Compulsory DNA Collection: A Fourth Amendment Analysis

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Summary

Relying on different legal standards, courts have historically upheld laws authorizing law enforcement's compulsory collection of deoxyribonucleic acid (DNA) as reasonable under the Fourth Amendment to the U.S. Constitution. However, prior cases reviewed the extraction of DNA samples from people who had been convicted on criminal charges. New state and federal laws authorize the collection of such samples from people who have been arrested or detained but not convicted. On the federal level, the U.S. Department of Justice implemented this expanded authority with a final rule that took effect January 9, 2009. The Katie Sepich Enhanced DNA Collection Act of 2010 (H.R. 4614), a bill passed by the House, would provide grant funding bonuses to states that authorized the collection of DNA from persons arrested for specified types of crimes.

To date, only a few courts have reviewed the constitutionality of pre-conviction DNA collection pursuant to the new federal rule. The two federal district courts to have considered the issue applied the same Fourth Amendment test—the "general balancing" or "general reasonableness" test—but reached opposite conclusions. In *United States v. Pool*, the U.S. District Court for the Eastern District of California held that the government's interest in collecting a DNA sample from a person facing charges outweighed any intrusion of privacy. In *United States v. Mitchell*, the U.S. District Court for the Western District of Pennsylvania reached the opposite conclusion.

Points of disagreement between the two district court opinions are likely to reemerge as themes in future decisions addressing pre-conviction DNA collection. One difference is whether the defendant's status as a person facing criminal charges was viewed as impacting the scope of Fourth Amendment protection. Another is the extent to which the government was seen as having a legitimate interest in obtaining a DNA sample in particular, rather than a fingerprint or another identifier. Finally, the courts disagreed regarding the degree of the privacy intrusion caused by collecting a DNA sample. The latter questions are framed by a larger debate about the nature and role of DNA in law enforcement. For example, is a DNA sample merely a means by which to identify a person, like a fingerprint? Or does it present a greater privacy intrusion?

A few additional factors might complicate courts' analyses of DNA collection in future cases. For example, emerging scientific research suggests that the type of DNA used in forensic analysis might implicate a greater privacy intrusion than courts had previously assumed. In addition, most courts have yet to review the constitutionality of storing convicts' DNA profiles beyond the time of sentence completion.

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Introduction

In recent years, state and federal laws have facilitated law enforcement's expanded use of deoxyribonucleic acid (DNA) for investigating and prosecuting crimes.[1] Such laws authorize compulsory collection of biological matter, which local law enforcement agencies send to the Federal Bureau of Investigation (FBI) for analysis. The FBI then stores unique DNA profiles in a national distributive database, through which law enforcement officials match individuals to crime scene evidence. Early laws authorized compulsory extraction of DNA only from people convicted for violent or sex-based felonies, such as murder, kidnapping, and offenses "related to sexual abuse"—crimes associated with historically high recidivism rates and for which police were likely to find evidence at crime scenes.[2] Since the turn of the century, new laws have greatly extended the scope of compulsory DNA collection, both by expanding the range of offenses triggering collection authority, and, more recently, by authorizing compulsory collection from people who have been arrested but not convicted. A bill passed by the House in May 2010, the Katie Sepich Enhanced DNA Collection Act of 2010 (H.R. 4614), would provide grant funding incentives to states that collected DNA samples from persons who are at least 18 years old who are arrested for specified types of crimes.[3]

Litigants have challenged compulsory collection and the subsequent analysis and storage of DNA as unreasonable searches and seizures under the Fourth Amendment to the U.S. Constitution. Although they have reached their conclusions using different analytical approaches, federal and state courts have generally upheld compulsory DNA collection as non-violative of the Fourth Amendment. However, prior cases involved the collection of DNA samples from people who had been convicted of a crime. More recently, a handful of state and federal courts have addressed such collection from arrestees, with differing results. This report examines statutory authorities, constitutional principles, and case law related to compulsory DNA extraction and analyzes potential impacts of recent developments for Fourth Amendment cases.

Background on Law Enforcement Use of DNA

DNA is a complex molecule found in human cells and "composed of two nucleotide strands," which "are arranged differently for every individual except for identical twins."[4] Relatively new technology enables DNA analysts to determine the arrangement of these strands, thereby creating unique DNA profiles.[5]

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[1] For more on the progression of federal legislation authorizing use of DNA, see CRS Report RL32247, *DNA Testing for Law Enforcement: Legislative Issues for Congress*, by (name redacted).

[2] For example, offenses triggering DNA collection authority under the original DNA Analysis Backlog Elimination Act of 2000, P.L. 106-546 (2000), included murder, voluntary manslaughter, and other offense relating to homicide; offenses relating to sexual abuse, sexual exploitation or other abuse of children, or transportation for illegal sexual activity; offenses relating to peonage and slavery; kidnapping; offenses involving robbery or burglary; certain offenses committed within Indian territory; and attempt or conspiracy to commit any of the above offenses.

[3] Katie Sepich Enhanced DNA Collection Act of 2010, H.R. 4614, 111th Cong. (2010).

[4] United States v. Kincade, 345 F.3d 1095, 1096 n.2 (9th Cir. 2003), *vac'd and rehearing en banc granted*, 354 F.3d 1000 (9th Cir. 2003).

[5] Forensic scientists use "short tandem repeat" technology to analyze 13 DNA regions, or "loci." Although it is theoretically possible that two unrelated people could share identical DNA strands, "the odds that two individuals will have the same 13-loci DNA profile is about one in a billion." Department of Energy, *Human Genome Project*
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In the law enforcement context, DNA profiles function like "genetic fingerprints" that aid in matching perpetrators to their crimes.[6] As with fingerprints, law enforcement officers collect DNA samples from specific classes of individuals, such as prisoners. However, compulsory DNA collection generally entails blood or saliva samples rather than finger impressions, and DNA profiles can later match any of many types of biological matter obtained from crime scenes.[7] For these reasons, DNA matching is considered a "critical complement to," rather than merely a supplement for, fingerprint analysis in identifying criminal suspects.[8]

The FBI administers DNA storage and analysis for law enforcement agencies across the country. Typically, a law enforcement agency's phlebotomist collects a blood sample pursuant to state or federal law. Then, the agency submits the sample to the FBI, which creates a DNA profile and stores the profile in the Combined DNA Index System, a database through which law enforcement officers match suspects to DNA profiles at the local, state, and national levels.[9]

FBI analysts create DNA profiles by "decoding sequences of 'junk DNA.'"[10] So-called "junk DNA," the name for "non-genic stretches of DNA not presently recognized as being responsible for trait coding," is "'purposefully selected'" for DNA analysis because it is not "associated with any known physical or medical characteristics," and thus theoretically poses only a minimal invasion of privacy.[11]

Statutory Framework

The categories of individuals from whom law enforcement officials may require DNA samples has expanded in recent years. The federal government and most states authorize compulsory collection of DNA samples from individuals convicted for specified criminal offenses, including all felonies in most jurisdictions and extending to misdemeanors, such as failure to register as a sex offender or crimes for which a sentence greater than six months applies, in some jurisdictions.[12] In addition, the federal government and some states now authorize compulsory

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Information: DNA Forensics, at http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml.

[6] *See* DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74932, 74933 (Dec. 10, 2008) ("DNA profiles, which embody information concerning 13 'core loci,' amount to 'genetic fingerprints' that can be used to identify an individual uniquely").

[7] Under federal statute and analogous state laws, officials collect DNA from "tissue, fluid, or other bodily sample." *See* 42 U.S.C. § 14135a(c)(1). To facilitate especially "reliable" DNA analysis, FBI guidelines direct federal law enforcement officials to rely on blood samples. *See* United States v. Kincade, 379 F.3d 813, 817 (9th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 924 (2005).

[8] DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. at 74933-34.

[9] The Combined DNA Index System includes a "hierarchy" of DNA-profile databases, including a National DNA Index System, which facilitates sharing of DNA profiles between participating law enforcement agencies throughout the country; a State DNA Index System, through which DNA profiles are shared throughout a state; and a Local DNA Index System, from which DNA profiles originate before being added to the higher-level indexing systems. Within these systems, profiles are categorized into offender profiles, arrestee profiles, and other categories. For a more detailed description of the system, see http://www.fbi.gov/hq/lab/html/codis1.htm.

[10] United States v. Amerson, 483 F.3d 73, 76 (2d Cir. 2007), *cert. denied* 552 U.S. 1042 (2007) (quoting H.R. Rep. No. 106-900 (2000)).

[11] *See Kincade*, 379 F.3d at 818; H.R. Rep. No. 106-900 at 27.

[12] For more information on state laws regarding compulsory DNA collection, see National Conference of State Legislatures, *State Laws on DNA Data Banks: Qualifying Offenses, Others Who Must Provide Sample* (Feb. 2010), at (continued...)

collection from people whom the government has arrested or detained but not convicted. As discussed *infra*, the DNA Analysis Backlog Elimination Act 2000, as amended, authorizes compulsory collection from individuals in federal custody, including those detained, arrested, or facing charges, and from individuals on release, parole, or probation in the federal criminal justice system.[13] Under the federal law, if an individual refuses to cooperate, relevant officials "may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample."[14] State laws vary, but nearly all states authorize compulsory DNA collection from people convicted for specified crimes, and a small but growing number of states also authorize compulsory collection from arrestees.[15]

Expansion of Statutory Authorities for DNA Collection and Analysis

At the federal level, statutory authority for compulsory DNA collection has expanded relatively rapidly. During the 1990s, a trio of federal laws created the logistical framework for DNA collection, storage, and analysis. The DNA Identification Act of 1994 provided funding to law enforcement agencies for DNA collection and created the FBI's Combined DNA Index System to facilitate the sharing of DNA information among law enforcement agencies.[16] Next, the Antiterrorism and Effective Death Penalty Act of 1996 authorized grants to states for developing and upgrading DNA collection procedures,[17] and the Crime Identification Technology Act of 1998 authorized additional funding for DNA analysis programs.[18] The resulting framework centers on the Combined DNA Index System; more than 170 law enforcement agencies throughout the country participate in the system.[19]

In recent years, federal and state laws have expanded law enforcement authority for collecting DNA in at least two ways. First, laws have increased the range of offenses which trigger authority for collecting and analyzing DNA. In the federal context, the DNA Analysis Backlog Elimination Act of 2000 limited compulsory extraction of DNA to people who had been convicted of a "qualifying federal offense."[20] Under the original act, "qualifying federal offenses" included limited but selected felonies, such as murder, kidnapping, and sexual exploitation.[21] After September 11, 2001, the USA PATRIOT Act expanded the "qualifying federal offense" definition to include terrorism-related crimes.[22] In 2004, the Justice for All Act further extended the

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http://www.ncsl.org/default.aspx?tabid=12737.

[13] 42 U.S.C. § 14135a.

[14] *Id.* at § 14135a(a)(4)(A).

[15] *See* National Conference of State Legislatures, *State Laws on DNA Data Banks: Qualifying Offenses, Others Who Must Provide Sample* (Feb. 2010), at http://www.ncsl.org/default.aspx?tabid=12737 (indicating 21 states that authorize DNA collection from arrestees). However, many of the state laws authorizing collection from arrestees limit the scope of such collection to people arrested for specified violent or serious crimes.

[16] P.L. 103-322, 108 Stat. 2065 (1994) (codified at 42 U.S.C. §§ 14131-14134).

[17] P.L. 104-132, 110 Stat. 1214 (1996).

[18] P.L. 105-251, 112 Stat. 1871 (1998).

[19] *See* http://www.fbi.gov/hq/lab/codis/clickmap.htm.

[20] 42 U.S.C. § 14135a(a)(1)(B).

[21] P.L. 106-546, § 3, 114 Stat. 2726, 2729-30 (2000).

[22] P.L. 107-56, § 503, 115 Stat. 272, 364 (2001).

definition to reach all crimes of violence, all sexual abuse crimes, and all felonies.[23] Similarly, almost all states now authorize collection of DNA from people convicted of any felony.[24]

Second, laws have authorized compulsory DNA collection from people who have been detained or arrested but not convicted on criminal charges. The 109th Congress authorized the Attorney General, in his discretion, to require collection from such individuals. Specifically, the DNA Fingerprinting Act of 2005 authorized collection "from individuals who are arrested or from non-U.S. persons who are detained under the authority of the United States."[25] The Adam Walsh Child Protection and Safety Act of 2006 subsequently substituted "arrested, facing charges, or convicted" for the word "arrested" in that authority.[26] The U.S. Department of Justice implemented the authorization in a final rule that took effect January 9, 2009.[27] Mirroring the statutory language, it requires 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."[28] As mentioned, some states have likewise enacted laws authorizing collection of arrestees' DNA.[29] As mentioned, H.R. 4614, a bill passed by the House, would provide grant funding incentives to encourage states to establish processes for collecting DNA from persons arrested for specified state offenses.[30]

Whereas the increase in the range of triggering offenses appears to be a natural outcome of DNA's success as a forensic tool, the expansion to collection from arrestees appears to be a more legally significant step. Overall, it seems Congress's goal for the expansion to arrestees and those facing charges was to facilitate crime prevention through "the creation of a comprehensive, robust database that will make it possible to catch serial rapists and murderers before they commit more crimes."[31] In background material for its implementing rule, the Justice Department explains that collection from arrestees will facilitate more effective law enforcement for at least two reasons: (1) it will aid in crime prevention by ensuring that the government need not wait until a crime has been committed before creating an individual's DNA profile; and (2) it will allow federal

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[23] P.L. 108-405, § 203(b), 118 Stat. 2260, 2270 (2004) (codified at 42 U.S.C. § 14135a(a)(2)).

[24] *See* National Conference of State Legislatures, *State Laws on DNA Data Banks: Qualifying Offenses, Others Who Must Provide Sample* (Feb. 2010), at http://www.ncsl.org/default.aspx?tabid=12737.

[25] DNA Fingerprint Act of 2005, Tit. X, P.L. 109-162, 119 Stat. 2960. 42 U.S.C. § 14135a(a)(1).

[26] Adam Walsh Child Protection and Safety Act of 2006, sec. 155, P.L. 109-248, 120 Stat. 587 (2006) (codified at 42 U.S.C. § 14135a(a)(1)).

[27] DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. at 74,932, 74,935.

[28] 28 C.F.R. § 28.12(b).

[29] *See, e.g.*, Kan. Stat. Ann. § 21-2511(e)(2) (authorizing DNA collection from individuals arrested for any felony or certain other crimes); N.M. Stat. § 29-16-6(B) (authorizing collection of DNA samples from individuals arrested for specific violent felonies); Va. Code Ann. § 19.2-310.2:1 (requiring collection of DNA samples from "arrested for the commission or attempted commission of a violent felony").

[30] Katie Sepich Enhanced DNA Collection Act of 2010, H.R. 4614, 111th Cong. (2010). Specifically, the legislation would authorize 5% and 10% increases in grants allocated pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3755, for states that instituted a "minimum" or "enhanced" "DNA collection process," respectively. A "minimum" process entails searching the federal DNA database "at least one time" against samples from individuals "arrested for, charged with, or indicted for" specified types of state offenses, such as those including an element of sexual contact that are punishable by at least five years imprisonment. An "enhanced" process requires the collection of samples, to be included in the federal database, from individuals "arrested for or charged with" a broader range of state law offenses, such as those with a sexual conduct element that are punishable by at least one year imprisonment.

[31] 151 Cong. Rec. S13756 (daily ed. Dec. 16, 2005) (statement of Sen. Kyl).

authorities to create DNA profiles for aliens detained in the United States, who might not otherwise undergo judicial proceedings in U.S. courts.[32]

Expungement Provisions

Although Congress expanded statutory authority for DNA collection, it has also provided some protection for arrestees whose arrests do not result in conviction. In particular, federal law mandates expungement of DNA samples upon an arrestee's showing of discharge or acquittal. The FBI and relevant state agencies "shall promptly expunge" DNA information "from the index" upon receipt of "a final court order establishing that such charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period."[33] Officials must also expunge DNA data for convicts in cases where a conviction is overturned.[34] These provisions apply to DNA collected by state and local law enforcement officers, in addition to DNA collected in the federal justice or detention systems.

Fourth Amendment Overview

The Fourth Amendment to the U.S. Constitution provides a right "of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[35] Two fundamental questions arise in every Fourth Amendment challenge. First, does the challenged action constitute a search or seizure by federal or local government and thus trigger the Fourth Amendment right?[36] Second, if so, is the search or seizure "reasonable"?

Search or Seizure

Different tests trigger the Fourth Amendment right depending on whether a litigant challenges government conduct as a seizure or as a search. Seizures involve interference with property rights; a seizure of property occurs when government action "meaningfully interferes" with possessory interests or freedom of movement.[37]

In contrast, searches interfere with personal privacy. Government action constitutes a search when it intrudes upon a person's "reasonable expectation of privacy."[38] A reasonable expectation of

[32] DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. at 74,934.

[33] 42 U.S.C. § 14132(d). *See also* Federal Bureau of Investigation, *Expungement of DNA Records in Accordance with 42 U.S.C. 14132(d)(1)(A)*, http://www.fbi.gov/hq/lab/html/expungement.htm (detailing procedures for expungement).

[34] *Id.* However, no provision requires expungement of DNA upon a convict's completion of his or her sentence.

[35] U.S. Const. amend. IV.

[36] Courts have applied the Fourth Amendment to state and local government actions since 1961, when, in *Mapp v. Ohio*, the Supreme Court interpreted the Fourteenth Amendment as having incorporated the Fourth Amendment to the states. 367 U.S. 643, 655 (1961).

[37] *See* United States v. Place, 462 U.S. 696, 716 (1983) (Brennan, J., concurring in result); Michigan v. Summers, 452 U.S. 692, 696 (1981).

[38] Some justices and experts have noted the circularity of the combination of this definition and the general Fourth Amendment "reasonableness" inquiry. *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring). However, such criticisms have not yet caused the Court to reconsider its test, except perhaps for the narrow category of interiors of homes, for which the Court has found a near-automatic reasonable expectation of privacy by virtue of privacy in the home having "roots deep in the common law." *See* Kyllo v. United States, 533 U.S. 27, 34 (2001).

privacy requires both that an "individual manifested a subjective expectation of privacy in the searched object" and that "society is willing to recognize that expectation as reasonable."[39]

In general, people have no reasonable expectation of privacy for physical characteristics they "knowingly expos[e] to the public."[40] In evaluating whether people "knowingly expose" identifying characteristics, the Supreme Court has sometimes distinguished the drawing of blood and other internal fluids from the taking of fingerprints. At times, it has signaled that people lack a reasonable expectation of privacy in their fingerprints,[41] but it has held that extraction of blood, urine, and other fluids implicates an intrusion upon a reasonable expectation of privacy, presumably because the former category is "knowingly exposed" to the public while the latter category generally is not.[42]

Under modern Supreme Court precedent, a further complicating factor is that reasonable expectation of privacy depends not only on the type of evidence gathered, but also on the status of the person from whom it is gathered. The inquiry is not simply a yes-or-no determination, but appears to include a continuum of privacy expectations. For example, in *United States v. Knights*, the Court held that the "condition" of probation "significantly diminished" a probationer's reasonable expectation of privacy.[43] This diminished privacy expectation did not completely negate the probationer's Fourth Amendment right; however, it affected the outcome under the Court's Fourth Amendment balancing test.[44]

"Reasonableness" Inquiry When the Fourth Amendment Applies

When government action constitutes a search or seizure, "reasonableness" is the "touchstone" of constitutionality.[45] However, courts apply different standards, in different circumstances, to determine whether searches and seizures are reasonable. The Court's Fourth Amendment analysis falls into three general categories.

The first category involves traditional law enforcement activities, such as arrests or searching of homes. To be reasonable, these activities require "probable cause," which must be formalized by

[39] *Kyllo*, 533 U.S. at 33 (citing California v. Ciraolo, 476 U.S. 207, 211 (1986)).

[40] Katz v. United States, 389 U.S. 347, 351 (1967).

[41] *See, e.g.*, Davis v. Mississippi, 394 U.S. 721, 727 (1969) ("Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."). Later, in *Hayes v. Florida*, the Supreme Court seemed to suggest that fingerprinting does constitute a search, 470 U.S. 811, 814 (1985) (referring to fingerprinting as less intrusive than *other* types of searches and seizures), a shift in keeping with the Court's broader trend toward classifying more activity as constituting a search and leaving the heart of the constitutional analysis for the Fourth Amendment "reasonableness" inquiry. Thus, it appears that although the Court views the drawing of blood as a greater intrusion than fingerprinting, both activities now qualify as searches.

[42] *See, e.g.*, Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616 (1989) ("We have long recognized that a 'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search" (quoting Schmerber v. California, 384 U.S. 757, 767-768 (1966)). This distinction contrasts with the Supreme Court's rejection of a blood-versus-fingerprints distinction in the context of the confrontation clause to the Sixth Amendment of the U.S. Constitution, wherein the Court has held neither fingerprinting nor the taking of blood are barred because they are both "real and physical" rather than "testimonial" evidence. *See* Pennsylvania v. Muniz, 496 U.S. 582, 591 (1990).

[43] 534 U.S. 112, 119-120 (2001).

[44] *Id.*

[45] *Id.* at 118.

a warrant unless a recognized warrant exception applies.[46] Probable cause is "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules,"[47] yet it is considered the most stringent Fourth Amendment standard. In the context of issuing warrants, probable cause requires an issuing magistrate to make a "common sense" determination, based on specific evidence, whether there exists a "fair probability" that, for example, an area contains contraband.[48]

The second category, introduced in the Supreme Court case *Terry v. Ohio*, involves situations in which a limited intrusion satisfies Fourth Amendment strictures with a reasonableness standard that is lower than probable cause.[49] For example, in *Terry*, a police officer's patting of the outside of a man's clothing to search for weapons required more than "inchoate and unparticularized suspicion" but was justified by "specific reasonable inferences" that the man might have a weapon.[50] In such situations, courts permit searches justified by "reasonable suspicion," which is a particularized suspicion prompted by somewhat less specific evidence than probable cause requires.[51]

The third category includes "exempted area," "administrative," "special needs," and other "suspicionless" searches. Examples include routine inventory searches, border searches, roadblocks, and drug testing. In these circumstances, courts apply a "general approach to the Fourth Amendment"—also called the "general balancing," "general reasonableness," or "totality-of-the-circumstances" test—to determine reasonableness "by assessing, on the one hand, the degree to which [a search or seizure] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[52] Although the Supreme Court has expanded the scope of application for this test, the approach historically applied only when a search or seizure satisfied parameters for one of several narrow categories. In particular, it applied where a routine, administrative purpose justified regular searches; where a long-recognized exception existed, such as for border searches; or where a "special nee[d], beyond the normal need for law enforcement, [made] the warrant and probable cause requirements impracticable."[53]

In the context of law enforcement's collection of DNA from prisoners, parolees, and others subject to law enforcement supervision, questions remain regarding when a special need, distinct from law enforcement interests, must exist before a court may apply a general reasonableness standard. Although the special needs test arose in the context of drug testing, the Supreme Court has held that probation and other post-conviction punishment regimes qualified as special needs with purposes distinct from law enforcement. For example, in *Griffin v. Wisconsin*, the Court held that a "state's operation of a probation system, like its operation of a school, government office or

[46] *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (recognizing a warrant exception for arrest of an individual who commits a crime in an officer's presence, as long as the arrest is supported by probable cause).

[47] Illinois v. Gates, 462 U.S. 213, 232 (1983).

[48] *Id.* at 238.

[49] 392 U.S. 1, 7 (1968).

[50] *Id.* at 21-22, 27.

[51] Alabama v. White, 496 U.S. 325, 330 (1990) ("[r]easonable suspicion is a less demanding standard than probable cause").

[52] Samson v. California, 547 U.S. 843, 848 (2006).

[53] Griffin v. Wisconsin, 483 U.S. 868, 873 (1986) (citing New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

prison, or its supervision of a regulated industry ... presents 'special needs' beyond law enforcement."[54] As discussed below, later Supreme Court cases seem to suggest that a defendant's post-conviction status, alone, might justify a court's direct application of a general reasonableness test to DNA collection, without any finding of a special need. Because its focus is the status of the person searched rather than the nature or justification of government action, such an approach is distinct from existing legal bases for applying a general reasonableness test to evaluate suspicionless searches.

Diminishment of Privacy Expectations Under Supreme Court Precedent

Since 2000, the Supreme Court has twice applied a general reasonableness test in Fourth Amendment cases involving people serving post-conviction punishments—specifically, in cases involving a probationer and a parolee—without first finding special needs justifying the government action. In both cases, the Court's legal basis for directly applying the general balancing approach was the reduced expectation of privacy to which each defendant was entitled by virtue of his post-conviction status. In addition to providing a justification for rejection of the special needs test, this same diminishment of defendants' privacy expectations also favored the government in the Court's application of the general balancing test.

In *United States v. Knights*, a 2001 case, a California court had sentenced Mark Knights to probation for a drug offense.[55] One condition of his probation was that his "person, property, place of residence," etc., were subject to search "with or without a search warrant."[56] After finding some evidence that appeared to link him with a fire at a local telecommunications vault, a police detective searched Knights's home without a warrant.[57] Emphasizing the curtailment of privacy rights that correspond with probation and other post-conviction punishment regimes, the Court evaluated the search under the general balancing test, without first identifying an administrative purpose or special needs justification.[58] In addition, Knights's diminished expectation of privacy affected the outcome under the Court's general Fourth Amendment balancing test. Noting that "Knights' status as a probationer subject to a search condition informs both sides of that balance," the Court easily upheld the officer's search based on reasonable suspicion.[59]

In *Samson v. California*, a 2006 case, the Court extended *Knight*s to uphold a search of a parolee's pockets, for the first time directly applying the general reasonableness test to a search justified only on the basis of the petitioner's status as a parolee, rather than on any particularized

[54] *Id.* at 873-74.

[55] 534 U.S. 112, 114 (2001).

[56] *Id.*

[57] *Id.* at 115.

[58] *Id.* at 119-20. (noting that "just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens" and concluding that "the probation condition thus significantly diminished Knights' reasonable expectation of privacy").

[59] *Id.* at 119, 121-22 (after discussing the interests on both sides of the general reasonableness test, holding "that the balance of these considerations requires no more than reasonable suspicion to conduct a search of petitioner's house").

suspicion.[60] As in *Knights*, the *Samson* Court explicitly rejected arguments that a special needs analysis was required; instead, finding that the petitioner's post-conviction status diminished his privacy rights, the Court again directly applied a "general Fourth Amendment approach."[61] In addition, as in *Knights*, the *Samson* court held that a parolee's diminished privacy right affected the outcome of the general balancing test.[62]

It is unclear what other categories of people might be subject to a reduced expectation of privacy by virtue of their status. It appears from Supreme Court dicta that at least a lesser reduction in privacy rights would apply to those in pre-trial detention versus people serving sentences after conviction. In *Knights* and *Samson*, the Supreme Court referred to parolees and probationers as being along a "'continuum' of state-imposed punishments."[63] Furthermore, in *Samson*, the Court held that a parolee lacked "an expectation of privacy that society would recognize as legitimate," because searches were a condition of parole, which was a "'an established variation on imprisonment.'"[64] Lower federal courts have interpreted these and other Supreme Court decisions as suggesting that prisoners' privacy expectations are the most diminished; parolees have the next lowest diminishment in privacy expectations, followed by people on supervised release and probationers.[65] The few U.S. district court cases addressing DNA collection from persons awaiting trial, discussed *infra*, have reached different conclusions regarding the extent to which a person's pre-trial detention diminishes his or her reasonable expectation of privacy.

Case Law on DNA Collection

Courts have uniformly held that compulsory DNA collection and analysis constitutes a search, and thus triggers Fourth Amendment rights.[66] Although some courts have signaled that DNA collection or storage might also constitute a seizure, courts have generally not addressed that question.[67] Thus, the question in cases brought is whether the collection of DNA satisfies the Fourth Amendment reasonableness test.

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[60] 547 U.S. 843 (2006).

[61] *Id.* at 848. In parts, the *Knights* opinion appeared to suggest that conditions explicitly imposed upon the probationer, rather than the probationer's status itself, created the diminished privacy expectation. However, in a footnote, the Court signaled its support for the rationale, later adopted in Samson, that post-conviction status itself diminishes a probationer's or a parolee's expectation of privacy. Specifically, it cited the Wisconsin Supreme Court's holding in *Griffin* that "'probation diminishes a probationer's reasonable expectation of privacy—so that a probation officer may, consistent with the Fourth Amendment, search a probationer's home without a warrant, and with only "reasonable grounds" (not probable cause) to believe that contraband is present.'" *Knights*, 534 U.S. at 118 n.3 (citing *Griffin*, 483 U.S. at 872.).

[62] *Samson*, 547 U.S. at 850-52.

[63] *Id.* at 850 (quoting *Knights*, 534 U.S. at 119).

[64] *See id.* at 852 (quoting Morrissey v. Brewer, 408 U.S. 471, 477 (1972)).

[65] *See, e.g.*, *Wilson*, 517 F.3d at 426-27 ("a parolee ... has less diminished privacy rights than a prisoner").

[66] *See, e.g.*, United States v. Amerson, 483 F.3d 73, 77 (2d Cir. 2007), *cert. denied* 552 U.S. 1042 (2007) ("It is settled law that DNA indexing statutes, because they authorize both a physical intrusion to obtain a tissue sample and a chemical analysis to obtain private physiological information about a person, are subject to the strictures of the Fourth Amendment.").

[67] *See, e.g.*, United States v. Kincade, 345 F.3d 1095, 1100 n.13 (9th Cir. 2003) ("Although the taking of blood may properly be characterized as a Fourth Amendment seizure, because it interferes with [the appellant's] 'possessory interest in his bodily fluids,' for present purposes we consider only the search, and note that the 'privacy expectations protected by this [the seizure] characterization are adequately taken into account by our conclusion that such intrusions (continued...)

Reasonableness of Post-Conviction Collection

Prior to the expansion of DNA collection authority to arrestees, nearly all courts that reviewed laws authorizing compulsory DNA collection upheld the laws against Fourth Amendment challenges.[68] Although the U.S. Supreme Court has never accepted a DNA collection case,[69] U.S. Courts of Appeals for the First, Second, Sixth, Seventh, Eight, Ninth, Tenth, and Eleventh Circuits upheld the 2004 version of the federal DNA collection law, which authorized collection and analysis of DNA from people convicted of any felony, certain sexual crimes, and crimes of violence.[70] Likewise, federal courts of appeals have upheld several state laws authorizing post-conviction DNA collection.[71]

Courts have relied on different legal tests in these cases.[72] While most courts have directly applied a general reasonableness approach, some courts have first evaluated government actions under the special needs test.[73] The majority of the federal courts of appeals have interpreted *Samson* as affirmatively requiring courts to apply the general reasonableness test, without a special needs prerequisite, at least as applied to prisoners or other individuals with post-conviction status. For example, in *Wilson v. Collins*, the Court of Appeals for the Sixth Circuit interpreted *Samson* as requiring direct application of the general balancing test in a case involving a prisoner.[74] Likewise, in *United States v. Weikert*, a case involving compulsory collection of DNA from a man on supervised release, the Court of Appeals for the First Circuit held that, under *Samson*, a general reasonableness test applied in DNA collections cases.[75]

(...continued)

are searches'") (quoting Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 617 n.4 (1989)).

[68] One exception is the panel decision of the U.S. Court of Appeals for the Ninth Circuit in *United States v. Kincade*, which was later overturned in an en banc decision. 345 F.3d 1095 (9th Cir. 2003), vac'd and rehearing en banc granted, 354 F.3d 1000 (9th Cir. 2003).

[69] The Supreme Court has addressed the separate issue of defendants' post-conviction access to DNA evidence. *See, e.g.*, District Attorney's Office for the Third Judicial District v. Osborne, 129 S. Ct. 2308 (2009).

[70] United States v. Weikert, 504 F.3d 1 (1st Cir. 2007); United States v. Amerson, 483 F.3d 73 (2d Cir. 2007), *cert. denied* 552 U.S. 1042 (2007); Wilson v. Collins, 517 F.3d 421 (6th Cir. 2006); United States v. Hook, 471 F.3d 766 (7th Cir. 2006), *cert. denied* 549 U.S. 1343 (2007); United States v. Kraklio, 451 F.3d 922 (8th Cir. 2006), *cert. denied* 549 U.S. 1044 (2006); United States v. Kriesel, 508 F.3d 941 (9th Cir. 2007); United States v. Banks, 490 F.3d 1178 (10th Cir. 2007); United States v. Castillo-Lagos, 147 Fed. App'x. 71 (11th Cir. 2005).

[71] Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005) (upholding the Georgia statute); Green v. Berge, 354 F.3d 675 (7th Cir. 2004) (upholding the Wisconsin statute); Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998) (upholding the Oklahoma statute); Schlicher v. Peters, 103 F.3d 940 (10th Cir. 1996) (upholding the Kansas statute); Boling v. Romer, 101 F.3d 1336 (10th Cir. 1996) (upholding the Colorado statute); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992) (upholding the Virginia statute).

[72] *See Kraklio*, 451 F.3d at 924 ("The only disagreement among the circuits is what analytical approach to use in upholding the [DNA collection] statutes.").

[73] *Compare Weikert*, 504 F.3d at 7, *Banks*, 490 F.3d at 1183, *and Kraklio*, 451 F.3d at 924 *with Amerson*, 483 F.3d at 78 *and Hook*, 471 F.3d at 772-74. The Sixth Circuit has upheld the federal DNA collection law under both tests. United States v. Conley, 453 F.3d 674, 677-81 (6th Cir. 2006).

[74] 517 F.3d 421, 426 (6th Cir. 2008).

[75] 504 F.3d 1, 3 (1st Cir. 2007) ("We interpret the Supreme Court's decision in *Samson v. California* to require that we join the majority of the 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)). Similarly, some state courts have interpreted *Samson* as applicable in compulsory DNA collection cases. For example, despite continuing to apply the special needs test in DNA cases, the Supreme Court of New Jersey recognized that "the most recent United States Supreme Court decision in *Samson* strongly suggests that the balancing test, which is an easier test for the State to satisfy, should apply to a Fourth Amendment analysis." State v. O'Hagen, 189 N.J. 140, 158 (2007).

In contrast, some federal courts of appeals have held that *Samson* did not affect their use of the special needs test in suits challenging DNA collection statutes. For example, the Court of Appeals for the Second Circuit declined to apply *Samson* in *United States v. Amerson*, a case upholding compulsory DNA collection from two individuals on probation, one for larceny and one for wire fraud.[76] The court interpreted *Samson* very narrowly, as applying only in contexts involving a "highly diminished" expectation of privacy.[77] Similarly, although it directly applied the general reasonableness test in *Wilson*, the Sixth Circuit suggested in that case that *Samson* might not apply in a case involving a person who was not a prisoner.[78]

The reading of *Samson* as limited to cases involving a significantly diminished expectation of privacy appears to comport with the Supreme Court's emphasis in *Knights* and *Samson* on the diminished privacy rights that stem from a petitioner's post-conviction status. In *Samson*, the Court framed the question in the case as "whether a condition of release can so diminish or eliminate a released prisoner's reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment."[79]

In evaluating post-conviction DNA collection, whether courts apply the special needs test before applying a general reasonableness test in DNA cases has had little or no practical import, because courts have consistently upheld the collection regardless of the standard they apply. Thus, courts have signaled that a change in analytic tools would not affect the ultimate determination of constitutionality in DNA collection cases involving convicted criminals.[80] However, some courts addressing DNA collection in the post-conviction context have made clear that their holdings do not apply to such collection from arrestees.[81]

Reasonableness as Applied to Arrestees

As mentioned, to date, only a handful of state[82] and federal[83] judicial decisions address compulsory collection of DNA from persons awaiting a criminal trial. Outcomes in the cases are mixed.

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[76] 483 F.3d at 73, 79 (2d Cir. 2007).

[77] *Id.* ("while after *Samson* it can no longer be said that 'the Supreme Court has never applied a general balancing test to a suspicionless-search regime,' nothing in Samson suggests that a general balancing test should replace special needs as the primary mode of analysis of suspicionless searches outside the context of the highly diminished expectation of privacy presented in *Samson*") (quoting its previous opinion, Nicholas v. Goord, 430 F.3d 652, 666 (2d Cir. 2005)).

[78] *Wilson*, 517 F.3d at 426 (noting that cases involving petitioners on supervised release had declined to follow *Samson*).

[79] 547 U.S. at 847.

[80] *See, e.g.*, *Wilson*, 517 F.3d at 427 n. 4 ("Even if we were to apply the more stringent special-needs test, there is no reason to believe the ultimate result would be different.").

[81] *See, e.g.*, United States v. Kriesel, 508 F.3d 941, 948-49 (9th Cir. 2007) ("We emphasize that our ruling today does not cover DNA collection from arrestees or non-citizens detained in the custody of the United States, who are required to submit to DNA collection by the 2006 version of the DNA Act").

[82] This report focuses on federal court decisions, but several state courts have also reviewed the collection of DNA from arrestees, with mixed results. For example, the Virginia Supreme Court upheld Virginia's statute authorizing DNA collection from arrestees. Anderson v. Virginia, 650 S.E.2d 702 (Vir. 2006), *cert. denied*, 553 U.S. 1054 (2008). In contrast, the Minnesota Court of Appeals held that a state law authorizing collection of a DNA sample "upon a finding of probable cause, but before any conviction …" violated the Fourth Amendment to the U.S. Constitution and Article 1, Section 10 of the Minnesota Constitution. In the Matter of the Welfare of C.T.L., 722 N.W.2d 484, 486 (Minn. Ct. App. 2006).

Two federal district courts have issued rulings in cases challenging the federal authorities for pre-conviction DNA collection. In *United States v. Pool*, the U.S. District Court for the Eastern District of California upheld such collection.[84] In *United States v. Mitchell*, the U.S. District Court for the Western District of Pennsylvania reached the opposite result.[85] The U.S. Court of Appeals for the Ninth Circuit will be the first federal court of appeals to address a challenge to federal collection from an arrestee when it rules in the pending appeal in *Pool*.

In both U.S. district court cases, the government requested a DNA sample after the defendant was arrested pursuant to a criminal indictment but before trial.[86] Both courts applied the general balancing test to determine whether such collection was reasonable under the Fourth Amendment.[87]

Their divergent conclusions can be explained, in part, by the courts' differing characterizations of DNA collection on both sides of the general balancing test. On the privacy intrusion side, the *Pool* court viewed a DNA sample as no more intrusive than fingerprinting.[88] In contrast, the *Mitchell* court noted that DNA has the potential to reveal a host of private genetic information and rejected the analogy to fingerprinting as "pure folly."[89]

The courts' different views of DNA's role also impacted their conclusions on the government interest side of the balancing test. The *Pool* court viewed the government's interest in collecting DNA as equally legitimate as fingerprinting and other identification tools, in which governments have been held to have a sufficient interest.[90] In contrast, because it viewed DNA collection as presenting a far greater privacy intrusion than fingerprinting, the *Mitchell* court held that although

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[83] In addition to the two federal district court cases discussed in this report, two other federal judicial decisions, both issued in December 2009, are of interest. First, in *Friedman v. Boucher*, the U.S. Court of Appeals for the Ninth Circuit denied Nevada police officers' motion for qualified immunity where the officers, acting on their own volition rather than pursuant to any state or federal law, forced the collection of DNA from a man in pre-trial detention for the purpose of comparing his DNA to evidence available in "cold cases." 580 F.3d 847 (9th Cir. 2009). The Ninth Circuit emphasized the lack of statutory authority and the absence of a strong governmental interest in the case. Given those fact-specific underpinnings for its decision, it is unclear whether the Ninth Circuit's rationale would apply in a future case in which statutory authority and a different governmental interest existed. Second, in *Haskell v. Brown*, the U.S. District Court for the Northern District of California denied a motion to enjoin the enforcement of a California statute requiring the collection of DNA from adults arrested for felony offenses. 677 F. Supp. 2d 1187 (N.D.Cal. 2009). Because the case arose at the preliminary injunction stage, it is unclear how much weight the decision might have on a future challenge to California's law.

[84] 645 F. Supp.2d 903 (E.D.Cal. 2009).

[85] 681 F.Supp.2d 597 (W.D.Pa. 2009).

[86] In *Pool*, the defendant was granted pre-trial release. For that reason, a provision of the Bail Reform Act, 18 U.S.C. § 3142(b), which requires DNA collection as a condition of pre-trial release, provided a supplementary basis of statutory authority.

[87] Both courts discussed but declined to apply the special needs test. They noted that a minority of federal courts of appeals have applied the special needs test in DNA collection cases and expressed doubt that the DNA collection statutes served a special need beyond law enforcement purposes. *See, e.g.*, *Mitchell*, 681 F.Supp.2d at 605 ("The legislative intent fails to suggest that the enactment of the DNA collection statutes was based upon any special need outside of law enforcement purposes").

[88] *Pool*, 645 F. Supp.2d at 911.

[89] *Mitchell*, 681 F.Supp.2d at 608.

[90] *Pool*, 645 F. Supp.2d at 911.

the government has a legitimate interest in identifying suspects, that interest is one "that can be satisfied with a fingerprint and photograph" rather than with the more intrusive DNA sample.[91]

Another explanation for the different outcomes is the courts' different views of the implication of an indictment for a defendant's reasonable expectation of privacy. The *Pool* court viewed a grand jury's finding of probable cause at an indictment as a "watershed event," pursuant to which it is constitutional to detain a defendant or otherwise restrict a defendant's liberty.[92] Thus, the *Pool* court found that a post-indictment arrestee has a substantially diminished reasonable expectation of privacy. However, it expressly limited its holding to cases in which DNA collection occurs after an indictment.[93]

Criticizing the *Pool* opinion, the *Mitchell* court stated that it is "loath to elevate a finding of probable cause"—that is, the standard which must be met for an indictment—to match the higher, "reasonable doubt" standard required for a conviction.[94] Therefore, it "strongly disagree[d] with the court's analysis in *Pool*" regarding the extent to which arrest and indictment diminish a person's reasonable expectation of privacy.[95]

The Ninth Circuit heard oral arguments in *Pool* in December 2009. At oral argument, Pool sought to distinguish his case, in which the DNA was collected prior to conviction, from previous Ninth Circuit decisions, namely *United States v. Kincade*[96] and *United States v. Kriesel*,[97] upholding post-conviction DNA collection. Some lines of questioning appeared to indicate that the court might consider a narrow ruling in the case. For example, it is possible that the court would limit its holding to instances in which the DNA collection follows an indictment or other formal probable cause determination.[98]

Issues Courts Are Likely to Consider in Future Cases

Courts will likely wrestle with the questions raised by the divergent *Pool* and *Marshall* decisions in future cases involving pre-conviction DNA collection. Several additional issues are likely to affect courts' analyses in such cases, and might also impact the existing judicial consensus regarding the constitutionality of DNA collection from persons who have been convicted of a crime. In particular, the emerging science regarding biological purposes for junk DNA and the FBI's long-term storage of DNA profiles are likely to play a role in future analyses.

[91] *Mitchell*, 681 F.Supp.2d at 609.

[92] *Pool*, 645 F. Supp.2d at 909.

[93] *Id.* at 905 (limiting its holding to cases where collection occurs "after a judicial or grand jury determination of probable cause has been made for felony criminal charges against a defendant").

[94] *Mitchell*, 681 F.Supp.2d at 606.

[95] *Id.*

[96] 379 F.3d 813 (9th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 924 (2005).

[97] 508 F.3d 941 (9th Cir. 2007).

[98] An audio recording of the oral argument hearing in *Pool* is available on the Ninth Circuit's website. *See* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004553.

New Research on Junk DNA

Despite the "rapid pace of technological development in the area of DNA analysis,"[99] much of DNA's scientific value remains a mystery. As mentioned, FBI analysts rely on junk DNA, thought not to reveal sensitive medical or biological information. Partly for that reason, proponents of expansive DNA collection argue that any privacy intrusion resulting from DNA storage or analysis is minimal at most. For example, when he introduced the amendment that authorizes collection and analysis of DNA from arrestees in the federal system, Senator Kyl emphasized that storage of DNA samples would not intrude upon individuals' privacy rights, stating that "the sample of DNA that is kept ... is what is called 'junk DNA'—it is impossible to determine anything medically sensitive from this DNA."[100] Likewise, courts have assumed that DNA analysis and storage involves only a minimal privacy intrusion.

However, language in some opinions suggest that this assumption might change if scientists discover new uses for junk DNA. For example, the U.S. Court of Appeals for the First Circuit has suggested that "discovery of new uses for 'junk DNA' would require a reevaluation of the [Fourth Amendment] reasonableness balance."[101]

Scientific research on junk DNA is still emerging, and some research suggests that junk DNA has more biological value than previously assumed. For example, in October 2008, University of Iowa researchers released study findings showing that junk DNA has the potential to "evolve into exons, which are the building blocks for protein-coding genes."[102] Other scientists have similarly argued that there might be "gems among the junk" in DNA.[103] Hence, a remaining question is whether use of junk DNA will continue to offer superficial identifying information or whether it will reveal more detailed medical or biological characteristics.

Storage of DNA Profiles after Punishment Ends

A final issue that might arise in future DNA cases is the constitutionality of storing convicts' DNA profiles after their sentences have ended. As mentioned, federal law requires the FBI to expunge DNA profiles for people who receive acquittals or whose convictions are overturned.[104] However, the expungement provisions do not address storage of DNA from people who have been convicted but have successfully completed their sentences. Rather, as the Ninth Circuit Court of Appeals noted in *United States v. Kriesel*, "once they have [a person's] DNA, police at any level of government with a general criminal investigative interest ... can tap into that DNA without any consent, suspicion, or warrant, long after his period of supervised release ends."[105]

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[99] United States v. Weikert, 504 F.3d 1, 3 (1st Cir. 2007).

[100] 151 Cong. Rec. S13757 (daily ed. Dec. 16, 2005) (statement of Sen. Kyl).

[101] United States v. Stewart, 532 F.3d 32, 36 (1st Cir. 2008). *See also* Haskell v. Brown, 677 F. Supp. 2d 1187, 1190 n.1 (N.D.Cal. 2009) (noting that "so-called 'junk' DNA might someday be found to contain genetic programming material," but stating that the court's opinion must be based on "the facts as they are … today.").

[102] Lin L, Shen S, Tye A, Cai JJ, Jiang P, et al. *Diverse Splicing Patterns of Exonized Alu Elements in Human Tissues.* PLoS Genet 4(10): e1000225. doi:10.1371/journal.pgen.1000225 (2008), http://www.plosgenetics.org/article/info%3Adoi%2F10.1371%2Fjournal.pgen.1000225.

[103] W. Wayt Gibbs. *The Unseen Genome: Gems Among the Junk.* Sci. Am. 29 (Nov. 2003).

[104] 42 U.S.C. § 14132(d).

[105] 508 F.3d 941, 952 (9th Cir. 2007).

Defendants have generally not raised this issue, but it might become a more prevalent argument since laws have expanded collection authority to reach people convicted for relatively minor charges.

Some courts have signaled that storage after sentences are completed could alter the Fourth Amendment analysis. For example, in an opinion upholding collection of DNA from a person on supervised release, the U.S. Court of Appeals for the First Circuit warned that its opinion had an "important limitation." Namely, because the petitioner was "on supervised release and will remain so until 2009, [the court did] not resolve the question of whether it is also constitutional to retain the DNA profile in the database after he is no longer on supervised release."[106] Courts might be receptive to arguments regarding the long-term storage of DNA as an unconstitutional search, although some courts have upheld ongoing storage of fingerprints and other evidence.[107] The resolution of that question might depend in part on whether completion of a sentence is viewed as restoring a person's reasonable expectation of privacy.

Conclusion

Although nearly all courts that have addressed the issue have upheld the compulsory collection of DNA from persons who have been convicted, no judicial consensus has yet emerged regarding the constitutionality of such collection from persons who have been arrested or are facing charges prior to a criminal trial. The two U.S. district court cases addressing pre-conviction DNA collection pursuant to the federal law illustrate that outcomes in future cases involving arrestees may depend on courts' resolution of at least two key issues, namely: (1) what, if any, distinction exists between the reasonable expectation of privacy of an arrestee and a convict; and (2) the degree of privacy intrusion perceived as a result of a DNA sample. The latter question may turn on courts' framing of the role of DNA collection—that is, whether it is analogous to the long-upheld practice of fingerprinting or whether it represents a greater privacy intrusion.

Existing expungement provisions might also become a factor in future challenges to pre-conviction DNA collection. The government might argue that requirements that DNA samples be expunged once an arrestee is discharged or acquitted offset the degree of privacy intrusion caused by such samples. To date, some federal courts have made note of the expungement provisions,[108] but they generally have not addressed the effect of expungement requirements in Fourth Amendment analyses.

[106] *Weikert*, 504 F.3d at 2.

[107] *See, e.g.*, Stevenson v. United States, 380 F.2d 590 (D.C. Cir.), *cert. denied*, 389 U.S. 962 (1967) (holding that a defendant had no constitutional right to the expungement of his mugshots and fingerprints after his conviction was set aside).

[108] *See, e.g.*, United States v. Sczubelek, 402 F.3d 175, 187 (3d. Cir. 2005), *cert. denied*, 548 U.S. 919 (2006).

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