

PRIVACY AND THE GEORGIA CONSTITUTION: PROTECTING INFORMATION IN THE DNA DATA BANK

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I. INTRODUCTION

On May 6, 2008, Georgia Governor Sonny Perdue signed Act 451 into law.¹ That law expands the ability of law enforcement personnel in Georgia to gain access to DNA information contained in the state's DNA data bank.² The enactment of this new law and the implementation of it raise privacy concerns under the United States and Georgia Constitutions.³

While Act 451 is not facially unconstitutional, the implementation of it will raise questions touching on the

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1. 2008 GA. LAWS, Act 451, § 1 (codified as amended at O.C.G.A. §24-4-63(b) (2008)).

2. *Id.*

3. *Id.*

privacy interests of all Georgians. In Georgia, the right to privacy is fundamental and court decisions that have given meaning to that right provide clear guidance. When addressing questions related to the collection and analysis of DNA, the fundamental right to privacy can be best protected if Georgia's courts continue to apply strict scrutiny when considering issues under the new law.

Part I of this article reviews the recently enacted law and the changes it makes to the existing Georgia law governing collection and analysis of DNA samples. Part II explains the distinction between DNA samples and DNA profiles as well as the difference between the collection of fingerprints and the collection of DNA samples. Part III discusses the implications of the growing use of DNA on privacy concerns by exploring issues that will inevitably be confronted by Georgia Courts as they implement this new law. Part IV summarizes the case law regarding the constitutionality of DNA collection statutes. Part V places this new law in the context of the nationwide debate over the constitutionality of collecting DNA from arrestees and other critical public policy issues related to the level of privacy protection that will be accorded DNA information.

II. LEGISLATIVE HISTORY OF THE RECENTLY ENACTED GEORGIA LAW GOVERNING DNA COLLECTION AND ANALYSIS

Senate Bill 430, which ultimately became Act 451, was introduced in the Georgia Senate on February 21, 2008.⁴ The bill proposed an amendment to the statute governing the dissemination of DNA information in the Georgia DNA databank by adding language to make it clear that law enforcement officials could request a comparison of a DNA sample collected from a suspect to DNA profiles already in the data bank.⁵ While the bill was modified during the legislative process, the substance of it remained the same.

The final version of the bill, which was signed by Governor Perdue, added this subparagraph to Section 24-4-63 of the Official Code of Georgia Annotated (hereinafter O.C.G.A.) :

4. The legislative history of Senate Bill 430 of the 2007-08 session of the Georgia General Assembly can be found at: http://www.legis.ga.gov/legis/2007_08/sum/sb430.htm

5. O.C.G.A. § 24-4-63.

(b) Upon request from a prosecutor or law enforcement agency, the bureau may compare a DNA profile from an analysis of a sample from a suspect in a criminal investigation where the sample was obtained through a search warrant, consent of the suspect, court order, or other lawful means to DNA profiles lawfully collected and maintained by the bureau. The bureau shall not add a DNA profile of any such suspect to any DNA data bank except upon conviction as provided in this article.⁶

Georgia, like every other state and the federal government, collects DNA samples from persons convicted of specified crimes. Those samples are analyzed to create a genetic profile, and the DNA profile created during that analysis is placed in the DNA data bank. O.C.G.A. § 24-4-63 governs the dissemination of information in the Georgia DNA data bank.⁷ That section authorizes access to the data bank by federal, state and local law enforcement officers when they are engaged in an official investigation of any criminal offense.⁸

Georgia enacted its first DNA collection law in 1992.⁹ At that time, collection of DNA was limited to people convicted of serious criminal offenses.¹⁰ In 2000, the Georgia General Assembly amended O.C.G.A. § 24-4-60 to expand the class of individuals from whom DNA must be collected.¹¹ As a result of the 2000 amendment, DNA samples were required from all persons convicted of a felony and incarcerated on or after July 1, 2000 as well as all felons incarcerated as of that date.¹²

Profiles generated through analysis of these samples are stored and maintained by the Georgia Bureau of Investigation in a DNA data bank.¹³

6. *Id.*

7. *Id.*

8. *Id.*

9. 1992 GA. LAWS 2034.

10. O.C.G.A. § 24-4-60 (1992).

11. O.C.G.A. § 24-4-60 (2000).

12. *Id.*

13. O.C.G.A. § 24-4-60 reads:

Requirement for DNA analysis of blood of persons convicted of certain sex offenses or convicted of a felony and incarcerated in a state correctional facility; storage of profile in data bank

(a) As used in subsection (b) of this Code section, the term “state correctional facility” means a penal institution under the jurisdiction of the

Department of Corrections, including inmate work camps and inmate boot camps; provided, however, that such term shall not include a probation detention center, probation diversion center, or probation boot camp under the jurisdiction of the Department of Corrections.

(b) Any person convicted of [rape, sodomy or aggravated sodomy, statutory rape, child molestation or aggravated child molestation, enticing a child for indecent purposes, sexual assault against persons in custody, in a hospital or other institution, bestiality, necrophilia and incest] shall have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. In addition, on and after July 1, 2000, any person convicted of a felony and incarcerated in a state correctional facility shall at the time of entering the prison system have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. The provisions and requirements of this Code section shall also apply to any person who has been convicted of a felony prior to July 1, 2000, and who currently is incarcerated in a state correctional facility in this state for such offense. The provisions and requirements of this Code section shall also apply to any person who has been convicted of a felony in this state on or after July 1, 2000, and who is incarcerated in a private correctional facility in this state for such offense pursuant to a contract with the Department of Corrections upon entering the facility, and for any person convicted of a felony prior to July 1, 2000, and who is incarcerated in a private correctional facility in this state pursuant to contract with the Department of Corrections. The analysis shall be performed by the Division of Forensic Sciences of the Georgia Bureau of Investigation. The division shall be authorized to contract with individuals or organizations for services to perform such analysis. The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the bureau in a DNA data bank and shall be made available only as provided in Code Section 24-4-63.

(c) (1) On and after July 1, 2007, any person who is placed on probation shall have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person if such person is convicted of a felony violation of any of the following:

[crimes against persons; rape; sodomy or aggravated sodomy; statutory rape; child molestation or aggravated child molestation; enticing a child for indecent purposes; sexual assault against persons in custody, sexual assault against a person detained or a patient in a hospital or other institution, or sexual assault by a practitioner of psychotherapy against a patient; bestiality; necrophilia; incest; burglary; robbery; armed robbery; impersonating an officer; obstruction of an officer; dangerous instrumentalities and practices; and controlled substances.].

(2) The analysis shall be performed by the Division of Forensic Sciences of

Act 451 makes it clear that Georgia law enforcement officials may compare a DNA profile generated from a DNA sample obtained through a search warrant, consent, or other lawful means to profiles contained in the DNA data bank.¹⁴ It does not expand the class of persons from whom a DNA sample can be collected.¹⁵ It does not permit the collection of a DNA sample from someone just because he or she is arrested.¹⁶ A DNA profile of a suspect can be added to the DNA data bank only if there has been an actual conviction.¹⁷

In implementing this new law, Georgia's courts and lawyers will confront a pair of critical issues. The first is determining whether a suspect has actually consented to the collection of his or her DNA. The legislation does not indicate the manner in which consent can be given or what a suspect must be told prior to giving consent. The courts will surely have to address those questions. Second, the legislation leaves unanswered the question of whether the surreptitious collection of DNA samples from cigarette butts, coffee cups or postage stamps is a lawful means of obtaining a DNA sample. The courts will have to determine if DNA samples collected without the knowledge and consent of a suspect can be analyzed under this new law. Both of these concerns raise significant questions affecting the privacy interests of Georgians. Those issues, as well as the privacy questions raised by proposals to collect DNA samples from arrestees, will be discussed later in this article.

III. DNA SAMPLES DISTINGUISHED FROM DNA PROFILES AND DIFFERENTIATED FROM FINGERPRINTS

In order to properly assess the privacy issues raised by the

the Georgia Bureau of Investigation. The division shall be authorized to contract with individuals or organizations for services to perform such analysis. The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the bureau in a DNA data bank and shall be made available only as provided in Code Section 24-4-63. . . . The Department of Corrections shall be responsible for collecting such sample.

14. O.C.G.A. § 24-4-63.

15. *Id.*

16. *Id.*

17. *Id.*

collection and use of DNA evidence, it is important to understand the distinction between a DNA sample and the profile that is generated from an analysis of that sample. It is even more important to understand how taking a DNA sample and creating a profile from it reveals information that is quite different from the information obtained through fingerprint analysis.

A DNA sample is the actual biological material taken from an individual.¹⁸ The most common means for obtaining DNA samples are through the use of buccal swabs.¹⁹ DNA samples can also be obtained through blood extractions.²⁰ DNA can even be found in semen, skin cells, tissue, organs, teeth, hair, saliva, and fingernails.²¹ DNA samples have been collected from discarded cigarette butts, used coffee cups, soda straws and even licked envelopes.²² Courts have been reluctant to suppress DNA evidence obtained unknowingly from individuals through surreptitious or deceitful police tactics.²³ After a DNA sample is collected it is submitted for analysis by a crime laboratory.²⁴ A DNA profile (in some states the term "DNA record" is used) is the information gathered from the analysis of the DNA sample.²⁵ The DNA profile or record becomes part of the state DNA databank.²⁶

Although Georgia does not, by statute, define the terms DNA

18. See, NAT'L INSTITUTE OF JUSTICE, U.S. DEPARTMENT DEP'T OF JUSTICE, WHAT EVERY LAW ENFORCEMENT OFFICER SHOULD KNOW ABOUT DNA EVIDENCE (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/bc000614.pdf>.

19. *Id.*

20. *Id.*

21. *Id.*

22. See Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U. L. REV. 857, 857-62 (2006).

23. See, e.g., *State v. Athan*, 158 P.3d 27, 35 (Wa. 2007) (Seattle police wrote a letter that purported to be from a law firm inviting defendant to join a class action lawsuit. The letter was mailed to the defendant and included an envelope for the defendant to use to send in his response. The defendant licked the envelope and returned it. The police submitted the envelope for DNA testing and the results were used to prosecute the defendant for a twenty year-old murder).

24. O.C.G.A. § 24-4-60(b).

25. *Id.*

26. O.C.G.A. § 24-4-63(a).

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sample or DNA profile (or DNA record), the language of O.C.G.A. § 24-4-60 is consistent with the distinctions described above.²⁷

[A]ny person convicted of a felony and incarcerated in a state correctional facility shall at the time of entering the prison system have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. . . The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the bureau in a DNA data bank.²⁸

Other states have enacted definitions that make clear the distinction between a DNA sample and a DNA record or DNA profile.²⁹ Those definitions consistently distinguish between biological material and the identification information obtained through crime laboratory analysis.³⁰

Another crucial distinction is that between traditional fingerprints and a DNA sample. Unfortunately, too many commentators and policy makers appear not to appreciate the significant difference between the two, and they have inaccurately called DNA the fingerprint of the 21st century.³¹ The link between fingerprinting and DNA is of course the ability to establish the identity of a person. However, a fingerprint is limited to establishing identity,³² whereas a DNA

27. O.C.G.A. § 24-4-60(b).

28. *Id.*

29. *See e.g.*, ALA. CODE § 36-18-21 (1975); IDAHO CODE ANN § 19-5502; IOWA CODE ANN. § 81.1; MD. CODE ANN., PUB. SAFETY § 2-501, MASS. GEN. LAWS. ANN. ch. 22E § 1; N.J. STAT. ANN. § 53:1-20.19; and S. D. CODIFIED LAWS § 23-5A-1.

30. *Id.*

31. *See, e.g.*, Yvonne Wenger, *S.C. House overrides DNA veto*, POST AND COURIER, Oct. 22, 2008, at B2 (quoting South Carolina House Speaker Bobby Harrell “DNA is the fingerprint of the 21st century”); Richard Willig, *White House Seeks to Expand DNA Database*, USA TODAY, Apr. 16, 2003, at 13A (quoting assistant U.S. Attorney General Deborah Daniels “DNA is to the 21st century what fingerprinting was to the 20th”).

32. *See* Christopher H. Asplen, *From Crime Scene to Courtroom: Integrating DNA Technology into the Criminal Justice System*, 83 *Judicature* 144, 146 (1999), available at http://www.ornl.gov/sci/techresources/Human_Genome/publicat/judicature/r

sample has the potential to provide information about a person's genetic makeup, family relationships, and predisposition for certain diseases and medical conditions.³³ A DNA sample, and the tests that can be conducted using it, can reveal a range of private information that many reasonable people would consider, and want to keep, confidential.³⁴ Fingerprint analysis is not used to learn such personal information.³⁵

Some courts have discussed this distinction. Judge Gould, in his concurring opinion in *United States v. Kincade*, specifically noted this difference:³⁶

[U]nlike fingerprints, DNA stores and reveals massive amounts of personal, private data about that individual, and the advance of science promises to make stored DNA only more revealing in time. Like DNA, a fingerprint identifies a person, but unlike DNA, a fingerprint says nothing about the person's health, their propensity for particular disease, their race and gender characteristics, and perhaps even their propensity for certain conduct.³⁷

Judge Gould's articulation of the difference between fingerprints and DNA was not the first time a federal appellate judge noted this distinction. In his dissenting opinion in *Rise v. State of Oregon*, Judge Nelson noted that "DNA information is much more than merely an identifying marker."³⁸ He specifically criticized those who claim that DNA is just like fingerprinting when he disparaged "the glib *linguistic* ease with which various commentators categorize DNA genetic pattern analysis as a kind of genetic 'fingerprinting.'"³⁹ Judge Nelson also wrote: "DNA genetic pattern analysis catalogs uniquely private genetic facts about the individual that should be subject

ticle9.html.

33. *Id.*

34. *Id.*

35. *Id.*

36. *United States v. Kincade*, 379 F.3d 813, 842 (9th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 924 (2005).

37. *Kincade*, 379 F. 3d at 842 (Gould J. concurring).

38. *Rise v. Oregon*, 59 F.3d 1556, 1569 (9th Cir. 1995) (Nelson, J. dissenting) (*abrogated on other grounds* in *Vore v. United States Department of Justice*, 281 F. Supp. 2d 1129, 1134 (D. Ariz. 2003)).

39. *Rise*, 59 F.3d at 1569 (Nelson, J., dissenting) (emphasis in original).

to rigorous confidentiality requirements.”⁴⁰

Other recent appellate decisions have also intimated that, because the unique nature of DNA information is so different from a traditional fingerprint, there are privacy interests that must be considered when evaluating the collection of DNA from criminal offenders.⁴¹ In *United States v. Weikert*, the court found that the collection of a DNA sample from a convicted individual on supervised release did not violate the Fourth Amendment.⁴² The court, however, did note the defendant’s privacy was “implicated not only by the blood draw, but also by the creation of his DNA profile and the entry of the profile into a databank.”⁴³ That same court also stated DNA profiles possess unique characteristics that distinguish them from other kinds of records, such as fingerprints.⁴⁴ The court concluded that it would reserve judgment on the question of whether the DNA profile could be retained after the completion of supervised release, acknowledging that this question raised distinct privacy issues.⁴⁵

Although, the Second Circuit upheld New York’s law providing for collection of DNA from a convicted felon in *Nicholas v. Goord*, it recognized that the statute raised privacy concerns when an offender’s DNA sample was subjected to analysis and when the DNA information was maintained in a data bank.⁴⁶ Regarding the second event, the court wrote:

It is potentially a far greater intrusion than the initial extraction of DNA, since the state analyzes DNA for information and maintains DNA records indefinitely. It is this intrusion that has caused the greatest concern among those of our colleagues who would strike down DNA-indexing statutes as unconstitutional.⁴⁷

This court also found that fingerprinting and DNA profiling are

40. *Id.*

41. *See* *United States v. Weikert*, 504 F.3d 1 (1st Cir. 2007); *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005); *see also* *Patterson v. State*, 742 N.Ed.2d 4 (Ind. Ct. App. 2000).

42. *Weikert*, 504 F.3d at 18.

43. *Id.* at 12.

44. *Id.* at 16.

45. *Id.* at 17.

46. *Nicholas*, 430 F.3d at 670.

47. *Id.*

dissimilar for purposes of determining whether the Fourth Amendment is implicated.⁴⁸

Similarly, the Court of Appeals of Indiana rejected equating DNA analysis to traditional fingerprinting:

We recognize the growing privacy concerns surrounding the use and access to information retrieved from an individual's DNA by government entities and third parties. The view that DNA analysis is no different than traditional fingerprinting is becoming less palatable. DNA analysis provides unprecedented access into an individual's future physical and psychological health, the health of close relatives, and insight into paternity issues.⁴⁹

Law enforcement officials are beginning to engage in a process known as "familial searching" which relies on information taken from DNA samples rather than fingerprints.⁵⁰ Because of the genetic similarity of close relatives, law enforcement is collecting DNA from family members to track down a perpetrator whose DNA was found at the scene of a crime.⁵¹ This process involves looking for a "partial match" between crime scene evidence and DNA profiles.⁵² Close relatives of persons identified by those matches are contacted and asked to voluntarily provide a DNA sample for purposes of developing a DNA profile.⁵³ They are not asked to supply fingerprints.⁵⁴

48. *Id.* at 658.

49. *Patterson*, 742 N.E.2d at 10 .

50. See, Joel Rubin & Maura Dolan, *DNA Search Fails to Find Relatives of Unknown Serial Killer*, L. A. TIMES, Dec. 3, 2008, at B.1, available at <http://articles.latimes.com/2008/dec/03/local/me-serial3> (last visited Mar. 19, 2009); Maura Dolan & Jason Felch, *Using State DNA Databases for Family Matches*, LOS ANGELES TIMES, Nov. 28, 2008.

51. Ellen Nakashima, *From DNA of Family, a Tool to Make Arrests: Privacy Advocates Say the Emerging Practice Turns Relatives Into Genetic Informants*, WASHINGTON POST, Apr. 21, 2008, at A1(criticizing how familial searching leads to the inclusion of DNA profiles of innocent people in DNA data banks because their relation to a suspect); Jennifer Mnookin, *Devil in the DNA Database*, L.A. TIMES, Apr. 5, 2007, A-23 (exploring the constitutionality of familial searching and the privacy issues raised by it are beyond the scope of this article).

52. *Id.*

53. *Id.*

54. *Id.*

Scientific research is underway to determine whether information found in DNA samples can be used to predict physical, behavioral or medical conditions.⁵⁵ DNA samples, unlike fingerprints, are seen as a basis for scientific inquiry into whether there is a genetic basis for aggression, substance addiction, criminal tendencies and/or sexual orientation.⁵⁶ In addition to scientific developments, other legal developments further demonstrate why it is fundamentally unsound to equate the collection of DNA with the collection of fingerprints. In 2008 Congress passed, and President Bush signed into law, the Genetic Information Nondiscrimination Act of 2008.⁵⁷ This law was passed to prevent the misuse of genetic information.⁵⁸ It provides a framework for protecting information obtained through DNA testing.⁵⁹ In the Act itself, Congress stated that many states have a history of misusing genetic information when they passed “laws that provided for sterilization of persons having presumed genetic ‘defects’ such as mental retardation, mental disease, epilepsy, blindness and hearing loss among other conditions.”⁶⁰ There is no similar statutory protection when it comes to fingerprints.

The federal government is not the only jurisdiction that has acted to protect against the misuse of information contained in DNA; other protections are provided under various state laws. In 2008, the Illinois legislature passed legislation updating the Genetic Information Privacy Act of 1988.⁶¹ A majority of states have enacted laws that prohibit the use of genetic information by health insurers.⁶² Even Georgia has a law that specifically declares that genetic information is the property of the

55. Mark A. Rothstein & Meghan K. Talbott, *The Expanding Use of DNA in Law Enforcement: What Role for Privacy?*, 34 J.L. MED. & ETHICS 153, 158 (2006).

56. *Id.*

57. Genetic Information Nondiscrimination Act of 2008, 122 Stat. 881 (PUB. L. NO. 110-233) (2008) [hereinafter GINA].

58. *Id.* § 2.

59. *Id.*

60. *Id.*

61. 2008 Ill. Legis. Serv. 95-927.

62. See National Conference of State Legislatures, *Genetics and Life, Disability and Long-term Care Insurance*, <http://www.ncsl.org/programs/health/genetics/ndislife.htm> (last visited Mar. 12, 2009).

individuals.⁶³ Enacted in 1955 to protect individual privacy, O.C.G.A. §33-54-1(1), states, “Genetic information is the unique property of the individual tested.”⁶⁴ Several other states have similar provisions including Colorado, Florida, Louisiana, and Oregon.⁶⁵

Perhaps most significant is the fact that law enforcement itself treats fingerprints differently from DNA profiles. Over the last several years, there have been numerous “John Doe” warrants issued that describe the defendant by reference to his DNA profile only.⁶⁶ There is no evidence, however, that “John Doe” warrants have ever been issued on the basis of conventional fingerprints alone.⁶⁷

Asserting that collecting DNA is just like collecting fingerprints reflects a flawed understanding of the unique character of DNA and trivializes the privacy concerns. Without an accurate understanding and appreciation of the highly sensitive and personal information that DNA can and does reveal, it is impossible for policy makers to accurately weigh the privacy interests at stake for purposes of constitutional analysis.

IV. PRIVACY CONCERNS RAISED BY ACT 451

Pursuant to Act 451, a prosecutor or law enforcement agency may request the Georgia Bureau of Investigation compare the DNA profile by analyzing a sample obtained from a suspect with the consent of the suspect to the DNA profiles already in the Georgia DNA data bank.⁶⁸ The Act does not spell out what constitutes consent.⁶⁹ Thus, it is inevitable that questions will

63. O.C.G.A. § 33-54-1(1).

64. *Id.*

65. COLO. REV. STAT. ANN. § 10-3-1104.7(1); FLA. STAT. § 760.40(2)(2); L.A. REV. STAT. ANN. § 22:213.7(e); and OR. REV. STAT. § 192.537(10).

66. See Veronica Valdivieso, *DNA Warrants: A Panacea for Old, Cold Rape Cases?*, 90 GEO. L.J. 1009, 1010 (2002); Andrew C. Bernasconi, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants' Constitutional and Statutory Rights*, 50 AM. U.L. REV. 979, 999-1001 (2001).

67. See BERNASCONI, *supra* note 65, at 1014-16.

68. O.C.G.A. § 24-4-63(b).

69. *Id.*

arise regarding whether consent has been given.

Will consent be deemed valid if a suspect has not been given notice as to what will be done with the sample? What action by the suspect will be considered as proof of consent? Since the statute does not address the issue of destruction of the sample, must a suspect be advised as to how long the DNA sample will be stored? Should a suspect be able to ask for the sample to be destroyed if his or her DNA profile does not match any DNA profiles contained in the DNA data bank?

While there is relatively little law in this area to look to for guidance on these questions, cases concerning DNA dragnets or sweeps offer some insight into how courts might approach these questions. A DNA dragnet occurs when “all ‘likely suspects’ in a wide geographical area around a crime are asked to provide a DNA sample in order to exclude them as suspects.”⁷⁰ These kinds of sweeps have already raised questions about whether individuals have actually consented to providing DNA and whether refusing to voluntarily provide a DNA sample is an appropriate basis for being served with a search warrant and treated as a suspect.⁷¹ In some cases, individuals who have been cleared of the crime have had to go to court to have their DNA sample returned to them.⁷²

Georgia’s courts will inevitably be called upon to answer the questions posed above. In doing so, they should consider the privacy implications associated with the collection of DNA and the potential uses for information contained in those samples. Given the threat to personal privacy posed by the negligent or intentional disclosure of such information, courts should require a high level of informed and knowing consent from any individual who voluntarily provides a DNA sample. Such consent should be based on proof that the individual knows what the sample will be used for and what kinds of personal information could be disclosed as a result of providing the

70. Troy Duster, *Explaining Differential Trust of DNA Forensic Technology: Grounded Assessment or Inexplicable Paranoia?* 34 J.L. MED & ETHICS 293, 296 (2006).

71. Yuval Levin, *DNA Dragnets*, 8 THE NEW ATLANTIS 104 (2005), available at <http://www.thenewatlantis.com/publications/dna-dragnets>.

72. See *Shelton v. Ann Arbor Police Dep’t*, 568 N.W.2d 87 (Mich. 1997); Complaint filed in *Amato v. Okeefe*, available at http://www.aclum.org/legal/amato_v_okeefe/complaint.pdf.

sample.

The issue of consent also arises with respect to DNA collected from discarded cigarette butts, coffee cups or any other object on which DNA can be found. Georgia courts will have to determine whether DNA evidence collected in a surreptitious manner is deemed to be a lawful means for purposes of O.C.G.A. § 24-4-63. Should Georgia Courts permit law enforcement to use surreptitiously collected DNA, they will essentially be eviscerating the requirement that there be a search warrant, consent of the suspect or a court order. This would leave virtually every Georgian's DNA available for comparison under the statute.

Because privacy is a fundamental right under the Georgia Constitution, Georgia courts should apply strict scrutiny when considering the issues of consent and surreptitious collection of DNA material.⁷³ Such a level of scrutiny is consistent with the longstanding recognition of the right to privacy under the Georgia Constitution and recognition of privacy concerns in so many contexts by Georgia's courts. A deep appreciation of the importance of privacy to Georgia's citizens should guide the consideration of the questions raised in this part. The citizens of Georgia can have their privacy interests protected by the Georgia courts if those courts require informed and knowing consent for the collection and use of DNA samples provided voluntarily. Furthermore, the privacy rights of Georgians will be better protected if the Georgia courts do not condone the surreptitious collection of DNA as a lawful means of obtaining DNA.

V. CONSTITUTIONALITY OF DNA STATUTES

A. Constitutionality under the Fourth Amendment

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their

73. GA. CONST. art. I, § I, ¶ 13.

persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated.”⁷⁴ The United States Supreme Court has made it clear that the taking and analyzing of biological samples constitutes a search under the Fourth Amendment.⁷⁵ The United States Supreme Court has also made it clear in *Flippo v. West Virginia* that the Fourth Amendment bars warrantless searches by the police unless they fall “within one of the narrow and well-delineated exceptions to the warrant requirement.”⁷⁶

Thus, it is not surprising that lower courts have consistently found that the government’s forcible taking of DNA from an individual constitutes a search subject to the Fourth Amendment. In one of the first cases to consider this issue, the Fourth Circuit Court of Appeals denied a constitutional challenge to a Virginia law mandating the taking of DNA samples from convicted felons.⁷⁷ The court held that the bodily intrusion that results from the taking of the blood sample constituted a search within the scope of the Fourth Amendment.⁷⁸ The Ninth Circuit has found that a blood extraction for purposes of DNA testing is a search, although the court deemed the exaction to be minimally intrusive.⁷⁹ In two other recent federal appellate court decisions, the courts noted that the government even conceded that the extraction of blood

74. U.S. CONST. amend. IV.

75. *Vernonia Sch. Dist. 47J v. Action*, 515 U.S. 646, 652 (1995) (The Supreme Court upheld a high school policy of random urine analysis of athlete, holding that the urine analysis is a search within the Fourth Amendment. However because of the schools legitimate interest in protecting students and students reduced expectations of privacy the search was not unconstitutional); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 617 (1989) (The Supreme Court upheld policy mandating random blood and urine analysis of federal rail road employees reaffirming that blood and urine analysis is a search within Fourth Amendment); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (Supreme Court held that taking blood for analysis of person arrested for DUI is a search).

76. *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999).

77. *Jones v. Murray*, 962 F.2d 302, 313 (4th Cir. 1992) (prisoners challenged state statute mandating the taking of DNA samples from convicted felons); *See infra* Part VI.

78. *Id.*

79. *United States v. Kincade*, 379 F.3d 813, 813 (9th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 924 (2005).

or saliva to obtain a DNA sample constituted a search within the meaning of the Fourth Amendment.⁸⁰

Courts have upheld statutes that provide for the collection of DNA samples from convicted felons who are incarcerated or on probation or parole.⁸¹ In doing so, they have relied on the United States Supreme Court decision, *United States v. Knights*, which held that persons already under the supervision of the criminal justice system as a result of a conviction have reduced expectations of privacy,⁸² a position reaffirmed by the Supreme Court in the 2006 decision *Samson v. California*.⁸³ Because convicted felons have a reduced expectation of privacy, their interest in keeping their DNA information confidential is deemed to be outweighed by the state's interest in collecting DNA samples.⁸⁴ Courts have accepted the government's proffered interest in the proper functioning of the criminal justice system. The effective prevention of crime⁸⁵ and a prisoner's status as a convicted felon justify the collection of DNA samples from criminals.⁸⁶ Other appellate courts have

80. *United States v. Sczubelek*, 402 F.3d 175, 184-87 (3d Cir. 2005) *cert denied*, 548 U.S. 919 (2006); *Padgett v. Donald*, 401 F.3d 1273, 1282 (11th Cir. 2005).

81. *Jones*, 962 F.2d at 315; *Kincade*, 379 F.3d at 838.

82. *See United States v. Knights*, 534 U.S. 112, 119-20 (2001) (explaining how the court specifically addressed the reduced expectation of privacy that correlates with probation as necessitated by the functioning of the criminal justice system).

83. *Samson v. California*, 547 U.S. 843, 856 (2006).

84. *See United States v. Kreisel*, 508 F.3d 941 (9th Cir. 2007) (government revoked conditional release of convicted felon for refusing to submit a DNA sample. Supreme Court upheld DNA statute authorizing taking of DNA samples from supervised paroled felons); *Landry v. Att'y General*, 709 N.E. 2d 1085 (Mass. 1999) (prisoner challenged state DNA statute mandating the taking of DNA samples from convicted felons); *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 520 (1998) (same); *People v. Wealer*, 636 N.E. 2d 1129 (Ill. App. Ct. 1994) (same); *Jones*, 962 F. 2d at 308 (same).

85. *See Knights*, 354 U.S. at 119 (explaining how the Supreme Court places greater weight on the side of the government rather than the individual when weighing a probationer's expectation of privacy compared to the governments' interest in crime prevention).

86. *Id.*; *see also, Samson*, 547 U.S. at 853 (noting that the "[s]tate's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy

reached a similar result, but they have justified the warrantless collection of DNA samples from convicted persons on the grounds that the government has a “special need” for those samples beyond normal law enforcement purposes.⁸⁷

In *Padgett v. Donald*, the Eleventh Circuit Court of Appeals held that the Georgia statute requiring the collection of DNA samples from all convicted, incarcerated felons was constitutional.⁸⁸ The court analyzed that statute under the Fourth Amendment in the United States Constitution as well as under Article I, Section 1, Paragraph 13 of the Georgia Constitution:

Searches, seizures, and warrants. 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 warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized.⁸⁹

As the Eleventh Circuit did in *Padgett*,⁹⁰ courts routinely focus on the status of the person from whom DNA is to be collected in upholding DNA collection statutes.⁹¹ Convicted criminals have reduced expectations of privacy in their identity.⁹² It is the identity function of DNA collection to which the government’s recognized interests are tied. Therefore, courts have had little trouble dismissing convicted criminals’ challenges based on violations of the Fourth Amendment.⁹³

intrusions that would not otherwise be tolerated under the Fourth Amendment).

87. *Green v. Berge*, 354 F.3d 675, 677 (7th Cir. 2004); *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1997); *State v. Olivas*, 856 P.2d 1076, 1082 (Wash. 1993).

88. *Padgett v. Donald*, 401 F.3d 1273, 1282 (11th Cir. 2005), *cert. denied*, 546 U.S. 820 (2006).

89. GA. CONST. ART. I, § I, ¶ 13.

90. *Padgett*, 401 F.3d at 1280.

91. Courts reach this conclusion irrespective of whether the courts apply the reasonable expectation of privacy analysis or focus on the government’s “special need” for DNA samples. *See, e.g.*, *United States v. Weikert*, 504 F.3d 1 (1st Cir. 2007) (“special needs” exception); *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005) (“special needs” exception); *Landry v. Att’y General*, 709 N.E. 2d 1085 (Mass. 1999) (expectation of privacy analysis).

92. *Id.*

93. *See, e.g.*, *Groceman v. United States*, 354 F.3d 411 (5th Cir. 2004)

There is, however, tension between a State's proffered interest in the functioning of its criminal justice system and the collection of DNA samples from private citizens that the Fourth Amendment is not suited to address. DNA profiles are capable of revealing much more than a person's identity.⁹⁴ In order to protect the privacy of persons who have not been convicted of criminal activity, the focus should not be on the identity function of DNA. Rather, the focus should be on what can be revealed by the genetic information contained in a DNA sample.

The Fourth Amendment is implicated when the government intrudes upon a person's expectation of privacy in his genetic material for identification purposes. Because the collection of DNA samples and the creation of DNA profiles can lead to governmental intrusion into a person's privacy beyond any identification purpose, Georgia's constitutional right to privacy is implicated.⁹⁵

B. Constitutionality in Light of Georgia's Fundamental Right to Privacy

Georgia courts were among the first to recognize a constitutional right to privacy even where such right was not specifically articulated in the state constitution.⁹⁶ The Georgia Supreme Court first recognized the right to privacy in *Pavesich v. New England Life Ins. Co.*, where the Georgia Supreme Court held that Georgia citizens have a "liberty of privacy" that derives from both "natural law" and "Roman law."⁹⁷

Subsequent Georgia cases have extended the reasoning in

(relying on *Kinghts* to uphold the DNA Act); *See also* United States v. Sczubelek, 402 F.3d 175, 184 (3rd Cir. 2005).

94. *See supra* Part III.

95. *See Padgett*, 401 F.3d at 1281-82 (illustrating how the collection of DNA from prison inmates raises questions about an individual's right to privacy under both the United States and Georgia Constitutions). The fact that the Eleventh Circuit in *Padgett* addressed the inmates' privacy concerns under both the Fourth Amendment and Georgia's constitutional right to privacy illustrates that the collection of DNA raises questions under both the United States and Georgia Constitutions.

96. *Pavesich v. New England Life. Ins. Co.*, 50 S.E. 68, 81 (Ga. 1905) (holding that a person, whose picture was used in advertisement without authorization, has a right to keep himself removed from the public eye if doing so does not violate the rights of others).

97. *Id.* at 70.

*Pavesich*⁹⁸ to protect a person's privacy interest in her medical information,⁹⁹ such as health condition and AIDS status.¹⁰⁰ Thus, Georgia has already recognized that a person has a constitutionally protected privacy interest in the kinds of information that are discoverable through DNA collection and analysis. DNA profiling provides "unprecedented access into an individual's future physical and psychological health, the health of close relatives, and insight into paternity issues."¹⁰¹ Such private genetic information is simply outside the scope of law enforcement purposes. DNA samples and profiles provide the State with access to information that is otherwise protected under the Georgia Constitution.¹⁰²

The Eleventh Circuit, in *Padgett*, held that because of an incarcerated prisoner's status, the collection of DNA samples from such person does not violate the inmate's right to privacy under the Georgia Constitution.¹⁰³ However, to evaluate the reasonableness of the collection of DNA samples from incarcerated felons under the Georgia Constitution, the court employed the same analysis that was used in its Fourth Amendment analysis.¹⁰⁴ Although the Court found that Georgia considers privacy to be a fundamental right, it did not find the required collection of DNA samples from incarcerated felons (a group the court described as a "limited population") was a violation of the inmates' rights to privacy under the Georgia Constitution.¹⁰⁵ The Court did not dismiss the argument that the convicted inmates' liberty-based constitutional right to privacy was implicated; it only held that the State's intrusion was

98. *Id.* at 68.

99. *See King v. State*, 535 S.E.2d 492, 495 (Ga. 2000) (recognizing that an individual's interest in medical information is a privacy interest protected under the fundamental right to privacy).

100. *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491, 493-94 (Ga. App. 1994) (recognizing that a person has a privacy interest in DNA which includes one's AIDS status).

101. *Patterson v. State*, 742 N.E.2d 4, 10 (Ind. Ct. App. 2000).

102. For instance medical information is protected under the Georgia Constitution yet DNA samples can easily yield medical information. *See King*, 535 S.E.2d at 492 (protecting personal medical records).

103. *See Padgett*, 401 F.3d at 1282.

104. *Id.* at 1280.

105. *Id.* at 1282.

justified.¹⁰⁶

The court's focus on the inmates' status as convicted felons coupled with State's interest in collecting DNA samples from such persons highlights the significant difference between pre-conviction suspects and/or arrestees and convicted felons. The status of the latter, according to the court, justifies intrusion into constitutionally protected privacy.¹⁰⁷ Suspects and/or arrestees are still private citizens. They are presumed innocent until proven guilty, and as such have not lost their constitutionally protected right to privacy.

Because Act 451 does not, in and of itself, expand the ability of law enforcement to involuntarily collect DNA samples, it is likely that in the event of a facial challenge to the new law, Georgia's courts will probably dismiss such a challenge relying on the reasoning in *Padgett v. Donald* that collecting DNA samples from incarcerated felons does not violate inmates' right to privacy.¹⁰⁸ While privacy is a fundamental right under the Georgia Constitution and Georgia's courts engage in a strict scrutiny level of analysis when privacy interests are raised in litigation, there is nothing in the case law to suggest that the additional authority granted law enforcement by Act 451 necessarily violates that fundamental right.

There is one way to truly protect Georgia citizens' right to privacy in regard to DNA samples. The courts can and should apply strict scrutiny when considering the issues of consent and law enforcement's surreptitious collection of DNA material.¹⁰⁹ Such a level of scrutiny is consistent with the long standing recognition of the right to privacy under the Georgia Constitution and recognition of privacy concerns in so many contexts by Georgia's courts.

VII. OTHER STATES APPROACHES

The issue of collecting DNA samples from arrestees gained prominence with the December 4, 2008 decision of the European Court of Human Rights which found that the retention

106. *See id.*

107. *See id.*

108. *See Padgett v. Donald*, 401 F.3d 1273, 1282 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 352 (2005).

109. GA Const. art. 1, § 1, ¶ XIII.

of DNA samples and profiles of persons not convicted violated the Convention for the Protection of Human Rights and Fundamental Freedoms.¹¹⁰ This, coupled with the subsequent December 10, 2008 issuance by the United States Department of Justice directing federal agencies to collect DNA samples from arrested individuals and from non-U.S. persons who are detained under the authority of the United States,¹¹¹ has only increased the controversial nature of DNA sample collection. Because the debate over expanding the collection of DNA to include collecting it from arrestees is likely to come to Georgia, it is appropriate to consider the implications of such an expansion for the privacy rights of Georgians.

Act 451 does not expand Georgia law to require the collection of DNA from individuals who are arrested.¹¹² Thus, while Georgia courts have not yet faced this question, other courts have. The Minnesota Court of Appeals held that collecting DNA from persons who have not been convicted violates the Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution.¹¹³ *In re Welfare of C.T.L.*, the court specifically held: “that the privacy interest of a person who has been charged but has not been convicted is not outweighed by the state’s interest in collecting and analyzing a DNA sample.”¹¹⁴ In its opinion, the court pointed out that under the Minnesota statute, there was no requirement that the biological sample taken from the defendant be related in any way to the alleged criminal activity.¹¹⁵ The court also relied on one of the fundamental principles of American jurisprudence - a person who has been charged is presumed innocent until he or she is

110. *S. and Marper v. The United Kingdom*, 30562/04 and 30566/04 Eur. Ct. H.R. (The European Court of Human Rights held that in the case of individuals who had not been convicted the retention of DNA samples and profiles violated Article 8, Section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 provides for the right to respect for private and family life).

111. 73 Fed. Reg. 74932-01 (Dec. 10, 2008) (federal regulations allowing the collection of DNA samples from persons arrested for federal crimes).

112. O.C.G.A. § 24-4-60.

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

114. *Id.* at 492.

115. *Id.*

proven guilty.¹¹⁶

In late October 2008, the South Carolina legislature overrode Governor Mark Sanford's July 2, 2008 veto of S. 429, a bill authorizing the collection of DNA from arrestees.¹¹⁷ Even though a super-majority of the legislature did not agree with the Governor, his letter to the South Carolina Senate, dated July 2, 2008, demonstrates an understanding of the Fourth Amendment principles at stake:

The Fourth Amendment to the Constitution guarantees that all people shall be 'secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fourth Amendment is intended to establish a perimeter of personal integrity into which the government cannot intrude without compelling reason. Currently, the State allows collection of DNA samples from arrestees after a search warrant is granted by a judge based on probable cause. This practice is consistent with the Fourth Amendment because it ensures that an arrestee is afforded due process as would be expected under the Constitution. This bill abolishes that right and requires collection of DNA automatically upon arrest without any showing that the DNA is needed as evidence of the crime for which the individual was arrested. Accordingly, we believe that this bill circumvents the probable cause requirement for a search warrant and is, therefore, unconstitutional.¹¹⁸

The courts that have reviewed the statutes providing for collection of DNA from convicted felons have drawn a line between the rights of an individual pre-conviction and post-conviction, and several of these decisions contain language that

116. *Id.*

117. The legislative history of Senate Bill 429 of the 2007-08 session of the South Carolina Legislature can be found at: http://www.scstatehouse.gov/cgi-bin/web_bh10.exe.

118. A copy of Governor Sanford's letter to the South Carolina Senate, dated July 2, 2008, in which he explains why he vetoed S. 429, is on file with the author of this article. Letter from Mark Sanford, Governor of South Carolina, to Andre Bauer, President of the South Carolina Senate, and members of the South Carolina Senate (July 8, 2008) (on file with the Office of the Governor of South Carolina) *available at* <http://www.scgovernor.com/NR/rdonlyres/D1D25900-9547-4A97-A4FE-2D43B0BE38EE/0/S429DNASampling.pdf>, citing *State v. Adolphe*, 314 S.C. 89, 92, 441 S.E.2d 832 (S.C. App. 1994).

strongly suggests that those courts would not support the taking of DNA from an individual prior to conviction.¹¹⁹ For instance, one of the first cases that examined a DNA collection statute was *Jones v. Murray*. Petitioners challenged Virginia's collection statute.¹²⁰ Virginia's statute was limited to collection of DNA from persons convicted of felonies.¹²¹ In rejecting the arguments of those challenging the statute, the court emphasized the fact that the challengers were convicted felons in the custody of the Commonwealth of Virginia.¹²² Relying on similar analysis, the Ninth Circuit Court of Appeals, in *United States v. Kincade*, upheld the taking of DNA from an individual who had been conditionally released.¹²³ The fact that the person had already been convicted of a federal crime was critical to the court's determination that the collection of DNA was constitutional.¹²⁴

As previously discussed, the Georgia DNA collection statute, O.C.G.A. § 24-4-60 was found to be constitutional in *Padgett v. Donald*.¹²⁵ That statute only applies to convicted, incarcerated felons.¹²⁶ The court made it clear that its conclusion as to constitutionality was based in part on the status of the persons to whom the statute applies:

Because we believe that Georgia's legitimate interest in creating a permanent identification record of convicted felons for law enforcement purposes outweighs the minor intrusion involved in taking prisoners' saliva samples and storing their DNA profiles, given prisoners' reduced expectation of privacy in their identities, we adopt the reasoning in *Jones* and hold that the statute does not violate the Fourth Amendment.¹²⁷

119. See *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992); *United States v. Kincade*, 379 F.3d 813, 813 (9th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 924 (2005); *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 352 (2005).

120. *Jones*, 962 F. 2d at 302.

121. *Id.* at 308.

122. *Id.* at 310.

123. *Kincade*, 379 F.3d at 813.

124. *Id.*

125. *Padgett*, 401 F.3d at 1282.

126. O.C.G.A. § 24-4-60.

127. *Padgett*, 401 F.3d at 1280.

In upholding a statute involving the collection of DNA, the Supreme Judicial Court of Massachusetts emphasized that it was considering a statute requiring involuntary collection of DNA from convicted individuals.¹²⁸ Similarly, in *Nicholas v. Goord*, the court made it clear that one of the key factors it considered was that the statute applied to convicted felons—prison inmates who had diminished expectations of privacy.¹²⁹

Further evidence of judicial skepticism of collecting DNA prior to a conviction can be found in *United States v. Weikert*.¹³⁰ In expressing its concern about the retention of DNA information from convicted individuals who have completed their sentences, the court noted the distinction in privacy expectations between people who are still on supervised release and those who are no longer under supervision.¹³¹ The court wrote:

We emphasize another important limitation on our holding. This case presents a challenge to the practice of collecting DNA of an individual currently on supervised release. Thus, we express no opinion on the constitutionality of the retention and searching by the government of the DNA profiles of individuals who have completed their terms of conditional release, which is its standard practice.

The court then stated:

The argument for a continued expectation of privacy despite the legality of an initial search is particularly deserving of separate consideration given the wealth of information that DNA has the potential to reveal, as well as the fact that science is continually uncovering new information that is contained in our DNA. We are hesitant to say that an individual has no continued expectation of privacy in a DNA profile when our understanding of the information that such a profile contains is incomplete.¹³²

This court indicated that the privacy considerations are more complex when the state claims an interest in collecting DNA

128. *Landry v. Att’y General*, 709 N.E. 2d 1085, 1096 (Mass. 1999).

129. *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005) .

130. *United States v. Weikert*, 504 F.3d 1 (1st Cir. 2007).

131. *Id.* at 11-12.

132. *Id.* at 15-17.

from an ever expanding class of persons.¹³³

One appellate court has, however, minimized the privacy interests of arrestees. In *Anderson v. Commonwealth*, the Court of Appeals of Virginia found that the taking of a DNA sample from the defendant upon his arrest was not an unlawful search under the Fourth Amendment.¹³⁴ That court did not discuss the privacy implications of taking DNA from a person who had not yet been convicted.¹³⁵ Rather, it based its decision on its belief that the taking of a DNA sample is analogous to the taking of fingerprints.¹³⁶

Apart from the constitutional questions, expanding the collection of DNA samples to include persons who are arrested undermines other important goals of the criminal justice system. For example, there exists an enormous backlog of crime scene evidence, particularly rape kits, from which DNA samples should be extracted and processed. Further expansion of the pool of persons from whom DNA must be collected threatens to divert important resources away from resolving that backlog. The use of technicians and police laboratories to further DNA collection will likely come at the expense of analyzing rape kits and other crime scene evidence.¹³⁷

VII. RECOMMENDATION

As a result of the enactment of Act 451, Georgia policy makers and courts will have to consider how vigorously they will protect the privacy interests of all Georgians. DNA evidence has proven to be a useful tool for exonerating the wrongfully convicted and helping to identify suspects.

133. *Id.*

134. *See Anderson v. Commonwealth*, 650 S.E.2d 702, 706 (Va. 2007) (“the taking of a DNA sample is permissible as a part of routine booking procedures [and] as such, no additional finding of individualized suspicion much less probable cause, must be established before the sample may be obtained”).

135. *Id.*

136. *Id.*

137. *See*, Sarah Tofte, *A Test of Justice for Rape Victims*, Washington Post, July 22, 2008 at A21; Mark A. Rothstein & Meghan K. Talbott, *The Expanding Use of DNA in Law Enforcement: What Role for Privacy?*, 34 J.L. MED. & ETHICS 153, 154 (2006).

Significant privacy issues associated with the collection of DNA and retention of genetic information remain with the potential to affect all Georgia citizens. It will be up to the Georgia legislature and courts to make sure those privacy interests are fully protected.

Georgia's policy makers should follow the lead of Nebraska. In 2005, the Nebraska Legislature enacted a statute that sensibly addresses the limits that should be placed on the government's collection of DNA samples.¹³⁸ Georgia should enact a similar statute, and the author recommends that the Georgia legislature enact the following:¹³⁹

Limitations on Obtaining, Using and Keeping Samples.

Notwithstanding any other provision of law:

(1) No DNA sample shall be obtained from any person in

138. NEB. REV. STAT. § 29-4126 (2006).

139. The recommended statute is based on NEB. REV. STAT. § 29-4126 which reads substantially the same as above, except the following provisions are present in Nebraska's statute following subsections three and four above:

"(4) A person shall be notified in writing by the law enforcement agency immediately upon the determination that he or she has not been implicated by his or her DNA sample in the commission of the particular crime in connection with which the DNA sample was obtained;

(5) Except as authorized in subdivision (7) of this section, such sample and all identifying information pertaining to the person shall be delivered to the person within ten days after the notification required by subdivision (4) of this section with a written explanation that the materials are being turned over in compliance with this section;

(6) Except as authorized in subdivision (7) of this section, the law enforcement agency shall purge all records and identifiable information pertaining to the person specified in subdivisions (4) and (5) of this section;

(7) An accredited laboratory authorized to perform DNA testing under section 29-4105 shall be allowed to maintain the minimum records and supporting documentation of DNA tests that it has performed as needed for the sole purpose of complying with the laboratory accreditation standards as set forth by a national accrediting body or public agency;

(8) No record authorized for retention under subdivision (7) of this section shall be transferred, shared, or otherwise provided to any national, state, county, or local law enforcement agency unless such person has been implicated in the case by his or her DNA sample."

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connection with an investigation of a crime without probable cause, a court order, or voluntary consent as described in subdivision (2) of this section;

(2) In the absence of probable cause, if any person is requested by a law enforcement person or agency to consent to the taking of a DNA sample in connection with an investigation of a particular crime, such consent shall be deemed voluntary only if:

(a) The sample is knowingly and voluntarily given in connection with the investigation of a particular crime;

(b) The person was informed for what purpose the sample was to be used;

(c) The person was informed in writing that the request may be refused and that such refusal does not provide probable cause or reasonable suspicion to believe that the person has committed a crime, and the person has signed the written notification; and

(d) No threat, pressure, duress, or coercion of any kind was employed, whether (i) direct or indirect, (ii) express or implied, or (iii) physical or psychological;

(3) Any DNA sample obtained in violation of this section is not admissible in any proceeding for any purpose whatsoever;

(4) If a law enforcement person or agency determines that the DNA sample does not implicate the person in the commission of the particular crime then the sample and all identifying information related to that sample shall be immediately destroyed.

(5) A person shall be notified in writing by the law enforcement agency immediately upon the determination that he or she has not been implicated by his or her DNA sample in the commission of the particular crime in connection with which the DNA sample was obtained and that the sample and all identifying information have been destroyed;

(6) Any aggrieved person may file an action against any person, including any law enforcement agency, to enjoin such person or law enforcement agency from violating this section; and

(7) Any person aggrieved by a knowing violation of this section may bring an action for damages. A person found by the court to be aggrieved by a violation of this section shall receive damages of not less than one thousand dollars and may recover reasonable costs and attorney's fees.

