

Seventh Circuit Review

Volume 3 | Issue 1

Article 11

9-1-2007

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Recommended Citation

Jessica K. Fender, *Probationers, Parolees and DNA Collection: Is This "Justice for All"?*, 3 *Seventh Circuit Rev.* 312 (2007).

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PROBATIONERS, PAROLEES AND DNA COLLECTION: IS THIS “JUSTICE FOR ALL”?

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Cite as: Jessica K. Fender, *Probationers, Parolees and DNA Collection: Is This “Justice for All”?*, 3 SEVENTH CIRCUIT REV. 312 (2007), at <http://www.kentlaw.edu/7cr/v3-1/fender.pdf>.

INTRODUCTION

Since its inception in 1990, the Combined DNA Index System (CODIS) has been used by the federal and state governments to store millions of people’s DNA data. Initially, CODIS was not in widespread use; few states participated, and the federal government could collect DNA only from those convicted of certain violent crimes.¹ Today, however, the picture has changed drastically—some state governments, and now the federal government, require DNA samples upon arrest;² a federal officer has no discretion in determining

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¹ 42 U.S.C. § 14135a(d) (2000 & Supp. IV 2004).

² In the federal government, see the DNA Fingerprint Act of 2005, Pub. L. No. 109-162, § 1001, 119 Stat. 2960, 3084. State governments requiring DNA upon arrest include, at the present time, Louisiana, Texas, Virginia, California, New Mexico, and Kansas. LA. REV. STAT. ANN. § 15:602 (2007); TEX. GOV’T CODE § 411.1471(a)(2) (2007); VA. CODE ANN. § 19.2-310.2:1 (2007); CAL. PENAL CODE § 296(a)(2)(C) (2007); N.M. STAT. ANN. § 29-3-10 (2007); KAN. STAT. ANN. 21-2511(e)(1) (2007). Some of these states require a DNA sample from anyone arrested

whether a person should provide a sample;³ and the list of “qualifying offenses” that require DNA collection continues to grow.⁴ As a result, more than 4.9 million individual DNA profiles are now available through CODIS.⁵

DNA collection is undoubtedly a search under the Fourth Amendment.⁶ Moreover, it is a search that occurs without the two touchstones typically used to guarantee the reasonableness of a search: a warrant, and probable cause. Not only is there no probable cause, there is no cause whatsoever—every circuit has evaluated the constitutionality of DNA collection statutes, and every circuit has implicitly or explicitly found that the searches take place absent any individualized suspicion of wrongdoing.⁷ The Supreme Court has not directly addressed DNA collection statutes, but since the statutes require collection without any individualized suspicion of wrongdoing, lower courts have been guided by the Supreme Court’s “suspicionless search” jurisprudence.

Applying the Court’s suspicionless search law can be difficult. The Court has, at various times, evaluated the constitutionality of such searches using one of two methods: the “totality of the circumstances,” or (the term I will use hereafter for brevity’s sake) “reasonableness” test; and the “special needs” test. Both frameworks permit the

for a felony (e.g., New Mexico) whereas others require the sample only if one is arrested for certain violent felonies (e.g., Virginia and Louisiana).

³ E.g., 18 U.S.C. § 3583(d) (2000 & Supp. V 2005) (“The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample . . .”); 42 U.S.C. § 14135a(a)(2).

⁴ 42 U.S.C. § 14135a(d). The Justice For All Act requires all felons to provide a sample.

⁵ Federal Bureau of Investigation, Combined DNA Index System (CODIS) Brochure, http://www.fbi.gov/hq/lab/codis/codis_brochures.htm (last visited Dec. 5, 2007).

⁶ *Green v. Berge*, 354 F.3d 675, 676 (7th Cir. 2004) (stating that taking a DNA sample is “clearly a search”); *Johnson v. Quander*, 440 F.3d 489, 493 (D.C. Cir. 2006) (“There is no question that the compulsory extraction of blood for DNA profiling constitutes a ‘search’ within the meaning of the Fourth Amendment.”) (citations omitted).

⁷ See sources cited *infra* note 69.

searching party to forego the warrant and probable-cause requirements in limited circumstances, when the government's interests outweigh the individual's privacy interests. The "special needs" test, however, first requires the searching party to identify a need "beyond the normal need for law enforcement" that would justify the lack of a warrant or probable cause.

Only the Second, Seventh, and Tenth Circuits use a special needs analysis to evaluate DNA collection statutes.⁸ The Seventh Circuit first addressed this issue in the 2004 case *Green v. Berge*,⁹ when it interpreted a Wisconsin state statute allowing for DNA collection from state prison inmates. After acknowledging that DNA collection is a search under the Fourth Amendment,¹⁰ the court noted that DNA collection may still be reasonable if it falls under one of the exceptions to the probable-cause requirement.¹¹ The court found that collecting DNA samples from state prison inmates constituted a "special need"—a need beyond the normal need for law enforcement—and, as such, it was an exception to the rule.¹² In doing so, the court ignored a number of other circuits that analyzed state or federal DNA statutes under the reasonableness test. The Fourth Circuit, for example, had already not only applied the reasonableness test, but explicitly overruled a lower court's use of the special needs test.¹³

But although explicit reasoning would be nice, the Seventh Circuit was free to take the path less traveled. Because the Supreme Court's suspicionless search case law is fact-specific, dense, and at times seems contradictory; and because the Court has yet to address any DNA collection statute; disagreement amongst the circuits was to be expected and perhaps even encouraged.

⁸ *United States v. Weikert*, 504 F.3d 1, 8-9 (1st Cir. 2007) (listing courts).

⁹ 354 F.3d at 675.

¹⁰ *Id.* at 676 (stating that taking a DNA sample is "clearly a search"); see *Johnson*, 440 F.3d at 493.

¹¹ *Green*, 354 F.3d at 677.

¹² *Id.*

¹³ *Jones v. Murray*, 962 F.2d 302, 307 n.2 (4th Cir. 1992).

It is not the *Green* opinion that is surprising; it is the Seventh Circuit's next DNA case, *United States v. Hook*,¹⁴ that is truly amazing. There, the court relied on *Green* and applied the special needs test, this time to the collection of DNA from a federal felon on supervised release. Hook, a white collar criminal, had agreed to certain terms as part of his supervised release conditions. This included an obligation that he "follow the instructions of the probation officer."¹⁵ When his probation officer scheduled him for DNA collection, as recently required by federal law,¹⁶ Hook refused, arguing that the search was unconstitutional.¹⁷ Hook had not explicitly consented to DNA collection, but since his probation officer requested that he do so, the Seventh Circuit reasoned that his probation agreement required him to submit to the search.¹⁸ As in *Green*, the Seventh Circuit evaluated that collection under the special needs approach.¹⁹ The court spent all of one sentence on that choice, simply noting that "[w]hile some circuits have employed a reasonableness standard" the court had "employed the 'special needs' approach in *Green* and will do the same here."²⁰

This would, of course, be an entirely predictable outcome, were it not for the fact that both the Supreme Court *and* the Seventh Circuit had, in the intervening period, effectively shut the door on the special needs test for the type of search at issue here.

First, more than a year and a half prior to *Hook*, the Seventh Circuit handed down two opinions addressing suspicionless searches of probationers.²¹ In *United States v. Barnett*, the court addressed a

¹⁴ 471 F.3d 766 (7th Cir. 2006).

¹⁵ *Id.* at 769-70.

¹⁶ See sources cited *supra* notes 3 and 4.

¹⁷ *Hook*, 471 F.3d at 771-72.

¹⁸ *Id.* at 770.

¹⁹ *Id.* at 773.

²⁰ *Id.* (citation omitted).

²¹ The Supreme Court has explained the difference between probationers and parolees (which are called "supervised releasees" in the federal system). A parolee is released from prison prior to completing his sentence, and that release is conditioned upon abiding by certain rules. In contrast, a probationer serves probation time

Fourth Amendment challenge by a probationer who had signed an agreement consenting to suspicionless searches as a condition of his probation.²² The court held that a plea-bargained agreement was a type of contract; consent to the contract terms operated to effectively waive any Fourth Amendment rights the probationer once had.²³ This opinion was quickly followed by *United States v. Hagenow*, where the court not only reaffirmed its adherence to *Barnett*, but also specifically disclaimed the use of the special needs test in analyzing these searches.²⁴

These two opinions anticipated with surprising accuracy the Supreme Court's most recent suspicionless search holding. In *Samson v. California*, the Court held that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee if the parolee consented to searches as part of his parole agreement.²⁵ The Court flatly refused to apply the special needs approach;²⁶ instead, it held that under "general Fourth Amendment principles" a parolee that signed a consent-to-search waiver greatly reduced his expectation of privacy, and therefore a police officer would not need reasonable suspicion prior to conducting a search.²⁷

The *Hook* court, however, failed to mention *Barnett*, *Hagenow*, or *Samson*—despite the fact that these three cases directly speak to the *Hook* facts. As in those three cases, *Hook* dealt with the suspicionless search of a parolee or a probationer, and *Hook* in effect dealt with the effect of a consent-to-search term in a supervised release

outside a penitentiary *instead of* being imprisoned. *Samson v. California*, 126 S. Ct. 2193, 2198 ("Federal supervised release . . . in contrast to probation, is meted out in addition, not in lieu of, incarceration.") (quoting *United States v. Reyes*, 283 F.3d 446, 461 (2d Cir. 2002)). Because of this difference, parolees often enjoy fewer rights than probationers, and parole is "more akin" to prison than probation. *Id.* at 2198 & n.2; *see also* text and accompanying sources cited *infra* note 82.

²² 415 F.3d 690 (7th Cir. 2005).

²³ *Id.* at 692-93.

²⁴ 423 F.3d 638, 642-43 (7th Cir. 2005).

²⁵ *Samson*, 126 S. Ct. at 2202.

²⁶ *Id.* at 2199 n.3.

²⁷ *Id.* at 2196, 2199.

agreement²⁸—yet the *Hook* court made use of an analytical framework that had been explicitly disclaimed by a previous Seventh Circuit panel and by the Supreme Court.

This Comment argues that the Seventh Circuit has improperly applied the special needs test to suspicionless DNA searches. Instead, such searches should be governed by the reasonableness test used in *Samson*. Further, regardless of which analytical framework a court has adopted, courts have almost universally held that DNA collection statutes do not violate the Fourth Amendment's search and seizure clause.²⁹ This Comment will show that the Seventh Circuit failed to consider factors unique to DNA collection when it balanced the individual and governmental interests at stake. A careful reconsideration of the weight given to these interests is needed, and this may ultimately require the court to change its stance on the constitutionality of DNA collection for probationers and parolees.

Part I(A) of this Comment provides an overview of CODIS, the various DNA techniques used in forensic sciences, and the expansion of the CODIS database through recent changes in federal law. Part I(B) explains what aspects of DNA collection implicate Fourth Amendment search and seizure law. Part II(A) briefly describes the balancing inquiries required for the special needs and reasonableness frameworks, while Part II(B) traces the evolution of the reasonableness and special needs tests through the Supreme Court's suspicionless search jurisprudence. Part III(A) looks to the Seventh Circuit's early suspicionless search opinions to provide some historical basis in the law. Part III(B) provides a detailed analysis of the Seventh Circuit's DNA cases, *Green* and *Hook*, and Part III(C) provides an in-depth look at the waiver issue described in *Barnett* and *Hagenow*. Part III(D) dissects the Supreme Court's *Samson* case, and concludes that post-*Samson*, the Seventh Circuit improperly employed the special needs framework instead of the reasonableness test in *Hook*. Finally,

²⁸ See *infra* text in Section III(B)(2) for an explanation of how the consent term was incorporated into *Hook*'s supervised release agreement.

²⁹ See *Nicholas v. Goord*, No. 01 Civ. 7891, 2003 U.S. Dist. LEXIS 1621, at *24-25 (S.D.N.Y. Feb. 6, 2003) (collecting cases).

Part IV argues that the Seventh Circuit should adopt the reasonableness framework, and that when it does so the court must reconsider not only the relative weight given to individual and governmental interests, but also the very nature of the search at issue in DNA collection. This Part seeks to provide some guidance to those considerations for the Seventh Circuit as it moves forward with DNA collection challenges.

I. CODIS – A BRIEF HISTORY

A. *CODIS and DNA Collection*

DNA. Incredibly, that small acronym contains the key to a person's identity. DNA, or deoxyribonucleic acid, is a double-stranded molecule contained in every nucleated cell³⁰ in a person's body—and despite the fact that DNA is not visible to the naked eye, this tiny molecule contains a person's entire genetic blueprint. Each person, with the exception of identical twins,³¹ has a DNA sequence which is completely unique. As such, DNA allows investigators to accurately

³⁰ A nucleated cell is a cell that contains a nucleus. Human red blood cells do not contain nuclei, and therefore are not useful for standard DNA testing. White blood cells, skin cells, saliva, semen, and hair that has been forcefully removed and still has the follicle attached can all be tested for DNA; on occasion, even urine, feces, and vaginal secretions may contain the cells necessary for testing.

³¹ Identical twins are genetically identical, at least at birth. Despite the fact that identical twins have the same DNA, they may evidence physical differences such as varying susceptibilities to disease. These differences may occur, at least in part, because of differences in genetic expression. Mario F. Fraga et al., *Epigenetic Differences Arise During the Lifetime of Monozygotic Twins*, 102 PROC. NAT'L ACAD. SCI. 10604, 10604 (2005). Although genetically-identical individuals may seem rare, identical twins actually account for about one in every 250 live births. *Id.* (citing JUDITH G. HALL & E. LOPEZ-RANGEL, TWINS AND TWINNING 395-404 (A. E. H. Emery & D. L. Rimoin eds., 1966)). It is interesting to note that although current forensic DNA analysis cannot differentiate between identical twins, the tried-and-true method of fingerprinting can. Anil K. Jain et al., *On the Similarity of Identical Twin Fingerprints*, 35 PATTERN RECOGNITION 2653 (2002).

identify suspects in criminal cases by “matching” the DNA evidence left at a crime scene to one particular person.³²

As techniques were invented that allowed labs to test even the smallest amounts of DNA,³³ courts began admitting DNA evidence

³² Forensic DNA technology has changed drastically over time. Sir Alec Jeffreys’ article, *infra* note 33, described restriction fragment length polymorphism (RFLP) techniques, where DNA is cleaved by special enzymes to produce DNA fragments that have repeating sequences. The number of these repeating sequences varies between individuals, so if a person’s DNA is cleaved using multiple enzymes, a unique pattern of different fragment lengths should emerge. These fragments can be imaged using various size-dependent separation techniques. NAT’L INSTITUTE OF JUSTICE, U.S. DEP’T OF JUSTICE, USING DNA TO SOLVE COLD CASES 5-6 (2002), available at <http://www.ncjrs.gov/pdffiles1/nij/194197.pdf>; Phillip Jones, *DNA Forensics: From RFLP to PCR-STR and Beyond*, FORENSIC MAG., Fall 2004. RFLP analysis requires a relatively substantial amount of DNA, however, and the DNA cannot be degraded prior to testing (as often occurs when the DNA sample is exposed to heat or light). C. R. Thacker et al., *An Investigation into Methods to Produce Artificially Degraded DNA*, 1288 INT’L CONGRESS SERIES 592, 592-93 (2006) (describing DNA degradation). To overcome the problems inherent to RFLP analysis, laboratories now use the polymerase chain reaction (PCR), which allows them to take a small amount of DNA and copy it to create a sizeable sample, in combination with the short tandem repeat (STR) technology that came onto the scene in the early 1990s. See Jones, *supra*, and sources cited *infra* note 33. Like RFLP, STR involves the identification of specific locations (called “loci”) on a DNA chain that repeat; these repeats are shorter (up to seven base pairs, as compared to the six to 100 found in RFLP), so PCR amplification works better. Jones, *supra*. The FBI requires thirteen different loci to “match” a suspect to a DNA profile, which theoretically ensures that a false match is nearly impossible (at least one-in-a-billion). NAT’L INSTITUTE OF JUSTICE, *supra*, at 6.

³³ To briefly trace some highlights in the evolution of DNA amplification techniques, see Arlene R. Wyman & Ray White, *A Highly Polymorphic Locus in Human DNA*, 77 PROC. NAT’L ACAD. SCI. 6754 (1980); Alec J. Jeffreys, Victoria Wilson & Swee Lay Thein, *Hypervariable ‘Minisatellite’ Regions in Human DNA*, 314 NATURE 67 (1985); Kary B. Mullis & Fred A. Faloona, *Specific Synthesis of DNA in vitro via a Polymerase-catalyzed Chain Reaction*, 155 METHODS IN ENZYMOLOGY 335 (1987); Randall Saiki et al., *Primer-Directed Enzymatic Amplification of DNA with a Thermostable DNA Polymerase*, 239 SCI. 487 (1988); Al Edwards et al., *DNA Typing and Genetic Mapping with Trimeric and Tetrameric Tandem Repeats*, 49 AM. J. HUM. GENETICS 746 (1991). For an excellent overview of DNA technologies in general, including the ones discussed herein, see DNA

into the courtroom.³⁴ In 1987, a British man named Colin Pitchfork became the first person ever identified and charged with a crime as a result of DNA testing.³⁵ Shortly thereafter, a Florida judge allowed the use of DNA evidence to convict Tommy Lee Andrews of aggravated battery, sexual battery, and burglary.³⁶ Today, DNA evidence is routinely admitted, both because DNA has been conclusively established as a unique identifier, and because as science strains against the initial limits of the technology, more DNA evidence is available. Smaller sample sizes, different types of DNA recovery (such as mtDNA and Y-STR DNA),³⁷ and larger databases in which to

Technologies, NATURE MILESTONES, Oct. 2007, at S1, available at <http://www.nature.com/milestones/dnatechnologies>.

³⁴ Tresa Baldas, *First DNA Conviction Case Returns*, NAT'L L.J., Feb. 9, 2004, at 5.

³⁵ Stephen Michaud, *DNA Detectives*, N.Y. TIMES MAG., Nov. 6, 1988, at 70.

³⁶ *Id.* (describing *Andrews v. State*, a Florida case "in which conviction hinged almost exclusively on DNA testing"). See *Andrews v. State*, 533 So.2d 841, 850 (Fla. Dist. Ct. App. 1988) (upholding the lower court's conviction and stating that "evidence from DNA print identification appears based on proven scientific principles."). Prior to that date, DNA evidence had also been used in a civil context. See *Commonwealth v. Pestinikas*, Nos. 85-CR-1020-A-E and 85-CR-1019-A-D, *aff'd*, 617 A.2d 1339 (Pa. Super. Ct. 1992); NORAH RUDIN & KEITH INMAN, AN INTRODUCTION TO FORENSIC DNA ANALYSIS 191 (2d ed. 2002) (describing *Pestinikas* as the first use of DNA in a U.S. trial).

³⁷ Mitochondrial DNA (mtDNA) is a particular type of DNA found in only in the mitochondria (a particular organelle within the cell) and inherited from one's mother; an offspring inherits nuclear DNA, on the other hand, from both its mother and father. Mitochondrial DNA is useful in that it may be obtained from samples where nuclear DNA cannot be found (such as in cut hair, which does not have an attached follicle) and less DNA is needed for testing. On the other hand, mtDNA is more prone to contamination than nuclear DNA, and since every person sharing a maternal line will have identical mtDNA, it cannot serve as a unique individual identifier. See Alice R. Isenberg & Jodi M. Moore, *Mitochondrial DNA Analysis at the FBI Laboratory*, 1 FORENSIC SCI. COMM'NS (1999), <http://www.fbi.gov/hq/lab/fsc/backissu/july1999/dnalist.htm>. Likewise, Y-STR DNA analysis looks only to the Y-chromosome of a male suspect or offender and can be used to eliminate a suspect, but generally cannot be used to conclusively identify the perpetrator. See Isabelle Sibille et al., *Y-STR DNA Amplification as*

search for suspect matches all contribute to the ubiquity of DNA evidence.

The federal government first began collecting and analyzing DNA samples from felons in 1990.³⁸ In 1994, Congress passed the DNA Identification Act, which formally recognized the FBI's ability to establish and maintain the CODIS national DNA database.³⁹ CODIS is a three-tiered system: the DNA "profiles" (which are generated via chemical analysis of the DNA sample) originate at the local level, and are stored in the Local DNA Index System (LDIS); from there, the profiles flow to the state system (SDIS), where various state laboratories are able to share and compare profiles; and finally, the profiles are indexed in the national system (NDIS).⁴⁰ Six different DNA profile categories are maintained: the convicted offender database, which contains the vast majority of the profiles; the forensic database, which contains profiles that are gathered from crime scenes and are believed to originate from the perpetrator; the arrestee database, which contains profiles from persons arrested for a qualifying offense under state law;⁴¹ the missing persons database; the biological relatives of missing persons database; and finally, the database for unidentified human remains.⁴²

CODIS has continued to grow, due in part to ever-expanding eligibility for inclusion in the system. In 2000, the DNA Analysis Backlog Elimination Act required federal parolees and probationers to

Biological Evidence in Sexually-Assaulted Female Victims With No Cytological Detection of Spermatozoa, 125 FORENSIC SCI. INT'L 212 (2002).

³⁸ Federal Bureau of Investigation, CODIS—Mission Statement & Background, <http://www.fbi.gov/hq/lab/codis/program.htm> (last visited Dec. 5, 2007).

³⁹ DNA Identification Act of 1994, Pub. L. No. 103-322, § 201301, 108 Stat. 1796, 2065.

⁴⁰ Federal Bureau of Investigation, *supra* note 38.

⁴¹ *See supra* note 2. The FBI may have to change this definition shortly in light of the DNA Fingerprint Act of 2005, as this Act extends the reach of DNA collection to include federal arrestee profiles in CODIS. *See* DNA Fingerprint Act of 2005, Pub. L. No. 109-162, § 1001, 119 Stat. 2960, 3084.

⁴² Federal Bureau of Investigation, *supra* note 5.

provide DNA samples,⁴³ and in 2001, the Patriot Act further expanded the list of persons required to give DNA.⁴⁴ In 2004, Congress passed the Justice for All Act, which expanded CODIS to include those who had been charged with a crime or, in some circumstances, simply arrested.⁴⁵ Most recently, in the DNA Fingerprint Act of 2005, the federal government has provided for the inclusion of samples from both federal arrestees and non-U.S. citizen detainees.⁴⁶

It is perhaps unsurprising, then, that as of August 2007 the NDIS contained more than 4.9 million offender profiles and just over 188,000 forensic profiles.⁴⁷ Over 440,000 of the offender profiles come from the three states in the Seventh Circuit's jurisdiction.⁴⁸ And just as the list of qualifying federal offenses has continued to grow, Illinois, Indiana, and Wisconsin are likely to see similar expansions to their statutes—all of these states are considering expanding or have expanded the states' SDIS databases to include, for example, profiles from persons charged with a crime, convicted of a misdemeanor, or arrested.⁴⁹

⁴³ DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2726.

⁴⁴ USA Patriot Act, Pub. L. No. 107-56, § 503, 115 Stat. 272, 364 (2001).

⁴⁵ Justice for All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2260, 2269. The law allowed CODIS to include profiles from those "charged in an indictment or information with a crime" and "other persons whose DNA samples are collected under applicable legal authorities," provided that the arrestee samples were not be included in the NDIS. *Id.* at § 203(a)(1)(B)–(C). They could, presumably, be included in the SDIS or LDIS systems.

⁴⁶ DNA Fingerprint Act of 2005, Pub. L. No. 109-162, § 1001, 119 Stat. 2960, 3084.

⁴⁷ Federal Bureau of Investigation, CODIS—National DNA Index System, <http://www.fbi.gov/hq/lab/codis/national.htm> (last visited Dec. 5, 2007).

⁴⁸ As of October 2007, the FBI listed 104,176 offender profiles from Wisconsin; 72,331 profiles from Indiana; and 271,438 profiles from Illinois. Federal Bureau of Investigation, CODIS—Statistical Clickable Map, <http://www.fbi.gov/hq/lab/codis/clickmap.htm> (last visited Dec. 5, 2007).

⁴⁹ Wisconsin has proposed legislation that allows for the collection of DNA evidence if person is charged with a felony and a court determines that probable cause exists to believe that person committed the felony. Assem. B. 1, 98th Leg.

B. CODIS and the Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵⁰

DNA collection statutes have been subjected to a host of constitutional challenges,⁵¹ but here I focus on just one—the Fourth Amendment challenge. Obviously, the Fourth Amendment only applies when a search or seizure has occurred. As Justice Harlan explained in *Katz v. United States*, a search occurs when an individual has a subjective expectation of privacy in the object being searched.⁵² This subjective expectation alone does not suffice—society must also generally recognize that expectation of privacy as reasonable.⁵³ If both of these criteria are met, then the search (in the colloquial sense) is a “search” (in the constitutional sense). As such, it must be supported by

Sess., Reg. Sess. (Wis. 2007). Illinois collects DNA samples from those convicted of certain sexually-motivated misdemeanors, 2005 Ill. Laws 1018, and is considering legislation that would allow for the collection of DNA evidence upon arrest. H.B. 1901, 95th Gen. Assem., 1st Reg. Sess. (Ill. 2007); S.B. 1315, 95th Gen. Assem., 1st Reg. Sess. (Ill. 2007). Indiana is also considering legislation that would allow collection of a DNA sample upon arrest for certain felonies. H.B. 1730, 115th Gen. Assem., 1st Reg. Sess. (Ind. 2007).

⁵⁰ U.S. CONST. amend. IV.

⁵¹ In *United States v. Hook*, for example, the defendant challenged the collection under the Fifth, Eighth, Ninth, Tenth and Thirteenth Amendments, as well as under the Ex Post Facto and Bill of Attainder clauses, the Equal Protection clause, and as a violation of separation of powers. 471 F.3d 766, 769 (7th Cir. 2006).

⁵² 389 U.S. 347, 361 (1967) (Harlan, J., concurring). See *Kyllo v. United States*, 533 U.S. 27, 32-33 (2001) (applying Justice Harlan’s formulation of a “search” under the Fourth Amendment).

⁵³ *Katz*, 389 U.S. at 361.

probable cause unless the search falls under one of the exceptions to the probable-cause requirement.⁵⁴

Courts have firmly embraced the notion that the extraction of a person's blood for DNA analysis is a search under the Fourth Amendment.⁵⁵ This result flows from *Schmerber v. California*, a case in which the Supreme Court held that testing blood samples for evidence of drunkenness plainly constitutes a "search[]" of 'persons' . . . within the meaning of that Amendment."⁵⁶ But it's not that simple. Some courts have held that more than one search takes place in the context of CODIS: first, the physical drawing of blood; and second, the subsequent chemical analysis of that sample.⁵⁷ Other

⁵⁴ The definition of probable cause is ever elusive. The Supreme Court has consistently resisted providing a concrete standard for this idea—it is "a practical, nontechnical" and "fluid concept," but the various definitions all have one thing in common: "a reasonable ground for belief of guilt, [where] the belief of guilt must be particularized with respect to the person to be searched or seized." *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (citations and quotations omitted).

⁵⁵ *Green v. Berge*, 354 F.3d 675, 676 (7th Cir. 2004) (stating that taking a DNA sample is "clearly a search"); *Johnson v. Quander*, 440 F.3d 489, 493 (D.C. Cir. 2006) ("There is no question that the compulsory extraction of blood for DNA profiling constitutes a 'search' within the meaning of the Fourth Amendment.") (citations omitted).

⁵⁶ 384 U.S. 757, 767 (1966). The collection of DNA using other methods, such as cheek swabs, also constitutes a search under the Fourth Amendment. Analyses of blood, urine, cheek cell, and breath samples have all been held to constitute a search. *See, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614, 617 (1989) ("We are unwilling to conclude . . . that breath and urine tests . . . will not implicate the Fourth Amendment" and "[although] collecting and testing urine samples do[es] not entail a surgical intrusion into the body," the "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee . . . Nor can it be disputed that the process of collecting the sample to be tested . . . itself implicates privacy interests."); *Banks v. United States*, 490 F.3d 1178, 1183 (10th Cir. 2007) ("[A]nalyzing the DNA . . . from a cheek swab[] must pass Fourth Amendment scrutiny.") (citing *Skinner*, 489 U.S. at 616; *Schlicher v. Peters*, 103 F.3d 940, 942-43 (10th Cir. 1996)).

⁵⁷ *E.g.*, *United States v. Stewart*, 468 F. Supp. 2d 261, 276 (D. Mass. 2007); *Banks v. Gonzales*, 415 F. Supp. 2d 1248, 1254 (N.D. Okla. 2006); *State v. Transou*, 201 S.W.3d 607, 619 (Tenn. 2006) (citations omitted). Some defendants have

courts have held that “if the initial search is lawful, the subsequent use of the evidence seized is not a search that implicates the Fourth Amendment.”⁵⁸ In at least one case, a court even held that the defendant did not have the requisite standing to challenge the use of his DNA profile.⁵⁹

This debate is not merely one of semantics—it could have important consequences for a person facing DNA collection. Although it is well settled that a blood draw is minimally invasive,⁶⁰ some courts are increasingly willing to embrace the idea that the chemical analysis of that blood, at least in the DNA context, may create a significant privacy concern.⁶¹ The weight given to the privacy interest at stake is of paramount importance, since regardless of which test is used to determine whether a search is unreasonable under the Fourth Amendment, that privacy interest will be considered as a factor in subsequent balancing.⁶²

attempted to argue that the subsequent comparison of their DNA against other samples via CODIS is an additional search, though as yet this proposition finds no support in the case law. *E.g.*, *Johnson*, 440 F.3d at 498-99 (noting that “the consequences of the contrary conclusion would be staggering”). The *Johnson* court considered two searches: the collection of a blood sample, and the comparison between that sample and others in CODIS. The court did not consider whether the chemical analysis was a separate search under the Fourth Amendment.

⁵⁸ *E.g.*, *A.A. v. Attorney General*, 914 A.2d 260, 266-67 (N.J. 2007) (citing *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987)).

⁵⁹ *Smith v. State*, 744 N.E.2d 437, 440 (Ind. 2001).

⁶⁰ *See Skinner*, 489 U.S. at 625 (citing *Schmerber*, 384 U.S. at 771; *Winston v. Lee*, 470 U.S. 753, 762 (1985); *South Dakota v. Neville*, 459 U.S. 553, 563 (1983); *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957)) (quotations omitted).

⁶¹ *Stewart*, 468 F. Supp. 2d at 276; *Banks*, 415 F. Supp. 2d at 1254; *Transou*, 201 S.W.3d at 619. *But see Ferguson v. City of Charleston*, 532 U.S. 67, 92-93 (2001) (Scalia, J., dissenting) (arguing that the only search that occurs in the taking and testing of a urine sample is taking of the sample, and analogizing the testing step as akin to the taking of abandoned property, such as garbage left at the curb).

⁶² *See infra* Part II(A) for a complete description of the balancing tests.

II. A TALE OF TWO TESTS: REASONABLENESS AND SPECIAL NEEDS

The Fourth Amendment does not prevent every search by the government—it only requires that the search be “reasonable.” Nor is “reasonable” some absolute standard. As the Supreme Court noted, what is reasonable will depend on the context of the search.⁶³ Generally, reasonable searches require probable cause, and probable cause is required to obtain a warrant.⁶⁴ But “probable cause is not an irreducible requirement of a valid search” and “[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [the Supreme Court] has not hesitated to adopt such a standard.”⁶⁵

Despite that language, the Court continues to insist that it only has permitted a few “narrowly defined intrusions” upon a person’s privacy absent a showing of probable cause.⁶⁶ Examples of such intrusions can be placed into two categories: those searches that require *some* individualized suspicion of wrongdoing, but do not require that suspicion to rise to the level of probable cause; and those searches that are completely suspicionless. The former category requires some amount of “reasonable” suspicion; the latter, at issue in DNA

⁶³ *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

⁶⁴ The Fourth Amendment does not always require a warrant. *See, e.g.*, *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967) (holding that police officers were not required to get a warrant prior to searching a residence when speed was “essential” to officers’ safety and the officers had probable cause to believe the suspect had a weapon and was inside the residence); *see also Dunaway v. New York*, 442 U.S. 200 (1979); *Chambers v. Marony*, 399 U.S. 42 (1970). In general, however, those searches that can be executed without a warrant must be based upon probable cause. *T.L.O.*, 469 U.S. at 339 (citing *Almeida-Sanchez v. United States*, 412 U.S. 266, 273 (1973); *Sibron v. New York*, 392 U.S. 40, 62-66 (1968)).

⁶⁵ *T.L.O.*, 469 U.S. at 341.

⁶⁶ *Dunaway*, 442 U.S. at 214 (“For all but those narrowly defined intrusions, the requisite ‘balancing’ has been performed in centuries of precedent and is embodied in the principle that seizures are ‘reasonable’ only if supported by probable cause.”).

collection, is a “closely guarded category”⁶⁷ that may require other forms of protection against abuse, such as “programmatically protections” that divest authorities of discretion in deciding how and when to administer the search.⁶⁸

All of the circuit courts have addressed the Fourth Amendment issues raised by state or federal DNA statutes and all have either implicitly or explicitly acknowledged that sample collection is a suspicionless search—one that occurs without any individualized suspicion of wrongdoing.⁶⁹ Although the circuit courts seem to agree on many things—notably, that DNA collection is a suspicionless search, and that this search is constitutional under the Fourth Amendment, etc.—the courts vary in how they analyze this type of search. Some analyze the search under the general “reasonableness” approach, whereas others first determine whether the search meets a “special need” before going on to weigh the various interests involved.

One might ask, “If the starting point and the endpoint are the same, what difference does it make how the courts arrive at their conclusions?” As we will see, it can and should have a significant impact. First, however, a brief description and explanation of the differences between these two frameworks is required.

⁶⁷ *Ferguson v. City of Charleston*, 532 U.S. 67, 77 (2001) (citing *Chandler v. Miller*, 520 U.S. 305, 309 (1997)); see *City of Indianapolis v. Edmond*, 531 U.S. 32, 36-37 (2000) (“[W]e have recognized only limited circumstances in which the usual rule [requiring individualized suspicion] does not apply.”).

⁶⁸ *Ferguson*, 532 U.S. at 81-82; *Edmond*, 531 U.S. at 45-46 (2000) (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

⁶⁹ See generally *United States v. Weikert*, 504 F.3d 1 (1st Cir. 2007); *United States v. Amerson*, 483 F.3d 73 (2d Cir. 2007); *Banks v. United States*, 490 F.3d 1178 (10th Cir. 2007); *United States v. Hook*, 471 F.3d 766 (7th Cir. 2006); *United States v. Kraklio*, 451 F.3d 922 (8th Cir. 2006); *United States v. Conley*, 453 F.3d 674 (6th Cir. 2006); *Johnson v. Quander*, 440 F.3d 489 (D.C. Cir. 2006); *United States v. Sczubelek*, 402 F.3d 175 (3d Cir. 2005); *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005); *Groceman v. U.S. Dep’t of Justice*, 354 F.3d 411 (5th Cir. 2004); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992).

A. *Analytical Frameworks*

Historically, the Fourth Amendment required probable cause for any search.⁷⁰ Over time, however, the courts drifted to a more relaxed interpretation—one that, in certain “limited circumstances,”⁷¹ permits a search unsupported by any individualized suspicion. In this context, courts have adopted at least two distinct analytical frameworks.⁷²

The first is the reasonableness standard.⁷³ The reasonableness standard “requires balancing the need to search against the invasion which the search entails. On one side of the balance are arrayed the individual’s legitimate expectations of privacy and personal security; on the other, the government’s need for effective methods to deal with breaches of public order.”⁷⁴ In other words, “the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the

⁷⁰ 4 THE ENCYCLOPEDIA OF CRIME & JUSTICE 1386 (Joshua Dressler ed., 2d ed. 2002) (“[B]y the end of the 1920s . . . [p]robable cause was required for all searches or arrests. A warrant, obtained in advance, was required at least for searches of homes, and possibly for many other searches as well.”).

⁷¹ *Edmond*, 531 U.S. at 36-37.

⁷² The jurisprudence in this area is somewhat confusing, as the Supreme Court has never set down a clear division between the various categories of searches which can be supported by something less than probable cause. *See id.* (describing permissible suspicionless searches in the context of special needs, administrative searches, border patrols, and sobriety checkpoints); *Kincade*, 379 F.3d at 822-24 (describing three non-mutually exclusive categories of suspicionless searches as the “exempted areas,” such as borders and airports; “administrative searches” in the context of closely-regulated businesses; and “special needs”); Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419, 421 (2007) (noting that the Court has never identified a discrete category of permissible suspicionless searches, and has justified suspicionless searches at different times as falling under an administrative, special needs, checkpoint or inventory, or “general Fourth Amendment” approach).

⁷³ *E.g.*, *United States v. Knights*, 534 U.S. 112, 118 (2001) (citing *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)) (equating the two standards).

⁷⁴ *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (citing *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967)) (quotations omitted).

degree to which it is needed for the promotion of legitimate governmental interests.”⁷⁵ Under this standard, “both the inception and the scope of the intrusion must be reasonable;”⁷⁶ the latter requires that the search as conducted must be “reasonably related in scope to the circumstances which justified the interference in the first place.”⁷⁷

The second is the “special needs” standard. In those instances where the government can identify a special need “beyond the normal need for law enforcement”—a need that makes obtaining a warrant or requiring probable cause impracticable—it may be able to forego the warrant and probable cause requirements.⁷⁸ First, a court must consider whether the search satisfies a special need.⁷⁹ If so, the court goes on to balance the nature of the privacy interest compromised by the search and the “character of the intrusion” imposed by the search against the “nature and immediacy of the government’s concerns and the efficacy of the [search] in meeting them.”⁸⁰

In addition to disagreeing over which test is applicable for DNA collection statutes, the courts have also disagreed over which test is the most rigorous of the two.⁸¹ The Third Circuit has held that the reasonableness test is the most stringent, and it adopted that test when it analyzed a supervised releasee’s⁸² Fourth Amendment challenge to

⁷⁵ *Knights*, 534 U.S. at 118-19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)) (quotations omitted).

⁷⁶ *O’Connor v. Ortega*, 480 U.S. 709, 726 (1987).

⁷⁷ *T.L.O.*, 469 U.S. at 341 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

⁷⁸ *Id.* at 351 (Blackmun, J., concurring).

⁷⁹ For a discussion of what suffices as a “special need,” see discussion *infra* Part II(B).

⁸⁰ *Bd. of Educ. v. Earls*, 536 U.S. 822, 830-38 (2002) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)).

⁸¹ *United States v. Weikert*, 504 F.3d 1, 9 n.6 (1st Cir. 2007).

⁸² In the federal system, parole was replaced with “supervised release” by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. See U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 1-11 (2004), available at http://www.ussc.gov/15_year/15_year_study_full.pdf.

DNA collection.⁸³ The court applied the “more rigorous” reasonableness test because the purpose for collecting DNA went “well beyond the supervision by the Probation Office of an individual on supervised release.”⁸⁴ The Eighth Circuit also adopted this reasoning when it chose to apply the reasonableness test to DNA collection.⁸⁵

In *United States v. Amerson*, however, the Second Circuit persuasively argued that the special needs test was the more stringent of the two. In doing so, the court clarified how it is that courts can apply different tests, yet consistently reach the same result:

The special needs exception requires the court to ask two questions. First, is the search justified by a special need beyond the ordinary need for normal law enforcement? Second, if the search does serve a special need, is the search reasonable when the government's special need is weighed against the intrusion on the individual's privacy interest? A general balancing test, on the other hand, only requires the court to balance the government's interest in conducting the search against the individual's privacy interests.⁸⁶

⁸³ *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005) (“[W]e believe that it is appropriate to examine the reasonableness of the taking of the sample under the more rigorous *Knights* totality of the circumstances test rather than the *Griffin* special needs exception.”).

⁸⁴ *Id.* Precisely how this statement justifies the choice of one framework over another is unclear—if anything, the statement seems to set up the court to adopt the special needs approach, since the choice rests upon the fact that there are larger (presumably non-law enforcement) purposes served by DNA collection.

⁸⁵ *United States v. Kraklio*, 451 F.3d 922, 924 (8th Cir. 2006).

⁸⁶ *United States v. Amerson*, 483 F.3d 73, 79 n.6 (2d Cir. 2007) (citing *Nicholas v. Goord*, 430 F.3d 652, 664 n.2 (2d Cir. 2005)) (quotations and citations omitted).

The court went on to explain that, once one concludes that the government has a special need to obtain DNA samples, the second prong of the special needs test becomes “very similar” to the balancing required under a reasonableness framework. In fact, the court stated that “had we concluded that it was appropriate to apply a general balancing test to suspicionless searches of probationers—which we did not—we would have reached the same result that we do under the special needs test.”⁸⁷

The Second Circuit’s reasoning makes perfect sense. The balancing tests under both the reasonableness and the special needs standards are indeed *very* similar. In fact, despite the ostensible language differences (weighing the government’s “legitimate interests” in the reasonableness context versus weighing the government’s “special needs”) most courts do not make this distinction—they engage in the same balancing test regardless of the framework they choose.⁸⁸ Because the balancing prong of the tests are *de facto* identical, and because the special needs test requires an additional step before the court may engage in balancing the interests involved, the special needs test must be the more stringent of the two.

Most federal circuit courts have chosen to analyze federal and state DNA statutes under the reasonableness standard. A minority, including the Seventh Circuit, have chosen to analyze the statutes under the special needs approach.⁸⁹ In the next section, I explore the

⁸⁷ *Amerson*, 483 F.3d at 79 n.6.

⁸⁸ *E.g.*, *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1059 (7th Cir. 2000) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995)) (listing the factors for special needs analysis as “(1) the nature of the privacy interest upon which the search intrudes, (2) the character of the intrusion on the individual’s privacy interest, (3) the nature of the governmental concern at issue, (4) the immediacy of the government’s concern, and (5) the efficacy of the particular means in addressing the problem.”).

⁸⁹ *United States v. Weikert*, 504 F.3d 1, 8-9 (1st Cir. 2007) (noting that the Third, Fourth, Fifth, Eighth, Ninth, Eleventh, and D.C. Circuits use the totality of the circumstances analysis; the Second, Seventh, and Tenth Circuits apply the special needs analysis; and the Sixth Circuit has declined to choose a mode of analysis, holding that the DNA Act is constitutional under both the totality of the circumstances and the special needs test).

evolution of these two exceptions to the warrant and probable cause requirement and why it is the reasonableness approach, not the special needs test, that applies to DNA collection statutes.

B. The Supreme Court's Suspicionless Search Jurisprudence

The evolution of the special needs test can be traced back at least as far as *New Jersey v. T.L.O.*⁹⁰ *T.L.O.* has the distinction of being the first case in which the Court used the term “special needs.” There, a schoolteacher found a young girl smoking in the bathroom; when taken to the principal’s office, the girl denied it.⁹¹ An administrator then demanded the girl’s purse, opened it, and found a pack of cigarettes and some rolling papers.⁹² The administrator recognized the papers as typical of those used to smoke marijuana, and continued searching the purse until he located the drug. After the student was suspended, she challenged both the initial search of her purse and the search for marijuana under the Fourth Amendment.

⁹⁰ 469 U.S. 325 (1985). Some persuasively argue that its true origin lies within *Camara v. Municipal Courts*. Butterfoss, *supra* note 72, at 420. In *Camara*, the Court examined the warrantless search of a rental unit by a housing inspector. 387 U.S. 523, 525-26 (1967). Despite noting that a routine inspection of private property was not as invasive as when the police search “for the fruits and instrumentalities of crime;” the Court nevertheless held that a significant intrusion had occurred. *Id.* at 534. The inspector was therefore required to obtain a warrant prior to carrying out the administrative search. That alone, however, did not settle the question. The Court went on to determine “whether some other accommodation between public need and individual right [was] essential.” *Id.* Instead of using the typical formulation of probable cause—namely, one dependent upon individualized suspicion—the Court defined probable cause in unique terms, holding that “‘probable cause’ to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied.” *Id.* at 538. *Camara*, therefore, has the (perhaps ignoble) distinction of being the first case in which the Supreme Court authorized a search absent any individualized suspicion. See *O’Connor v. Ortega*, 480 U.S. 709, 723 (1987) (describing *Camara* as holding that “the appropriate standard for administrative searches is not probable cause in its traditional meaning”).

⁹¹ *T.L.O.*, 469 U.S. at 328-29.

⁹² *Id.*

Although the term “special needs” is often attributed solely to Justice Blackmun’s concurrence, the majority recognized that “the special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause.”⁹³ Instead of requiring probable cause, the Court held that the legality of the searches at issue depended on “the reasonableness, under all the circumstances, of the search[es].”⁹⁴ To determine whether the searches were reasonable, the Court engaged in the now-canonical balancing test, weighing the student’s legitimate expectation of privacy and security against the government’s interest in dealing with breaches of the public order.⁹⁵ The Court concluded that both searches were reasonable and constitutional.⁹⁶

The Court explicitly limited its holding: even though the searches at issue were based on individualized suspicion, the Court refused to decide whether individualized suspicion was “an essential element of the reasonableness standard we adopt for searches by school authorities.”⁹⁷ Although constitutional searches usually call for some individualized suspicion, such suspicion is not always necessary.⁹⁸ The Court warned that those exceptions are few and far between, as they are “generally appropriate only where the privacy interests implicated by a search are minimal *and* where other safeguards are available to assure that the individual’s reasonable expectation of privacy is not subject to the discretion of the official in the field.”⁹⁹

⁹³ *Id.* at 333. Although the quoted language actually refers to the Court’s restatement of the Supreme Court of New Jersey and other courts’ opinions, the Court ultimately adopted the same reasoning, holding that “the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.” *Id.* at 340. Ultimately, the Court required neither a warrant nor probable cause. *Id.* at 340-42.

⁹⁴ *Id.* at 341.

⁹⁵ *Id.* at 337.

⁹⁶ *Id.* at 346-47 & n.12.

⁹⁷ *Id.* at 342 n.8.

⁹⁸ *Id.*

⁹⁹ *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)) (emphasis added and quotation marks omitted).

The opinion proffers five different approaches to the same issue. It is Justice Blackmun's lonely concurrence, however, that continues to inform suspicionless search jurisprudence today. Justice Blackmun largely agreed with the majority's opinion, but he wrote separately to express concern over what he saw as a divergence from the Court's past practices.¹⁰⁰ He saw those decisions as illustrating that the Framers had already engaged in the requisite balancing, and had determined that "reasonableness" was synonymous with the warrant and probable cause requirements.¹⁰¹ In Justice Blackmun's view, "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."¹⁰² He defined that special need as the "need for greater flexibility,"¹⁰³ when, "as a practical matter," it would be impossible to obtain a warrant or to satisfy the probable-cause requirement. Because in *T.L.O.* teachers, and not police, were conducting the searches; and because there was a special need for an immediate response to anything threatening school safety or learning, Justice Blackmun believed that the searches at issue were constitutional.¹⁰⁴ Two years later, Justice Blackmun's special needs framework was formally adopted in *O'Connor v. Ortega*.¹⁰⁵

¹⁰⁰ *Id.* at 351 (Blackmun, J., concurring).

¹⁰¹ *Id.* (citing *United States v. Place*, 462 U.S. 696 (1983)). See *Dunaway v. New York*, 442 U.S. 200, 214 (1979) ("For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause.").

¹⁰² *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

¹⁰³ *Id.* (citing *Florida v. Royer*, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting)).

¹⁰⁴ *Id.* at 353.

¹⁰⁵ 480 U.S. 709, 720, 724-25 (1987). In that case, a public employer searched an employee's office upon an individualized suspicion of wrongdoing—the employee had allegedly improperly solicited contributions from and sexually harassed other employees. *Id.* at 712-14. Although the employee had a reasonable expectation of privacy in his office, the Court did not require a warrant or probable cause prior to the search. *Id.* at 721, 724. Instead, the Court expressly drew on

The next key case for our purposes, *Griffin v. Wisconsin*, is of particular relevance because it addressed the warrantless search of a probationer.¹⁰⁶ As a felon on probation, Griffin was not permitted to possess a firearm.¹⁰⁷ During his probation, a policeman informed Griffin's probation office that Griffin "had or might have" guns in his apartment.¹⁰⁸ Probation officers and the police searched Griffin's home, where they found an illegal handgun.¹⁰⁹ Griffin challenged the search; the Wisconsin Supreme Court affirmed the conviction because under Wisconsin law, the probation officer did not have to obtain a warrant. Instead, the probation officer only was required to obtain supervisor approval and to have "reasonable grounds" to believe that the probationer possessed a forbidden item prior to searching the probationer's home.¹¹⁰

As in *T.L.O.* and *Ortega*, the party conducting the search had an individualized, reasonable suspicion of wrongdoing, and as in *Ortega*, the Supreme Court applied the special needs test to analyze the constitutionality of the search.¹¹¹ The Court analogized a state's operation of a probation system to that of a school or prison, and reasoned that the state had a special need—supervision of probationers—that made the warrant and probable-cause requirements impracticable.¹¹² The Court recognized that a probationer could never enjoy the same absolute liberty to which a law-abiding citizen is

Justice Blackmun's reasoning in *T.L.O.* to support its holding that the warrant and probable cause requirements were "impracticable" for "legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct." *Id.* at 725. And as in *T.L.O.*, the Court again refused to comment on whether individualized suspicion was an essential element of the standard of reasonableness. *Id.* at 726.

¹⁰⁶ 483 U.S. 868 (1987).

¹⁰⁷ *Id.* at 871-72.

¹⁰⁸ *Id.* at 880.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 870-72.

¹¹¹ *Id.* at 873. The Court did so without any discussion as to why it chose to apply the special needs test instead of the totality of the circumstances test.

¹¹² *Id.* at 873-75.

entitled, but also took care to note that the probationer did not lose all protection against invasions of his privacy.¹¹³ After determining that the search did not require a warrant or probable cause,¹¹⁴ the Court went on to determine whether that search was reasonable. The Court agreed that the search satisfied Wisconsin's "reasonable grounds" standard and that the search was constitutional because "it was conducted pursuant to a valid regulation governing probationers."¹¹⁵

The *Griffin* decision seemed to signal that the special needs framework applied to probationer searches, at least when the searcher had an individualized suspicion of wrongdoing. But *Griffin*, *T.L.O.*, and *Ortega* all dealt with searches as a result of individualized suspicion; other cases addressed the issue as to whether the special needs test could apply to suspicionless searches. In using the special needs test to evaluate suspicionless searches, however, the Court opened up a new line of inquiry: just what, precisely, is required to show that a "need beyond the normal need for law enforcement" exists?

¹¹³ *See id.* at 874.

¹¹⁴ *Id.* at 876 ("A warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires. Moreover, the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct . . . and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create . . ."). In analyzing the probable-cause requirement, the Court relied upon a textual interpretation of the Constitution, noting that although probable cause might be required in circumstances where a warrant was not, the reverse was not true, since "no Warrants shall issue, but upon probable cause." Therefore, when a judicially-issued warrant is required, "[the search] is also of such a nature as to require probable cause." *Id.* at 877-78. Even absent this reading, the Court would have required a lesser degree of suspicion since the "probation regime would also be unduly disrupted by a requirement of probable cause." *Id.* at 878.

¹¹⁵ *Id.* at 880. Earlier in the opinion, the Court referenced *Camara*, stating that it had permitted searches pursuant to a regulatory scheme without a warrant or probable cause when the search met "reasonable legislative or administrative standards." *Id.* at 873. It is not clear whether the Court was stating that the search at issue in *Griffin* was such a regulatory search. *See id.* at 878 n.4.

In *Ferguson v. City of Charleston*, for example, the Court used the special needs test to evaluate a suspicionless drug-testing program.¹¹⁶ In response to an apparent increase in “crack babies,” a public hospital instituted a program whereby it identified nine possible signs¹¹⁷ that a pregnant woman was using cocaine; upon satisfying at least one of the criteria, the hospital would collect the mother’s urine for drug testing without her consent or knowledge.¹¹⁸ Women thus identified as cocaine abusers were threatened with “law enforcement involvement” if they did not agree to take part in certain educational activities or to join a substance abuse program.¹¹⁹

The Court found that there was no reasonable suspicion whatsoever that the women identified in this manner abused illegal drugs.¹²⁰ The Court analyzed the suspicionless search using the special needs approach, bringing *Ferguson* in line with four previous cases in which it had evaluated drug-testing programs.¹²¹ In each of those

¹¹⁶ 532 U.S. 67 (2001).

¹¹⁷ These criteria included (1) lack of any prenatal care, (2) late prenatal care (that is, prenatal care after twenty-four weeks of gestation), (3) “incomplete” prenatal care, (4) abruption placentae, (5) intrauterine fetal death, (6) preterm labor “of no obvious cause,” (7) intrauterine growth retardation “of no obvious cause,” (8) previously known drug or alcohol abuse, and (9) any unexplained congenital anomalies. *Id.* at 71 n.4.

¹¹⁸ *Id.* at 70-72. The consent issue was not addressed by the Court; instead, it assumed without deciding that the searches were conducted without informed consent and decided the case on special needs grounds. It then remanded the case for a determination of the consent issue. *Id.* at 76, 77 & n.11.

¹¹⁹ *Id.* at 72.

¹²⁰ *Id.* at 76-77. The Court did not undertake its own substantive analysis of this issue, but it did note that the hospital did not point to any evidence that any of the nine factors “was more apt to be caused by cocaine use than by some other factor, such as malnutrition, illness, or indigency. More significantly . . . the reasoning of the majority panel opinion rest on the premise that the policy would be valid even if the tests were conducted randomly.” *Id.* at 77 n.10.

¹²¹ *Id.* at 77. These included *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); and *Chandler v. Miller*, 520 U.S. 305 (1997). The *Ferguson* Court noted that in the first three of these cases, it upheld drug tests, whereas in *Chandler*, the Court struck down the testing as

cases, government officials argued that the search met a special need “divorced from the State’s general interest in law enforcement.”¹²² Here, in contrast, the Court believed that the “central and indispensable feature” of the program was the use of law enforcement to pressure women into treatment programs.¹²³ The Court distinguished the three earlier cases in which it had upheld drug-testing programs, reasoning that it had permitted those warrantless, suspicionless searches in part “because there was no law enforcement purpose behind the searches . . . and there was little, if any, entanglement with law enforcement.”¹²⁴

In fact, the State had argued that the ultimate purpose of the program was *not* law enforcement, but to protect the health of the mother and fetus.¹²⁵ The Court, however, refused to accept the State’s characterization of the program’s purpose; instead, it engaged in a “close review” to make its own determination.¹²⁶ The Court built upon the programmatic purpose reasoning it first described in *City of Indianapolis v. Edmond*,¹²⁷ refining the inquiry into one of the

unconstitutional. *Ferguson*, 532 U.S. at 77. In each of these cases, the Court used a special needs framework to evaluate the constitutionality of the search at issue.

¹²² *Ferguson*, 532 U.S. at 79.

¹²³ *Id.* at 80.

¹²⁴ *Id.* at 81.

¹²⁵ *Id.*

¹²⁶ *Id.* (citing *Chandler*, 520 U.S. at 322).

¹²⁷ 531 U.S. 32 (2000). *Edmond* is not technically a special needs case, since the *Edmond* Court discussed its checkpoint cases as being in a category apart from special needs. *Id.* at 37-38. In *Edmond*, the plaintiffs were stopped at a suspicionless narcotics checkpoint; an officer examined the driver and the car using a narcotics-detection dog. *Id.* at 35-36. The Court had previously upheld some suspicionless checkpoint searches, but it distinguished the facts in *Edmond* by focusing on the “primary purpose” of the seizure—in *Edmond*, the program “unquestionably ha[d] the primary purpose of interdicting illegal narcotics,” and the Court emphasized that it had never approved a checkpoint program with the primary purpose of detecting “evidence of ordinary criminal wrongdoing.” *Id.* at 40-41. Moreover, in permitting inquiry into the programmatic purposes of a search, the Court included the special needs framework, stating that its “special needs and administrative search cases demonstrate that purpose is often relevant when suspicionless intrusions pursuant to a general scheme are at issue.” *Id.* at 47.

program's relevant *primary* purpose.¹²⁸ Even though the ultimate point of the program was to obtain substance abuse help for expectant mothers, the immediate objective¹²⁹ was to generate evidence for law enforcement, since the “policy was specifically designed to gather evidence of violations of penal laws.”¹³⁰ The search could not, therefore, satisfy a special need beyond the normal need for law enforcement.¹³¹

After *Ferguson*, the Court seemed to be consistently applying the special needs test to evaluate searches unsupported by warrants or probable cause. But in *United States v. Knights*, the Court revisited the applicability of the special needs framework when it examined the warrantless search of a probationer.¹³² Knights had been sentenced to probation for a drug offense, and as a condition of that probation he signed an order that permitted the search of his person or residence without a warrant or “reasonable cause.”¹³³ Lo and behold, Knights' apartment was searched—but not without reasonable cause.¹³⁴ Knights had a previous run-in with an electric company, and when the company suffered \$1.5 million in damage from an act of vandalism, Knights became a suspect.¹³⁵ A detective decided to search Knights' apartment without a warrant, and upon doing so discovered evidence

¹²⁸ *Ferguson*, 532 U.S. at 81. The Court distinguished this “primary purpose” from an “ultimate” purpose or goal—and even where the ultimate purpose was not related to law enforcement, if the primary purpose was for law enforcement purposes, the search required a warrant and individualized suspicion. *Id.* at 82-84. To allow otherwise, apparently, would be to constitutionalize almost any suspicionless search, since the search could be justified by its ultimate purpose. *Id.* at 84.

¹²⁹ The Court used the terms “immediate objective” and “primary purpose” interchangeably.

¹³⁰ *Ferguson*, 532 U.S. at 84.

¹³¹ *Id.* at 86.

¹³² 534 U.S. 112 (2001).

¹³³ *Id.* at 114.

¹³⁴ *Id.* at 115.

¹³⁵ *Id.* at 114.

of the crime.¹³⁶ The district court granted a motion to suppress this evidence, and the government appealed.¹³⁷

Knights relied on the *Griffin* holding, arguing that the search had to be analyzed under the special needs framework.¹³⁸ The Court disagreed, stating that “[t]his dubious logic . . . runs contrary to *Griffin*’s express statement that its ‘special needs’ holding made it ‘unnecessary to consider whether’ warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment.”¹³⁹ But the Court did not explain why the special needs framework was inappropriate; instead, the Court simply used the reasonableness test.¹⁴⁰ The Court balanced Knights’ privacy interest against the government’s interests, and began with the observation that Knights’ probationer status informed “both sides of that balance.”¹⁴¹ Because Knights was a probationer, the Court held that he had a significantly diminished expectation of privacy; when weighed against the government’s interest in rehabilitating Knights and in “protecting society against future criminal violations,” the government’s interests handily surpassed Knights’.¹⁴² The Court limited this holding by refusing to address the constitutionality of a suspicionless search under these circumstances—namely, when a probationer consents to suspicionless searches as part of his probation agreement.¹⁴³

What, then, are the lessons an appellate court would draw from looking at the Supreme Court’s Fourth Amendment jurisprudence up to and including *Knights*? Although the special needs framework first came into being in cases where the searching party reasonably

¹³⁶ *Id.* at 115 & n.1.

¹³⁷ *Id.* at 116.

¹³⁸ *Id.* at 117.

¹³⁹ *Id.* at 117-18.

¹⁴⁰ *Id.* at 118.

¹⁴¹ *Id.* at 119.

¹⁴² *Id.* at 118-20.

¹⁴³ *Id.* at 120 n.6 (“[W]e need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.”).

suspected an individual of some wrongdoing, over time the framework evolved to address suspicionless searches like those in *Ferguson*. *Griffin* seemed to indicate that the special needs framework applied to probationer searches supported by individualized suspicion, but *Knights* indicates that under similar facts, the Court endorsed the reasonableness test for use in determining whether a search is constitutional.

In not overruling *Griffin*, however, the *Knights* Court left open the possibility that the special needs framework could still be appropriate when one is analyzing a probationer search supported by individualized suspicion of wrongdoing, but the Court did not explain how a lower court would decide which framework to use. Nor did *Knights* speak to suspicionless searches—although the Court apparently thought that it left the issue unresolved, *Ferguson* indicates that perhaps the question had already been answered; those cases might lead an appellate court to reason that suspicionless searches are governed by the special needs test.

Ferguson and *Edmond* also specifically call for an inquiry into the programmatic purpose (or the primary purpose, or the immediate objective) of suspicionless searches, and ask an appellate court to engage in a “close review” of any proffered rationales for an administrative scheme that endorses such searches. Finally, none of these cases truly clarified what, precisely, was meant by the requirement that one have a need “beyond the normal need for law enforcement.”¹⁴⁴

It is not surprising, then, that when analyzing a suspicionless search the Seventh Circuit would understand these cases to endorse a special needs approach—and this is, in fact, precisely what one sees in the Seventh Circuit’s suspicionless search case law.

¹⁴⁴ Butterfoss, *supra* note 72, at 422-23 (citing various Supreme Court cases for the proposition that the Court has, at various times, “expressed concern over, or suggested a different outcome for, searches motivated by,” for example, a law enforcement purpose, general crime control purposes, an intent to aid law enforcement efforts, a purely investigatory purpose, an investigatory police motive, a search to detect evidence of ordinary criminal wrongdoing, or a search to obtain evidence of violations of the penal law).

III. SEVENTH CIRCUIT IMPROPERLY APPLIES SPECIAL NEEDS TO FEDERAL DNA COLLECTION

A. *The Seventh Circuit's Special Needs Cases*

The Seventh Circuit recognized the special needs test at least as early as 1996, in its *Thompson v. Harper* case.¹⁴⁵ Since then, the court has proven quite capable of applying the special needs factors—making the court's failure to properly balance those factors in its DNA cases is all the more surprising.

In *Joy v. Penn-Harris-Madison School Corp.*, for example, the Seventh Circuit engaged in a careful balancing of the relevant factors.¹⁴⁶ As in *T.L.O.*, certain high school students were subjected to random, suspicionless drug (including alcohol and nicotine) testing.¹⁴⁷ The Seventh Circuit wasted little time explaining why the special needs framework was appropriate; instead, after citing various other drug testing cases where the special needs test was used,¹⁴⁸ and noting

¹⁴⁵ 77 F.3d 484 (1996) (unpublished table opinion). There, the court referenced *Griffin* for its understanding that the probation system poses special needs that could justify warrantless searches unsupported by probable cause, but the court did not actually engage in special needs balancing. The court took a more detailed look at the doctrine in *United States v. Jones*, when it rejected a parolee's argument that the only special need capable of justifying a warrantless search unsupported by probable cause was the "need to act quickly to prevent harm to the probationer and society." 152 F.3d 680, 686 (1998). The *Jones* court also noted that it would review de novo a district court's determination of whether "reasonable grounds" existed to support such a search. *Id.* at 687.

¹⁴⁶ 212 F.3d 1052 (2000).

¹⁴⁷ *Id.* at 1054-55. The group of students that could be tested included those involved in non-athletic extracurricular activities and those that drove to school.

¹⁴⁸ *Id.* at 1058 (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (using special needs analysis for suspicionless drug testing of railroad employees); *Chandler v. Miller*, 520 U.S. 305 (1997) (same for drug testing of public office candidates); *Vernonia Sch. Dist 47J v. Acton*, 515 U.S. 646 (1995) (same for suspicionless drug testing of public school students); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (same for suspicionless drug testing for U.S. Custom Service employees); *Willis v. Anderson Community Sch.*

that special needs in particular seem to arise in the public school context, it dove into its analysis.¹⁴⁹ The court laid forth a series of factors that it used to balance between the government's interests and those of the individual, including: "(1) the nature of the privacy interest upon which the search intrudes, (2) the character of the intrusion on the individual's privacy interest, (3) the nature of the governmental concern at issue,¹⁵⁰ (4) the immediacy of the government's concern,¹⁵¹ and (5) the efficacy of the particular means in addressing the problem."¹⁵²

In addition to the complicated balancing of these various factors, the court also had to contend with some of its own unwelcome precedent. The court previously addressed suspicionless drug testing in *Todd v. Rush County Schools*¹⁵³ and *Willis v. Anderson Community School Corp.*¹⁵⁴ The *Joy* panel stated that were it relying solely upon Supreme Court precedent, it would hold the random drug testing of students participating in extracurricular activities unconstitutional.¹⁵⁵ Under the doctrine of *stare decisis*, however, the court felt compelled

Corp., 158 F.3d 415 (7th Cir. 1998) (same for drug testing of a public school student accused of fighting)).

¹⁴⁹ *Id.* at 1058. The court's language indicates that it may not have realized it had a choice, as it stated that to "be a reasonable search without a warrant and probable cause, the government *must* show a 'special need,' beyond the normal need for law enforcement . . ." *Id.* (emphasis added).

¹⁵⁰ The court analyzed this factor from two perspectives: first, whether there is a correlation between the defined population and drug abuse; and second, whether there is a correlation between the abuse and the government's interest in protecting property and life. *Id.* at 1064.

¹⁵¹ In *Willis v. Anderson Community School Corp.*, the Seventh Circuit placed particular emphasis on this factor, stating that "it may be that when a suspicion-based search is workable, the needs of the government will *never* be strong enough to outweigh the privacy interests of the individual." 158 F.3d 415, 422 (7th Cir. 1998) (emphasis added).

¹⁵² *Joy*, 212 F.3d at 1059 (citing *Vernonia*, 515 U.S. at 654, 658, 661, 662, 663) (internal citations omitted).

¹⁵³ 133 F.3d 984 (7th Cir. 1998).

¹⁵⁴ 158 F.3d 415 (7th Cir. 1998).

¹⁵⁵ *Joy*, 212 F.3d at 1062-63.

to affirm the lower court's decision on the basis of *Todd*—an opinion that did not even reference relevant Supreme Court precedent. Therefore, the court warned against an overly broad reading of its holding and strictly limited its conclusions to the facts of *Joy*,¹⁵⁶ stating that “[u]ntil we receive further guidance from the Supreme Court, we shall stand by our admonishment in *Willis* that the special needs exception must be justified” according to the factors described above.¹⁵⁷

Whether the court meant to further limit its holding as relevant only to suspicionless drug testing cases is not clear. It is clear that in its next special needs case, the Seventh Circuit did not reference the factors it highlighted so carefully in *Joy*. That case was *Green v. Berge*, the first Seventh Circuit decision to address DNA collection.

B. *The Seventh Circuit's DNA Cases*

1. *Green v. Berge*

In *Green v. Berge*, the Seventh Circuit evaluated the constitutionality of a Wisconsin law that had been amended to require all convicted felons to provide DNA samples.¹⁵⁸ Four prisoners in Wisconsin's Supermax penitentiary filed a suit challenging their DNA collection.¹⁵⁹ From the moment one begins reading, it is clear that the opinion does not bode well for the plaintiffs. The court began by mentioning that almost all challenges to state- and federally-mandated DNA collections had failed, and as such, “the plaintiffs in this suit face a decidedly uphill struggle”¹⁶⁰

¹⁵⁶ *Id.* at 1066.

¹⁵⁷ *Id.* at 1067.

¹⁵⁸ 354 F.3d 675 (2004). The Wisconsin law at issue was WIS. STAT. § 165.76 (1993) (amended 1999).

¹⁵⁹ *Green*, 354 F.3d at 676.

¹⁶⁰ *Id.* at 676-77 (“[The] state and federal courts that have [addressed the issue] are almost unanimous in holding that these statutes do not violate the Fourth Amendment.”).

The Seventh Circuit acknowledged that taking a person's DNA is a search¹⁶¹ and that there was no individualized reasonable suspicion to believe these prisoners had committed a new crime.¹⁶² Without addressing the facts specific to this case, the court proffered other courts' justifications for upholding these statutes:

Courts uphold these DNA collection statutes because the government interest in obtaining reliable DNA identification evidence for storage in a database and possible use in solving past and future crimes outweighs the limited privacy interests that prisoners retain. Also, courts generally conclude that the collection of biological samples is only a minimal intrusion on one's personal physical integrity. These courts find that the government has a special need in obtaining identity DNA samples.¹⁶³

The court agreed with the Tenth Circuit that a desire to build a DNA database went beyond the ordinary needs of law enforcement.¹⁶⁴ It then explicitly adopted the reasoning of Chief Judge Crabb in the Western District of Wisconsin, who held that “[a]lthough the state’s DNA testing of inmates is ultimately for a law enforcement goal,” DNA collection seemed “to fit within the special needs analysis . . . since it is not undertaken for the investigation of a specific crime.”¹⁶⁵

¹⁶¹ *Id.* at 676-77 (“Although the taking of a DNA sample is clearly a search, the Fourth Amendment does not proscribe all searches, only those that are unreasonable.”).

¹⁶² *Id.* at 676.

¹⁶³ *Id.* at 677.

¹⁶⁴ *Id.* (citing *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003)).

¹⁶⁵ *Id.* at 678 (citing *Shelton v. Gudmanson*, 934 F. Supp. 1048, 1050-51 (W.D. Wis. 1996)). The court strongly agreed, calling the special needs framework “firmly entrenched” later in the opinion. *Id.* at 679.

The plaintiffs argued that the Supreme Court's decisions in *Edmond* and *Ferguson* dictated a contrary result.¹⁶⁶ Those opinions required inquiry into a suspicionless search program's primary purpose or immediate objective. Since the plaintiffs believed that the primary purpose of DNA collection was to assist law enforcement, it followed that the search could not meet a special need.

The Seventh Circuit did not find *Edmond* or *Ferguson* applicable. It first distinguished *Edmond*, finding that the primary purpose of the *Edmond* search had been to see if "then and there" a driver was using illegal drugs. In contrast, the court held that Wisconsin's DNA statute did not have the purpose of searching for evidence of criminal behavior; instead, its purpose was to "obtain reliable proof of a felon's identity."¹⁶⁷ The court also distinguished *Ferguson*. It interpreted *Ferguson* to show that the Supreme Court classified suspicionless drug testing cases as constitutional if (1) the person providing a sample understood the purpose of the test, and (2) the results of the test were protected from dissemination to third parties.¹⁶⁸ Because the *Green* plaintiffs did not misunderstand the purpose of the DNA test, and because the Wisconsin statute prohibited unauthorized dissemination of the results, *Ferguson* was of little assistance. The court concluded that Wisconsin's DNA statute was constitutional.

Judge Easterbrook concurred. Although he joined the opinion without reservation, he wrote separately to express concern over the "lump[ing] together" of all persons potentially subjected to DNA collection.¹⁶⁹ In his view, at least four distinct categories of persons exist for Fourth Amendment purposes: prisoners, people on conditional release, felons with expired terms, and those never convicted of a felony.¹⁷⁰ Belying his own classification scheme, however, Judge Easterbrook did not take issue with DNA collection from within the first three categories; instead, he argued that only

¹⁶⁶ *Id.* at 678.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 678-79.

¹⁶⁹ *Id.* at 679 (Easterbrook, J., concurring).

¹⁷⁰ *Id.* at 680.

DNA collection from those in the fourth category might require a special need or individualized suspicion.¹⁷¹ He criticized a Ninth Circuit opinion that had applied the special needs framework to the DNA collection of a person on supervised release, claiming that the court “confuse[d] the fourth category with the second.”¹⁷² The judge concluded by noting that the fourth category was not at issue in *Green*, and that he read the court’s opinion to mean that a suspicionless DNA search was only permissible when conducted on those persons outside of his fourth category.¹⁷³

The *Green* opinion left many issues unresolved. Notably, the court did not address whether other searches occur in the context of DNA testing, such as, for example, the chemical analysis of a DNA sample.¹⁷⁴ Nor did the court identify why the special needs framework, as opposed to the reasonableness framework, was the appropriate choice in this case of first impression. The Seventh Circuit also failed to evaluate those factors crucial in determining whether a special need exists, despite having identified the factors both in *Joy*¹⁷⁵ and in its adoption of Chief Judge Crabb’s factor list in *Green*.¹⁷⁶ The court simply accepted the outcome of other courts’ balancing. Finally, although Judge Easterbrook raised the subject, the majority opinion failed to address what effect, if any, the “continuum of possible punishments ranging from solitary confinement . . . to a few hours of mandatory community service”¹⁷⁷ would have on its special needs analysis, since expectations of privacy vary as a convict’s status

¹⁷¹ *Id.* at 680-81.

¹⁷² *Id.* at 681. Judge Easterbrook’s reasoning is less than clear, since his own *Green* panel applied special needs analysis to imprisoned felons (thereby apparently confusing the fourth category with the first).

¹⁷³ *Id.*

¹⁷⁴ See cases cited *supra* notes 55-62 & 254-57 and accompanying text.

¹⁷⁵ See discussion *supra* Part III(A).

¹⁷⁶ *Green*, 354 F.3d at 678 (citing *Shelton v. Gudmanson*, 934 F. Supp. 1048, 1050-51 (W.D. Wis. 1996) (listing the factors the Supreme Court used to determine the reasonableness of various searches)).

¹⁷⁷ *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

changes. But despite these issues, the next Seventh Circuit case to address DNA collection adopted the *Green* reasoning wholesale.

2. *U.S. v. Hook*

In *United States v. Hook*, the Seventh Circuit revisited the issue of DNA collection.¹⁷⁸ George Hook was a white collar criminal, convicted of wire fraud, money laundering, and theft from an employee benefit plan.¹⁷⁹ After serving his full prison term, he began serving his thirty-six month period of supervised release.¹⁸⁰ As one of the terms of his release, Hook agreed to “follow the instructions of the probation officer.”¹⁸¹ That agreement was put to the test when, after about a year into his supervised release, Hook’s probation officer requested that Hook submit a DNA sample under the recently enacted Justice for All Act of 2004.¹⁸² Hook refused, and filed a petition in the Northern District of Illinois challenging the collection.¹⁸³

At the district court, Judge Lefkow recognized that courts have used two different approaches in analyzing DNA collection statutes.¹⁸⁴ The judge felt that there was no “constitutionally relevant distinction” between the Wisconsin law analyzed in *Green* and the facts in Hook’s case.¹⁸⁵ Therefore, relying on *Green*, she used the special needs approach to determine whether Hook’s DNA collection was reasonable.¹⁸⁶ Guided by the Supreme Court’s *Edmond* holding, she looked to the primary purpose of the federal DNA collection statute, and found that the “ultimate goal” was solving past and future crimes,

¹⁷⁸ 471 F.3d 766 (2006).

¹⁷⁹ *Id.* at 769.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 770.

¹⁸² *Id.* at 769.

¹⁸³ *United States v. Hook*, No. 04-CR-1045, 2006 U.S. Dist. LEXIS 2386, at *1-13 (N.D. Ill. Jan. 20, 2006).

¹⁸⁴ *Id.* at *5.

¹⁸⁵ *Id.* at *7.

¹⁸⁶ *Id.*

exonerating innocent persons, and deterring recidivism.¹⁸⁷ These purposes went beyond the ordinary need for law enforcement, and constituted a special need.

That being the case, the district court then moved on to the reasonableness analysis, weighing Hook's privacy interests against the government's special need.¹⁸⁸ Citing *Griffin*, she held that people on conditional release have a greatly diminished expectation of privacy, and have no privacy interest in proof of their identities.¹⁸⁹ That Hook had not explicitly consented to providing a DNA sample as a term of his release was of no import—the court stated that this had no effect on Hook's expectation of privacy.¹⁹⁰ Judge Lefkow defined the search at issue as the extraction of blood, and in accordance with other courts held that such an intrusion was minimal.¹⁹¹ Although the government in this case did not identify its interests in the DNA collection, the judge used the same interests she had identified as providing a special need—solving crime, promoting accuracy in the judicial system, and reducing recidivism—to find that the government had “several important government interests.”¹⁹² The district court therefore denied Hook's petition,¹⁹³ and Hook appealed.

At the Seventh Circuit, the panel largely agreed with Judge Lefkow's analysis. Prior to diving into the special needs analysis, though, the court addressed the issue of consent.¹⁹⁴ Hook argued that because DNA collection was not included in the original terms of his supervised release agreement, he was not required to provide a

¹⁸⁷ *Id.* at *8-9.

¹⁸⁸ *Id.* at *9-10.

¹⁸⁹ *Id.* (citing *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987); *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005); *Padgett v. Donald*, 401 F.3d 1273, 1279-80 (11th Cir. 2005)).

¹⁹⁰ *Id.* at *11 n.3.

¹⁹¹ *Id.* at *11.

¹⁹² *Id.* at *11-12.

¹⁹³ *Id.* at *25.

¹⁹⁴ *United States v. Hook*, 471 F.3d 766, 770 (7th Cir. 2006).

sample.¹⁹⁵ The court remained unpersuaded: “[T]he original term of supervised release instituted by the district court required Hook to ‘follow the instructions of the probation officer’ In this case, the probation officer instructed Hook to submit to DNA collection, and this brings the DNA collection into his original sentence.”¹⁹⁶ In addition, the court noted that the district court held a hearing before ordering Hook to comply with the DNA collection. That hearing satisfied the conditions precedent to modifying the terms of supervised release.¹⁹⁷ Hook also argued that there was, in effect, a breach of contract—but Hook was sentenced by a jury, and was not on probation as the result of a plea agreement. The court found that no contract existed.¹⁹⁸

After addressing those arguments, the court analyzed Hook’s Fourth Amendment claim. As at the district court, the Seventh Circuit felt that the federal DNA act presented issues identical to those in *Green*.¹⁹⁹ Hook tried to distinguish *Green* by noting that *Green* dealt with incarcerated felons, whereas he was only on supervised release—but the court found that this was “a distinction without difference for the purposes of the DNA Act and the Fourth Amendment.”²⁰⁰

The court acknowledged that other circuits used the reasonableness standard, but was not persuaded to change or even justify its special needs framework. Instead, the court stated that “[w]hile some circuits have employed a reasonableness standard, we employed the ‘special needs’ approach in *Green* and will do the same here.”²⁰¹ Reiterating its *Green* reasoning, the court again held that the purpose of DNA collection was not ordinary law enforcement, but to

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 771. Instead, Hook’s situation is more akin to that in *Hagenow*, with the probation term being a part of the original sentence. *See* discussion *infra* section III(C).

¹⁹⁹ *Hook*, 471 F.3d at 772.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 773 (citations omitted).

“establish a database of accurate felon identification information and to deter recidivism, not to search for information on a specific crime or to detect ‘ordinary criminal wrongdoing.’”²⁰² The court also took solace in the fact that the federal DNA Act provides penalties for unauthorized access to CODIS, and that a probation officer has no discretion in deciding whether someone must provide a sample.²⁰³

The purpose of the above reasoning was solely to establish that a special need did, in fact, exist. The court did not engage in the reasonableness balancing anew—after finding a special need, the court simply “appl[ie]d the reasoning in *Green*” and concluded that Hook’s DNA collection did not violate the Fourth Amendment.²⁰⁴

Of course, as noted above, the *Green* court also failed to engage in a detailed balancing of the interests at issue. The court clearly was capable of doing so, as it already had in *Joy* and other special needs cases. But as alluded to earlier, the problems in *Hook* go far beyond a mere failure to flesh out important considerations left unresolved in *Green*. In the time between *Green* and *Hook*, three opinions made it clear that the special needs approach was not the appropriate method for determining the constitutionality of DNA collection, at least insofar as that collection takes place in the context of supervised releases. The first two of these cases were Seventh Circuit opinions that addressed the effect of a waiver, much like the one the court read into Hook’s supervised release agreement.

C. *Waiver, Barnett, and Hagenow*

About a year and a half after the Seventh Circuit issued the *Green* opinion, it took up suspicionless searches again in *United States v. Barnett*.²⁰⁵ The court’s opinion bears little resemblance to *Green*; instead, the court focused almost entirely on the issue of waiver. In *Barnett*, a probationer plea bargained with the government and agreed

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ 415 F.3d 690 (7th Cir. 2005).

to various probation conditions in lieu of serving prison time.²⁰⁶ One of the conditions required Barnett to permit searches of his body, home, and any other effects whenever his probation officer requested access.²⁰⁷ Barnett agreed, and at some point (the court does not go into the facts of the case) his probation officer searched his house and found a gun.²⁰⁸ Barnett challenged the blanket waiver of his Fourth Amendment rights as unconstitutional—the issue the Supreme Court left open in *Knights*.

The court quickly disposed of the case, noting that “[c]onstitutional rights like other rights can be waived, provided that the waiver is knowing and intelligent.”²⁰⁹ Further, plea bargains are a form of contract, and are evaluated according to the norms of contract interpretation.²¹⁰ Therefore, the plea bargain had to be interpreted “in light of common sense,”²¹¹ meaning it implicitly forbade those searches having no law enforcement purpose as well as those greatly exceeding legitimate law enforcement needs.²¹²

Finally, Barnett pointed to discrepancies between his particular probation agreement (which permitted suspicionless searches) and the probation office’s policy manual (which required reasonable suspicion of a parole violation or crime). He argued that the policy manual’s

²⁰⁶ *Id.* at 691.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* Some courts have held that probationers’ blanket waivers of Fourth Amendment rights are valid; others have imposed limits on how, if at all, such rights may be waived. Such a discussion is beyond the scope of this note. *See generally* Jay M. Zitter, Annotation, *Validity of Requirement that, as Condition of Probation, Defendant Submit to Warrantless Searches*, 99 A.L.R. 5TH 557 (2002); Antoine McNamara, *The “Special Needs” of Prison, Probation, and Parole*, 82 N.Y.U. L. REV. 209, 235-36 (2007) (noting that the common counterargument to the Seventh Circuit’s *Barnett* reasoning is the doctrine of “unconstitutional conditions,” but also noting that the doctrine itself is the subject of debate).

²¹⁰ *Barnett*, 415 F.3d at 692-93 (citations omitted).

²¹¹ *Id.* at 692 (quoting *McElroy v. B. F. Goodrich Co.*, 73 F.3d 722, 726-27 (7th Cir. 1996)).

²¹² *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981)).

terms should be implicitly included in his agreement.²¹³ The court deftly dispatched this argument using standard contract construction: if an indefinite contract should not be enforced, the court could invalidate the plea agreement, thereby placing Barnett back before a court for resentencing.²¹⁴ Since Barnett did not appear to relish this option, the court left the contract undisturbed.²¹⁵

Less than two months after the *Barnett* opinion, the Seventh Circuit further fleshed out its answer to the *Knights* question. As in *Barnett*, the probationer in *United States v. Hagenow* signed a waiver permitting suspicionless searches of his person or property.²¹⁶ The court provided a two-pronged response. First, it held that a reasonable suspicion of wrongdoing existed, which alone would validate the search.²¹⁷ Second, it held that under *Barnett*, a blanket waiver of Fourth Amendment rights eliminates any expectation of privacy that a probationer might have, which likewise eliminates the need for any individualized suspicion.²¹⁸ This was true even though in *Barnett*, the court used a “plea bargain as contract” approach, whereas in *Hagenow* the probationer did not have a plea bargain, but merely consented to searches as a condition of his probation—the waivers were “similar” and the same reasoning applied.²¹⁹ As a result, the Seventh Circuit held that the suspicionless search of a probationer who consented to all searches as a condition of parole is inherently reasonable.

Perhaps more importantly for the purposes of this note, the court also specifically recognized and disregarded the special needs

²¹³ *Id.* at 693.

²¹⁴ *Id.* Under this analysis, it would appear that probation office policy manuals are meaningless—either the same terms appear in both the manual and the individual probationer’s agreement, and no indefiniteness exists; or there are discrepancies between the two, and a probationer can challenge the probation agreement only if he is willing to give up probation entirely. It is hard to imagine a probationer willing to choose that route to make a point.

²¹⁵ *Id.*

²¹⁶ 423 F.3d 638, 641 (7th Cir. 2005).

²¹⁷ *Id.* at 642-43.

²¹⁸ *Id.* at 643.

²¹⁹ *Id.*

framework.²²⁰ Hagenow attacked the search by arguing that *Griffin* required a special need; the Seventh Circuit parried, citing the *Knights* Court's rejection of this argument.²²¹ The court concluded that "[b]ecause Hagenow signed a waiver agreeing to submit to searches while on probation, this case falls under *Knights* and its progeny, not *Griffin*, and the 'special needs' test does not apply."²²²

After *Barnett* and *Hagenow*, a strong argument can be made that a consent-to-search clause in a probation agreement automatically renders a suspicionless search constitutional in the Seventh Circuit. Further, the *Hagenow* court specifically cautioned against use of the special needs analysis when consent to a search had been given. And *Green*, of course, did not speak to this issue, as the DNA searches in that case were performed on prisoners who did not consent to the search.

How does all of this relate to DNA collection? Under federal law, a sentencing court that grants a period of supervised release now *must* include "as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample" if DNA collection is otherwise required under the DNA Analysis Backlog Elimination Act.²²³ Under this DNA Act, samples must be collected from anyone convicted of (1) any felony; (2) any offense listed in chapter 109A, title 18 of the United States Code; (3) any crime of violence, as that term is defined in section 16, title 18 of the United

²²⁰ *Id.* ("[T]he *Griffin v. Wisconsin* 'special needs' doctrine does not apply here.") (citation omitted).

²²¹ *Id.*

²²² *Id.*

²²³ 18 U.S.C. § 3583(d) (2000). The DNA Analysis Backlog Elimination Act of 2000 also states that "[t]he probation office responsible for the supervision under Federal law of an individual on probation, parole, or supervised release shall collect a DNA sample from each such individual who is, or has been, convicted of a qualifying Federal . . . or a qualifying military offense . . ." 42 U.S.C. § 14135a(a)(2) (2000 & Supp. IV 2004).

States Code; or (4) any attempt or conspiracy to commit any of the offenses listed above.²²⁴

Therefore, a person placed on supervised release after the recent spate of amendments to the federal DNA statute would necessarily have to sign a blanket waiver like those seen in *Barnett* and *Hagenow*—the person would have to consent to the suspicionless search that occurs when DNA is collected.²²⁵ In effect, such was the case in *Hook*—as I explained above, at the time Hook was placed on supervised release he did not explicitly consent to DNA collection; the Seventh Circuit read the DNA collection condition into his agreement. Nonetheless, the *Hook* court did not follow, nor did it even mention, *Barnett* and *Hagenow*. Instead, the court relied almost exclusively on its *Green* opinion, thereby directly contradicting its own precedent.

In addition to ignoring its own relevant precedent, the Seventh Circuit also failed to account for a Supreme Court opinion that issued well in advance of the arguments in *Hook*. That decision, *Samson v. California*, was anticipated by both *Barnett* and *Hagenow*—like *Barnett* and *Hagenow*, the *Samson* opinion dealt directly with the Supreme Court’s *Knights* holding. But as with those Seventh Circuit opinions, the *Hook* court ignored *Samson*—an oversight that is all the more inexplicable given that Judge Easterbrook explicitly relied upon *Knights* in his *Green* concurrence.²²⁶

²²⁴ 42 U.S.C. § 14135a(d) (as amended by the Justice For All Act of 2004, Pub. L. No. 108-405, § 203, 118 Stat. 2260).

²²⁵ Failure to consent to such a search is a misdemeanor under the federal DNA collection statutes, and the refusing person “shall be punished” as mandated by Title 18 of the United States Code. 42 U.S.C. § 14135a(a)(5)(A)–(B). The collecting party may “may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample.” 42 U.S.C. § 14135a(a)(4)(A). This is also true in at least some states: in California, for example, “use of reasonable force” is appropriate to obtain a sample from an offender that refuses to cooperate. CAL. PENAL CODE 298.1(a)–(c) (2007).

²²⁶ *Green v. Berge*, 354 F.3d 675, 680-81 (7th Cir. 2004) (Easterbrook, J., concurring).

D. Survival of Special Needs in Light of Samson v. California

In *Samson v. California*, the Supreme Court sought to answer a question it left open in *Knights*: “whether a condition of release can so diminish or eliminate a released prisoner’s expectation of privacy that a suspicionless search by a law enforcement officer” would be constitutional.²²⁷ Under California law, every prisoner eligible for parole has to sign an agreement permitting suspicionless searches and seizures by a parole officer at any time.²²⁸ In *Samson*, a police officer saw Samson, a parolee—one that the officer believed had an outstanding warrant—walking down the street.²²⁹ When the officer stopped Samson, however, Samson told him that no outstanding warrant existed.²³⁰ The officer verified this information, but still decided to search Samson. Upon doing so, the officer discovered methamphetamine.²³¹ Samson was charged with possession, and filed a motion to suppress on the basis that the search was unconstitutional.²³² At the trial court, the judge denied Samson’s motion to suppress the evidence; the California appellate court affirmed that ruling, since in California, a search is reasonable as long as it is not arbitrary, capricious, or harassing.²³³

The Supreme Court took up the case to resolve the *Knights* issue, and used the reasonableness framework instead of the special needs test in doing so. The Court declined to use the special needs approach because “under general Fourth Amendment principles” such an analysis was unnecessary.²³⁴ The Court reiterated the proper balancing test for determining whether a search is reasonable: the test requires

²²⁷ 126 S. Ct. 2193, 2196 (2006).

²²⁸ CAL. PENAL CODE § 3067(a) (West 2000).

²²⁹ *Samson*, 126 S. Ct. at 2196.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *People v. Samson*, No. A102394, 2004 WL 2307111, at *1-3 (Cal. Ct. App. Oct. 14, 2004).

²³⁴ *Samson*, 126 S. Ct. at 2199 n.3.

weighing the degree to which the search intrudes on a person's privacy against the degree to which the search promotes a legitimate governmental interest.²³⁵ Under *Knights*, the Court had already addressed that balancing, and it adopted the same weighing of interests in *Samson*.²³⁶

Moreover, as in *Knights*, the Court focused on the fact that Samson consented to suspicionless searches.²³⁷ While that condition weighed heavily in the Court's balancing test (as Samson's awareness that he could be searched at any time served to significantly diminish any expectation of privacy that he had), the Court did not rely on the consent-to-search condition in Samson's parolee agreement as the basis for its holding.²³⁸ This allowed the Court to definitively answer the question it left in *Knights*—the Court's reasonableness analysis alone provided its rationale for holding that the search was constitutional.²³⁹

The Court also fleshed out the "continuum" of privacy interests that go along with varying punishments in the penal system. In *Knights*, the Court had held that probationers did not enjoy the same rights as free citizens; in *Samson*, the Court further found that parole was "more akin" to imprisonment than probation—meaning that a parolee has less of an expectation of privacy than a probationer.²⁴⁰ But the Court drew the line at the dissent's characterization of that holding, and stated that it did not go so far as to find that parolees had no Fourth Amendment rights.²⁴¹ After weighing Samson's diminished expectation of privacy against important governmental interests such

²³⁵ *Id.* at 2197.

²³⁶ *Id.*

²³⁷ *Id.* at 2199.

²³⁸ *Id.* at 2199 n.3.

²³⁹ *Id.* The Court refrained from doing so in part because the California Supreme Court had not yet had a chance to construe the statute that required a consent-to-search provision in any parolee's agreement. *Id.*

²⁴⁰ *Id.* at 2197-98. Note that under the current federal sentencing guidelines, parole has been replaced by supervised release. *See supra* notes 21 and 82 and accompanying text.

²⁴¹ *Id.* at 2198.

as supervising parolees and reducing recidivism, the Court concluded that the search was reasonable under the Fourth Amendment.²⁴²

After *Samson*, how could the Seventh Circuit still believe the special needs approach was appropriate? After all, Hook was a supervised releasee and the court interpreted his agreement to include DNA collection. One answer could lie in the Second Circuit's reasoning. The Second Circuit, along with the Tenth Circuit, had previously joined the Seventh in applying the special needs framework to DNA collection. In *United States v. Amerson*, the Second Circuit revisited DNA collection.²⁴³ Contrary to the Seventh Circuit's approach, the Second Circuit realized that *Samson* warranted discussion. Interestingly, in *Amerson* the Second Circuit held that the special needs test remained viable.²⁴⁴ But the *Amerson* case dealt with two probationers, and the court strictly limited its reading of *Samson*, noting:

While after *Samson* it can no longer be said that 'the Supreme Court has never applied a general balancing test to a suspicionless-search regime,' nothing in *Samson* suggests that a general balancing test should replace special needs as the primary mode of analysis of suspicionless searches outside the context of the highly diminished expectation of privacy presented in *Samson*. . . . [T]he Supreme Court has not, to date, held that the expectations of privacy of *probationers* are sufficiently diminished to permit probationer suspicionless searches to be tested by a general balancing test²⁴⁵

Even under *Amerson*'s rejection of the reasonableness test, then, Hook's DNA collection would have been analyzed under the

²⁴² *Id.* at 2200-02.

²⁴³ 483 F.3d 73 (2007).

²⁴⁴ *Id.* at 89.

²⁴⁵ *Id.* at 79 (emphasis in original) (citations omitted).

reasonableness test, since Hook, like Samson, was on supervised release (or parole, depending on the language of the jurisdiction).

The Tenth Circuit also found that *Samson* modified its suspicionless search law. In *United States v. Freeman*, that court reinterpreted the *Griffin* line of cases.²⁴⁶ It limited the special needs test to apply only to those searches conducted by a parole officer, because it felt that the rehabilitative relationship between officer and parolee was key to *Griffin*'s reasoning.²⁴⁷ The Tenth Circuit still shifted its position on the special needs test post-*Samson*, however, holding that suspicionless searches by "ordinary law enforcement officers" would be evaluated under the reasonableness test.²⁴⁸

Perhaps, then, *Freeman* could provide some justification for the outcome of *Hook*, since Hook's DNA collection was at the behest of his parole officer—but the Seventh Circuit's own case law forecloses that avenue. Although *Barnett* relied upon the existence of a plea agreement to interpret the consent-to-search provisions as part of a contract, *Hagenow* had no such limitation—Hagenow had no plea agreement, but the Seventh Circuit held that Hagenow's waiver alone made the search reasonable. Further, both Hagenow and Barnett were probationers, and under *Samson* they both have a greater expectation of privacy than the supervised releasee in *Hook*.

Finally, under the Tenth Circuit's *Freeman* holding, if the court in *Hook* had not read DNA collection into the terms of Hook's probation agreement, the outcome might have been different—in Hook's case. Going forward, such reasoning is bound to fail since the federal DNA collection statutes now require consent to DNA collection in every eligible supervised releasee's agreement.²⁴⁹ While the federal government and some state governments may require some amount of

²⁴⁶ 479 F.3d 743 (10th Cir. 2007).

²⁴⁷ *Id.* at 748.

²⁴⁸ *Id.*

²⁴⁹ 18 U.S.C. § 3583(d) (2000) ("The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample . . ."); 42 U.S.C. § 14135a(a)(2) (2000 & Supp. IV 2004).

individualized suspicion before searching in other cases,²⁵⁰ the federal government is the entity that requires a suspicionless search in the context of DNA collection. Every agreement will operate to bring the supervised releasee into the confines of *Hagenow* and *Samson*.

Since the reasonableness test probably should have applied in *Hook*, and will apply in any case where a supervised releasee consents (as required by federal law) to DNA collection, the Seventh Circuit erred in applying the special needs test to Hook's case. But beyond using the wrong framework to analyze DNA collection, the court further erred in failing to engage in a careful balancing of the relevant interests at stake. The special needs test collapses into the reasonableness test once a "special need" is identified²⁵¹—had the court carefully considered the privacy interests at stake in *Green* and *Hook*, much of that reasoning would remain viable upon adoption of the proper reasonableness test. Instead, the Seventh Circuit must evaluate the reasonableness factors anew. Upon doing so, the court may conclude that DNA collection as mandated by federal law is unconstitutional with respect to probationers, and perhaps even for persons on supervised release.

IV. BALANCING INTERESTS IN FEDERAL DNA COLLECTION

The next time the Seventh Circuit is presented with the DNA collection of a federal probationer or a supervised releasee, the Seventh Circuit should disclaim the special needs test and adopt the reasonableness framework. In doing so, it is key that the Seventh Circuit engage in a careful weighing of the interests involved, since

²⁵⁰ *Samson*, 126 S. Ct. at 2201; see also *Freeman*, 479 F.3d at 748 ("The Court [in *Samson*] noted 'that some States and the Federal Government require a level of individualized suspicion,' and strongly implied that in such jurisdictions a suspicionless search would remain impermissible. Parolee searches are therefore an example of the rare instance in which the contours of a federal constitutional right are determined, in part, by the content of state law.") (quoting *Samson*, 126 S. Ct. at 2201).

²⁵¹ See the discussion of *United States v. Amerson* in the Second Circuit, *supra* Part II(A).

many of the assumptions in *Green* and *Hook* no longer hold true. For instance, in *Samson* the Supreme Court explicitly recognized that persons on supervised release are closer to prisoners in their privacy interests; while it is clear that probationers likewise have a diminished expectation of privacy, it is not clear how a probationer's interest will compare to a supervised releasee's interest. In *Hook*, however, the Seventh Circuit rejected *Hook*'s attempt to distinguish between *Green*'s incarcerated prisoners and himself, stated that no distinction existed between those in custody and those on supervised release.²⁵²

Under the reasonableness approach, DNA collection may not pass constitutional muster for probationers or supervised releasees. As the Supreme Court reiterated in *Samson*, the reasonableness of a search is determined by weighing the degree of intrusion on an individual's privacy against the degree to which the search is needed to promote legitimate governmental interests.²⁵³ Before weighing the interests involved, however, the Seventh Circuit should first reevaluate which search is at issue.

Courts analyzing DNA collection have largely focused on the initial blood draw as the relevant Fourth Amendment search. But as mentioned above, some courts have held that more than one search takes place when DNA is collected: first, the physical drawing of blood (or swabbing of cheek cells, or similar method for obtaining DNA); and second, the subsequent biochemical analysis of that sample.²⁵⁴ On the other hand, some courts have held that if the initial

²⁵² *United States v. Hook*, 471 F.3d 766, 772 (7th Cir. 2006) (citing *Griffin* for the observation that supervised releasees, like probationers, are not entitled to the same absolute liberty to which a citizen is entitled.).

²⁵³ *Samson*, 126 S. Ct. at 2197.

²⁵⁴ *E.g.*, *United States v. Stewart*, 468 F. Supp. 2d 261, 276 (D. Mass. 2007); *Banks v. Gonzales*, 415 F. Supp. 2d 1248, 1254 (N.D. Okla. 2006); *State v. Transou*, 201 S.W.3d 607, 619 (Tenn. 2006) (citations omitted). Although some probationers or parolees further argue that every comparison of their DNA against other samples via CODIS is an additional search, this reasoning has not been adopted by a court. *E.g.*, *Johnson v. Quander*, 440 F.3d 489, 498-99 (D.C. Cir. 2006) (noting that "the consequences of the contrary conclusion would be staggering").

search is lawful, any later use of the evidence is not a search under the Fourth Amendment.²⁵⁵

Which search the court analyzes has serious implications in a balancing of the privacy interests at stake. In other contexts, the Seventh Circuit has recognized that more than one search may occur within the same series of events, and that each search must be evaluated individually.²⁵⁶ Courts are disingenuous when they support the outcome of their balancing tests based only on the privacy interests implicated in the search that occurs when a DNA sample is obtained.²⁵⁷ Instead, the Seventh Circuit should evaluate the “second search” that occurs when the DNA sample undergoes processing and is uploaded into the CODIS system. If the court does so, it is bound to find that the privacy interests at stake shift dramatically.

Unlike fingerprints, it cannot properly be said that “the DNA profile derived from [a] defendant’s blood sample establishes only a record of the defendant’s identity—otherwise personal information in which the qualified offender can claim no right of privacy once lawfully convicted of a qualifying offense.”²⁵⁸ Moreover, in the chemical analysis of other bodily tissues or fluids, the privacy interests are relatively minimal—the analysis typically provides an answer to such questions as whether a person has been drinking or using illegal drugs. That may not be the case in DNA analysis—it has, at the very least, the *potential* to reveal much more. Although a DNA profile is theoretically comprised of “non-coding” or “junk” DNA—DNA regions selected because those DNA sequences were not associated

²⁵⁵ *E.g.*, *A.A. v. Attorney General*, 914 A.2d 260, 266-67 (N.J. 2007) (citing *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987)).

²⁵⁶ *E.g.*, *United States v. Brown*, 188 F.3d 860, 864-66 (7th Cir. 1999) (analyzing a traffic stop, a search that does not require reasonable suspicion, and the subsequent pat-down search, which does, as two distinct searches).

²⁵⁷ *See United States v. Kincade*, 379 F.3d 813, 867-68 (9th Cir. 2004) (Reinhardt, J., dissenting) (“The search in question, however, constitutes far more of an intrusion than the mere insertion of a needle into an individual’s body and the consequent extraction of a blood sample.”).

²⁵⁸ *Id.* at 837 (majority opinion).

with physical or medical characteristics²⁵⁹—the notion that *any* DNA is purely “junk” has been strongly refuted.²⁶⁰ Professor Cole clarifies the distinction between non-coding DNA and functional DNA: functional DNA actually performs a specific, identifiable function in the body, whereas non-coding DNA does not yield specific physical traits.²⁶¹ But while non-coding DNA may not be “functional” in the traditional sense, it can indicate a propensity for physical traits, thereby creating privacy concerns.²⁶² These concerns extend to the short tandem repeat sequences, or STRs, that are uploaded into CODIS.²⁶³ STRs are non-coding portions of DNA, but those sequences may nevertheless yield information about an individual, such as whether an individual has a propensity toward particular genetic diseases. While some argue that none of the sequences used in *forensic* STR have been found to be predictive, other STR sequences

²⁵⁹ United States v. Weikert, 504 F.3d 1, 3-4 (1st Cir. 2007) (citing H.R. REP. NO. 106-900(I) (2000)).

²⁶⁰ E.g., ‘Junk’ DNA Now Looks Like Powerful Regulator, *Scientists Find*, SCI. DAILY, Apr. 24, 2007, <http://www.sciencedaily.com/releases/2007/04/070423185538.htm>; Julianna Kettlewell, ‘Junk’ Throws Up Precious Secret, BBC NEWS, May 12, 2004, <http://news.bbc.co.uk/2/hi/science/nature/3703935.stm>; Helen Pearson, ‘Junk’ DNA Reveals Vital Role, NATURE NEWS, May 7, 2004, <http://www.nature.com/news/2004/040503/full/news040503-9.html>; *Not ‘Junk DNA’ After All: Tiny RNAs Play Big Role Controlling Genes*, SCI. DAILY, Oct. 26, 2007, <http://www.sciencedaily.com/releases/2007/10/071025112059.htm>; Paul Rincon, *Salvage Prospect for ‘Junk’ DNA*, BBC NEWS, Apr. 26, 2006, <http://news.bbc.co.uk/2/hi/science/nature/4940654.stm>; *Scientists Explore Function of ‘Junk DNA’*, SCI. DAILY, Nov. 21, 2006, <http://www.sciencedaily.com/releases/2006/11/061113180029.htm>.

²⁶¹ Simon Cole, *Is the “Junk” DNA Designation Bunk?*, 102 NW. U. L. REV. COLLOQUY 54 (2007), <http://colloquy.law.northwestern.edu/main/2007/09/is-the-junk-dna.html>.

²⁶² *Id.* at 56-57.

²⁶³ See notes and accompanying text *supra* note 32 and 33. The entirety of a person’s DNA sequence is not uploaded into CODIS. Instead, only those thirteen specific STR sequences chosen by the FBI for identification purposes are uploaded into CODIS.

have proven useful in tracking genetic diseases.²⁶⁴ As Judge Gould in the Ninth Circuit noted, “the threat of a loss of privacy is real, even if we cannot yet discern the full scope of the problem.”²⁶⁵ The privacy interests implicated in STR DNA sequences are hotly debated,²⁶⁶ and these interests deserve at the very least a closer exploration in the Seventh Circuit.

In addition, the DNA sequences in CODIS can also yield information about people in Judge Easterbrook’s “fourth category”—those who have never been convicted or arrested of a crime. CODIS yields the best matches, not only “identical” matches, and a forensic expert takes those matches and draws conclusions based upon personal examination. In at least one instance, a near-match in CODIS led the investigators to suspect not the individual whose sample was included in the system, but a close relative—in that case, a brother.²⁶⁷ The potential for CODIS to yield genetic information about those never convicted of a crime raises unique privacy concerns—many of the courts, and indeed the Seventh Circuit, have recognized that a free citizen has a much greater expectation of privacy than one convicted of a crime, and free citizens generally cannot be subjected to searches

²⁶⁴ Cole, *supra* note 261, at 58-59 (citing David H. Kaye, *Science Fiction and Shed DNA*, 101 NW. U. L. REV. COLLOQUY 62 (2006), <http://www.law.northwestern.edu/lawreview/colloquy/2006/7/>; Colin Kimpton et al., *Report on the Second EDNAP Collaborative STR Exercise*, 71 FORENSIC SCI. INT’L 137 (1995)).

²⁶⁵ United States v. Kincade, 379 F.3d 813, 842 (9th Cir. 2004) (Gould, J., concurring).

²⁶⁶ See, e.g., TANIA SIMONCELLI & SHELDON KRIMSKY, A NEW ERA OF DNA COLLECTIONS: AT WHAT COST TO CIVIL LIBERTIES? (2007), <http://www.acslaw.org/node/5338>; Colloquy, *Privacy Risks of DNA Archiving*, 101 NW. U. L. REV. COLLOQUY 62 (2006), <http://www.law.northwestern.edu/lawreview/colloquy/prior-colloquies/junk-dna.html>; Symposium, *DNA Fingerprinting and Civil Liberties*, 34 J.L. & MED. ETHICS 147 (2006).

²⁶⁷ Heather Bennett, Comment, *Taking the “Banks” Out of Banks v. Gonzales: DNA Databanks and the Fourth Amendment Prohibition on Unreasonable Searches and Seizures*, 15 AM. U. J. GENDER SOC. POL’Y & L. 547, 573-74 (2007) (citing *Flowers v. Indiana*, 654 N.E.2d 1124, 1124 (Ind. 1995)).

without a warrant or probable cause.²⁶⁸ DNA collections clearly raise issues that are not properly addressed when a court focuses only on the initial DNA collection.

Many commentators have identified additional concerns in the context of DNA searches. Some have expressed concern over the fact that once a person has served the entirety of his sentence, the DNA profile in CODIS nevertheless remains active.²⁶⁹ This indefinite retention belies the fact that expectations of privacy vary over the course of one's sentence (from incarceration, to supervised release, to probation).²⁷⁰ Further, DNA collection from all offenders, regardless of offense, "does not necessarily serve the government's interests equally."²⁷¹ In *Hook*, for example, the supervised releasee was a white collar criminal: the chance of his DNA ever being left at a future crime scene is slim to none. Persuasive arguments also have been made that white collar criminals do not re-offend at the same rates,²⁷² yet the Seventh Circuit failed to account for this possibility in looking at the government's interests. And as alluded to previously, it may well be necessary to draw different conclusions when balancing the expectations of privacy for supervised releasees as compared to probationers, much as the Second Circuit did in *Amerson*. The Supreme Court's *Samson* holding indicates that the expectations of privacy may vary substantially between these two classes.

²⁶⁸ See *United States v. Hook*, 471 F.3d 766, 772-73 (7th Cir. 2006) (citing *Knights* and *Griffin* for the proposition that "[t]hose under supervised release do not enjoy the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special restrictions.").

²⁶⁹ *Kincade*, 379 F.3d at 841-42 (Gould, J., concurring).

²⁷⁰ Eric May, *Who's Next? The Continued Expansion of DNA Databases in United States v. Kincade*, 43 CRIM. L. BULL. 113 (2007).

²⁷¹ *Id.*

²⁷² Ellen S. Podgor, *Throwing Away the Key*, 116 YALE L.J. POCKET PART 279 (2007), <http://thepocketpart.org/2007/02/21/podgor.html>. *But see* Andrew Weissmann & Joshua A. Block, *White-Collar Defendants and White-Collar Crimes*, 116 YALE L.J. POCKET PART 286 (2007), http://thepocketpart.org/2007/02/21/weissmann_block.html.

In light of the unique considerations that go hand-in-hand with DNA, the Seventh Circuit needs to engage in a detailed, fresh look at DNA collection. If the court embraces the special concerns inherent to DNA information, it is bound to find that the privacy interests in DNA searches look quite different than those the court considered (or failed to consider) in *Hook*.

CONCLUSION

The Seventh Circuit erred in using the special needs approach to evaluate the constitutionality of a supervised releasee's DNA collection. At the time the court decided *Green*, the state of the Supreme Court's suspicionless search jurisprudence was decidedly confusing, and the *Green* court can be forgiven for applying the special needs test. After *Barnett*, *Hagenow*, and *Samson*, however, both the Seventh Circuit and the Supreme Court had effectively closed the door on the special needs framework as a method for analyzing searches like the one in *Hook*. The Seventh Circuit should account for those cases by adopting the reasonableness approach when next it analyzes DNA collection. Further, where a supervised releasee consents to a suspicionless search, as will be the case for every qualifying federal felon subject to the federal DNA collection statutes, *Samson* dictates that the consent operates to diminish the releasee's expectation of privacy so much that a suspicionless search becomes inherently reasonable. Under the Second Circuit's *Amerson* holding, the Seventh Circuit may still be able to apply the special needs test to DNA collection from probationers. Regardless of the test used, however, the balancing of interests that a court must engage in remains relatively unchanged—and if the interests are properly weighed, the result is that DNA collection from either a supervised releasee or a probationer may very well be unconstitutional.