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Driving Through Arkansas? Have Your DNA Sample Ready

Brian Gallini



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SEARCH AND SEIZURE LAW REPORT

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Driving Through Arkansas? Have Your DNA Sample Ready*

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Introduction

In March 2003, Detective Dolphus Boucher was employed with the Las Vegas Metropolitan Police Department, and Kenneth Friedman was incarcerated in Clark County Jail as an arrestee pending the prosecution of unrelated charges for which DNA evidence was inapplicable. *Friedman v. Boucher*, 568 F.3d 1119, 1122 (9th Cir. 2009). When Boucher asked Friedman to provide a sample of his DNA, Boucher had no warrant, no court order, no individualized suspicion, had not articulated an offense for which a DNA sample was required or justified, and admitted as much to Friedman.

Friedman declined to volunteer the DNA sample and asked to speak with his attorney. Boucher refused and told him that the prosecuting attorney had authorized Boucher to obtain a DNA sample from Friedman—by force if necessary. A different detective chimed in and told Friedman, “We can force you. We’re authorized and you can get hurt pretty bad.” Boucher and the other detective also threatened to call in other officers to beat him into submission. During the course of these interactions, Friedman sat in shackles chained to a metal bench. After Friedman repeatedly refused to voluntarily provide a DNA sample, Detec-

tive Boucher forced Friedman’s jaw open and forcefully took a buccal swab from the inside of Friedman’s mouth.

Can officers do that? Can they conduct suspicionless searches inside the body of your person following an arrest for certain offenses, even if (1) the basis for the arrest has nothing to do with the taking of your DNA, and (2) you are ultimately later exonerated? In Arkansas, they can. By recently enacting “Juli’s Law,” Arkansas joined at least twenty-one other states with similar statutes. NAT’L CONFERENCE OF STATE LEGISLATURES, STATE LAWS ON DNA DATA BANKS QUALIFYING OFFENSES, OTHERS WHO MUST PROVIDE SAMPLE (Feb. 2010), <http://www.ncsl.org/programs/cj/dnadatabanks.htm>.

To date, however, no Arkansas appellate court has examined the constitutionality of House Bill 1473—better known as “Juli’s Law”—which allows officers to take DNA samples from suspects arrested for capital murder, murder in the first degree, kidnapping, sexual assault in the first degree, and sexual assault in the second degree. ARK. CODE ANN. § 12-12-1006(a)(2)(A)-(E) (Supp. 2009). This issue of SEARCH & SEIZURE LAW REPORT contends that Juli’s Law violates the Fourth Amendment of the U.S. Constitution. First, I will highlight certain features of the statute and explore the rationale underlying its enactment. Then I will discuss the only published decision upholding

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the practice of taking DNA samples from certain felony arrestees and the rationale for allowing the practice. Finally I will assess the possible analytical approaches to evaluating the constitutionality of Juli's Law and conclude that any approach yields the same result: taking DNA swabs from felony arrestees *prior to any conviction* is unconstitutional.

***... taking DNA swabs from felony
arrestees prior to any conviction is
unconstitutional.***

Juli's Law

On the morning of December 20, 1996, Jewell "Juli" Busken agreed to give one of her friends a ride to Will Rogers World Airport in Oklahoma City. Juli left her Norman, Oklahoma, apartment before 5:00 a.m. and drove her friend to the airport in Oklahoma City. She returned at approximately 5:30 a.m., at which point neighbors remembered hearing a scream and a man's voice say, "Just shut up, get in the car." A fisherman recovered her raped and murdered body the next afternoon in Lake Stanley Draper in nearby Oklahoma City.

Police on the scene were confused; they found her body in Oklahoma City, yet discovered her car back in Norman. Investigators therefore believed Juli's killer drove her car—a belief later bolstered by a witness who told police, a month after the crime, that he saw a man in Juli's car at around the time of her disappearance. Law enforcement also recovered a semen sample from a pair of Busken's tights. Although the investigation quickly went stale, prosecutors—in order to avoid statute-of-limitations problems—creatively charged a "John Doe" in March of 2000 with murder, first-degree rape, forcible sodomy, and kidnapping, based on the DNA sample.

Four years later, Anthony Sanchez was already serving time for burglary when he was ordered to submit to a blood test. The test revealed a match between his DNA and the material recovered from Busken's tights. Prosecutors charged Sanchez following the match and confirmed the match by using a cotton swab to collect and test a sample of skin cells from inside Sanchez's mouth. Sanchez was ultimately convicted and sentenced to death in 2006.

Following Sanchez's conviction, Oklahoma enacted the first version of what it called "Juli's Law." OKLA. STAT. tit. 74, § 150.27a (2006) (amended 2009). At first, the law required only defendants convicted of sex offenses to provide DNA samples. Then, the Oklahoma legislature expanded the scope of Juli's Law in 2005 by requiring all defendants convicted of felonies to submit a DNA sample. Oklahoma has now expanded the scope of Juli's Law by requiring DNA samples from: (1) defendants convicted of certain misdemeanors; and (2) arrestees who are arrested on suspicion that they are in the country illegally. OKLA. STAT. tit. 74, § 150.27a (2009). Significantly, proposals in the Oklahoma legislature to expand Juli's Law to include arrestee sampling have failed.

At each juncture, proponents relied on the value of DNA evidence to justify expanding the scope of Juli's Law. To rationalize amending Juli's Law the first time in 2005, for example, one legislator commented in support of the amendment that "[b]y adding DNA samples from categories we haven't included in the past, we're greatly increasing our chances of solving cold cases. DNA is what finally helped identify a suspect in the 1996 murder of Juli Busken." *OK Senate Backs DNA Database Expansion*, THE J. REC. (Oklahoma City, Okla.), May 26, 2005. And, in May of 2009, when the law was extended to collecting samples from those convicted of certain misdemeanors and arrested for illegal presence in the United States, legislators again relied on the value of DNA evidence: "I've seen just how extraordinarily helpful DNA is in solving a crime." Julie Bisbee, *DNA Sampling Faces Governor's Verdict*, THE OKLAHOMAN, May 17, 2009, at 5A.

Similar logic has driven efforts in Arkansas to expand DNA sampling. Indeed, although Oklahoma's current version of Juli's Law *excludes* arrestee sampling, OKLA. STAT. tit. 22, § 991a; OKLA. STAT. tit. 74, § 150.27a, Ar-

kansas' modified version of Juli's Law requires individuals *arrested* for certain felonies to provide a DNA sample, ARK. CODE ANN. § 12-12-1006(a)(2)(A)-(E) (Supp. 2009). Originally introduced in February of 2009, Arkansas House Bill 1473 was initially written to require the taking of DNA samples from anyone arrested for any felony. At a press conference following its introduction, bill introducer and legislator Dawn Creekmore commented, "DNA is merely a technologically advanced fingerprint." Charlie Frago & Michael R. Wickline, *Bill on Oil, Gas Commission Setup Fails*, ARK. DEMOCRAT-GAZETTE, Feb. 17, 2009, at 6A. Although she acknowledged that the measure as introduced would cost the state about \$538,000 per year, she argued that it would save money in the long term by shortening criminal investigations and exonerating the wrongfully convicted.

The scope of House Bill 1473 was nonetheless subsequently narrowed to require DNA samples from anyone arrested for any of the following five felonies: (1) capital murder; (2) first-degree murder; (3) kidnapping; (4) first-degree sexual assault; and (5) second-degree sexual assault. Notably, although Juli Buskin was raped, the crime of rape is excluded from Juli's Law. Representative Creekmore nonetheless again praised the bill following its amendment, observing that it would save the state about \$200,000 and solve cold cases. She also observed that fifteen states have enacted similar laws. In response to questioning about whether the new legislation, if enacted, would violate the Fourth Amendment, Creekmore responded that giving a post-arrest DNA sample is "reasonable" and that Virginia's similar statute has already withstood constitutional scrutiny.

Juli Buskin's mother testified in favor of the law, as did John Ramsey—father of Jon-Benet Ramsey—whose name DNA cleared while he was under investigation for the murder of his daughter. Creekmore also told House members, "If you pass this bill, law enforcement will not be driving around the state of Arkansas, pulling people over, just to take their DNA." Charlie Frago & Michael R. Wickline, *Bill on Paying Employees with Food, Clothing Falters*, ARK. DEMOCRAT-GAZETTE, Mar. 19, 2009, at 8A. The bill passed the House on March 17, 2009, prompting Creekmore to characterize DNA as the "21st-century fingerprint." The Senate subsequently approved Creekmore's measure on April 2, and the governor signed the bill into law on April 7.

In its final form, Juli's Law requires:

A law enforcement official at the receiving criminal detention facility shall take, or cause to be taken, a DNA sample of a person arrested for: (A) Capital murder, § 5-10-101; (B) Murder in the first degree, § 5-10-102; (C) Kidnapping, § 5-11-102, (D) Sexual assault in the first degree, § 5-14-124; or (E) Sexual assault in the second degree, § 5-14-125.

ARK. CODE ANN. § 12-12-1006(a)(2)(A)-(E) (Supp. 2009). The statute authorizes law enforcement to use "reasonable force" in obtaining the sample, so long as they exercise that force in "good faith."

A few additional points about the statute bear mention. First, the statute defines DNA as "deoxyribonucleic acid that is located in the cells of an individual, provides an individual's personal genetic blueprint, and encodes genetic information that is the basis of human heredity and forensic identification." ARK. CODE ANN. § 12-12-1001(12) (Supp. 2009). Second, an arrestee's "DNA sample" is, after collection, (1) delivered to the State Crime Laboratory, (2) retained in the State DNA Data Bank, and (3) provided to the Federal Bureau of Investigation for storage in its Combined DNA Index System. Third, any individual who refuses to provide a post-arrest DNA sample is guilty of a Class B misdemeanor. Finally, certain arrestees—e.g., those who were acquitted, never charged, or whose charges were dismissed—may "apply to the State Crime Laboratory for removal and destruction of the DNA record . . ." If successful, the State Crime Lab removes the record from its system and "requests" that the arrestee's DNA record be purged from the National DNA Index System.

Judicial response

This section focuses on the only judicial response to arrestee DNA sampling laws. Although Arkansas has yet to opine on the constitutionality of Juli's Law, the state is hardly alone in having yet to resolve whether arrestee DNA sampling violates the Fourth Amendment. Perhaps that explains why Creekmore relied on the Virginia Supreme Court's decision to uphold its arrestee DNA-sampling stat-

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ute as a basis for seeking enactment of Juli's Law. Regardless, one thing is clear: if the Virginia Supreme Court's decision to uphold its arrestee DNA-sampling statute played a role in the promulgation of Juli's Law, which it apparently did, the court's opinion in *Anderson v. Commonwealth*, 650 S.E.2d 702 (Va. 2007), *cert. denied*, 128 S. Ct. 2473 (2008), merits special consideration.

Anderson v. Commonwealth

In *Anderson*, the defendant raped, robbed, and sodomized the victim while she was walking to work in 1991. Following the crime, physicians used a "physical evidence recovery kit" to collect and preserve specimens taken from the victim—including DNA—for evidence. The crime went unsolved until 2003 when the defendant was arrested on unrelated charges. Pursuant to Virginia's post-arrest DNA-sampling statute, officers took a sample of the defendant's DNA and entered it into a DNA databank that, in turn, produced a "cold hit" matching DNA found on the victim. Pursuant to a search warrant, law enforcement obtained two additional DNA samples from the defendant, each of which confirmed that he raped the victim. Following a jury trial, the defendant was subsequently found guilty and sentenced to two life terms plus ten years.

On appeal, the defendant contended that requiring him to provide a DNA sample following an arrest for an unrelated crime violated his Fourth Amendment rights. The Supreme Court of Virginia disagreed and held that taking an arrestee's DNA is part of the "routine booking process," which requires "no additional finding of individualized suspicion . . ." The court reasoned that taking an arrestee's DNA is analogous to the taking of a fingerprint. The court further reasoned that it, along with other courts, had already held that taking a DNA sample from convicted felons imposed no constitutional problem.

The court reasoned that taking an arrestee's DNA is analogous to the taking of a fingerprint.

Reliance on *Anderson*

What, then, is wrong with relying on *Anderson* as a basis for enacting Juli's Law in Arkansas? First, the statute considered in *Anderson* is far different from the enacted version of Juli's Law. In pertinent part, Virginia's arrestee DNA-sampling statute provides as follows:

Every person arrested for the commission or attempted commission of a violent felony as defined in § 19.2-297.1 or a violation or attempt to commit a violation of § 18.2-31, 18.2-89, 18.2-90, 18.2-91, or 18.2-92, shall have a sample of his saliva or tis-

sue taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. *After a determination by a magistrate or a grand jury that probable cause exists for the arrest*, a sample shall be taken prior to the person's release from custody.

VA. CODE ANN. § 19.2-310.2:1 (2009) (emphasis added).

As the italicized portion of the quoted statute indicates, the Virginia statute includes at least a modest effort to provide procedural safeguards. Indeed, although the Virginia statute requires an independent judicial probable cause determination prior to taking the arrestee's DNA, Juli's Law contains no similar requirement. Although it would of course be constitutionally preferable for that determination to focus on whether probable cause exists *to take a suspect's DNA*—as opposed to the presence of probable cause to believe the suspect has committed *any* crime—the colloquial phrase "something's better than nothing" comes to mind.

Second, although the *Anderson* court candidly admitted that taking a DNA sample is "more revealing" than a fingerprint, it nonetheless subsequently asserted that the two procedures are "analogous"—a conclusion supported neither by commonsense nor science. From a commonsense standpoint, law enforcement unsurprisingly learns the pattern of your finger following the unobtrusive taking of a fingerprint. Yet, even the layperson knows that taking a DNA sample requires an intrusion into the body, which thereafter reveals the totality of a person's genetic makeup. That elementary observation suggests that the *Anderson* court's reasoning is questionable at best.

More substantively, the *Anderson* court considered whether the government may constitutionally acquire an arrestee's DNA via a buccal or cheek swab. Thus, the question becomes what exactly does a buccal swab entail? A buccal swab itself is "a cotton tipped stick which is placed into the mouth and rubbed against the inside of the cheek to remove epithelial cells." Catherine Arcabascio, *Chimeras: Double the DNA-Double the Fun for Crime Scene Investigators, Prosecutors, and Defense Attorneys?*, 40 AKRON L. REV. 435, 449 n.153 (2007).

Significantly, this is the first of *two* intrusions into the person of the arrestee. Although courts have characterized DNA swabs as only "minimally intrusive," *e.g.*, *U.S. v. Kincade*, 379 F.3d 813, 836-38 (9th Cir. 2004) (en banc); *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992), they do so without recognizing the second intrusion: the intrusion upon the arrestee's interest in keeping the information revealed by a DNA sample *private*. From a buccal swab, the state obtains an analyzable sample of an arrestee's DNA. That, in turn, allows the state to perform a polymerase chain reaction procedure ("PCR"), which involves replicating the DNA sample. This replication then allows the tester to look at "short tandem repeats" (STR). At this stage, the STRs

reveal specific areas of DNA known as “loci.” In total, the tester is looking to isolate thirteen different loci in order to identify an individual’s exact genetic makeup. Once complete, the sample potentially “provides the instructions for all human characteristics, from eye color to height to blood type.” *Armstead v. State*, 673 A.2d 221, 228 (Md. 1996).

All of this information is, of course, to be contrasted against the Supreme Court’s observation that “[f]ingerprinting involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search.” *Davis v. Mississippi*, 394 U.S. 721, 727 (1969). Given that taking a DNA sample is a “search” for Fourth Amendment purposes, e.g., *U.S. v. Amerson*, 483 F.3d 73, 77 (2d Cir. 2007), it is difficult to take seriously the idea that the taking of a DNA sample is “analogous” to the taking of a fingerprint.

Putting the *Anderson* court’s reasoning aside for a minute, compliance with Juli’s Law intrudes on an arrestee’s person and privacy even more so than does compliance with Virginia’s arrestee DNA sampling statute. To begin with, unlike Virginia’s statute, which contains no “definitions” section, Juli’s Law broadly defines “DNA sample” to provide the state with varied methods of invading the arrestee’s body, including saliva, tissue, and blood samples. ARK. CODE ANN. § 12-12-1001(14) (Supp. 2009). More problematically, unlike the federal mandate, which promotes collecting DNA in a manner that avoids learning an individual’s genetic makeup, *Amerson*, 483 F.3d at 76, Juli’s Law specifically aims to collect an arrestee’s genetic blueprint by defining DNA to include “an individual’s *personal genetic blueprint... genetic information that is the basis of human heredity and identification.*” ARK. CODE ANN. § 12-12-1001(12) (emphasis added). Even a generous extension of *Anderson*’s strained reasoning does not provide a basis for upholding Juli’s Law as constitutional.

Finally, the *Anderson* court summarily reasoned that arrestee sampling is constitutional because a series of decisions have already held that it is constitutional to require a *convicted felon* to provide a DNA sample. Specifically, citing the Fourth Circuit’s decision in *Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992), the court observed that other courts have already held that “requiring a convicted felon to provide a blood, saliva, or tissue sample for DNA analysis, does not violate the Fourth Amendment.” The *Jones* decision itself relied in part on that very distinction to find the taking of DNA samples from *convicted* felons constitutional. *Murray*, 962 F.2d at 306. Yet, that distinction is meaningless in this context for the obvious reason that *convicted* felons give up a significant privacy interest that arrestees who still enjoy a presumption of innocence do not.

The totality of the foregoing demonstrates two arguably obvious realities. First, the *Anderson* court’s reasoning is embarrassingly flawed. Second, any reliance by Arkansas on *Anderson* as a basis either for enacting or upholding Juli’s Law is wholly unwarranted.

Analytical approaches

In 2006, the D.C. Circuit considered the constitutionality of a federal DNA Analysis Backlog Elimination Act of 2000 provision that requires convicted felons released on probation to provide a DNA sample. *Johnson v. Quander*, 440 F.3d 489, 492 (D.C. Cir. 2006). Although the court upheld the provision by reasoning that probationers have lesser privacy interests than do ordinary citizens, the court observed, in passing, the following:

To be sure, genetic fingerprints differ somewhat from their metacarpal brethren, and future technological advances in DNA testing (coupled with possible expansions of the DNA Act’s scope) may empower the government to conduct wide-ranging “DNA dragnets” that raise justifiable citations to George Orwell.

Johnson v. Quander at 499.

DNA dragnets are now alive in Arkansas, and as a result, residents are now living the D.C. Circuit’s Orwellian concerns. Given that the Arkansas Supreme Court has yet to evaluate the constitutionality of Juli’s Law—and any reliance by the court on *Anderson* as an analytical roadmap for considering the issue would be imprudent—I now consider what the Fourth Amendment analysis of Juli’s Law could look like.

DNA dragnets are now alive in Arkansas

As noted, collecting DNA from an individual’s mouth is a “search” for purposes of the Fourth Amendment. The question therefore becomes whether the Fourth Amendment’s text requires the state to get a warrant before taking an arrestee’s DNA. Answering that question raises a familiar debate: does the Fourth Amendment categorically impose a warrant requirement or, instead, does the Amendment merely require that warrantless searches be “reasonable”? That, in turn, begs the question of whether there exists any connection between the Fourth Amendment’s Reasonableness and Warrant Clauses.

Warrantless searches

The Supreme Court’s early Fourth Amendment jurisprudence unequivocally suggested that searches conducted without a warrant were presumptively “unreasonable.” *See, e.g., Stoner v. California*, 376 U.S. 483, 486-87 (1964); *Rios v. U.S.*, 364 U.S. 253, 261 (1960); *Chapman v. U.S.*, 365 U.S. 610, 614 (1961). That position was forcefully reaffirmed by the Court’s 1967 decision in *Katz v. U.S.*, where it observed that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are

per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” 389 U.S. 347, 357 (1967). Although the Court in the following two decades approved of more exceptions to the warrant “requirement,” *e.g.*, *New York v. Belton*, 453 U.S. 454, 460 (1981), it continued to periodically highlight the Fourth Amendment’s Warrant Clause as the predominant clause, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

Reasonableness

Amid the discussion of exceptions to the warrant “requirement,” the Court also began exploring a new analytical path. In *Terry v. Ohio*, a case decided one year after *Katz*, the Court observed that “the central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.” 392 U.S. 1, 19 (1968). That shift in Fourth Amendment analysis, suggesting that the Reasonableness Clause governs, took hold in a number of subsequent cases. Perhaps Justice Scalia summed up the tension best by noting that the Court’s Fourth Amendment jurisprudence has “lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone.” *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

In the Court’s most recent discussion of the Fourth Amendment, the majority in *Arizona v. Gant* quoted from *Katz* and again noted that “‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’” 129 S. Ct. 1710, 1717 (2009) (quoting *Katz*, 389 U.S. at 357). Whether the Court’s reliance on that *Katz* language signals a return to viewing the Warrant Clause as supreme remains unanswered. Yet finding an answer to that question is critical to resolving the constitutionality of Juli’s Law. Indeed, strict application of the *Katz* language demands a straight-forward conclusion that Juli’s Law is unconstitutional: (1) the intrusion into an arrestee’s mouth is a “search”; (2) there exists no recognized warrant exception for acquiring an arrestee’s DNA; (3) officers must therefore have a warrant to acquire that DNA; and (4) Juli’s Law unconstitutionally allows officers to search the body of an arrestee without a warrant.

Although that analysis simultaneously provides the benefits of simplicity and brevity, it ignores the Court’s steady trend—*Gant* notwithstanding—toward viewing reasonableness as the “touchstone” of constitutionality. *U.S. v. Knights*, 534 U.S. 112, 118 (2001). The change in the Court’s attitude toward a warrant requirement is arguably best reflected in language from *California v. Acevedo*, wherein it stated:

To the extent that the [warrant-requirement] rule protects privacy, its protection is minimal. Law enforcement officers may seize a container and hold it until they obtain a search warrant. “Since the police, by hypothesis, have probable cause to seize the property, *we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases.*”

500 U.S. at 575 (quoting *Arkansas v. Sanders*, 442 U.S. 753, 770 (1979)) (emphasis added). Given the modern Court’s apparent willingness to dispense with the requirement of a neutral arbiter, I proceed on the analytical assumption that the Arkansas Supreme Court would review Juli’s Law pursuant to a “reasonableness” test.

When utilizing the “reasonableness” test, the Supreme Court analyzes the particular law by balancing its intrusion on an individual’s liberty interests as against the law’s promotion of legitimate governmental interests. *E.g.*, *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999). In applying that test, “the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against ‘an objective standard,’ whether this be probable cause or a less stringent test.” *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Wholly apart from the presence of a warrant, then, the Court still requires officers to possess at least some objective, individualized suspicion to justify the infringement of a person’s Fourth Amendment rights. But how much individualized suspicion must an officer possess before taking an arrestee’s DNA?

Answering that question seems to depend on what, if anything, a court might require the officer to suspect. To justify taking an arrestee’s DNA as “reasonable,” the Supreme Court’s Fourth Amendment jurisprudence could require the officer to first obtain a warrant supported by probable cause to believe the arrestee’s DNA is related to the basis for the arrest. Although “probable cause is a fluid concept,” *Illinois v. Gates*, 462 U.S. 213, 232 (1983), it is undoubtedly the most stringent Fourth Amendment standard, and would obligate the magistrate to make a “common sense” determination based on specific evidence that there exists a “fair probability” that the arrestee’s DNA is related to the crime for which he was arrested, *see id.* at 238. Were this line of reasoning to apply, Juli’s Law would surely be unconstitutional given that it allows for a suspicionless intrusion into the arrestee’s body.

Terry reasonable suspicion

Alternatively, assuming a warrant is not required, the Court’s Fourth Amendment case law could obligate the officer to demonstrate that he has reasonable suspicion to believe that the arrestee’s DNA is connected to the arrest. The Court’s decision in *Terry* made constitutional certain limited intrusions on a person’s liberty based on something

less than probable cause. Specifically, an officer may stop an individual based on “reasonable suspicion” to believe that criminal activity is afoot. *Terry*, 392 U.S. at 30. If nothing during that stop dispels the officer’s suspicion, then he may likewise engage in a pat down of the suspect’s outer clothing.

Even an intrusion on liberty premised on *Terry*, however, requires some objective level of individualized suspicion that Juli’s Law does not. Thus, should arrestee DNA-sampling require reasonable suspicion, Juli’s Law would again be unconstitutional. Perhaps, though, because Juli’s Law allows for a suspicionless search of the arrestee’s person, it is more properly evaluated in the context of the Supreme Court’s so-called “special needs” jurisprudence.

Special needs

The still evolving “special needs” rule allows for suspicionless searches when “‘special needs, beyond the normal need for law enforcement, make the warrant and/or probable-cause requirement[s] impracticable.’” *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)). To determine the validity of policy or law allowing for a suspicionless search, the Supreme Court applies a “general Fourth Amendment approach” to determine reasonableness “by assessing, on the one hand, the degree to which [a search] intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *Samson v. California*, 547 U.S. 843, 848 (2006).

Relying on this analysis, the Court has upheld the following suspicionless Fourth Amendment intrusions as constitutional: (1) highway checkpoint stops during which officers ask citizens about a recent crime, *Illinois v. Lidster*, 540 U.S. 419, 428 (2004); (2) sobriety checkpoints, *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990); (3) brief seizures of motorists at border patrol checkpoints, *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976); (4) certain work-related searches by government employers of employees’ desks and offices, *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987); (5) school officials searching some student property, *T.L.O.*, 469 U.S. at 340; and (6) some governmental searches conducted pursuant to a regulatory scheme, e.g., *New York v. Burger*, 482 U.S. 691, 702-03 (1987).

Given that government’s “general interest in crime control” will not justify a suspicionless search, *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000), the Supreme Court upholds certain laws pursuant to the special-needs doctrine when there exists “no law enforcement purpose behind the searches” and “there [is] little, if any, entanglement with law enforcement[.]” *Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.15 (2001).

Against that backdrop, numerous federal courts have relied on the Court’s “special needs” rationale to uphold certain federal DNA-collection statutes. Specifically, the federal courts have upheld statutory provisions allowing for DNA collection from: (1) individuals on supervised release, *U.S. v. Lujan*, 504 F.3d 1003, 1006-07 (9th Cir. 2007); (2) individuals on parole, *Banks v. Gonzales*, 415 F. Supp. 2d 1248, 1261 (N.D. Okla. 2006); and (3) convicted felons, *Kincade*, 379 F.3d at 839. Yet, in doing so, each court has thematically relied on the status of the offenders to justify its holdings; i.e., that convicted persons and parolees have a reduced expectation of privacy. In fact, it is their very status as convicted individuals, parolees, or living while on supervised release that provides the “special need” necessary to subject them to the suspicionless taking of their DNA.

There is no comparable “special need” to justify DNA sampling of arrestees. Unlike felony convicts, probationers, and those on supervised release, it is axiomatic that arrestees have no similar diminishment of their reasonable expectation of privacy. Equally as disconcerting, Juli’s Law runs afoul of the Supreme Court’s concern about suspicionless intrusions that have a “law enforcement purpose behind the searches” and are “entangle[d] with law enforcement.” In pushing for passage of the Juli’s Law, Representative Creekmore admitted that a goal of Juli’s Law is to help solve cold cases. Accordingly, no honest application of the “special needs” doctrine can justify the state’s generalized interest in solving unspecified cold cases by taking DNA samples from certain arrestees.

Even if the Arkansas Supreme Court concluded that there exists a “special need” to dispense with the need for *any* and *all* individualized suspicion before acquiring an arrestee’s DNA, Juli’s Law is not narrowly tailored to justify tipping the balancing test in favor of the state. Courts upholding various DNA-collection statutes have thematically emphasized the need for those statutes to be narrowly tailored in terms of offender status and qualifying offense. In doing so, courts are quick to note that constitutional statutes “provide[] adequate safeguards against collection of unnecessary physiological information.” *U.S. v. Lifshitz*, 369 F.3d 173, 187 (2d Cir. 2004). Constitutional DNA-collection statutes also include limitations on the manner in which DNA information may be used for purposes *other* than identification. *U.S. v. Sczubelek*, 402 F.3d 175, 187 (3d Cir. 2005).

Arrestees have not been convicted

Although Juli’s Law limits qualifying felonies to capital murder, murder, kidnapping, and first/second degree sexual assault, it of course provides no limitation on offender status simply because an arrestee, by definition, is not an offender yet. The feeble rationale underlying the enactment of Juli’s Law—that it will help absolve the innocent while solving cold cases—could therefore hypothetically also

justify a law allowing police to go door-to-door demanding that Arkansas residents provide a DNA sample.

Juli's Law also provides neither discernible protections to safeguard against the collection of "unnecessary physiological information," *Lifshitz*, 369 F.3d at 187, nor limitations on the dissemination of an arrestee's DNA. Instead, the law leaves to the State Crime Lab the job of promulgating regulations related to the dissemination of an arrestee's DNA, and tacitly encourages the collection of physiological information by broadly defining DNA to include an "individual's personal genetic blueprint."

Moreover, to say that Juli's Law is not narrowly tailored would be an understatement. The statute allows for the wholesale warrantless DNA profiling of persons who have not yet been convicted of *anything* while simultaneously providing no protections to safeguard against the collection and dissemination of their DNA. As a result, officers are free to take DNA samples from certain arrestees even in the absence of any nexus between the alleged crime and the information revealed by a DNA test.

Balancing

Wholly apart from a special-needs prerequisite, there is seemingly little to discuss in the context of a generalized reasonableness balancing. On the one hand is the state's aforementioned generalized interest in preventing and prosecuting crimes and, on the other, a two-fold privacy intrusion resulting from the gathering and analyzing of an arrestee's DNA. No court believing that the Fourth Amendment retains any substance could tip that scale in favor of upholding Juli's Law as constitutional. Yet, concluding that Juli's Law is unconstitutional does not mean that officers cannot obtain DNA from arrestees; it simply requires a neutral and detached magistrate to first authorize a search inside the body of the arrestee. Perhaps, then, it is *finally* time to dust off and resurrect some faintly familiar logic:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead

of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. U.S., 333 U.S. 10, 13-14 (1948).

Conclusion

Whatever a constitutionally legitimate DNA-collection system for arrestees might look like, it is abundantly clear that Juli's Law does not provide an example. From a commonsense standpoint, reliance on Juli Busken's case as a basis for enacting Juli's Law is inapposite given that DNA was taken from her attacker while he was in prison for another offense, not after his arrest. Moreover, although Busken's offender raped her before killing her, rape is surprisingly *excluded* from Juli's Law.

From a constitutional standpoint, providing a *post-conviction* DNA sample is acceptable because courts and scholars almost uniformly agree that defendants forfeit significant privacy rights following a felony conviction. At the risk of stating the obvious, the same is hardly true of those who are merely *arrested* for committing a Juli's Law felony. Any faithful application of *any* aspect of the Supreme Court's jurisprudence therefore demands holding arrestee sampling as allowed by Juli's Law is unconstitutional.

Any faithful application of any aspect of the Supreme Court's jurisprudence therefore demands holding arrestee sampling as allowed by Juli's Law is unconstitutional.

In the end, "[I'm] all for getting the bad guys, but not this way." Opinion, *Fishing Trip: DNA Legislation Casts Net Too Wide*, THE OKLAHOMAN, Feb. 19, 2009, at 6A. Methods are already in place for obtaining DNA samples from those charged with a crime; prosecutors need only to show a magistrate probable cause to believe that the reason for obtaining the DNA is related to the basis for the arrest.

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