WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

Constitutionality of Collecting DNA from Arrestees

In recent years, the federal government and nearly half of the states have authorized the collection of deoxyribonucleic acid (DNA) from persons who have been arrested, but not yet convicted, for suspected criminal behavior. In Wisconsin, bills introduced during the 2011-12 Legislative Session proposed to authorize the collection of DNA from persons arrested on suspicion of having committed certain felonies and sex-related crimes, and the Governor has expressed his support for such DNA collection.

This Information Memorandum explores constitutional considerations regarding the collection and analysis of arrestees' DNA, particularly with respect to the Fourth Amendment to the U.S. Constitution. This area of the law is rapidly developing, with various state and federal courts reaching differing conclusions over the past several years. The legal status of such laws will not be finally determined until the U.S. Supreme Court has ruled on the question. The Supreme Court appears poised to do so, possibly during its next term.

BACKGROUND

DNA is biological material that contains unique genetic information. With the exception of identical twins, no two people have identical DNA.

DNA first emerged as a crime forensics tool during the 1980s. In the early years of its use, DNA was typically collected from persons who had been convicted for serious crimes. Over the past decade, the authority to collect and retain DNA samples has expanded.

Although its usefulness may be overemphasized in television dramas, DNA analysis is a powerful law enforcement tool. The U.S. Supreme Court has stated that "[m]odern DNA testing can provide powerful new evidence unlike anything known before." [*District Attorney's Office v. Osborne*, 557 U.S. 52, 62 (2009).] Most people are familiar with the use of DNA to match a suspect with evidence found at a crime scene. Less commonly known is that DNA profiles are stored in data banks that may be searched in future crime investigations. In addition, DNA may be used to exonerate a person who is wrongly accused or convicted.

The use of DNA for law enforcement purposes is often compared with fingerprinting, and is sometimes referred to as "DNA fingerprinting." Like fingerprints, DNA profiles function as identifiers. Unlike fingerprints, DNA profiles may be matched with various types of biological evidence found in connection with a crime.

DNA profiles are created by decoding what is sometimes referred to as "junk DNA," meaning DNA material for which no specific genetic function has been identified. Junk DNA is often

characterized as not indicating known biological characteristics, although the science on junk DNA is still developing.

HISTORICAL EXPANSION OF LAWS AUTHORIZING DNA COLLECTION AND ANALYSIS

In recent years, states and the federal government have expanded law enforcement authority for DNA collection and analysis[1] in two ways. First, they have increased the range of offenses which trigger authority for collecting and analyzing DNA. For example, in 2004, the federal Justice for All Act extended federal DNA collection authority to reach all crimes of violence, all sexual abuse crimes, and all felonies. [P.L. 108-405.] Previously, federal law had limited compulsory DNA collection to people who had been convicted of felonies such as murder, kidnapping, and sexual exploitation. Similarly, nearly all states now authorize the collection of DNA from people convicted of any felony. Many states also authorize the collection of DNA samples from persons convicted of specified sex-related misdemeanors.

Second, laws have authorized compulsory DNA collection from people who have been detained or arrested but not yet convicted. Since 2009, the federal government has required the collection of 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." [42 U.S.C. s. 14135a (a) (1) (A); 28 C.F.R. § 28.12 (b).] Similarly, 24 states have enacted laws authorizing DNA collection from persons arrested upon suspicion of having committed a felony or one of a specified subset of felonies.[2] Most of these new state laws were enacted within the past five years.

WISCONSIN LAW

Wisconsin first required the post-conviction collection of DNA in 1993. At that time, collection was limited to persons who were convicted or committed for violations of specified sexual assault crimes.

Since 2000, Wisconsin law has authorized the collection of DNA samples from additional categories of people, including every person convicted of a felony. Specifically, the following persons are required to submit DNA samples in Wisconsin:

- A person who has been found guilty of any felony or a specified misdemeanor sex offense.[3]
- A person who has been found not guilty or not responsible by reason of mental disease or defect and committed for violating a specified sexual assault offense.
- A person who is or was in institutional care for a felony or a violation of a specified sexual assault offense.

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[1] In the law enforcement context, DNA "analysis" generally refers to the creation of a DNA profile from a sample of DNA.

[2] For a list of relevant state laws, see National Conference of State Legislatures, *DNA Laws Database*, http://www.ncsl.org/issues-research/justice/dna-laws-database.aspx.

[3] The misdemeanor offenses include fourth-degree sexual assault; lewd and lascivious behavior; and the exposing of genitals or pubic area.

- A person who has been found to be a sexually violent person under ch. 980, Stats.
- A person who is or was released on parole or extended supervision or placed on probation in another state and is or was on parole, extended supervision, or probation in Wisconsin from the other state for a violation of a law that the Wisconsin Department of Corrections determines would constitute a felony if committed in Wisconsin.
- A person who has been required by a court to provide a DNA sample as part of an adjudication for a specified sex offense.

[s. 165.76 (1), Stats.] Wisconsin law does not provide for the routine collection of DNA following a suspect's arrest.

COLLECTION AND ANALYSIS

In Wisconsin, DNA is collected by buccal swab, meaning that a swab is used to collect a sample of cells from the inside of a person's cheek. If a person refuses to provide a sample, a district attorney may petition a circuit court for an order compelling the person to provide the sample. The circuit court must issue the order if it finds that the petition shows reasonable cause to believe that the person is required to submit a sample under state law and that the person's DNA is not already included in a DNA databank. [s. 165.76 (6), Stats.]

After collection, samples are sent to one of Wisconsin's state crime laboratories, located in Madison, Milwaukee, and Wausau, for analysis. The resulting DNA profiles may be stored in the Wisconsin DNA Database, which is linked to the Combined DNA Index System (CODIS), a national database. Participation in CODIS enables Wisconsin law enforcement officials to access DNA profiles created in other states. Each of the participating state laboratories has negotiated a memorandum of understanding with the Federal Bureau of Investigation (FBI) regarding the use of the national database and standards for operation of a laboratory.

The state laboratories must analyze DNA samples submitted pursuant to a court order. For other DNA samples, Wisconsin law requires the state laboratories to provide analysis pursuant to the following types of requests:

- A request from a law enforcement agency regarding an investigation.
- A request, pursuant to a court order, from a defense attorney regarding his or her client's DNA.
- A request from an individual regarding his or her own DNA.

[s. 165.77 (2), Stats.]

The laboratories may make data obtained from the analysis of a DNA sample available to law enforcement agencies in connection with criminal investigations. Upon request, the laboratories may also make DNA profiles available to any prosecutor, defense attorney, or subject of the data.

RETENTION AND EXPUNGEMENT

A person may request the expungement of DNA analysis from the state data bank if the person's conviction or adjudication has been reversed, set aside, or vacated. If a state laboratory receives a written request for expungement and a certified court order reversing,

setting aside, or vacating the conviction or adjudication of the person whose DNA was collected and analyzed, then the laboratory must purge all relevant records and identifiable information from the state data bank. If there are no valid grounds for expungement, the laboratory must retain DNA profiles until every person connected with a given conviction, adjudication, or commitment has been discharged from custody. [s.165.81 (3) (b), Stats.]

PROPOSED LEGISLATION

Companion Senate and Assembly bills introduced during the 2009-10 and 2011-12 Legislative Sessions proposed the expansion of DNA collection authority in Wisconsin.[4] Specifically, the bills would have required all persons in charge of law enforcement and tribal law enforcement agencies to obtain a biological specimen for DNA analysis from the following groups of people:

- Each adult arrested for a felony.
- Each adult arrested upon suspicion of having committed one or more specified sex-related offenses, including sexual assault, lewd or lascivious behavior, and exposing genitals or pubic area to a child.
- Each minor taken into custody upon suspicion of having committed one or more specified sexual assault offenses.

Public hearings were held on the bills in both sessions. Neither bill received a vote by a standing committee.

In an April 9, 2012 press release, Governor Walker announced that he had asked the Attorney General to submit a plan to implement the collection of DNA at the time of arrest for some felonies and serious sex-related offenses. The Governor characterized DNA collection as a common sense tool that will assist law enforcement efforts. The press release also stated that the Governor would include a statutory change in his 2013-15 Biennial Budget proposal.

FOURTH AMENDMENT FRAMEWORK

The Fourth Amendment to the U.S. Constitution is the most common basis for challenges to laws authorizing the collection and retention of arrestees' DNA.[5] The Fourth Amendment provides a right "of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" conducted by the government.[6] [U.S. Const. amend. IV.]

Article 1, Section 11 of the Wisconsin Constitution provides a similar guarantee, specifically that "[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." The Wisconsin Supreme Court has

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[4] 2009 Assembly Bill 511; 2009 Senate Bill 336; 2011 Assembly Bill 584; and 2011 Senate Bill 214.

[5] Some challenges to DNA collection have included grounds other than the Fourth Amendment. For example, defendants and plaintiffs have challenged DNA collection as violating constitutional guarantees regarding cruel and unusual punishment, *ex post facto* laws, equal protection, due process, freedom of speech, and freedom of religion. Because the Fourth Amendment arguments have resulted in the most legal activity and the only successful basis for challenges, this Information Memorandum focuses on the Fourth Amendment.

[6] In 1961, the U.S. Supreme Court interpreted the Fourteenth Amendment, which explicitly applies to the states, as having incorporated the Fourth Amendment. Thus, the Fourth Amendment applies to actions by state and local governments. [*Mapp v. Ohio*, 367 U.S. 643, 655 (1961).]

held that Art. 1, Sec. 11 is interpreted in the same manner as the Fourth Amendment to the U.S. Constitution is interpreted by the U.S. Supreme Court. [*State v. Ferguson*, 2009 WI 50.] For that reason, the constitutional analysis is identical under the state and federal constitutions.

The Fourth Amendment framework involves two questions. First, does the challenged action constitute a search or seizure and thus trigger the Fourth Amendment guarantee? Second, if so, is the search or seizure "reasonable"? In cases challenging DNA collection, the government action is typically challenged as a search.

DNA Collection is a Search Under the Fourth Amendment

Under the Fourth Amendment, government action constitutes a search when it intrudes upon a person's "reasonable expectation of privacy." [*Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).] In other words, to be a search, a government intrusion must invade an expectation of privacy that society views as reasonable. In general, people have no reasonable expectation of privacy for physical characteristics they "knowingly expos[e] to the public." [*Id.* at 351.]

Courts have typically found that DNA collection constitutes a search under the Fourth Amendment. Since the question first arose in the mid-1900s, the U.S. Supreme Court has held that taking a blood sample constitutes a search, in part because characteristics revealed by an analysis of blood are not readily perceived by the public.[7] Courts have reached the same conclusion with regard to DNA collected from saliva.[8]

Is the Search Reasonable Under the Fourth Amendment?

Because courts have held that DNA collection constitutes a search, the "action" in the judicial review of DNA collection cases shifts to the next question: Is the search reasonable?[9] A court decides whether a search is reasonable by applying a legal standard, typically "probable cause" or a general balancing test.

Warrant and Probable Cause

For traditional law enforcement activities, such as searching for evidence of a crime, the Fourth Amendment generally requires that police demonstrate "probable cause" and obtain a warrant, unless a specific exception to the warrant requirement applies. Over the years, the U.S. Supreme Court has recognized various circumstances in which probable cause need not be formalized by a warrant before the government may conduct a search or seizure.[10]

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[7] *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)).

[8] *See, e.g.*, *Schlicher v. Peters,* 103 F.3d 940, 942-43 (10th Cir. 1996).

[9] The emphasis on the second part of the test in DNA collection cases follows a broader trend over time toward a focus on the "reasonableness" part of the Fourth Amendment framework. One outcome of this shift is that the "reasonable expectation of privacy" analysis, which was first introduced in the context of determining whether a given action constitutes a search, has been subsumed within the "reasonableness" analysis. The result is that privacy expectations may be sufficient to find that a search has taken place but may be insufficient in the reasonableness inquiry, described below.

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

General Balancing Test

Over time, courts have developed alternatives to the probable cause standard for searches made without any specific suspicion, such as routine booking searches, border searches, and road blocks.[11] For these searches, the general test for whether a search is reasonable is a general balancing test, also called the "totality of the circumstances test," in which a court considers whether the governmental interest in conducting a search outweighs the intrusion of privacy caused by the search.

In past cases, courts have justified the application of the general balancing test in two situations. First, it is applied when a search is justified by a law enforcement need, but the search is routinely administered. Routine booking procedures, including fingerprinting, are typically reviewed under the general balancing test using this rationale.

Second, the general balancing test is applied when the government has justified a "special need," distinct from law enforcement justifications, to conduct a search.[12] In early cases involving arrestee DNA, some courts required a showing of special need, but the special need analysis has recently been set aside in favor of a more direct application of the general balancing test.

Analysis Affected by Status of Person Who is Searched

The outcome of the general balancing test may depend in part on the status of the person who is the subject of a search. Specifically, prisoners and others subject to government supervision have been found to have a diminished right to privacy under the Fourth Amendment. For that reason, it is less likely that a given action will be found to intrude on a prisoner's or parolee's right to privacy than on an ordinary citizen's right to privacy.

In *United States v. Knights*, a sheriff's deputy searched a truck owned by the friend of a person serving probation following a conviction for a drug offense. The U.S. Supreme Court held that the "condition" of probation "significantly diminished" the probationer's reasonable expectation of privacy. [534 U.S. 112, 119-120 (2001).] This diminished privacy expectation did not eliminate the probationer's Fourth Amendment right, but it affected the outcome under the general balancing test.

In *Samson v. California*, 547 U.S. 843 (2006), the U.S. Supreme Court extended its holding in *Knights* to uphold the search of a parolee's pockets, for the first time directly applying the general balancing test to a search justified only on the basis of the petitioner's status as a parolee, rather than on any suspicion particular to the person who is searched.

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[11] Other circumstances may also justify a legal standard other than probable cause. For example, beginning with a 1968 case, *Terry v. Ohio*, the U.S. Supreme Court has allowed a standard less than probable cause for searches that involve only minimal intrusions of privacy. [392 U.S. 1.] Such "*Terry* stops" typically involve a brief, light pat down or request for identification.

[12] However, the special needs framework has sometimes been applied to situations that might typically be characterized as part of law enforcement. For example, in *Griffin v. Wisconsin*, the U.S. Supreme Court held that Wisconsin's "operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry...presents 'special needs' beyond law enforcement." [483 U.S. 868, 873 (1986).]

The U.S. Supreme Court has not yet determined whether this analysis might extend to a person who is arrested but not yet convicted. However, some lower court decisions, discussed below, have adopted similar reasoning in such cases.

APPLICATION OF THE FOURTH AMENDMENT FRAMEWORK TO COLLECTION AND ANALYSIS OF ARRESTEES' DNA

Many state and federal courts, including the Wisconsin Supreme Court,[13] have upheld the collection and analysis of DNA samples from persons who have been convicted of a crime, including from persons who have been released from custody on supervised release.[14] These holdings have formed a general consensus that such DNA collection and analysis is constitutional. However, courts have made clear that such holdings do not necessarily apply to the collection of DNA from arrestees.[15]

A smaller number of judicial opinions specifically address the constitutionality of collecting and analyzing DNA samples from persons who have been arrested, but not yet convicted, for alleged crimes. In general, federal appellate court rulings have upheld such collection and analysis, whereas state court decisions have yielded mixed results.

U.S. SUPREME COURT

The U.S. Supreme Court has not yet considered the constitutionality of collecting or analyzing DNA from arrestees, although it appears that it may do so during its next term.[16] Other cases in which the Court considered searches of arrestees provide some guidance but do not necessarily predict the outcome of a case involving DNA collection from arrestees.

In cases pre-dating widespread use of DNA analysis, the U.S. Supreme Court held that detaining a suspect involuntarily for the purpose of obtaining fingerprints violated the Fourth Amendment.[17] [*Davis v. Mississippi*, 394 U.S. 721 (1969); *Hayes v.* Florida, 470 U.S. 811 (1985).] However, the unconstitutional government action in those cases was the involuntary pre-trial detention for the mere purpose of obtaining fingerprints. The court held that the detentions were unconstitutional, but it emphasized that its holding did not primarily concern the act of fingerprinting, which it characterized as "a much less serious intrusion upon personal security than other types of searches and detentions." [*Davis*, 394 at 727; *Hayes*, 470 at 814.]

In *Schmerber v. California*, the U.S. Supreme Court upheld the collection and analysis of blood from an arrestee for purposes of determining the arrestee's blood alcohol content. [384 U.S. 757 (1966).] The defendant in the case had been arrested on charges of driving under the

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[13] *State v. Martin*, 2004 WI App. 167.

[14] *See, e.g.*, *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004) (*en banc*) (upholding compulsory DNA profiling of certain federal offenders who were on parole, probation, or supervised release).

[15] *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").

[16] See the discussion of *Maryland v. King*, below.

[17] These detentions differed from general pre-trial detentions. Fingerprinting has long been upheld as an accepted practice during the routine booking procedures subsequent to arrest, although the U.S. Supreme Court has not directly addressed that question.

influence. Thus, the blood sample was justified by a need for evidence in the present law enforcement investigation.

In an April 2012 decision, *Florence v. Board of Chosen Freeholders of County of Burlington*, the U.S. Supreme Court upheld "strip searches" of persons arrested and brought into custody. [566 U.S. __ (2012).] The appellant in the case was arrested for failure to appear at a hearing to enforce a fine. After he was taken into custody, he was required to shower and was inspected after he disrobed. The procedure was applied to all new detainees at the corrections facility, without regard to whether corrections officials had any particular suspicion that a given detainee might be carrying contraband.

In a future case, it is possible that the U.S. Supreme Court would distinguish DNA collection from the facts in *Florence*. In *Florence*, the five-justice majority emphasized the need for correctional institutions to be afforded "substantial discretion" to enable them to minimize the unique safety risks relevant to custodial settings. In that light, the court viewed pre-trial detention searches as a justified method to ensure that no dangerous contraband would enter a correctional institution. DNA collection is arguably less closely related to maintaining safety inside a custodial facility. However, it might be found to be supported by alternative justifications.

U.S. Courts of Appeals

To date, two U.S. courts of appeals have considered the specific question whether collecting DNA from arrestees violates the Fourth Amendment to the U.S. Constitution, in three cases.[18] In all three cases, the courts applied the general balancing test and upheld the collection of DNA from arrestees. One of the cases is pending a rehearing *en banc*.

In *United States v. Mitchell*, the defendant was arrested for charges relating to the possession and intended distribution of cocaine. [652 F.3d 387 (3d Cir. 2011), *cert. denied*, 566 U.S. __ (2012).] The U.S. Court of Appeals for the Third Circuit, sitting *en banc* (i.e., as a full court rather than a panel of three judges), emphasized that "arrestees have a diminished expectation of privacy in their identities." On the other side of the balance, the court held that the government has a legitimate interest in the collection of DNA from arrestees. Thus, the court held that the balancing test favored a finding that the DNA sample was constitutional. [*Mitchell*, 652 F.3d at 416.]

The *Mitchell* court emphasized that federal law limits the purposes for which DNA samples may be used. For example, the court noted that a person searching the CODIS database does not see names associated with the DNA profiles. The court also concluded that, "by using only so-called 'junk DNA' to create a DNA profile, the Government ensures that meaningful personal genetic information about the individual is not published in CODIS." [*Id.* at 400.]

The U.S. Court of Appeals for the Ninth Circuit reached a similar holding in *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), a case involving a defendant arrested on charges relating to

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[18] In an August 2012 decision, a third U.S. Court of Appeals considered the constitutionality of DNA collection, but from a person who was a crime victim, rather than an arrestee. The court held that the DNA violated the Fourth Amendment, but it distinguished collection from a victim from collection from an arrestee. [*United States v. Davis*, 2012 U.S. App. LEXIS 17217 (Aug. 16, 2012).]

child pornography.[19] The *Pool* court reached a narrower holding than did the *Mitchell* court. Specifically, the court held that "where a court has determined that there is probable cause to believe that the defendant committed a felony," the taking of a DNA sample survives under the Fourth Amendment balancing test "in cases in which the government's use of the DNA is limited to identification purposes and there is no indication that the government intends to use the information for any other purpose." [*Pool*, 621 F.3d at 1214-15.] Thus, the *Pool* court appeared to suggest that its holding might not apply to persons arrested on misdemeanor charges, or in cases in which the government intended to use a DNA sample for a purpose other than identification.

In 2012, the Ninth Circuit considered arrestee DNA collection for a second time in *Haskell v. Harris*. [669 F.3d 1049 (9th Cir. 2012) *reh'g en banc granted*, 2012 U.S. App. LEXIS 15378 (July 25, 2012).] Plaintiffs in the case sued to stop the enforcement of California's law requiring DNA samples to be collected from all adults arrested on felony charges. Comparing DNA collection to fingerprinting, the court applied the general balancing test and determined that the "minimal intrusion" involved in extracting a DNA sample was far outweighed by the government's interest in using DNA, which the court described as "an extraordinarily effective law enforcement tool." [*Id*. at 1051.] However, the court noted that its ruling "deals solely with DNA extraction, processing, and analysis as it presently exists" and that "future developments in the law could alter" the constitutional analysis. [*Id*. at 1065.] The case is currently pending rehearing *en banc*, meaning that the decision will be either affirmed or reversed after a hearing by all of the judges on the Ninth Circuit.

All three of these cases garnered strongly worded dissenting opinions. The differences of opinion turn, in part, on differing interpretations of the scope of the privacy interest implicated by sampling and analyzing DNA, together with differing interpretations of the degree to which arrest reduces a person's privacy expectations. For example, the dissent in *Mitchell* characterizes arrestees' privacy interests as "diminished in certain, very circumscribed situations," in contrast to the much broader diminishment of rights assumed by the majority.

STATE COURTS

A relatively small number of state appellate courts have ruled in arrestee DNA collection cases, with mixed outcomes. To date, appellate courts in Arizona, California, Maryland, Minnesota, and Virginia have ruled in such cases.

Arizona

In a 2012 decision, the Arizona Supreme Court adopted a "two-tiered approach." The case, *Mario v. Kaipo*, involved five juveniles who had been charged with crimes. [2012 Ariz. LEXIS 153 (June 27, 2012).] Under Arizona law, the juveniles were required at a pre-trial advisory hearing to submit a sample of buccal cells or other bodily substances for DNA testing and extraction.

The court noted that, for the purposes of the Fourth Amendment analysis, the case involved two separate searches: (1) the physical buccal swab; and (2) the processing of the DNA to create a DNA profile. The court distinguished the first search, which "does not reveal by itself intimate personal information," from the second search, which "reveals uniquely identifying

[19] The Court of Appeals subsequently vacated the opinion because the case had become moot.

information about individual genetics." [*Mario* at *14.] Applying the general balancing test, the court held that, as applied to juveniles prior to conviction, the first search is constitutional, but the second is not.

California

A 2011 California case, *People v. Buza*, involved a man who refused to provide a DNA sample, as required under California law, after his arrest for allegedly setting a police car on fire. [197 Cal. App. 4th 1424 (Cal. App. 1st Dist. 2011).] A state appellate court held that, to the extent it requires arrestees to submit DNA samples for law enforcement analysis and inclusion in state and federal DNA databases prior to conviction or any determination of probable case, the state's DNA collection requirement violates the Fourth Amendment.

In reaching that conclusion, the court emphasized that "the privacy rights of arrestees are greater than those of probationers, parolees or convicted prisoners." In addition, the court stated that "even within the category of arrestees, an individual such as appellant, who has not yet been the subject of a judicial determination of probable cause, falls closer to the ordinary citizen end of the continuum than one as to whom probable cause has been found by a judicial officer or grand jury." [*Id.* at 1459-60.] The opinion is currently pending a decision on appeal before the California Supreme Court.[20]

Maryland

In 2012, Maryland's highest court held that Maryland's law authorizing DNA collection from arrestees was unconstitutional as applied to the defendant in the case. [*King v. Maryland*, 422 Md. 353 (2011).] The defendant, Alonzo Jay King, Jr., was arrested in 2009 on assault charges. Pursuant to Maryland's law authorizing the collection of DNA from certain arrestees, law enforcement officials collected a buccal swab sample from King on the day of his arrest. An analysis of the sample showed a match with DNA collected from a rape victim in an unsolved case from 2003. On the basis of that match, King was convicted of first-degree rape for the 2003 crime. The government argued that it had an "overriding" interest in collecting DNA from arrestees in order to ensure that arrested persons were accurately identified.

The court held that King's expectation of privacy outweighed the government's interest in using DNA to obtain accurate identification, particularly because fingerprinting and photo identification were sufficient, alternative means by which the government might have positively identified King. However, the court explicitly left open the possibility that in a future case, a DNA sample might be a more necessary means by which the government might need to obtain an accurate identification prior to a defendant's conviction.

On July 30, 2012, the U.S. Supreme Court granted a stay (i.e., temporarily halted the enforcement) of the Maryland ruling pending a decision from the U.S. Supreme Court regarding whether to grant a *writ of certiorari* (i.e., agree to review) in the case. [2012 U.S. LEXIS 5018 (July 30, 2012).] In the order, Chief Justice Roberts stated that "there is a reasonable probability [the U.S. Supreme Court] will grant certiorari" in the case, because of the split court decisions on the issue and the fact that the issue "implicates an important feature of day-to-day law enforcement practice in nearly half of the states and the federal

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[20] See docket: http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1990653&doc_no=S196200.

government." Thus, it appears likely that the Supreme Court may hear an appeal of the case during its next term.

Minnesota

In a 2006 case, *In re Welfare of C.T.L.*, the Minnesota Supreme Court struck down a Minnesota law requiring arrestees to submit DNA samples after receiving a probable cause hearing but prior to conviction. [722 N.W.2d 484 (Minn. Ct. App. 2006).] Applying the general balancing test, the court held that the government's interest in collecting DNA from arrestees without a warrant did not outweigh the privacy intrusion. The court noted that the expectation of privacy under the Fourth Amendment is not reduced for arrestees in the same manner it is reduced for persons who have been convicted.

Virginia

In *Anderson v. Commonwealth*, law enforcement officials took a DNA sample from Angel Anderson after Anderson's arrest on charges of rape and sodomy. [650 S.E.2d 702 (Va. 2007), *cert. denied*, 553 U. S. 1054 (2008).] After the DNA was entered in a databank, a "cold hit" matched Anderson's DNA profile to DNA collected from a rape victim in an earlier investigation. The match prompted an investigation resulting in Anderson's indictment for the earlier rape.

The Virginia Supreme Court upheld the collection of Anderson's DNA upon his arrest as a "permissible part of routine booking procedures." [*Id.* at 706.] Relying on a previous Virginia Supreme Court decision in which collection and analysis of DNA from a convicted felon had been upheld under the general balancing test, the court concluded that the collection and analysis of Anderson's DNA was "analogous to the taking of a suspect's fingerprints upon arrest and was not an unlawful search under the Fourth Amendment." [*Id.*]

CONCLUSION

The flurry of judicial decisions with divergent outcomes sets the stage for U.S. Supreme Court consideration of the collection and analysis of arrestee DNA. Until a Supreme Court ruling settles the question, the constitutionality of such collection and analysis remains uncertain.

Judicial review of DNA collection could be complicated by developing scientific understandings of the nature of DNA. To the extent that DNA collection may be compared with fingerprinting, a long accepted practice, it is more likely to survive judicial scrutiny. In contrast, if DNA analysis of "junk DNA" is found to reveal more private or sensitive information than mere identity, it may be viewed as a greater privacy intrusion than fingerprinting and thus more legally suspect.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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