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Opinion No. 07-45

Constitutionality of Proposed Legislation Requiring a Person Arrested For a Violent Felony to Provide a Biological Specimen For DNA Analysis

QUESTION

In April 2006 this office opined that proposed legislation allowing the collection and analysis of DNA from persons arrested, but not yet convicted of violent felonies was constitutionally suspect under Article I, § 7 of the Tennessee Constitution, which prohibits unreasonable searches and seizures. *See* Op. Tenn. Att'y Gen. 06-070 (April 17, 2006) (copy attached). In light of a recent decision by the Virginia Court of Appeals upholding a similar law in that state, and considering the arguments supporting such legislation in recent scholarly journals, is Senate Bill 1196/House Bill 867, requiring DNA collection and testing as set forth above, constitutionally defensible?

OPINION

It remains the opinion of this office that the legislation is constitutionally suspect.

ANALYSIS

In Op. Tenn. Att'y Gen. 06-070 (April 17, 2006), cited above, it was noted that the courts have determined that the drawing of blood constitutes a search under the Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution. *See Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 616, 109 S.Ct. 1402, 1412-1413, 103 L.Ed.2d 639 (1989) (stating that the collection of a person's blood for alcohol content analysis "must be deemed a Fourth Amendment search"); *State v. Blackwood*, 713 S.W.2d 677, 679 (Tenn. Crim. App. 1986) (stating that "[i]ntrusions into the human body and the withdrawal of blood for the testing of its alcohol content has been held to be subject to the constraints of the Fourth Amendment"). Similarly, the United States Supreme Court has found that a search of a suspect's fingernails constitutes "the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny." *Cupp v. Murphy*, 412 US. 291, 295, 93 S.Ct. 2000, 2003, 36 L.Ed.2d 900 (1973) (citing *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 1882, 20 L.Ed.2d 889 (1968). Also, swabs or scrapings of cells from inside a person's mouth for DNA analysis have been deemed

searches under the Fourth Amendment. *See, e.g., Banks v. Gonzales*, 415 F.Supp.2d 1248 (N.D. Okla. Feb. 14, 2006); *Nicholas v. Goord*, 430 F.3d 652, 656 n.5 (2d Cir. N.Y. Nov. 28, 2005).

In August 2006, our Supreme Court released its opinion in *State v.Scarborough*, 201 S.W.3d 607 (Tenn. 2006), holding that the collection of blood from a convicted and incarcerated defendant for DNA analysis and identification purposes pursuant to Tennessee's DNA collection statute was a search for Fourth Amendment purposes. *Id*. at 616. However, the Court determined that "searches of incarcerated felons undertaken pursuant to Tennessee's DNA collection statute pass constitutional muster when they are reasonable under all of the circumstances." *Id*. at 618. After a careful analysis, the Court summarized:

> [O]ur legislature has put into place a method of more accurately identifying those who commit and are convicted of felonies, thereby enabling law enforcement personnel to more quickly and accurately exonerate the innocent and prosecute the perpetrators. The gravity of the public concern served by the instant searches is therefore significant. Given the heightened accuracy of DNA analysis compared to more traditional methods of identification, such as fingerprints and eyewitness testimony, the degree to which the DNA collection statute advances that interest is also significant. Additionally, Tennessee's DNA collection statute clearly and unambiguously specifies who is subject to the searches: the risk of arbitrary or capricious searches is therefore eliminated. Further, no measure of individualized suspicion is necessary because the searches are not aimed at recovering incriminating evidence of contemporaneous criminal conduct. Finally, we have determined that the convicted felons subject to search pursuant to the statute have a significantly reduced expectation of privacy.

Id. at 621. Applying the totality of the circumstances test, the Court concluded that the drawing of blood and the subsequent DNA analysis, conducted pursuant to the Tennessee DNA collection statute, was reasonable and did not violate that defendant's rights under the Fourth Amendment or the Tennessee Constitution.

Although the Tennessee Supreme Court in *Scarborough* justified the statutorily mandated searches of convicted prisoners, the first justification for such searches was a finding, beyond a reasonable doubt, that those persons had committed criminal offenses. The legislation under consideration broadens the range of persons required to provide a DNA sample to include any person arrested for the commission of a violent felony, based on a probable cause determination by a magistrate or grand jury that probable cause exists for the arrest.

In this office's earlier opinion, it was noted that, when a person is arrested and detained upon probable cause to believe he has committed a crime, he loses the right of privacy from routine searches of the cavities of his body and his jail cell during his detention. *See Bell v. Wolfish*, 441 U.S. 520, 559-560, 99 S.Ct. 1861, 1884-1885, 60 L.Ed.2d 447 (1979) (balancing the interest in maintaining security in a detention facility against the privacy interests of the detained person). However, it was also recognized that several courts have determined that a search warrant is

required to draw blood from an arrestee. *See, e.g., Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966) ("Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned"); *Graves v. Beto*, 301 F.Supp. 264 (E.D. Tex. 1969), *aff'd*, 424 F.2d 524 (5th Cir. 1970) (consent of an arrestee ineffective where police intimated that blood was taken to determine degree of drunkenness rather than for comparison to blood found at rape scene); *State v. Jones*, 49 P.3d 273, 281 (Ariz. 2002) (the drawing of blood is a bodily invasion and therefore a search under the Fourth Amendment requiring probable cause); *People v. Diaz*, 53 P.3d 1171, 1174 (Colo. 2002) (the Fourth Amendment forbids the unreasonable search and seizure of nontestimonial identification evidence taken from a defendant's body); *State v. Thomas*, 407 S.E.2d 141, 438 (N.C. 1991) (unless error was found to be harmless, arrestee defendant was entitled to relief where police took blood pursuant to a nontestimonial identification order when a search warrant was required); *State v. Carter*, 370 S.E.2d 553, 556 (N.C. 1988) (a search warrant must be issued before a blood sample can be obtained, unless probable cause and exigent circumstances exist that would justify a warrantless search); *Ferguson v. State*, 573 S.W.2d 516, 520 (Tex. Crim. App. 1978) ("if a defendant is in custody, either a warrant must be obtained or the defendant must consent to the taking of his blood"); *State v. Easthope*, 668 P.2d 528, 531-532 (Utah 1983) (taking of arrestee defendant's blood without a search warrant was justified where a magistrate conducted a hearing on a motion to compel discovery of body fluids, counsel were notified and defendant participated in the hearing, thus meeting the intent of the warrant requirement). Clearly, the courts have deemed the privacy rights of arrestees to be greater than the privacy rights of convicted prisoners.

In spite of the greater privacy rights of arrestees, as opposed to convicted prisoners, several states have enacted legislation by which DNA samples are required to be taken from such arrestees. As of the drafting of this opinion, only two courts have considered constitutional challenges to such statutes. In *United States v. Purdy*, 2005 WL 3465721 (D. Neb. Dec. 19, 2005), a defendant challenged the constitutionality of a Nebraska law, known as the "Nebraska Identifying Physical Characteristics Act," which allowed law enforcement officers to obtain physical evidence to aid in the identification of criminal perpetrators. The statute specified such physical evidence as "fingerprints, palm prints, footprints, measurements, handwriting exemplars, lineups, hand printing, voice samples, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance, and photographs of an individual." Neb. Rev. Stat. § 29-3301. Like Senate Bill 1196/ House Bill 867, the Nebraska statute allowed the seizure of a biological specimen where a person had been lawfully arrested without any requirement for a legal proceeding to authorize the seizure. Neb. Rev. Stat. § 29-3304. The Nebraska legislature clearly intended to justify the taking of blood for DNA analysis in the same manner as other identification procedures, such as fingerprinting, visual identification, and other less intrusive manners of identification. However, the Court in *Purdy* distinguished the identifying characteristics of a person's DNA from other identifying characteristics which are readily ascertainable by the naked eye. The Court explained:

> The Fourth Amendment . . . does not protect characteristics that a person knowingly exposes to the public. [*United States v. Dionisio*, 410 U.S. 1, 14, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973)] (involving the physical characteristic of a person's voice); *Hayes v. Florida*, 470 U.S. 811, 817, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) (stating

> that "the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch."); *United States v. Mara*, 410 U.S. 19, 21 (1973 (involving handwriting exemplars, noting "there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice"); *but see Davis v. Mississippi*, 394 U.S. 721, 727, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) (holding that warrantless fingerprinting in absence of either consent or probable cause to arrest violates the Fourth Amendment, despite the finding that "fingerprinting, because it involves neither repeated harassment nor any of the probing into private life and thoughts that often marks interrogation and search, represents a much less serious intrusion upon personal security than other types of searches and detentions").
>
> However, DNA does not fit in the category of characteristics exposed to the public. The collection and chemical analysis of blood and body fluids "can reveal a host of medical facts" and "intrudes upon expectations of privacy that society has long recognized as reasonable." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (holding that breathalyzer exam for chemical analysis constitutes a search). . . . The court finds that compulsory extraction of cheek cells for DNA analysis, though marginally less intrusive than extraction of blood or collection of urine, constitutes a search for Fourth Amendment purposes.

Purdy at *3-4.

The Court in *Purdy* recognized that courts across the country have upheld laws requiring convicted prisoners to provide biological specimens for DNA analysis, but distinguished the status of convicted prisoners from that of mere arrestees:

> Arrestees and persons in custody may not qualify as the "general public," but neither do they have the same status as convicted felons. *See Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995) (noting that convicted felons "do not have the same expectation of privacy in their identifying genetic material that free persons and *mere arrestees* have: once a person is convicted of certain felonies "his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling"). There is an obvious and significant distinction between the DNA profiling of law-abiding citizens. . . .

Purdy at *6.

The Court in *Purdy* found the Nebraska statute to be unconstitutional and reasoned:

> The statute, as written, would authorize wholesale warrantless DNA profiling of persons who have not been convicted of a crime without any narrowing limitations or safeguards whatsoever. It would authorize DNA searches of all those in custody, even for misdemeanor or traffic violations, and of all those arrested for any felony, without the showing of any nexus between the alleged crime and the information that a DNA test would reveal. A person arrested, but not convicted, for a certain crime cannot be forced to provide DNA "identification" evidence without a showing that such evidence would identify him as the perpetrator of the crime. The probable cause that supports an arrest is not necessarily probable cause for a DNA search. Further, there is no showing, in the case of DNA evidence, that exigent circumstances would justify a warrantless search at issue. . . . The information revealed in a DNA analysis does not dissipate over time, thus, its acquisition is not time sensitive.

Id. at *7.

Currently, the only other case where a statute requiring the collection of biological specimens for DNA analysis from persons arrested for the suspected commission of crimes was directly addressed is *Anderson v. Commonwealth*, 634 S.E.2d 372 (Va. Ct. App. 2006). There, the Virginia Court of Appeals upheld the law, finding that the collection of a DNA sample "involved a permissible application of law enforcement's authority to search an arrestee incident to an arrest." *Id*. at 375. The Virginia court failed to recognize any distinction between the taking of fingerprints and the taking of blood for DNA analysis. The court simply treated the extraction of DNA in the same fashion as a piece of physical evidence which might be found on a defendant during any search incident to arrest:

> A search of an arrestee requires no independent legal justification apart from the arrest itself. "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 477, 38 L.Ed.2d 427 (1973).[1] "It is the fact of the lawful arrest which establishes the authority to search." *Id*. Upon a "lawful custodial arrest, a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id*. "With the person's loss of liberty upon arrest comes the loss of at least some, if not

[1]In *Robinson*, after arresting the defendant for driving on a revoked license, police searched the defendant and found a crumpled cigarette package containing fourteen heroin capsules in the left breast pocket of the defendant's coat. *Robinson* at 414 U.S. 222-223.

> all, rights to personal privacy otherwise protected by the Fourth Amendment." *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992).[2]
>
> That is particularly true when the search merely seeks to identify the arrestee. When a person is "arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it." *Id*.; *see also Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963) (recognizing as "elementary" the proposition that arrestees may be fingerprinted and photographed "as part of routine identification processes"). The state's interest in the arrestee's identity, moreover, "is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes." *Jones*, 962 F.2d at 306.

Anderson, 634 S.E.2d at 375.

Although *Anderson* specifically addressed the issue of DNA collection from persons arrested but not convicted of criminal offenses, the court seemingly ignored distinctions between the rights of arrestees and the rights of convicted prisoners. Further, the court did not distinguish between the relatively superficial search of a person where contraband or weapons might be found and the search of the person's genetic make up, arguably more intrusive and unrelated to the purpose of a search incident to arrest, which is to facilitate the removal of weapons which might pose a threat to a police officer's safety and to seize evidence which the arrestee might otherwise destroy or discard. *See Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969).

Reference has been made to two scholarly articles addressing the constitutionality of laws that would require the collection of biological specimens for DNA analysis and entry into a DNA databank. While the arguments presented in such articles may be persuasive, they carry no precedential value before the courts. Nevertheless, the articles mentioned are discussed below.

In a student note entitled *Personal Does Not Always Equal "Private": The Constitutionality of Requiring DNA Samples From Convicted Felons and Arrestees*, 9 Wm. & Mary Bill Rts. J. 645 (April 2001), Martha L. Lawson examined court decisions regarding DNA databases and the mandatory testing of persons arrested for certain offenses. However, Ms. Lawson conceded that "[t]o date, all of the case law on DNA databases has involved people already convicted of a crime." *Id*. at 656. Ms. Lawson discussed the value of DNA "fingerprints" for identifying persons and connecting them with unsolved crimes where biological material was left at the scene. She concluded:

> A DNA fingerprint is merely a physical identifier, no more personal than the color of a person's eyes or their height. People shed cells every day in every thing they do.

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[2]In *Jones*, the defendant was a convicted prisoner who challenged the taking of his DNA under Virginia's DNA collection law. There, the court noted that "persons lawfully arrested on probable cause and detained lose a right of privacy from routine searches of the cavities of their bodies and their jail cells." *Jones* at 962 F.2d 306.

> While those cells are unique to the individual they are no more "private" than the fingerprints left on every thing a person touches.

Id. at 671.

While Ms. Lawson's remarks offer a reasonable argument that DNA in itself is not evidence of wrongdoing, her conclusion hardly addresses the central Fourth Amendment concerns aroused by the taking of biological material from persons arrested, yet presumed innocent of any crime, for the primary purpose of identifying criminal offenders.

In a symposium article published in the Journal of Law, Medicine and Ethics, Tracy Maclin, a professor of constitutional law and criminal procedure at Boston University School of Law, addresses the question, *"Is obtaining an arrestee's DNA a valid special needs search under the Fourth Amendment? What should (and will) the Supreme Court do?"* 34 J.L. Med. & Ethics 165 (Summer 2006). In that article, Professor Maclin examines the legislation enacted in Virginia and Louisiana that requires collection and analysis of DNA from persons arrested for certain offenses. He concludes that, based on the current state of the law, if presented with the question, the United States Supreme Court would probably find that the taking and analyzing of DNA samples taken from arrestees constitutes a search under the Fourth Amendment. *Id*. at 168-170. He then discusses whether such warrantless searches of arrestees would be justified due to a special need of the government to collect the DNA data. "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 36, 121 S.Ct. 447 (2000). There are only limited circumstances in which individualized suspicion is not required. However, certain suspicionless searches are constitutional where the purpose of the policy or program is designed to serve "special needs, beyond the normal need for law enforcement." *Id.* After an exhaustive analysis of the law related to the "special needs" justification for the taking of DNA from arrestees, Professor Maclin recognizes that the searches are effected with the primary goal of generating evidence for law enforcement purposes. He concludes:

> Under the existing Fourth Amendment doctrine of the Supreme Court, there is little doubt that the intrusions permitted by these statutes constitute searches. And under the Court's special needs cases, a very strong argument can be made, based on the well-known purposes of these searches, that these procedures cannot be upheld as special needs searches unrelated to law enforcement interests. Thus, if the Court were to address the constitutional validity of either or both of these statutes, an objective analysis of the statutes themselves, when combined with an objective reading of the Court's precedents, indicates that the statutes should be declared unconstitutional.

34 J.L. Med. & Ethics at 181.

Undeniably, the collection of DNA and the development of a database whereby unsolved crimes may be revitalized promotes the interests of justice and security. However, based on the current state of the law, the constitutionality of requiring one accused and arrested, yet not convicted

of a crime, remains questionable. Accordingly, it is the opinion of this office that Senate Bill 1196/House Bill 867 is constitutionally suspect.

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