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I. Introduction

Advancement of the modern science changed our everyday lives to the extent unimaginable to previous generations. At the same time new technologies create novel legal issues which are to be analyzed in the context of our existing law and most notably the U.S. Constitution. One area of science that witnessed most rapid advances over the past decades is biology. Achievements of biology play a significant role in our lives. Similarly, the government came to rely on biology as well in carrying its basic functions such as law enforcement.

One biological discovery that is of particular importance to law enforcement is the discovery of DNA. DNA is uniquely suited for the crime investigation – criminals leave DNA everywhere and they cannot destroy it, unlike fingerprints. Matching DNA from the crime scene with the DNA of criminals will allow police to determine who committed the crime. In order to achieve that there is a need to have the DNA of offenders in advance. To address this issue the Federal Bureau of Investigation (FBI) created Combined DNA Index System (CODIS), the DNA database, containing DNA samples from various offenders.¹ Evidently, the larger is the database, the more likely it is that a DNA sample from the crime scene will match a sample in the database. Additionally, more samples in the database means a greater likelihood of solving “cold cases”. The scope of the DNA database was gradually expanded first to include those convicted

¹ *United States v. Mitchell*, 652 F.3d 387, 399 (3d Cir. 2011).

of violent offenses and then to persons convicted of any felony.² Finally, twenty four states and the federal government amended their laws so that any person *arrested* for a felony must provide a DNA sample to the government.³

DNA collecting statutes mandate collection without a warrant.⁴ DNA is collected without connection with the crime for which the individual is arrested. This provision raised numerous challenges on the privacy grounds –arrestees and convicted offenders challenge them as violations of their Fourth Amendment rights against unlawful searches and seizures.⁵ All Circuits upheld DNA statutes against convicted offenders based on their diminished expectation of privacy. However, there is a heated debate whether the same holds true for mere arrestees who have not been convicted of any crime.⁶

This paper will analyze the constitutionality of the DNA databases' expansion to include arrestees. Expanding DNA to arrestees is unconstitutional under the Fourth Amendment. DNA seizure and subsequent entry into the database is a warrantless search. Warrantless searches absent individualized suspicion are prohibited by the Fourth Amendment unless they can satisfy either totality of the circumstances test or the special need test. Totality of the circumstances test balances individual's privacy expectations against legitimate governmental interests. Privacy expectations of the arrestees are undiminished, comparing to the ordinary citizens and outweigh governmental interests. Special need test requires existence of a special need beyond ordinary law enforcement. The stated goal of the DNA sampling is crime investigation i.e. ordinary law

² *Id.* at 401.

³ Michael Crook, *Sacrificing Liberty for Security: North Carolina's Unconstitutional Search and Seizure of Arrestee DNA* at 2 (February 17, 2011), available at SSRN: <http://ssrn.com/abstract=1763534>.

⁴ *Id.*

⁵ *Mitchell*, 652 F.3d at 401.

⁶ John Biancamano, *Arresting DNA: The Evolving Nature of DNA Collection Statutes and Their Fourth Amendment Justifications*, 70 Ohio St. L.J. 619, 629 (2009).

enforcement. The DNA sampling does not pass special need test because there is no special need in the sampling, only ordinary law enforcement. DNA collection from the arrestees doesn't pass either the special need or the totality of the circumstances test. Therefore, DNA collection from the arrestees should be declared unconstitutional. Part II of the paper will provide an overview of the DNA databases' expansion. Part III will analyze the Fourth Amendment challenges to the DNA collecting statutes. Part IV will show that the expansion of these statutes to include arrestees is unconstitutional.

II. Expansion of DNA databases.

The states began using DNA in crime investigations starting from 1989, with Virginia being a pioneer.⁷ Since then all states and the federal government passed DNA collection statutes and established databases of DNA samples.⁸ The scope of these databases has gradually expanded to include broader categories of people.⁹ First statutes mandated DNA collection only from those convicted of certain violent crimes.¹⁰ Gradually the databases were expanded to include all felons, including those convicted of non-violent crimes, some juveniles, and arrestees.¹¹

A. CODIS database

Recognizing the potential of DNA to aid in crime solving and stimulated by desire to solve cold cases, the Congress passed the Crime Control Act (Subsequently renamed DNA Act) in 1994.¹² The Act authorized the Federal Bureau of Investigation (FBI) to establish national DNA

⁷ Tracey Maclin, *Is Obtaining an Arrestee's DNA A Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. Med. & Ethics 165, 166 (2006).

⁸ Crook, *supra* note 3 at 2.

⁹ Biancamano, *supra* note 6 at 628.

¹⁰ *Mitchell*, 652 F.3d at 399.

¹¹ *Id.*

¹² *Id.*

database system – CODIS.¹³ Each state has its own DNA system but they are required to submit all the data to CODIS as well.¹⁴ CODIS consists of two databases – a database of offenders’ profiles and a database consisting of the samples taken from the crime scenes.¹⁵ When the sample from one database matches the sample from the other it results in a “hit” which indicates that the individual, who provided the sample, committed the crime. The system then notifies the agency that provided the sample that the person has been implicated in the crime.¹⁶ As of 2010, the database contains 9,000,000 offender profiles and 300,000 forensic profiles; it is the largest database of its kind in the world.¹⁷

After the DNA sample is collected, DNA profile is created.¹⁸ DNA profile is the sequence of the DNA molecule that will be entered in the database. Not all the DNA is sequenced but only three areas containing short tandem repeats (STRs) which do not code for any personal information about the individual, such as disease susceptibility.¹⁹ Most of the DNA sequence never enters the database.²⁰ However government retains the entire sample indefinitely, raising the possibility that the entire genetic information can be accessed in the future.²¹ Each profile in the database contains the following information: 1) DNA sequence; 2) Agency that submitted the profile; 3) profile ID number; 4) information about the lab personnel, associated with the creation of the profile.²²

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Crook, *supra* note 3 at 8.

¹⁶ *Id.*

¹⁷ *Id.* at 9.

¹⁸ *Mitchell*, 652 F.3d at 400.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 423 (Rendell, J., dissenting).

²² Federal Bureau of Investigation, CODIS and NDIS Fact Sheet, *available at* <http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet>.

The system's primary use is for the law enforcement purposes, including identification purposes, as evidence in judicial proceedings if otherwise admissible, for criminal defense and finally for use of the DNA profiles in research if all personal information has been removed.²³ It is not used to collect any personal information about the individuals at the present time.²⁴ The DNA Act specifically provides penalties for the unauthorized database use.²⁵

The DNA is collected pursuant to the state and federal statutes. States are required to submit all DNA data they collected to CODIS.²⁶ The DNA Act of 2000 required DNA collection from individuals convicted of "qualifying" federal offenses (mostly violent crimes such as rape or murder).²⁷ In 2004 the Congress expanded the definition of the qualifying offense to include all felonies (including non-violent crimes) and in 2006 to include all the people who are "arrested, facing charges or convicted".²⁸

The DNA Act provides for an opportunity to expunge the DNA profile of an arrestee who has not been convicted, although the process is quite lengthy: The former arrestee has to provide the government with a copy of the order that the charges against him has been dismissed or resulted in acquittal. If no charges has been filed the arrestee has to wait until the statute of limitations has run and even then the prosecutor can object to the expunging.²⁹ In any event only

²³ DNA Act 42 U.S.C.A. § 14132 (West).

²⁴ *Mitchell*, 652 F.3d at 400.

²⁵ A person who knowingly discloses a sample or result described in subsection (a) of this section in any manner to any person not authorized to receive it, or obtains or uses, without authorization, such sample or result, shall be fined not more than \$250,000, or imprisoned for a period of not more than one year. Each instance of disclosure, obtaining, or use shall constitute a separate offense under this subsection. 42 U.S.C.A. § 14135e (West 2006).

²⁶ *Mitchell*, 652 F.3d at 399.

²⁷ "[Q]ualifying federal offenses," enumerated in the statute, included murder, voluntary manslaughter, aggravated assault, sexual abuse and other violent offenses. *People v. Buza*, 197 Cal. App. 4th 1424, 129 Cal. Rptr. 3d 753 (2011), as modified (Aug. 31, 2011), review granted and opinion superseded, 262 P.3d 854 (Cal. 2011) (citing *United States v. Kincade*, 379 F.3d 816 (9th Cir. 2004)).

²⁸ 42 U.S.C. § 14135(a)(1)(A) (2006).

²⁹ An arrestee must wait until the statute of limitations has run before requesting expungement; the court must then wait 180 days before it can grant the request; the court's order is not reviewable by appeal or by writ; and the prosecutor can prevent expungement by objecting to the request. *Buza*, 129 Cal. Rptr. 3d at 758.

the DNA profile will be expunged; the DNA sample will be retained by the government indefinitely.³⁰

B. State databases

The states' statutes differ somewhat from each other but most are modeled on the Federal DNA Act.³¹ Each state maintains its own DNA database and is able to access data from other states through CODIS system.³² The major difference between the state and federal statutes is from what class of individuals the DNA is collected.

Virginia was a pioneer in developing DNA databases. Its database is the oldest in the country, predating CODIS.³³ Virginia also led the nation in the matter of database expansion. It was the first state to expand the database from convicted offenders to arrestees.³⁴ Currently Virginia authorizes DNA collection from any one arrested in a connection with a violent offence.³⁵

California has a largest state database, consisting of over a million profiles.³⁶ It permits collecting DNA sample from all adults or juveniles convicted of a felony or a sexual offense.³⁷ Notably sexual offense includes misdemeanors as well.³⁸ Additionally, it authorizes DNA

³⁰ *Mitchell*, 652 F.3d at 423 (Rendell, J., dissenting).

³¹ DNA Act 42 U.S.C. § 14135(a) (2006); *People v. Buza*, 197 Cal. App. 4th 1424, 129 Cal. Rptr. 3d 753, 759 (2011), review granted and opinion superseded (Oct. 19, 2011), as modified (Aug. 31, 2011).

³² Maclin, *supra* note 7 at 166.

³³ Maclin, *supra* note 7 at 167.

³⁴ *Id.*

³⁵ Every person arrested for the commission or attempted commission of a violent felony as defined in § 19.2-297.1 or a violation or attempt to commit a violation of § 18.2-31, 18.2-89, 18.2-90, 18.2-91, or 18.2-92, shall have a sample of his saliva or tissue taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. Va. Code Ann. § 19.2-310.2:1 (West 2006).

³⁶ Biancamano, *supra* note 6 at 627.

³⁷ *Id.*

³⁸ *Id.*

collection from all persons arrested for a felony offense.³⁹ Thus California allows in some form DNA collection from juveniles, arrestees and people who committed misdemeanors.

Texas allows for DNA collection from all persons indicted for a violent offence and from those who are arrested for a violent offence if they have been previously convicted for one.⁴⁰ Furthermore, if any state law requires a creation of a DNA record these results may be included in the state database. Evidently in Texas this includes DNA samples from civil paternity suits.⁴¹

In sum, all states currently maintain DNA databases, forty-seven of them collect samples from all convicted offenders, thirty four collect samples from juveniles and twenty-four currently collect samples from mere arrestees.⁴² Sixteen more states have legislation pending to include arrestees.⁴³

C. Goals of the expansion

The history of the databases represents is a clear trend of expansion. There are several reasons for this expansion: Desire to increase crime solving, accurate identification, deterrence of the recidivism, desire to avoid statute of limitations problem and financial motives. Most legislatures cite as the reasons for expansion desire to solve cold cases.⁴⁴ The idea behind it is quite simple – the more samples are in the databases the more likely it is that they will match the samples from the crime scenes. Another often cited reason is exoneration of wrongly convicted.⁴⁵ Even if jury found defendant guilty beyond reasonable doubt DNA sample from a crime scene may match a DNA profile of another offender, potentially incriminating the former and

³⁹ *Id.*

⁴⁰ Tex. Gov't Code Ann. § 411.1471(a)(1)(A)-(I) (Vernon 2005 & Supp. 2008).

⁴¹ Biancamano, *supra* note 6 at 627.

⁴² Crook, *supra* note 3 at 2.

⁴³ *Id.* at 3.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.*

exonerating the later. The third reason is prevention of recidivism.⁴⁶ The person whose DNA sample is already in the database is deemed to be less likely to commit a future crime because of the greater likelihood of being caught. DNA sample from the crime scene will be matched with the sample from the database, thus implicating the offender.

Finally, the expansion of the databases may be driven by financial incentives.⁴⁷ Due to the present state of the economy the states are increasingly looking for additional sources of income. By expanding the DNA databases they are trying to attract governmental funding for the maintenance of the forensic laboratories.⁴⁸ The DNA Act offers funding to the laboratories that have a backlog of untested samples.⁴⁹ This funding may be used not only for the actual testing of the DNA sample but for the maintenance of the laboratories, salaries of the personnel and research and development.⁵⁰ This scheme creates an incentive for the states to keep the flow of untested samples to keep the federal money coming.⁵¹ These reasons led states to expand the scope of DNA collection to include arrestees.

III. Fourth Amendment Challenges to DNA collection.

DNA collection is most often challenged on the Fourth Amendment grounds. The Fourth amendment protects against unreasonable searches and seizures. It is well settled that DNA extraction represents a “search” with the meaning of the Constitution.⁵² In fact there are two “searches” involved. A search occurs when the DNA sample is collected and a search occurs

⁴⁶ *Buza*, 129 Cal. Rptr. 3d at 762.

⁴⁷ Crook, *supra* note 3 at 4.

⁴⁸ *Id.*

⁴⁹ DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546 § 3, 114 Stat. 2726 (codified as amended at 42 U.S.C. § 14135a).

⁵⁰ Mark Nelson, *Making Sense of DNA Backlogs – Myth vs. Reality*, NAT’L INST. OF JUSTICE SPECIAL REPORT, June 2010. Available online at <http://www.cca.courts.state.tx.us/tcju/pdf/Marone2.pdf>.

⁵¹ Crook, *supra* note 3 at 4.

⁵² *United States v. Pool*, 621 F.3d 1213, 1217 (9th Cir. 2010) reh’g en banc granted, 646 F.3d 659 (9th Cir. 2011) and vacated, 659 F.3d 761 (9th Cir. 2011) (citing *Kincade*, 379 F.3d at 813).

when the DNA profile in the database is compared to the crime scene profiles.⁵³ Additionally a search will occur every time the profile is compared to other profiles in the future. Not all the searches require a warrant under the Fourth Amendment, only those deemed unreasonable. Thus, DNA sample extraction and the subsequent DNA profile analysis do not require a warrant if they are reasonable.⁵⁴

There are two tests used to determine reasonableness of a search under the Fourth Amendment: The special need test and the totality of the circumstances test.⁵⁵ As evident from its name, the special need test involves existence of a special need for the search, such as airport security considerations.⁵⁶ The totality of circumstances test on the other hand involves balancing the individual's expectations of privacy against the governmental interests in the search.⁵⁷

There was a split in the Circuits as to which test to apply to the DNA-collection statutes. Majority of the Circuits used totality of the circumstances test, while the Second and the Seventh Circuits used the special need test. The special need test became much harder to apply after the Supreme Court decisions in *City of Indianapolis v. Edmond* and *Ferguson v. City of Charleston* which held that the general need for the law enforcement cannot be a special need in the context of the Fourth Amendment challenge.⁵⁸ The stated need for the DNA collection is solving past crimes and preventing future crimes i.e. general law enforcement.⁵⁹ Hence, it would be difficult for the DNA collection statutes to pass the special need test.⁶⁰ Additionally, the Supreme Court

⁵³ *Mitchell*, 652 F.3d at 406.

⁵⁴ *Pool*, 621 F.3d at 1217(citing *U.S. v. Brown*, 563 F.3d 410, 414-15).

⁵⁵ *Pool*, 621 F.3d at 1218.

⁵⁶ *Crook*, *supra* note 3 at 27.

⁵⁷ *Pool*, 621 F.3d at 1218.

⁵⁸ *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

⁵⁹ Solving crimes is clearly a normal law enforcement function. Because the "special needs" exception applies only to non-law enforcement purposes, and the State's interest here is the use of data for purely law enforcement purposes, the "special needs" exception is inapplicable. *Friedman v. Boucher*, 580 F.3d 847, 853 (9th Cir. 2009).

⁶⁰ *Id.*

decision in *Samson v. California* directs to the use of the totality of the circumstances test in the context of the DNA collection.⁶¹ In this paper the DNA collection statutes are analyzed on the basis of the totality of the circumstances test although the special need test would be addressed as well to a lesser extent.

A. Application of the DNA collection statutes to the convicts.

There are two issues in analyzing reasonableness of the DNA collection from arrestees. The first is the collection of the DNA sample and the second is matching of the DNA profile with those from the crime scenes.⁶² The issue of the DNA collection is analyzed in light of *Skinner v. Railway Labor Executives' Ass'n*.⁶³ *Skinner* held that collection of blood, breath and urine sample constitutes a search under the Fourth Amendment; however the search is so minimal and non-intrusive that it is considered to be reasonable.⁶⁴ DNA sample is currently obtained by the means of a buccal swab.⁶⁵ The buccal swab is even less intrusive procedure than blood sample collection, hence it is reasonable.⁶⁶ Additionally, blood and urine samples may be used to obtain the DNA sample. Therefore, the collection of the DNA sample is reasonable under the Fourth Amendment.

The real issue in most of the cases is not the collection of the sample, but the creation of a profile for CODIS system. Governmental possession of a DNA sample bears little consequences to an individual by itself, while the DNA profile can implicate him or her in further crimes.⁶⁷ All Circuits faced with the question of whether DNA collection post-conviction violates Fourth

⁶¹ *Pool*, 621 F.3d at 1218; *Samson v. California*, 547 U.S. 843 (2006).

⁶² *Mitchell*, 652 F.3d at 406.

⁶³ *Pool*, 621 F.3d at 1220 (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, (1989).

⁶⁴ *Skinner*, 489 U.S. at 625-27.

⁶⁵ *Mitchell*, 652 F.3d at 407.

⁶⁶ *Id.*

⁶⁷ *Pool*, 621 F.3d at 1220.

Amendment upheld the DNA collection statutes either on totality of the circumstances test or the special need test.⁶⁸

1. Totality of the circumstances test.

Majority of the circuits used the totality of the circumstances test.⁶⁹ Under this test the courts weight the governmental interests against the privacy expectations of convicted offenders. The most often cited government interests are investigation of the “cold” cases, aid in the reintegration into the society and continuing supervision of the individual.⁷⁰ The government has a legitimate interest in investigating cold cases as a part of normal law enforcement.⁷¹ Additionally, DNA analysis helps exonerate individuals who are serving sentences for the crimes they did not commit.⁷² Collecting DNA samples will help deter recidivism. Those who were once convicted of a crime are more likely to commit another crime.⁷³ If their DNA sample is already in the system they will be easily identified when the crime scene sample is entered into the database.⁷⁴ Thus the likelihood of being caught will prevent the felons from committing more crimes and help their reintegration in the society.⁷⁵ Another governmental interest is a continued supervision of a criminal after being released on a parole or probation.⁷⁶ The individual on a supervised release still remains in the governmental custody, thus government retains a

⁶⁸ *Buza*, 129 Cal. Rptr. 3d at 760.

⁶⁹ *Id.*

⁷⁰ *Friedman*, 580 F.3d at 858, *Mitchell*, 652 F.3d at 413.

⁷¹ *Mitchell*, 652 F.3d at 413.

⁷² *Id.* at 404.

⁷³ *Id.* at 424 (Rendell, J., dissenting).

⁷⁴ *Id.* at 414.

⁷⁵ *Buza*, 129 Cal. Rptr. 3d at 762.

⁷⁶ *Friedman*, 580 F.3d at 858.

legitimate interest in his or her person; the government has a legitimate interest in DNA use as a means of the continued supervision.⁷⁷

On the other hand, weighting individual expectations of privacy all the Circuits held that convicts have diminished expectations of privacy.⁷⁸ The “watershed event” in diminishing the privacy expectation is the conviction.⁷⁹ The individuals in the governmental custody cannot reasonably expect to hide their personal information from the government.⁸⁰ Therefore, their expectations of privacy are lower than those of the general public. Totality of the circumstances test balances governmental interests against individual expectations of privacy. In case of convicted felons, the governmental interests are very strong and the individual expectations of privacy are diminished. Hence, in balancing the legitimate governmental interests against the diminished privacy interests of the felons the governmental interests prevailed.⁸¹ Therefore, collection of the DNA from the convicted felons was found to be constitutional.

The same reasoning held true even for those who were convicted of non-violent felonies. – The event of conviction diminished their privacy expectations in their identity.⁸² Regardless of the crime committed, because of the conviction and being in custody, any convicted felon can claim very limited expectations of privacy.⁸³ On the other hand the governmental interests remain significant even in case of non-violent offenders: solving crimes and deterrence of

⁷⁷ *Id.*; *Buza*, 129 Cal. Rptr. 3d at 762.

⁷⁸ *Banks v. United States*, 490 F.3d 1178 (10th Cir. 2007); *United States v. Castillo-Lagos*, 147 F. App'x 71 (11th Cir. 2005); *United States v. Kriesel*, 508 F.3d 941 (9th Cir. 2007); *United States v. Kraklio*, 451 F.3d 922 (8th Cir. 2006); *United States v. Hook*, 471 F.3d 766 (7th Cir. 2006); *Wilson v. Collins*, 517 F.3d 421 (6th Cir. 2008); *United States v. Weikert*, 504 F.3d 1 (1st Cir. 2007); *United States v. Sczubelek*, 402 F.3d 175 (3d Cir. 2005); *Kincade*, 379 F.3d 813; *United States v. Amerson*, 483 F.3d 73 (2d Cir. 2007) .

⁷⁹ *Mitchell*, 652 F.3d at 404, *Pool*, 621 F.3d at 1236 (Schroeder, J., dissenting).

⁸⁰ *Mitchell*, 652 F.3d at 404.

⁸¹ *Pool*, 621 F.3d at 1236 (Schroeder, J., dissenting).

⁸² *Id.*

⁸³ *Kriesel*, 508 F.3d 947.

recidivism.⁸⁴ Non-violent criminals leave their DNA at the crime scenes just as the violent ones do, therefore DNA collection from non-violent felons will aid solving past crimes and deterring recidivism as well.⁸⁵ In balancing diminished privacy expectations of non-violent criminals against significant governmental interests, the governmental interest prevailed. DNA collection from non-violent criminals was found constitutional under the totality of circumstances test.⁸⁶

2. Special needs test.

Two circuits upheld DNA collection statutes as applied to convicts based on the special needs test.⁸⁷ Special needs test requires an existence of a special need beyond normal law enforcement. If such need exists the search does not violate the Fourth amendment. While general crime prevention and investigation is not sufficient to satisfy special need test, the Seventh Circuit upheld a DNA collection statute citing a special need of collecting felon's identification information.⁸⁸ Similarly, the Second Circuit cited a special need establishing an information database.⁸⁹ The Second Circuit noted that while the primary need for the DNA database is law enforcement, this need is nevertheless "special".⁹⁰ The need for law enforcement is "special" because it aims at uncovering evidence that is not detectable by the means of "normal" law enforcement.⁹¹ The Court found that there are no other means of establishing a database that will allow matching offenders with the evidence from the crime scene.⁹² Absence

⁸⁴ *Id.* at 949.

⁸⁵ *Id.*

⁸⁶ *Id.* at 950.

⁸⁷ *Hook*, 471 F.3d 766; *Amerson*, 483 F.3d 73.

⁸⁸ *Hook*, 471 F.3d 766.

⁸⁹ *Amerson*, 483 F.3d 73.

⁹⁰ *Id.* at 82

⁹¹ *Id.*

⁹² *Id.*

of any other means makes DNA collection a “special” need.⁹³ Thus DNA collection from convicted felons was found to be constitutional under the special need tests as well.

B. Application to Arrestees

Since adoption of amendments to the DNA Act that include arrestees and similar amendments to the states’ DNA statutes there were several cases challenging the constitutionality of those statutes. There is currently a judicial split with some courts deciding in favor of the arrestees and some in favor of the government. *Friedman v. Boucher*, *In re Welfare of C.T.L.* and *People v. Buza* found extension of the DNA collecting statutes to arrestees unconstitutional, while *United States v. Mitchell*, *United States v. Pool*, *Anderson v. Com.* and *Haskell v. Brown* found it to be constitutional.⁹⁴ The matter is far from settled and some opinions are being withdrawn and superseded, as higher courts review the issue as evidenced by *Pool* and *Buza*.⁹⁵ In *Pool* defendant lost in the Ninth Circuit and petitioned the panel for *en banc* review.⁹⁶ However, two days before the argument was scheduled defendant pleaded guilty in the underlying crime rendering the case moot and the Ninth Circuit withdrew its opinion⁹⁷. In *Buza* Supreme Court of California granted the petition for review, superseding the decision of the California Court of Appeals but it did not hear the case yet. Nevertheless the analysis of the

⁹³ *Id.*

⁹⁴ *Mitchell*, 652 F.3d 387; *Pool*, 621 F.3d 1213, *Buza*, 129 Cal. Rptr. 3d 753, *Anderson v. Com.*, 274 Va. 469, 650 S.E.2d 702 (2007); *In re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. Ct. App. 2006), *Friedman*, 580 F.3d at 847; *Haskell v. Brown*, 677 F. Supp. 2d 1187 (N.D. Cal. 2009).

⁹⁵ *United States v. Pool*, 09-10303, 2011 WL 4359899 (9th Cir. Sept. 19, 2011); Petition for review granted. *People v. Buza*, 262 P.3d 854 (Cal. 2011)

⁹⁶ *Id.*

⁹⁷ We have been advised that *Pool* has entered a guilty plea. The parties agree there is no longer a live controversy, and the case is moot *United States v. Pool*, 09-10303, 2011 WL 4359899 (9th Cir. Sept. 19, 2011).

subject matter in these decisions is important since other courts based their analysis these precedents.⁹⁸

1. Special need test

The only case where the court applied special need test to the DNA sampling of arrestees is *Friedman*.⁹⁹ The Ninth Circuit found the DNA collecting from an arrestee unconstitutional based on the special need test.¹⁰⁰ The plaintiff in *Friedman* was convicted in Montana in 1980 and served its full term by 2000.¹⁰¹ He consequently moved to Nevada where he was arrested on unrelated charges in 2003.¹⁰² After his repeated objections, the detectives forcefully obtained a DNA sample from him by a buccal swab.¹⁰³ In 2000, Montana did not yet require mandatory DNA sampling of the convicts and in 2003 Nevada did not yet require mandatory DNA testing of the arrestees.¹⁰⁴ Hence there was no statutory authority for the DNA collection. The Ninth Circuit applied the special need test to the DNA collection.¹⁰⁵ It reasoned that the only “special need” in DNA collection was solving crimes.¹⁰⁶ Solving crimes is general law enforcement. The Ninth Circuit found that general law enforcement is not a special need based on *Samson*.¹⁰⁷ Hence the Ninth Circuit found collecting of a DNA sample from an arrestee unconstitutional

⁹⁸ *Buza*, 129 Cal. Rptr. 3d 753.

⁹⁹ *Id.* at 853.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 851.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Although by 2003 Montana required DNA sampling of all felons, even if released prior to the statute enactment, the Ninth Circuit held that Montana statute did not apply to felons residing in the other states, such as Nevada. *Id.* at 854.

¹⁰⁵ *Id.* at 853.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

based on the special need test.¹⁰⁸ No other court applied special needs test to the DNA sampling of arrestees.

2. Totality of the Circumstances Test

All other courts applied the totality of the circumstances test based on the increased adaption of *Samson*. Totality of the circumstances test involves balancing individual privacy expectations against legitimate governmental interests. The individual expectations of privacy analysis includes the distinction between the privacy interests of general public, arrestees, detainees and convicts, fear of further use of the genetic information such as disease susceptibility and dignity interests. Governmental interests include crime investigation and identification of the person in custody.

There is no consensus on the significance of arrestees' expectations of privacy.¹⁰⁹ All courts that considered the matter agree that the diminished privacy expectations of convicts do not outweigh legitimate governmental interests.¹¹⁰ At the same time all courts note that privacy expectations of ordinary people outweigh governmental interests in DNA collection, which precludes government from collecting DNA samples from the members of general public.¹¹¹ Thus privacy expectations of the arrestees outweigh governmental interests if they are above the privacy interests of the convict, closer to the privacy interests of the general public. The courts differ on how much weight to give individual expectations of privacy. Some find them undiminished, while other held that finding of a probable cause for an underlying crime

¹⁰⁸ *Id.*

¹⁰⁹ *Pool* 621 F.3d at 1219; *In re Welfare of C.T.L.*, 722 N.W.2d 491.

¹¹⁰ See, *supra* note 78.

¹¹¹ *Mitchell*, 652 F.3d at 429 (Rendell, J., dissenting).

diminished the privacy expectations.¹¹² *Anderson* court compared arrestees' privacy expectations in their DNA sample to those in the fingerprinting.¹¹³ It found that arrestees have little privacy expectations in fingerprinting and, correspondingly, little privacy expectations in their DNA profile. On the other hand *Buza* court distinguished between DNA and fingerprinting, and held that arrestees have significant privacy expectations in their DNA profile.¹¹⁴ Thus, courts disagree over the scope of arrestees' privacy expectations.

The governmental interests on the other side of the balance include crime solving and identification of the person in custody. Crime solving is the stated goal of the DNA collection statutes as it allows matching of the DNA profiles from the database with those from the crime scenes. Another stated governmental interest is identification of the person in custody. DNA provides the most accurate means of identification since no two persons have the same DNA sequence. Thus, government asserts interest in using DNA sampling to determine who is in its custody.

All courts agree that these interests apply to arrestees; however, the courts disagree on the weight of these interests. Some courts find that these interests are as strong for arrestees as for the convicted felons.¹¹⁵ On the other hand, *Buza* court finds both identification and investigation interests significantly diminished in case of arrestees, based on *Schmerber v. California*.¹¹⁶ It found that suspicionless searches are not permitted beyond convicted felons and that government conflates identification with investigation.¹¹⁷

¹¹² *Pool* 621 F.3d at 1219; *In re Welfare of C.T.L.*, 722 N.W.2d 491.

¹¹³ *Anderson* 274 Va. at 475

¹¹⁴ *Buza* 129 Cal. Rptr. 3d at 767.

¹¹⁵ *Pool* 621 F.3d at 1223; *Mitchell* 652 F.3d at 414.

¹¹⁶ *Buza* 129 Cal. Rptr. 3d at 771.

¹¹⁷ *Id.*

The totality of circumstances test involves balancing arrestees' expectations of privacy against legitimate governmental interests. The courts disagree both on the scope of the arrestees' privacy expectations and on importance of the governmental interests. Correspondingly, in balancing one against the other some courts favor arrestees and some favor the government.

IV. Extension of the DNA Collecting Statutes to Include Arrestees is unconstitutional.

A. Special need analysis

DNA sampling of arrestees does not pass the special need test because there is no special need for the sampling. In *Friedman* court found that the only asserted need for the DNA sampling of the arrestee is solving "cold cases"¹¹⁸. Solving cold cases is ordinary law enforcement. Special need tests requires a "special need" beyond law enforcement and the Ninth Circuit in *Friedman* found that there is no such need in the DNA sampling of arrestees.¹¹⁹ This is the only case decided on the basis of the special need test - it establishes a precedent that DNA testing of the arrestees is unconstitutional.

Another potential special need for the DNA collection is the identification of the individual, although this argument wasn't raised in *Friedman*.¹²⁰ DNA presents the most accurate way to identify an individual since no two individuals have exactly same DNA sequence. All crimes have statutes of limitations – i.e. if a person was not charged with a particular crime within the specified time period, he can no longer be charged with it even if he is guilty beyond the reasonable doubt. Identifying the offenders by their DNA profiles allows the government to

¹¹⁸ *Friedman*, 580 F.3d at 853.

¹¹⁹ *Id.*

¹²⁰ Biancamano, *supra* note 6 at 658.

avoid the statute of limitations problem.¹²¹ The individual is charged with a crime when his DNA from the crime scene is charged with the crime even if his identity is unknown at the time.¹²²

This argument poses to create a special need of identification to include arrestees in the DNA database. Nevertheless, this argument has in its core law enforcement rather than identification because the primary purpose is not to simply identify the individuals but to charge them with the crimes. This argument may identify a valid special need in the context of convicted offenders, but not in the context of arrestees. The Supreme Court never permitted suspicionless searches directed at uncovering evidence of other crimes outside the context of convicted felons.¹²³ DNA sampling of arrestees to implicate them in crimes where the suspect was identified by his or her DNA is a suspicionless search. Therefore, “special need” to toll statutes of limitations may not be a special need as applied to arrestees, because it is expressly prohibited by the Supreme Court. It is unlikely, that this “special need” will pass the special need test. The DNA expansion to include arrestees fails the special need test.

The only court that applied the special needs test decided in favor of an arrestee. There are no other plausible special needs that may justify collection of DNA sample from arrestees. The DNA sampling fails the special need test and should be declared unconstitutional under this test.

B. Totality of the Circumstances test analysis.

Totality of the circumstances test focuses on balancing privacy expectations of arrestees against legitimate governmental interest. Arrestees possess higher expectations of privacy than

¹²¹ *Id.* at 659.

¹²² *Id.*

¹²³ *Buza*, 129 Cal. Rptr. 3d 777.

convicted offenders. These expectations are not outweighed by the governmental interests. Privacy expectations of arrestees are greater than the privacy expectations of the convicts because arrestees are entitled to the presumption of innocence, all DNA collection statutes provide for expungement of the DNA profile if the person is found not guilty, and there is no pervasive authority to support that arrestees have diminished privacy expectations.

Arrestees' privacy expectations outweigh governmental interests because all the current statutes provide for expungement of the DNA profile after the charges were dropped, dismissed or the defendant was acquitted. This scheme suggests that the privacy interests of an individual who has not been convicted outweigh the governmental interest in storing the DNA profile.¹²⁴ Arrestee is an individual who has not been convicted. Unless there is a difference between the privacy expectations of an arrestee and a person who has been found not guilty, arrestee's privacy expectations outweigh the governmental interests.¹²⁵ Because of the presumption of innocence, the privacy expectations of an arrestee are no different from the privacy expectations of an ordinary citizen.¹²⁶ Therefore, arrestee has high expectations of privacy.

Arrestees share the same privacy expectations as the ordinary citizens because they are entitled to the presumption of innocence.¹²⁷ A person is innocent until proven guilty; therefore privacy expectations of an arrestee are the same as of the ordinary citizens. Some courts draw a distinction between arrestees and the ordinary citizens based on judicial finding of a probable cause.¹²⁸ The argument is as follows: finding of a probable cause is a "watershed event" that

¹²⁴ *In re Welfare of C.T.L.*, 722 N.W.2d at 491.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Pool*, 621 F.3d at 1224; *Anderson*, 274 Va. at 469.

differentiates an arrestee from the general public and diminishes his or her privacy expectations.¹²⁹

However this argument is flawed: the existence of the probable cause for arrest is not the same as existence of a probable cause for the DNA sample and it does not satisfy the reasonableness requirement of the Fourth Amendment.¹³⁰ This situation is similar to *Schmerber*.¹³¹ In that case Supreme Court decided that the existence of a probable cause to arrest a person is not sufficient to take a biological sample from an arrestee without first obtaining a search warrant.¹³² Only limited circumstances, such as the fear that the evidence may disappear justifies collecting the biological sample from a person without a warrant.¹³³ Disappearance of the evidence is not applicable to DNA because DNA exists in every cell of our body and is recoverable long after death.¹³⁴ Therefore, probable cause for arrest does not by itself diminish privacy interests of the arrestee.

Additionally, the proposition that finding of a probable cause diminishes privacy expectations is undermined by the fact that probable cause is mostly determined by the arresting officer, not by the grand jury. Many DNA collecting statutes including the DNA Act require DNA sample collection as soon as practically possible¹³⁵. This means that the DNA sample is taken at the initial “booking” of the individual, before he’ll see a judge or a grand jury.¹³⁶ The finding of the probable cause is made by the arresting officer. The finding of the probable cause by the arresting officer does not carry significant weight because it is not made by a “neutral and

¹²⁹ *Pool*, 621 F.3d at 1219.

¹³⁰ *In re Welfare of C.T.L.*, 722 N.W.2d at 490.

¹³¹ *Id.* at 490 (citing *Schmerber*, 384 U.S. 757).

¹³² *Schmerber*, 384 U.S. at 767.

¹³³ *In re Welfare of C.T.L.*, 722 N.W.2d at 490.

¹³⁴ Lauren Frayer, *Can Woolly Mammoth Be Cloned From Frozen DNA?*, AOL NEWS (Jan. 18, 2011, 10:25AM) <http://www.aolnews.com/2011/01/18/can-woolly-mammoth-be-cloned-from-frozen-dna/>.

¹³⁵ *Buza*, 129 Cal. Rptr. 3d at 766.

¹³⁶ *Mitchell*, 652 F.3d at 427 (Rendell, J., dissenting).

detached magistrate”. It does not diminish arrestee’s expectations of privacy.¹³⁷ Thus, finding of a probable cause for an arrest is not determinative in assessing arrestees’ expectations of privacy.

There is no persuasive authority that arrestees have diminished privacy expectations.¹³⁸ The courts that found diminished expectations of privacy rely heavily on the analogy to fingerprinting.¹³⁹ According to this reasoning once the arrestee enters into the custody he or she is a subject to standard booking procedures such as fingerprinting and photographing. The fingerprinting does not implicate significant expectations of privacy, so doesn’t the DNA collection.

However this analogy is based on a faulty premise.¹⁴⁰ Fingerprinting entered our life before majority of the decisions defining the scope of the Fourth Amendment, such as *Katz v. United States*; essentially no one has challenged the constitutionality of fingerprinting.¹⁴¹ The fingerprinting cannot serve a model for subsequent judicial determinations of the constitutionality of the DNA statutes because it does not have any judicial determination itself.¹⁴² In fact, the analogy to fingerprinting raises a question of whether fingerprinting itself violates Fourth Amendment. While fingerprinting of convicted felons may be explained by their diminished privacy interests upon conviction, the arrestees retain high privacy expectations of the ordinary citizens. Thus, there is no persuasive authority that the arrestees have diminished privacy expectations.

¹³⁷ *Buza*, 129 Cal. Rptr. 3d 766, note 12.

¹³⁸ *Mitchell*, 652 F.3d at 425 (Rendell, J., dissenting).

¹³⁹ *Id.* at 410; *Anderson*, 274 Va. 474.

¹⁴⁰ *Mitchell*, 652 F.3d at 426 (Rendell, J., dissenting).

¹⁴¹ *Id.*; *Katz v. United States*, 389 U.S. 347(1967).

¹⁴² *Mitchell*, 652 F.3d at 426 (Rendell, J., dissenting).

Another difference between DNA collection and fingerprinting is dignity interests of arrestees.¹⁴³ Fingerprinting is routinely used in many professions and is not seen as a “badge of crime”.¹⁴⁴ DNA collection, on the other hand, is viewed as something reserved exclusively for the criminals, especially for the dangerous ones.¹⁴⁵ DNA collection infringes on the privacy of the arrestees much more than the fingerprinting does because it offends their dignity.

Arrestees’ privacy interests are greater than those of convicts because of the presumption of innocence. Finding of a probable cause for arrest does not diminish privacy expectations of arrestees in their bodily integrity. Analogy to fingerprints is false because there is no judicial basis for diminished privacy expectations in the fingerprints in the first place. Furthermore, unlike fingerprinting, DNA extraction is strongly associated with criminality.

On the other scale of the balance lay governmental interests. The first and foremost interest stated by the government is interest in solving crimes. However, the interest in crime solving, does not carry much weight in the analysis of the arrestees’ rights under the Fourth Amendment, unlike in context of the convicted felons, because it is a suspicionless search. The DNA collection is not done in connection with the crime for which the individual is arrested. Furthermore, DNA testing is not done in connection with any specific crime whatsoever. Thus, DNA collection is a suspicionless search. The Supreme Court never permitted suspicionless searches directed at uncovering evidence of other crimes outside the context of felons.¹⁴⁶ These are precisely the searches against which the Fourth Amendment is supposed to guard.¹⁴⁷ DNA sampling involves a physical intrusion. The Supreme Court in *Schmerber* specifically cautioned

¹⁴³ *Buza*, 129 Cal. Rptr. 3d at 769.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 777.

¹⁴⁷ *Id.*

against this type of searches: “The interest in human dignity and privacy <...> forbid such intrusions on the mere chance that desired evidence may be obtained.”¹⁴⁸ DNA sampling is a physical intrusion which is based on a mere chance that evidence of crimes may be obtained. While this may be a valid interest in case of convicted felons it is not so for the arrestees, according to the Supreme Court. Therefore, government does not possess a valid interest in collecting DNA samples from arrestees for investigatory purposes.

The only exceptions where warrantless intrusions beyond the body surface are permitted are when the evidence may disappear, like blood alcohol content and to enforce prison security.¹⁴⁹ None of these circumstances is an issue in the DNA collection. The government does not allege any importance of DNA samples to the prison security; DNA is present in every cell of our body. It is settled that convicted felons have to provide the DNA sample¹⁵⁰. Thus government will be able to obtain the sample post-conviction anyway and if the arrestee is found not guilty the DNA profile will be expunged.¹⁵¹ The total impact of collecting DNA from arrestees is small.¹⁵² The government does not significantly benefit from receiving the sample sooner rather than later.

Recent data suggests that gains of including arrestees into the database might be quite limited: Only one in forty criminal cases results in trial, while the rest of defendants plead guilty.¹⁵³ Those who plead guilty are already subject to the DNA-collecting statutes. The benefits of DNA collection from arrestees are insignificant since majority of them would be subject to

¹⁴⁸ *Schmerber*, 384 U.S. at 768.

¹⁴⁹ *Id.*; *Pool*, 621 F.3d at 1237 (Schroeder, J., dissenting).

¹⁵⁰ See *supra*, note 78

¹⁵¹ *Mitchell*, 652 F.3d at 423 (Rendell, J., dissenting).

¹⁵² *Buza*, 129 Cal. Rptr. 3d at 777.

¹⁵³ Richard Oppel, *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 26, 2011) at A1, available at <http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html?ref=us>.

DNA collecting statutes after conviction. This is best illustrated by *U.S. v. Pool*.¹⁵⁴ In that case an arrestee objected to the DNA sample taking and attacked the DNA Act on the Fourth Amendment grounds. After losing in the district court and in the Ninth Circuit, defendant petitioned the panel for *en banc* review¹⁵⁵. The review was granted but the day before the argument was scheduled defendant pleaded guilty in the initial case, rendering the argument moot.¹⁵⁶ The panel canceled the review and withdrew the previous opinion, leaving the Ninth Circuit without a precedent.¹⁵⁷ *U.S. v. Pool* indicates limited advantage of including arrestees into the database and an unnecessary waste of judicial resources in the litigations, involving the DNA collection from the arrestees.

The number of samples the government receives from arrestees that are later acquitted is very small based on how many cases even go to trial; the scope of DNA databases expansion to include arrestees is very limited.¹⁵⁸ Since there is no significant benefit for the government it is not justified to expand DNA collection to arrestee because the DNA evidence will not disappear and the government will be able to collect it post-conviction. Benefits from DNA collecting prior to conviction are insignificant and do not justify an exception to the general prohibition of intrusions beyond body surfaces.

Another commonly stated governmental interest is identification. The government interest in identifying who is in custody is a legitimate one. However, this reasoning is flawed. It attempts

¹⁵⁴ *Pool*, 621 F.3d 1213 reh'g en banc granted, 646 F.3d 659 (9th Cir. 2011) and vacated, 09-10303, 2011 WL 4359899 (9th Cir. Sept. 19, 2011).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *supra* note 153.

to mask investigation for the identification.¹⁵⁹ First of all, DNA sample processing takes too long to serve as the means of identification. While the fingerprinting gives a response in ten minutes, the current processing time for the DNA sample is 31 calendar days.¹⁶⁰ The DNA sampling technology cannot serve as an adequate means of identification of the person in custody. This may not make a difference for the convicted felons who are likely to stay under the governmental supervision for more than thirty days, but this form of identification is not reasonable in the context of arrestees. It is not reasonable to keep someone under the supervision for 31 days just to identify who is at custody, when fingerprinting can provide a response to the same question in just ten minutes. Therefore, application of the DNA for the identification of arrestees is unreasonable.

Government further asserts that identification means not only who the person is but also what did the person do.¹⁶¹ However, finding what the person did is investigation rather than identification.¹⁶² As discussed above, investigation is not a significant governmental interest because suspicionless search does not justify bodily intrusions beyond the context of convicted felons. Therefore, government does not possess a significant interest in identification through the DNA sampling. The DNA technology does not provide adequate means of determining who the person is at the time of arrest. Identifying what the person did is investigation and investigation is not considered significant governmental interest.

Additionally is desire to obtain federal funding in connection with the DNA collection might be driving states' legislatures to expand databases.¹⁶³ Due to a difficult economic situation the

¹⁵⁹ *Buza*, 129 Cal. Rptr. 3d at 772.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 771 (citing *Haskell*, 677 F. Supp. 2d 1187).

¹⁶² *Buza*, 129 Cal. Rptr. 3d at 777.

¹⁶³ *Crook*, *supra* note 3 at 4.

states are increasingly looking for additional sources of income. By expanding the DNA databases they are trying to attract governmental funding for the maintenance of the forensic laboratories.¹⁶⁴ The DNA Act offers funding to the laboratories that have a backlog of untested samples.¹⁶⁵ This funding may be used not only for the actual testing of the DNA sample but for the maintenance of forensic laboratories, salaries of the personnel and research and development.¹⁶⁶ This creates an incentive for the states to keep the flow of untested samples to keep the federal money coming.¹⁶⁷ This strategy results in creation of a constant backlog of samples by delaying processing some samples, including the samples from the crime scenes.¹⁶⁸ This somewhat undermines the stated goals of the DNA database creation, namely increase in the crime solving.¹⁶⁹ Thus, DNA databases became a powerful tool for the States to obtain additional funding and do not necessarily contribute to the crime solving or identification. Governmental interest in obtaining additional funding by the means of intrusion into privacy is not a legitimate governmental interest in the context of Fourth Amendment.

Totality of the circumstances test balances individual expectations of privacy against the governmental interests. Arrestees' expectations of privacy are greater than those of convicted offenders and closer to those of the general public because of the presumption of innocence. There is no persuasive authority that arrestees have diminished expectations of privacy. On the other hand governmental interests in DNA collection of arrestees are weaker than in the context of convicted offenders. DNA technology at the present state cannot provide adequate means for identification of the offenders. Another governmental interest is in crime investigation.

¹⁶⁴ *Id.*

¹⁶⁵ DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546 § 3, 114 Stat. 2726 (codified as amended at 42 U.S.C. § 14135a).

¹⁶⁶ Nelson, *supra* note 50.

¹⁶⁷ Crook, *supra* note 3 at 4.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

Suspicionless intrusions beyond body surface are not permitted outside the context of convicted offenders. Finally, state legislatures may be driven by financial motives in their desire to extend DNA databases, which is not a legitimate governmental interest in the context of privacy rights under the Fourth Amendment. In balancing arrestees' expectations of privacy against the governmental interests, the privacy expectations should prevail. DNA sampling of arrestees fails both the totality of the circumstances test and the special need test. Therefore, it should be declared unconstitutional.

V. CONCLUSION

DNA provides a useful tool for the crime investigation and law enforcement relies more and more on the DNA databases. Expanding use of DNA affects greater and greater categories of people, subjecting the DNA extraction to the Fourth Amendment challenges against unreasonable searches and seizures. The most recent development of the state and federal law is to introduce mandatory DNA sampling of arrestees. It implicates Fourth Amendment's rights to a greater extent than mandatory DNA testing of the convicted felons. Warrantless searches absent individualized suspicion are prohibited by the Fourth Amendment unless they can satisfy either totality of the circumstances test or the special need test. DNA sampling of arrestees doesn't pass either the totality of the circumstances test or the special need test. Therefore, extension of the DNA collecting statutes to include arrestees should be declared unconstitutional.