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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	No. R-08-0019
Petition to Amend Rules 23 and 28, Rules of Procedure for the Juvenile Court; and to Amend Rule 7.3, Arizona Rules of Criminal Procedure	**COMMENT TO AMENDED PETITION TO AMEND RULES 2.7, 7.3 & 7.5, ARIZONA RULES OF CRIMINAL PROCEDURE, AND RULES 23 & 28, RULES OF PROCEDURE FOR THE JUVENILE COURT**

¶1 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the Office of the Pima County Public Defender hereby submits the following comment to the above-referenced petition.

¶2 The Pima County Public Defender opposes the above-referenced rule change petition because its implementation will result in wholesale violation of constitutional rights of arrestees. The criminally-accused have the Constitutional rights to privacy and to be free from unreasonable searches and seizures and to be free of deprivation of liberty without due process of law. These searches and seizures violate the Fourth, Fifth, and Fourteenth Amendments to the United States

Constitution, and Article II, §§ 2, 4, and 8 of the Arizona Constitution, as explained below, and therefore both statutes upon which these proposed rule changes are premised, A.R.S. §§8-238 and 13-610(O)(3), and the rules themselves, are unconstitutional deprivations of the above rights.

¶3 The arguments herein formed the basis for a recent ruling declaring the juvenile statute unconstitutional, and there will be no basis for distinguishing the mirroring adult statute when a case or controversy arises challenging it. Therefore, were this Court to adopt the proposed Criminal and Juvenile rules, it would be giving judicial imprimatur to unconstitutional statutes, and the Pima County Public Defender urges this Court to decline to do so. (Order declaring juvenile statute unconstitutional attached hereto as Exhibit A.)

PROCEDURAL HISTORY

¶4 In the 2008 legislative session, the Arizona Legislature created A.R.S. §§ 8-238 and 13-610(O)(3), which require adults and juveniles arrested on suspicion of committing certain offenses[1] to submit to the compulsory extraction, collection, analysis, and storage of their DNA or face revocation of pre-trial release conditions (and subsequent testing). The statute became effective September 26, 2008. In response, this Court issued Supreme Court Order R-08-0019 (effective

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[1] The enumerated offenses include homicides, residential burglaries, sex offenses, and serious offenses under A.R.S. § 13-604 where a weapon was used or threatened or injury occurred are included as well. However, some of the offenses are misdemeanors, such as indecent exposure.

September 26, 2008), an emergency rule amending Rules of Juvenile Procedure 23 and 28 and Rules of Criminal Procedure 7.3 and 7.5 to direct courts to order testing in accordance with the statutes. Presently pending is a permanent rule change to implement the changes in accordance with the statutes. On June 25, 2009, Petitioner also suggested the addition of Rule 2.7, Ariz.R.Crim.P., which would allow for forcible extraction of biological samples and DNA from arrestees.

I. The federal and state constitutions assure the right of citizens to be free from unreasonable searches and seizures conducted by the government, to due process of law, and to equal treatment under the law

¶5 The Fourth Amendment to the United States Constitution declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend IV. The Fourth Amendment applies to the States by incorporation in the Fourteenth Amendment, which also, together with the Fifth Amendment, separately ensures the right to due process of law. Similarly, Article II, § 4 of the Arizona Constitution states, "No person shall be deprived of life, liberty, or property without due process of law."[2] Article II, § 8 provides a right to privacy and to freedom from illegal intrusions into one's personal affairs or home.

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[2] Article II, § 2 of the Arizona Constitution states: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."

II. A.R.S. §§ 8-238 and 13-610(O)(3) extend the authority for DNA collection from those convicted or adjudicated beyond a reaonable doubt, to mere arrestees, in violation of the Fourth Amendment and Article II, § 8.

¶6 It is well established that obtaining and analyzing DNA is a search and seizure under the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 618 (1989) ("the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches"). The seizure is the actual taking of the blood sample and the search is the subsequent analysis of that sample. In general, searches and seizures conducted without a warrant are *per se* unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1969) ("searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specially established and well-delineated exceptions").

¶7 All 50 states and the federal government currently authorize DNA profiling of convicted offenders in custody and on conditional release.[3] Arizona's policy of collecting DNA from convicted (adjudicated) juveniles was challenged under the Fourth Amendment and Article II, § 4 of the Arizona Constitution in *Maricopa County Juvenile Action Numbers, JV-512600 and JV-512797*, 187 Ariz. 419, 930 P.2d 496 (App. 1996) (reviewing A.R.S. §§ 13-4438 and 31-281). In that case, the

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[3] It is worth noting that the United States Supreme Court has not ruled on the question whether such mandatory testing laws are constitutional.

Court of Appeals found that a "'compelled intrusion[ ] into the body for blood' must be deemed a Fourth Amendment search" (citing *Schmerber v. California*, 384 U.S. 757, 767-68 (1966)), and that "normally, a search or seizure is not considered reasonable unless it is accompanied by a judicial warrant issued only after finding of probable cause" (citing *Skinner*, 489 U.S. at 619). However, in concluding that *adjudicated* juveniles could be compelled to provide DNA samples, the court specifically rested its decision on the notion that:

> the procedural safeguards required by [these statutes] are more stringent than those required for the issuance of a warrant based upon a finding of probable cause. Here, the order to draw blood follows either an adjudication of delinquency, which is based on a determination beyond a reasonable doubt, or a constitutionally safeguarded admission by a juvenile that an enumerated sexual offense was committed. Further, it applies *only after* the juvenile is incarcerated, committed to a secure facility, or placed on probation. **In effect, the standard required by the statutes is beyond a reasonable doubt, which is a substantially greater burden than the finding of probable cause required for a search warrant.**

187 Ariz. at 423, 930 P.2d at 500 (emphasis added).[4]

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[4] There is not a universal theory as to why there is no violation; courts have reached the same conclusion with different reasoning, not to mention that there are lingering questions about the propriety of the ultimate conclusion. *See, e.g., United States v. Kincade (II)*, 379 F.3d 813 (9th Cir. 2004) (*en banc*) (plurality relied on "totality of the circumstances" test and convicted persons' diminished privacy interest; concurrence cited "special needs exception" to Fourth Amendment; but multiple dissents contended a constitutional violation had occurred).

One framework for analysis, the "special needs" test cited by the *Kincade (II)* concurrence, bears mention because it helps to demonstrate why the invasion in Arizona is so egregious. The "special needs" exception authorizes searches of a class of persons without individualized suspicion where the police can articulate a need that is different from a traditional law enforcement purpose, *i.e.*, the main reason is not evidence-gathering. Thus, the Supreme Court has allowed warrantless roadblocks to question all drivers on a highway where

However, A.R.S. §§ 8-238 and 13-610(O)(3) are targeted solely at mere arrestees, not at persons who have been convicted or adjudicated beyond a reasonable doubt of any offense. The juvenile statute mandates:

> if a juvenile is arrested for a violation of any of the [specified] offenses and is summoned to appear at an advisory hearing, the judicial officer shall order the juvenile to report within five days to the law enforcement agency that arrested the person or to the agency's designee and submit a sufficient sample of buccal cells or other bodily substances for deoxyribonucleic acid (DNA) testing and extraction.

A.R.S. § 8-238. There is a similar mandate in A.R.S. § 13-610(K) and (L). As is plain, the statutes apply to all arrestees as a class. The proposed Supreme Court rules direct judges to issue orders in accordance with the statutes. The statutes and proposed rules require neither a warrant nor any other showing of individualized suspicion to support the order that the arrestee succumb to this compelled search and seizure. None of the procedural safeguards identified by the Court of Appeals in *JV-512600* (namely, conviction based on proof beyond a reasonable doubt, or

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the purpose was highway safety, any questioning was limited in scope, and the drivers could choose to avoid the roadblock. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). But the Supreme Court struck down a roadblock that involved a quick sniff of the exterior of the car by a drug dog looking for cars carrying drugs, as the primary purpose was to find evidence of a crime and highway safety was a distant second objective. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). The Court similarly invalidated a hospital's practice of screening all maternity patients for drugs and notifying the police for prosecution if women with positive screens refused drug treatment. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). The Court has made clear that the "special needs" exception is limited and to be closely guarded. *Chandler v. Miller*, 520 U.S. 305 (1997) (striking down a Georgia law requiring candidates for office to certify that they have taken a drug test that returned negative results within thirty days of qualifying for nomination or election). There is no legitimate reason that can be advanced as the purpose of this statute that is not an evidence-gathering purpose.

upon a safeguarded admission) exist when a mere arrestee is required to give a DNA sample without a warrant or any other individualized showing. Without these procedural safeguards, a search compelled by these statutes violates the Fourth, Fifth and Fourteenth Amendments, and Article II, §§ 2, 4, and 8.

III. Case law has held similar statutes unconstitutional

¶8 In 2006, the Court of Appeals of Minnesota addressed a constitutional challenge to a statute very similar to A.R.S. § 8-238. The Court declared the statute an unconstitutional violation of juveniles' rights under the Fourth Amendment. *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. App. 2006) (declaring parts of M.S.A. § 299C.105 unconstitutional). The Minnesota law directed law enforcement personnel to take biological specimens from juveniles who had had a probable cause determination on a charged offense but who were still awaiting trial. Like our statute, the Minnesota statute applied only to certain enumerated offenses; but unlike our statute, the Minnesota statute required the submission of a DNA sample only *after* a probable cause determination on the charge. (In Pima County, minors who have detention hearings receive a probable cause hearing, but minors who are "paper arrested," *i.e.*, cited and field-released, never receive a probable cause determination prior to trial.) Yet, even the probable cause hearing was not enough of a safeguard to satisfy the Fourth Amendment.

¶9 *C.T.L.* involved a juvenile who was compelled to surrender a DNA sample following a probable cause hearing on charges of assault and aiding and abetting aggravated robbery. In finding the statute unconstitutional, the appellate court explained that "probable cause to support a criminal charge is **not the same thing** as probable cause to issue a search warrant." 722 N.W.2d at 490 (emphasis added). The court elaborated:

> By directing that biological specimens be taken from individuals who have been charged with certain offenses solely because there has been a judicial determination of probable cause to support a criminal charge, [the statutes] dispense with the requirement under the Fourth Amendment that before conducting a search, law-enforcement personnel must obtain a warrant based on a neutral and detached magistrate's determination that there is a fair probability that the search will produce contraband or evidence of a crime. Under the statute, it is not necessary for anyone to even consider whether the biological specimen to be taken is related in any way to the charged crime or to any other criminal activity.

Id. at 491.[5] Like Minnesota's statute, neither A.R.S. § 8-238 nor § 13-610 provides for a hearing to determine probable cause to believe that the DNA search and seizure would yield evidence connecting the suspect to a particular offense.

¶10 But our statutes reach even deeper into the realm of the unconstitutional than the Minnesota statute, for our statutes sweep in even arrestees who have

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[5] *C.T.L.* is not the only court to reach this exact conclusion. *See, e.g., United States v. Purdy*, 2005 WL 3465721 (D. Neb. 2005), which, while it is unpublished, is note worthy because it appears to have been the first case to discuss the issue and laid the theoretical groundwork for much of what was discussed in *C.T.L.*

never had a probable cause hearing as to the offense, let alone a hearing on probable cause as to identity evidence. As noted earlier, § 8-238 requires juveniles who receive a paper arrest for certain offenses and a summons to appear at an advisory hearing to submit a DNA sample within five days of the initial appearance. In Pima County, the first appearance for a juvenile who is paper arrested is a trial review, not a probable cause hearing; no probable cause determination as to the charge is ever made for such juveniles. And adults are charged with felonies almost exclusively by presentment to a grand jury (preliminary hearings are truly exceptional in Pima County), so there is no judicial oversight of the probable cause determination. Beyond the violations already shown, there is the risk of an additional violation of taking DNA samples from the wrongfully accused. There is no neutral, detached magistrate making a determination that probable cause existed for an arrest, much less that probable cause existed for a search of bodily fluids.

IV. A.R.S. §§ 8-238 and 13-610(O)(3) violate arrestees' separate right to privacy under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article II, § 8 of the Arizona Constitution, and these statutes are not supported by a legitimate governmental objective

¶11 The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article II, § 8 of the Arizona Constitution provide

a substantive right to privacy.[6] Since A.R.S. §§ 8-238 and 13-610(O)(3) involve government intrusion into private and personal genetic information of arrestees by acquiring, analyzing, and storing their biological samples and DNA information, the Fourteenth Amendment requires that the intrusion be supported by a legitimate governmental objective that outweighs the arrestees' privacy interests and that the intrusion be narrowly tailored to meet that legitimate objective.

¶12 When determining the constitutionality of a statute in light of privacy concerns, courts will often apply a balancing test, weighing the governmental interest against a person's right to privacy. Statutes compelling persons convicted or adjudicated of felonies to provide blood or tissue for DNA analysis without a probable cause warrant have been upheld because convicts have a reduced expectation of privacy. "Once a person is convicted of certain felonies his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling." *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995). The government purposes that outweigh the privacy interests of convicted felons that have been upheld as

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[6] Since *Griswold v. Connecticut*, 381 U.S. 479 (1965), this has been recognized as a penumbral right; it is not express in the text, but its implicit existence secures the express rights, and analysis of it is often referred to as substantive due process analysis. The right to privacy is implicit in the Fourth Amendment, particularly, as well as the others. *Cf. Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down statute criminalizing same-sex sexual conduct and citing *Griswold* but resting the decision on a Fourteenth Amendment right to liberty rather than privacy).

constitutional include: deterring such individuals from "committing future offenses of a similar nature," *Roe v. Marcotte*, 193 F.3d 72, 78-79 (2d Cir. 1999); the "public's interest in effective law enforcement, crime prevention, and the identification and apprehension of those who commit [certain] offenses," *JV-512600*, 187 Ariz. at 424, 930 P.2d at 501; and "the goals of rehabilitation and protection of society," *United States v. Knights*, 534 U.S. 112, 115-16 (2001). All of the courts in these cases depended on the status of the offenders as convicted felons, parolees or probationers to validate their conclusions that these statutes are constitutional under the Fourth and Fourteenth Amendments.

¶13 However, people who are merely arrested do not have the same status as convicted felons. *Rise*, 59 F.3d at 1560 (noting that convicted felons "do not have the same expectation of privacy in their identifying genetic material that free persons and mere arrestees have"). The Ninth Circuit has recently upheld the distinction between detainees pre-trial and post-conviction pertaining to searches for DNA. *Friedman v. Boucher*, 568 F.3d 1119, 1128 (9th Cir. 2009).

¶14 Arrestees obliged to submit a DNA sample under A.R.S. §§ 8-238 and 13-610(O)(3) are not convicted felons; therefore, their expectations of privacy are not reduced. The privacy concern is significant here, necessitating a compelling government interest in order to overcome the individual's privacy interest. A.R.S. § 13-610(I) allows these DNA samples to be taken for the following wide-

reaching purposes: (1) law enforcement identification purposes; (2) proceedings in criminal prosecutions or juvenile adjudications; and (3) proceedings under title 36, chapter 37 (pertaining to sexually violent persons (SVP)).[7] None of these objectives is sufficient to defeat the arrestees' privacy interests.

¶15 First, as to identification[8] purposes: it is well-settled that law enforcement officials are authorized to obtain personally identifying information, including photographs and fingerprints, as part of the routine booking process. Taking DNA for identification purposes not only would be superfluous, but entire impractical because, unlike a photograph or fingerprint that can be analyzed immediately in a non-sterile environment, it takes a minimum of three days to analyze a DNA sample (according to recent testimony given in Pima County Juvenile Court), which must be done in a sterile laboratory, and DNA analysis is prohibitively expensive in comparison with photographing and fingerprinting. Thus, DNA is of

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[7] Of course, there is a wealth of personal information that could be gleaned from a sample, once taken. Today's statute-based limits on use are simply that: statute-based and therefore subject to future change. DNA information in other circumstances has been used to deny people jobs and health and life insurance, among other non-benign purposes. Furthermore, A.R.S. § 13-610(M) permits that both a person's DNA "profile and sample be expunged" if the charges are not filed timely, dismissed, or the person is acquitted; on the other hand, A.R.S. § 13-610(J) allows only for the *profile* to be expunged from the identification system when the person's conviction is overturned on appeal or in post-conviction proceedings. The retention of the sample in these cases presents numerous constitutional problems in future cases.

[8] It is important to note that the term "identification" has a specific meaning in case law. It does not mean "to solve a mystery about who is the perpetrator of a crime," rather it specifically pertains to management of the jail population and allowing authorities to identify who is in their custody. That the government can keep the fingerprints and later use them in crime-solving is an incidental benefit to the government. *See, e.g., United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932).

no functional assistance in distinguishing between persons in custody. Further, where arrestees are not held in custody, there is no need to distinguish them for purposes of managing the detention population, and this justification would be entirely irrelevant as to those persons. Moreover, case law has recognized that DNA samples are not similar to fingerprints for purposes of constitutional analysis. *Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005), *cert. denied*, 549 U.S. 953 (2006). Yet, Petitioner has amended the rule change petition by creating Rule 2.7, Ariz.R.Crim.P.[9], which would permit forcible extraction of biological samples and DNA from arrestees, as would be done with fingerprinting pursuant to Proposed Rule 2.6.

¶16 Second, as to the use of the DNA information in criminal prosecutions, juvenile adjudications, or SVP proceedings: the statute's overbroad language speaks of "***a*** criminal prosecution," so it is not limited to the instant matter. The DNA sample could be completely irrelevant to the present charge but used to connect the arrestee with other crimes or at a future date, all in violation of his Fourth Amendment rights. And of course, allowing the sample to be used in the arrestee's current case without a probable cause warrant would plainly violate the Fourth Amendment.

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[9] There is a separate pending petition, R-08-0026, to create new Rule 2.6, Ariz.R.Crim.P., that would allow for forcible fingerprinting of detainees. This comment does not address the constitutionality of that proposed rule.

¶17 The court in *C.T.L.* further elaborated on the nature of the arrestee's privacy right when discussing a subdivision of the Minnesota statute similar to one in A.R.S. § 13-610 that required the automatic destruction of a biological specimen and the removal of any information pertaining to the specimen from that state's DNA Index system upon an acquittal on or dismissal of the charges against the person from whom the DNA sample was obtained. 722 N.W.2d 484. The court reasoned that this provision indicated that the legislature, when drafting the statute, concluded that the privacy interests of a person who has not been convicted of a crime prevail over the state's interest in gathering and storing DNA samples acquired from such person. Accordingly, the court added,

> unless the privacy expectation of a person who has been charged and is awaiting the disposition of the charge is different from the privacy expectation of a person who was charged but the charge was dismissed or the person was found not guilty, we see no basis for concluding that the state's interest in taking a biological specimen from a person solely because the person has been charged outweighs the person's right to privacy. And because a person who has been charged is presumed innocent until proven guilty, we see no basis for concluding that before being convicted, a charged person's privacy expectation is different from the privacy expectation of a person who is charged but the charge was dismissed or the person was found not guilty.

Id. at 491-92.

¶18 The same argument pertains to A.R.S. §§ 8-238 and 13-610(O)(3). § 13-610(M) allows a person subject to this statute to petition the superior court to order his DNA profile and sample be expunged from the Arizona DNA

identification system[10] if (1) the criminal charges are not filed within the statute of limitations, (2) the criminal charges are dismissed, or (3) the person is acquitted at trial. This section suggests that our Legislature decided that the privacy interests of a person who is arrested for or charged with certain crimes, but later exonerated, outweighs the state's interest in having such biological information. Consequently, as in *C.T.L.*, there is no foundation to presume that the privacy interests of arrestees charged with particular offenses who are awaiting disposition are any less substantial than those of persons who are charged but are later acquitted or have their charges dismissed. Moreover, the kinds of information that could be derived from the DNA sample in the period before removal from the database, and the uses to which such information could be put, are an alarming invasion of the right to privacy of the arrestee who is never prosecuted or who is ultimately exonerated.

V. A.R.S. § 13-610(O)(3) has not been challenged yet, but § 8-238 has been challenged on the grounds cited in this comment, and the Pima County Juvenile Court has determined the statute is unconstitutional

¶19 It is unknown whether A.R.S. § 13-610(O)(3) is being applied to adults in Pima County or elsewhere in Arizona. However, the Pima County Juvenile Court had been ordering juveniles to comply with the provisions of § 8-238 as a condition of release. The Pima County Public Defender filed a motion to preclude

[10] Unlike the Minnesota statue, A.R.S. § 13-610(M) does not provide for automatic expungement; rather, the burden is on the acquitted person to make application.

the taking of a DNA sample of an arrestee with the division of the Juvenile Court tasked with presiding over detention hearings, citing the grounds argued in this comment. Judge Leslie Miller of the Pima County Juvenile Court agreed with these arguments and granted the motion to preclude. The State did not appeal that order, thereby effectively rendering the juvenile statute a "dead letter" in Pima County. It is the position of the Pima County Public Defender that courts will continue to rule that these statutes are unconstitutional when the case or controversy arises.

CONCLUSION

¶20 By requiring persons who are merely arrested to submit a DNA sample without a showing of probable cause for the seizure, A.R.S. §§ 8-238 and 13-610(O)(3) violate the rights to privacy and due process of law of arrestees under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article II, §§ 2, 4, and 8 of the Arizona Constitution. Case law elsewhere has found unconstitutional similar statutes that require DNA testing of mere arrestees absent a showing of probable cause that the sample has evidentiary value in that case. Because the statutes are unconstitutional, so are any rules of court giving effect to those statutes. The Pima County Public Defender requests that this Court reject the rule change petition, and to remove the emergency rules that were enacted on September 26, 2008.

DATED: (electronically filed) July 29, 2009.

By /s/
David J. Euchner
Assistant Public Defender

By /s/
Julie M. Levitt-Guren
Assistant Public Defender

This comment electronically filed
this 29th day of July, 2009, with:

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Mailed this 29th day of July, 2009, to:

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EXHIBIT A

ARIZONA SUPERIOR COURT
PIMA COUNTY

HON. LESLIE MILLER

COURT REPORTER: NONE

CASE NUMBER: 16854404

IN THE MATTER OF

DATE: May 6, 2009

I, AUGUSTINE

A PERSON UNDER THE AGE
OF EIGHTEEN YEARS

ORDER

IN CHAMBERS

RE: UNDER ADVISEMENT RULING

On November 6, 2008, Augustine B[illegible] was arrested and detained on the charge of child molestation. A delinquency petition alleging molestation of a child and public sexual indecency to a minor under 15 was filed on November 7, 2008. On November 12, 2008, the judge ordered that the minor be released and report within five days to law enforcement to submit to DNA testing. However, the order was deferred at the request of counsel to permit the submission of the minor's Motion to Preclude Taking of DNA Sample.

A.R.S. § 8-238(A) states:

> A. If a juvenile is arrested for a violation of any of the following offenses and is summoned to appear at an advisory hearing, the judicial officer shall order the juvenile to report within five days to the law enforcement agency that arrested the person or to the agency's designee and submit a sufficient sample of buccal cells or other bodily substances for deoxyribonucleic acid testing and extraction . . .

The offenses with which the minor was charged are included among those specified in the statute. In response to this legislation, the Arizona Supreme Court issued Supreme Court Order R-08-0019 amending the Rules of Juvenile Procedure, Rule 23 and 28, requiring judges of the juvenile court

to order testing as set forth by the statute as a condition of release. Both the statute and rules became effective September 26, 2008.

The minor has challenged the Arizona statute as being an unlawful search and seizure, an invasion of privacy, and a violation of equal protection, in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article 2, Sections 2, 4, 8 and 13 of the Arizona Constitution. When a court reviews a challenged statute, the statue is presumed constitutional and any doubts are resolved in favor of its validity. *Goodman v. Samaritan Health Sys*, 195 Ariz. 502, 506, 990 P.2d 1061, 1065 (App. 1999).

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV

It is well recognized that collection of bodily fluids or DNA is a search and seizure under the Fourth Amendment. *Skinner v. Ry. Labor Executive Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1412-13, 103 L. Ed. 2d 639 (1989); *United States v. Kincade*, 379 F.3d 813, 821 n.15 (9th Cir. 2004) (en banc) (plurality opinion) *Cert denied*, 544 U.S. 924, 125 S.Ct. 1638 (2005); *In re Appeal in Maricopa County Juvenile Action Nos. JV-512600 and JV-512797*, 187 Ariz. 419, 423, 930 P.2d 496, 500 (App. 1996) (quoting *Schmerber v. State of California*, 384 U.S. 757, 767-68, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966)). Before a search may be conducted, law enforcement must normally obtain a search warrant by establishing probable cause before a neutral magistrate. Various exceptions have been recognized to provide for warrantless searches. *Kincade*, 379 F.3d at 822 (plurality opinion). The exceptions include "exempted areas" (including borders and airports), "administrative" (including regulatory business inspections) and "special needs" (including roadside check points and drug testing of student athletes, custom officials and railroad employees). *Id.* at 822-823. For the most part, the aforementioned searches occur in situations where the requirement to obtain a warrant and establish probable cause would be impracticable. *Id.* at 823.

The majority of circuits have now adopted a "totality of circumstances" assessment in analyzing DNA testing. *United States v. Kriesel*, 508 F.3d 941, 946 (9th Cir. 2007). The court in *Kriesel* found that:

> Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'

Kriesel, 508 F.3d at 947 (quoting *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 2197, 165 L.Ed.2d 250 (2006) (quoting *United States v. Knights*, 534 U.S. 112, 118-19, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001)))

As states and the federal government have passed laws requiring DNA testing for convicted felons, courts have upheld the right of the government to do so. The courts have determined that a convicted person is not entitled to the full range of rights and protection provided the general public. *Kriesel*, 508 F.3d at 947: (quoting *Kincade*, 379 F.3d at 833 (plurality opinion)).

> "Once a person is convicted of one of the felonies included as predicate offenses under [the DNA Act], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sample."

Kincade, 379 F.3d at 837 (plurality opinion) (quoting *Rise v. State of Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995)).

In *In re Appeal in Maricopa County Juvenile Actions Numbered JV-512600 and JV-512797*, 187 Ariz. at 423, 930 P.2d at 500, the Arizona Court of Appeals upheld DNA testing after a delinquency adjudication, noting that the testing occurs only after a juvenile has been adjudicated delinquent. As a result, the juvenile has been found to have committed the offense beyond a reasonable doubt, a substantially greater burden than the finding of probable cause required for a search warrant. The court found that the expectation of privacy was lowered for a juvenile adjudicated of a sexual offense. *Id.* at 424. No such adjudication has occurred in the instant case.

The issue before this Court was addressed in *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. App. 2006). A Minnesota statute required DNA testing of minors after arrest but prior to conviction. *Id.* at 488. The statute provided that if a minor was later found not guilty or the charge was dismissed, the state was required to destroy the sample taken from the minor and all records returned to the person charged. *Id.* Additionally, the Minnesota statute required that a court make a probable cause determination regarding the arrest before the DNA testing could occur. *Id.* at 487-88. In reviewing the constitutionality of the statute, the court held that probable cause to support a criminal charge was not the same as probable cause for a search warrant and that a judicial determination of probable cause to support a criminal charge was not an adequate substitute for a neutral and detached magistrate's finding

of probable cause to issue a search warrant. *Id.* at 490. The court further found that the reduced expectation of privacy applied to convicted felons was not applicable in the cases of individuals merely charged with an offense. *Id.* at 491. Because a person who has been charged with a crime is presumed by law to be innocent, an arrestee's expectation of privacy is no different from an individual whose case is later dismissed or found to be not guilty. *Id.* at 491-492.

The lower expectation of privacy attributable to a convicted felon has no application to one who is merely arrested and presumed by law to be innocent. The Arizona statutes relating to DNA testing of arrestees also lack some of the safeguards imposed by the Minnesota statute. A.R.S. § 13-610(M) addresses the destruction of DNA records when an arrestee has been found not guilty or the charges have been dismissed. Although the statute provides that an individual's records may be destroyed upon dismissal of the charges or a finding of not guilty, it does not make this destruction automatic. The individual must first petition the court. A.R.S. § 13-610(M). The Minnesota statute also required that a judge make a finding of probable cause for the arrest before the DNA sample could be obtained. No such requirement exists in the Arizona statute. See A.R.S. § 8-238(A). As a result, a police officer could arrest an individual without probable cause and subject the person to DNA testing in an effort to solve offenses for which a search warrant would not be authorized. While the test results could ultimately be destroyed, law enforcement would have the opportunity to utilize the DNA findings without having been subject to the requirements of a warrant; thus, lending legitimacy to what would otherwise be an unconstitutional act.

The state argues that the sample could not be used for evidentiary purposes for the offense for which the minor has been arrested. However, A.R.S. § 13-610 (I)(2) establishes that the DNA testing for arrestees may be used "[i]n a proceeding in a criminal prosecution or juvenile adjudication." The statute does not establish any safeguards to prohibit the results from a use that would otherwise require the issuance of a warrant before a sample could be obtained.

Based on the foregoing,

IT IS HEREBY ORDERED that the motion to preclude is GRANTED.

Hon. Leslie Miller

Jayne Ruhberg
Judicial Administrative Assistant

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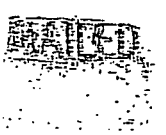

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