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A.A., a minor, by his parent and guardian B.A., and JAMAAL W. ALLAH, Plaintiffs,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MERCER COUNTY
V.	DOCKET NO.: MER-L-0346-04
ATTORNEY GENERAL OF NEW JERSEY, NEW JERSEY DEPARTMENT OF CORRECTIONS, and MERCER COUNTY PROBATION SERVICES, Defendants.	CIVIL ACTION **OPINION**

Argued: June 24, 2004 & August 13, 2004
Post-Argument Submissions Completed: December 6, 2004
Decided: December 22, 2004

Appearances:

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-and-

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SABATINO, J.S.C.

Plaintiffs, an adult offender and a juvenile offender, seek to enjoin the forcible collection and maintenance of samples of their DNA by the State of New Jersey. They assail the validity of the State's present DNA collection statutes, N.J.S.A. 53:1-20.17 et. seq., under the Federal and New Jersey Constitutions, claiming that the statutes impermissibly condone searches of persons and the seizure of their bodily tissues without a warrant or any individualized suspicion of wrongdoing.

This case raises important constitutional issues not yet resolved in the courts of New Jersey. Other courts across the nation recently have wrestled with the validity of similar DNA statutes, at times deciding such cases by the slimmest of margins. See, e.g., United States v. Kincade, 379 F.3d 813 (9th Cir. 2004)(upholding the federal DNA collection statute by a 6-5 *en banc* vote, displacing a prior 2-1 panel decision declaring the statute unconstitutional); State v. Raines, 383 Md. 1, 857 A.2d 19 (2004)(sustaining, by a 4-3 vote, the Maryland DNA Collection Act).

This Court finds that the United States and New Jersey Constitutions do permit the State to collect DNA samples from the plaintiffs, and to maintain those samples and the

corresponding data during plaintiffs' terms of confinement and supervised release. However, this Court further holds that, absent the informed consent of the plaintiffs, the State may not maintain their DNA samples or profiles indefinitely. Rather, the State must honor future requests by plaintiffs to expunge their DNA from its databases, when and if they have completed their supervisory terms and have fully resumed civilian life. As a corollary to that right of expungement, the State shall not contribute plaintiffs' DNA information to other governmental databases without plaintiffs' consent, unless the receiving agencies provide for similar means of expungement.

Subject to the foregoing constitutional limitations, plaintiffs' application for injunctive relief is conditionally denied.

I.

Every nucleated cell in a human being contains deoxyribonucleic acid ("DNA"), arranged in a pattern that is unique to that person except for an identical twin. See generally Thomas M. Fleming, Annotation, *Admissibility of DNA Identification Evidence*, 84 A.L.R. 4th 313 (1991). A person's DNA remains the same throughout his or her body, and throughout his or her life. The odds that two randomly

selected persons will share the same DNA profile are virtually nil. Accordingly, DNA testing has become an important law enforcement tool for identifying criminal suspects and linking them to particular crime scenes.[1]

All fifty states and the federal government have adopted statutes for the collection of DNA samples and the maintenance of DNA databanks. See 42 U.S.C. §§ 14131-35 (federal DNA collection statutes); see also http://www.dnaresource.com (regularly-updated list of state DNA collection statutes) (last visited Dec. 20, 2004). The United States has provided $170 million in funding to support state programs that collect and maintain DNA profiles. 42 U.S.C. §§ 14135(a) & (j). Overarching those efforts, the Federal Bureau of Investigation maintains a national DNA database known as "CODIS," the Combined DNA Index System. CODIS presently contains nearly two million DNA profiles. The profiles are derived from DNA samples taken from federal and state criminal offenders, crime

[1] See generally D, Kaye & M. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Poulation-Wide Coverage*, 2003 Wis. L. Rev. 413 (2003); Jeffrey S. Grand, *The Blooding of America: Privacy and The DNA Dragnet*, 23 Cardozo L. Rev. 2277 (2002); Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 Wake Forest L. Rev. 767 (1999).

scenes, human remains, and specimens provided by the next of kin of missing persons.

In tandem with these national initiatives, our State enacted a decade ago the New Jersey DNA Database and Databank Act of 1994, N.J.S.A. 53:1-20.17 et. seq. (the "DNA Act"). Initially, the DNA Act created a database program requiring DNA samples only from certain adult sex offenders. L. 1994, c. 137. Subsequent amendments expanded the statute to encompass juvenile sex offenders and various enumerated crimes of violence such a murder and kidnapping. L. 1997, c. 136 (expansion to juveniles); L. 2000, c. 118 (expansion to more covered crimes).

As the result of the DNA Act's most recent expansion effective September 22, 2003, L. 2003, c. 183, all adults convicted in New Jersey of any crime, or found not guilty of any such crime by reason of insanity, are subject to compulsory DNA sampling. N.J.S.A. 53:1-20.20. In addition, mandatory DNA sampling is now required for all juveniles in New Jersey who are adjudicated delinquent on the basis of an act which, if it had been committed by an adult, would constitute any crime. Id. Persons convicted of earlier crimes, or previously found liable for qualifying juvenile acts, are also subject to the DNA Act's present requirements if they were imprisoned or serving some form

of supervised release as of September 22, 2003. N.J.S.A. 53:1-20.20(g). The 2003 amendment requires that persons subject to its terms "shall provide a DNA sample before termination of imprisonment or probation." N.J.S.A. 53:1-20.20(g).

The DNA Act authorizes the collection of DNA from a person either through a blood extraction or orally through what is known as a buccal swab. N.J.S.A. 53:1-20.22. The buccal swab has become the dominant collection method in New Jersey, although the State continues to perform blood extractions (via a pin prick of the subject's finger) in limited instances.[2] The samples are collected by various law enforcement agencies within the State, including the State Department of Corrections, the State Parole Board, the State Juvenile Justice Commission, the State Division of Criminal Justice and various county sheriffs and county corrections facilities. The State distributed more than 70,000 buccal swab kits to those agencies in the six months between September 2003 and March 2004.

The buccal swab procedure involves placing a disc-shaped foam applicator into the mouth of the testing

[2] The FBI considers DNA from blood samples to be more reliable than DNA from other sources such as saliva. See Nancy Beatty Gregoire, *Federal Probation Joins the World of DNA Collection*, 66 Fed. Probation 30, 31 (2002), quoted in United States v. Kincade, supra, 379 F.3d at 817.

subject, often by the subject himself or herself. The applicator is rolled between the teeth and each cheek of the subject, and also is placed under the subject's tongue for ten seconds. The wet swab is then pressed onto a micro-card, which changes in color once the DNA has been transferred to it. Thereafter, the swab is discarded, and the micro-card is sent to the New Jersey State Police Forensic Center along with biographical data and the subject's fingerprints.[3]

The Forensic Center analyzes the data on the micro-card and creates a corresponding DNA profile. The profile results from measuring the tetra-nucleotide repeats, also referred to as short-tandem repeats ("STRs") at each of thirteen specific regions (or "loci") on the human genome. The State's certifications contend that these thirteen loci merely identify the individual, and do not reveal personal traits such as physical characteristics or latent health defects.[4]

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[3] These procedures are described in detail in the Certifications of Linda B. Jankowski, Director of the State Police DNA Laboratory, and of Joseph S. Buttich, Deputy Chief State Investigator in the Division of Criminal Justice.

[4] The allegedly-limited explanatory value of the thirteen loci, sometimes referred to as "junk DNA," is a matter of scientific dispute. See United States v. Kincade, supra, 379 F.3d at 818-19 and the authorities cited therein.

The State of New Jersey stores the DNA profiles that it collects in an internal, bar-coded database known as the State DNA Index System ("SDIS"), which is jointly maintained by the State Police and the Division of Criminal Justice. The State Police also retains the actual physical DNA sample.

The DNA Act permits data collected pursuant to its terms to be used for the following purposes:

(a) For law enforcement identification purposes;

(b) For development of a population database;

(c) To support identification research and protocol development of forensic DNA analysis methods;

(d) To assist in the recovery or identification of human remains from mass disasters or for other humanitarian purposes;

(e) For research, administrative and quality control purposes;

(f) For judicial proceedings, by order of the court, if otherwise admissible pursuant to applicable statutes and rules;

(g) For criminal defense purposes, on behalf of a defendant, who shall have access to relevant samples and analyses performed in connection with the case in which defendant is charged; and

(h) For such other purposes as may be required under federal law as a condition for obtaining federal funding.

[N.J.S.A. 53:1-20.21.]

The DNA samples and profiles collected by the State may not be used for any other purpose, see N.J.S.A. 53:1-20.27, and the Act imposes disorderly-persons penalties upon anyone who makes an unauthorized disclosure. N.J.S.A. 53:1-20.26. The Act also permits expungement of a DNA record from the database if the criminal or juvenile adjudications that triggered its inclusion in the database have been reversed on appeal and the charges have been dismissed. N.J.S.A. 53:1-20.25. In such instances, the individual's DNA profile is to be deleted and the DNA sample itself is to be destroyed.

New Jersey routinely forwards its DNA profiles of adult offenders to the FBI for inclusion in CODIS. The data is transferred to CODIS through an electronic upload. To date, the State has not contributed the DNA profiles of juvenile offenders to CODIS, although the federal program was recently amended to allow CODIS to accept juvenile DNA profiles. See 42 U.S.C. § 14132(a)(1)(C)(eff. October 30, 2004).

As a participant in the CODIS system, New Jersey gains access to DNA profiles from around the country to ascertain if any of those profiles in CODIS matches (or, as the parlance goes, "hits") a DNA profile associated with a

crime scene or a criminal suspect in New Jersey.[5] Congress recently amended the federal DNA statutes to permit so-called "keyboard searches" of the CODIS database, thereby enabling one to compare results from a DNA sample to data in the CODIS index without adding information from that sample to the CODIS database itself. See 42 U.S.C. § 14132(e)(eff. October 30, 2004).

In general, if there is a "hit" achieved that links the DNA in a database to the DNA left behind at the scene of a crime, law enforcement officials will attempt to amass other evidence that ties that particular person to the offense. Often, the DNA analysis itself is not offered into evidence at trial. Rather, the DNA match becomes an important crime-solving tool in the investigatory phase, by ruling in a specific person as a suspect and by ruling others out.

Both plaintiffs here are subject to compulsory testing under the terms of the current statute. Plaintiff A.A., a sixteen year-old juvenile, was sentenced on October 20,

[5] DNA technology has now advanced to a point where a DNA profile can be generated from one nanogram of DNA, which can be extracted from very tiny amounts of biological material. Accordingly, DNA profiles can now be developed from "chewing gum, cigarette butts, drinking cups and bottles, clothing, eyeglasses, or just about any item that comes into substantial contact with sweat, skin, saliva, blood, semen, or any other bodily fluid." Supp. Certification of Linda Jankowski dated July 2, 2004, at ¶6.

2002 to eighteen months probation for his admitted assault of a law enforcement officer. That conduct, if it had been committed by an adult, would amount to a fourth degree crime under N.J.S.A. 2C:12-1b(5). A.A. was serving his term of probation at the time this lawsuit was filed.

The adult co-plaintiff, Jamaal W. Allah, pleaded guilty in 2001 of drug-related offenses in violation of N.J.S.A. 2C:35-5(2) and N.J.S.A. 2C:35-5(3), respectively. He was sentenced on December 1, 2001 to concurrent terms of five to ten years and four to eight years. Because Allah was incarcerated in State prison as of September 22, 2003, he was subject to DNA sampling prior to his release.

Plaintiffs filed this lawsuit in January 2004, principally seeking a preliminary and permanent injunction to prevent State officials[6] from collecting and maintaining their DNA samples. Plaintiffs allege that the compelled taking of their DNA violates several provisions of the federal and New Jersey Constitutions. Plaintiffs also seek

[6] The Complaint named as defendants the State Attorney General and the State Department of Corrections, each having a statewide role in implementing the collection and maintenance of DNA samples under the Act. The Complaint also named a third defendant, the "Mercer County Probation Services," an arm of the State Judiciary involved in administering statutorily-required DNA testing of juveniles. The Judiciary defendant took no position on the merits of the plaintiffs' claims. All defendants were represented in this action by the Attorney General.

declaratory and other incidental relief. Defendants cross-moved to dismiss the Complaint. At the suggestion of the Court, the parties consented to collapse the plaintiffs' request for a preliminary injunction into the disposition on their motion for a permanent injunction.

Given the pendency of the litigation, the parties also have entered into interim provisional arrangements regarding the DNA sampling of the parties. As to the juvenile A.A., his parents and the defendants have entered into a Consent Order (filed under seal pursuant to R. 1:4-1 and R. 5:19-2), through which the parents have agreed to present their son for the collection of a DNA sample within three weeks if the court denies him injunctive relief. Plaintiff Allah, meanwhile, has supplied a provisional DNA sample to the defendants, with the understanding that neither the sample or his DNA profile will be used or forwarded to the State databank or to CODIS unless and until ordered to do so by this court.

Because the constitutional issues before the Court almost entirely turn on questions of law rather than of fact, the parties agreed to forbear from exchanging discovery and did not request an evidentiary hearing. The parties instead relied upon extensive briefs and certifications. Counsel appeared for two lengthy sessions

of oral argument, and thereafter furnished the Court with a series of post-argument submissions, including memoranda addressing the implications of the Ninth Circuit's August 18, 2004 *en banc* opinions in United States v. Kincade, supra.

This Opinion now resolves the contested substantive issues.

II.

Our democracy has long enshrined the right of citizens to be free from indiscriminate governmental incursions upon their privacy. In that regard, the Fourth Amendment of the United States recites 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 . . . [.]" U.S. Const., amend IV. Likewise, the New Jersey State Constitution since 1844 has consistently proscribed "unreasonable searches and seizures." N.J. Const., Art. I, ¶7. These principles have remained at the core of our federal and state constitutional systems from agrarian times through the present era of modern technology.

Plaintiffs invoke these constitutional mandates to invalidate the State's DNA testing statutes, or at least to

prevent the application of those statutes to their own circumstances.

A. The Forcible Collection of a DNA Sample is a Search.

As a threshold matter, the Court considers whether the forcible collection of a DNA sample through either a pin-prick extraction of a person's blood, or the less intrusive buccal swabbing of the inside of a person's mouth, constitutionally amounts to a "search" or a "seizure." The answer is yes, a proposition that is not disputed by the State defendants.

It is well established that compulsory blood extractions are searches under the Fourth Amendment of the United States Constitution and under Article I, ¶7 of the New Jersey Constitution. Schmerber v. California, 384 U.S. 757, 767 (1966); State v. Ravotto, 169 N.J. 227, 236, 316 (2001). It makes no constitutional difference whether the blood is extracted through a syringe or through the prick of a pin; in both instances the State is conducting "intrusions into the human body." See Schmerber, supra, 384 U.S. at 767.

Unlike blood extractions, buccal swabbing does not require penetration of the skin. Nevertheless, the State-

compelled intrusion of a foreign object into a person's mouth, even if it is performed by that person, likewise amounts to a governmental search, and an attendant seizure of the person, regulated by the federal and state constitutions. The forced collection of such a biological specimen intrudes upon the person's privacy interest in bodily integrity. Cf. Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 616-17 (1989)(holding that forced "deep lung" breaths during breathalyzer exams are searches); N.J. Transit PBA Local 304 v. New Jersey Transit Corp., 151 N.J. 543 (1997)(deeming urine tests searches subject to constitutional requirements); In re J.G., 151 N.J. 565, 580 n.4 (1987)(observing that oral tests are searches). Other courts similarly have found that swabbing the inside of a person's mouth for a biological sample triggers constitutional search-and-seizure precepts.[7]

The Fourth Amendment generally requires law enforcement officials to procure a warrant, based upon probable cause, from a neutral magistrate or a judge before conducting a search. U.S. Const., amend. IV. This

[7] See, e.g., In re Shabazz, 200 F. Supp. 2d 578, 582-83 (D.S.C. 2002); Balding v. State, 812 N.E.2d 169, 173 (Ind. App. 2004); State v. Raines, supra, 857 A.2d at 27 (2004); Commonwealth v. Maxwell, 441 Mass. 773, 808 N.E.2d 806, 810 (2004); State v. Surge, 122 Wash. App. 451, 94 P.3d 345, 347-48 (2004).

constitutional mandate applies to the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

Nevertheless, the United States Supreme Court has fashioned a host of exceptions to the Fourth Amendment's general warrant requirement.[8] The question here is whether any of those recognized exceptions fairly applies to the warrantless searches of plaintiffs that are otherwise permitted under the New Jersey DNA Act.

B. The Judicial Obligation for "Discerning Inquiry"

The present factual context, involving as it does a search of the human body, is analytically significant. The Fourth Amendment requires "a discerning inquiry" to determine whether an intrusion into a human body is justifiable. Winston v. Lee, 470 U.S. 753, 760 (1985)(prohibiting state officials from forcing a man arrested for robbery to undergo surgery to remove a bullet lodged under his collarbone). Hence, forcibly obtaining a

[8] See, e.g., United States v. Flores-Montano, 540 U.S. 149 (2004)(border search of vehicle by customs inspectors) Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989)(random drug testing of certain railway workers); New York v. Burger, 482 U.S. 691 (1987) (administrative search of closely-regulated businesses); Chimel v. California, 395 U.S. 752 (1969)(search incident to lawful arrest); Terry v. Ohio, 392 U.S. 1 (1968)(brief stop-and-frisk of pedestrian based upon reasonable suspicion of criminal activity).

person's DNA, either through buccal swabbing or through a blood extraction, is constitutionally distinguishable from other steps in the processing of a criminal suspect or offender, such as fingerprinting or photographing a mug shot.

Neither fingerprinting nor the taking of a photograph involves a physical entry into a human body. The Supreme Court has not extended to fingerprinting the "discerning inquiry" of Fourth Amendment compliance otherwise demanded under Winston v. Lee. See, e.g., Davis v. Mississippi, 394 U.S. 721, 727 (1969)(noting that "[f]ingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search"). As to photographs, "it has been common practice for police to take mug shots of newly-arrested defendants, and no court has ever suggested that this practice somehow intruded on the defendant's Fourth Amendment rights." Caldarola v. County of Westchester, 142 F. Supp. 2d 431, 439 (S.D.N.Y. 2001); see also Simmons v. United States, 390 U.S. 377, 384 (1969) (upholding photograph identification as a procedure "used widely and effectively in criminal law enforcement."); State v. Farrow, 61 N.J. 434 (1972) (sustaining non-suggestive use of police mug shots).

Moreover, a DNA sample has the scientific capacity, whether it is utilized by the government or not, to reveal far more information about a person than his or her outward appearance or the contours of his or her fingertips. Subjected to certain laboratory analyses, a DNA sample may expose massive amounts of private traits such as a person's family history, health, and propensity for certain diseases. Although the New Jersey statute does not authorize the State to analyze forcibly-collected DNA samples for these intrusive purposes, the risk of illegal abuse or misuse of those samples by state actors elevates the DNA Act's threat to privacy far beyond that which may arise out of governmental compilation of mug shots and fingerprints.

For these reasons, the Court cannot resolve the important constitutional issues that are at stake in this case by simply analogizing DNA collection to long-standing permissible "booking" procedures such as fingerprinting and the taking of mug shots. Those other devices do not involve an intrusion into a bodily cavity, and also do not have the equivalent potential to uncover intimate details of a person's history and biological make-up. Instead, the Court is obliged to make a "discerning inquiry" into the

constitutionality of the DNA Act under the specific precepts of Fourth Amendment case law.

Faced with the prospect of such a discerning constitutional inquiry, the State defendants invoke two distinct strands of Fourth Amendment doctrine to validate the warrantless collection of plaintiffs' DNA.

First, the State defendants contend that the DNA Act is constitutionally justified under the so-called "special needs" doctrine, a doctrine exemplified by a line of Fourth Amendment cases dating back to New Jersey v. T.L.O., 469 U.S. 325 (1985). In developing this doctrine, the United States Supreme Court has identified several circumstances, in the workplace and elsewhere, in which the Court has abated the warrant requirement and allowed certain searches in order to serve, out of perceived necessity, vital public policies.

Alternatively, the State argues that the DNA Act passes muster under a "totality of the circumstances" analysis. See, e.g., Ohio v. Robinette, 519 U.S. 33, 39 (1996). Under this rubric, the Supreme Court has condoned warrantless searches in limited instances where it has been persuaded that the nature of the intrusion is modest in comparison to the strong governmental interests advanced by the search.

In response, plaintiffs argue that the special-needs doctrine cannot sustain the DNA Act because the New Jersey statute is predominantly designed to serve law enforcement objectives rather than other public policies. As to the State's alternative theory, plaintiffs dispute that a distinct "totality of the circumstances" exception to the warrant requirement even exists in Fourth Amendment jurisprudence. If such a doctrine is recognized at all, plaintiffs argue that it should not apply here because the overall negative impacts of the DNA Act upon civil liberties and individual privacy far outweigh the positive benefits that the statute may produce.

Each of these Fourth Amendment claims is respectively explored in Parts III and IV below.

III.

A. The "Special Needs" Doctrine

In New Jersey v. T.L.O., supra, 469 U.S. 325 (1985), the United States Supreme Court sustained the constitutionality of a warrantless search by a public school official of a high school student's purse. The official, an assistant vice principal, had received a report that the student had been smoking in the lavatory in violation of school rules. The Court upheld the search,

despite the absence of a warrant, because of "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." 469 U.S. at 339.

Given those substantial educational interests, the Court ruled in T.L.O. that a school is not required to adhere strictly to the requirement that searches be based upon probable cause to believe that a person has violated or is violating the law; instead, the legality of such a search "should depend simply on the reasonableness, under all the circumstances, of the search." Id. at 339. Applying that flexible standard to the facts in T.L.O., the Court upheld the search of the student's purse for cigarettes based upon the assistant vice principal's reasonable suspicion of wrongful behavior. Id. at 343-48.

In concurring in the result in T.L.O., Justice Blackmun observed that:

> Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests to that of the Framers.
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> [469 U.S. at 351 (Blackmun, J., concurring) (emphasis added).]

Justice Blackmun reiterated this "special needs" concept in the last paragraph of his concurrence:

> Education "is perhaps the most important function of government, *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed.2d 873 (1954), and government has a heightened obligation to safeguard students whom it compels to attend school. The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement, and in applying a standard determined by balancing the relevant interests.
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> [Id. at 353 (emphasis added).]

Following T.L.O., the Supreme Court has crafted the "special needs" doctrine first articulated by Justice Blackmun through a line of cases in which it has upheld certain searches conducted in the absence of a warrant based upon probable cause. See, e.g., Bd. of Educ. v. Earls, 536 U.S. 822 (2002)(validating random, suspicionless drug testing of students participating in all extracurricular activities); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995)(upholding random drug testing of student athletes); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)(upholding suspicionless drug testing of certain U.S. Customs workers); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616 (1989)(upholding mandatory blood and urine tests of railroad employees involved in serious train accidents); O'Connor v. Ortega, 480 U.S. 709, 720 (1987)(plurality opinion)(upholding a

public employer's search of an employee's office for legitimate work-related, noninvestigatory intrusions as well as for investigations of work-related misconduct). These cases often but not exclusively have arisen either in a workplace or in a school setting.

B. Edmond & Ferguson: The Inapplicability of the Special Needs Exception to "Ordinary" Law Enforcement Activity

The Supreme Court has declined, however, to adopt a special-needs exemption to the Fourth Amendment's warrant requirement in several cases in which the search was principally designed to further ordinary law enforcement objectives. Two such recent cases deserve close attention here: City of Indianapolis v. Edmond, 531 U.S. 32 (2000) and Ferguson v. City of Charleston, 532 U.S. 67 (2001).

In Edmond the Court considered the validity of a city's program in which local police would randomly stop passing motorists at certain checkpoints within the city limits. Upon detaining a vehicle, police officers would request the driver's credentials, make a visual inspection of the vehicle's interior, and lead a narcotics-detecting dog around its interior. The purpose of the program was to stop the flow of illegal drugs within the city. The city defended the absence of warrant or reasonable suspicion to

stop the vehicles because of the importance of attaining that governmental objective.

The Supreme Court declared the city's checkpoint program in Edmond unconstitutional. In doing so, the Court acknowledged the legitimacy of the city's drug interdiction objectives. Id. at 42 ("There is no doubt that traffic in illegal narcotics creates social harms of the first magnitude"). Nevertheless, it held that those aims did not qualify as needs that justified departure from the Fourth Amendment's warrant requirement. Finding that the "primary purpose" of the city's checkpoint program was "to detect evidence of ordinary criminal wrongdoing," 531 U.S. at 38, the Court distinguished the program from other cases in which the Court had upheld suspicionless roadside stops that had served arguably more distinctive and compelling state objectives.[9]

[9] Cf. United States v. Martinez-Fuerte, 428 U.S. 543 (1976)(upholding suspicionless border stops to identify and apprehend illegal aliens) and Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990)(upholding suspicionless highway sobriety checkpoints). The Court found these prior scenarios involved extraordinary factors not present in Edmond. The immigration checkpoints in Martinez-Fuerte were justified, among other reasons, because of the federal government's unique "interests in policing the Nation's borders," the "difficulty of effectively containing illegal immigration at the border itself," and the "impracticality of the particularized study of a given car to discern whether it was transporting illegal aliens." Edmond, 531 U.S. at 38. Likewise, the Court in Edmond explained its

Edmond instructs that the special-needs exception cannot be extended to the state's general interest in detecting and thwarting crime:

> [T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose. Rather, in determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue. We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.
>
> [Edmond, 531 U.S. at 42-43 (emphasis added).]

The Court concluded that "[b]ecause the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment." Id. at 48.[10]

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validation of the highway sobriety checkpoints in Sitz because the program "was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways," and the "obvious connection between the imperative of highway safety and the law enforcement practice at issue." Edmond, 531 U.S. at 39.

[10] One might be tempted to regard Edmond as something other than a "special needs" case, since the majority's analysis does not expressly compare the facts in Edmond to the facts in the Court's various special-needs precedents. However, Justice O'Connor clearly identifies the special-needs doctrine at the outset of Part II of the opinion of the Court in Edmond, noting that the doctrine has authorized "certain regimes of suspicionless searches where the

A year after Edmond, the Supreme Court reaffirmed the boundaries of the special-needs doctrine in Ferguson v. City of Charleston, supra, 532 U.S. 67 (2001). There a city hospital had embarked on a program to require urine samples from maternity patients who met one of nine or more criteria associated with possible cocaine usage. If the samples tested positive for cocaine, the hospital would share the results with the local police and the patient would be arrested.

Several pregnant women who had been prosecuted for drug crimes through the Charleston testing protocol sued the hospital, the city and the police, alleging that their bodily fluids had been taken by state actors without their consent in violation of the Fourth Amendment. The

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program is designed to serve 'special needs, beyond the normal need for law enforcement.'" Edmond, 531 U.S. at 36. That observation is consistent with the majority's rejection of the city's checkpoint program, as a measure primarily aimed at detecting evidence of "ordinary criminal wrongdoing." Id. at 41.

Moreover, Chief Justice Rehnquist's dissent in Edmond defending the constitutionality of the city's program eschewed reliance on the special-needs doctrine, a doctrine which the Chief Justice noted "has been used to uphold certain suspicionless searches performed for reasons other than law enforcement." Id. at 54 (Rehnquist, C.J., dissenting). Justice Scalia did not join in that part of Chief Justice Reqhnquist's dissent, but offered no separate opinion on the point.

Thus, eight of the nine members of the Court in Edmond agreed that the special-needs doctrine can only justify warrantless searches that are designed to achieve goals that are beyond the ordinary aims of law enforcement.

defendants argued that the protocol for warrantless testing of the patients' urine was justified as a means to detect and deter harm to innocent fetuses and their mothers caused by prenatal cocaine usage.

The Supreme Court invalidated the hospital's testing protocol in Ferguson, concluding it failed to qualify under the special-needs doctrine. The Court observed that "the central and indispensable feature of the [protocol] was the use of law enforcement to coerce the patients into substance abuse treatment," as distinguished from situations in which medical providers come across reportable information of drug abuse "in the course of ordinary medical procedures aimed at helping the patient herself." Ferguson, 532 U.S. at 80-81. That central link to law enforcement made the warrantless searches of the patients in Ferguson unconstitutional, even though the avowed "ultimate goal" of the program may have been to protect the health of both the tested mothers and their unborn children:

> While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal. The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary

> purpose of [the defendants'] policy was to ensure the use of those means. In our opinion, this distinction is critical.
>
> [Ferguson, 532 U.S. at 82-84 (italics in original; footnotes omitted).]

Given that primary purpose, combined with the "extensive involvement of law enforcement officials at every stage of the policy," the Court majority in Ferguson concluded that the case "simply does not fit within the closely guarded category of 'special needs.'" Id. at 84.[11]

Against this backdrop of precedent, this Court finds that the coerced and suspicionless taking of plaintiffs' DNA pursuant to the DNA Act is incompatible with the limitations on the special-needs doctrine expressed by the Supreme Court in Edmond and Ferguson.

C. The Primary Law Enforcement Purpose of the DNA Act

The primary purpose of the DNA Act unquestionably is to assist law enforcement. That conclusion is inescapable

[11] In his dissent in Ferguson joined by two other justices, Justice Scalia initially states that the special-needs doctrine is "quite irrelevant" to the obtaining of the plaintiffs' urine samples, which he regarded as non-coercive. Id., 532 U.S. at 97-98. (Scalia, J., dissenting). However, if one assumes the samples were taken with governmental coercion, Justice Scalia argues that there were ample legitimate medical reasons for doing so that, in his view, comprise "special needs" sufficient to excuse the warrantless nature of those searches. Id. at 98-104.

from the terms of the statute, its legislative history, and its implementation.

Section 53:1-20.18 of the DNA Act, which codifies the Legislature's findings underlying the statute, repeatedly declares its law enforcement objectives:

> The Legislature finds and declares that DNA databanks are an important tool in criminal investigations and in deterring and detecting recidivist acts. It is the policy of this State to assist federal, state and local criminal justice and law enforcement agencies in the identification and detection of individuals who are the subjects of criminal investigations. It is therefore in the best interest of the State of New Jersey to establish a DNA database and a DNA databank containing blood or other biological samples submitted by every person convicted or found not guilty by reason of insanity of a crime. It is also in the best interest of the State of New Jersey to include in this DNA database and DNA databank blood or other biological samples submitted by juveniles adjudicated delinquent or adjudicated not delinquent by reason of insanity for acts, which if committed by an adult, would constitute a crime.
>
> [N.J.S.A. 53:1-20.18 (as amended 2003)(emphasis added).]

As noted above, the Act is explicitly aimed at assisting "federal, state and local criminal justice law enforcements agencies." Id. To support those crime-stopping efforts, the statute creates a State program for DNA databanks, which the Legislature finds are "an important tool in criminal investigations."

Although Section 21 of the Act lists certain benign alternative uses for DNA databanks, see N.J.S.A. 53:1-20.21, none of them are set forth in the legislative findings in the Act's preamble. Rather, the preamble underscores the core law enforcement objectives of "deterring and detecting recidivist acts," and the "identification and detection of individuals who are the subjects of criminal investigations." Id. at 53:1-20.18. Not a word is mentioned in the codified legislative findings about exonerating the innocent, identifying the remains of mass disaster victims, conducting scientific research, or other humanitarian purposes. The focus is on law enforcement.

The legislative proceedings that led to the current version of the DNA Act also focused, almost exclusively, on the law enforcement benefits of a State-maintained DNA database. When the original version of the Act was adopted in 1994, the Assembly Judiciary, Law and Public Safety Committee explained that the statute would require certain sexual offenders to provide samples "for DNA profiling and for use in connection with subsequent criminal investigations." Assembly Judiciary, Law & Public Safety Committee Statement to A-1592, L. 1994, c. 136, at ¶ 2. The Assembly Committee in 1994 highlighted that the results of

such testing "would then be available to federal, State and local law enforcement agencies involved in investigating criminal offenses." Id. It also highlighted the ability of the State to contribute that data to the national CODIS database then being developed by the FBI. Id. at ¶ 3.

When the Legislature most recently expanded the DNA Act in 2003 to include a wider range of adult and juvenile offenders, the Senate Committee reporting out the bill singled out the law enforcement benefits that would ensue:

> According to the sponsor, expanding this State's DNA database will greatly enhance the ability of law enforcement to solve crimes. Other states which collect DNA samples for a wider range of crimes have experienced a large increase in database "hits," particularly with respect to property crimes, such as burglary and robbery.
>
> [Senate Budget & Appropriations Committee Statement to A-2617, L. 2003, c. 183, at ¶ 8 (emphasis added).]

The Senate Statement mentions no other purposes or benefits. Moreover, this Court's on-line review of public audiotapes from the Senate and Assembly Committee hearings that considered the Act's revision in 2003 further confirms the law enforcement focus of the statute.[12]

[12] See, e.g., Audiotape of Senate Law & Public Safety Committee Hearing on A-2617, November 25, 2002, at http://www.njleg.state.nj.us/media/archive_audio2.asp (last visited 12/20/04), in which the sponsor of the bill, Senator Sacco, led off the discussion by remarking that "I feel this bill encompasses what we should be doing today

The design of the DNA Act is also closely intertwined with law enforcement activities. The statute is administered predominantly by criminal justice agencies: the Division of the State Police and the Division of Criminal Justice in the Department of Public Safety.[13] The statute directs the State Police to retain all DNA profile information taken from the offenders' biological samples, and to forward such data, at least for adults, to the FBI

[and] would be a great help to law enforcement." Id. at 1:24:00 EST (emphasis added). The Attorney General's representatives who testified at that hearing in favor of the amendment touted the importance of the DNA databank to law enforcement, the problems of recidivism among convicted offenders, and the impressive frequency of positive hits for criminal activity derived from DNA databanks in other jurisdictions such as England and the State of New York. Id. at 1:24:57 to 1:45:00 EST.

Law enforcement objectives similarly dominated the discussion in proceedings on A-2617 conducted in the State Assembly. See Audiotape of Assembly Law and Public Safety Committee Hearing on A-2617, December 9, 2002, at http://www.njleg.state.nj.us/media/archive_audio2.asp (last visited 12/20/04); and Audiotape of Assembly Appropriations Committee Hearing on A-2617, February 3, 2003, at http://www.njleg.state.nj.us/media/archive_audio2.asp (last visited 12/20/04).

Although the potential of an expanded New Jersey DNA databank to exonerate innocent persons was also mentioned in these proceedings, that feature was overshadowed by the legislative emphasis on law enforcement benefits.

[13] The DNA program includes an incidental role of the State Judiciary, utilizing the services of probation officers and family court personnel to assist in the collection of DNA samples from probationers and juveniles. The Department of Corrections and the Juvenile Justice Commission also participate in the sampling process. The Administrative Office of the Courts also has a role in collecting traffic ticket surcharges that help fund the program.

for inclusion in CODIS. N.J.S.A. 53:1-20.37(a). The Attorney General is the cabinet officer responsible for adopting rules for the analysis and storage of DNA profile information. See N.J.S.A. 53:1:20.37(b).

To be sure, the statute also contemplates various uses of the state DNA databank that do not necessarily assist law enforcement authorities, such as population research and identifying human remains from mass disasters. See N.J.S.A. 53:1:20.21(b) and (d). But these laudable uses are ancillary to the law enforcement thrust of the statute. The DNA databank's most salient functional advantage is in assisting prosecutors and investigators in identifying the perpetrators of crimes. The non-criminal uses of the statute do not emasculate that focus: to detect and deter "ordinary criminal wrongdoing." See Edmond, supra, 531 U.S. at 41.

The State suggested at oral argument that the Act's primary purpose may be conceived more broadly as "citizen safety," but the Court regards that term as a euphemism for law enforcement. As the Supreme Court majority recognized in Ferguson, such a broad label cannot mask the law enforcement goals that are at the core of a state-mandated search and seizure:

> Because law enforcement involvement always serves some broader social purpose or objective, under [the defendants'] view, virtually any nonconsensual search could be immunized under the special needs doctrine by defining the search in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment.
>
> [Id. at 84 (emphasis added; footnote omitted).][14]

D. Other "Special Needs" Case Law

The foregoing analysis is not altered by the most recent special-needs case[15] decided by the Supreme Court, Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885 (2004). In Lidster the Court upheld a state highway checkpoint that had been set up a week after a fatal hit-and-run accident. The checkpoint was not aimed at gathering evidence to incriminate the motorists who were stopped, but instead was designed to obtain "their help in providing information

[14] See also Edmond, supra, 531 U.S. at 42 (rejecting the defendant city's efforts to liken the primary purpose of its challenged roadblock program to the goals involved in the Court's prior cases upholding border-patrol and drunk-driver roadblocks, noting that "[i]f we were to rest the case at this level of generality, there would be little check on the ability of the authorities to construct roadblocks for any conceivable law enforcement purpose").

[15] In upholding the police checkpoint in Lidster and distinguishing it from the checkpoint invalidated in Edmond, Justice Breyer's majority opinion in Lidster refers to "special circumstances," rather than to "special needs." See 124 S.Ct. at 889. That slight variation in terminology does not appear to connote any substantive difference.

about a crime in all likelihood committed by others." Id., 124 S.Ct. at 889. The Court observed that the stopped motorists in Lidster were not apt to suffer adverse consequences from their encounter with police personnel. Ibid. The cooperation sought from them, as "members of the public," was purely voluntary. Ibid.

Given the recency of the fatal accident and the brief, non-inculpatory nature of the police action, the Court found that the suspicionless stop in Lidster was reasonable and constitutional. Id. at 890-91. The Lidster scenario is very different from the State defendants' coercive effort here to obtain plaintiffs' DNA, mainly for the purpose of potentially linking them to past or future crimes.

Perhaps the Supreme Court opinion that comes nearest to supporting a special-needs exception in the present case is Griffin v. Wisconsin, 483 U.S. 868 (1987). At the relevant time, Griffin was on probation in the State of Wisconsin for a prior felony. A probation supervisor learned that Griffin might have guns in his apartment. The supervisor went to Griffin's apartment, along with another probation officer and three plainclothes policemen, and insisted on entering the premises. The officers went inside and, in the course of their search, discovered a handgun.

Based on that evidence, Griffin was indicted and convicted of a weapons offense.

The Supreme Court, by a 5-4 vote, upheld the warrantless search of Griffin's apartment. The majority opinion, authored by Justice Scalia, concluded that the State of Wisconsin's "special needs" in its probation system justified the search under the Fourth Amendment. The majority noted that "[a] State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." Griffin, 483 U.S. at 873-74.

Although the search in Griffin was conducted without a warrant, it flowed out of a situation in which a government official had a credible, particularized basis to believe that Griffin was then in possession of an illegal firearm in his home. The Court found that informed tip, even if it did not amount to probable cause, constituted "reasonable suspicion" that justified an invasion of the probationer's privacy. Id. at 880. That reduced level of suspicion, along with Griffin's state-monitored status as a probationer,

sufficed to excuse the absence of a warrant otherwise required under the Fourth Amendment.

Unlike the plaintiffs' circumstances before this Court, the search authorized by the Court in Griffin was not suspicionless. Indeed, the Court majority in Griffin expressly stated that the record presented before it, including a state regulation that allowed searches of probationer's home when there are "reasonable grounds" for doing so, made it "unnecessary to consider" whether the search would have been upheld under different circumstances. Ibid.

This Court is reluctant to extend the "special needs" justification of Griffin to the instant case for several reasons. First, as explained in more detail in Part IV of this Opinion, infra, the Supreme Court subsequently revisited the constitutionality of a warrantless search of a probationer in United States v. Knights, 534 U.S. 112 (2001), and upheld that search upon a "totality-of-the-circumstances" basis rather than upon a special-needs rationale. Second, the special-needs analysis in Griffin now appears qualified by the doctrinal caveats the Court thereafter expressed in Edmond and Ferguson. Third, unlike Griffin, the present case does not involve a reasonable

suspicion that either plaintiff is guilty of an unsolved crime.

This Court is well aware that many courts have relied on the special-needs doctrine to validate DNA testing conducted in other jurisdictions.[16] However, the more dominant trend in the case law is to turn to other rationales for sustaining compulsory DNA testing programs.[17]

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[16] See, e.g., Green v. Berge, 354 F.3d 675, 679 (7th Cir. 2004)(special needs rationale); see also United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003)(same); Roe v. Marcotte, 193 F.3d 72, 79-82 (2d Cir. 1999)(same); Vore v. U.S. Dep't of Justice, 281 F. Supp. 2d 1129, 1133-35 (D.Ariz. 2003)(same); Miller v. U.S. Parole Comm'n, 259 F. Supp. 2d 1166, 1175-78 (D.Kan. 2003)(same); United States v. Sczubelek, 255 F. Supp. 2d 315, 319-23 (D.Del. 2003)(same); United States v. Reynard, 220 F. Supp. 2d 1142, 1165-69 (S.D.Cal. 2002)(same); State v. Martinez, 276 Kan. 527, 78 P.3d 769, 771-75 (2003)(same); State v. Olivas, 122 Wash. 2d 73, 856 P.2d 1076, 1085-86 (1993)(same); Balding v. Indiana, supra, 812 N.E.2d 169 (Ind. App. 2004)(same); State v. Steele, 155 Ohio App.3d 659, 802 N.E.2d 1127, 1132-37 (2003)(same); In re D.L.C., 124 S.W.3d 354, 370-73 (Tex.App. 2003)(same); State v. Surge, supra, 122 Wash. App. 451, 94 P.3d 345 (2004)(same).

[17] Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413-14 (5th Cir. 2004) (per curiam)(relying on a "totality of the circumstances" rationale rather than "special needs" exception in sustaining DNA collection statute); see also Velasquez v. Woods, 329 F.3d 420, 421 (5th Cir. 2003) (per curiam); Jones v. Murray, 962 F.2d 302, 306-07 (4th Cir. 1992)(same); Nicholas v. Goord, 2004 WL 1432533, *2-*6 (S.D.N.Y. Jun 24, 2004)(same); United States v. Stegman, 295 F. Supp. 2d 542, 548-50 (D.Md. 2003)(same); Padgett v. Ferrero, 294 F. Supp. 2d 1338, 1343-44 (N.D.Ga. 2003)(same); United States v. Meier, No. CR97-72HA, 2002 U.S. Dist. LEXIS 25755 (D.Or. 2002)(same); United States v. Lujan, No. CR98-480-02HA, 2002 U.S. Dist. LEXIS 25754 (D.Or. 2002)(same); In re Shabazz, supra, 200 F. Supp. 2d

Two of the most recent appellate cases on the subject exemplify that trend. On August 18, 2004, the United States Court of Appeals for the Ninth Circuit, sitting *en banc*, comprehensively addressed the validity of the federal DNA collection statutes in United States v. Kincade, supra, 379 F.3d 813 (9th Cir. 2004). The Ninth Circuit upheld the federal statutes by a 6-5 vote, with five of the judges in the majority relying upon a "totality of the circumstances" rationale,[18] and only one judge in that majority relying upon the special-needs doctrine.[19]

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578 (D.S.C. 2002)(same); Shelton v. Gudmanson, 934 F. Supp. 1048 (W.D.Wis. 1996)(same); Kruger v. Erickson, 875 F. Supp. 583 (D.Minn. 1995)(same); Vanderlinden v. Kansas, 874 F. Supp. 1210 (D.Kan. 1995)(same); Sanders v. Coman, 864 F. Supp. 496 (E.D.N.C. 1994)(same); Ryncarz v. Eikenberry, 824 F. Supp. 1493 (E.D.Wash. 1993)(same); Landry v. Attorney General, 429 Mass. 336, 343-48, 709 N.E.2d 1085 (1999)(same); Gaines v. State, 116 Nev. 359, 998 P.2d 166, 171-73 (2000)(same); Johnson v. Commonwealth, 259 Va. 654, 529 S.E.2d 769, 779 (2000)(same); Doles v. State, 994 P.2d 315, 317-20 (Wyo. 1999)(same); In re Maricopa County Juvenile Action, 187 Ariz. 419, 930 P.2d 496, 500-01 (1996)(same); People v. Adams, 115 Cal. App. 4th 243, 9 Cal. Rptr. 3d 170, 180-84 (2004)(same); L.S. v. State, 805 So.2d 1004, 1006-07 (2001)(same); People v. Calahan, 272 Ill. App. 3d 293, 208 Ill. Dec. 532, 649 N.E.2d 588, 591-92 (1995)(same); Cooper v. Gammon, 943 S.W.2d 699, 704-05 (Mo.Ct.App.1997)(same).

[18] See the plurality opinion of Circuit Judge O'Scannlain, joined by Chief Judge Schroeder and Circuit Judges Silverman, Clifton, and Callahan. Kincade, 379 F.3d at 816, 832("While not precluding the possibility that the federal DNA Act could satisfy a special needs analysis, we today reaffirm the continuing vitality of . . . reliance on a totality of the circumstances analysis to uphold compulsory

Similarly, on August 26, 2004, the Maryland Court of Appeals held by a 4-3 vote in State v. Raines, supra, that the Maryland DNA Collection Act does not violate the Fourth Amendment. The majority in Raines relied upon a totality-of-the-circumstances rationale, with the plurality opinion declining to address whether the DNA testing compelled by the Maryland statute would come under a special-needs exception.[20]

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DNA profiling of convicted offenders[.]").

[19] See the concurring opinion of Circuit Judge Gould. Id. at 840-42. The five dissenting judges in Kincade found the federal statutes could not be justified under either a totality-of-the-circumstances or a special-needs rationale. Id. at 842-71 (Reinhardt, C.J., dissenting, joined by Circuit Judges Pregerson, Kozinski and Wardlaw), at 871-75 (Kozinski, C.J., dissenting), and at 875-76 (Hawkins, C.J., dissenting).

[20] State v. Raines, supra, 383 Md. at 14-15, 857 A.2d at 27. (plurality opinion of Cathell, J., joined by Battaglia, J.). The two concurring judges in Raines specifically rejected the State's argument that the Maryland statute qualified for a special-needs exception, because they both conceived that the statute's purpose was "to further normal law enforcement needs." Id., 383 Md. at 43 n.1, 857 A.2d at 44 n.1 (Raker, J., concurring), and 383 Md. at 49-51, 857 A.2d at 48-50 (Wilner, J., concurring). Meanwhile, the three dissenting judges found that the statute could not be sustained under any Fourth Amendment exception, including the special-needs doctrine. Id., 383 Md. at 52-76, 857 A.2d at 50-64 (Bell, C.J., dissenting, joined by Harrell and Greene, JJ.). Thus, five of the seven judges in the State of Maryland's highest court have rejected a special-needs rationale for suspicionless DNA testing of convicted persons, with the other two members of that Court not reaching the question.

In sum, although the question is not free from doubt, this Court concludes that the suspicionless taking of plaintiffs' biological tissue pursuant to the DNA Act is not defensible under the special-needs doctrine. The Court next considers alternative Fourth Amendment justifications for the statute in Part IV below.

IV.

Apart from searches it has justified under a "special needs" exception, the United States Supreme Court on occasion has upheld other warrantless searches that it has deemed reasonable. These occasions are difficult to classify, but nonetheless provide an independent basis for compliance with the strictures of the Fourth Amendment.

A. The Standard of Reasonableness Under the "Totality of Circumstances"

The Fourth Amendment literally protects "[t]he right of people to be secure in their persons, houses, papers and effects, against unreasonable searches [.]" U.S. Const., amend IV. (emphasis added). This standard of reasonableness at times has offered a sufficient basis for the Court to excuse the government's failure to obtain a warrant before conducting a search. "The touchstone of [the Court's]

analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977), quoting Terry v. Ohio, supra, 392 U.S. at 19 (emphasis added).

The State defendants invoke such a standard of reasonableness, under what has been described at times as the "totality of the circumstances" test. Plaintiffs dispute the legitimacy of such a constitutional standard, arguing that the Supreme Court has not condoned suspicionless searches based upon generalized notions of what may seem reasonable.

Although the legal principles have not been expressed with analytic precision or unwavering consistency, the Supreme Court has indeed authorized warrantless searches in several cases where it has found the search, all things considered, to be reasonable.[21] That residual justification under the Fourth Amendment was described by the Court in an automobile search case, Ohio v. Robinette, 519 U.S. 33 (1996), in this fashion:

> Reasonableness . . . is measured in objective terms by examining the totality of the circumstances. In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the

[21] See, e.g., the cases cited in footnote 8, supra.

> reasonableness inquiry. Thus, in Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), we expressly disavowed any "litmus-paper test" or single "sentence or . . . paragraph . . . rule," in recognition of the "endless variations in the facts and circumstances" implicating the Fourth Amendment.
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> [Id., 519 U.S. at 506(emphasis added).]

The test involves a balancing of the invasiveness of the search against the public good that the search is designed to advance.[22]

B. Probationers and the Implications of U.S. v. Knights

This Court recognizes that, carried to the extreme, the totality-of-the-circumstances standard has the dangerous potential to eviscerate the fundamental rights of privacy afforded to citizens under our Constitution. However, the Supreme Court has been sparing in its invocation of that test, reserving it for a very narrow

[22] Analytically, the demarcation of the Supreme Court's "special needs" holdings from its "totality of the circumstances" (or "reasonableness") precedents is elusive. Both standards, at bottom, require a judge to compare the state interests achieved by a warrantless search to the severity of the privacy invasion that the search inflicts. The most cogent explanation of the dividing line between these tests may be the teaching of Edmond and Ferguson: that the "special needs" exception cannot justify searches performed to advance the goals of ordinary law enforcement. By implication, the totality-of-the-circumstances doctrine may allow a warrantless search carried out as part of such ordinary law enforcement activity, provided that the search is sufficiently reasonable.

band of cases in which it has found the privacy intrusion associated with a search to be minimal and the State's interests in conducting it to be formidable.

That sparing approach is illustrated by United States v. Knights, 534 U.S. 112 (2001), a decision that, for a variety of reasons, is especially germane to the factual setting here. The defendant in Knights was on probation in the State of California for a drug offense. As a condition of his probation, the state court had ordered that Knights submit to a search of his person or property "at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement." Id. at 114.

Three days after Knights was placed on probation, a local power plant was vandalized and set afire. Knights, who had an ongoing dispute with the power company, was suspected of being involved in the break-in and the arson, along with a friend. The police conducted surveillance of Knights' apartment, and observed his friend carrying items out of the apartment that resembled pipe bombs. Having made that and other observations of suspicious activity, the police entered Knights' premises, relying upon the terms of the probation order. Once inside, they found various incriminating objects for making bombs.

The Supreme Court unanimously upheld the warrantless search of Knights' residence. In particular, the Court concluded that "the search of Knights was reasonable under [its] general Fourth Amendment approach of 'examining the totality of the circumstances.'" Id. at 118. In reaching that result, the Court stressed Knights' status as a probationer, "with the probation search condition being a salient circumstance." Id.

The Court in Knights balanced the defendant's individual privacy interests against the state's interests in monitoring his behavior while he was on probation. It observed that, as a probationer, Knights had a "significantly diminished" expectation of privacy. Id. at 120. The Court repeated themes it had advanced about probationers in Griffin v. Wisconsin, supra:

> "Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.' " *Griffin, supra*, at 874, 107 S.Ct. 3164 (quoting G. Killinger, H. Kerper, & P. Cromwell, Probation and Parole in the Criminal Justice System 14 (1976)). Probation is "one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." 483 U.S., at 874, 107 S.Ct. 3164. Inherent in the very nature of probation is that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled.'" Ibid. (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). 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.
>
> [United States v. Knights, supra, 534 U.S. at 119 (emphasis added).]

Weighed against that reduced expectation of privacy are the two primary goals of probation identified by the Supreme Court: (1) rehabilitation and (2) the protection of society from future violations. Id. As to the latter goal, the Court pointed to a litany of crime statistics showing that "the recidivism rate of probationers is significantly higher than the general crime rate." Id. at 120. The Court further noted that "probationers have even more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal, because [they] are aware that they may be subject to supervision and face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply." Id.

Having so defined the competing interests at stake, the Court in Knights readily concluded that the search of his abode was reasonable. It did so without resorting to any "special needs" analysis, a doctrine mentioned purely for comparative purposes at the end of the majority

opinion. Id. at 122. As the most recent case on the subject, Knights has effectively displaced Griffin as the seminal Fourth Amendment authority on probationer searches.

C. Applying the "Totality of Circumstances" Test to the DNA Act

Guided by the Supreme Court's analysis in Knights, this Court accepts the State defendants' request to evaluate the DNA Act under a "totality of the circumstances" standard. That exercise requires an assessment of the interests respectively advanced, and infringed by the compulsory taking and profiling of plaintiffs' DNA.

On the State's side of the ledger, there is much to be said for the technological benefits of a government-maintained DNA databank. As noted above, DNA analysis offers a uniquely-reliable means of identifying a human being. A positive DNA match may save law enforcement agents countless hours in identifying the perpetrator of an offense. Conversely, a negative DNA result may conserve scarce law enforcement resources that otherwise might be diverted to investigating persons for offenses they did not

commit. The guilty are more readily targeted, and the innocent are more readily extricated.[23]

The law enforcement benefits of DNA are probably not confined to offender detection and identification. A widely-publicized program for collecting DNA samples from convicted adults and delinquent juveniles could help deter future crimes. Although the data on this point is not yet well developed, there is an intuitive logic to the proposition that a past offender might think twice about committing another offense if his or her DNA profile is on file with the government. The logic is buttressed by the fact that is exceedingly difficult for a human being to avoid leaving a DNA trail behind at a crime scene, such as a hair, a flake of skin, even a few particles from an ill-timed sneeze.

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[23] The statistics furnished by defense counsel showing the efficacy and frequency of "hits" from DNA databanks are impressive. For example, Canadian authorities reported that their national DNA database produced 763 hits linking DNA to criminal activity in 2002-03, triple the amount the databank had produced in the pervious year. Annual Report of the National DNA Data Bank of Canada for 2002-03, at p. 6. In the State of New York, 282 hits for criminal activity from its database were reported between January and August 2002, more than double the amount produced in New York the previous year. See Bar Graph with New York State DNA Databank Statistics Presented by Assistant Attorney General Patricia Prezioso to N.J. Senate and Assembly Committees at the legislative hearings on L. 2003, c.183, identified in footnote 12, supra.

On the other hand, a person in the custody of the State or under its supervision, as the Court noted in Griffin and reiterated in Knights, has a diminished expectation of privacy. Prisoners, probationers and parolees do not enjoy the degree of liberty or privacy possessed by the average citizen. If housed in a state institution, such persons are routinely subjected to bed checks, bunk searches, property inventories, and other incursions on their privacy.[24] If released into the community under state supervision, they typically face ongoing restraints such as mandatory reporting to probation officers, travel restrictions, curfews, and the like.

Yet despite the reduced nature of the privacy expectations of a person who is or remains a ward of the State, the Supreme Court has not declared such individuals completely unworthy of Fourth Amendment protection. Indeed, in upholding the search of the probationer in Knights, the Supreme Court admonished that it was *not* deciding whether "a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." Knights, supra, 534 U.S. at 120 n.6. The Court repeatedly

[24] See, e.g., Hudson v. Palmer, 468 U.S. 517 (1983)(upholding suspicionless search of prisoner's cell).

noted in Knights that the search of defendant's home was based upon "reasonable suspicion" that he had been involved in the crimes at the utility plant. Id. at 118, 120, 121 and 122.

Similarly, as noted in Part III of this opinion, the facts in Griffin also involved a reasonable suspicion of criminal activity, founded upon a report that Griffin was keeping an illegal firearm in his residence. Griffin, 483 U.S. at 880. See also State v. Maples, 346 N.J. Super. 408 (App. Div. 2002)(upholding a parole officer's warrantless search of a crumpled paper bag seen on the floor in a parolee's bedroom, where the officer had reasonable suspicion that the bag contained drug-related contraband).

Plaintiffs argue that they may not be subjected to a search for their DNA without, at a minimum, a reasonable suspicion that they have committed another offense beyond the offenses for which they are now being punished. That argument overlooks, however, the fact that the Supreme Court at times has upheld warrantless searches even in the absence of reasonable suspicion.[25] The Court has yet to

[25] See, e.g., Chandler v. Miller, 520 U.S. 305, 323 (1997)("[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'— for example, searches now routine at airports and at entrances to courts and other official buildings"). See also Mich. Dep't of State Police

declare that reasonable suspicion is a *sina qua non* for a warrantless search to be defensible under the Fourth Amendment.

D. Temporal Factors

An important thread that seems to run through many of the Supreme Court cases that have approved warrantless searches, with or without reasonable suspicion, is the element of time. The cases typically involve a temporal connection between the privacy invasion itself and the government's interests in reaping the fruits of that invasion. For instance, in the border patrol, roadblock or regulatory search cases, the government is usually concerned with a crime that either has recently transpired or may be ongoing. In the search-incident-to-arrest context, the immediate safety of the arresting officer is at potential risk.

Such a temporal relationship lies beneath the Supreme Court's resolution of the probationer cases in Griffin and Knights. In Griffin, there was an immediate public safety

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v. Sitz, supra, 496 U.S. 444 (1990)(upholding suspicionless highway sobriety checkpoints); Hudson v. Palmer, supra, 468 U.S. 517(1983)(upholding suspicionless search of prison cell); United States v. Martinez-Fuerte, supra, 428 U.S. 543 (1976)(upholding suspicionless border stops to identify and apprehend illegal aliens).

concern that the defendant was housing a firearm in his room. In Knights, the police were concerned about incendiary devices being moved out of defendant's apartment into a motor vehicle. The present need for those searches overlapped with the continued duration of the state's supervisory role over the probationers. Had they already completed their terms of probation and had resumed civilian life, the defendants may not have been constitutionally suspectible to such warrantless entries into their homes.

Given these various considerations, it is doubtful that the United States Supreme Court would allow the government to compel a DNA sample from a civilian person without a search warrant, or at least without some reasonable suspicion that the person is violating or has violated the law. It is also doubtful that the Court would permit the government to require a released offender who has completed his or her jail term and all post-release supervision to provide thereafter a DNA sample on demand.[26]

[26] In his concurring opinion in United States v. Kincade, supra, Judge Gould aptly observed that "[w]ith monumental increases in technologies, [the] alarm about technology's assault on privacy must be seriously pondered. A nice question, if and when properly presented, would be whether DNA samples, though lawfully obtained from a felon on supervised release, may properly be retained by the government after the felon has finished his or her term and has paid his or her debt to society." Kincade, 379 F.3d at

Although the method for taking the DNA sample may not be painful or laborious, the privacy interests of civilians cannot be so readily sacrificed to ordinary law enforcement goals.

However, while an individual is incarcerated, or is under the ongoing post-release supervision of the state, the constitutional balance shifts. As the Court recognized in Knights, the State's "interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise, may . . . justifiably focus on probationers in a way that it does not on the ordinary citizen." Knights, supra, 534 U.S. at 111. Obtaining a DNA sample from such a person, and maintaining it through his or her period of incarceration and supervision, comports with both the objectives of the penal system and the curtailed privacy expectations of inmates and probationers.

If, for example, the DNA profile reveals that the subject has committed another offense while in jail, or while on probation or parole, that revelation will rightly affect his or her custody status. The new offense, if proven, will support an extension of the subject's prison

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842 (Gould, J., concurring). This Court answers that hypothetical question in the negative.

sentence, a revocation of probation or parole, or other sanctions.

If, alternatively, the DNA profile reveals that the subject had committed some other offense before his or her present conviction, that criminal history should influence the manner in which the State continues to supervise that person. A person imprisoned or on probation for a simple drug possession offense is apt to be guarded or monitored more closely if a DNA match reveals that he or she had previously engaged in a serious crime of violence.

Further, as noted, supra, the State's acquisition of the inmate's or probationer's DNA may deter that person from committing any future offenses. Such deterrence would advance the rehabilitative goals of the criminal justice system.

A DNA profile also has administrative value in identifying and tracking a convicted offender while he or she is being housed in a state institution or is participating in state-supervised programs. Government has a long-recognized interest in "the acquisition, collection, classification and preservation of identification records of those processed through the criminal tribunals." United States v. Krapf, 285 F.2d 647, 650 (3d Cir. 1961). The unique capacity of DNA to confirm a person's identity

should be useful to prison administrators and to parole or probation officers in managing the populations who are assigned to them.[27]

Once a felon has paid his or her debt to society and has fully resumed civilian life, the State's right to maintain that person's DNA sample withers. The defendants do not accept this proposition, arguing that as long as the DNA sample was lawfully obtained in the first place, the State has a constitutional entitlement to retain that sample forever. That argument proves too much. It is the pendency of the individual's status as an inmate or as a probationer that makes it reasonable, under the totality of the circumstances, for his or her bodily tissues to be extracted for the use of the State. If and when that supervised status ends, the individual's privacy expectations increase and the State's justifications for maintaining the DNA profile decline.

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[27] In fact, this identification feature became the salient factor for two of the concurring Maryland judges who voted in State v. Raines, supra, to uphold that State's DNA collection statute. See State v. Raines, supra, 383 Md. at 43, 857 A.2d at 44 (Raker, J., concurring) ("I write separately because, in my view, the statute is constitutional on the narrow grounds that DNA sampling is an acceptable means of identifying prisoners, and on this basis alone, is reasonable.") and 383 Md. at 50-52, 857 A.2d at 48-50 (Wilner, J., concurring) (noting the reduced privacy expectations of inmates and probationers and the constitutionally-reasonable use of DNA as a "reliable identifier" to track such persons).

Permanently retaining a former offender's seized DNA in a state database is somewhat akin to the government keeping his property without a forfeiture hearing[28] or a waiver of an interest in that property. See N.J.S.A. 2C:64-1 to -9; State v. One 1990 Honda Accord, 154 N.J. 373 (1998) (describing elements of forfeiture law). Once an inmate has done his time, he should get back his personal belongings. See N.J.A.C. 10A:1-11.8 (specifying procedures for the disposition of an inmate's personal property upon release). The State has not demonstrated a constitutional basis for doing otherwise here.

E. Expungement as a Condition to Sustain the DNA Act's Constitutionality

For these reasons, subject to certain conditions, the Court finds that the DNA Act is reasonable under the Fourth Amendment. The State may coercively extract a DNA sample from a prisoner, a probationer or a parolee. The State also may retain that sample, and the data derived from it, for the duration of that person's period of confinement or supervised release. It may take these steps without obtaining a search warrant and without having reasonable

[28] Parenthetically, it is hard to imagine how DNA extracted from a subject's mouth or blood sample could be regarded as "fruits" or "instrumentality" of a crime subject to forfeiture. The Court does not resolve that question here.

suspicion that the subject has committed another offense. However, once that person has been fully restored to civilian life, the State must expunge the sample and the associated data if that individual asks it to do so.

The Court engrafts a right of post-supervision expungement upon the DNA Act as an appropriate measure to save the law's constitutionality. As a general matter, statutes are presumed to be constitutional, see Paul Kimball Hospital, Inc. v. Brick Township Hospital, Inc., 86 N.J. 429, 446-47 (1981), but when judicial review determines that a statute is constitutionally flawed, the court is authorized to construe it in a fashion that will preserve its validity. In re Village of Loch Arbour, 25 N.J. 258 (1957) ("if the statute under attack admits of two constructions, one of which will render it invalid and the other valid, the interpretation sustaining constitutionality will be adopted.")

Here, the statute already contains a provision that allows expungement of a subject's DNA in situations when his or her conviction is overturned on appeal. See N.J.S.A. 53:1-20.25. Although the State apparently has not yet adopted specific regulations for the expungement of DNA information, the State does have established general procedures for expungements to be applied for, granted, and

implemented. See N.J.S.A. 2C:52-1 et seq. The additional grounds for expungement which are recognized, out of constitutional necessity, by this Opinion should be administered through those existing procedures with suitable adaptations. To ease administrative burdens, the onus shall be on the released offender to pursue expungement, rather than requiring the State to purge its records automatically.[29]

Further, the State may contribute the DNA data of offenders who are within its custody or supervision to other governmental agency databanks, so long as the agencies provide those persons with equivalent means of post-supervisory expungement.[30]

The defendants might worry that this holding will hamstring the State's practical ability to take full advantage of the rich technological benefits of DNA databanks. That is not necessarily true. As conceded at

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[29] Some persons may be indifferent to the government retaining their DNA profile, or perhaps might even desire law enforcement officials to keep it on file so that they may be easily ruled out as suspects in crimes committed by others. Such individual preferences ought not, however, diminish the expungement rights of others.

[30] At present that would not include CODIS. Federal law restricts the expungement of DNA data from CODIS to situations in which an offender's conviction has been overturned on appeal, or where all charges have been dismissed or have resulted in acquittal. See 42 U.S.C. § 14132(d) (as amended October 30, 2004).

oral argument by the Attorney General, New Jersey is free to draw information from the national CODIS databank, even if the State does not contribute all of its DNA data to CODIS.[31]

F. The Possibility of Informed Consent

Moreover, nothing in this Opinion prevents the State from obtaining a DNA sample and indefinitely maintaining it and the data derived from it, provided that it receives informed consent to do so from the subject of the DNA test. See Schenckloth v. Bustamonte, 412 U.S. 218 (1973) (describing elements of consent exception); see also Zap v. United States, 328 U.S. 624 (1946). The possibility of such informed consent was recognized at oral argument, with plaintiffs' counsel acknowledging that such consent could vitiate the constitutional infirmities they have raised with the statute.[32]

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[31] In this regard, the State may take advantage of the "keyboard search" process recently authorized by Congress. As noted above, that process enables law enforcement agencies to compare information in DNA samples they have collected to information in the CODIS database, without contributing those samples. See 42 U.S.C. § 14132(e).

[32] The Supreme Court has not yet clarified the boundaries of informed consent by probationers, although probation documents typically contain acknowledgments by the probationer that he or she will be subject to various forms of inspections and searches during the term of probation.

This Court will not detail here in the abstract what methods the State may or may not lawfully use to obtain the informed consent of subjects of DNA profiling. That is a matter best reserved to future litigation.[33] Neither of the present plaintiffs has consented to turn over their DNA to the State indefinitely, so the point need not be reached on this record. Nevertheless, the Court notes the prospect of consensual DNA sampling may well abate the State's anticipated concerns about the practical effect of the constraints on involuntary sampling imposed by this Opinion.

G. Juvenile Justice Considerations

The foregoing constitutional analysis has focused upon the context of adult offenders such as plaintiff Allah. With respect to juveniles such as plaintiff A.A., this

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The Court found it unnecessary to reach in Knights whether the defendant had voluntarily waived his Fourth Amendment rights when he accepted a search condition as part of his probationary sentence. Knights, supra, 534 U.S. at 118.

[33] If such consent is sought at the time the DNA sample is taken, the State will have "a special obligation to make sure that the [subjects] are fully informed about their constitutional rights, as standards of knowing waiver require." Ferguson, supra, 532 U.S. at 85 (finding that the defendant hospital employees had not adequately informed their patients that they were sampling their urine "for the specific purpose of incriminating those patients"); See also Miranda v. Arizona, 384 U.S. 436 (1966).

Court reaches the same result, even though the State's interests in the DNA profiling of youth offenders are not quite as manifest.

The objectives of New Jersey's juvenile justice system encompass often-competing goals of rehabilitation and public safety. To further those ends, the State has created a special court in the Family Part of the Chancery Division to adjudicate matters involving juveniles, distinct from the Criminal Part of the Law Division reserved for the prosecution of adult crimes. Among other things, the stated aim of that juvenile system is, "[c]onsistent with the protection of the public interest, to remove from children committing delinquent acts certain statutory consequences of criminal behavior, and to substitute therefore an adequate program of supervision, care and rehabilitation, and a range of sanctions designed to promote accountability and protect the public." N.J.S.A. 2A:4A-21(b).

Although public safety considerations retain importance in the juvenile system, its philosophy is largely grounded upon achieving rehabilitation, through reformation and education, to return a delinquent youth to productive citizenship. See State ex rel. G.S., 330 N.J. Super. 383, 390 (Ch. Div. 2000). The Juvenile Code provides for a wide variety of dispositional alternatives to

incarceration, and also limits the duration of most of those dispositions. See In re Registrant J.G., 169 N.J. 304, 321-27, 335-36 (2001)(tracing the distinct policies of the State juvenile justice system).

The Juvenile Code assures that all rights guaranteed to a criminal defendant under the federal and state constitutions are available to a juvenile charged with committing an act of delinquency, with the exception of the rights of indictment, trial by jury and to bail. N.J.S.A. 2A:4A-40. The Code also bespeaks concerns about the adverse long-term consequences that could flow from adjudications of delinquency. A disposition of delinquency does not "impose any of the civil disabilities ordinarily imposed by virtue of a criminal conviction." N.J.S.A. 2A:4A-48. Additionally, juvenile proceedings and courts records are presumptively confidential, subject to a variety of statutory exceptions that may permit disclosure. See N.J.S.A. 2A:4A-60 and -62.

These special characteristics of the juvenile justice system must be factored into this Court's assessment, under the totality of the circumstances, of whether DNA profiling of young offenders may be constitutionally justified. Analogous concerns were before the New Jersey Supreme Court in Registrant J.G., in which the Court balanced the

policies of juvenile justice against the general registration and notification strictures of "Megan's Law" for sexual offenders.

In Registrant J.G., our Court ultimately allowed Megan's Law to apply to juvenile sex offenders, provided that certain limitations were observed. Those judicially-crafted limitations included, among other measures, a right of juveniles found delinquent of such offenses while they are under the age of fourteen to have their Megan's Law obligations abated when they turn eighteen, if a court finds at that time, by clear and convincing evidence, that he or she is not likely to pose a threat to the safety of others. Id. at 337.

Here, the State has not proffered substantial empirical data confirming that DNA profiling of such youths will produce special benefits in the detection and deterrence of delinquent activity or future criminal activity. The record before this Court on recidivism by juveniles is, at best, limited.[34]

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[34] The State has presented some data from a 2002 Bureau of Justice study on recidivism that suggests that repeat arrests of "prisoners" who had been released at ages 14-17 occur at high rates. Patrick A. Logan, Ph.D and David L. Levin, Ph.D, Recidivism of Prisoners Released in 1994, U.S. Dept. of Justice Bureau of Justice Statistics (2002). The Court does not place much weight on that study in its analysis of the juvenile issues here, since repeat youthful

Nor does the DNA Act's legislative history shed much light on the statute's inclusion of juveniles. When the Act was expanded in 1997 to cover juvenile sex offenders, the legislature offered little insight for the need for that expansion, except for the insertion of a conclusory finding in the amended statute that "[i]t is also in the best interest of the State of New Jersey to include in [the] DNA database and DNA databank blood samples submitted by certain juveniles adjudicated delinquent for certain acts, which if committed by an adult, would constitute serious sexual offenses." L. 1997, c. 341, § 1 (amending legislative findings at N.J.S.A. 53:1-20.18).

At the time the DNA Act was last revised in 2003, the Legislature expanded, among other things, the class of juveniles who must provide DNA samples. In support of that change, the codified legislative findings in N.J.S.A. 53:1-20.18 were altered, without further explanation, by simply deleting the statute's previous qualifiers of "certain" juveniles who had committed "serious sexual offenses." L. 2003, c. 183, § 1. Now the statute applies to *any* juvenile

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offenders were a very small part of the study's sample (0.3%). Also, it is not clear whether the study's reference to "prisoners" released at ages 14-17 encompassed only those hard-core youths who were serving time in adult prisons, as opposed to delinquent youths in all juvenile detention facilities.

"adjudicated delinquent or adjudicated not guilty by reason of insanity for acts, which if committed by an adult, would constitute a crime," that is to say, *any* crime.

The legislative materials supplied by the State's counsel, as well as the audiotapes of the legislative hearings on the 2003 amendment to the Act, contain only fleeting references to juveniles or to youthful offenders. The dominant concern of the legislators was on the general benefits of expanding the State's DNA databank, without special attention to the enlargement of DNA testing for juveniles.

Even so, this Court does not find the totality of circumstances require the DNA Act, as it is applied to juveniles, to be constitutionally nullified. Many of the policy arguments that support the government's legitimate interests in DNA profiling — i.e., identifying offenders, effectively monitoring persons under State supervision, deterring wrongful acts, and so on — seem equally plausible in the context of juveniles.[35] Further, there is no obvious doctrinal reason to afford a juvenile a greater constitutional right of privacy in his or her bodily

[35] Thirty-one states presently include juveniles within the scope of their DNA profiling statutes. See a state-by-state compilation of those laws at http://www.dnaresource.com (last visited Dec. 20, 2004).

tissues than an adult. Accord In re Robert K., 336 Ill. App. 3d 867, 873 (2003)(holding that Illinois' DNA collection statute may properly extend to juvenile offenders; In re Nicholson, 132 Ohio App. 3d 303, 308, 724 N.E.2d 1217 (1999)(upholding suspicionless collection of DNA from juveniles adjudicated delinquent of certain offenses).

Once a DNA sample has been collected and analyzed, however, a juvenile might be regarded as deserving greater insulation from the disclosure of those results than a convicted adult. The records amassed from the DNA testing of a juvenile offender logically fall within the records deemed confidential by N.J.S.A. 2A:4A-62. However, as a general matter, access to such juvenile records nonetheless "may be maintained for purposes of prior offender status, identification and law enforcement purposes." Id. at subsection (d). That is exactly what the State defendants want to do with a juvenile's DNA: to be able to identify that youth and potentially link him or her to other offenses. That permissible use does not run afoul of the confidentiality provisions in the Juvenile Code.

The Court is mindful of the right of a delinquent youth under the Juvenile Code to expunge his or her juvenile record upon attaining the age of majority and

completing the terms of his or her court disposition. N.J.S.A. 2C:52-4.1. That right in the Juvenile Code is readily harmonized, however, with the expungement conditions set forth in this Court's general disposition of the Fourth Amendment issues here.

As the DNA Act has been construed by this Court to preserve its constitutional validity, see supra at pp. 56 to 59, any person whose DNA was involuntarily taken by the State may apply to have that DNA and the corresponding data expunged, once his or her period of confinement and State supervision is over. That recourse should apply to a juvenile as well as to an adult. There is no dissonance between the DNA Act, as so construed, and the policies and philosophies of the juvenile justice system.

With such imputed constraints in place, the Court concludes that the application of the DNA Act to adults and to juveniles does not violate the Fourth Amendment.

V.

Regardless of whether the DNA Act complies with the Fourth Amendment of the Federal Constitution, plaintiffs contend that the Act violates the search-and-seizure precepts independently set forth in Article I, Paragraph 7 of the 1947 New Jersey Constitution.

Although the language of Article I, Paragraph 7 is virtually identical to the terms of the Fourth Amendment, the New Jersey Supreme Court at times has interpreted that parallel state constitutional provision to confer greater protections upon citizens of our State from unreasonable searches and seizures. See, e.g., State v. Hempele, 120 N.J. 182 (1990) (invalidating under the State Constitution searches of closed curbside trash containers); State v. Novembrino, 105 N.J. 95 (1987) (rejecting a "good faith" exception to the exclusionary rule for evidence obtained through searches that violate the State Constitution); State v. Hunt, 91 N.J. 338 (1982)(recognizing a greater privacy interest in telephone billing records under the State Constitution).

In deciding whether to diverge from federal constitutional precedents in construing and applying cognate provisions of the New Jersey Constitution, our state courts have often looked to the seven so-called "divergence factors" identified by Justice Handler in his concurring opinion in State v. Hunt, supra, 91 N.J. at 965-68. Those factors include (1) textual language; (2) legislative history; (3) pre-existing state law; (4) structural differences; (5) particular state or local interests; (6) state traditions; and (7) public attitudes.

The Court finds that neither the Hunt factors – nor, for that matter, search-and-seizure cases previously decided by the New Jersey Supreme Court – call for a different outcome in this case under Article I, Paragraph 7 of the State Constitution than under the Fourth Amendment.

As our Supreme Court has often noted, the text and legislative history of Article I, Paragraph 7 do not appreciably vary from the text and history of the Fourth Amendment. N.J. Transit PBA Local 304 v. N.J. Transit Corp., 151 N.J. 531, 543 (1997). Although there are structural differences in where those search-and-seizure provisions respectively are situated in the Federal and New Jersey Constitutions, those variations do not have particular significance here.

Given the emerging nature of DNA technology, there was no pre-existing law on DNA profiling in New Jersey before the Legislature first adopted the DNA Act in 1994. Moreover, no reported cases have evaluated the validity of the statute since its adoption.

The remaining three Hunt factors (state or local interests; state traditions; and public attitudes) may be considered in tandem. Here again, the Court essentially writes on a clean slate. The record does not establish that DNA testing is a topic of special local concern among New

Jerseyans, or the presence of any distinctive traditions in our State on the practice. Nor does the record contain public opinion polls reflecting that the citizens of New Jersey care any more about the privacy of their personal DNA information than do the citizens of any other State.

If anything, the initiative for DNA testing of convicted offenders and the compilation of DNA databanks is as much a national concern as it is a local one. All fifty states now have DNA collection statutes, which supplement the compilation of DNA administered under the federal statute. The federal CODIS databank for DNA is a method of sharing that data gathered from disparate sources with law enforcement agencies all over the country. New Jersey's efforts are a small, but surely important, part of that enterprise. The national scope of that endeavor augers in favor of resolving plaintiffs' objections to DNA testing under the New Jersey Constitution in a manner consistent with the resolution of their claims under the Fourth Amendment.

This Court acknowledges that numerous federal courts and other state courts have upheld DNA collection statutes thus far without qualification.[36] Nonetheless, several

[36] See generally Richard P. Shafer, *Validity, Construction and Application of DNA Analysis Backlog Elimination Act of*

appellate judges in the most recent cases have expressed serious concerns about the constitutional limits of such programs. See United States v. Kincade, supra, 379 F.3d 813 (9th Cir. 2004)(in which five of the eleven Ninth Circuit judges voted to strike down the federal DNA statute, with a sixth judge expressing doubts about whether the government could hold a felon's DNA indefinitely);[37] State v. Raines, supra, 383 Md. 1, 857 A.2d 19 (2004) (in which three of the seven judges on the Maryland Court of Appeals voted to nullify that State's DNA statute, with two other judges limiting their approval of the statute to its use in identifying inmates and probationers). The United States Supreme Court itself, and many of the highest state courts, have yet to weigh in on the important constitutional questions raised by DNA profiling.

It therefore remains to be seen whether DNA collection statutes will continue to be unconditionally validated in every jurisdiction. Given that dynamic context, this Court does not perceive that the caveats that it has appended to

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2000, 187 A.L.R. Fed. 373 (2004), and the federal cases cited therein. See also Robin Cheryl Miller, *Validity, Construction and Operation of State DNA Database Statutes*, 76 A.L.R. 5th 239 (2000), and the state court cases cited therein.

[37] A petition for certiorari was filed in Kincade on November 15, 2004 (No. 04-7253).

New Jersey's DNA Act will thwart our State's beneficial participation in the national DNA profiling effort. For sake of analytic consistency, this Court finds that the expungement conditions that it found necessary in Part IV to sustain the Act's constitutionality under the Fourth Amendment are likewise required under Article I, Paragraph 7 of the New Jersey Constitution.

Lastly, it is worth pointing out that the New Jersey Supreme Court's most recent drug testing cases have not interpreted the New Jersey search-and-seizure provision any more stringently than the parallel case law under the Fourth Amendment. For example, last year in Joye v. Hunterdon Central Regional H.S. Bd. of Educ., 176 N.J. 568 (2003), our Supreme Court upheld a New Jersey public high school's random drug testing program under Article I, Paragraph 7, consistent with United States Supreme Court precedent holding that such testing does not transgress the Fourth Amendment. A few years earlier, in N.J. Transit PBA Local 304 v. New Jersey Transit Corp., supra, 151 N.J. 531 (1997), the Court upheld random urine testing of transit police officers under the New Jersey Constitution, choosing not to diverge from federal authorities that had sustained such testing. These recent cases weigh against the

plaintiff's request for independent relief under Article I, paragraph 7.

For these various reasons, this Court resolves plaintiffs' search-and-seizure challenge here no differently under the State Constitution than under the Federal Constitution.

VI.

Plaintiffs also contest the State's retroactive application of the DNA Act to them under the Ex Post Facto Clauses of the Federal and State Constitutions. See U.S. Const., art. 1, § 10, cl. 1; N.J. Const., art. IV, § 7, ¶ 3.

At the times of their respective adjudications, plaintiffs pleaded guilty to offenses that did not require them, under then-existing law, to submit to DNA sampling. Plaintiff Allah was convicted of drug-related crimes in 2001. Plaintiff A.A. was adjudicated delinquent of his assault offense in 2002. The Legislature amended the DNA Act effective September 22, 2003.

As noted above, the expanded terms of the statute cover the categories of offenses committed by the plaintiffs. The statute specifies that offenders who were imprisoned or serving some form of supervised release as of

September 22, 2003 for earlier offenses now qualifying within the expanded scope of the Act must provide a DNA sample. N.J.S.A. 53:1-20.17. It is undisputed that on September 22, 2003, plaintiff Allah was then incarcerated in State prison and plaintiff A.A. was then serving his term of juvenile probation.

Neither plaintiff seeks to retract his plea based on the change in the law. Rather, plaintiffs seek to prevent the expanded DNA statute from being applied to them retroactively, based upon their view that compulsory DNA testing amounts to the unconstitutional *ex post facto* infliction of punishment.

The Court rejects these claims.

The Ex Post Facto doctrine is intended to prevent the retroactive application of a law that 'inflicts a greater punishment, than the law annexed to the crime, when committed." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), see also E.B. v. Verniero, 119 F.3d 1077, 1092 (3d Cir. 1997). The doctrine assures that penal statutes "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28-29 (1981); see also State v. Muhammad, 148 N.J. 23, 56 (1996). The Ex Post Facto Clause in the New Jersey Constitution has been interpreted in the

same fashion as its analogue in the Federal Constitution. See, e.g., Doe v. Poritz, 142 N.J. 1, 42 & n.10 (1995).

The pivotal *ex post facto* inquiry here is whether the retroactive application of the DNA collection statute to plaintiffs constitutes a form of "punishment." To determine whether a statute imposes such punishment, courts have looked to the statute's (1) actual purpose, (2) objective purpose, and (3) effect. E.B. v. Verniero, supra, 119 F.3d at 1093.[38] None of those three factors suggest that the DNA Act is a form of punishment.

First, the actual purpose of the DNA Act, as enumerated in the statute's legislative findings at N.J.S.A. 53:1:20.18, is to assist law enforcement officials "in the identification and detection of individuals who are the subjects of criminal investigations." Id. The statute says nothing about using the DNA collection process itself to inflict punishment. Although a positive DNA match may furnish proof that the subject has violated some other criminal statute, any punishment that he or she may face will flow out of the commission of that crime, not because

[38] See also Smith v. Doe, 538 U.S. 84 (2003)(describing the *ex post facto* test as whether the legislature intended to establish punishment; if not, then the test becomes whether the statutory scheme is so punitive either in purpose or effect as to negate the state's intention to establish a regulatory, non-punitive, civil scheme).

of his or her DNA results. The punishment would derive from violating a law that was already on the books. Accord Doe v. Illinois, 162 Ill.2d 15, 20, 642 N.E.2d 114, 116, 204 Ill. Dec. 652, 654, cert. denied, 513 U.S. 1168 (1995)(holding that Illinois statute requiring collection of inmates' DNA before their release did not work to impose punishment for a past crime or extend a criminal sentence).

Second, the objective purpose of the DNA Act also is not punitive. In making this objective assessment, a court is to examine "the operation of the legislative measure and on whether analogous measures have traditionally been regarded in our society as punishment". E.B. v. Verniero, supra, at 1093. Operationally, the DNA Act functions as an information-gathering program. The buccal swab technique typically used to gather a subject's DNA is quick and painless. No analogous measures have been traditionally used to inflict punishment. Although the collection process may deter future crimes by some detainees who provide DNA specimens, that incidental deterrent benefit does not transform the Act into a form of punishment. Id. at 1101 (incidental deterrent features of Megan's Law do not overwhelm its non-punitive regulatory purposes).

If an inmate, or an offender who is on probation or other form of supervised release, refuses to supply a DNA

sample in compliance with the statute, he or she may be subjected to prison disciplinary proceedings or to the revocation of probation or parole. Such penalties, however, would be imposed based upon the subject's refusal to obey the law. They would not constitute the retroactive imposition of additional punishment for a past offense. Accord Jones v. Murray, supra, 962 F.2d at 310 n.3 (4th Cir. 1992)(finding no *ex post facto* violation in the application of the Virginia DNA collection statute to previously-convicted felons); State v. Raines, supra, 383 Md. at 26-41, 857 A.2d at 33-43 (rejecting *ex post facto* challenge to Maryland DNA statute).

Third, the effects of the statute are not punitive, certainly not in any predominant way. If the favorable experience with DNA profiling as a crime-solving tool from other states and countries is borne out here, the DNA Act may very well have the effect of helping law enforcement agencies in New Jersey to detect and identify criminal actors that might otherwise have escaped detection. But that enhancement of the State's ability to solve and to prevent crimes is not a form of punishment. The Act simply gives the police more tools to succeed in ferreting out conduct that is already proscribed. Accord United States v. Stegman, 295 F. Supp. 2d 542, 547-48 (D. Md. 2003)(holding

the forced extraction of a blood specimen, pursuant to the federal DNA collection statutes, from a person on supervised release for a federal firearms offense was not penal or punitive in effect, and thereby did not violate the Ex Post Facto Clause).

Because the amended DNA Act "does not criminalize conduct legal before its enactment," Kansas v. Hendricks, 521 U.S. 346, 371 (1997), the Court holds that its application to plaintiffs does not violate the Ex Post Facto Clauses of the Federal or New Jersey Constitutions.

VII.

Finally, plaintiffs contend that the DNA Act violates principles of due process of law. U.S. Const., amend. XIV, § 1; N.J. Const., art. I, ¶ 1. That contention is readily dismissed, in light of the Court's ameliorated construction of the statute in Part IV, supra.

The process of collecting a DNA sample does not arbitrarily deprive inmates, or offenders who are under State supervision, of their liberty or property. As noted above, the buccal swabbing procedure is brief, painless and minimally invasive. That minor deprivation is substantially outweighed by legitimate and compelling State interests in law enforcement and in the administration of correctional

and juvenile justice programs, which have been described in detail in earlier Parts of this Opinion. Cf. State v. J.T., 151 N.J. 565, 593-94 (1997)(rejecting due process challenge to mandatory HIV testing of persons arrested for aggravated sexual assault).

The Act also displays sensitivity to individual privacy concerns, by making it unlawful for a renegade employee or other third party to disseminate a subject's DNA information beyond the purposes authorized by the statute. N.J.S.A. 53:1-20.26. As a further safeguard, the statute requires the adoption of administrative rules "for verification of the identity and authority" of any requester who seeks information from the State DNA database. N.J.S.A. 53:1-20.24(b). Requesters who are not from law enforcement agencies, or from "approved crime laboratories" who serve those agencies, must obtain a court order to gain access to the DNA data. N.J.S.A. 53:1-20.24(a).

As articulated in their papers, plaintiffs' due process challenge is largely grounded upon a concern that the Act will subject them to "lifetime inclusion" in DNA databanks maintained by the government. This Court has previously addressed that concern in its resolution of the Fourth Amendment issues in Part IV, supra. The eventual

opportunity of a released offender to expunge his or her DNA information, as outlined above in Part IV, provides a reasonable and sufficient avenue for either plaintiff to avoid such lifetime consequences, assuming, of course, that he does not commit further offenses that prolong his term of prison or supervision.

So construed to impute a right of post-supervision expungement, the DNA Act comports with principles of substantive and procedural due process. See Doe v. Poritz, supra, 142 N.J. 1 (1995)(sustaining Megan's Law procedures, as construed and qualified by the Court, against due process attack). The statute serves important state interests and, as modified herein, fairly protects the liberty and privacy of those persons whose DNA is sampled.

IX.

Having completed the "discerning inquiry" required of it, this Court concludes that the New Jersey DNA Act passes muster under both the Federal and State Constitutions, subject to the conditions expressed in this Opinion.

The record is unclear, due to the passage of time, regarding the present custody status of the plaintiffs. With respect to plaintiff Allah, it would appear that the concurrent sentences of four-to-eight years and five-to-ten

years imposed upon him in December 2001 have not been completed, and therefore he is either still incarcerated or otherwise under State supervision. If that assumption is true, then Allah's DNA sample, which already was collected provisionally subject to the outcome of this lawsuit, may be analyzed and contributed to State's DNA databank not sooner than thirty (30) days of this Opinion.

As to plaintiff A.A., his 18-month juvenile probation that began in October 2002 should now be concluded. However, the Court is unaware whether A.A. remains, for any reason, subject to any continued form of oversight by the Juvenile Justice Commission. If so, he too must submit to DNA testing, as previously agreed by his guardian, within twenty-one (21) days, and may contribute that DNA sample to the State's DNA database not sooner than thirty (30) days from this ruling. If not, then A.A. does not have to provide a sample, subject to the State's right to appeal the conditions set forth in this Court's ruling.[39]

The State may retain and make use of either plaintiff's DNA sample only for the purposes authorized herein in this Opinion, subject to each plaintiff's right

[39] Any contrary language in an Order previously issued in A.A.'s juvenile ("FJ") case docket in the Family Part is hereby modified and superseded.

to have the DNA information expunged when and if he completes his entire term of State supervision.

Given the uncertainty of each plaintiff's present custody status, the need for injunctive relief on the present record is not clearly established. See Crowe v. DeGioia, 90 N.J. 132-34 (1982). The Court therefore issues an Order without any injunctive provisions, but with a qualified declaration that the DNA Act is constitutional, subject to the conditions expressed herein.

A corresponding Order accompanies this Opinion.