JUSTIFYING FORCIBLE DNA TESTING SCHEMES UNDER THE SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT: A DANGEROUS PRECEDENT

Julie Rikelman*

* As a Blackmun Fellow at the Center for Reproductive Rights, Julie Rikelman litigated *Ferguson v. City of Charleston*, a special needs case discussed in this Article, before the United States Supreme Court. She received an A.B. from Harvard College in 1993 and a J.D. from Harvard Law School in 1997. Ms. Rikelman is currently a litigator in New York City.

I. INTRODUCTION

Each of the fifty states and the federal government have passed statutes requiring certain individuals involved with the criminal justice system to submit blood samples for DNA testing. The statutes vary from state to state; most states require only those convicted of certain crimes to provide blood samples; some states require anyone who has been arrested of a particular crime to provide blood samples, even if the person is never convicted. The statutes generally allow government officials to forcibly extract blood samples from those who come within the law's requirements.

Individuals affected by the statutes have repeatedly challenged them in court. One of the most common challenges raised is that the statutes violate the Fourth Amendment to the United States Constitution, which gives every citizen the right to be free from unreasonable searches and seizures.

Each United States Court of Appeals that has considered the issue has decided that forcible DNA testing schemes are constitutional under the Fourth Amendment. The reasoning relied on by the appellate courts in their most recent decisions, however, cannot be squared with Supreme Court precedent. In particular, the courts' conclusion that such searches can be justified under the special needs exception to the Fourth Amendment is incorrect in light of the Supreme Court's latest opinions. The Court created the special needs exception to permit the government to conduct warrantless searches when its purpose is to uncover something other than ordinary criminal conduct. Relying on the special needs exception to uphold forcible DNA testing schemes sets a dangerous precedent by expanding the exception so broadly that it could be used to justify any governmental search or seizure, so long as the search or seizure is not related to a particular crime that the government is currently investigating. For instance, the reasoning relied upon by the appellate courts in recent decisions arguably could be used to justify the government's warrantless spying on ordinary, law-abiding Americans as part of the War on Terror, an issue currently under consideration by the courts.

This Article concludes that forcible DNA testing cannot be justified under the special needs exception. Further, it predicts that if the Supreme Court were to uphold forcible DNA testing schemes, it would do so under a general balancing test, relying heavily on the diminished expectation of privacy of those convicted of a crime to justify the statutes. For this reason, this Article concludes that forcible DNA testing of those merely arrested of a crime cannot be justified under the Fourth Amendment.

II. THE STATUS OF DNA TESTING PROGRAMS

All fifty states and the federal government have passed DNA testing statutes.[1] The vast majority of states and the federal government limit their

[1] *See* 42 U.S.C.S. § 14135a (LexisNexis 2004 & Supp. 2006) (federal statute requiring individuals who have been convicted of certain federal crimes to provide blood or tissue samples for DNA testing); ALA. CODE § 36-18-25 (LexisNexis Supp. 2006); ALASKA STAT. § 44.41.035 (2004); ARIZ. REV. STAT. ANN. § 13-610 (Supp. 2006); ARK. CODE ANN. § 12-12-1109 (2003); CAL. PENAL CODE § 296 (West 1999 & Supp. 2006); COLO. REV. STAT. ANN. § 16-11-102.4 (West Supp. 2006); CONN. GEN. STAT. ANN. § 54-102g (West. Supp. 2006); DEL. CODE ANN. tit. 29, § 4713 (Supp. 2004); FLA. STAT. ANN. § 943.325 (West Supp. 2007); GA. CODE ANN. § 24-4-60 (West Supp. 2006); HAW. REV. STAT. ANN. § 844D-31 (LexisNexis Supp. 2006); IDAHO CODE ANN. § 19-5506 (Supp. 2006); 730 ILL. COMP. STAT. ANN. 5/5-4-3 (West Supp. 2006); IND. CODE ANN. § 10-13-6-10 (West. Supp. 2006); IOWA CODE ANN. § 81.2 (West Supp. 2006); KAN. STAT. ANN. § 21-2511 (Supp. 2005); KY. REV. STAT. ANN. § 17.171 (LexisNexis 2003); LA. REV. STAT. ANN. § 15:609 (2005); ME. REV. STAT. ANN. tit. 25, § 1574 (Supp. 2006); MD. CODE ANN., PUB. SAFETY § 2-504 (LexisNexis Supp. 2006); MASS. ANN. LAWS ch. 22E, § 3 (LexisNexis Supp. 2006); MICH. COMP. LAWS SERV. § 28.176 (LexisNexis Supp. 2006); MINN. STAT. ANN. § 609.117 (West 2003 & Supp. 2006); MISS. CODE ANN. § 45-33-37 (West Supp. 2006); MO. ANN. STAT. § 650.055 (West 2006); MONT. CODE ANN. § 44-6-103 (2006); NEB. REV. STAT. § 29-4106 (Supp. 2006); NEV. REV. STAT. ANN. § 176.0913 (West Supp. 2006); N.H. REV. STAT. ANN. § 651-C:2 (LexisNexis Supp. 2006); N.J. STAT. ANN. § 53:1-20.20 (West Supp. 2006); N.M. STAT. ANN. § 29-3-10(A) (West Supp. 2006); N.Y. EXEC. LAW § 995-c (Consol. 1995 & Supp. 2006); N.C. GEN. STAT. ANN. § 15A-266.4 (West 2005); N.D. CENT. CODE § 31-13-03 (Supp. 2005); OHIO REV. CODE ANN. §§ 2152.74, 2901.07 (LexisNexis 2002 & Supp. 2006); OKLA. STAT. ANN. tit. 57, § 595 (West Supp. 2007); OR. REV. STAT. § 137.076 (2005); 44 PA. CONS. STAT. ANN. § 2316 (West Supp. 2006); R.I. GEN. LAWS § 12-1.5-7 (Supp. 2005); S.C. CODE ANN. § 23-3-620 (Supp. 2005); S.D. CODIFIED LAWS § 23-5A-6 (Supp. 2003); TENN. CODE ANN. § 40-35-321 (2003); TEX. GOV'T CODE ANN. § 411.1471(a)(2) (Vernon 2005); UTAH CODE ANN. § 53-10-403 (Supp. 2006); VT. STAT. ANN. tit. 20, § 1933 (2006); VA. CODE ANN. § 19.2-310.2:1 (2004 & Supp. 2006); WASH. REV. CODE ANN. § 43.43.754 (West 2006); W. VA. CODE ANN. § 15-2B-6 (LexisNexis Supp. 2006); WIS. STAT. ANN. § 165.76 (West Supp. 2006); WYO. STAT. ANN. § 7-19-403 (2005). *See generally*, DNA Resource,

DNA testing programs to individuals convicted of a crime.[2] Some states in this group require testing for all felony offenders;[3] other states and the federal government require testing only for more serious felonies, such as murder, robbery, and sex-related crimes.[4] The testing programs normally require an individual to submit a blood sample or a saliva sample or both for the DNA test.[5]

Five states—California, Louisiana, New Mexico, Texas, and Virginia—require forced DNA testing for individuals arrested of certain crimes, even if the State never charges or convicts the individual of the crime involved.[6]

III. THE RATIONALE BEHIND FORCIBLE DNA TESTING SCHEMES

The purpose of the DNA testing statutes is to help law enforcement solve crime. For example, the State of New York has explained that "'[t]he primary function of [its] DNA Databank is to maintain DNA profiles of convicted offenders that can be used by law enforcement to identify a perpetrator of a crime when DNA evidence is retrieved from a crime scene.'"[7] Indeed, identifying perpetrators of crime appears to be the only purpose of the New York statute. Its legislative history makes no mention of the other goals sometimes connected to DNA testing statutes: deterring future criminal activity and identifying human remains.[8]

Other states are equally clear on the purpose of DNA testing schemes. As the Commonwealth of Virginia has said, "the collection of the blood

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http://www.dnaresource.com (last visited Dec. 22, 2006) (providing summary and updates on DNA legislation in the fifty states).

[2] *See, e.g.*, VA. CODE ANN. § 19.2-310.2 (2004 & Supp. 2006). *See generally* DNA Resource, *supra* note 1.

[3] *See, e.g.*, ALASKA STAT. § 44.41.035 (2004).

[4] *See, e.g.*, KY. REV. STAT. ANN. § 17.171 (LexisNexis 2003); *see also* 42 U.S.C.S. § 14135a(d)(1)–(2) (LexisNexis 2004 & Supp. 2006); 28 C.F.R. § 28.2 (2006).

[5] *See, e.g.*, VA. CODE ANN. § 19.2-310.2 (2004 & Supp. 2006).

[6] *See* CAL. PENAL CODE § 296(2) (West 1999 & Supp. 2006); LA. REV. STAT. ANN. § 15:602 (2005); N.M. STAT. ANN. § 29-3-10(A) (West Supp. 2006); TEX. GOV'T CODE ANN. § 411.1471(a)(2) (Vernon 2005); VA. CODE ANN. § 19.2-310.2:1 (2004 & Supp. 2006).

[7] Nicholas v. Goord, 430 F.3d 652, 668 (2d Cir. 2005) (second alteration added) (quoting New York State Division of Criminal Justice Services Frequently Asked Questions, http://criminaljustice.state.ny.us/forensic/dnafaqs.htm (last visited Dec. 22, 2006)), *cert. denied*, 127 S.Ct. 384 (2006).

[8] *Id.*

samples is designed to solve future [crime] cases."[9] Thus, it cannot reasonably be disputed that the government is collecting DNA samples under the DNA testing statutes to assist its officers in ordinary criminal investigations.

IV. LOWER COURT DECISIONS UPHOLDING DNA TESTING SCHEMES

Nine of the twelve federal appellate courts have considered the constitutionality of forcible DNA testing statutes.[10] All nine have upheld the statutes against challenges under the Fourth Amendment.[11]

In all of these cases, the party challenging the laws had been convicted of a crime specified in the relevant statute.[12] As described above, however, certain states' DNA testing statutes apply to those arrested, as well as to those convicted, of certain crimes.[13] The courts have not yet ruled on the constitutionality of DNA testing statutes as applied to arrestees.[14]

Five of the federal appellate courts have upheld the DNA testing statutes on the theory that those convicted of a crime have a diminished expectation of privacy, and thus, searches of their blood can be justified under a general Fourth Amendment balancing test.[15] Most of these courts have relied

[9] Jones v. Murray, 962 F.2d 302, 305 (4th Cir. 1992); *see also* ALASKA STAT. § 44.41.035(f)(2) (2004) (stating that the DNA database can be used only for criminal investigations, prosecutions and identification of human remains).

[10] *See* United States v. Kraklio, 451 F.3d 922, 923 (8th Cir. 2006); *Nicholas*, 430 F.3d at 665; United States v. Sczubelek, 402 F.3d 175, 187 (3d Cir. 2005); Padgett v. Donald, 401 F.3d 1273, 1278 (11th Cir. 2005); United States v. Kincade, 379 F.3d 813, 839 (9th Cir. 2004); Green v. Berge, 354 F.3d 675, 677 (7th Cir. 2004); Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413 (5th Cir. 2004); United States v. Kimler, 335 F.3d 1132, 1145 (10th Cir. 2003); Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996); *Jones*, 962 F.2d 302, 310.

[11] *See Kraklio*, 451 F.3d at 924–25; *Nicholas*, 430 F.3d at 672; *Sczubelek*, 402 F.3d at 187; *Padgett*, 401 F.3d at 1280; *Kincade*, 379 F.3d at 839; *Berge*, 354 F.3d at 679; *Groceman*, 354 F.3d at 414; *Kimler*, 335 F.3d at 1146–47; *Jones*, 962 F.2d at 308.

[12] *Kraklio*, 451 F.3d at 923; *Nicholas*, 430 F.3d at 655; *Sczubelek*, 402 F.3d at 177; *Padgett*, 401 F.3d at 1276; *Kincade*, 379 F.3d at 820; *Berge*, 354 F.3d at 676; *Groceman*, 354 F.3d at 412; *Kimler*, 335 F.3d at 1137; *Jones*, 962 F.2d at 303.

[13] *See supra* note 6.

[14] A constitutional challenge was posed to California's law requiring DNA testing of arrestees, but the court dismissed the case as not ripe. Weber v. Lockyer, 365 F. Supp. 2d 1119, 1126 (N.D. Cal. 2005).

[15] *See Sczubelek*, 402 F.3d at 187; *Padgett*, 401 F.3d at 1280; *Kincade*, 379 F.3d at 832–39; *Groceman*, 354 F.3d at 413–14; *Jones*, 962 F.2d at 305–08.

heavily on a recent Supreme Court case, *United States v. Knights*,[16] in upholding the statutes.[17]

But in three of the most recent appellate decisions, the Second, Seventh, and Tenth Circuits have relied on the special needs exception to uphold the DNA testing schemes at issue.[18] The Tenth Circuit reached its holding without substantial analysis, stating simply that the "desire to build a DNA database goes beyond the ordinary law enforcement need" and therefore the special needs exception applied.[19] The Second and Seventh Circuits, however, reached their decisions after evaluating the Supreme Court's recent Fourth Amendment decisions.[20]

The holdings of these recent federal appellate decisions cannot be squared with Supreme Court precedent on the special needs exception, which the Court created for the limited situations when the government conducts searches for reasons other than to uncover evidence of a crime.

[16] 534 U.S. 112 (2001).

[17] *See, e.g.*, *Sczubelek*, 402 F.3d at 182; *Padgett*, 401 F.3d at 1278–80; *Kincade*, 379 F.3d at 831–35; *Groceman*, 354 F.3d at 413.

[18] Nicholas v. Goord, 430 F.3d 652, 667–72 (2d Cir. 2005), *cert denied*, 127 S.Ct. 384 (2006); Green v. Berge, 354 F.3d 675, 679 (7th Cir. 2004); United States v. Kimler, 335 F.3d 1132, 1146–47 (10th Cir. 2003). The Tenth Circuit actually has applied both the general balancing test and the special needs test in evaluating the DNA statutes. *See* Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996); *Kimler*, 335 F.3d at 1146. While the plurality in the Ninth Circuit's decision in *Kincade* applied the general balancing test, one of the judges who heard the case voted to apply the special needs test. *See* 379 F.3d at 840, 842.

[19] *Kimler*, 335 F.3d at 1146.

[20] *See Nicholas*, 430 F.3d at 661–667; *Berge*, 354 F.3d at 678–79.

V. FORCIBLE DNA TESTING SCHEMES CANNOT BE JUSTIFIED UNDER THE SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT AND PROBABLE CAUSE REQUIREMENT, REGARDLESS OF WHETHER THEY TARGET INDIVIDUALS CONVICTED OR ARRESTED OF CERTAIN FELONIES

A. The Supreme Court's Recent Decisions on Suspicionless Searches and Seizures

The DNA testing schemes generally require extraction of blood from those to whom the statutes apply.[21] There is no question that forcible extraction of blood for DNA testing constitutes a search under the Fourth Amendment.[22] No appellate court to consider the constitutionality of DNA testing schemes has concluded otherwise.[23]

Further, as federal appellate courts that have ruled on this issue have recognized, the DNA testing statutes represent suspicionless search regimes.[24] Indeed, many state governments trying to beat back challenges to their statutes readily admit that the searches involved are suspicionless. As the Commonwealth of Virginia acknowledged in defending its DNA testing statute, "the collection of the blood samples is designed to solve future cases *for which no present suspicion can exist*."[25] Even when law enforcement is using the DNA databases to solve past crimes, it does not need any particular suspicion before running DNA uncovered at a crime scene through the entire database to look for a match. Thus, in evaluating the DNA testing statutes, all of the appellate courts have considered the

[21] *See supra* note 1.

[22] *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616 (1989) ("We have long recognized that a compelled intrusion into the body for blood . . . must be deemed a Fourth Amendment search." (internal citations omitted)); *see also* Ferguson v. City of Charleston, 532 U.S. 67, 93 n.1 (2001) (Scalia, J., dissenting) (stating that involuntarily testing of urine is a Fourth Amendment search).

[23] *See, e.g.*, *Nicholas*, 430 F.3d at 658; United States v. Sczubelek, 402 F.3d 175, 182 (3d Cir. 2005); *Kincade*, 379 F.3d at 821 n.15.

[24] United States v. Kraklio, 451 F.3d 922, 924 (8th Cir. 2006); *Nicholas*, 430 F.3d at 660–70; *Sczublelek*, 402 F.3d at 203; Padgett v. Donald, 401 F.3d 1273, 1277–78 (11th Cir. 2005); *Kincade*, 379 F.3d at 822–24; Green v. Berge, 354 F.3d 675, 677 (7th Cir. 2004); Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413 n.2 (5th Cir. 2004); Boling v. Romer, 101 F.3d 1336, 1339 (10th Cir. 1996); Jones v. Murray, 962 F.2d 302, 305–07 (4th Cir. 1992).

[25] *Jones*, 962 F.2d at 305 (emphasis added).

question whether such a suspicionless search regime can be justified under the Fourth Amendment.[26]

The Supreme Court generally has found suspicionless searches to be unconstitutional. Ordinarily, "[a] search or seizure is . . . unreasonable in the absence of individualized suspicion of wrongdoing."[27] The Court has "recognized only limited circumstances in which the usual rule does not apply."[28] One such circumstance is when a regime of suspicionless searches is "designed to serve 'special needs, beyond the normal need for law enforcement.'"[29] A second category is searches conducted "for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited."[30] The third category is "brief, suspicionless seizures of motorists" designed to secure the borders or to get drunk drivers off the roads.[31] To date, these are the only categories of suspicionless searches that the Court has upheld under the Fourth Amendment.

Further, the Supreme Court has approved suspicionless searches that fall into these three categories only when the search did not serve the purpose of discovering ordinary criminal conduct.[32] Indeed, in recent years, the Court has repeatedly struck down as unconstitutional suspicionless searches or seizures that fall into one of these three categories but were conducted to

[26] *See, e.g.*, *Kraklio*, 451 F.3d at 924–25; *Nicholas*, 430 F.3d at 660, 672; *Sczubelek*, 402 F.3d at 186–87; *Padgett*, 401 F.3d at 1280; *Kincade*, 379 F.3d at 839; *Berge*, 354 F.3d at 679; *Groceman*, 354 F.3d at 414; United States v. Kimler, 335 F.3d 1132, 1146–47 (10th Cir. 2003); *Jones*, 962 F.2d at 308.

[27] City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

[28] *Id.*

[29] *Id.* (citing Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995); Treasury Employees v. Von Raab, 489 U.S. 656, 680 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 620 (1989)).

[30] *Id.*

[31] *Id.* (citing United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976) (checkpoint to intercept illegal aliens); Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 452 (1990) (checkpoint to combat drunk driving)).

[32] *See* Samson v. California, 126 S. Ct. 2193, 2197–2202 (2006); Bd. of Educ. v. Earls, 536 U.S. 822, 833–38 (2002); Ferguson v. City of Charleston, 532 U.S. 67, 86 (2001); *Edmond*, 531 U.S. at 38; Chandler v. Miller, 520 U.S. 305, 312–23 (1997); *Acton*, 515 U.S. at 659–66; *Von Raab*, 489 U.S. at 665–77; *Skinner*, 489 U.S. at 616–21.

uncover criminal wrongdoing.[33] For instance, in *Ferguson v. City of Charleston*, the Court struck down a suspicionless search regime set up by a public hospital, working hand in glove with law enforcement, with the primary purpose of discovering criminal drug use among pregnant women.[34] Although the City argued that the program's real purpose was to protect the welfare of children and therefore was justified under the special needs exception, the Court disagreed.[35]

Similarly, in *Edmond*, the Court struck down a checkpoint program set up with the primary purpose of intercepting illegal drugs.[36] The *Edmond* Court pointed out that none of its previous cases upholding suspicionless checkpoint seizures involved a "program whose primary purpose was to detect evidence of ordinary criminal wrongdoing."[37]

And, although the Court has not recently issued a major administrative search decision, it has made clear in its past decisions that where the purpose of the search is to "gather evidence of criminal activity," a criminal search warrant based upon probable cause must be obtained and the administrative search exception will not apply.[38] Similarly, even when it has upheld suspicionless searches of closely regulated businesses pursuant to an administrative scheme, the Court has looked to see whether the regulation permitting such searches and the particular search in question were a mere pretext for obtaining evidence of ordinary criminal wrongdoing.[39]

The only suspicionless regime designed to investigate crime that the Supreme Court has recently upheld was a checkpoint program examined in *Illinois v. Lidster*.[40] *Lidster*, however, did not involve a search or seizure of the person suspected of wrongdoing.[41]

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[33] *See Ferguson*, 532 U.S. at 86; *Edmond*, 531 U.S. at 48; Michigan v. Clifford, 464 U.S. 287, 294 (1984).

[34] 532 U.S. at 70, 86.

[35] *Id.* at 81–86.

[36] *Edmond*, 531 U.S. 31, 34, 48 (2000).

[37] *Id.* at 38.

[38] *See Clifford*, 464 U.S. at 294 (refusing to uphold warrantless search of person's home in aftermath of a fire, where search was done to gather evidence of criminal activity rather than to determine cause of fire).

[39] *See, e.g.*, New York v. Burger, 482 U.S. 691, 716–17 n.27 (1987) (finding no such pretext).

[40] 540 U.S. 419, 428 (2004).

[41] *Id.* at 422.

Lidster concerned a highway checkpoint at which police stopped and questioned motorists about a crime that had occurred one week earlier in the checkpoint's vicinity.[42] The Court acknowledged that it had recently held a checkpoint program unconstitutional under the Fourth Amendment in *Edmond*.[43] The Court stated, however, that the facts made it inappropriate to apply "an *Edmond*-type rule of automatic unconstitutionality" in *Lidster*.[44] Instead, the *Lidster* Court applied the reasonableness test for highway checkpoints set out in *Brown v. Texas*.[45] Under this test, the Court evaluates "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[46] The Court found that the checkpoint in *Lidster* was constitutional under this test.[47]

The *Lidster* Court found no presumption of unconstitutionality because of the crucial fact that the government was not looking for criminal conduct *by the persons seized* in the checkpoint.[48] As the Court said, the checkpoint's "primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others."[49] The Court refused to apply a presumption of unconstitutionality to such information-seeking highway stops,[50] particularly in light of its precedent permitting the police to stop pedestrians for questioning on a voluntary basis.[51] The brief nature of the stops at the *Lidster* checkpoint also influenced the Court,[52] but its opinion makes clear that the determinative fact was that the police were not looking for criminal conduct by those they seized.[53]

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[42] *Id.*

[43] *Id.* at 423.

[44] *Id.* at 424.

[45] *Id.* at 426–27 (citing Brown v. Texas, 443 U.S. 47, 51(1979)).

[46] *Id.* at 427 (quoting *Brown*, 443 U.S. at 51(1979)).

[47] *Id.* at 427–28.

[48] *See id.* at 423–26.

[49] *Id.* at 423.

[50] *See id.* at 424, 426.

[51] *Id.* at 425.

[52] *Id.* at 422, 425.

[53] *See id.* at 423–24.

This crucial fact also was the reason why the three dissenting judges in *Lidster* agreed with the majority that *Edmond* was not controlling.[54] As Justice Stevens wrote, "There is a valid and important distinction between seizing a person to determine whether she has committed a crime and seizing a person to ask whether she has any information about an unknown person who committed a crime a week earlier."[55] The three dissenters disagreed with the majority only because they believed that the Court should have remanded the case back to the state court to determine in the first instance whether the checkpoint was reasonable under *Brown*.[56] Thus, *Lidster* in no way expands or contradicts the Court's previous decisions limiting suspicionless searches.

Instead, the Court's recent Fourth Amendment decisions reaffirm the principle that a suspicionless search of an individual suspected of ordinary criminal wrongdoing is unreasonable under the Fourth Amendment.

B. The Special Needs Exception Cannot Apply To Searches Conducted to Assist Law Enforcement in Uncovering Ordinary Criminal Conduct

The Court created the special needs exception to the Fourth Amendment's warrant and probable cause requirement to permit the government to conduct suspicionless searches when its purpose is something other than criminal law enforcement.[57] For instance, in *Acton*, the Court upheld suspicionless drug searches of high school athletes' urine.[58] The school district had been conducting the searches to reduce documented drug use and what it perceived to be related disciplinary problems among its students.[59] Only the students and school officials had access to the test results, and the only penalty for testing positive was

[54] *Id.* at 428.

[55] *Id.*

[56] *Id.* at 428–29.

[57] *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665–66 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619, 621 n.5, 633 (1989) (upholding scheme to test urine of railroad employees after railroad accidents and noting that record established that test results were not provided to law enforcement).

[58] 515 U.S. at 648, 664–65.

[59] *Id.* at 648–50.

suspension from the athletics program; school officials did not report the results to the police.[60] Under these circumstances, the Court concluded that the government had articulated a special need justifying the searches.[61]

Similarly, in *Von Raab*, the Court upheld drug testing of the urine of customs officials who applied for positions requiring the use of firearms or involving the interdiction of illegal drugs.[62] The Commissioner of Customs justified the testing program on the grounds that it would deter drug use among officials in sensitive positions and prevent the promotion of drug users to those positions.[63] Officials who tested positive were subject to dismissal, but their test results could not be turned over to any other government agency, including prosecutors.[64] The Court found that the program was constitutional under the special needs exception.[65]

In its most recent special needs case, *Ferguson v. City of Charleston*, the Court reaffirmed that the special needs exception does not apply when government conducts a search for normal law enforcement purposes.[66] In that case, the public hospital in Charleston worked with the local police and prosecutor to surreptitiously test pregnant women's urine for cocaine use and then prosecute those women who tested positive.[67] In the early stages of the program, the police arrested the pregnant women after one positive urine screen.[68] The hospital and police then changed the program to allow the women the option of obtaining drug treatment as an alternative to arrest.[69] If the women failed to comply with treatment or again tested positive for cocaine, they were promptly arrested.[70] The police and prosecutors were involved in every stage of the program: from its development, to its daily operations, to its later changes.[71] For example, the police taught hospital personnel to maintain a chain of custody in obtaining

[60] *Id.* at 651, 658.
[61] *Id.* at 664–65.
[62] 489 U.S. at 664–65.
[63] *Id.* at 660–61.
[64] *Id.* at 663.
[65] *Id.* at 677.
[66] 532 U.S. 67, 70–71 (2001).
[67] *Id.*
[68] *Id.* at 72 & n.5.
[69] *Id.* at 72.
[70] *Id.*
[71] *Id.* at 71–73, 82.

and testing urine samples.[72] The police and prosecutors also decided who would receive reports of positive drug screens and what information those reports would contain.[73] The City of Charleston sought to justify the program under the special needs exception.[74] The Court rejected the City's argument.[75]

The Court stated that *Ferguson* was different from its previous special needs cases that involved comparable drug tests.[76] As the Court explained, "In each of those earlier cases, the 'special need' that was advanced . . . was one divorced from the State's general interest in law enforcement."[77] The Court pointed out that in its earlier cases, the government had not set up the testing program to prosecute the individuals concerned, and it did not routinely provide the results of the drug tests to law enforcement.[78] Indeed, the Court stated that "[i]n none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes."[79]

The Court also resoundingly rejected the City of Charleston's argument that the special needs exception should apply because the "ultimate goal of [its] program . . . [was] to get the women in question into substance abuse treatment and off of drugs."[80] The Court rebuffed the notion that a suspicionless "search to generate evidence for use by the police in enforcing general criminal laws [c]ould be justified by reference to the . . . social harms that [those laws] might prevent."[81] The Court said:

> Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by

[72] *Id.* at 71–72.

[73] *Id.* at 82.

[74] *Id.* at 73–76.

[75] *Id.* at 86.

[76] *See id.* at 77.

[77] *Id.* at 79; *see also* Chandler v. Miller, 520 U.S. 305, 313–14 (1997) (refusing to uphold testing under special needs exception); Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664 (1995); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 611 (1989).

[78] *Ferguson*, 532 U.S. at 80 n.16.

[79] *Id.* at 83 n.20.

[80] *Id.* at 82–83.

[81] *Id.* at 84 n.22.

> defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment.[82]

The Court found that "the primary purpose of the Charleston program . . . was to use the threat of arrest and prosecution in order to force women into treatment" and that there was "extensive involvement of law enforcement officials at every stage of the policy."[83] It therefore held that the "case simply does not fit within the closely guarded category of 'special needs.'"[84]

Justice Kennedy disagreed with the majority's discussion that the immediate, rather than the ultimate, purpose of the policy was critical to the special needs analysis.[85] But he agreed with the majority's central holding that a search conducted for normal law enforcement purposes cannot be justified under the special needs exception.[86] In his concurrence, he stated: "The traditional warrant and probable-cause requirements are waived in our previous [special needs] cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes."[87] Further, like the majority, he saw as decisive the fact that the City's policy relied on normal law enforcement means—including arrests and prosecutions—to achieve its goals.[88] Because law enforcement was an integral part of the City's policy, Justice Kennedy concurred that the policy fell outside the special needs exception.[89]

The dissenting justices argued, however, that a policy implemented with a law enforcement purpose did not necessarily fall outside of the special needs exception.[90] Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, stated: "[T]he presence of a law enforcement purpose does not render the special-needs doctrine inapplicable."[91] According to the

[82] *Id.* at 84 (footnote omitted).
[83] *Id.*
[84] *Id.*
[85] *Id.* at 87 (Kennedy, J., concurring).
[86] *Id.* at 88.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 88–89.
[90] *Id.* at 101 (Scalia, J., dissenting).
[91] *Id.*

dissenting justices, as long as the hospital began and continued the program with the legitimate medical purpose of improving the health of pregnant women and their babies, law enforcement's involvement in the program, including the threat of arrest and prosecution to make the policy work, was irrelevant to the Fourth Amendment analysis.[92] The majority and Justice Kennedy rejected this reasoning.[93]

Thus, the Court in *Ferguson* created at least three disqualifiers for applying the special needs exception to a suspicionless search regime: (1) significant law enforcement involvement,[94] (2) a primary law enforcement purpose,[95] and (3) the use of normal law enforcement sanctions, such as arrest and prosecution, to further the regime's stated goals.[96]

Further, *Ferguson* clarifies that the special needs cases are a separate category from and require different analysis than administrative search and checkpoint seizure cases—the other two categories of cases in which the Court has upheld suspicionless intrusions.[97] The Court noted in *Ferguson* that *Sitz* itself had "distinguished the cases dealing with checkpoints from those dealing with 'special needs.'"[98] As the Court explained, checkpoint seizure cases like *Sitz* and *Martinez-Fuerte* are different because they "involved roadblock seizures, rather than the 'intrusive search of the body or the home.'"[99] The same is generally true of administrative search cases, which usually involve searches of businesses and commercial property.[100]

This distinction is important when evaluating searches under the special needs exception because checkpoint seizures and administrative searches

[92] *Id.* at 99–100.

[93] *Id.* at 85, 89–90.

[94] *See id.* at 82.

[95] *See id.* at 83–84.

[96] *See id.* at 85–86.

[97] *Id.* at 83 n.21.

[98] *Id.* at 84 n.21 (citing Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990)).

[99] *Id.* at 83 n.21 (citing City of Indianapolis v. Edmond, 531 U.S. 32, 54–55 (2000); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)).

[100] *See, e.g.*, New York v. Burger, 482 U.S. 691, 702–712 (1987) (upholding administrative inspection of automobile junkyard); See v. City of Seattle, 387 U.S. 541, 542 (1967) (refusing to uphold the warrantless inspection of a commercial warehouse). *But see* Michigan v. Clifford, 464 U.S. 287, 289 (1984) (refusing to uphold the warrantless, administrative inspection of a person's home after a fire).

regularly result in criminal action against those seized or searched.[101] For example, although the primary purpose of checkpoints may be to keep drunk drivers off the road and to secure our borders, not to uncover ordinary criminal wrongdoing, those who are caught driving drunk or smuggling aliens at the checkpoints are arrested and prosecuted.[102] Similarly, in cases like *New York v. Burger*, the Court has upheld administrative searches conducted pursuant to a valid regulation without a warrant based upon probable cause, even when the government used the search results to criminally prosecute the individual searched.[103] As the Court explained in *Ferguson*, such searches are constitutional because the administrative regulation was not "designed to gather evidence to enable convictions under the penal laws."[104] Instead, "[t]he discovery of evidence of other violations [is] merely incidental to the purposes of the administrative search."[105] By distinguishing these two other categories of cases from special needs cases, the Court in *Ferguson* strongly suggested, although it did not decide, that a search program could not qualify for the special needs exception if it resulted in regular reports to the police, even when the program's primary purpose was not ordinary criminal law enforcement.[106]

The Court's recent decisions are consistent with older Supreme Court precedent on the Fourth Amendment. In the past, the Court has repeatedly refused to uphold the constitutionality of warrantless searches when the searches are conducted for normal law enforcement reasons.[107] For instance, the Court has found two of the interests offered in support of the DNA testing regimes—to increase the government's ability to solve serious

[101] *See, e.g.*, *Burger*, 482 U.S. at 693–96; *See*, 387 U.S. at 541; *Clifford*, 464 U.S. at 289–91.

[102] *See Sitz*, 496 U.S. at 448; *Martinez-Fuerte*, 428 U.S. at 545.

[103] 482 U.S. at 695–96; *see also* United States v. Biswell, 406 U.S. 311, 312–13 (1972) (pawnshop operator charged and convicted of certain crimes based on evidence discovered during course of administrative inspection).

[104] 532 U.S. at 83 n.21 (quoting *Burger*, 482 U.S. at 715).

[105] *Id.*

[106] *See id.* at 82–85.

[107] *See* Flippo v. West Virginia, 528 U.S. 11, 13–14 (1999) (reaffirming its rejection of "homicide crime scene exception" to the warrant requirement of the Fourth Amendment); Mincey v. Arizona, 437 U.S. 385, 393–94 (1978) (rejecting "murder scene exception" to warrant requirement); Chimel v. California, 395 U.S. 752, 764–66 (1969) (rejecting warrantless search of defendant's entire home when defendant was arrested at home on burglary charges pursuant to an arrest warrant).

crimes and to make the government more efficient in doing so—as insufficient reasons for dispensing with the warrant and probable cause requirements.[108] Thus, in recent years, the Court has reaffirmed the strong protection provided by the Fourth Amendment, at least for ordinary citizens.

C. Recent Appellate Court Decisions Upholding DNA Testing Statutes Under The Special Needs Exception Ignore Key Aspects Of The Court's Special Needs Jurisprudence

Some of the appellate courts that have construed the DNA testing schemes did so before the Court's recent Fourth Amendment decisions.[109] But three appellate courts, the Second, Seventh and Tenth Circuits, have upheld these statutes under the special needs exception after the Court decided *Ferguson* and *Edmond*.[110] These courts' reliance on the special needs exception to justify forcible DNA testing schemes sets a dangerous precedent. Indeed, accepting the reasoning of these three cases would so broaden the special needs exception that Fourth Amendment protection "would approach the evaporation point."[111]

The Seventh Circuit upheld the DNA search conducted under the Wisconsin statute at issue on the theory that it was "not undertaken for the investigation of a specific crime."[112] It distinguished the Supreme Court's decision in *Edmond*, stating that in *Edmond*, the police were conducting searches "to see if a driver was *then and there* engaged in illegal drug activity."[113] The Seventh Circuit distinguished *Ferguson* on the ground that the individuals searched under Wisconsin's statute had no misunderstanding about the purpose of the DNA test or the potential use of

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[108] *See Mincey*, 437 U.S. at 393–94 (rejecting "murder scene exception" to warrant requirement); *see also Flippo*, 528 U.S. at 11, 14.

[109] *See generally* Boling v. Romer, 101 F.3d 1336 (10th Cir. 1996); Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).

[110] Nicholas v. Goord, 430 F.3d 652, 664–72 (2d Cir. 2005), *cert denied*, 127 S.Ct. 384 (2006); Green v. Berge 354 F.3d 675, 678–79 (7th Cir. 2004); United States v. Kimler, 335 F.3d 1132, 1144–46 (10th Cir. 2003).

[111] *Chimel*, 395 U.S. at 765.

[112] *Green*, 354 F.3d at 678 (citing Shelton v. Gudmanson, 934 F. Supp. 1048, 1050–51 (W.D. Wis. 1996)).

[113] *Id.* (emphasis added).

the test's results, and that the statute protected against unauthorized dissemination of the test results to third parties.[114]

The Second Circuit upheld New York's DNA testing statute for similar reasons in *Nicholas*.[115] The New York statute requires persons convicted of certain felonies to provide DNA samples, provides for information obtained through the DNA samples to be stored in a database, and specifies that DNA samples will be analyzed only for markers "having value for law enforcement identification purposes."[116] Records in the DNA database can be released only (1) to law enforcement agencies for identification of specified human remains or for identification purposes in criminal investigations; (2) to a defendant or his legal representative, (3) or after personally identifiable information has been removed, to authorized entities for the purpose of maintaining a population-statistics database.[117] All nine plaintiffs in *Nicholas* had been forced against their will to provide blood samples for DNA testing and were serving their sentences at the time that they did so.[118]

The Second Circuit applied the special needs exception in *Nicholas* after a lengthy discussion of the exception's scope.[119] In describing the New York DNA testing statute, the Second Circuit claimed that "at the time of collection," the blood samples "are not sought 'for the investigation of a specific crime.'"[120] Although the New York statute only allows the state to analyze the DNA samples for markers with value for law enforcement identification purposes, the Second Circuit concluded that, unlike in *Ferugson* and *Edmond*, the searches were not aimed at "'detecting evidence of ordinary criminal wrongdoing'"[121] because the state was not "trying to 'determine that a particular individual has engaged in some specific

[114] *Id.* at 678–79.

[115] *Nicholas*, 430 F.3d at 664–72.

[116] N.Y. EXEC. LAW § 995-c(5) (Consol. 1995 & Supp. 2006).

[117] *Id.* § 995-c(6).

[118] 430 F.3d at 655 n.1.

[119] *Id.* at 664–72.

[120] *Id.* at 669 (emphasis added) (quoting Nicholas v. Goord, No. 01 Civ. 7891, 2003 U.S. Dist. LEXIS 1621, at *44 (S.D.N.Y. Feb. 6, 2003)).

[121] *Id.* at 668 (quoting Illinois v. Lidster, 540 U.S. 419, 423 (2004)).

wrongdoing.'"[122] The Second Circuit claimed to find support in *Lidster*, which it appeared to treat as a special needs case.[123]

Thus, both the Second and Seventh Circuits relied on a temporal distinction to uphold the DNA testing statutes. Under their reasoning, as long as the government is gathering evidence for general crime investigations in the future, rather than to investigate a specific crime now, a suspicionless search can qualify for the special needs exception.[124]

The reasoning in these cases cannot be squared with Supreme Court precedent. For instance, the Seventh Circuit's decision ignores *Ferguson's* clear language. The Supreme Court did not strike down the drug testing scheme in *Ferguson* because the pregnant patients misunderstood the purpose of the drug tests conducted on them or because there was no protection for unauthorized dissemination of the test results to third parties, as the Seventh Circuit suggests.[125] The Court noted these facts as indicative of the greater invasion of privacy at issue in *Ferguson*, as compared to earlier cases.[126] But it then stated, "The critical difference between [earlier cases] and this one . . . [is that in] earlier cases, the 'special need' that was advanced . . . was one divorced from the State's general interest in law enforcement."[127]

Indeed, the Supreme Court struck down the search program in *Ferguson* because police and prosecutors were involved in the searches and used the results to prosecute the women searched. The Court could not have been clearer on this point.[128] Just as the government intended to use the search results in *Ferguson* for law enforcement reasons—to arrest and prosecute

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[122] *Id.* (quoting *Nicholas*, 2003 U.S. Dist. LEXIS 1621, at *43).

[123] *Id.*

[124] *Id.* at 668–69; Green v. Berge, 354 F.3d 675, 678–79 (7th Cir. 2004). The Tenth Circuit applied the special needs exception without any real analysis. *See* United States v. Kimler, 335 F.3d 1132, 1144–46 (10th Cir. 2003).

[125] Indeed, there is no indication in *Ferguson* that the drug test results were disseminated to third parties in the sense that the Seventh Circuit means—the results went directly to those who conducted the search, the hospital staff and police, and to no one else. *See* Ferguson v. City of Charleston, 532 U.S. 67, 82 (2001).

[126] *Id.* at 78.

[127] *Id.* at 79.

[128] *Id.* at 84 ("Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement . . . this case simply does not fit within the closely guarded category of 'special needs.'").

the women searched, the government intends to use DNA test results for law enforcement reasons—to help it solve crimes.

As for the Second Circuit's decision, it flatly misinterprets *Lidster*. The Second Circuit construes *Lidster* as drawing a distinction between "'information-seeking' searches . . . and those [search] regimes aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'"[129] No such distinction appears anywhere in *Lidster*'s text, and the police officers conducting the checkpoint in *Lidster* were certainly looking for evidence related to ordinary criminal wrongdoing—they were trying to solve a crime that had occurred a week earlier. Instead, the Court upheld the checkpoint seizure in *Lidster* because the police were not looking for evidence of criminal wrongdoing by the person they seized.[130] In contrast, the government conducts DNA testing because it hopes to obtain information about past and future crimes by the very individuals it tests. Thus, *Lidster* cannot help justify the DNA testing statutes.[131]

Further, the Second Circuit seemed to conclude that it was required to apply the special needs test simply because New York's DNA statute constituted a suspicionless search regime. It wrote, "*Edmond* and *Ferguson* are notable for two reasons. First, they indicate that searches conducted in the absence of individualized suspicion are subject to the special needs test."[132] However, there is nothing in either of these cases that suggests that suspicionless searches must be subject to the special needs test. *Edmond* is not even a special needs case but rather deals with a checkpoint seizure.[133] *Ferguson* addressed the special needs test because the Fourth Circuit had relied on the exception in upholding the search policy and because the City

[129] Nicholas v. Goord, 430 F.3d 652, 668 (2d Cir. 2005), *cert denied*, 127 S.Ct. 384 (2006) (quoting Illinois v. Lidster, 540 U.S. 419, 424, 423 (2004)).

[130] *Lidster*, 540 U.S. at 423.

[131] The Second Circuit's treatment of *Lidster* as a special needs case is incorrect. *See Nicholas*, 430 F.3d at 663 & n.21. *Lidster* is a checkpoint case, which the Court has explicitly distinguished from those dealing with "special needs." *Ferguson*, 532 U.S. at 83 n. 21 (citing Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990)). Accordingly, the term "special needs" never appears in *Lidster*'s text. Further, the Second Circuit is wrong that it is irrelevant that *Lidster* involved a seizure rather than a search. *Nicholas*, 430 F.3d at 663 n.21. Roadblock seizures are less intrusive than searches of the body and the home and receive less Fourth Amendment protection. 532 U.S. at 83 n.21.

[132] *Nicholas*, 430 F.3d at 662.

[133] *See supra* Part V.A.

of Charleston asked the Court to uphold the Fourth Circuit's decision.[134] The Court never said that, because it was considering a suspicionless search regime, it had to apply the special needs test.

Just as importantly, there is no basis in the Supreme Court's special needs decisions to conclude that the time distinction relied on by both the Second and Seventh Circuits is a distinction with a difference. There is no basis to conclude that such a distinction would be relevant under general Fourth Amendment doctrine.

Rather, one would expect that the government's need to conduct a search without a warrant based upon probable cause is reduced when it is gathering evidence to investigate a future crime that has not yet occurred, as compared to investigating a current crime that needs solving. Fourth Amendment doctrine clearly gives the government more leeway when it is in the process of investigating a crime that is happening now. Hence, the exception created for searches conducted in exigent circumstances, including to apprehend a suspect during a hot pursuit or to obtain evidence that may dissipate.[135]

Special needs jurisprudence follows general Fourth Amendment jurisprudence on this issue. For instance, in *Skinner*, the Court considered whether suspicionless drug testing of the blood and urine of railroad employees following train accidents qualified for the special needs exception.[136] The Court concluded that it did.[137] In its analysis, the Court noted that one of the reasons that the warrant and probable cause requirement was impracticable and that the special needs exception applied was because "alcohol and other drugs are eliminated from the bloodstream at a constant rate" and thus the government must obtain samples from railroad employees "as soon as possible" following a railroad accident.[138] The Court feared that the "delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence."[139] Thus, if the DNA testing statutes only permitted searches to investigate unspecified

[134] *Ferguson*, 532 U.S. at 76.

[135] *See, e.g.*, Illinois v. McArthur, 531 U.S. 326, 331 (2001) (applying exigent circumstances exception and tracing its history).

[136] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 609–11 (1989).

[137] *Id.* at 633.

[138] *Id.* at 623.

[139] *Id.*

future crimes, as the Second and Seventh Circuit's decisions assume, suspicionless searches conducted under the statutes should be less likely to be constitutional under the Fourth Amendment, including under the special needs exception.

Additionally, the Second and Seventh Circuits are factually incorrect that the government uses the DNA searches only to investigate future crimes. Instead, police use the DNA samples collected under the statutes to help them investigate past crimes that remain unsolved. For instance, the *New York Times* recently reported that DNA collected under the federal statute from a Georgia inmate was used to link the individual tested to a series of crimes committed years earlier in Connecticut.[140] Thus, the DNA statutes are not merely forward-looking.

The Seventh Circuit also relied on the Court's decisions in *Griffin* to uphold the DNA testing statute under the special needs exception.[141] But *Griffin* cannot be considered a special needs case after *Ferguson*. In *Griffin*, the petitioner was convicted of resisting arrest, among other crimes, and sentenced to probation.[142] A Wisconsin regulation generally applicable to all probationers permitted a probation officer to search Griffin's home without a warrant as long as a supervisor approved and as long as "reasonable grounds" existed to believe that there was contraband in Griffin's home.[143]

While Griffin was on probation, the probation office received a tip from a detective in a local police department that there might be guns in Griffin's apartment.[144] Two probation officers and three policemen then went to Griffin's home, without first obtaining a warrant.[145] After Griffin let them in, the probation officers searched his apartment and found a handgun.[146] The State charged Griffin with possession of a firearm by a convicted felon which is itself a felony.[147] After a judge denied Griffin's motion to

[140] *See* William Yardley, *DNA Samples Link 4 Murders in Connecticut*, N.Y. TIMES, June 8, 2006, at B1.

[141] *See* Green v. Berge, 354 F.3d 675, 678 (7th Cir. 2004).

[142] Griffin v. Wisconsin, 483 U.S. 868, 870 (1987).

[143] *See id.* at 870–71.

[144] *See id.* at 871.

[145] *See id.*

[146] *See id.*

[147] *Id.* at 872.

suppress the evidence found in the warrantless search, a jury convicted Griffin of the firearms violation.[148]

The Supreme Court concluded that the search of Griffin's home complied with the Fourth Amendment "because it was carried out pursuant to a regulation that itself satisfies the Fourth Amendment's reasonableness requirement."[149] The Court began by noting that a probationer's home, like anyone else's, was protected by the Fourth Amendment's requirement that a search be reasonable.[150] But the Court stated that a state's operation of a probation system presented "special needs" beyond normal law enforcement that could justify departure from the usual warrant and probable cause requirement.[151] The Court suggested that these special needs were: (i) that probation serve "as a period of genuine rehabilitation"; and, (ii) that the "community is not harmed by the probationer's being at large."[152] Later in its opinion, the Court made clear that it equated rehabilitation, the first special need it mentions, with deterrence.[153] Because these purportedly special needs, particularly the need for deterrence, could not be achieved under the normal warrant and probable cause rule,[154] the Court concluded that the Wisconsin regulation was valid, and therefore the search of Griffin's home was constitutional.[155]

Griffin's diminished expectation of privacy was crucial to the decision. As the Court explained, probation, like incarceration, is a form of criminal punishment.[156] Thus, probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'"[157]

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[148] *Id.*

[149] *Id.* at 873.

[150] *Id.*

[151] *Id.* at 873–74.

[152] *Id.* at 875.

[153] *Id.* at 875–76 (noting that "[r]ecent research suggests that more intensive supervision can reduce recidivism," and that warrant requirement would reduce the "deterrent effect" of "expeditious searches").

[154] *See id.* at 876–78.

[155] *See id.* at 880. The Court specifically left open the question of whether *any* search of a probationer's home by a probation officer, even one not conducted pursuant to a valid regulation, is lawful if there are reasonable grounds to believe that contraband is present. *Id.*

[156] *Id.* at 874.

[157] *Id.* (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)) (alteration in original).

Griffin no longer makes sense as a special needs case after *Ferguson*. Instead, the outcome in *Griffin* can be justified only based on Griffin's diminished expectation of privacy, and not under the special needs exception.

As discussed above, the probation officer conducted a warrantless search that yielded evidence used to convict Griffin of a felony, with police officers present, based on a tip from a police officer.[158] Under the standard established in *Ferguson*, this significant law enforcement involvement from beginning to end in the search, as well as the crucial fact that the search results were used in an ordinary criminal prosecution, would preclude the search from qualifying under the special needs exception.[159]

Indeed, even if the particular search in *Griffin* had not been conducted based on a police tip with police officers present and then used as the basis of a conviction, it is not at all clear that the Court, after *Ferguson*, could uphold a probation regulation like Wisconsin's under the special needs exception. Certainly, *Ferguson* undermines the notion that deterrence of ordinary criminal wrongdoing through the threat of law enforcement sanction can qualify as a special need.

In *Ferguson*, the Court framed the question before it as "whether the interest in using the threat of criminal sanctions *to deter* pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant."[160] The Court concluded that, because the "threat of law enforcement intervention" was what "'provided the necessary "leverage" to make the [p]olicy [at issue in Ferguson] effective,'"[161] the policy's primary purpose was to force women into treatment through the involvement of law enforcement, and it could not be upheld under the special needs exception.[162] The Court therefore found that the government's goal to deter individuals from certain conduct by using the threat of criminal sanctions cannot constitute a special need.

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[158] *See id.* at 871–72.

[159] *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 79 n.15 (2001) (stating "[i]n other special needs cases, we have tolerated suspension of the Fourth Amendment's warrant or probable cause requirement in part because there was no law enforcement purpose behind the searches in those cases, and there was little, if any, entanglement with law enforcement").

[160] *Id.* at 70 (emphasis added).

[161] *Id.* at 72 (quoting Brief for Respondents at 8) (second alteration added).

[162] *Id.* at 84.

Further, although the Court in *Ferguson* does not come out and say that *Griffin* cannot be categorized as a special needs case in light of later precedent, it does state that "*Griffin* is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large."[163] The majority makes this point in response to Justice Scalia, who correctly points out that the reasoning in *Ferguson* cannot be squared with the decision in *Griffin*.[164] As he notes, in *Griffin*, "police were involved in the search from the very beginning" and used the evidence uncovered to obtain a conviction.[165] Indeed, "active use of law enforcement . . . [was] an integral part"[166] of Wisconsin's probation program because "the parole officer in *Griffin* was using threat of reincarceration to assure compliance."[167] Thus, after *Ferguson*, *Griffin* does not fit within the special needs exception and thus cannot support the decisions reached by the Second and Seventh Circuits.

In short, the reasoning of the appellate courts that have upheld DNA testing statutes under the special needs exception cannot stand up to scrutiny. These appellate decisions reach their holdings only by ignoring key aspects of the Court's special needs jurisprudence and the purpose of the DNA testing statutes themselves.

D. The DNA Testing Statutes Cannot Be Justified Under the Special Needs Exception

The special needs exception cannot justify the DNA testing statutes for at least two reasons: (i) the primary purpose of the testing programs is to uncover ordinary criminal wrongdoing, and, (ii) primary purpose aside, law enforcement is heavily involved in conducting the testing, which often could result in arrest and prosecution of those searched.

First, it is important to note that the special needs exception permits "intrusions into a person's body and home, areas afforded the greatest Fourth Amendment protection."[168] This is the reason why the Court has not justified checkpoint seizures under the special needs exception. As the

[163] *Id.* at 80 n.15.

[164] *Id.* at 100–03.

[165] *Id.* at 101.

[166] *Id.* at 88.

[167] *Id.* at 102.

[168] City of Indianapolis v. Edmond, 531 U.S. 32, 54 (2000) (Rehnquist, C.J. dissenting).

former Chief Justice of the Court explained, "[t]he brief seizure of an automobile can hardly be compared to the intrusive search of the body or the home."[169]

Second, the Court could use the special needs exception to justify searches of ordinary citizens. It is true that in every case in which the Court has upheld a search under the special needs exception, the individuals searched have had a diminished expectation of privacy.[170] But, the Court has treated this diminished expectation of privacy as simply one factor in the balancing test it uses to decide whether the search is ultimately reasonable under the exception. Importantly, although the Petitioners in *Ferguson* argued that a diminished expectation of privacy was a requirement of the special needs exception and that the Court could overrule the Fourth Circuit's decision on this alternative ground,[171] the Court did not adopt this reasoning. Thus, the *Ferguson* decision leaves open the possibility that the special needs exception could apply to individuals with an undiminished expectation of privacy.

Arguably then, the special needs exception could be used to justify searches of the homes or bodies of ordinary citizens without a warrant based upon probable cause or any individualized suspicion. For this reason, it is crucial that the exception not be expanded so far that it swallows the rule of the Fourth Amendment. If government is conducting a search for ordinary criminal law enforcement purposes, such as gathering evidence to investigate a past or prevent a future crime, there is no special need that justifies an exception to the Fourth Amendment's usual requirements. Indeed, *Ferguson* has foreclosed the notion that the special needs exception can justify searches performed to further the "State's general interest in law enforcement."[172]

Furthering the government's general interest in criminal law enforcement, however, is the primary purpose of the DNA testing statutes. Both the federal and state governments have acknowledged this obvious

[169] *Id.* at 55.

[170] *See, e.g.*, Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656–57 (1995) (noting diminished expectation of privacy of public school students and particularly athletes); *see also* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 627 (1989) (noting diminished expectation of privacy of employees working in pervasively regulated industry).

[171] *See* Brief for Petitioners at 24, 33–36, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (No. 99–936), 2000 WL 728149.

[172] Ferguson v. City of Charleston, 532 U.S. 67, 79 (2001).

fact. For instance, in defending the federal statute, the government admitted that the "purpose of the searches authorized by the DNA Act is to 'help law enforcement solve unresolved and future cases.'"[173] Federal courts not straining to apply the special needs test have reached the same conclusion.[174] As the Tenth Circuit stated when it considered Colorado's DNA testing scheme, the statute serves the "government interest in the investigation and prosecution of unsolved and future criminal acts by the use of DNA in a manner not significantly different from the use of fingerprints."[175]

Because the primary purpose of the DNA testing statutes is to serve ordinary law enforcement needs—solving crime—the searches the government conducts under the statutes may often lead to future arrests and prosecutions of those searched. Indeed, this is the goal of those who designed the statutes. The statutes operate on the assumption that if enough convicted offenders are tested, the government will find matches between their DNA and DNA removed from the scene of unsolved crimes.[176] The government will then be able to arrest and prosecute the tested offenders for these additional crimes.

As Justice Kennedy explained in *Ferguson*, the Court has applied the special needs exception only "on the explicit assumption that the evidence obtained in the search [was] not intended to be used for law enforcement purposes."[177] The Court approved of the search regimes in cases like *Von Raab* and *Skinner* because the government, as employer, was searching its employees for work-related purposes, and never provided the search results to the police or prosecutors.[178] The Court has never upheld "the collection of evidence for criminal law enforcement purposes" under the special needs exception.[179]

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[173] United States v. Kincade, 379 F.3d 813, 855 (9th Cir. 2004) (Reinhardt, J., dissenting); *see also* Jones v. Murray, 962 F.2d 302, 305 (4th Cir. 1992).

[174] *See* Boling v. Romer, 101 F.3d 1336, 1340, 1340 n.4 (10th Cir. 1996).

[175] *Id.* at 1340; *see also* Padgett v. Donald, 401 F.3d 1273, 1280 (11th Cir. 2005) (stating that the purpose of Georgia's DNA testing statute was "creating a permanent identification record of convicted felons *for law enforcement purposes*") (emphasis added).

[176] *See, e.g.*, H.R. REP. NO. 106-900, pt. 1. at 9–11 (2000).

[177] 532 U.S. at 88 (Kennedy, J., concurring).

[178] *See* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 607 (1989).

[179] *Ferguson*, 532 U.S. at 83 n.20.

Indeed, the DNA testing statutes pose a much easier case for evaluating the application of the special needs exception than did *Ferguson*. At least in *Ferguson*, the City of Charleston was able to claim that its testing program was designed to serve the additional non-law enforcement purpose of helping pregnant women to stop using drugs as quickly as possible, thereby protecting the health of their babies.[180] There is no additional non-law enforcement purpose behind the DNA statutes. The statutes' only purpose is to help law enforcement solve crimes. Therefore, the special needs exception cannot justify the suspicionless search regimes created by the DNA testing statutes.

E. Will The Court Uphold The DNA Testing Statutes Under Another Fourth Amendment Theory?

The question remains whether the Court will uphold the DNA testing statutes under a theory other than the special needs exception. Current precedent does not support the DNA testing statutes under any Fourth Amendment theory. However, given that every federal appellate court that has considered the statutes has found them constitutional, it is more likely than not that the Supreme Court will do the same. This Article predicts that should the Court uphold the DNA testing schemes, it will rely on its line of cases establishing a diminished expectation of privacy for prisoners and those on probation or supervised release. Under this standard, the Court should refuse to uphold the statutes as applied to arrestees, as opposed to convicted felons.

The Court should not uphold the DNA testing statutes under any Fourth Amendment theory. Indeed, it would be hard to square upholding the DNA statutes with the Court's decision in *Edmond*, where the Court refused to uphold suspicionless seizures conducted for law enforcement purposes.

In *Edmond*, the Court considered a series of checkpoints set up by the City of Indianapolis with the primary purpose of interdicting illegal drugs.[181] The checkpoints involved only brief stops—two to five minutes—and police conducted searches "only by consent or based on the appropriate quantum of particularized suspicion."[182] By a vote of six to three, with five

[180] *Id.* at 82–83.

[181] City of Indianapolis v. Edmond, 531 U.S. 32, 34 (2000).

[182] *Id.* at 35.

of the justices in the majority still on the Court, the Court struck down the checkpoints as invalid under the Fourth Amendment.[183]

Importantly, *Edmond* considered only the constitutionality of the initial seizure of the cars and passengers at the checkpoints. As the Court has repeatedly stated, seizures are less intrusive, and therefore merit less Fourth Amendment protection, than searches of one's home or one's body.[184]

Further, a person traveling in an automobile has a diminished expectation of privacy.[185] "This is because '[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulations and controls.'"[186]

Additionally, the checkpoints in *Edmond* served a crucial government interest—stopping the flow of illegal drugs. As the Court said, "[t]here is no doubt that traffic in illegal narcotics creates social harms of the first magnitude."[187] The Court recognized that the "law enforcement problems that the drug trade creates likewise remain daunting and complex, particularly in light of the myriad forms of spin-off crime that it spawns."[188] But the Court went on to explain that "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."[189]

Crucially, the Court said: "We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends."[190] The Indianapolis police sought to use the checkpoints "primarily for the ordinary enterprise of investigating crimes."[191] The Court therefore "decline[d] to suspend the usual requirement of individualized suspicion" and found the checkpoints unconstitutional.[192]

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[183] *Id.* at 48.

[184] *Id.* at 54 (Rehnquist, C.J., dissenting).

[185] *Id.*

[186] *Id.* (alteration in original) (quoting South Dakota v. Opperman, 428 U.S. 364, 368 (1976)).

[187] *Id.* at 42 (majority opinion).

[188] *Id.*

[189] *Id.*

[190] *Id.* at 43.

[191] *Id.* at 44.

[192] *Id.* at 44, 48.

The result and reasoning of *Edmond* undermine the constitutionality of the DNA statutes. In *Edmond*, the Court considered a significantly lesser Fourth Amendment intrusion than that posed by the DNA statutes—a brief seizure rather than a search of one's genetic code—and it considered the constitutionality of this lesser intrusion for individuals with a diminished expectation of privacy—motorists. Further, one would be hard pressed to argue that the government interest at issue in *Edmond*—stopping the flow of illegal drugs—is less substantial than the government interest in the DNA statutes—solving crime. This is particularly true given that the Court has often noted that the illegal drug trade leads to violent crime and a variety of other serious social harms,[193] whereas at least some of the DNA statutes require the testing of individuals who have committed only minor offenses, such as stealing food stamps.[194] Finally, the checkpoints in *Edmond* were effective. The police arrested five percent of the individuals they stopped for drug-related crimes, and another four percent for other crimes.[195] Compared to the success of other search or seizure programs that the Court has considered, this is a very high hit rate.[196] There is no indication that the DNA testing statutes are so successful. Thus, the application of current precedent should result in holding the DNA statutes unconstitutional.

Nevertheless, probationers and prisoners have a lesser expectation of privacy than motorists. [197] Should the Court choose to apply a general balancing test in evaluating the DNA testing schemes, this distinction may be enough to convince a majority of the Court to uphold the statutes, despite *Edmond*.

The Court has applied a Fourth Amendment balancing test and excused strict adherence to the Amendment's requirements of a warrant based upon probable cause in certain circumstances, in cases involving detainees,

[193] *See, e.g.*, Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 668–69 (1989).

[194] *See* ALA. CODE § 13A-9-91 (LexisNexis 2005); ALA CODE § 36-18-24 (LexisNexis 2001 & Supp. 2005); *see generally* DNA Resource, http://dnaresource.com (last visited Dec. 15, 2006) (reporting that a majority of the states require testing for some misdemeanors).

[195] *See Edmond*, 531 U.S. at 35.

[196] *See, e.g.*, *Von Raab*, 489 U.S. at 673 (noting that only 5 out of 3600 customs employees—less than .25 percent—had tested positive for drugs under testing program).

[197] Sampson v. California, 126 S. Ct. 2193, 2196 (2006); Hudson v. Palmer, 468 U.S. 517, 530 (1984).

prisoners, and those on probation following a conviction.[198] Although previous cases have been decided based on the unique needs of running a prison or supervising a probationer,[199] a recent case has demonstrated the Court's willingness to apply a balancing test when considering a search purely for ordinary criminal law enforcement purposes of a convicted offender serving probation.[200]

The Court decided *United States v. Knights* in late 2001, after its decisions in *Edmond* and *Ferguson*. Importantly, *Knights* is a 9-0 decision, with a short concurrence by Justice Souter as the only separate opinion.[201] In the decision, the Court does not rely on the special needs exception.[202]

Knights was sentenced to probation for a drug offense.[203] The court that sentenced him explicitly required Knights to submit to searches by either a police or probation officer of his person, property or home, with or without a warrant and with or without reasonable suspicion, as a condition of his probation.[204] Knights accepted this condition by signing the probation order.[205]

In *Knights*, the Court considered whether a search pursuant to this probation condition, conducted by a police officer to obtain evidence of ordinary criminal conduct and supported by reasonable suspicion, satisfied the Fourth Amendment.[206] The Court concluded that it did.[207] Specifically, the police officer who conducted the search in *Knights* suspected Knights of repeatedly vandalizing a local power company's property.[208] After an act of arson again occurred at the power company and based on various pieces of information, the officer set up surveillance of Knights's apartment.[209] The officer observed one of Knights's friends leave the apartment and drive off

[198] *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 870–71 (1987); Bell v. Wolfish, 441 U.S. 520, 557–59 (1979).

[199] *See Griffin*, 483 U.S. at 873–74; *Bell*, 441 U.S. at 559.

[200] *See* United States v. Knights, 534 U.S. 112, 121 (2001).

[201] *Id.* at 121–23.

[202] *Id.* at 121.

[203] *Id.* at 114.

[204] *Id.*

[205] *Id.*

[206] *Id.* at 122.

[207] *Id.*

[208] *Id.* at 114–15.

[209] *Id.*

in his truck.[210] When the officer looked into the truck a short time later, it contained explosive materials and items that fit the description of property removed from the power company.[211] After viewing these items, the officer conducted a warrantless search of Knights's apartment pursuant to the probation order.[212] The search revealed significant physical evidence incriminating Knights in the arson.[213] A federal grand jury indicted Knights based on this evidence, but the district court granted Knights's motion to suppress, and the appellate court affirmed on the theory that the probation order could not justify an investigatory search.[214]

The Supreme Court reversed, upholding the search as reasonable under its "general Fourth Amendment approach of 'examining the totality of the circumstances.'"[215] The Court described the reasonableness standard as the "touchstone of the Fourth Amendment,"[216] and stated that in determining reasonableness, it "assess[es] on the one hand the degree to which [a search] intrudes upon an individual's privacy and, on the other, the degree to which the search is needed [to promote] legitimate governmental interests."[217] It then stated that "Knights' status as a probationer subject to a search condition informs both sides of that balance."[218] In assessing the intrusiveness of the search, the Court explained that, as a general matter, probationers do not enjoy the same liberties as ordinary citizens,[219] and, specifically, the probation condition at issue in the case "significantly diminished Knights' reasonable expectation of privacy."[220] The Court found that because there was a governmental interest involved, the government may "justifiably focus on probationers in a way that it does not on the ordinary citizen."[221] In reaching this conclusion, the Court reasoned that the probationer is more likely than the ordinary citizen to violate the

[210] *Id.* at 115.
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.* at 116.
[215] *Id.* at 118 (quoting Ohio v. Robinette, 519 U.S. 33, 39 (1996)).
[216] *Id.*
[217] *Id.* at 118–19 (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).
[218] *Id.* at 119.
[219] *Id.*
[220] *Id.* at 119–20.
[221] *Id.* at 121.

law and has a greater incentive to conceal criminal activities by quickly disposing of evidence to avoid discovery by probation officers.[222] Balancing these considerations, the Court concluded that reasonable suspicion was sufficient under the Fourth Amendment to conduct a warrantless search of Knights's home.[223]

The Court recognized that *Knights* did not involve a special needs search.[224] Indeed, the Court stated that it was deciding the question left open by *Griffin*: Whether, special needs considerations aside, warrantless searches of probationers are reasonable within the meaning of the Fourth Amendment.[225]

Thus, *Knights* is not a special needs case, but rather a case that applies a different balancing test to determine reasonableness. Knights's diminished expectation of privacy was crucial to the Court's decision to apply this balancing test, as it is crucial to the case's outcome.[226]

The Court specifically left open the question whether a probation condition such as the one at issue in *Knights* could so diminish or completely eliminate a probationer's expectation of privacy such that "a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment."[227] But the Court gave no indication that a balancing test would not be appropriate to assess the constitutionality of such a search. Although some appellate judges have noted that the Supreme Court has never applied a balancing test to evaluate a suspicionless search outside the special needs context,[228] the Court has applied a balancing test to evaluate suspicionless seizures in its checkpoint cases, which it has indicated are not special needs cases.[229] Thus, so long as the DNA statutes apply to prisoners or to those on probation or supervised release, rather than to individuals who have fully served their sentences and are no longer involved with the

[222] *Id.* at 120.

[223] *Id.* at 121.

[224] *Id.* at 117–18.

[225] *Id.*

[226] *Id.* at 121–22.

[227] *Id.* at 120 n.6.

[228] *See* United States v. Kincade, 379 F.3d 813, 862 (9th Cir. 2004).

[229] *See supra* Part V.A.

criminal justice system,[230] the Court could apply a balancing test to evaluate the statutes, citing the reduced Fourth Amendment rights of those affected by the statutes.

Further, should the Court uphold the DNA statutes, this Article predicts that it will do so relying primarily on the convicted offender's significantly diminished expectation of privacy in his identity. As a number of appellate courts have pointed out, the government has long had the right to obtain substantial personal information from someone convicted of a crime, including past addresses, aliases, contacts, and, of course, the individual's fingerprints.[231] The Court could treat DNA as the next logical step for confirming identity.

Additionally, the Court already has held in *Skinner* that the "intrusion occasioned by a blood test is not significant, since such 'tests are a commonplace in these days of periodic physical examinations . . . and that for most people the procedure involves virtually no risk, trauma, or pain.'"[232] Of course, the DNA tests are much more intrusive than a blood test for the presence of alcohol or illegal drugs. In particular, because the statutes permit the government to keep genetic information on file indefinitely,[233] which raises the specter of later retesting to obtain even more information about the genetics of the individuals in question, these statutes are not in the realm of an ordinary blood test. Nevertheless, the Court could conclude that this specter is not currently before it and, thus, need not be considered.[234]

Finally, and particularly for DNA statutes that require testing only of those committing violent felonies, the Court will find that the statutes serve

[230] There would be no grounds for the Court to apply a balancing test, rather than the usual Fourth Amendment warrant and probable cause requirements, to an individual with a previous conviction who had fully served his sentence. The Court has never suggested, for instance, that merely because a suspect has a previous conviction, the government does not need to obtain a warrant based upon probable cause to search his home for evidence of a crime. *See, e.g.*, Ohio v. Robinette, 519 U.S. 33, 39 (1996).

[231] *See, e.g.*, United States v. Sczubelek, 402 F.3d 175, 184–85 (3d Cir. 2005); Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992).

[232] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 625 (1989) (quoting Schmerber v. California, 384 U.S. 757, 771 (1966)).

[233] *See, e.g.*, ALASKA STAT. § 44.41.035(i) (2004) (providing for expungement of material in the DNA database only when conviction is reversed and there is no retrial); *see supra* note 1.

[234] *See, e.g.*, United States v. Kincade, 379 F.3d 813, 837–38 (9th Cir. 2004).

an important governmental interest. Given the recidivism rates of convicted felons,[235] obtaining DNA samples from these offenders is likely to help the government solve similar crimes. Even appellate judges who have concluded that the statutes are unconstitutional agree on this point.[236] Thus, balancing all of these factors, the Court could uphold the statutes in light of the special status of prisoners and those on probation or supervised release.

Should the Court reach such a conclusion, however, it nevertheless should refuse to uphold the constitutionality of the DNA statutes as applied to arrestees. The expectation of privacy of those merely arrested of a crime is much higher than that of an individual in prison or on probation or supervised release after a conviction.[237] Indeed, the Court has never held that arrestees have lesser Fourth Amendment rights, unless the arrestee also happens to be in custody, with the exception of permitting the government to conduct a search incident to arrest to look for weapons or contraband.[238] Further, because an individual who has been arrested may never be charged or may be acquitted of the crime in question, there is likely to be a smaller hit rate for the DNA of arrestees. Thus, even under a general balancing test, the Court should strike down a DNA testing statute as it applies to those merely arrested of a crime.

VI. CONCLUSION

The DNA testing statutes cannot be justified under the special needs exception to the Fourth Amendment because the purpose of such statutes is to help the government investigate ordinary criminal conduct. Appellate courts have strained to apply the special needs exception in an attempt to avoid applying what they perceive to be a weaker, and more standardless, general balancing test.[239] But the reasoning of these courts ultimately does more harm than good to the protections offered by the Fourth Amendment. Because the special needs exception arguably can apply to justify searches

[235] United States v. Knights, 534 U.S. 112, 120 (2001).

[236] *See, e.g.*, *Kincade*, 379 F.3d at 868–69 (Reinhardt, J., dissenting) (agreeing that federal DNA statute serves governmental interest in solving crime).

[237] *See* Chimel v. California, 395 U.S. 752, 762–63 (1969); *see also* Thornton v. United States, 541 U.S. 615, 623 (2004).

[238] *See Chimel*, 395 U.S. at 762–63; *see also Thornton*, 541 U.S. at 623.

[239] *See Kincade*, 379 F.3d at 830–31 (listing the circuit courts that use a special needs test and the circuits that use a balancing test).

of ordinary citizens, stretching the exception to cover the DNA testing statutes leaves ordinary citizens vulnerable to government claims that the exception can justify criminal investigations, as long as the government is investigating only future, rather than past, crimes. Although the DNA testing statutes cannot be justified based on any current Supreme Court precedent, courts upholding the statutes will do far less damage to the Fourth Amendment by relying on the significantly diminished expectation of privacy of prisoners and probationers, rather than on the special needs exception.