” meant that he “ha[d] a diminished expectation of privacy in his identity” and thus [could] be subjected to routine booking procedures such as fingerprinting.”<sup>113</sup> The district court, however, did not agree that a fingerprint and the taking of a DNA sample amounted to the same level of intrusion and thus held that the statute was an unreasonable search in violation of the Fourth Amendment.<sup>114</sup> The Third Circuit reversed, determining that DNA collection from arrestees and pretrial detainees does not violate the Fourth Amendment.<sup>115</sup>

The court first determined that a DNA profile was “a tool for establishing identity,” and therefore the issue was how great was Mitchell’s “expectation of privacy in his . . . own identity.”<sup>116</sup> The government in Mitchell’s case had already been convinced there was probable cause to believe he committed a crime.<sup>117</sup> The court concluded, “[i]n light of this probable cause finding, arrestees possess a diminished expectation of privacy in their own identity.”<sup>118</sup> The diminished expectation of privacy justified the taking of fingerprints, photographs, and DNA profiles for identification purposes.<sup>119</sup>

The next step in the court’s analysis was to determine to what degree the search was necessary to promote a legitimate government interest.<sup>120</sup> The court concluded that the government had a “strong interest in identifying arrestees.”<sup>121</sup> DNA provides the government with a more reliable process to identify criminals who have changed their name or appearance, making DNA an important tool to accurately identify the arrestee.<sup>122</sup> The court then balanced the diminished expectation of privacy that an arrestee possesses in his or her identity against the legitimate government interest in accurately identifying criminals and the minimal privacy intrusion because of the safeguards provided to limit the amount of personal information revealed.<sup>123</sup> The court held that the government’s interest and the minimal intrusion outweighed an arrestee’s diminished expectation of privacy.<sup>124</sup>

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<sup>112</sup> *Id.*; 42 U.S.C.S. § 14135a(a)(1)(A) (LexisNexis 2013) (allowing the government to collect DNA samples from “individuals who are arrested, facing charges, or convicted”).

<sup>113</sup> *Mitchell*, 652 F.3d at 390 (citing *United States v. Mitchell*, 681 F. Supp. 2d 597, 608 (W.D. Pa. 2009)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 416.

<sup>116</sup> *Id.* at 410 (“Instead, the critical question is whether arrestees and pretrial detainees who have not been convicted of felonies have a diminished privacy interest in their identity.”).

<sup>117</sup> *Id.* at 412.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 413.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 414.

<sup>123</sup> *Id.* at 415-16.

<sup>124</sup> *Id.*

In *People v. Buza*, the California Appellate Court determined that California's statute requiring the sampling from an arrestee during the booking procedure violated the appellant's Fourth Amendment right to be free from unreasonable searches and seizures.<sup>125</sup> This case involved a person required to submit to a DNA collection procedure before there had been any judicial determination of probable cause.<sup>126</sup> The court in *Buza* applied the totality of the circumstances test, but took a different view on a couple of the factors in the balancing test. For one, it concluded that the primary purpose of California's arrestee DNA statute was not identification of arrestees.<sup>127</sup> Instead, the court stated, “[t]here can be no doubt that this use of DNA samples is for purposes of criminal investigation rather than simple identification.”<sup>128</sup> Another factor on which the court in *Buza* differed was the arrestee's expectation of privacy.<sup>129</sup> The court did not agree that arrestees have a diminished expectation of privacy, because there had been no judicial finding of probable cause.<sup>130</sup>

The court then weighed the intrusion into the privacy rights of the arrestee against the government's interest in having a valuable crime-solving tool.<sup>131</sup> The court held that since identification was not the purpose of the statute and the government's interest in a useful crime-fighting tool could not outweigh a person's expectation of privacy, California's felony-arrestee DNA statute was unconstitutional.<sup>132</sup>

*Haskell v. Harris* involved a challenge to California's felony-arrestee law by four plaintiffs who were arrested and required to give a DNA sample but never convicted.<sup>133</sup> The Ninth Circuit Court of Appeals upheld the district court's denial of a preliminary injunction to stop the enforcement of the felony-arrestee sampling provision.<sup>134</sup>

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<sup>125</sup> *People v. Buza*, 129 Cal. Rptr. 3d 753, 760 (Ct. App. 2011), *petition for review granted by* 262 P.3d 854 (Cal. 2011).

<sup>126</sup> *Buza*, 129 Cal. Rptr. 3d at 766.

<sup>127</sup> *Id.* at 772-75 (stating that DNA samples are not necessary or feasible for quickly identifying an arrestee as it can take over a month for the sample to be entered into the database).

<sup>128</sup> *Id.* at 774.

<sup>129</sup> *Id.* at 779.

<sup>130</sup> *Id.* at 782 (“[A]n individual such as appellant, who has not yet been the subject of a judicial determination of probable cause, falls closer to the ordinary citizen end of the continuum than one as to whom probable cause has been found by a judicial officer or grand jury.”).

<sup>131</sup> *Id.* at 782-83.

<sup>132</sup> *Id.* at 783 (citing *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (“[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.’ If it did, the State could take a DNA sample from every citizen and use it for investigative purpose, an Orwellian prospect.”)).

<sup>133</sup> *Haskell v. Harris*, 669 F.3d 1049, 1052 (9th Cir. 2012).

<sup>134</sup> *Id.* at 1065.

The majority in *Haskell* applied the totality of the circumstances test, balancing the privacy interests of the plaintiffs with the government's interest in law enforcement.<sup>135</sup> The privacy expectation, according to the majority, was "significantly diminished" by the multitude of evasive and degrading searches that can take place as part of the booking procedure.<sup>136</sup> The court concluded that there was not a significant privacy right to intrude upon due to the low expectation of privacy at booking, combined with the minimal intrusiveness of the search and the safeguards imposed by the law.<sup>137</sup> The majority found that the government had four important interests: "identifying arrestees, solving past crimes, preventing future crimes, and exonerating the innocent."<sup>138</sup> After balancing the factors and weighing in favor of the government against the diminished expectation of privacy, the majority held that California's felony-arrestee DNA law was not an unreasonable violation of the Fourth Amendment and thus the district court was correct in rejecting the preliminary injunction.<sup>139</sup>

The dissent in *Haskell* argued that the California law was unconstitutional based on three alternative theories.<sup>140</sup> The first was that *Friedman v. Boucher* directly prohibits the taking of DNA from an arrestee without a warrant or "suspicion of a crime that the DNA might solve."<sup>141</sup> The next argument was that DNA is analogous to fingerprinting and that DNA testing, like fingerprinting, can only be used to identify suspects, not for investigation purposes.<sup>142</sup> The second argument relied on a line of cases stating that fingerprints taken for investigation without consent, a warrant, or probable cause violates the Fourth Amendment.<sup>143</sup> The dissent applied this reasoning to hold that taking DNA "without a warrant, and without suspicion of any crime committed by the arrestee that the DNA will help solve, violates the Fourth Amendment."<sup>144</sup> Lastly, the dissent briefly mentioned that the majority overstated the government's interest and understated the plaintiffs' privacy expectations.<sup>145</sup>

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<sup>135</sup> *Id.* at 1057-58.

<sup>136</sup> *Id.* at 1058.

<sup>137</sup> *Id.* at 1062.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1066.

<sup>140</sup> *Id.* at 1066-67 (Fetcher, J., dissenting).

<sup>141</sup> *Id.* at 1069 (citing *Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009) (involving Nevada police forcibly taking a DNA sample from a person arrested for a crime committed in Montana, when there was no Nevada law allowing the warrantless taking of a DNA sample; the majority distinguishes *Friedman* quite convincingly based on the fact that it only applies to the very narrow factual situation that it involved)).

<sup>142</sup> *Id.* at 1073.

<sup>143</sup> *Id.* at 1076 (citing *Davis v. Mississippi*, 394 U.S. 721 (1969); *Hayes v. Florida*, 470 U.S. 811 (1985); *United States v. Garcia-Beltran*, 389 F.3d 864 (9th Cir. 2004); *United States v. Ortiz-Hernandez*, 427 F.3d 567 (9th Cir. 2005)).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

*King v. State* involved facial and as applied challenges to the Maryland arrestee DNA statute.<sup>146</sup> The defendant, Alonzo King, was arrested for assault, a qualifying offense under Maryland's statute.<sup>147</sup> His DNA was taken upon arrest and added into the state's DNA database.<sup>148</sup> Prior to the resolution of his assault charges, a DNA "hit" matched King's sample taken upon arrest with a sample related to an unsolved rape case.<sup>149</sup> The police then obtained a search warrant based on this match and retrieved another DNA sample that confirmed the original DNA match.<sup>150</sup> The DNA match was the only evidence presented to indict and convict King.<sup>151</sup> King was found guilty of the rape and sentenced to life in prison.<sup>152</sup>

The Court of Appeals of Maryland held that the statute was unconstitutional as applied to King.<sup>153</sup> The court used the totality of the circumstances balancing test and compared the government's interest in correctly identifying King with his reasonable expectation of privacy.<sup>154</sup> The court determined that King, as an arrestee, had a lower expectation of privacy than the general public, but that the presumption of innocence and the nature of the information collected by DNA sampling outweighed the government's interest in correctly identifying him.<sup>155</sup> The court rejected the fingerprint analogy and instead compared the information contained in DNA profiles to a warrantless search of medical records.<sup>156</sup> The court agreed with the Minnesota court of appeals that probable cause for arrest "cannot serve as the probable cause for a DNA search of an arrestee."<sup>157</sup> The court reasoned that the government could achieve the same identification through less intrusive means.<sup>158</sup> Therefore, the government's interest in properly identifying criminals did not outweigh King's reasonable expectation of privacy in his own genetic material.<sup>159</sup>

The likelihood of the court's decision being upheld is doubtful. The court took the unusual step of granting a stay of the Maryland Court of Appeals's decision before granting certiorari.<sup>160</sup> Stays are ordered when it is likely the Supreme Court

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<sup>146</sup> *King v. State*, 42 A.3d 549, 553 (Md. 2012), *cert. granted*, 133 S. Ct. 594 (2012).

<sup>147</sup> *King*, 42 A.3d at 553.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 553-54.

<sup>150</sup> *Id.* at 554.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 555.

<sup>153</sup> *Id.* at 556.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 577.

<sup>156</sup> *Id.* at 576-77.

<sup>157</sup> *Id.* at 578.

<sup>158</sup> *Id.* at 579.

<sup>159</sup> *Id.* at 576-79.

<sup>160</sup> *Maryland v. King*, 133 S. Ct. 1 (2012) (granting a stay of the Maryland Court of Appeals' decision).

will grant certiorari, overturn the lower court's decision, and that denial of the stay will result in serious harm.<sup>161</sup> Oral arguments were held on February 26, 2013.<sup>162</sup> The Supreme Court's decision to take the case and the indication it will likely reverse the Maryland Court of Appeals illustrates the need for clarity in our application of Fourth Amendment principles to arrestee DNA statutes.

*Mitchell*, *Buza*, *Haskell*, and *King* are examples of how courts have had difficulty applying the totality of circumstances test to arrestee DNA laws.<sup>163</sup> The different courts emphasized a number of factors, including the subject's expectation of privacy, whether the law provided safeguards for the storing and use of the DNA, the government's interest in correctly identifying criminals, and whether there was a probable cause determination.<sup>164</sup> All the cases deal with a timeline from arrest and to either conviction or release. At what point during that timeline the court decides the relevant search occurred determines the strength of the relevant factors.

The majority and dissent in *Haskell* analyzed California's arrestee law as only implicating one search: the initial swab.<sup>165</sup> The *Haskell* court, by focusing on the initial swab as the key search, completely mischaracterized the privacy expectation of the plaintiffs in the case.<sup>166</sup> "Two of the plaintiffs were never charged" with a crime, while the "other two plaintiffs were charged with felonies, but the charges were dismissed."<sup>167</sup> The plaintiffs' expectations of privacy were greater than that of a recent arrestee with a recent probable cause determination.<sup>168</sup> The plaintiffs had already been released and the charges dropped, making their expectations of privacy exactly the same as someone who had never been arrested at all.<sup>169</sup>

*Mitchell* and *Buza*, on the other hand, considered the laws to implicate another search, when the sample was added to the DNA database, and focused analysis on this search.<sup>170</sup>

The courts in *Mitchell* and *Buza* came to different determinations of the constitutionality of arrestee DNA laws, but the two cases do not actually contradict one another.<sup>171</sup> The reason is that the court in *Mitchell* considered an arrestee to have the same diminished expectation of privacy as a pre-trial detainee after a

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<sup>161</sup> *Id.* at 2 (citing *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009)).

<sup>162</sup> Oral Argument, *Maryland v. King*, 133 S. Ct. 594 (2012) (No. 12-207), available at [http://www.oyez.org/cases/2010-2019/2012/2012\\_11\\_207](http://www.oyez.org/cases/2010-2019/2012/2012_11_207).

<sup>163</sup> *United States v. Mitchell*, 652 F.3d 387 (3d Cir. 2011) (en banc); *People v. Buza*, 129 Cal. Rptr. 3d 753, 760 (Ct. App. 2011), *petition for review granted* by 262 P.3d 854 (Cal. 2011); *Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012).

<sup>164</sup> See cases cited *supra* note 109.

<sup>165</sup> *Haskell*, 669 F.3d at 1058.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1066.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *United States v. Mitchell*, 652 F.3d 387, 406 (3d Cir. 2011); *People v. Buza*, 129 Cal. Rptr. 3d 753, 760 (Ct. App. 2011).

<sup>171</sup> *Mitchell*, 652 F.3d at 416; *Buza*, 129 Cal. Rptr. 3d at 783.

probable cause determination. However, the court in *Buza* considered an arrestee's expectation of privacy when there was no judicial determination of probable cause to resemble a person who has never entered the criminal justice system.<sup>172</sup> Thus, it makes a fundamental difference at what point on the timeline the court decided that the relevant search occurred, and whether the court considers the arrestee's privacy expectations to be similar to a convicted offender or those that have never entered the criminal justice system.<sup>173</sup>

*King* is an excellent example of why a different approach for analyzing the constitutionality of arrestee sampling is needed.<sup>174</sup> The Maryland Court of Appeals correctly identified the government's interest and the defendant's diminished expectation of privacy.<sup>175</sup> The court, however, did not correctly balance the interests as applied to the defendant.<sup>176</sup> The DNA was taken and a profile created, leading to a match all while King was still awaiting adjudication of his assault charge.<sup>177</sup> Therefore, as applied to King, the statute did not violate his Fourth Amendment protections because the government's interest outweighed his minimal expectation of privacy. The court did not address the facial challenge to the statute, although they did express some doubt as to its facial validity.<sup>178</sup> The approach presented in Part III of this Note solves the problems associated with the Maryland Court of Appeals' application of the totality of the circumstances test while still protecting those persons whose right to be free from unreasonable searches Maryland's statute violates.<sup>179</sup>

The analysis of arrestee DNA sampling in *Mitchell* and *Buza* and the misapplication of the totality of the circumstances test as applied to the plaintiffs in *Haskell* and *King* show the need for a different approach in order to properly analyze the searches that a felony-arrestee statute implicates.

## 2. Special Needs Doctrine

The special needs doctrine has never been used to uphold a felony-arrestee DNA statute.<sup>180</sup> Even courts that have found felony-arrestee statutes constitutional have expressed that the special needs doctrine does not apply.<sup>181</sup> Yet some commentators

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<sup>172</sup> *Buza*, 129 Cal. Rptr. 3d at 782-83.

<sup>173</sup> See, e.g., *Mitchell*, 652 F.3d at 411-12; *Buza*, 129 Cal. Rptr. 3d at 782-83; *Haskell*, 669 F.3d at 1065.

<sup>174</sup> *King v. State*, 42 A.3d 549, 576-79 (Md. 2012).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 553-54.

<sup>178</sup> *Id.* at 553.

<sup>179</sup> See *infra* Part III.A.2.

<sup>180</sup> See, e.g., *United States v. Frank*, No. CR-09-2075-EFS-1, 2010 U.S. Dist. LEXIS 32542, at \*1 (E.D. Wash. Apr. 1, 2010) (rejecting the special needs doctrine because the needs indemnified "are for classic law enforcement purposes").

<sup>181</sup> *United States v. Pool*, 621 F.3d 1213, 1218 (9th Cir. 2009), vacated by 659 F.3d 761 (9th Cir. 2011) (rejecting the application of the special needs doctrine "because the 'special needs' exception applies only to non-law enforcement purposes").

argue that the best way to analyze felony arrestee statutes is under the special needs doctrine.<sup>182</sup> The issue is that courts do not seem ready to accept this as a possibility, something that commentators proposing changes have been forced to admit.<sup>183</sup>

Another, more pressing, issue with attempting to analyze arrestee DNA statutes under the special needs doctrine is that DNA statutes in general do not survive the first prong of the test.<sup>184</sup> The special needs doctrine is meant for things beyond normal law enforcement purposes.<sup>185</sup> As previously discussed, although courts have used the special needs doctrine to uphold sampling from convicted felons, it is not a proper application because the special needs provided amount to nothing more than general law enforcement purposes.<sup>186</sup> Many of the same justifications have been provided for arrestee DNA statutes, namely the identification of criminals that have already committed crimes and deterring and solving future crimes.<sup>187</sup> Since these justifications are part of general law enforcement purposes, the special needs doctrine cannot be used to justify the sampling of arrestees.<sup>188</sup>

### 3. *Anderson v. Commonwealth* and the Fingerprint Analogy

The Supreme Court of Virginia has upheld Virginia's arrestee DNA statute, analogizing it to taking someone's fingerprints as part of a normal booking procedure.<sup>189</sup> Other courts have used this analogy of fingerprinting, that appears in *Anderson v. Commonwealth*, to support the position that DNA is nothing more than an identification tool.<sup>190</sup>

*Anderson* resulted from a challenge to Virginia's felony-arrestee DNA statute that required a sample of Anderson's DNA to be taken upon arrest and added to the DNA databank.<sup>191</sup> The Virginia Supreme Court held that "[a] DNA sample of the accused taken upon arrest, while more revealing, is no different in character than acquiring fingerprints upon arrest."<sup>192</sup> The court then reasoned that since DNA

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<sup>182</sup> Derek Regensburger, *DNA Databanks and the Fourth Amendment: The Time has Come to Reexamine the Special Needs Exception to the Warrant Requirement and the Primary Purpose Test*, 19 ALB. L.J. SCI. & TECH. 319, 386 (2009) (arguing that the same special needs that justify profiling convicted offenders apply to arrestees).

<sup>183</sup> *Id.* ("Unfortunately, if the special needs test is applied rather than a balancing test and the Ferguson/Edmond primary purpose is adhered to, such an extension of DNA testing would likely be declared invalid.").

<sup>184</sup> *Ferguson v. City of Charleston*, 532 U.S. 67, 78-81 (2001).

<sup>185</sup> *Id.*

<sup>186</sup> See *supra* Part II.B.2.

<sup>187</sup> *United States v. Mitchell*, 652 F.3d 387, 413 (3d Cir. 2011) (en banc).

<sup>188</sup> *United States v. Frank*, No. CR-09-2075-EFS-1, 2010 U.S. Dist. LEXIS 32542, at \*1 (E.D. Wash. Apr. 1, 2010).

<sup>189</sup> *Anderson v. Commonwealth*, 650 S.E.2d 702, 706 (Va. 2007).

<sup>190</sup> *Mitchell*, 652 F.3d at 410 (stating that DNA samples are "used solely as an accurate, unique identifying marker—in other words as fingerprints for the twenty-first century").

<sup>191</sup> *Anderson*, 650 S.E.2d at 704.

<sup>192</sup> *Id.* at 705.

sampling is no more intrusive than the taking of a fingerprint, and fingerprints are not a prohibited search under the Fourth Amendment, the minor intrusion of a DNA sample does not violate the arrestee's Fourth Amendment rights because no individualized suspicion or warrant is required.<sup>193</sup>

The fingerprint analogy has some serious flaws. For one, fingerprints do not contain the same type of information that a person's DNA sample does, and thus do not implicate the same level of privacy intrusion.<sup>194</sup> This is because a DNA sample, unlike a fingerprint, contains a person's entire genetic profile, including the ability to see possible character traits and predisposition to diseases.<sup>195</sup> Second, the analogy of DNA samples with fingerprints does not actually justify the sampling under the Fourth Amendment.<sup>196</sup> Although fingerprinting is a routine practice in this country, it has never actually been analyzed under the modern understanding of the Fourth Amendment.<sup>197</sup> Thus, using the analogy as support for DNA sampling surviving a Fourth Amendment analysis is faulty since the practice of fingerprinting has never actually been considered in that manner.<sup>198</sup>

#### 4. *State v. Emerson* and a Person's Reasonable Expectation of Privacy in a DNA Profile

The Ohio Supreme Court recently ruled in *State v. Emerson* that no person has a reasonable expectation of privacy in a lawfully-obtained DNA profile.<sup>199</sup> The decision does not discuss the constitutionality of Ohio's felony-arrestee DNA statute directly, but in holding that a defendant lacks standing to object to the use of DNA profiles, the court effectively upheld the collection and use of DNA profiles from anyone for any reason.<sup>200</sup>

In *Emerson*, the appellant, Dajuan Emerson, was accused of rape in 2005.<sup>201</sup> As a part of this investigation, a DNA sample was obtained pursuant to a valid warrant.<sup>202</sup> Emerson's DNA sample was processed and a DNA profile created and included in Combined DNA Index System (CODIS).<sup>203</sup> Emerson was eventually acquitted of the rape charge, but his DNA profile remained in the CODIS database, subject to repeated searches.<sup>204</sup>

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<sup>193</sup> *Id.* at 705-06.

<sup>194</sup> Eiler, *supra* note 18, at 1211-12.

<sup>195</sup> *Id.* (discussing what type of information is contained in DNA samples).

<sup>196</sup> People v. Buza, 129 Cal. Rptr. 3d 753, 760 (Ct. App. 2011), *petition for review granted by* 262 P.3d 854 (Cal. 2011) (citing United States v. Kincade, 379 F.3d 813, 874 (Kozinski, J., dissenting)).

<sup>197</sup> *Buza*, 129 Cal. Rptr. 3d at 770-71.

<sup>198</sup> *Id.*

<sup>199</sup> State v. Emerson, 981 N.E.2d 787, 789 (Ohio 2012).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

In 2007, as part of a murder investigation, the police found blood on a door handle.<sup>205</sup> The blood sample was processed and a DNA profile created, entered into CODIS, and compared to the other DNA profiles in the database.<sup>206</sup> The DNA profile from the murder scene matched Emerson's profile still in the database.<sup>207</sup> As a result of this match, Emerson was indicted for aggravated murder, aggravated burglary, and tampering with evidence.<sup>208</sup> After the trial court denied Emerson's motion to suppress the DNA evidence, the matter proceeded to trial.<sup>209</sup> At trial, Emerson was convicted of aggravated murder.<sup>210</sup>

The Ohio Supreme Court granted review on two issues: (1) does a person have standing to object to the retention and use of a lawfully-obtained DNA profile that was created from a criminal investigation even if the person was acquitted; and (2) does the state have the power to retain the profile and use it in subsequent investigations.<sup>211</sup>

The court held that a person does not have standing to object to the use of a DNA profile.<sup>212</sup> The court based its reasoning on the fact that other courts around the country have similarly held that "a person has no reasonable expectation of privacy in his or her DNA profile extracted from a lawfully obtained DNA sample."<sup>213</sup> The court determined that a DNA profile, unlike a DNA sample, is "the work product of the government."<sup>214</sup> Additionally, the court went on to compare the use of DNA sampling to that of fingerprinting because the DNA profile itself is merely an identification tool.<sup>215</sup>

The Ohio Supreme Court's analysis is fundamentally flawed. First, in determining that there is no reasonable expectation of privacy in a DNA profile, the court misidentified exactly what information can be learned for a DNA profile.<sup>216</sup> The court reasoned that a DNA profile is merely work product, similar to other scientific evidence that laboratories create for trial.<sup>217</sup> Further, the court's reasoning

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 790.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 793.

<sup>213</sup> *Id.* at 792 (citing *Herman v. State*, 128 F.3d 469 (Nev. 2006) (holding that there was no standing to sue because "[a] reasonable person would have understood that the resulting DNA profile, like fingerprints, could be available for general investigative purposes")); *State v. Hauge*, 79 P.3d 131 (Haw. 2003); *Smith v. State*, 744 N.E.2d 437, 439 (Ind. 2001).

<sup>214</sup> *Emerson*, 981 N.E.2d at 791.

<sup>215</sup> *Id.* at 792.

<sup>216</sup> *Id.* at 792; *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (en banc) (explaining that DNA profiles are more predictive than originally believed).

<sup>217</sup> *Emerson*, 981 N.E.2d at 792.

that DNA profiles are merely identification tools similar to fingerprints is misleading.<sup>218</sup> As previously discussed, DNA profiles are much more predictive than originally believed.<sup>219</sup>

Second, although the Ohio Supreme Court decision does not directly touch upon the constitutionality of DNA sampling statutes, the holding that no person has a reasonable expectation of privacy in his or her DNA profile opens the door for potentially unlimited uses of DNA sampling.<sup>220</sup> The only point at which a person can challenge the government's intrusion into his or her genetic makeup in Ohio is when the physical sample is being extracted.<sup>221</sup> If the sample is obtained in a lawful manner, the constitution is satisfied.<sup>222</sup> Because of the relative ease in which DNA can be lawfully obtained, the result of the court's holding is that genetic information can be obtained and used in a variety of manners without any available protection.<sup>223</sup>

The Ohio Supreme Court's failure to consider the most up to date scientific understanding of junk-DNA and DNA profiles, as well as the potential implications of the decision, demonstrates that *State v. Emerson* is fundamentally flawed. Moreover, the *Emerson* decision underscores why this Note's proposed view of arrestee DNA statutes, implicating three distinct search types, will provide courts with a better approach to analyze DNA sampling and profile creation.<sup>224</sup>

### III. WHY OHIO'S FELONY-ARRESTEE DNA STATUTE IS UNCONSTITUTIONAL IN ITS CURRENT FORM

#### A. *Ohio's Felony Arrestee Statute: Impact and Types of Searches Implicated*

##### 1. Impact of Ohio's Felony-Arrestee Statute

Ohio's Felony-Arrestee DNA statute requires taking samples from two distinct groups of people: (1) those that will ultimately be found guilty of the crime of arrest and (2) those that will have the charges dismissed or be found not guilty at trial.<sup>225</sup> The first group of arrestees, those that will become convicted felons, will eventually

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<sup>218</sup> *Id.*

<sup>219</sup> *Kincade*, 379 F.3d 813; *see also supra* note 67.

<sup>220</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012) (declaring that Ohio's felony-arrestee DNA statute may still be challenged, because it mandates warrantless sampling of arrestees, which the Ohio Supreme Court has not ruled on; however, it is unlikely to be held unconstitutional as the searches implicated in the profile creation cannot be challenged according to the reasoning of *Emerson*).

<sup>221</sup> *Emerson*, 981 N.E.2d at 791.

<sup>222</sup> *Id.* at 793.

<sup>223</sup> *See Banks v. United States*, 490 F.3d 1178, 1190 (10th Cir. 2007) (finding that identifiable quantities of DNA can be found on coffee cups, doorknobs, and other common items); Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 861 (2006) (noting that Los Angeles police solved a murder by retrieving DNA from a recently used coffee cup).

<sup>224</sup> *See infra* Part III.A.2.

<sup>225</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

be required to provide a DNA sample.<sup>226</sup> Ohio courts have upheld the sampling of convicted felons.<sup>227</sup> The only change to this first group is how soon the government collects the sample.<sup>228</sup>

The real target of Ohio's new DNA law is the second group: those who are innocent or whose guilt cannot be proved beyond a reasonable doubt.<sup>229</sup> This group of individuals represents the real addition to the DNA database: before the enactment of the arrestee DNA law, people in the second group would never have their DNA samples taken and added to a database.<sup>230</sup> In Ohio in 2010, there were 63,870 adults arrested for violent crimes.<sup>231</sup> Additionally, another 314,050 adults were arrested for property crimes.<sup>232</sup> Under the current statutory scheme, all 377,920 of these arrestees would have had a DNA sample taken as part of their booking procedures.<sup>233</sup> Based on reports from other states, anywhere from 30 to 40 percent of arrests never result in a conviction.<sup>234</sup> In 2010 alone, Ohio's arrestee DNA law would have resulted in the addition of over 100,000 new samples—of persons who will not be convicted of a crime—to Ohio's DNA database that previously were unobtainable.<sup>235</sup> This is a substantial increase in the number of samples, considering that as of October 2011 there were only 398,377 profiles in CODIS from Ohio.<sup>236</sup>

The substantial increase in the number of samples included in the state's DNA database may allow law enforcement to solve a greater number of violent crimes and crimes of a sexual nature.<sup>237</sup> Although there is a clear benefit to Ohio's law

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<sup>226</sup> OHIO REV. CODE ANN. § 2901.07(B)(2) (LexisNexis 2012) (requiring that anyone convicted of a felony submit to a DNA sampling procedure).

<sup>227</sup> State v. Steele, 802 N.E.2d 1127 (Ohio Ct. App. 2003).

<sup>228</sup> OHIO REV. CODE ANN. § 2901.07(B)(1) (LexisNexis 2012).

<sup>229</sup> See, e.g., Biancamano, *supra* note 105, at 654 ("[A]rrestee statutes really only target individuals who are not ultimately found guilty of the crime for which they have been arrested.").

<sup>230</sup> S.B. 77, 128th Gen. Assemb., Reg. Sess. (Ohio 2010) (codified at OHIO REV. CODE ANN. § 2901.07(B)(1) (LexisNexis 2012)).

<sup>231</sup> *Uniform Crime Reports Table 69 Arrests by State 2010*, FED. BUREAU OF INVESTIGATION (2010), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u-s/2010/crime-in-the-u-s-2010/tables/10tbl69.xls>. Violent crimes include murder, manslaughter, forcible rape, robbery, and aggravated assault.

<sup>232</sup> *Id.* Property crimes are the offenses of burglary, larceny-theft, motor vehicle theft, and arson.

<sup>233</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

<sup>234</sup> See *supra* note 15 and accompanying text.

<sup>235</sup> This number is based on a conservative 30 percent of 2010 arrests not resulting in convictions. See *supra* note 15 and accompanying text.

<sup>236</sup> CODIS—NDIS Statistics, FED. BUREAU OF INVESTIGATION (Jan. 2013), [www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics/#Ohio](http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics/#Ohio).

<sup>237</sup> John Maddux, Comment, *Arresting Development: A Call for North Carolina to Expand Its Forensic Database by Collecting DNA from Felony Arrestees*, 32 CAMPBELL L. REV. 103, 117-19 (2009) (arguing that the benefits of collecting samples from arrest suspects outweigh the risks).

enforcement agencies, the repeated search of an innocent person's DNA as required by the statutory revision is unreasonable under the totality of the circumstances balancing test and not justified by the special needs doctrine.<sup>238</sup>

## 2. Analyzing Ohio's Felony-Arrestee DNA Statute as Involving Three Types of Searches

Generally, courts approach arrestee DNA statutes as containing a two-part search.<sup>239</sup> Part one is the initial buccal swab.<sup>240</sup> Courts have routinely held that bodily invasions similar to buccal swabs are searches that implicate the Fourth Amendment.<sup>241</sup> A buccal swab does not, however, reveal any personal information unless it is analyzed and included in a searchable database.<sup>242</sup> The second search is the inclusion of the DNA profile in the database and the resulting comparison with other profiles.<sup>243</sup> Courts have focused their analysis on this second search, as it implicates greater privacy concerns. Courts have not analyzed each and every database search; instead, the focus has been on whether the type of search, the comparison of one DNA sample to another, is reasonable.<sup>244</sup> The concept that all comparisons of DNA samples are created equal is problematic, because depending on at what point during the criminal investigation and prosecution the subject is at, the government's interests and the person's privacy expectations vary.<sup>245</sup> It is more analytically accurate and practical to consider the database search not as the one search phase in a two-part search, but rather as two distinct search types depending on whether the subject is still facing charges.

The first of these search types is DNA specimen comparisons of those profiles from people the government is still investigating, prosecuting, or has already convicted. The second search type is the DNA profile comparisons of people who have had the charges dismissed, been found not guilty, or exonerated in any other manner. Analyzing the statute as involving two types of database searches provides a more effective way of determining in what situations Ohio's felony-arrestee DNA statute is constitutional.

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<sup>238</sup> See *infra* Parts III.A-B.

<sup>239</sup> People v. Buza, 129 Cal. Rptr. 3d 753, 760 (Ct. App. 2011), *petition for review granted by* 262 P.3d 854 (Cal. 2011).

<sup>240</sup> *Buza*, 129 Cal. Rptr. 3d at 760.

<sup>241</sup> State v. Steele, 802 N.E.2d 1127, 1132 (Ohio Ct. App. 2003); *Buza*, 129 Cal. Rptr. 3d at 760 ("Courts have routinely held the collection of DNA by means of a blood test is a minimal intrusion into an individual's privacy interest in bodily integrity while collection by buccal swab is even less intrusive.") (internal citations omitted); United States v. Mitchell, 652 F.3d 387, 406 (3rd Cir. 2011) (en banc).

<sup>242</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2011).

<sup>243</sup> *Buza*, 129 Cal. Rptr. 3d at 760 ("The latter search is the true focus of our analysis and the analyses of other courts that have considered the validity of DNA statutes.").

<sup>244</sup> *Id.*; *Mitchell*, 652 F.3d at 407.

<sup>245</sup> See, e.g., Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) (determining that parolees have a diminished expectation of privacy).

*B. Application of the Totality of the Circumstances Test*

The totality of the circumstances test requires the balancing of the person's reasonable expectation of privacy and the intrusiveness of the government's incursion against the government's interest in effective law enforcement.<sup>246</sup> The balancing test must be applied to each of three distinct search types that Ohio's statute requires.<sup>247</sup> As this Note has previously discussed, the constitutionality of arrestee DNA statutes has turned primarily on the arrestee's diminished expectation of privacy in his or her identification.<sup>248</sup> Courts have also considered the government's interest in identifying criminals and have shown preferences that there be some safeguards to protect the private information contained within DNA samples.<sup>249</sup> The most important factor in determining whether or not an arrestee DNA statute will be upheld as constitutional is how great is the subject's expectation of privacy.<sup>250</sup>

The first search type is the bodily intrusion that happens during the buccal cheek swab.<sup>251</sup> The primary manner of collecting a DNA sample under Ohio's arrestee DNA statute is via a buccal swab, a procedure arguably less intrusive than a forcible blood draw.<sup>252</sup> According to the United States Supreme Court, "blood tests do not constitute an unduly extensive imposition on individuals' privacy and bodily integrity."<sup>253</sup> Ohio courts have also upheld blood sampling as a means of retrieving DNA samples, stating that it is a "minimal intrusion."<sup>254</sup> The physical swab itself does not reveal any private information before the sample is added to a database.<sup>255</sup> The government's interest in collecting the swabs for potential evidentiary purposes and the minimal physical intrusion outweighs the almost negligible privacy concerns implicated by the swabbing procedure, making this first search type reasonable.<sup>256</sup>

The second search type implicated by Ohio's arrestee DNA statute is database comparisons of people currently under arrest or facing charges. When this type of search occurs, courts must balance the government's interest in properly identifying persons under criminal suspicion against the intrusion into the subject's expectation

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<sup>246</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>247</sup> See Eiler, *supra* note 18, at 1209.

<sup>248</sup> See *supra* Part II.C.1.

<sup>249</sup> *Mitchell*, 652 F.3d at 407-08.

<sup>250</sup> *People v. Buza*, 129 Cal. Rptr. 3d 753, 760 (Ct. App. 2011), *petition for review granted by* 262 P.3d 854 (Cal. 2011).

<sup>251</sup> *Mitchell*, 652 F.3d at 406.

<sup>252</sup> Eiler, *supra* note 18, at 1210; *Buza*, 129 Cal. Rptr. 3d at 760.

<sup>253</sup> *Mitchell*, 652 F.3d at 406 (citing *Winston v. Lee*, 470 U.S. 753, 762 (1985)).

<sup>254</sup> *State v. Steele*, 802 N.E.2d 1127, 1133 (Ohio Ct. App. 2003) (citing *In re Nicholson*, 724 N.E.2d 1217 (Ohio Ct. App. 1999)).

<sup>255</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

<sup>256</sup> See, e.g., *Mitchell*, 652 F.3d at 506-07 (citing *Nicholas v. Goord*, 430 F.3d 652, 656 (2d Cir. 2005)) (upholding the buccal swab as a minimal intrusion); *United States v. Weikert*, 504 F.3d 1, 12 (1st Cir. 2007).

of privacy in his or her DNA sample.<sup>257</sup> The major factor in this determination is the diminished expectation of privacy that an arrestee still facing charges has in his identity.<sup>258</sup> Law enforcement officials have made a probable cause determination that a crime has been committed, justifying the arrest, and as a result the subject can expect privacy incursions as part of the booking procedure and detention.<sup>259</sup> Based on this probable cause determination and the fact that arrestees must submit to routine booking procedures and detention, an arrestee currently in the criminal justice system has a diminished expectation of privacy in his identity.<sup>260</sup> The government's interest in properly identifying arrestees and solving crimes outweighs the reasonable expectation of privacy in his or her DNA of an arrestee still facing charges.

The last search type implicated by Ohio's arrestee DNA statute is the database comparisons of people who are no longer facing charges because either the charges were dismissed or they were found not guilty. The constitutionality of this search type also turns on the subject's expectation of privacy. Unlike the searches of those still facing charges, people who are no longer the targets of the criminal justice system do not have a diminished expectation of privacy.<sup>261</sup> In fact, people who have been found not guilty or have had charges dismissed have the same expectation of privacy as someone who has never been arrested at all.<sup>262</sup> The diminished expectation of privacy is directly linked to the government having a vested interest in a person because they pose some risk to society at large. If the criminal justice system has determined that no such risk exists, there is no justification for a diminished expectation of privacy.<sup>263</sup> The privacy expectation that an innocent person has in his or her identity and personal information outweighs the government's interest in identifying potential criminals. If this were not the case, then the Fourth Amendment would provide no protection in the area of DNA sampling and the government could require the warrantless DNA sampling of any individual.<sup>264</sup> This "Orwellian nightmare" is not the state of the law, however, and since a person's expectation of privacy outweighs the government's interest in identifying potential criminals, the third type of search is unreasonable.<sup>265</sup>

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<sup>257</sup> This search type directly parallels the expectation of privacy described in *Mitchell*. *Mitchell*, 652 F.3d at 410.

<sup>258</sup> *Id.* at 412-13.

<sup>259</sup> See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

<sup>260</sup> *Mitchell*, 652 F.3d at 412.

<sup>261</sup> *In re Welfare of C.T.L.*, 722 N.W.2d 484, 491 (Minn. Ct. App. 2006) (stating that the diminished expectation of privacy present in dealing with convicted offenders was not present in a juvenile arrestee).

<sup>262</sup> *People v. Buza*, 129 Cal. Rptr. 3d 753, 782 (Ct. App. 2011), *petition for review granted by* 262 P.3d 854 (Cal. 2011) ("[T]he category of arrestees . . . who has not yet been the subject of a judicial determination of probable cause, falls closer to the ordinary citizen end of the continuum.").

<sup>263</sup> *In re Welfare of C.T.L.*, 722 N.W.2d at 491.

<sup>264</sup> See *Eiler, supra* note 18, at 1229.

<sup>265</sup> *United States v. Kincade*, 379 F.3d 813, 873 (Kozinski, J., dissenting) (expressing concern over the far-reaching implications that allowing arrestee sampling will bring and

Ohio's arrestee DNA statute is arguably constitutional as applied only to the second type of search: those who are still in the criminal justice system. It is not constitutional when it results in the third type of search.

#### *C. Application of the Special Needs Doctrine*

The special needs doctrine cannot be used to justify a search that is primarily for general law enforcement purposes.<sup>266</sup> The reason that arrestee DNA statutes are analyzed under the special needs doctrine is due to a few circuit courts applying it to uphold sampling from convicted felons.<sup>267</sup> The special needs doctrine has never been used to uphold the constitutionality of an arrestee DNA statute.<sup>268</sup>

The special needs doctrine likewise cannot justify any of the three types of searches implicated by Ohio's felony-arrestee statute.<sup>269</sup> Identifying criminals has been the primary justification for why the government should be allowed to take DNA samples from arrestees.<sup>270</sup> Other reasons have included deterring future criminal conduct and protecting communities.<sup>271</sup> None of these justifications survives the first part of the special needs analysis, however, because each one is simply another way of stating the general purpose of law enforcement. Identifying and apprehending criminals, deterring future criminals, and protecting our communities are exactly what law enforcement agencies are designed to do.<sup>272</sup> The purpose of Ohio's felony-arrestee DNA statute is to provide law enforcement agencies in Ohio with a more accurate DNA database to solve crimes, and as that is a general law enforcement purpose, the statute cannot be upheld using the special needs doctrine.<sup>273</sup>

#### *D. Ohio's Expungement Process Not a Solution*

Expungement methods are available in many state and federal government statutory schemes, including Ohio.<sup>274</sup> Expungement is the process by which a convicted person either seals or destroys his or her criminal or other records held by the government.<sup>275</sup> Expungement is problematic because the burden is generally

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stating that this opens the door for DNA testing from all people. "My colleagues in the plurality assure us that, when that day comes, they will stand vigilant and guard the line, but by then the line—never very clear to begin with—will have shifted.").

<sup>266</sup> Ferguson v. City of Charleston, 532 U.S. 67, 78-81 (2001).

<sup>267</sup> Nicholas v. Goord, 430 F.3d 652, 666 (2d Cir. 2003); Green v. Berge, 354 F.3d 675, 678 (7th Cir. 2004); United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003).

<sup>268</sup> United States v. Frank, No. CR-09-2075-EFS-1, 2010 U.S. Dist. LEXIS 32542, at \*1 (E.D. Wash. Apr. 1, 2010).

<sup>269</sup> See Regensburger, *supra* note 181, at 386.

<sup>270</sup> United States v. Mitchell, 652 F.3d 387, 413 (3d Cir. 2011) (en banc).

<sup>271</sup> See Regensburger, *supra* note 181, at 386.

<sup>272</sup> United States v. Conley, 453 F.3d 674, 678 (6th Cir. 2006).

<sup>273</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012).

<sup>274</sup> See, e.g., OHIO REV. CODE ANN. § 2953.52 (LexisNexis 2012); MINN. STAT. § 299C.105 (2011); CAL. PENAL CODE § 299 (Deering 2013).

<sup>275</sup> OHIO REV. CODE ANN. § 2953.52 (LexisNexis 2012).

placed entirely on the arrestee, it is not an option available to everyone, and usually does not end the constitutional violation in a timely manner.<sup>276</sup>

The burden for seeking expungement is often placed on the individual rather than the government.<sup>277</sup> This is problematic, as it automatically discourages those attempting to secure expungement of their records because they have to be proactive.<sup>278</sup> Placing the burden on the individual is also problematic in that the actual expungement process is generally a difficult and lengthy process.<sup>279</sup>

Ohio's expungement process allows for a person to request to have his DNA profile sealed, but only if the BCII receives a "certified copy of a final court order establishing that the offender's conviction has been overturned."<sup>280</sup> If there is still the possibility of appeal or "application of discretionary review," it is not possible for a court to grant the sealing of the DNA record.<sup>281</sup> The fact that a court cannot seal a record even after a person has been found not guilty or charges have been dismissed means that even proactive citizens will still be subject to violations of their constitutional protections against unreasonable searches.

The sealing of the record in Ohio does not actually destroy the DNA record from the DNA database; it just restricts the access to the actual sample to those people listed in the statute.<sup>282</sup> One of the groups of people who can still access a sealed record is law enforcement officials and prosecutors, for the purpose of determining the proper charges in a criminal prosecution.<sup>283</sup> The subsection does not explicitly mention DNA, but as a DNA profile or a hit therefrom could possibly lead to an additional charge being added to the current arrestee, it is entirely possible that this exception could apply to DNA profiles.<sup>284</sup> At the very least it is not clear which or if any of the exceptions to a sealed record apply to DNA profiles.<sup>285</sup> The ambiguity in

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<sup>276</sup> People v. Buza, 129 Cal. Rptr. 3d 753, 782 (Ct. App. 2011), *petition for review granted by* 262 P.3d 854 (Cal. 2011).

<sup>277</sup> *Buza*, 129 Cal. Rptr. 3d at 782.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 758 ("An arrestee must wait until the statute of limitations has run before requesting expungement; the court must wait 180 days before it can grant the request; the court's order is not reviewable by appeal or by writ; the prosecutor can prevent expungement by objecting to the request.").

<sup>280</sup> OHIO REV. CODE ANN. § 2953.32(H) (LexisNexis 2012).

<sup>281</sup> *Id.*

<sup>282</sup> OHIO REV. CODE ANN. § 2953.32(D) (LexisNexis 2012) (stating that sealed records can be inspected by law enforcement, parole officers, the subject of the record, and by the BCII and Attorney General offices as part of background checks).

<sup>283</sup> OHIO REV. CODE ANN. § 2953.32(D)(1). The relevant subsection states:

Inspection of the sealed records included in the order may be made only by the following persons or for the following purposes: (1) By a law enforcement officer or prosecutor, or the assistants of either, to determine whether the nature and the character of the offense with which a person is to be charged would be affected by virtue of the person's previously having been convicted of a crime.

<sup>284</sup> *Id.*

<sup>285</sup> OHIO REV. CODE ANN. § 2953.32 (LexisNexis 2012).

the expungement statute opens a door for the possibility of continued searches of a sealed DNA profile in violation of the Fourth Amendment's prohibition on unreasonable searches.

Ohio's current process for sealing records does not end the continuing searching of an innocent person's DNA profile, and therefore does not cure Ohio's DNA law of its constitutional defect.

#### IV. PROPOSED CHANGES TO OHIO'S ALL-ARRESTEE DNA STATUTE

##### *A. Proposed Judicial and Legislative Solutions*

###### 1. Proposed Judicial Solutions: Expanding the Exceptions to the Warrant Requirement

One possible solution that has been discussed by commentators is a judicial solution: either expanding the special needs doctrine to encompass DNA sampling or creating a new exception to the warrant requirement.<sup>286</sup>

One possible judicial solution would be the creation of a "DNA database exception" to the warrant requirement, an option advocated by Professor Kaye.<sup>287</sup> The reason that a new exception is the preferred choice, according to Professor Kaye, is based on the fact that arrestee DNA statutes are difficult to analyze under current precedent and the benefit outweighs the minimal privacy implications.<sup>288</sup> In fact, the privacy implication is almost non-existent under this reasoning; the "physical intrusion is minimal" and "no additional privacy interest are implicated."<sup>289</sup> Since the privacy implications are so minimal, a warrant is not necessary to "protect against unwarranted invasions of privacy" but would place a real burden on law enforcement's use of an important tool.<sup>290</sup> Professor Kaye is satisfied as long as there are safeguards in place determining what information is contained in the sample and who has access to the sample.<sup>291</sup>

Professor Kaye's exception would allow for the warrantless DNA sampling of any citizen without any justification other than law enforcement feigning a need for the sample.<sup>292</sup> The privacy expectation in DNA that she describes is so minimal that any government justification would suffice.<sup>293</sup> As previously discussed, a person who has been arrested and subsequently had the charges dismissed, was acquitted at trial, or exonerated at a later time has the same expectation of privacy as someone

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<sup>286</sup> Kaye, *supra* note 66, at 498-500; Regensburger, *supra* note 181, at 387-89.

<sup>287</sup> Kaye, *supra* note 66, at 498.

<sup>288</sup> *Id.* at 499.

<sup>289</sup> *Id.* at 499-500. In fact, Professor Kaye actually compares the privacy invasion implicated by a DNA sample to the privacy invasion that occurs when a fingerprint is taken during the booking procedure.

<sup>290</sup> *Id.* at 500.

<sup>291</sup> *Id.* at 504.

<sup>292</sup> *Id.* at 500 (describing the Fourth Amendment implications as "de minimis" because "persons, houses, papers, and effects" are not implicated).

<sup>293</sup> *Id.* at 499-500.

who has never been arrested.<sup>294</sup> The notion that a person is innocent until proven guilty is one of the cornerstones of America's judicial system and it applies to both arrestees and non-arrestees. The privacy expectation that Professor Kaye describes is so minimal that it would allow for the DNA sampling from not only arrestees but also every citizen. The DNA testing of all citizens is a brave new world that courts are not yet ready to accept.<sup>295</sup> A new exception to the warrant requirement that conceivably would allow for the DNA testing of every citizen is too broad of a solution to implement.

Another possible solution is to revert to the original special needs doctrine before *Edmond* and *Ferguson* added the general law enforcement purposes test.<sup>296</sup> The original understanding of the special needs doctrine was that a special need could be for a "law enforcement related purpose."<sup>297</sup> The only stipulation was that the justification for the warrantless search had to be something more than the "elimination of the individual's rights" in order to help "the police catch criminals more quickly."<sup>298</sup>

There are two issues with this solution; for one, it flies in the face of precedent and would be a "radical new theory" even by its creator's admission.<sup>299</sup> The special needs doctrine may not be a perfect area of the law, but it is a well-established exception to the warrant requirement that has been used to justify sobriety checkpoints and school drug testing.<sup>300</sup> Reverting to a tougher standard would most likely put these precedents on shaky legal ground at best.<sup>301</sup> The second reason is that even with this new standard, it is not clear that DNA sampling from felony arrestees would be upheld. The two proposed special needs for DNA sampling are that DNA is different from other types of personal information and does not implicate the same privacy concerns and that it will greatly benefit crime control and protecting innocent people.<sup>302</sup> As previously stated, DNA implicates some serious privacy concerns with the amount of personal information that it contains.<sup>303</sup> At the very least, however, the idea that "DNA identification information does not implicate privacy concerns nearly to the same degree as . . . reading habits" is inaccurate.<sup>304</sup> Secondly, crime control and protecting innocent people are not special

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<sup>294</sup> See *People v. Buza*, 129 Cal. Rptr. 3d 753, 782 (Ct. App. 2011), *petition for review granted* by 262 P.3d 854 (Cal. 2011).

<sup>295</sup> See, e.g., *United States v. Kincade*, 379 F.3d 813, 873 (9th Cir. 2004) (Kozinski, J., dissenting).

<sup>296</sup> Regensburger, *supra* note 181, at 387-88.

<sup>297</sup> *Id.* at 388.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 387.

<sup>300</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>301</sup> Regensburger, *supra* note 181, at 389.

<sup>302</sup> *Id.* at 389.

<sup>303</sup> See *supra* Part II.A.2.

<sup>304</sup> Regensburger, *supra* note 181, at 389; see *supra* Part II.A.2.

needs because they are precisely what law enforcement agencies are tasked to do.<sup>305</sup> All that changing the special needs doctrine would do is eliminate a person's privacy protection in their personal information in order to more easily catch criminals based on a DNA match.<sup>306</sup> Therefore, the reversion to an original understanding of the special needs doctrine would not solve the problem of the constitutionality of arrestee DNA statutes.

## 2. Proposed Legislative Solution: Delaying the Addition of the Sample to the Database

Another proposal has been to rewrite the federal version of an all-arrestee statute to delay the addition of a DNA specimen to the database.<sup>307</sup> The proposed process would allow for the law enforcement agency to collect the specimen at arrest, but the specimen would not be analyzed or compared to other DNA profiles until after the subject was found guilty of the offense of arrest or the subject consented to the analysis.<sup>308</sup> The reason for the delay is based on the argument that the only search required by an all-arrestee DNA statute that is constitutional is the physical cheek swab.<sup>309</sup>

This argument that any addition of a DNA specimen to a DNA database is an unreasonable invasion of an individual's reasonable expectation of privacy is contrary to the weight of authority and an application of the totality of the

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<sup>305</sup> United States v. Conley, 453 F.3d 674, 678 (6th Cir. 2006).

<sup>306</sup> Regensburger, *supra* note 181, at 390.

<sup>307</sup> Eiler, *supra* note 18, at 1230-31 (proposing that the DNA specimen be held in a separate database until either the arrestee is convicted or the arrestee consents to the analysis and addition of the DNA specimen).

<sup>308</sup> *Id.* at 1231-32. The proposed language for the revision of the federal statute is as follows:

- (A) The Attorney General shall, as prescribed by the Attorney General through regulation, store such unanalyzed DNA samples in a databank that is not link to CODIS, nor searchable by any law enforcement official for any crime-solving purpose.
- (B) The Attorney General shall, upon the occurrence of either of the events in subparagraph (i) or (ii) below, furnish the analyzed DNA sample to the Director of the Federal Bureau of Investigation, who shall carry out a DNA analysis on each such DNA sample and include the results in CODIS—
  - (i) the conviction of the individual arrestee for a charge stemming from the circumstances that led to her arrest; or
  - (ii) the knowing or voluntary consent of the individual arrestee for analysis of her DNA sample and the inclusion of the results in CODIS by the Attorney General.
- (C) If neither of the events detailed in the subparagraphs (i) or (ii) occur, the Attorney General shall, upon final disposition in favor of an arrestee of any charges stemming from the circumstances that led to her arrest, remove the arrestee's DNA sample from the databank described in paragraph (2)(A) and destroy it.

<sup>309</sup> *Id.* at 1219-20 ("It is only when the government goes beyond the physical extraction of DNA that an individual's expectation of privacy in her personal information is invaded.").

circumstances test to Ohio's felony-arrestee DNA statute.<sup>310</sup> The only searches that are unreasonable under the Fourth Amendment are those that continue to occur after the person has been found not guilty, the charges have been dismissed, or they have been exonerated in any manner.<sup>311</sup> This places a heavy burden on law enforcement because during the time it would take to determine someone's eventual guilt or innocence, the sample could be analyzed and lead to the solving of unsolved rapes and murders.<sup>312</sup> Thus, delaying the addition of samples to a DNA database is unnecessary because although it definitely secures the privacy interests of innocent people, it also places a burden on the government that the Fourth Amendment does not require.

#### *B. Automatic Expungement as the Best Solution*

In order to achieve the proper balance and cure Ohio's DNA law of its constitutional defects, the continuing searches of innocent citizens' DNA profiles must be eliminated.<sup>313</sup> The best solution is an automatic expungement process for DNA samples.<sup>314</sup> Automatic expungement requires that the DNA sample and accompanying profile be destroyed as soon as the charges are dropped or the accused is found not guilty.<sup>315</sup> Automatic expungement has two major benefits over the current system of sealing records.<sup>316</sup> For one, the sample is actually destroyed, meaning that there is no possibility of any intentional or accidental future searches and constitutional violations.<sup>317</sup> The second reason is that an automatic expungement, rather than proactive record sealing, ensures that every person is protected from constitutional violations, not just those with understanding and knowledge of the system.

Automatic expungement would go even farther than the current expungement statute by requiring that a person originally convicted but later exonerated will also have his or her DNA profile destroyed.<sup>318</sup> The exoneration portion will apply only if the person has no other convictions for which their DNA sample would have been lawfully collected.

<sup>310</sup> See *supra* Part III; see also Eiler, *supra* note 18, at 1230. Much of Eiler's analysis was based on the Western District of Pennsylvania's decision in *Mitchell*. The circuit court's overruling of the district court's decision makes Eiler's conclusion that only the initial swab is constitutional unpersuasive.

<sup>311</sup> See *supra* Part III.

<sup>312</sup> Maddux, *supra* note 236, at 117-18 (using two cases as examples of how an all-arrestee DNA statute could have provided evidence that could have potentially stopped a rapist from harming more victims).

<sup>313</sup> See *supra* Parts III and IV.A.

<sup>314</sup> MINN. STAT. § 299C.105 Subd. 3 (2012) (requiring the destruction of the "biological specimen" when the person is found not guilty, but the person must request destruction if charges are dismissed).

<sup>315</sup> See *infra* Part IV.C.

<sup>316</sup> For the current process, see OHIO REV. CODE ANN. § 2953.32 (LexisNexis 2012).

<sup>317</sup> Biancamano, *supra* note 104, at 650-51 (discussing the problems and inequalities that occur with the already extensive number of samples included in databases).

<sup>318</sup> See *supra* Part IV.C.

This revision will mean that the only searches required by Ohio's statute will be those that are reasonable under the Fourth Amendment tests. The unreasonable searches of innocent people's DNA profiles will no longer occur because the samples and accompanying profiles will have been destroyed.

### C. Proposed Statutory Language

The following are the proposed revisions to Ohio's current all-arrestee DNA statute:<sup>319</sup>

(F) Any person who is required to submit to a DNA specimen collection procedure under division (B)(1) of this section, who is acquitted, has the charges against them dropped, dismissed, or is exonerated in any manner will have their DNA sample and profile automatically expunged from any database pursuant to the procedures of the Automatic DNA Expungement Act.<sup>320</sup>

(G) Any person who is required to submit a DNA specimen under division (B)(2)-(4) but is later exonerated of the charge and has no other charges that would require them to submit a DNA specimen, will have their DNA sample and profile automatically expunged from any database pursuant to the procedures of the Automatic DNA Expungement Act.<sup>321</sup>

The language of the Automatic DNA Expungement Act is as follows: "The Automatic DNA Expungement Act's purpose is to ensure that Ohio's DNA samples and the resulting searches of them are done in a manner that is constitutional under the Fourth Amendment and Article I, § 14 of the Ohio Constitution."<sup>322</sup>

(A) As used in this section:

- (1) "Acquittal" means being found not guilty of the charged offense
- (2) "Dismissal of charges" means that the person is no longer being charged with the offense of arrest.
- (3) "Exoneration" means the reversal of a guilty conviction upon appeal, not to include pardons, or clemency, not to include remanding for a new trial, parole, or any other type of early release programs.

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<sup>319</sup> OHIO REV. CODE ANN. § 2901.07 (LexisNexis 2012) (corresponding headings to the actual statute).

<sup>320</sup> OHIO REV. CODE ANN. § 2901.07(B)(1) (LexisNexis 2012) (sampling from all felony arrestees).

<sup>321</sup> OHIO REV. CODE ANN. § 2901.07(B)(2)-(4) (LexisNexis 2012) (explaining the process of sampling from convicted offenders).

<sup>322</sup> See, e.g., MINN. STAT. § 299C.105 Subd. 3 (2012); MO. REV. STAT. § 650.055(11) (2012). The basic framework of automatically destroying DNA samples is similar to the Minnesota and Missouri statutes; however, the proposed changes require a stricter expungement process and explain some of the procedure in greater detail.

(4) "DNA," "DNA analysis," "DNA specimen," "DNA database," and "DNA record" have the same meanings as in section 109.573 of the Revised Code.<sup>323</sup>

(B)(1) Upon the dismissal of charges, acquittal or any other means of exoneration from a person arrested or indicted for a felony the arresting law enforcement agency, or dismissing court will notify the Bureau of Criminal Identification and Investigation that the person DNA specimen and accompany profile is to be automatically expunged.

(2) Upon the exoneration of any convicted felon for any reason, the reversing court will notify the Bureau of Criminal Identification and Investigation of the person's exoneration and the Bureau of Criminal Identification and Investigation will automatically expunge the person's DNA specimen and accompany profile.

(C)(1) The Bureau of Criminal Investigation and Identification must destroy the DNA specimen, the DNA record and any accompanying identification records.

(2) The Bureau of Criminal Investigation and Identification will have 15 days to destroy the DNA specimen and DNA record. Upon the completion of the automatic expungement process the Bureau of Criminal Investigation and Identification will notify the samplee in writing that his or her DNA record has been expunged.

(3) The Director of the Bureau of Criminal Investigation and Identification may prescribe rules for the efficient expungement of DNA specimen and DNA records in accordance with Chapter 119 of the Revised Code.

(D) This section does not preclude the admissibility of any DNA matches or other evidence linked to a DNA sample match while the DNA specimen was lawfully contained in a DNA database at the time the analysis was conducted.

#### V. CONCLUSION

Courts have begun a slow and steady march towards permitting the inclusion of DNA samples from anyone arrested for any offense. The proposed creation of a new warrant exception, the expansion of the special needs doctrine, or the legislative revision of statutes to delay the implementation are in stark contrast to precedent

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<sup>323</sup> OHIO REV. CODE ANN. § 109.573(A) (LexisNexis 2012). The pertinent definitions are:

(A) As used in this section: (1) "DNA" means human deoxyribonucleic acid. (2) "DNA analysis" means a laboratory analysis of a DNA specimen to identify DNA characteristics and to create a DNA record. (3) "DNA database" means a collection of DNA records from forensic casework or from crime scenes, specimens from anonymous and unidentified sources, and records collected pursuant to sections 2152.74 and 2901.07 of the Revised Code and a population statistics database for determining the frequency of occurrence of characteristics in DNA records. (4) "DNA record" means the objective result of a DNA specimen, including representations of DNA fragments lengths, digital images of autoradiographs, discrete allele assignment numbers, and other DNA specimen characteristics that aid in establishing the identity of an individual. (5) "DNA specimen" includes human blood cells or physiological tissues or body fluids.

dealing with these issues. Until the Supreme Court decides how much protection the Fourth Amendment guarantees in the area of DNA sampling, Ohio's best recourse is to revise its current DNA collection scheme with the addition of an automatic expungement procedure.