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Step Out of the Car: License, Registration, and DNA Please

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Imagine the following scenario: you are driving home after a long day of work and are understandably anxious to arrive home. To hasten the process, you step on the accelerator and progressively increase your speed until you angrily spot blue lights behind you. You compliantly pull your car to the side of the road, where Officer Smith approaches, expresses his concern that you were speeding, and asks for your license and registration. After producing the requested items, Officer Smith retreats to his cruiser where he enters your information into his cruiser's computer and learns that a warrant is out for your arrest on the charge of murder. He does not, however, learn that the warrant clerk erroneously entered your name.

Officer Smith returns and asks you to step out of your vehicle. "What did I do?" you ask upon exiting the vehicle. Rather than responding, Officer Smith places you under arrest for murder and takes you down to the stationhouse for booking. Pursuant to routine booking procedures, he takes your fingerprints, photographs you, and then – to your surprise – inserts a cotton swab into your mouth in order to gather a sample of your DNA. Hours later you emerge from the stationhouse with wrists swollen from handcuffs and a verbal apology from Officer Smith. But, where did your DNA go? What enabled Officer Smith to invade your person in the first place?

If your response is, "oh, that will never happen to me," then you are missing the point; other versions of this fact pattern are indeed easy to fathom. Imagine, for example, that instead of the warrant clerk committing a clerical error, Officer Smith simply thinks you *look like* someone wanted for murder, sexual assault, or kidnapping. Regardless of the scenario, though, each varied hypothetical raises the same question: can officers 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? The Arkansas Legislature, by enacting "Juli's Law", recently answered "yes" and, in doing so, joined at least fifteen other states with similar statutes.¹ Merely

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¹ State Laws on DNA Data Banks Qualifying Offenses, Others Who Must Provide Sample, <http://www.ncsl.org/programs/cj/dnadatabanks.htm> (last visited May 26, 2009).

enacting the law, however, does not necessarily mean that it is constitutional.

No Arkansas appellate court has examined the constitutionality of the recently enacted 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.² This Essay contends that Juli’s Law violates the Fourth Amendment of the federal constitution. Part I highlights certain features of the statute and explores the rationale underlying its enactment. Part II discusses the only published decision upholding the practice of taking of DNA samples from certain felony arrestees and the rationale for allowing the practice. Part III assesses the possible analytical approaches to evaluating the constitutionality of Juli’s law and concludes that any approach yields the same result: taking DNA swabs from felony arrestees *prior to any conviction* is unconstitutional.

I.

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.³ Juli left her Norman, Oklahoma apartment before 5 a.m. and drove her friend to the airport in Oklahoma City.⁴ 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.”⁵ A fisherman recovered her raped and murdered body the next afternoon in Lake Stanley Draper, nearby Oklahoma City.⁶

² ARK. CODE ANN. § 12-12-1006(a)(2)(A)-(E) (2009).

³ America’s Most Wanted: Anthony Sanchez (The Case Overview), <http://www.amw.com/fugitives/case.cfm?id=27666> (last visited May 19, 2009); see *Jurors testify in case of slain Oklahoma ballerina Jewell "Juli" Busken*, NewsOK, May 18, 2009, <http://newsok.com/jurors-testify-in-case-of-slain-oklahoma-ballerina-jewell-juli-busken/article/3370479> (providing Juli’s full name). Busken’s cases was featured on the January 25, 1997, episode of America’s Most Wanted. Penny Owen, *Slain OU Ballerina Delighted in Life*, NEWSOK, January 19, 1997, <http://newsok.com/slain-ou-ballerina-delighted-in-life/article/1745353>.

⁴ America’s Most Wanted: Anthony Sanchez (The Case Overview), <http://www.amw.com/fugitives/case.cfm?id=27666> (last visited May 19, 2009).

⁵ *Id.*; Jane Glenn Cannon, *Preliminary Hearing Begins in Busken Case*, THE OKLAHOMAN, Feb. 24, 2005, at 1A.

⁶ *Id.*

Police on the scene were confused; they found her body in Oklahoma City, yet discovered her car back in Norman.⁷ 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.⁸ Law enforcement also recovered a semen sample from a pair of Busken's tights.⁹ 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.¹⁰

Four years later, Anthony Sanchez was already serving time for burglary when he was ordered to submit to a blood test.¹¹ The test revealed a match between his DNA and the material recovered from Busken's tights.¹² 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

⁷ *Id.*

⁸ *Id.*; accord Penny Owen, *Slain OU Ballerina Delighted in Life*, NEWSOK, January 19, 1997, <http://newsok.com/slain-ou-ballerina-delighted-in-life/article/1745353>.

⁹ Jane Glenn Cannon, *Attorneys say DNA test illegal; Defense team in Busken murder trial want mouth swab results suppressed*, THE OKLAHOMAN, Dec. 28, 2005, at 1D; Jane Glenn Cannon, *Gag Order Granted by Judge*, THE OKLAHOMAN, Jan. 21, 2005, at 10A; see Kendal Kelly, *Oklahoma Student's Murder Case Will go to Trial*, OKLAHOMA DAILY, Feb. 25, 2005 (explaining that investigators developed a DNA profile based on bodily fluids and a hair from the attacker).

¹⁰ News, *Jewell “Juli” Busken*, THE DAILY OKLAHOMAN, Sept. 1, 2003, at 4-A; Diana Baldwin, *DA Files Rape Charge Against ‘John Doe’*, THE OKLAHOMAN, Jan. 16, 2004, at 6A. For a critique of the constitutionality of indicting a DNA profile, see Andrew C. Bernasconi, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants' Constitutional and Statutory Rights*, 50 AM. U. L. REV. 979 (2001).

¹¹ Jane Glenn Cannon, *Attorneys say DNA test illegal; Defense team in Busken murder trial want mouth swab results suppressed*, THE OKLAHOMAN, Dec. 28, 2005, at 1D. State law at the time required all violent offenders and those convicted of burglary to provide a blood sample for entry of their DNA profile into a statewide DNA database.

¹² Jane Glenn Cannon, *Crime and Courts: Deputies Seek Suspect's Return to Prison; Trial Ordered in OU Dancer's Death*, THE OKLAHOMAN, March 31, 2005, at 9A; see Kendal Kelly, *Oklahoma Student's Murder Case Will go to Trial*, OKLAHOMA DAILY, Feb. 25, 2005 (noting that Sanchez attempted to escape from prison after he was charged with Busken's murder). Specifically, a national database matched Sanchez's DNA to the DNA he left on Busken's body. Kendal Kelly, *Oklahoma Student's Murder Case Will go to Trial*, OKLAHOMA DAILY, Feb. 25, 2005.

mouth.¹³ Sanchez was ultimately convicted and sentenced to death in 2006.¹⁴

Following Sanchez's conviction, Oklahoma enacted the first version of what it called "Juli's law." At first, the law required only defendants convicted of sex offenses to provide DNA samples.¹⁵ The Oklahoma legislature expanded the scope of Juli's law in 2005 by requiring all defendants convicted of felonies to submit a DNA sample.¹⁶ Oklahoma is currently seeking to expand the scope of its 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.¹⁷ Significantly, proposals in the Oklahoma legislature to expand Juli's law to include arrestee sampling have failed.¹⁸

At each juncture, proponents have 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

¹³ Jane Glenn Cannon, *DNA Can be Used, Judge Says*, THE OKLAHOMAN, Jan. 27, 2006, at 11A.

¹⁴ Jane Glenn Cannon, *OU Ballet Students' Killer to Die, Jury Decides*, THE OKLAHOMAN, Feb. 18, 2006, at 1A; Jane Glenn Cannon, *'Cold-blooded'; Judge says jury spoke 'loud and clear' as he sentences Sanchez to death*, THE OKLAHOMAN, June 7, 2006, at 1A. Sanchez is now appealing his conviction by arguing that he was denied a fair trial because, he alleges, jurors may have seen him in shackles before they began deliberating. *Jurors testify in case of slain Oklahoma ballerina Jewell "Juli" Busken*, NEWSOK, May 18, 2009, <http://newsok.com/jurors-testify-in-case-of-slain-oklahoma-ballerina-jewell-juli-busken/article/3370479>.

¹⁵ Journal Record Staff, *OK Senate Backs DNA Database Expansion*, THE JOURNAL RECORD, May 26, 2005.

¹⁶ *Id.*

¹⁷ Julie Bisbee, *DNA Sampling Faces Henry's Verdict*, THE OKLAHOMAN, May 17, 2009, at 5A.

¹⁸ Michael McNutt, *DNA Sample Push Picks Up Steam in Oklahoma House: Proposal Would Widen Criminal Testing*, THE OKLAHOMAN, April 21, 2009, at 2A ("Proposals last year and this year to require people arrested on certain felonies to provide DNA samples failed to pass."). Oklahoma House Bill 3194 proposed extending DNA testing to any person arrested on a felony complaint and booked in a jail. Michael McNutt, *Measure honors memory of slain OU student; DNA testing proposal clears House*, THE OKLAHOMAN, March 7, 2008, at 1A.

of Juli Busken.”¹⁹ And, in May of this year, 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.”²⁰

Similar logic has driven efforts in Arkansas to expand DNA sampling. Indeed, although Oklahoma’s current version of Juli’s Law *excludes* arrestee sampling,²¹ Arkansas’s modified version of Juli’s Law – also called Juli’s law – requires individuals *arrested* for certain felonies to provide a DNA sample.²² Originally introduced in February of this year,²³ Arkansas House Bill 1473 was initially written to require the taking of DNA samples from anyone arrested for any felony.²⁴ At a press conference following its introduction, Bill introducer and legislator Dawn Creekmore commented, “DNA is merely a technologically advanced fingerprint.”²⁵ 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.²⁶

The scope of House Bill 1473 was nonetheless subsequently narrowed to requiring DNA samples from anyone arrested for any of the following five felonies: capital murder, first-degree murder,

¹⁹ Journal Record Staff, *OK Senate Backs DNA Database Expansion*, THE JOURNAL RECORD, May 26, 2005

²⁰ Julie Bisbee, *DNA Sampling Faces Henry’s Verdict*, THE OKLAHOMAN, May 17, 2009, at 5A.

²¹ *Id.*

²² ARK. CODE ANN. § 12-12-1006(a)(2)(A)-(E) (2009). Although Juli Busken attended the University of Oklahoma, she is originally from Arkansas. See Ken Raymond & Diana Baldwin, *Inmate faces Busken charges; DA amends ‘John Doe’ counts in OU ballerina’s rape, death*, THE OKLAHOMAN, Sept. 22, 2004, at 1A.

²³ Charlie Frago & Michael R. Wickline, *Oil, Gas Commission Membership Revamp Fails in House*, ARKANSAS-DEMOCRAT-GAZETTE, February 17, 2009.

²⁴ Seth Blomeley, *Measure on DNA Advances in House Proposal Calls for Post-Arrest Samples*, ARKANSAS DEMOCRAT-GAZETTE, March 18, 2009.

²⁵ Charlie Frago & Michael R. Wickline, *Oil, Gas Commission Membership Revamp Fails in House*, ARKANSAS-DEMOCRAT-GAZETTE, February 17, 2009.

²⁶ *Id.*

kidnapping, and first/second degree sexual assault.²⁷ Following its amendment, Creekmore again praised the Bill, observing that it would save the state about \$200,000, and solve cold cases.²⁸ She also observed that fifteen states have enacted similar laws.²⁹ 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.³⁰

Creekmore marshaled familiar support for the Bill: Juli Busken’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.³¹ 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.”³² Her testimony and the support evidently paid off; the Bill passed the House on March 17, 2009,³³ prompting Creekmore to characterize the Bill as the “21st-century fingerprint.” The Senate subsequently approved Creekmore’s measure on April 2,³⁴ and the governor signed the Bill into law on April 7.³⁵

²⁷ Seth Blomeley, *Measure on DNA Advances in House Proposal Calls for Post-Arrest Samples*, ARKANSAS DEMOCRAT-GAZETTE, March 18, 2009. Significantly, although Juli Buskin was raped, the crime of rape is excluded from Juli’s law. Compare ARK. CODE ANN. § 5-14-103 (2008) (providing rape statute, which is excluded from Juli’s law), with ARK. CODE ANN. § 5-14-124 (2008) (providing sexual assault in the first degree statute, which is included in Juli’s law); ARK. CODE ANN. § 5-14-125 (2008) (providing sexual assault in the second degree statute, which is included in Juli’s law). Creekmore indicated that rape was eliminated from the Bill because the number of yearly rapes would make the legislation cost-prohibitive. *Juli’s Law Now Arkansas Law*, BENTON COUNTY COURIER, Apr. 8, 2009, <http://www.bentoncourier.com/content/view/166473/1/>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Charlie Frago & Michael R. Wickline, *Bill on Paying Employees with Food, Clothing Falters*, ARKANSAS DEMOCRAT-GAZETTE, March 19, 2009.

³³ Seth Blomeley, *DNA Bill Advances Past Panel in House*, ARKANSAS DEMOCRAT-GAZETTE, March 18, 2009.

³⁴ Charlie Frago & Michael R. Wickline, *Lobbying Restriction Wins House Ok*, ARKANSAS-DEMOCRAT-GAZETTE, Apr. 3, 2009. Notably, Creekmore was not successful the first time she presented the Bill to the Senate. Charlie Frago, *Bill Requiring DNA From Suspects Halted*, ARKANSAS

In its final form, Juli's law requires:

a law enforcement official at the receiving criminal detention facility [to] 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 Sexual assault in the second degree, § 5-14-125.^[36]

The statute authorizes law enforcement to use “reasonable force” in obtaining the sample, so long as they exercise that force in “good faith.”³⁷

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.”³⁸ Second, an arrestee’s “DNA sample”³⁹ is, after collection, (1) delivered to the State Crime Laboratory,⁴⁰ (2) retained in the State DNA Data Bank;⁴¹ and (3) provided to the Federal Bureau of Investigation for storage in its Combined DNA Index System.⁴² Third, any individual who refuses to provide a post-arrest DNA sample is

DEMOCRAT-GAZETTE, March 26, 2009. Indeed, the legislation failed in a Senate committee based, in part, on legislators’ concerns about illegal arrests. *Id.*

³⁵ *Juli’s Law Now Arkansas Law*, BENTON COUNTY COURIER, Apr. 8, 2009, <http://www.bentoncourier.com/content/view/166473/1/>.

³⁶ ARK. CODE ANN. § 12-12-1006(a)(2)(A)-(E) (2009).

³⁷ *Id.* §§ 12-12-1006(j)(1)-(2), 1006(k)(1)-(2). These provisions not only allow officers to use reasonable force in DNA sample collection, but also expressly exempt them from criminal and civil liability in exercising that force. *Id.*

³⁸ *Id.* § 12-12-1001(12).

³⁹ The statute defines “DNA sample” as “a blood, saliva, or tissue sample provided by any individual as required by this subchapter or submitted to the State Crime Laboratory for analysis or storage, or both[.]” *Id.* § 12-12-1001(14). Notably, the statute does not define “fingerprint.”

⁴⁰ *Id.* § 12-12-1006(g)(1).

⁴¹ *Id.* § 12-12-1006(g)(2).

⁴² *Id.* § 12-12-1105(a)(2). The FBI’s Combined DNA Index System, or “CODIS,” “allows the storage and exchange of DNA records submitted by federal forensic laboratories, state forensic laboratories, and local forensic laboratories[.]” *Id.* 12-12-1001(4).

guilty of a Class B misdemeanor.⁴³ Finally, certain arrestees – e.g., those who were acquitted, never charged, or whose charges were dismissed⁴⁴ – may “apply to the State Crime Laboratory for removal and destruction of the DNA record.”⁴⁵ 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 index system.⁴⁶

II.

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.⁴⁷ Perhaps that explains why Creekmore relied on the Virginia Supreme Court’s decision to uphold its arrestee DNA sampling statute 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*⁴⁸ merits special consideration with a critical eye.

In *Anderson*, defendant raped, robbed, and sodomized the victim while she was walking to work in 1991.⁴⁹ Following the crime,

⁴³ *Id.* § 12-12-1006(i). As an aside, it seems counter-intuitive to charge the arrestee who refuses to provide a DNA sample with a misdemeanor given that officers are already allowed to use reasonable force to obtain the sample.

⁴⁴ *Id.* § 12-12-1019(a)(1)-(2).

⁴⁵ *Id.* § 12-12-1019(a).

⁴⁶ *Id.* § 12-12-1019(d). The New York Times has already reported problems defense attorneys are having in seeking to have DNA samples expunged from those whose DNA sample was taken erroneously. Solomon Moore, *F.B.I. and States Vastly Expand DNA Databases*, N.Y. TIMES, Apr. 18, 2009, at A1.

⁴⁷ Local media has, however, misled Arkansas citizens into believing that Juli’s law is similar to many other DNA collection statutes that courts across the nation have already upheld as constitutional. *New Law Allows Police To Take DNA From Arrestees*, 4029TV.COM, Apr. 23, 2009, <http://www.4029tv.com/print/19134460/detail.html/> (“Supreme Courts across the country have upheld [arrestee DNA sampling] as constitutional.”). In addition to ignoring the differences between collecting DNA from convicted felons – as opposed to arrestees – the local media was also kind enough to misquote my views on the subject. *Id.*

⁴⁸ 650 S.E.2d 702 (Va. 2007), *cert. denied*, 128 S. Ct. 2473 (2008).

⁴⁹ *Id.* at 703-04.

physicians used a “physical evidence recovery kit” to collect and preserve specimens taken from the victim – including DNA – for evidence.⁵⁰ The crime went unsolved until 2003 when defendant was arrested on unrelated charges.⁵¹ Pursuant to Virginia’s post-arrest DNA sampling statute,⁵² officers took a sample of defendant’s DNA and entered it into a DNA databank that, in turn, produced a “cold hit” matching DNA found on the victim.⁵³ Pursuant to a search warrant, law enforcement obtained two additional DNA samples from defendant, each of which confirmed that he raped the victim.⁵⁴ Defendant was subsequently found guilty following a jury trial and sentenced to two life terms plus ten years.⁵⁵

On appeal, defendant contended, *inter alia*, that requiring him to provide a DNA sample following an arrest for an unrelated crime violated his Fourth Amendment rights.⁵⁶ 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.⁵⁷ The court reasoned that taking an arrestee’s DNA is analogous to the taking of a fingerprint.⁵⁸ 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.⁵⁹

What then is wrong with relying on *Anderson* as a basis for enacting Juli’s law in Arkansas? First, the statute considered in

⁵⁰ *Id.* at 704.

⁵¹ *Id.*

⁵² *Id.*; see VA. CODE ANN. § 19.2-310.2:1 (2009).

⁵³ *Anderson*, 650 S.E.2d at 704.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 704, 706.

⁵⁷ *Id.* at 705.

⁵⁸ *Id.* at 705-06.

⁵⁹ *Anderson*, 650 S.E.2d at 705. Indeed, 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.” *Id.* (citing *Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992)). And yet, *Murray* relied in part on prisoners’ diminished privacy rights to find the taking of DNA samples from convicted felons constitutional. 962 F.2d at 306 (“With the person’s loss of liberty upon arrest comes the loss of at least some, if not all, rights to personal privacy otherwise protected by the Fourth Amendment.”).

Anderson is far different from the enacted version of Juli's law. Virginia's arrestee DNA sampling statute provides, in pertinent part, 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 tissue 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.^[60]

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 taking the arrestee's DNA, Juli's law contains no similar requirement.⁶¹ 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,⁶² it nonetheless subsequently asserted that the two procedures are “analogous”⁶³ – a conclusion unsupported either by commonsense or science. From a commonsense standpoint, law enforcement unsurprisingly learns the pattern of your finger following the

⁶⁰ VA. CODE ANN. § 19.2-310.2:1 (2009) (emphasis added). As discussed below, the Virginia statutory scheme neither has a definitions section, nor does it authorize the taking of an arrestee's DNA via blood sample.

⁶¹ Cf. Seth Blomeley, *Measure on DNA advances in House Proposal Calls for Post-Arrest Samples*, ARKANSAS DEMOCRAT-GAZETTE (Mar. 18, 2009) (noting House testimony on Juli's law suggesting that a judge verify the existence of probable cause before taking an arrestee's DNA).

⁶² *Anderson*, 650 S.E.2d at 705 (“A DNA sample of the accused taken upon arrest, while more revealing, is no different in character than acquiring fingerprints upon arrest.”).

⁶³ *Id.* (asserting that the “taking of [defendant's] DNA sample upon arrest . . . is analogous to the taking of a suspect's fingerprints upon arrest”).

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 at best questionable and, at worst, laughable.

More substantively, the *Anderson* court considered whether the government may constitutionally acquire an arrestee's DNA via a buccal, or cheek, swab.⁶⁴ The question therefore 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."⁶⁵ Significantly, this is the first of *two* intrusions into the person of the arrestee. Although courts have characterized DNA swabs as only "minimally intrusive,"⁶⁶ 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*.⁶⁷ From a buccal swab, the state obtains an analyzable sample of an arrestee's DNA.⁶⁸ That, in turn, allows the state to perform a polymerase chain reaction procedure ("PCR"),⁶⁹ which involves

⁶⁴ *Id.* As an interesting aside, although the results of buccal swabs are admissible in court, FBI guidelines direct federal law enforcement to rely on blood samples to facilitate especially "reliable" DNA analysis. See *United States v. Kincade*, 379 F.3d 813, 817 (9th Cir. 2004) (en banc).

⁶⁵ 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).

⁶⁶ See, e.g., *Kincade*, 379 F.3d at 836-38; *Murray*, 962 F.2d at 307; *Anderson*, 650 S.E.2d at 706.

⁶⁷ Accord Sepideh Esmaili, *Searching for a Needle in a Haystack: The Constitutionality of Police DNA Dragnets*, 82 CHI.-KENT L. REV. 495, 507 (2007) ("Although the Supreme Court has not yet addressed the intrusion that DNA testing involves, other state and federal courts addressing the issue have failed to consider not just the intrusion that results from the procedure used to obtain a sample, but also the intrusion upon the individual's interest in keeping private the information revealed by a sample.").

⁶⁸ Laurel Beeler & William R. Wiebe, *DNA Identification Tests and the Courts*, 63 WASH. L. REV. 903, 912 n.41 (1988)

⁶⁹ The federal government's Human Genome Project Information website describes the PCR process as follows:

A method for amplifying a DNA base sequence using a heat-stable polymerase and two 20-base primers, one complementary to the (+) strand at one end of the sequence to be amplified and one complementary to the (-) strand at the other end. Because the newly synthesized DNA strands can subsequently serve as additional templates for the same primer sequences, successive rounds of primer annealing, strand

replicating the DNA sample.⁷⁰ This replication then allows the tester to look at “short tandem repeats” (“STR”).⁷¹ At this stage, the STRs reveal specific areas of DNA known as “loci.”⁷² In total, the tester is looking to isolate thirteen different loci in order to identify an individual’s exact genetic makeup.⁷³ Once complete, that sample potentially “provides the instructions for all human characteristics, from eye color to height to blood type.”⁷⁴

elongation, and dissociation produce rapid and highly specific amplification of the desired sequence. *PCR also can be used to detect the existence of the defined sequence in a DNA sample.*

Human Genome Project Information, Genome Glossary, http://www.ornl.gov/sci/techresources/Human_Genome/glossary/glossary_p.shtml (last visited May 20, 2009) (emphasis added). Although beyond the scope of this Essay, it is perhaps worth noting that defendants are beginning to challenge the *method* of implementing the PCR-STR analysis. *People v. Jackson*, 77 Cal. Rptr. 3d 474, 481-82 (Cal Ct. App. 2008) (challenging the prosecution’s use of an “Identifier” test kit for performing the PCR-STR analysis).

⁷⁰ Arcabascio, *supra* note 64, at 449 (noting that the federal CODIS system uses PCR-STR testing). PCR-STR testing is considered best for evaluating smaller samples of DNA, although a “restriction fragment length polymorphism” (“RFLP”) analysis is used for larger samples. *Armstead v. State*, 673 A.2d 221, 228 (Md. 1996). The three-step RFLP analysis seeks to create a picture of the individual’s DNA via the creation of an “autoradiograph.” *Id.* The bands on the autoradiograph represent fragments of DNA that, taken together, create banding patterns that “can be used for identification by comparing the banding pattern in the suspect’s DNA with the pattern derived from DNA extracted from crime scene evidence.” *Id.* (citing J. McKenna et al., *Reference Guide on Forensic DNA Evidence*, in FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 283-84 (1994)).

⁷¹ *Id.* (“The following thirteen loci are used in the CODIS system: CSF1PO, FGA, TH01, TPOX, vWA, D3S1358, D5S818, D7S820, D8S1179, D13S317, D16S539, D18S51 and D21S11.”). “Loci” is the plural of “locus” and represents “[t]he position on a chromosome of a gene or other chromosome marker; also, the DNA at that position. The use of locus is sometimes restricted to mean expressed DNA regions.” Human Genome Project Information, Genome Glossary, http://www.ornl.gov/sci/techresources/Human_Genome/glossary/glossary_l.shtml (last visited May 20, 2009).

⁷² Arcabascio, *supra* note 64, at 449

⁷³ *Id.*

⁷⁴ *Armstead*, 673 A.2d at 227. Use of the word “potentially” is appropriate in the body text. Significantly, DNA testers seek to create DNA profiles by isolating “junk DNA,” so named because it was thought not to contain “any known physical or medical characteristics.” *United States v. Amerson*, 483 F.3d 73, 76 (2d Cir. 2007) (quoting H.R. Rep. No. 106-900(I) (2000)); *accord Goord*, 430 F.3d at 656 n.3 (“DNA databases like New York’s utilize ‘junk DNA,’ which does not (as far as we know) contain genetic information.” (citing *Kincade*, 379 F.3d at 818)). The validity of that thought is waning; a study from the University of Iowa, released on October of 2008,

All of this information is, of course, to be contrasted against the Supreme Court’s observation that “fingerprinting involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search.”⁷⁵ With that in mind, it is difficult to avoid snickering at the idea that the taking of a DNA sample is “analogous” to the taking of a fingerprint.⁷⁶

Putting aside for a minute the *Anderson* court’s reasoning, 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,⁷⁷ 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.⁷⁸ More problematically, unlike the federal mandate to avoid collecting DNA in a manner that avoids learning an individual’s genetic makeup,⁷⁹ 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.*”⁸⁰ Even a generous extension of *Anderson*’s already 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

suggests that junk DNA may “evolve into exons, which are the building blocks for protein-coding genes.” Lin L, Shen S, Tye A, Cai JJ, Jiang P, et al. Diverse Splicing Patterns of Exonized Alu Elements in Human Tissues, <http://www.plosgenetics.org/article/info:doi/10.1371/journal.pgen.1000225> (last visited May 20, 2009).

⁷⁵ *Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

⁷⁶ It would instead be correct to say that DNA samples provide a *genetic* fingerprint. DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932, 74933 (Dec. 10, 2008) (to be codified at 28 C.F.R. pt. 28) (“DNA profiles, which embody information concerning 13 ‘core loci,’ amount to ‘genetic fingerprints’ that can be used to identify an individual uniquely.”).

⁷⁷ There is no “definitions” section in Virginia’s DNA analysis and data bank statutes.

⁷⁸ ARK. CODE ANN. § 12-12-1001(14). In Virginia, the state may acquire an individual’s DNA via blood sample only *after* a felony conviction. VA. CODE ANN. § 19.2-310.2 (2009).

⁷⁹ *Amerson*, 483 F.3d at 76.

⁸⁰ ARK. CODE ANN. § 12-12-1001(12).

provide a DNA sample.⁸¹ Specifically, citing the Fourth Circuit’s decision in *Jones v. Murray*, 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.”⁸² The *Jones* decision itself relied in part on that very distinction to find the taking of DNA samples from convicted felons constitutional.⁸³ 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.⁸⁴

The totality of the foregoing suggests two harsh 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.

III.

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.⁸⁵ Although the court upheld the provision by reasoning that probationers have lesser privacy interests than do ordinary citizens,⁸⁶ 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.^[87]

⁸¹ *Anderson*, 650 S.E.2d at 705.

⁸² *Id.* (citing *Murray*, 962 F.2d at 308).

⁸³ *Murray*, 962 F.2d at 306 (“With the person’s loss of liberty upon arrest comes the loss of at least some, if not all, rights to personal privacy otherwise protected by the Fourth Amendment.”).

⁸⁴ *See id.* (identifying convicted felons, current inmates, and probationers as the classes of people who possess diminished privacy rights).

⁸⁵ *Johnson v. Quander*, 440 F.3d 489, 492 (D.C. Cir. 2006).

⁸⁶ *Id.* at 496.

⁸⁷ *Id.* at 499.

DNA dragnets are now alive in Arkansas; 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, however, all hope is not lost.⁸⁸ And, given that any reliance by the court on *Anderson* as an analytical roadmap for considering the issue would be imprudent, this section considers what the Fourth Amendment analysis of Juli's law could look like.

To be clear at the outset, collecting DNA from an individual's mouth is a "search" for purposes of the Fourth Amendment.⁸⁹ The question therefore becomes whether the Fourth Amendment's text requires the state to get a warrant before taking an arrestee's DNA? How to answer 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.⁹⁰

The Supreme Court's early Fourth Amendment jurisprudence unequivocally suggested that searches conducted without a warrant

⁸⁸ Although the Arkansas Supreme Court could uphold Juli's law, that does not necessarily mean the statute is constitutional pursuant to the *federal* constitution. See *Knowles v. Iowa*, 525 U.S. 113, 116 (1998) (finding that a search authorized by state law nonetheless violated the Fourth Amendment).

⁸⁹ *E.g.*, *United States v. Amerson*, 483 F.3d 73, 77 (2d Cir. 2007); *Nicholas v. Goord*, 430 F.3d 652, 656 n.5 (2d Cir. 2005). Of course, individuals have no personal privacy rights in what they knowingly expose to the public. *Katz v. United States*, 389 U.S. 347, 351 (1967). Courts rightly reject that analysis in the context of taking DNA samples. The Supreme Court has, for example, distinguished the drawing of blood from the tone of a suspect's voice: although individuals generally have a reasonable expectation of privacy in their bodily fluids, they lack that same expectation in the sound of their voice because the latter is knowingly exposed to the public. Compare *United States v. Mara*, 410 U.S. 19, 21 (1973) (noting "there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice"), with *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) (observing that the chemical analysis of blood and body fluids "can reveal a host of medical facts" and "intrudes upon expectations of privacy that society has long recognized as reasonable").

⁹⁰ The Reasonableness Clause in the Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. CONST. amend IV. The Warrant Clause thereafter provides "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." *Id.* A comma, not a semi-colon, connects the two clauses.

were presumptively “unreasonable.”⁹¹ That position was forcefully reaffirmed by the Court’s 1967 decision in *Katz v. United States*,⁹² wherein 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.”⁹³ Although the Court in the following two decades approved of more exceptions to the warrant “requirement,”⁹⁴ it continued to periodically highlight the Fourth Amendment’s Warrant Clause as the predominant clause.⁹⁵

Amid the discussion of exceptions to the warrant “requirement,” the Court also began exploring a new analytical path. In *Terry v. Ohio*,⁹⁶ 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.”⁹⁷ That shift in Fourth Amendment analysis, suggesting that the Reasonableness Clause governs, took hold in a number of subsequent cases.⁹⁸ Perhaps Justice Scalia summed the tension up

⁹¹ See *Stoner v. California*, 376 U.S. 483, 486-87 (1964); *Rios v. United States*, 364 U.S. 253, 261 (1960); see also *Chapman v. United States*, 365 U.S. 610, 614 (1961) (“[The Fourth Amendment’s] 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.”); *Jones v. United States*, 357 U.S. 493, 498 (1958) (“The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy.”).

⁹² 389 U.S. 347 (1967).

⁹³ *Id.* at 357.

⁹⁴ See, e.g., *New York v. Belton*, 453 U.S. 454, 460 (1981) (allowing for warrantless searches of an arrestee’s car post-arrest); *Schneekloth v. Bustamonte*, 412 U.S. 218, 242-43 (1973) (allowing for warrantless searches premised on an individual’s consent); *Chimel v. California*, 395 U.S. 752, 762-63 (1969) (allowing for warrantless searches incident to arrest).

⁹⁵ See, e.g., *Belton*, 453 U.S. at 457 (“It is a first principle of the Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so.”); *Schneekloth*, 412 U.S. at 219 (quoting from *Katz*); *Chimel*, 395 U.S. at 762 (observing “the general requirement that a search warrant be obtained is not lightly to be dispensed with” (citation omitted)).

⁹⁶ 392 U.S. 1 (1968).

⁹⁷ *Id.* at 19.

⁹⁸ See, e.g., *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 187-88 (2004); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991); *Delaware v. Prouse*, 440

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.”⁹⁹

In the Court’s most recent discussion of the Fourth Amendment, the majority in *Arizona v. Gant*¹⁰⁰ 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.’”¹⁰¹ 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.¹⁰² The change in the Court’s attitude toward a warrant requirement is arguably best reflected in language from *California v. Acevedo*,¹⁰³ 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*

U.S. 648, 654 (1979); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 315 (1978); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973).

⁹⁹ *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in the judgment).

¹⁰⁰ -- U.S. --, 129 S. Ct. 1710, 173 L. Ed. 485 (2009)

¹⁰¹ *Id.* at 493 (quoting *Katz*, 389 U.S. at 357).

¹⁰² *United States v. Knights*, 534 U.S. 112, 118 (2001).

¹⁰³ 500 U.S. 565, 575 (1991).

routinely forthcoming in the overwhelming majority of cases.”^{104]}

Given the modern Court’s apparent willingness to dispense with the requirement of a neutral arbiter, this Essay proceeds on the analytical assumption that the Arkansas Supreme Court would review Juli’s law pursuant to a “reasonableness” test.¹⁰⁵

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.¹⁰⁶ 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.”¹⁰⁷ 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.¹⁰⁸ Although probable cause is a “fluid concept,”¹⁰⁹ it is undoubtedly the most stringent Fourth

¹⁰⁴ *Id.* at 575 (quoting *Arkansas v. Sanders*, 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting)) (emphasis added).

¹⁰⁵ *See generally, e.g.,* *Wofford v. State*, 952 S.W.2d 646, 651 (Ark. 1997) (applying reasonableness inquiry to emergency exception); *Burnett v. State*, 749 S.W.2d 308, 311 (Ark. 1988) (approving of Supreme Court’s reasonableness analysis in *Hayes v. Florida*, 470 U.S. 811 (1985)); *Holden v. State*, 721 S.W.2d 614, 622 (Ark. 1986) (approving of Supreme Court’s reasonableness analysis in *Bell v. Wolfish*, 441 U.S. 520 (1979)).

¹⁰⁶ *See, e.g.,* *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999); *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976).

¹⁰⁷ *Prouse*, 440 U.S. at 654.

¹⁰⁸ There is, as yet, no recognized warrant exception for taking an arrestee’s DNA, although one creative court has justified arrestee sampling as part of the search incident to arrest exception. *Anderson v. Commonwealth*, 634 S.E.2d 372, 374-75 (Va. Ct. App. 2006), *aff’d*, 650 S.E.2d 702 (2007).

¹⁰⁹ *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

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.¹¹⁰ 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.

Alternatively, assuming a warrant is not required, the Court’s Fourth Amendment caselaw 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 v. Ohio*¹¹¹ made constitutional certain limited intrusions on a person’s liberty based on something less than probable cause.¹¹² Specifically, an officer may stop an individual based on “reasonable suspicion” to believe that criminal activity is afoot.¹¹³ 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.¹¹⁴ 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.¹¹⁵

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.¹¹⁶ 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.””¹¹⁷ To determine the validity

¹¹⁰ *Id.* at 238.

¹¹¹ 392 U.S. 1 (1968).

¹¹² *Id.* at 7; *see* *Alabama v. White*, 496 U.S. 325, 330 (1990).

¹¹³ *Terry*, 392 U.S. at 30.

¹¹⁴ *Id.*

¹¹⁵ Similar logic would of course dictate a conclusion that Juli’s law is unconstitutional were officers required to (without a warrant) demonstrate probable cause to believe there is a nexus between the taking of a DNA sample and the basis for arrest.

¹¹⁶ Interestingly, the *Anderson* court rejected applying the special needs doctrine, choosing (as previously discussed) to instead uphold its arrestee DNA sampling law on the basis of “routine booking procedures.” 650 S.E.2d at 706.

¹¹⁷ *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)).

of policy or law allowing for a suspicionless search, the Supreme Court applies a “general approach to the Fourth Amendment” 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.”¹¹⁸

Relying on this analysis, the Court has upheld, *inter alia*, the following suspicionless Fourth Amendment intrusions as constitutional: (1) highway checkpoint stops during which officers ask citizens about a recent crime;¹¹⁹ (2) sobriety checkpoints;¹²⁰ (3) brief seizures of motorists at border patrol checkpoints;¹²¹ (4) work-related searches by government employers of employees’ desks and offices;¹²² (5) school officials searching some student property;¹²³ and (6) some governmental searches conducted pursuant to a regulatory scheme.¹²⁴ Given that government’s “general interest in crime control” will not justify a suspicionless search,¹²⁵ 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.”¹²⁶

¹¹⁸ *Samson v. California*, 547 U.S. 843, 848 (2006).

¹¹⁹ *Illinois v. Lidster*, 540 U.S. 419, 428 (2004).

¹²⁰ *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

¹²¹ *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976).

¹²² *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987).

¹²³ *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985).

¹²⁴ *See, e.g., New York v. Burger*, 482 U.S. 691, 702-03 (1987) (upholding New York law requiring junkyard owners to maintain records for routine spontaneous inspections by police officers and state agents); *Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (upholding a statute that enabled federal mine inspectors to inspect mining company’s quarries without a search warrant); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (upholding gun control law allowing for warrantless “compliance checks” of individuals who were federally licensed to deal in sporting weapons); *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (finding unconstitutional a city ordinance that gave city building inspectors the right to enter any building at reasonable times in furtherance of their code enforcement duties).

¹²⁵ *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (declining to allow the government to engage in a generalized narcotics-interdiction); *see Ferguson v. City of Charleston*, 532 U.S. 67, 79-80 (2000) (striking down state hospital’s policy of routinely testing pregnant women for evidence of cocaine use).

¹²⁶ *Ferguson*, 532 U.S. at 79 n.15 (citations omitted).

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;¹²⁷ (2) individuals on parole;¹²⁸ and (3) convicted felons.¹²⁹ 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.¹³⁰ In fact, it is their very status as

¹²⁷ *United States v. Lujan*, 504 F.3d 1003, 1006 (9th Cir. 2007).

¹²⁸ *Banks v. Gonazales*, 415 F. Supp. 2d 1248, 1261 (N.D. Okla. 2006) (upholding 42 U.S.C.S. § 14135a(a)(2) in part because parolees have a "significantly diminished expectation of privacy"); *Miller v. United States Parole Comm'n*, 259 F. Supp. 2d 1166, 1177 (D. Kan. 2003) (applying special needs doctrine to uphold taking parolee's DNA based on his reduced expectation of privacy).

¹²⁹ *United States v. Kincade*, 379 F.3d 813, 839 (9th Cir. 2004) (en banc) ("In light of conditional releasees' substantially diminished expectations of privacy, the minimal intrusion occasioned by blood sampling, and the overwhelming societal interests so clearly furthered by the collection of DNA information from convicted offenders, we must conclude that compulsory DNA profiling of qualified federal offenders is reasonable under the totality of the circumstances."). The Ninth Circuit carefully limited its holding solely to those convicted for a qualifying federal offense and, in doing so, distinguished "the rights of convicted felons" from "free persons or even mere arrestees." *Id.* at 836 n.31 (quoting *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995)).

Although a federal statute allows the Attorney General to promulgate regulations allowing federal law enforcement to collect DNA from arrestees, 42 U.S.C.S. § 14135a(a)(1)(A) (Lexis 2009), no federal court has analyzed the constitutionality of that provision. The issue is unlikely to remain dormant for long; on January 9, 2009, the Department of Justice began implementing a rule requiring U.S. agencies to collect DNA samples from "individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under authority of the United States." DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932, 74,935 (Dec. 10, 2008) (to be codified at 28 C.F.R. pt. 28). At least one federal court has already struck down a somewhat similar state law allowing for wide-ranging arrestee sampling. *United States v. Purdy*, No. 8:05-CR-204, 2005 U.S. Dist. LEXIS 40433, **3-24 (D. Neb. Dec. 19, 2005) (providing excellent analysis and holding Nevada's arrestee sampling statute unconstitutional).

¹³⁰ *Ferguson*, 532 U.S. at 79 n.15 (noting that convicted persons and probationers "have a lesser expectation of privacy than the public at large."); *Kincade*, 379 F.3d at 833 (observing that "those who have suffered a lawful conviction" are properly subject to a "broad range of [restrictions] that might infringe constitutional rights in a free society" (quoting *McKune v. Lile*, 536 U.S. 24, 36 (2002))). Arkansas has likewise relied on a convicted felon's reduced expectation of privacy as a basis to uphold as constitutional the practice of collecting a post-conviction DNA sample. *Polston v. State*, 201 S.W.3d 406, 411 (Ark. 2005) ("We agree with the State's contention that because the privacy rights of felons are diminished by virtue of their conviction and the intrusion of

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.¹³¹

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.”¹³² In pushing for passage of the Juli’s law, Creekmore admitted that a goal of Juli’s law is to help solve cold cases.¹³³ 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

the blood test is not significant, the privacy rights implicated by searches under the DNA Act are minimal.”).

¹³¹ *E.g.*, *Griffin*, 483 U.S. at 875. The *Griffin* Court expressly noted that supervising an individual whose status is “probationer” is itself a “special need”:

These restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer’s being at large. These same goals require and justify the exercise of supervision to assure that the restrictions are in fact observed. Recent research suggests that more intensive supervision can reduce recidivism, and the importance of supervision has grown as probation has become an increasingly common sentence for those convicted of serious crimes. *Supervision, then, is a ‘special need’ of the State permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large.*

Id. (citations omitted) (emphasis added); *see* *United States v. Knights*, 534 U.S. 112, 115-116 (2001) (relying on probationer’s diminished expectation of privacy to uphold allowance of a warrantless search of probationer’s home based only on reasonable suspicion).

¹³² *Ferguson*, 532 U.S. at 79 n.15 (citations omitted).

¹³³ *Juli’s Law Now Arkansas Law*, BENTON COUNTY COURIER, Apr. 8, 2009, <http://www.bentoncourier.com/content/view/166473/1/>.

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.¹³⁴ In doing so, courts are quick to note that constitutional statutes “provide[] adequate safeguards against collection of unnecessary physiological information.”¹³⁵ Constitutional DNA collection statutes also include limitations on the manner in which DNA information may be used for purposes *other* than identification.¹³⁶

Although Juli’s law limits qualifying felonies to capital murder, murder, kidnapping, and first/second degree sexual assault,¹³⁷ it of course provides no limitation on offender status simply because an arrestee, by definition, not an offender yet. The feeble rationale underlying enactment of Juli’s law – that it will help absolve the innocent while solving cold cases¹³⁸ – could therefore

¹³⁴ See, e.g., *Kincade*, 379 F.3d at 819 n.9 (“In light of these widely varying measures, it is therefore particularly important to observe that we deal here solely with the legality of requiring compulsory DNA profiling of qualified federal offenders on conditional release.”); *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) (noting a concern with whether Wisconsin’s DNA collection law was “narrowly drawn”); *Roe v. Marcotte*, 193 F.3d 72, 78-79 (2d Cir. 1999) (highlighting the rate of recidivism among sexual offenders and emphasizing that “the statute’s requirement that imprisoned sexual offenders provide a DNA sample will deter these individuals from committing future offenses of a similar nature”); *Murray*, 962 F.2d at 304 (upholding statute limited to taking DNA from convicted sex offenders).

¹³⁵ *Marcotte*, 193 F.3d at 80.

¹³⁶ *United States v. Sczubelek*, 402 F.3d 175, 187 (3d Cir. 2005); *Rise*, 59 F.3d at 1560.

¹³⁷ ARK. CODE ANN. § 12-12-1006(a)(2)(A)-(E) (2009).

¹³⁸ *Juli’s Law Now Arkansas Law*, BENTON COUNTY COURIER, Apr. 8, 2009, <http://www.bentoncourier.com/content/view/166473/1/>. Proponents of arrestee sampling have also argued that its “effect is not always that it puts someone in prison. There have been cases where DNA has proven people’s innocence, as well.” Julie Bisbee, *DNA Sampling Faces Henry’s Verdict*, THE OKLAHOMAN, May 17, 2009, at 5A. The problem with that, as the New York Times recently reported, is that prosecutors are opposing requests for DNA testing by inmates seeking exoneration in about one of every five cases. Shaila Dewan, *Prosecutors Block Access to DNA Testing for Inmates*, N.Y. TIMES, May 17, 2009, at A1.

Proponents of arrestee sampling also sing the familiar refrain that taking arrestees’ DNA is proper because they have nothing to worry about if they are innocent. Michael McNutt, *Measure Honors Memory of Slain OU student; DNA testing proposal clears House*, THE OKLAHOMAN, Mar. 7, 2008, at 1A (noting legislators remark, “[w]hy would an innocent person be worried about having their DNA on record?”). The time for that tired fear-based logic has passed; after all, “at what time does it invade our privacy sufficiently that we’re going to get upset about it?” Opinion, *Easy sell: Expanding DNA testing*

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," nor limitations on the dissemination of an arrestee's DNA. Instead, the law leaves to the State Crime Law the job of promulgating regulations related to the dissemination of an arrestee's DNA,¹³⁹ and tacitly encourages the collection of physiological information by broadly defining DNA to include an "individual's personal genetic blueprint."¹⁴⁰

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.

Wholly apart from a special needs prerequisite,¹⁴¹ there is seemingly little to discuss in the context of a generalized

no surprise, THE OKLAHOMAN, May 22, 2009, at 12A. Perhaps Professor Solove said it best, though, when he observed:

[T]he value of protecting the individual is a social one. Society involves a great deal of friction, and we are constantly clashing with each other. Part of what makes a society a good place in which to live is the extent to which it allows people freedom from the intrusiveness of others. A society without privacy protection would be suffocating, and it might not be a place in which most would want to live. When protecting individual rights, we as a society decide to hold back in order to receive the benefits of creating the kinds of free zones for individuals to flourish.

Daniel J. Solove, *"I've Got Nothing to Hide" and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 762 (2007).

¹³⁹ ARK. CODE ANN. § 12-12-1003(b)(2).

¹⁴⁰ *Id.* § 12-12-1001(12).

¹⁴¹ In evaluating DNA collection statutes, some courts dispense with the special needs analysis and skip directly to reasonableness balancing. *E.g.*, *Wilson v. Collins*, 517 F.3d 421, 426 (6th Cir. 2008); *United States v. Weikert*, 504 F.3d 1, 3 (1st Cir. 2007). Those courts rely on the Supreme Court's decision in *Samson v. California*, to conclude that no special needs prerequisite exists when evaluating the rights of prisoners or convicts. 547 U.S. 843, 848 (2006) (applying general reasonableness test and rejecting applicability of special needs test to uphold the suspicionless search of parolee's pockets, in part, because of the parolee's post-conviction status); *see Weikert*, 504 F.3d at 3

reasonableness balancing. On the one hand is the state's aforementioned generalized interest in preventing and prosecuting crimes and, on the other, is 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.¹⁴²

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

("We interpret the Supreme Court's decision in *Samson v. California* to require that we join the majority of circuits in applying a 'totality of the circumstances' approach to the issues in this case, rather than the 'special needs' analysis used by the minority of circuits." (citations omitted)). Given the dissimilarity between arrestee's and convicted felon's status, it is difficult to imagine the Arkansas Supreme Court avoiding the special needs hurdle as it did when upholding DNA sample collection from convicted felons. See *Polston*, 201 S.W.3d at 409-10 (rejecting (pre-*Samson*) the applicability of a special needs exception when evaluating the constitutionality of taking DNA samples from convicted felons and implicitly relying on felons' status as a basis for doing so).

¹⁴² Johnson v. United States, 333 U.S. 10, 13-14 (1948).

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 that 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."¹⁴³ Methods are already in place for obtaining DNA samples from those charged with a crime; prosecutors need only show to magistrate probable cause to believe that the reason for obtaining the DNA is related to the basis for the arrest.

¹⁴³ Opinion, *Fishing Trip: DNA Legislation Casts Net Too Wide*, THE OKLAHOMAN, Feb. 19, 2009, at 6A.