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North Carolina's Arrested Development: Fourth Amendment Problems in the DNA Database Act of 2010*

INTRODUCTION

Most Americans can probably hum a few bars of the theme song to one of television's most successful franchises: *Law & Order*.¹ Watching the ever-cynical Detective Briscoe investigate crimes alongside the good-looking Detective Logan made viewers root for police to catch New York City's criminals. Sometimes the "bad guys" won, such as when the judge excluded the smoking gun from trial, introducing Americans to some of the costs to the criminal justice system in preserving defendants' rights. As much as society hates seeing a criminal go free, maintaining a defendant's rights before and during trial is integral to the American justice system. In passing the DNA Database Act of 2010,² the North Carolina General Assembly has reduced the costs for law enforcement and prosecutors to obtain a conviction but increased costs for the civil liberties of criminal defendants who have not yet been tried by a jury of their peers. At first blush, one might wonder, "What is wrong with using DNA samples to close cold cases and close fresh ones even faster?"³ The problem lies in trampling arrested individuals' civil rights in the footrace to a conviction.

This Recent Development will argue that collecting an arrestee's DNA under the DNA Database Act without a search warrant violates the Fourth Amendment's protection against unreasonable searches. In Part I, this Recent Development will discuss the passage of the DNA Database Act and the statute itself. Part II will establish that a cheek swab of an arrested individual is a search. Since

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1. *Law & Order* (NBC television broadcast 1990–2010). DNA database laws were recently featured on *Law & Order: Los Angeles*. *Law & Order: Los Angeles: Ballona Creek* (NBC television broadcast Nov. 17, 2010).

2. DNA Database Act of 2010, ch. 94, 2010-3 N.C. Adv. Legis. Serv. 1 (LexisNexis) (codified at N.C. GEN. STAT. § 15A-266.3A (Supp. 2010)). This law became effective on February 1, 2011. *Id.* at 9.

3. Raleigh chief of police Harry Patrick Dolan argued that North Carolina Board of Education member Kathy Taft's murder could have been closed in seven days, rather than the forty-one it actually took to close the case, had the police been able to take advantage of the new law. Thomasi McDonald, *Cooper Argues for Taking DNA*, NEWS & OBSERVER (Raleigh, N.C.), June 29, 2010, at 3B, available at <http://www.newsobserver.com/2010/06/29/556360/cooper-argues-for-taking-dna.html> #storylink=misearch.

“[s]earches 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 specifically established and well-delineated exceptions,”⁴ Part III will demonstrate that none of the “well-delineated exceptions,”⁵—including search incident to lawful arrest, inventory search, or exigent circumstances—justify the warrantless search. Furthermore, as discussed in Part IV, at least two state courts differ in their treatment of this issue, and the Minnesota Court of Appeals’ invalidation of a statute⁶ analogous to North Carolina’s is instructive on the Fourth Amendment unreasonableness of cheek swabs under such statutes. Finally, Part V will show that the policy reasons advanced by supporters of DNA database laws are not persuasive and that there is a less constitutionally questionable method to achieve many of the same goals.

I. DNA DATABASE ACT OF 2010

The North Carolina General Assembly passed the DNA Database Act on July 10, 2010, substantially amending North Carolina’s criminal procedure statutes.⁷ Legislators, commentators, and scholars have spoken out against the passage of this law,⁸ and with good reason. On the other hand, law enforcement officials and prosecutors supported the Act, citing the possibilities of closing old cases and exonerating innocent individuals.⁹ North Carolina Attorney General Roy Cooper and law enforcement officials even invoked the highly publicized investigations into the murder of University of North Carolina student body president Eve Carson and the murder of

4. *Katz v. United States*, 389 U.S. 347, 357 (1967).

5. *Id.*

6. *In re C.T.L.*, 722 N.W.2d 484, 492 (Minn. Ct. App. 2006).

7. 2010-3 N.C. Adv. Legis. Serv. 1. Governor Beverly E. Perdue signed the bill into law on July 15, 2010. *Id.* at 9.

8. See Daren Bakst & Sarah Preston, Editorial, *Don’t Let the State Take Arrestees’ DNA*, NEWS & OBSERVER (Raleigh, N.C.), June 17, 2010, at 13A, available at <http://www.newsobserver.com/2010/06/17/536558/dont-let-the-state-take-arrestees.html#storylink=misearch> (arguing that the DNA Database Act endangers the rights of the innocent); Anne Blythe & Lynn Bonner, *DNA Law Raises Legal Questions*, NEWS & OBSERVER (Raleigh, N.C.), July 29, 2010, at 1A, available at <http://www.newsobserver.com/2010/07/29/602467/dna-law-raises-legal-questions.html#storylink=misearch> (surveying legal commentators concerned about the constitutional implications of the act); McDonald, *supra* note 3 (noting Attorney General Cooper’s support for the law as well as the critics’ critiques of the law); *Perdue Signs DNA Bill*, NEWS & OBSERVER (Raleigh, N.C.), July 15, 2010, <http://www.newsobserver.com/2010/07/15/583005/perdue-signs-dna-bill.html#storylink=misearch> (“Opponents vigorously objected to having DNA records from people who are presumed innocent added to the DNA database.”).

9. McDonald, *supra* note 3.

North Carolina Board of Education member Kathy Taft in their advocacy for this law.¹⁰

The Act authorizes police to take a cheek swab to obtain a DNA sample from anyone arrested pursuant to a valid warrant for over fifty different criminal offenses,¹¹ some of which are nonviolent.¹² The offenses include first- and second-degree murder,¹³ voluntary and involuntary manslaughter,¹⁴ first-degree rape,¹⁵ enticing a minor out of the state for employment,¹⁶ unlawful arrest by an officer of another state,¹⁷ first- and second-degree burglary,¹⁸ burning of ginhouses and tobacco houses,¹⁹ failure to comply with orders of public authorities,²⁰ and cyberstalking.²¹ In addition, one's DNA can be collected for

10. *Id.* For more information about Eve Carson, see Anne Blythe & Cheryl Johnston Sadgrove, 'Carolina, . . . the Whole World Has Lost a Lot,' NEWS & OBSERVER (Raleigh, N.C.), Mar. 7, 2008, at 10A, available at <http://www.newsobserver.com/2008/03/07/41509/carolina-the-whole-world-has-lost.html#storylink=misearch>. For more information about Kathy Taft, see Anne Blythe & Thomas McDonald, *Taft Is Honored as Questions Persist*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 2, 2010, at 1B, available at <http://www.newsobserver.com/2010/04/02/417685/taft-is-honored-as-questions-persist.html#storylink=misearch>.

11. N.C. GEN. STAT. § 15A-266.3A(a)–(b) (Supp. 2010). Seventeen of these criminal offenses can be found in article 15 of chapter 14. See N.C. GEN. STAT. §§ 14-58.2-69.3 (2009).

12. See, e.g., N.C. GEN. STAT. §§ 14-68, 14-69, 14-69.1, 14-196.3 (2009) (criminalizing failure to comply with orders of public authorities, officers' failure to investigate an incendiary fire, making a false bomb threat, and cyberstalking, respectively).

13. § 15A-266.3A(f)(1); see also N.C. GEN. STAT. § 14-17 (2009) (defining first- and second-degree murder).

14. § 15A-266.3A(f)(2); see also N.C. GEN. STAT. § 14-18 (2009) (defining voluntary and involuntary manslaughter).

15. § 15A-266.3A(f)(3); see also N.C. GEN. STAT. § 14-27.2 (2009) (defining first-degree rape).

16. § 15A-266.3A(f)(5); see also N.C. GEN. STAT. § 14-40 (2009) (defining the crime of enticing a minor out of the state for employment).

17. § 15A-266.3A(f)(5); see also N.C. GEN. STAT. § 14-43.1 (2009) (defining unlawful arrest by another state's officer).

18. § 15A-266.3A(f)(6); see also N.C. GEN. STAT. § 14-51 (2009) (defining first- and second-degree burglary).

19. § 15A-266.3A(f)(7); see also N.C. GEN. STAT. § 14-64 (2009) (defining the burning of ginhouses and tobacco houses).

20. § 15A-266.3A(f)(7); see also N.C. GEN. STAT. § 14-68 (2009) (defining failure to comply with the orders of a public official).

21. § 15A-266.3A(f)(10); see also N.C. GEN. STAT. § 14-196.3 (2009) (defining cyberstalking). For other offenses for which an arrestee's DNA can be collected, see, for example, statutory rape, § 15A-266.3A(f)(3), felonious assault with a deadly weapon, § 15A-266.3A(f)(4), burning of boats and barges, § 15A-266.3A(f)(7), and officer's failure to investigate incendiary fires, § 15A-266.3A(f)(7); see also N.C. GEN. STAT. § 14-27.7A (2009) (defining statutory rape); N.C. GEN. STAT. § 14-32 (2009) (defining felonious assault with a deadly weapon); N.C. GEN. STAT. § 14-63 (2009) (defining burning of boats and barges); N.C. GEN. STAT. § 14-69 (2009) (defining failure to investigate incendiary fire).

“attempting, solicitation of another to commit, conspiracy to commit, or aiding and abetting another to commit” any of the enumerated offenses.²² The State Bureau of Investigation (SBI) will maintain the DNA database.²³ The SBI is also charged with promulgating the procedures, safeguards, and quality standards for the database.²⁴

Once collected, an arrestee’s DNA is expunged only in a narrow class of cases: (1) if the arrestee is acquitted; (2) if the arrestee is convicted of a lesser included offense that is a misdemeanor and not specifically enumerated in the statute as subject to the taking of DNA; (3) if no charge was filed within the statute of limitations;²⁵ or (4) if after three years from the date of arrest no conviction occurred and no prosecution is being actively pursued.²⁶ An arrestee must also show that he is not required to give a DNA sample pursuant to the sex offender registry.²⁷ For an arrestee who wishes to have his DNA deleted prior to June 1, 2012, he must submit an expunction request, with documentation from the Administrative Office of the Courts (AOC), to the prosecuting attorney.²⁸ After June 1, 2012, the district attorney’s office is to investigate and document the circumstances that purportedly qualify the arrestee for expunction within thirty days of the qualifying event, sign the AOC verification form, and submit the AOC verification form to the SBI.²⁹ Within thirty days, the SBI must decide whether the arrestee has truly qualified for removal and notify the arrestee of the decision.³⁰ There is some opportunity for judicial

22. § 15A-266.3A(g).

23. § 15A-266.3A(e).

24. § 15A-266.3A(o). The SBI is currently under investigation for mishandling the results of blood tests in at least 230 cases, among other alleged incidents of misconduct. Joseph Neff & Mandy Locke, *Legislators Turn Against SBI*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 6, 2010, at 1A, available at <http://www.newsobserver.com/2010/09/06/667047/legislators-turn-against-sbi.html#storylink=misearch>.

25. North Carolina does not have a statute of limitations for felonies. *State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969).

26. § 15A-266.3A(h)(1). While much of this Recent Development may appear to argue that criminals should be shielded from prosecution for their past crimes, there is a genuine argument that the innocent will also be affected by this law. It is important to note that the State can keep one’s DNA in the database for up to three years if no active prosecution is pending. *Id.* This provision allows the State to keep an innocent individual’s DNA in the database. If a close relative, such as a parent, child, or sibling, of an innocent individual (whose DNA remains in the database despite the lack of an active prosecution) commits a crime and leaves his own DNA on the scene, police could potentially track down the criminal using the innocent relative’s DNA.

27. § 15A-266.3A(h)(2).

28. § 15A-266.3A(i).

29. § 15A-266.3A(j).

30. § 15A-266.3A(k).

review³¹ of the SBI's decision or any failure to comply with the respective thirty-day time constraints upon the district attorney's office and SBI.³²

This law may raise other legal concerns;³³ however, this Recent Development will focus on the Fourth Amendment issues.

II. CHEEK SWABS ARE SEARCHES UNDER RELEVANT CASE LAW

The cheek swab process authorized by the Act should be deemed a search within the meaning of the Fourth Amendment. The touchstone case for what is considered a search is *Katz v. United States*.³⁴ *Katz* held that there is no Fourth Amendment protection in "[w]hat a person knowingly exposes to the public."³⁵ Justice Stewart's majority opinion acknowledged that while a glass telephone booth may not completely exclude "intruding eyes," it nonetheless provides protection from the "uninvited ear."³⁶ The Court's distinction is an important one: the content of what *Katz* discussed in the phone booth, and not his mere presence in the phone booth, was the basis of criminal charges.³⁷

More important than the majority's opinion is Justice Harlan's concurring opinion setting out the mode of analysis that was adopted

31. As the statute is written, there is no explanation regarding the scope of such review. See § 15A-266.3A(l).

32. *Id.*

33. For example, there may be procedural due process concerns. Has the State afforded a sufficient process to an arrestee to protect his liberty or property interest in his DNA if the SBI determines that he is not eligible for expunction? Since the statute provides no guidance regarding what the scope of judicial review will be, this question cannot yet be answered.

34. 389 U.S. 347 (1967). The Fourth Amendment was incorporated as against the states through the Fourteenth Amendment in *Wolf v. Colorado*, 338 U.S. 25, 26–28 (1949), and the exclusionary rule was held to be applicable to the states in *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

35. *Katz*, 389 U.S. at 351. The North Carolina courts have long followed the same Fourth Amendment jurisprudence as that announced by the United States Supreme Court. *State v. Pearson*, 145 N.C. App. 506, 517, 551 S.E.2d 471, 478 (2001) (stating that there is no variation between the United States Constitution and the North Carolina Constitution as it concerns searches and seizures despite the use of different language in the North Carolina Constitution); *State v. Gwyn*, 103 N.C. App. 369, 371, 406 S.E.2d 145, 146 (1991) ("North Carolina's law of search and seizure and the requirements of the Fourth Amendment to the Constitution of the United States are the same."); *State v. Hendricks*, 43 N.C. App. 245, 251–52, 258 S.E.2d 872, 877 (1979) ("[T]here is no variance between the search and seizure law of North Carolina and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States.").

36. *Katz*, 389 U.S. at 352.

37. See *id.* at 348–49 (detailing that *Katz* was charged with placing bets over the phone and that taped conversations between *Katz* and others were used against him at trial).

by subsequent Court opinions to find whether a search occurred.³⁸ Justice Harlan agreed with the majority that a search had occurred, but he would have analyzed this issue with a two-step inquiry: first, whether the defendant “exhibited an actual (subjective) expectation of privacy,” and second, whether, when objectively considered, the defendant’s expectation was “one that society is prepared to recognize as ‘reasonable.’”³⁹

As the majority did in *Katz*, one must distinguish between the sources of DNA that are exposed and those that are shielded from the uninvited public. A person regularly exposes her saliva, containing DNA, when drinking, eating, or spitting. The waiter that collects a person’s drinking glass at the end of dinner may hand that glass, and the person’s DNA, over to police.⁴⁰ In contrast, cheek cells are not left behind on objects for anyone to collect. A person’s cheek cells are within the metaphorical telephone booth, a zone of protected privacy into which police may not enter without probable cause.⁴¹ Therefore, a cheek swab does not fall within the public exposure rule for which there is no Fourth Amendment protection under *Katz*.⁴²

Additionally, language from *United States v. Dionisio*⁴³ helps to distinguish characteristics that the Court has held to be exposed to the public.

The physical characteristics of a person’s voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man’s facial characteristics, or handwriting, his voice is repeatedly produced

38. See, e.g., *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629–33 (2010) (discussing whether plaintiff police officer had a reasonable expectation of privacy in the text messages sent from his department-issued cell phone); *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (“Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action.”); *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (“[T]he Court in *Katz* held that capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.”).

39. *Katz*, 389 U.S. at 361.

40. See *California v. Greenwood*, 486 U.S. 35, 42 (1988) (holding that there is no reasonable expectation of privacy in garbage that is abandoned by the roadside for collection).

41. “[N]o 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.

42. *Katz*, 389 U.S. at 351.

43. 410 U.S. 1 (1973).

for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.⁴⁴

Unlike a face or voice, cheek cells containing DNA are not exposed to the public for the average person to recognize their characteristics. One can easily recognize a parent's face or a friend's voice without any technological assistance. Even fingerprints can be identified with the aid of a magnifying glass, whereas DNA requires more advanced technology. Taking into account this divergence from other physical characteristics, a cheek swab should be considered a search within the meaning of the Fourth Amendment.⁴⁵

Despite the arguable difference in level of technology required, several courts have analogized the process of fingerprinting an arrestee to the collection of an arrestee's DNA.⁴⁶ DNA and fingerprints can both be left behind on a drinking glass for any member of the public or the police to collect. However, DNA obtained from an arrestee holds the possibility of being significantly more revealing than a fingerprint. A fingerprint shows ridges and curves that are meaningless unless there is a sample with which to match it. DNA can show various traits without necessarily requiring a match. Though some commentators have asserted that the typical DNA testing does not reveal those sorts of intimate details,⁴⁷ the

44. *Id.* at 14.

45. See *Williamson v. State*, 993 A.2d 626, 649, 652, 654 (Md. 2010) (Bell, C.J., dissenting). "Fingerprint analysis and DNA analysis, in fact, are not akin to each other. DNA analysis involves more than just collection of DNA, the testing of the sample collected is a significant invasion, a search, it has been held." *Id.* at 649. Chief Judge Bell has argued similarly in dissent in a prior case: "Unlike fingerprints, which contain all of the useable identifying information at the time the prints are taken, the DNA search does not end with the swab. To the contrary, the swab is then subjected to scientific tests, which may extract very sensitive, personal, and potentially humiliating information." *State v. Raines*, 857 A.2d 19, 62–63 (Md. 2004) (Bell, C.J., dissenting).

46. See, e.g., *Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005) ("[F]ingerprinting and DNA indexing serve similar purposes."); *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005) (likening the collection of DNA from individual on supervised release to photographing and fingerprinting at the time of his arrest); *Rise v. Oregon*, 59 F.3d 1556, 1559 (9th Cir. 1995) ("The information derived from the blood sample is substantially the same as that derived from fingerprinting."). Even when the collection of DNA requires a blood sample, the Ninth Circuit stated that "rolling a person's fingertips does not elevate the intrusion upon the plaintiffs' Fourth Amendment interests to a level beyond minimal." *Rise*, 59 F.3d at 1560. Notably, these cases dealt with the collection of DNA from convicted felons, a distinction which may be significant. See *infra* notes 165–82 and accompanying text.

47. See D.H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J.L. & PUB. POL'Y 455, 461–62 (2001); John Maddux, Comment, *Arresting Development: A*

nature of DNA and the possibilities of abuse could allow more traits to be revealed, setting DNA apart from fingerprints.⁴⁸

Furthermore, at least one judge has pointed out in a challenge to a DNA database law that some modicum of suspicion is required in order to even collect an arrestee's fingerprints.⁴⁹ And fingerprinting an arrestee only requires taking identifying information from the body's surface, in contrast to a cheek swab that requires intrusion into one's mouth. As this Recent Development will argue, there is a subjective and objective reasonable expectation of privacy in a person's body; thus bodily intrusions to collect DNA must be justified by probable cause embodied in a search warrant or a valid exception.⁵⁰ DNA collection is not analogous to fingerprinting; DNA reveals details that cannot be obtained from the whorls of a thumbprint.

One might argue that DNA collection simply reflects the progression of technology for identification, along the lines of the progression from sketches to photographic mugshots.⁵¹ The Supreme Court considered the use of advanced technology in criminal investigations in *Kyllo v. United States*.⁵² Federal officers used thermal imaging technology to determine whether there was an unusual amount of heat being emitted at Danny Kyllo's residence, which could indicate that he was growing marijuana using heat lamps.⁵³ Justice Scalia, writing for the Court, acknowledged that the use of this technology was more than "naked eye surveillance."⁵⁴ The majority

Call for North Carolina to Expand Its Forensic Database by Collecting DNA from Felony Arrestees, 32 CAMPBELL L. REV. 103, 107-08 (2009).

48. Kaye, *supra* note 47, at 506-07 (discussing "front-loaded" and "back-loaded" systems to prevent abuse of DNA databases, but acknowledging that no system will ever be perfect); *see also* Neff & Locke, *supra* note 24 (noting the investigation into the SBI's suspected wrongdoing).

49. *Rise*, 59 F.3d at 1570 n.4 (Nelson, J., dissenting). Judge Nelson also argued that there is a lower expectation of privacy in fingerprints because they are exposed to the public. *Id.* at 1570. Judge Nelson may have been subtly referring to the fact that fingerprints are left on drinking glasses in public. As this Recent Development has pointed out, DNA can also be left on drinking glasses. This would tend to support a similar, lesser expectation of privacy in one's DNA; however, DNA contains a wealth of information not contained in a fingerprint. *See id.* (noting that fingerprinting "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search") (quoting *United States v. Dionisio*, 410 U.S. 1, 14-15 (1973)).

50. *See infra* Part II.A-B and Part III.

51. *Cf. Sczubelek*, 402 F.3d at 184-85 (comparing the collection of DNA from individual on supervised release to photographing and fingerprinting at the time of his arrest).

52. 533 U.S. 27 (2001).

53. *Id.* at 29-30.

54. *Id.* at 33.

ultimately concluded that there was a search and that the warrantless search was unreasonable.⁵⁵ In so concluding, the *Kyllo* majority distinguished the case from *Dow Chemical v. United States*⁵⁶ in that the advanced photographic technology at issue in *Dow* was not used to survey the interior of the home—unlike the thermal imaging in *Kyllo*.⁵⁷ The *Kyllo* Court held that police may not use “sense-enhancing technology” that “is not in general public use” to collect information from the interior of a home, information which would otherwise require a trespass upon the home to obtain.⁵⁸

As the Supreme Court pointed out in the context of thermal imaging, the technological progression argument equating DNA matching with photographic identification fails to capture the complex technological assistance needed to make a positive identification with DNA.⁵⁹ The naked eye can identify a perpetrator from a mugshot; the same cannot be said for DNA.⁶⁰ Photographic identification is simpler than the enhanced photographic aerial surveillance in *Dow Chemical*, which was held not to be a search by the Supreme Court.⁶¹ DNA technology is more akin to the thermal imaging that was found to be a search in *Kyllo* because forensic DNA technology is advanced and not in general public use. The average person is unlikely to be able to acquire the necessary equipment and ably employ the proper techniques to find a DNA match at home. While drugstores now carry paternity tests and genetic testing kits, the samples customers collect must still be sent to a lab where professionals analyze them.⁶² DNA collection, like the thermal imaging surveillance conducted on *Kyllo*’s home, intrudes upon one’s person, a place that is sacred in the law.⁶³ DNA thus cannot likely be

55. *Id.* at 40.

56. 476 U.S. 227 (1986).

57. *Kyllo*, 533 U.S. at 33.

58. *Id.* at 34.

59. See generally Donald E. Riley, *DNA Testing: An Introduction for Non-Scientists*, SCI. TESTIMONY (Apr. 6, 2005), <http://www.scientific.org/tutorials/articles/riley/riley.html> (describing the two primary types of forensic DNA testing and the technological methods involved).

60. *Id.*

61. *Dow Chemical*, 476 U.S. at 239.

62. See JoNel Aleccia, *Who’s Your Daddy? Answer’s at the Drugstore*, MSNBC.COM (Mar. 23, 2008), http://www.msnbc.msn.com/id/23814032/ns/health-womens_health/; Daniel DeNoon, *Concerns Raised About Drugstore Genetic Test*, CBS NEWS.COM (May 12, 2010), <http://www.cbsnews.com/stories/2010/05/13/health/webmd/main6480841.shtml>.

63. See U.S. CONST. amend. IV (“The right of the people to be secure in their *persons*, *houses*, *papers*, and *effects*, against unreasonable searches and seizures shall not be violated”) (emphasis added). It is also true that the home is even more sacred in the Court’s Fourth Amendment jurisprudence. See *Kyllo*, 533 U.S. at 31, 40. The Court in

deemed sufficiently analogous to photographic identification to support routine DNA collection upon arrest because DNA technology is more advanced and the typical citizen cannot fully employ DNA technology himself.

Recall that *Katz* is the touchstone case for determining whether there was a search and that Justice Harlan's concurrence, which asked whether the person who argued he was searched had a subjective expectation of privacy and whether that expectation of privacy is objectively reasonable, has become the measure for whether a search occurred.⁶⁴ Two cases suggest a subjective and objectively reasonable expectation of privacy in one's body: *Cupp v. Murphy*⁶⁵ and *Schmerber v. California*.⁶⁶ A discussion of these cases will show that because a swab of an arrestee's cheek goes beyond the surface of the body, it should thus be regarded as a search.⁶⁷

A. *There Is a Subjective Expectation of Privacy in an Arrestee's Cheek Cells*

The subjective expectation of privacy is likely met by the fact that one's cheek cells, unlike saliva and fingerprints, have not been displayed to the public or abandoned.⁶⁸ The Court has characterized this prong as "whether he has shown that 'he [sought] to preserve [something] as private.'"⁶⁹ Using an opaque bag while traveling was found to exhibit a subjective expectation of privacy as to the bag's contents.⁷⁰ Likewise, one's cheeks could be considered the metaphorical opaque bag in which there would be a subjective expectation of privacy as to the cheek cells and the DNA contained therein.

Kyllo partially rested its holding on the fact that the thermal imaging intruded into a home, as opposed to other areas that the Fourth Amendment provides less protection. *Id.* at 40. Although DNA extraction through a cheek swab involves an intrusion into a person's mouth as opposed to her home, the application of the Court's discussion of advanced technology in *Kyllo* is useful as far as it applies to all searches and not just home intrusions.

64. *See supra* notes 38–39 and accompanying text.

65. 412 U.S. 291 (1973).

66. 384 U.S. 757 (1966).

67. *See id.* at 769 (acknowledging implicitly that going beneath the skin's surface is a search, using the phrase "searches involving intrusions beyond the body's surface").

68. *See supra* notes 39–45 and accompanying text.

69. *Bond v. United States*, 529 U.S. 334, 338 (2000) (quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979)).

70. *Id.*

The Court also recognized in *Cupp* that citizens have a high regard for the security of their bodies.⁷¹ *Cupp* involved a man, Daniel Murphy, who was accused of his wife's murder by strangulation.⁷² By force and without a search warrant, officers scraped beneath Murphy's fingernails.⁷³ The scrapings matched his wife's skin, blood, and nightgown, and the report was introduced at trial.⁷⁴

The Court declared that "the search of [Murphy]'s fingernails went beyond mere 'physical characteristics . . . constantly exposed to the public,' . . . and constituted the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny."⁷⁵ Much like fingernail scraping, a cheek swab requires a technician, with whom the arrestee is likely unfamiliar, to physically collect a substance from the arrestee's body. Though this encounter lasts but a few moments, the subject of the swabbing nonetheless feels invaded. A cheek swab is a "severe, though brief, intrusion"⁷⁶ upon an arrestee's subjective privacy interest in his body that must conform to the Fourth Amendment.⁷⁷

B. *There Is an Objective Expectation of Privacy in an Arrestee's Cheek Cells*

The objective prong of Justice Harlan's test is well demonstrated in *Schmerber v. California*.⁷⁸ *Schmerber* involved a blood-alcohol test performed on Armando Schmerber, a driver whom police believed was drunk.⁷⁹ The officer who requested the blood sample responded to the scene of Schmerber's car accident, smelled Schmerber's breath,

71. See *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (citing *Terry v. Ohio*, 392 U.S. 1, 24–25 (1968)).

72. *Id.* at 292.

73. *Id.*

74. *Id.*

75. *Id.* at 295 (quoting *United States v. Dionisio*, 410 U.S. 1, 14 (1973); *Terry v. Ohio*, 392 U.S. 1, 24–25 (1968)).

76. *Terry v. Ohio*, 392 U.S. 1, 24–25 (1968).

77. See also Kaye, *supra* note 47, at 472 (stating that "the threshold question of whether there is a search should be answered in the affirmative," but ultimately arguing that a "carefully designed" DNA database system would make such a search reasonable). To contrast the argument by Professor Kaye, officers perpetrating a different sort of abuse might make unauthorized arrests in order to obtain additional DNA samples for the database. Robert Berlet, Comment, *A Step Too Far: Due Process and DNA Collection in California After Proposition 69*, 40 U.C. DAVIS L. REV. 1481, 1510 (2007). Incidentally, in the *Ballona Creek* episode of *Law & Order: Los Angeles*, *supra* note 1, the district attorney pressured a woman raped eighteen years earlier to file a report with the Santa Ana police in order to obtain a DNA sample from a suspected serial killer.

78. 384 U.S. 757 (1966).

79. *Id.* at 758.

and observed Schmerber's behavior while in the hospital.⁸⁰ The State introduced the incriminating evidence at trial over Schmerber's objection that his Fourth Amendment rights had been violated.⁸¹

In deciding the defendant's appeal, the Court stated, "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained."⁸² Writing for the Court, Justice Brennan described the necessity of a search warrant, asserting that "[t]he importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great."⁸³ Such rhetoric alludes to the objective prong of Justice Harlan's test. Even before *Katz*, the Court concluded that "[compulsory administration of a blood test] plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment" because the Amendment specifically lists the "person" as protected.⁸⁴ The Court's previously mentioned discussion in *Dionisio* is also illustrative of the reasonableness of the privacy expectation in one's cheek cells.⁸⁵ Therefore, one has both a subjective and objective reasonable expectation of privacy because DNA is hidden from view within one's opaque cheeks and the Supreme Court has recognized a heightened privacy interest in one's own body that is respected by society.⁸⁶

Given the Court's finding that blood tests are searches under the Fourth Amendment, the *Katz* two-part test can be satisfied in the DNA collection context by analogizing cheek swabs to blood tests.

80. *Id.* at 768–69.

81. *Id.* at 759.

82. *Id.* at 769–70.

83. *Id.* at 770.

84. *Id.* at 767.

85. The Court stated:

The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.

United States v. Dionisio, 410 U.S. 1, 14 (1973).

86. In *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988), the North Carolina Supreme Court announced a holding similar to *Schmerber*: a blood sample requires a search warrant absent exigent circumstances. *Id.* at 714, 370 S.E.2d at 556. The *Carter* court cited *Schmerber* for support. *Id.* at 714, 370 S.E.2d at 556. Thus, in North Carolina, a blood test is termed a search without the court's explicit consideration of the two-pronged analysis from *Katz*.

While a blood test is more intrusive because of the use of a needle, a cheek swab could also be considered intrusive since one must open her mouth and allow a stranger to scrape the inside of her cheek. North Carolina courts should thus find that a swab is a search requiring a search warrant or proof of a “well-delineated exception.”⁸⁷

III. A SEARCH REQUIRES A SEARCH WARRANT UNLESS SUBJECT TO AN EXCEPTION

Based on the above argument that a cheek swab constitutes a search under the Fourth Amendment, a search warrant for a swab is required absent an exception. This Part will discuss three exceptions to the search warrant requirement—search incident to lawful arrest, inventory search upon arrest, and exigent circumstances—and will argue that none apply to a warrantless cheek swab.

A. Search Incident to Lawful Arrest

As declared in *Chimel v. California*,⁸⁸ an officer may search the arrested person and “the area ‘within his immediate control’ ” for the officer’s own safety and to discover evidence that the suspect might otherwise destroy.⁸⁹

In applying this exception in *Schmerber*, the Court employed a similar standard as in *Chimel*, observing the two rationales for a search incident to lawful arrest: the need to discover weapons hidden on the suspect’s person and the preservation of evidence that the suspect may destroy.⁹⁰ These two justifications “have little

87. *Katz v. United States*, 389 U.S. 347, 357 (1967).

88. 395 U.S. 752 (1969).

89. *Id.* at 762–63; *see also* *Cupp v. Murphy*, 412 U.S. 291, 295–96 (1973) (holding that, even though the scraping of defendant’s fingernails was a search, destruction of evidence was imminent); *Schmerber*, 384 U.S. at 770–71 (finding that the blood extraction was a reasonable search incident to the defendant’s arrest since the evidence of the offense was being destroyed every second as the defendant’s body metabolized the alcohol); 3 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 5.3(c), at 171–72 (4th ed. 2004) (“It seems clear from the *Schmerber* case that a more demanding test must be met when the search incident to the arrest involves the taking of a blood sample or the making of some similar intrusion into the body.”). The search for weapons by swabbing an arrestee’s cheek has little relevance since one cannot be injured by DNA; thus only the destruction of evidence rationale will be discussed in this Recent Development. The North Carolina courts have applied the doctrine in *Chimel*. *See* *State v. Thomas*, 81 N.C. App. 200, 210, 343 S.E.2d 588, 594 (1986) (stating that a search incident to arrest applies to the area in the arrestee’s immediate control to preserve evidence and the officer’s safety); *see also* *State v. Logner*, 148 N.C. App. 135, 139, 557 S.E.2d 191, 194 (2001) (quoting the same proposition from *Thomas*).

90. *Schmerber*, 384 U.S. at 769.

applicability with respect to searches involving intrusions beyond the body's surface."⁹¹ Despite that statement, the Court held that the officer's collection of the defendant's blood was a reasonable search incident to lawful arrest under the circumstances.⁹² The evidence of guilt was metabolizing in the defendant's body with every minute of delay.⁹³ A significant amount of time had also elapsed between the defendant's car accident, the officer's arrival on the scene, and the transportation of the defendant to the hospital, further supporting the search to preserve evidence.⁹⁴

In *Cupp*, despite finding that fingernail scrapings were an intrusion into the defendant's bodily integrity, the Court also held that the search was reasonable under the imminent destruction of evidence justification.⁹⁵ Officers saw Murphy hiding his hands in his pockets, whereupon they heard the contents of his pockets, including keys, being jostled.⁹⁶ On these facts, where it appeared that Murphy could be destroying evidence, the Court believed that the police had justification to scrape under Murphy's fingernails in order to preserve the evidence.⁹⁷

In view of the unique, exigent circumstances in *Schmerber* and *Cupp*, collecting a suspect's DNA by a cheek swab without a search warrant does not further law enforcement's need to prevent the imminent destruction of evidence. An arrestee cannot destroy his DNA, so there is no need to swab an arrestee immediately. DNA, furthermore, is not a weapon nor can it conceal one. In sum, both reasons for searches incident to a lawful arrest are irrelevant to DNA collection.⁹⁸

B. Inventory Search

In performing an arrest inventory, an officer collects an arrestee's belongings, including clothing and personal effects.⁹⁹ The

91. *Id.*

92. *Id.* at 771. Prior to this holding, the Court found that the policeman had probable cause to arrest the defendant for driving under the influence. *Id.* at 768.

93. *Id.* at 770.

94. *Id.* at 770-71.

95. *Cupp v. Murphy*, 412 U.S. 291, 295-96 (1973).

96. *Id.* at 296.

97. *Id.*

98. *Schmerber*, 384 U.S. at 769.

99. See *LAFAVE*, *supra* note 89, § 5.3, at 144 ("A search is considered to be 'of the person' for the purposes of this section if it involves an examination of or intrusion into the body, or if it necessitates scrutiny of or looking into clothing worn at the time of arrest or effects found in that clothing, whether or not the clothing or effects were actually on the person at the time of the search.").

officer then catalogs and safely stores the items until the person is released. An inventory search does not have to be supported by probable cause¹⁰⁰ and does not violate the Fourth Amendment if performed under standard operating procedures.¹⁰¹ Protecting the arrestee's belongings, protecting the police department from false claims of larceny, and protecting the jailhouse from contraband and weapons justify an inventory search.¹⁰² As recognized by the Court in *Florida v. Wells*,¹⁰³ an inventory search may not be a general search for inculpatory evidence disguised by standard operating procedure.¹⁰⁴ The *Wells* Court further recognized that an inventory search must be connected to the aforesaid purposes.¹⁰⁵

DNA is not collected for the purpose of protecting an arrestee's belongings, shielding the police from false claims of theft, or defending the jail from weapons and drugs. DNA is not a belonging that can be stolen in the sense that a wallet or clothing can be stolen. A prisoner is not likely to lodge a complaint against the department for stealing her DNA. DNA is also not a weapon that would endanger the general safety of the jail. As *Wells* showed, regardless of whether the collection is under standard procedures, such searches under the guise of inventories must relate to the aforesaid goals. Swabs of arrestees fail to relate to those goals.

C. *Exigent Circumstances*

In addition to likely falling outside of the search incident to lawful arrest and inventory exceptions, DNA evidence taken from an arrestee is not justified by exigent circumstances. Exigent circumstances is an independent exception to the search warrant requirement,¹⁰⁶ and it is often an underlying consideration in other

100. *Illinois v. Lafayette*, 462 U.S. 640, 643 (1983).

101. *See id.* at 648. North Carolina courts have held that “[a]n inventory, pursuant to standard police procedures, is not unreasonable under the Fourth Amendment.” *State v. Jones*, 63 N.C. App. 411, 418, 305 S.E.2d 221, 225 (1983). The North Carolina Supreme Court has also noted that “[i]t is not an unlawful search or seizure for officers to take from the person under arrest and to examine an article of clothing worn by him.” *State v. Shedd*, 274 N.C. 95, 102, 161 S.E.2d 477, 482 (1968).

102. *Lafayette*, 462 U.S. at 646.

103. 495 U.S. 1 (1990).

104. *Id.* at 4.

105. *See id.* (citing *Colorado v. Bertine*, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring); *Lafayette*, 462 U.S. at 648; *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976)).

106. *See LAFAYE*, *supra* note 89, § 4.1, at 402 (calling exigent circumstances the “emergency doctrine”).

search warrant exceptions.¹⁰⁷ This exception is premised on an emergency that prevents officers from applying for a search warrant.¹⁰⁸ Dispensing with the warrant requirement in an urgent situation is not unreasonable; it would be unreasonable to require a warrant.¹⁰⁹ Examples of exigent circumstances include pursuit of a fleeing felon,¹¹⁰ prevention of the imminent destruction of evidence,¹¹¹ and preservation of officer safety.¹¹²

Arrestees in the jailhouse are not fleeing felons, and the police are not in hot pursuit. The arrestee has already been detained at the police station, awaiting the arrival of a technician to swab his cheek. Flight from authority has already ceased. As previously mentioned, DNA is not evidence that can be destroyed, unlike illicit drugs that might be destroyed with the push of the toilet lever. Officer safety is not a concern in this instance that would justify a warrantless cheek swab.

A warrantless search in the form of a swab of an arrestee's cheek thus cannot be defended on the basis of any of the "well-delineated exceptions"¹¹³ discussed above: search incident to lawful arrest, inventory search, or exigent circumstances.¹¹⁴

107. See, e.g., *supra* Part III.A (discussing that imminent destruction of evidence and the officer's immediate need for safety justify a search incident to lawful arrest).

108. See *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (stating that exigent circumstances may justify a warrantless search); *Warden v. Hayden*, 387 U.S. 294, 288–89 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.").

109. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); see *Terry*, 392 U.S. at 20; *Warden*, 387 U.S. at 288–89 (stating that "speed was essential").

110. See *Warden*, 387 U.S. at 288–89.

111. See *California v. Acevedo*, 500 U.S. 565, 569–73 (1991) (discussing exigency in the context of vehicle searches); *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (noting this exigency as a justification for searches incident to lawful arrest); *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion) ("Suspects have no constitutional right to destroy or dispose of evidence.").

112. See *Chimel*, 395 U.S. at 762–63 (holding this exigency to be a justification for searches incident to lawful arrest); *Warden*, 387 U.S. at 288–89.

113. *Katz v. United States*, 389 U.S. 347, 357 (1967).

114. A reviewing court may also attempt to apply the "plain view" doctrine to warrantless cheek swabs. Justice Stevens described the doctrine as "merely authoriz[ing] an officer with a lawful right of access to an item to seize it without a [search] warrant." *Horton v. California*, 496 U.S. 128, 142 (1990). For example, evidence in plain view may be seized if police have entered a home pursuant to a search warrant or an exigent circumstance, or if police are searching a suspect incident to a lawful arrest. See *id.* at 135. However, the plain view exception only allows for the seizure of evidence that immediately appears to be incriminating to the investigating officer. *Id.* at 137. DNA contained in cheek cells is not immediately incriminating evidence since it must be scientifically analyzed to find a match. Further, even if one were to construe DNA to be incriminating evidence in a particular circumstance, the officer would still not have a

IV. OTHER JURISDICTIONS' TREATMENT OF THE ISSUE

At least two other states' courts have considered Fourth Amendment appeals under laws similar to the DNA Database Act. As explained below, the Minnesota Court of Appeals employed the correct analysis and drew the logical conclusions while the Virginia Supreme Court reached a less constitutionally sound holding.

A. *The Minnesota Court of Appeals' Analysis and Conclusion Was Correct*

The Minnesota Court of Appeals engaged in a logical analysis in *In re C.T.L.*¹¹⁵ by examining the search issue, comparing the privacy interests of criminal defendants and incarcerated prisoners, and noting the insignificance of taking DNA for solving the crime charged.¹¹⁶ Though not following the exact methodology this Recent Development has laid out, *In re C.T.L.*'s invalidation of Minnesota's DNA database law is instructive on the unreasonableness of cheek swabs.

C.T.L. was charged as a juvenile for aiding and abetting aggravated robbery in the first degree and committing an assault in the fifth degree.¹¹⁷ The State ordered C.T.L. to give a DNA sample, and he refused.¹¹⁸ The district court upheld the challenge, finding that "compulsory DNA profiling of criminal defendants prior to conviction" violated the Constitution.¹¹⁹ The district court certified the question to the Minnesota Court of Appeals to determine whether—by authorizing the extraction of DNA before a conviction—section 299C.105 violated the Minnesota Constitution and the U.S. Constitution.¹²⁰

For purposes of the Fourth Amendment, the State conceded that taking a juvenile's DNA and subjecting it to testing constituted a search and seizure, but the court still considered the issue to some

"lawful right of access" to the arrestee's cheek cells, and thus the seizure would still be unconstitutional. One might also try to analogize DNA to hair, which is exposed to the public and thus not protected by the Fourth Amendment under *Katz*. As previously argued in Part II, DNA may be exposed to the public in other ways, such as in saliva, but not in cheek cells. DNA is a physical characteristic, but it is not generally shown to the public in the same way that hair can be seen by all passersby. Therefore, unlike hair, one has a reasonable expectation of privacy in the DNA contained in one's cheek cells.

115. 722 N.W.2d 484 (Minn. Ct. App. 2006).

116. *Id.* at 488, 491.

117. *Id.* at 486.

118. *Id.*

119. *Id.*

120. *Id.*

extent.¹²¹ The court looked to *Skinner v. Railroad Labor Executives Ass'n*¹²² for support.¹²³ As the *Skinner* Court observed, "the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches."¹²⁴ The Minnesota Court of Appeals also drew on language from *Katz* that searches and seizures without a search warrant are "'per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'"¹²⁵ The Minnesota court correctly concluded that the cheek swab was a search within the meaning of the Fourth Amendment, as this Recent Development has argued.

The Minnesota Court of Appeals then considered the reasonableness of such a search, relying heavily on *Schmerber*.¹²⁶ The court discussed the exigencies at work in *Schmerber*¹²⁷ and noted that probable cause to arrest, without an emergency, does not permit a warrantless search in collecting bodily substances.¹²⁸ The Minnesota court stated the principle succinctly: "Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned."¹²⁹ Without explicitly concluding that exigent circumstances were lacking in *In re C.T.L.*, the court made no mention of flight or danger that evidence would be destroyed¹³⁰ and ultimately concluded that collecting an arrestee's DNA without a search warrant violated the Fourth Amendment.¹³¹

The court further pointed out that the standards for an arrest warrant are different from those for a search warrant.¹³² In Minnesota, the standard for a search warrant is whether there is "'a fair probability that contraband or evidence of a crime will be found in a particular place.'"¹³³ However, the quoted language tracks *Illinois v. Gates*,¹³⁴ in which the Supreme Court established the federal

121. *Id.* at 488.

122. 489 U.S. 602 (1989).

123. *In re C.T.L.*, 722 N.W.2d at 488.

124. *Skinner*, 489 U.S. at 618.

125. *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

126. *See id.* at 488–91.

127. *Id.* at 490.

128. *Id.*

129. *Id.* at 489.

130. *See id.* at 489–90.

131. *Id.* at 492.

132. *Id.* at 490.

133. *Id.* (quoting *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995)).

134. 462 U.S. 213 (1983).

standard for a search warrant.¹³⁵ A Minnesota arrest warrant must be based upon “‘evidence worthy of consideration . . . [that] brings the charge against the prisoner within reasonable probability.’”¹³⁶

The court highlighted an excellent distinction between the two types of warrants.¹³⁷ An arrest warrant is based on different standards than a search warrant and does not include the same considerations as a search warrant.¹³⁸ A warrantless search must be justified by an applicable exception.¹³⁹

The State cited several federal opinions that employ a balancing test between the state’s interests and the defendant’s privacy interests.¹⁴⁰ The court fittingly highlighted that these federal cases did not involve defendants; the federal cases cited involved convicts, who have a lower expectation of privacy than individuals who have not yet been convicted.¹⁴¹ Also, considering that a person is “presumed innocent until proved guilty,” the court concluded that a person who

135. *Id.* at 238.

136. *In re C.T.L.*, 722 N.W.2d at 490 (quoting *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003)). North Carolina has adopted the “totality of the circumstances test” from *Gates* for the issuance of search warrants. *State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984) (adopting the standard from *Gates*).

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at 638, 319 S.E.2d at 257–58 (quoting *Gates*, 462 U.S. at 214). A reviewing court’s task is “simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.” *Id.* at 638, 319 S.E.2d at 258 (quoting *Gates*, 462 U.S. at 238–39). The North Carolina standard for an arrest warrant is “sufficient information, supported by oath or affirmation, to make an independent judgment that there is probable cause to believe that a crime has been committed and that the person to be arrested committed it.” N.C. GEN. STAT. § 15A-304(d) (2009). Though North Carolina and Minnesota do not have identical standards for arrest warrants, their respective laws show that there is a meaningful difference in the standards for a search warrant versus an arrest warrant.

137. *In re C.T.L.*, 722 N.W.2d at 490.

138. *Id.*

139. *Katz v. United States*, 389 U.S. 347, 357 (1967).

140. *In re C.T.L.*, 722 N.W.2d at 491 (citing *Kruger v. Erickson*, 875 F. Supp. 583, 588 (D. Minn. 1995); *Johnson v. Quander*, 370 F. Supp. 2d 79, 87 (D.D.C. 2005), *aff’d*, 440 F.3d 489 (D.C. Cir. 2006); *Padgett v. Ferrero*, 294 F. Supp. 2d 1338, 1343 (N.D. Ga. 2003), *aff’d sub nom.* *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005); *United States v. Sczubelek*, 255 F. Supp. 2d 315, 323 (D. Del. 2003), *aff’d*, 402 F.3d 175 (3d Cir. 2005)).

141. *Id.* The Minnesota statute requires the database administrators to destroy the DNA and expunge the record from the database if the charges are dismissed or if the defendant is found not guilty. MINN. STAT. ANN. § 299C.105(3) (West 2007). The court interpreted this as legislative intent to give more weight to the privacy interests of those who have not yet been convicted. *In re C.T.L.*, 722 N.W.2d at 491.

has not yet been convicted has a greater privacy interest in her DNA than the state's interest in obtaining the DNA evidence.¹⁴² The court aptly noted that “[u]nder 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.”¹⁴³ Recall that the Court in *Schmerber* stated that bodily intrusions should not be undertaken lightly “on the mere chance that desired evidence might be obtained.”¹⁴⁴ In *Schmerber*, the blood test would prove the defendant's intoxication, which is one element of driving while intoxicated, the offense for which the defendant was arrested.¹⁴⁵ The fact that the collection of an arrestee's DNA may have nothing to do with matching it to evidence from the crime scene indicated to the *C.T.L.* court that warrantless cheek swabs are unconstitutional.

The Minnesota Court of Appeals reached the appropriate conclusion regarding the collection and analysis of DNA from arrestees by deciding that a search had occurred, finding that a search warrant is still required since no exigencies were present although an arrest warrant had been obtained, and distinguishing other DNA database case law that dealt only with convicted felons who have a lesser expectation of privacy. Though this Recent Development has laid out a different form of analysis, North Carolina courts should ultimately reach the same conclusion to find that the DNA Database Act of 2010 authorizes unconstitutional searches.

B. The Virginia Supreme Court Applied Unsuitable Precedent and Reached an Unsound Conclusion

The Virginia Supreme Court considered its DNA database law in *Anderson v. Commonwealth*.¹⁴⁶ While on her way to work in the summer of 1991, Laura Berry was raped, sodomized, and robbed.¹⁴⁷ Angel Anderson was arrested in 2003 on unrelated charges of rape and sodomy.¹⁴⁸ Police collected a DNA sample from Anderson and entered it into the system under Virginia Code section 19.2-310.2:1.¹⁴⁹ Anderson's DNA appeared to match the DNA collected from Ms. Berry in 1991.¹⁵⁰ Officers applied for and were granted a search

142. *In re C.T.L.*, 722 N.W.2d at 492.

143. *Id.* at 491.

144. *Schmerber v. California*, 384 U.S. 757, 770 (1966).

145. *Id.* at 758–59.

146. 650 S.E.2d 702 (Va. 2007).

147. *Id.* at 703.

148. *Id.* at 704.

149. VA. CODE ANN. § 19.2-310.2:1 (2008); *Anderson*, 650 S.E.2d at 704.

150. *Anderson*, 650 S.E.2d at 704.

warrant to obtain Anderson's DNA for further, more detailed analysis.¹⁵¹ DNA analysts found that Anderson's DNA was a match.¹⁵² Anderson was indicted, convicted, and sentenced to two life sentences and ten years for the rape, sodomy, and robbery of Ms. Berry.¹⁵³ Anderson argued that the seizure of his DNA for a crime unrelated to the one for which he was convicted violated the Fourth Amendment.¹⁵⁴ The Virginia Court of Appeals affirmed his convictions.¹⁵⁵ The Virginia Supreme Court, in upholding the court of appeals, relied on precedent dealing with individuals who had been convicted through the criminal justice process.¹⁵⁶ The justices also relied on an arguably flawed analogy to fingerprinting without explicating whether the cheek swab was a search.¹⁵⁷

The Virginia Supreme Court looked to *Jones v. Murray*,¹⁵⁸ a Fourth Circuit case that upheld a related Virginia statute requiring convicted felons to produce a DNA sample.¹⁵⁹ The *Anderson* court admitted that the statute at bar allowed DNA samples to be collected from arrestees, not convicts, but it nonetheless announced that section 19.2-310.2:1 did not transgress the Fourth Amendment.¹⁶⁰

The basis for the court's holding is a debatable analogy to fingerprinting: "A DNA sample of the accused taken upon arrest, while more revealing, is no different in character than acquiring fingerprints upon arrest."¹⁶¹ As previously argued, DNA collection is not sufficiently similar to fingerprinting to support such an analogy.¹⁶² DNA holds the key to information that cannot be obtained from fingerprints.¹⁶³

The Virginia court attempted to bolster its position by stating that the analogy between fingerprints and DNA is "widely accepted."¹⁶⁴ The federal and state cases cited by the court supported this comparison between fingerprints and DNA, but only in the

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 705.

157. *See id.* at 705–06.

158. 962 F.2d 302 (4th Cir. 1992).

159. VA. CODE ANN. § 19.2-310.2 (2008); *Anderson*, 650 S.E.2d at 705 (citing *Jones*, 962 F.2d at 308).

160. *Anderson*, 650 S.E.2d at 705.

161. *Id.*

162. *See supra* notes 46–50 and accompanying text.

163. *See supra* notes 47–48 and accompanying text.

164. *Anderson*, 650 S.E.2d at 705.

context of convicted felons in prison or on supervised release.¹⁶⁵ Proceeding through the cases cited, the Second Circuit in *Nicholas v. Goord*¹⁶⁶ and the Ninth Circuit in *Rise v. Oregon*¹⁶⁷ supported the analogy in suits by convicted felons.¹⁶⁸ In *United States v. Sczubelek*,¹⁶⁹ the Third Circuit announced a similar holding when a former inmate on supervised release refused to give a DNA sample.¹⁷⁰ All of the state court opinions cited by the *Anderson* majority were appeals pursued by incarcerated felons.¹⁷¹

The distinction between persons who have been convicted of a crime and those who have not yet been tried is substantial. In *Hudson v. Palmer*,¹⁷² the Supreme Court held that prisoners have no legitimate expectation of privacy in their prison cells.¹⁷³ The Court has acknowledged shades of privacy rights dependent upon the individual's status in the criminal justice system. Later, the Court clarified that "[Hudson] is of limited usefulness outside the prison context with respect to the coverage of the Fourth Amendment."¹⁷⁴ The Court assumed for argument's sake in *Bell v. Wolfish*¹⁷⁵ that a defendant detained pending trial has "retained at least a 'diminished expectation of privacy.'"¹⁷⁶ The *Anderson* court failed to acknowledge the privacy differences dependent upon an individual's level of incarceration.

The distinction between those who have been convicted and those not yet tried also affects the purported state interest in DNA identification, making the analogy to fingerprints less tenable. Even granting that fingerprints and DNA can identify a suspect, fingerprints do so less intrusively, obviating the need for DNA to accomplish the same goal.¹⁷⁷ In the *Jones* decision, upon which the *Anderson* court relied, the Fourth Circuit used expansive language regarding identification:

165. *See id.*

166. 430 F.3d 652 (2d Cir. 2005).

167. 59 F.3d 1556 (9th Cir. 1995).

168. *Nicholas*, 430 F.3d at 655, 671; *Rise*, 59 F.3d at 1559–60.

169. 402 F.3d 175 (3d Cir. 2005).

170. *Id.* at 184–85.

171. *See State v. Raines*, 857 A.2d 19, 33 (Md. 2004); *State v. O'Hagen*, 914 A.2d 267, 281 (N.J. 2007); *State v. Brown*, 157 P.3d 301, 302–03 (Or. Ct. App. 2007).

172. 468 U.S. 517 (1984).

173. *Id.* at 525–26.

174. *Soldal v. Cook County, Ill.*, 506 U.S. 56, 65 (1992).

175. 441 U.S. 520 (1979).

176. *Hudson*, 468 U.S. at 524 n.6 (quoting *Bell*, 441 U.S. at 557).

177. *See Kaye, supra* note 47, at 488 ("[F]ingerprints already provide an unequivocal, and in some respects, better record of personal identity than forensic DNA typing.").

[W]hen a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it. We accept this proposition because the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes.¹⁷⁸

Taken out of context, *Jones* practically decides *Anderson*; however, the Fourth Circuit concluded this passage with reference only to identification of incarcerated felons.¹⁷⁹ The *Anderson* court invoked Professor Wayne LaFave's treatise to state that the "taking of a DNA sample by minimally intrusive means 'is justified by the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution.'"¹⁸⁰ The contextual difference between felons and arrestees fails to support the analogy from fingerprints to DNA. Moreover, recidivism was tied in with the state's interest in identification of convicted felons.¹⁸¹ Recidivism cannot similarly be tied to arrested individuals to justify a greater state interest in identification.

The *Anderson* decision employed precedent that dealt with convicted felons, failed to address the distinctions between such individuals and arrestees, and inadequately supported the analogy from fingerprints to DNA. As such, *Anderson*'s approval of Virginia's DNA database law should not be followed by North Carolina courts in considering challenges to the DNA Database Act of 2010.

V. POLICY

The supporters of DNA database laws posit several rationales for their existence. The main reasons include "catch[ing] repeat

178. *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1993).

179. *Id.* at 306–07 ("As with fingerprinting, therefore, we find that the Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken from *incarcerated felons* for the purpose of identifying them.") (emphasis added).

180. *Anderson v. Commonwealth*, 650 S.E.2d 702, 706 (Va. 2007) (quoting LAFAVE, *supra* note 89, § 5.3(c), at 168). Professor LaFave made the quoted statement with reference to fingerprinting an arrestee. LAFAVE, *supra* note 89, § 5.3(c), at 168 ("Fingerprinting, as a routine part of the booking process is justified by the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution . . .").

181. *See Jones*, 962 F.2d at 304–07.

offenders sooner, prevent[ing] violent crimes, . . . and reduc[ing] criminal justice costs.”¹⁸² These rationales are flawed.

A. The Asserted Goals of Jailing Career Criminals and Preventing Violent Crimes Are Based on Logical Fallacies

The argument that DNA database laws will catch career criminals sooner and prevent violent crimes is logically unsound. Essentially, this argument presumes that collecting arrestee X’s DNA will lead to a conviction for crime A, and it concludes that if arrestee X was not convicted of crime A, then he would commit crimes B, C, and so on.

The premise that collection of DNA will be guaranteed to lead to a conviction is untenable. A conviction cannot be guaranteed given several variables, including the exclusionary rule barring other evidence that was obtained wrongfully, other pretrial motions by defense counsel, uncooperative witnesses, and a not guilty verdict by a jury.¹⁸³ DNA could be helpful in solving future crimes committed by the convicted felon; however, an arrestee’s DNA can be expunged from the system if the arrestee is not convicted.¹⁸⁴

The conclusion that a DNA database would assist in convicting a criminal in the future is less flawed than the premises, as evidenced by data showing the recidivism rates for convicted felons.¹⁸⁵ Nevertheless, DNA evidence would only assist in imprisoning an individual in the future if DNA is left behind at the crime scene. If an individual does not leave biological material at the scene, then police will not be able to solve the case any quicker with the DNA database than without it. Thus, the inability to guarantee a conviction lessens the future applications of an arrestee’s DNA and may largely thwart the asserted goals of jailing career criminals and preventing violent crimes.

182. *Why Pass the DNA Law?*, DNA SAVES, http://www.dnasaves.org/dna_law.php (last visited Apr. 12, 2011).

183. At least one study shows that only about fifty percent of CODIS (Combined DNA Index System) hits result in convictions. JAY SIEGEL & SUSAN D. NARVESON, *WHY ARRESTEE DNA LEGISLATION CAN SAVE INDIANA TAXPAYERS OVER \$60 MILLION PER YEAR 6–7* (2009), available at http://www.dnasaves.org/files/IN_DNA_Cost_Savings_Study.pdf.

184. See *supra* notes 25–32 and accompanying text.

185. Bureau of Justice Statistics, *Recidivism*, DEP’T OF JUSTICE, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17> (last visited Apr. 12, 2011). Of approximately 300,000 inmates released from prisons in fifteen states in 1994, nearly seventy percent were arrested within three years for another offense. *Id.*

B. Alleged Cost Savings Do Not Outweigh the Value of Civil Rights

While society often gives up some modicum of civil liberties in exchange for security, the DNA Database Act sacrifices civil liberties in exchange for budget cuts. In Indiana, a DNA database law was estimated to save the state anywhere from \$7 million to \$66 million.¹⁸⁶ In a time when many Americans are angry with government spending, this argument has some appeal. The difficult question is where to draw the line. Though North Carolina could save \$127 million by cutting the indigent defense fund from the budget,¹⁸⁷ it is an unacceptable diminution of civil liberties.¹⁸⁸

This Recent Development has further asserted that the violation of individuals' Fourth Amendment rights by collecting DNA upon arrest is constitutionally unacceptable. The Supreme Court has long lauded the role of the "neutral and detached magistrate" that intercedes between the suspect and "the officer engaged in the often competitive enterprise of ferreting out crime."¹⁸⁹ "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."¹⁹⁰ The *Schmerber* Court, in reliance on this often quoted language from *Johnson v. United States*, declared that the rational and independent consideration of the magistrate or judge takes on colossal significance when government agents wish to intrude on an individual's bodily security.¹⁹¹ In short, civil rights are worth more than can be quantified by cost savings in the state's budget.

186. SIEGEL & NARVESON, *supra* note 183, at 6, 9 fig.10. Indiana's budget for the fiscal years of 2008 and 2009 was around \$13 billion. STATE BUDGET AGENCY, STATE OF INDIANA: LIST OF APPROPRIATIONS FOR THE BIENNIUM JULY 1, 2007 TO JUNE 30, 2009, at 1 (2009), available at http://www.state.in.us/sba/files/ap_2007_all.pdf. Even if the law would have saved \$66 million, this constitutes only half of one percent of the state's budget. *Id.*

187. OFFICE OF STATE BUDGET & MGMT., RECOMMENDED OPERATING BUDGET, 2009-2011: JUSTICE AND PUBLIC SAFETY 13 (2009), available at http://www.osbm.state.nc.us/files/pdf_files/bgt0911v4r.pdf.

188. See *Miranda v. Arizona*, 384 U.S. 436, 473 (1966) (asserting that the warning to a defendant that he may have counsel present during questioning is a "hollow" guarantee without the assurance that counsel can be appointed if the defendant is indigent).

189. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

190. *Id.*

191. *Schmerber v. California*, 384 U.S. 757, 770 (1966) (citing *Johnson*, 333 U.S. at 14).

C. *The Better Solution: Criminal Justice Law Enforcement Automated Data Services*

North Carolina is already making strides in capturing and punishing criminal offenders while saving taxpayers' money and protecting civil liberties at the same time. In response to the murder of Eve Carson, the state partnered with SAS, a private software corporation headquartered in Cary, North Carolina, to pilot a new criminal database in Wake County called Criminal Justice Law Enforcement Automated Data Services (CJLEADS) that brings information from a variety of sources onto a single computer screen.¹⁹² CJLEADS is designed to make a complete picture of an offender available to criminal justice professionals.¹⁹³ In addition, the database has a feature called "offender watch" to alert law enforcement when an individual's criminal status has changed.¹⁹⁴ The overarching goal is for law enforcement and criminal justice officials to make better decisions with the complete history of an offender at their fingertips.¹⁹⁵ This system would allow police to more easily track criminal offenders without invading an arrestee's body.

The pilot program began in Wake County¹⁹⁶ in July 2010.¹⁹⁷ At the end of 2010, over 2,000 criminal justice professionals had been trained to use CJLEADS.¹⁹⁸ The State Controller's Office has recommended an "aggressive regional deployment approach" to

192. *CJLEADS—Criminal Justice Law Enforcement Automated Data Services*, OFFICE OF STATE CONTROLLER, <http://www.ncosc.net/cjleads/cjleads.html> (last visited Apr. 12, 2011); Mark Johnson, *N.C. Builds a Better Rap Sheet*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 3, 2010, at 1A, available at <http://www.newsobserver.com/2010/01/03/265764/nc-builds-a-better-rap-sheet.html#storylink=misearch>; John McCann, *CJLEADS May Help Prevent Major Crimes*, HERALD SUN (Durham, N.C.), Nov. 15, 2010, at C1, available at http://www.heraldsun.com/view/full_story/10314132/article-CJLEADS-may-help-prevent-major-crimes?instance=homethirdleft.

193. OFFICE OF STATE CONTROLLER, *supra* note 192.

194. *Id.*

195. *Id.*

196. Wake County is the second most populous county in North Carolina. *North Carolina by County*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US37&-_box_head_nbr=GCT-T1-R&-ds_name=PEP_2009_EST&-_lang=en&-format=ST-2S&-_sse=on (last visited Apr. 12, 2011).

197. THE OFFICE OF N.C. STATE CONTROLLER, NORTH CAROLINA CRIMINAL JUSTICE DATA INTEGRATION PILOT PROGRAM QUARTERLY REPORT: OCTOBER 2010, at 3 (2010) [hereinafter OCTOBER 2010 QUARTERLY REPORT], available at http://www.ncosc.net/cjleads/BEACON_Criminal_Justice_Pilot_Oct_2010_final.pdf.

198. N.C. OFFICE OF THE STATE CONTROLLER, NORTH CAROLINA CRIMINAL JUSTICE LAW ENFORCEMENT AUTOMATED DATA SERVICES (CJLEADS) QUARTERLY REPORT: JANUARY 2011, at 3 (2011) [hereinafter JANUARY 2011 QUARTERLY REPORT], available at http://www.ncosc.net/cjleads/CJLEADS_Quarterly_Report_Jan_2011_final.pdf.

implement CJLEADS across the state.¹⁹⁹ The plan would take about eighteen months beginning in January 2011.²⁰⁰ Statewide implementation would allow all law enforcement organizations—local, state, and federal—the opportunity to access the database.²⁰¹

As of April 2010, over 13.2 million clustered offender records were stored by CJLEADS, a compilation of 39.8 million records from the Administrative Office of the Courts, the Department of Corrections, and local jail information.²⁰² The most recent release in December 2010 added records from the Department of Motor Vehicles and the sex offender database.²⁰³ SAS also developed a “night vision” setting for officers to use when the light from a computer screen might compromise their safety.²⁰⁴ Work has already begun to add “real time” record updates, including arrest warrant information from NCAWARE (a statewide warrant repository), concealed handgun permit records, and juvenile records to the system for release in the spring of 2011.²⁰⁵ Technical support is available around the clock.²⁰⁶

Importantly, criminal justice professionals are responding positively to the use of CJLEADS in the execution of their law enforcement duties. The CJLEADS administrators surveyed users in the Wake County pilot program regarding their satisfaction with the database.²⁰⁷ All survey respondents agreed that CJLEADS was “a benefit to their organizations.”²⁰⁸ Ninety-eight percent responded that CJLEADS “improved their ability to use offender information more effectively,” and ninety-seven percent believed CJLEADS enabled them to use offender information more efficiently.²⁰⁹ One particular

199. *Id.* at 11.

200. *Id.*; see also John McCann, *Courts Program Going Statewide*, HERALD SUN (Durham, N.C.), Nov. 17, 2010, at A1, available at http://www.heraldsun.com/view/full_story/10315114/article-Courts-program-going-statewide? (stating the statewide execution to be in January of 2011).

201. OCTOBER 2010 QUARTERLY REPORT, *supra* note 197, at 11.

202. OFFICE OF THE STATE CONTROLLER, NORTH CAROLINA CRIMINAL JUSTICE DATA INTEGRATION PILOT PROGRAM QUARTERLY REPORT: APRIL 2010, at 7 (2010) [hereinafter APRIL 2010 QUARTERLY REPORT], available at http://www.ncosc.net/cjleads/BEACON_Criminal_Justice_Pilot_Apr_2010_final.pdf. Clustering is defined as “the process of mapping individual records to an offender.” *Id.*

203. JANUARY 2011 QUARTERLY REPORT, *supra* note 198, at 8.

204. *Id.* at 9.

205. OCTOBER 2010 QUARTERLY REPORT, *supra* note 197, at 9–10; JANUARY 2011 QUARTERLY REPORT, *supra* note 198, at 12–13.

206. OCTOBER 2010 QUARTERLY REPORT, *supra* note 197, at 3.

207. JANUARY 2011 QUARTERLY REPORT, *supra* note 198, at 5.

208. *Id.* at 5.

209. *Id.*

user searches CJLEADS prior to scheduled home visits to determine if someone at the home may have a record of drug and weapons violations.²¹⁰ In reference to CJLEADS, a Cary police officer said, "This might be the best tool we currently have in our toolbox."²¹¹

CJLEADS already has success stories. The Wake County Board of Alcoholic Beverage Control Law Enforcement Division quickly identified a suspect in a larceny by comparing a photo from video surveillance to a photo from CJLEADS.²¹² Holly Springs police were able to run an alias provided by a motorist during a traffic stop.²¹³ Not only did the officers discover that the driver had several outstanding warrants, but CJLEADS also informed the officers that his passengers were wanted on various charges as well.²¹⁴ The North Carolina Department of Insurance saved hours of investigation by using CJLEADS to learn that a fugitive was scheduled to appear in New Hanover County for a traffic violation.²¹⁵ The fugitive had been wanted for over a month.²¹⁶ At the North Carolina State Fair, police used a photograph from CJLEADS, in conjunction with other technology, to find and remove a sex offender that was legally prohibited from attending the State Fair.²¹⁷ CJLEADS allowed a Cary police officer to learn that an offender was living with his girlfriend, unbeknownst to the apartment managers, based on the address that he provided to his parole officer.²¹⁸ The officer reported that, "If not for CJLEADS I would have had the warrant returned to the clerk as unable to locate. To me that was a success for us and the Town of Cary."²¹⁹ Significantly, these criminals were apprehended based on information about their criminal histories, not their genotypes.

In terms of funding, CJLEADS is projected to break even after the third year of statewide implementation.²²⁰ The database offsets its costs through improved efficiency of law enforcement, without a reduction in the workforce, and benefits the economy in preventing

210. *Id.* This user said, "Love it," regarding this functionality. *Id.* For more direct quotes from CJLEADS users, see *id.* at 32–37.

211. *Id.* at 7.

212. OCTOBER 2010 QUARTERLY REPORT, *supra* note 197, at 3.

213. *Id.* at 4.

214. *Id.*

215. *Id.* at 3–4.

216. *Id.* at 3.

217. JANUARY 2011 QUARTERLY REPORT, *supra* note 198, at 6.

218. *Id.* at 7.

219. *Id.*

220. *Id.* at 17.

citizen deaths.²²¹ Improvements in search efficiency by police and court officials can save an estimated \$14.2 million per year.²²² By 2016, the state controller forecasts a return on investment of about \$52 million.²²³ Thus, CJLEADS will result in substantial savings for the State of North Carolina that—unlike cheek swabs—are untainted by potential violations of constitutional rights.

CONCLUSION

Law-abiding citizens may endorse Governor Perdue's approval of the DNA Database Act of 2010. Nonetheless, this Act threatens the civil liberties that the Founding Fathers memorialized in the Bill of Rights. The Fourth Amendment and its interpretation by the Supreme Court have drawn the line in the sand to bar unreasonable searches and seizures. As maintained above, the swabbing of an arrestee's cheek to collect his or her DNA should be considered a search under North Carolina case law as well as Supreme Court jurisprudence illustrating a reasonable expectation of privacy in one's cheek cells. As such, a search warrant is required for this conduct unless there is an applicable "well-delineated exception."²²⁴ Such a swabbing cannot likely be considered a search incident to arrest, an inventory search, or within the exigent circumstances doctrine. Additionally, the Minnesota Court of Appeals has followed case precedent and logic in concluding that a similar DNA database law is unconstitutional. As argued above, the bases for the Virginia Supreme Court's decision upholding Virginia's database law are more tenuous and should not be considered persuasive precedent for North Carolina courts. Finally, North Carolina is pioneering a revolutionary database system that will assist criminal justice professionals in capturing and prosecuting criminals while preserving arrestees' civil liberties. Though the line between reasonable and unreasonable searches may be drawn in sand, all citizens should be concerned by the storm coming ashore that will erode civil liberties—the DNA Database Act of 2010.

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221. *Id.* The state controller's initial projections assumed that only two lives would be saved per year, contributing \$2.25 million per year. APRIL 2010 QUARTERLY REPORT, *supra* note 202, at 32. The state controller now estimates saving four lives for a total of \$4.5 million per year. JANUARY 2011 QUARTERLY REPORT, *supra* note 198, at 16.

222. JANUARY 2011 QUARTERLY REPORT, *supra* note 198, at 16.

223. *Id.* at 38.

224. *Katz v. United States*, 389 U.S. 347, 357 (1967).