COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2008-SC-000213-DG

PETITIONERS F, G, H, J AND K, JUVENILES **APPELLANTS**

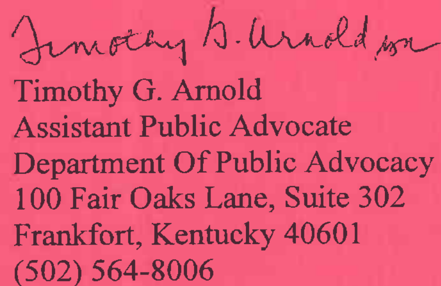
V.

Appeal from Franklin Circuit Court, Division I
Hon. Sam McNamara, Judge
Case No. 06-CI-00214

BRIDGET SKAGGS BROWN,
COMMISSIONER, DEPARTMENT OF JUVENILE JUSTICE,
IN HER OFFICIAL CAPACITY **APPELLEE**

BRIEF FOR APPELLANT

Respectfully submitted,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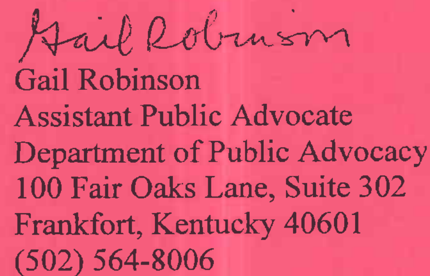
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CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of this Brief have been served by first class mail, postage prepaid on January 14, 2009 to Hon. Sam McNamara, Franklin Circuit Court, Courthouse, 214 St. Clair Street, Frankfort, Kentucky 40601; Joslyn Olinger, Department of Juvenile Justice, 1025 Capital Center Drive, Third Floor, Frankfort, Kentucky 40601 and Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, 3rd Floor, Frankfort, Kentucky 40601. I also certify that the record was returned to the Supreme Court of Kentucky.

INTRODUCTION

This is the appeal of Appellants F, G, H, J, and K, all juveniles found guilty in juvenile court of felony sex offenses,[1] challenging the application of DNA testing to them.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants desire oral argument. The issues in this case are novel and complex and they believe oral arguments would be helpful to the Court.

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[1] Appellants I and L were found guilty in juvenile court of burglary second degree and burglary first degree, respectively. They prevailed in the Court of Appeals on their claim that DNA sampling could not be applied to them and should not have been included in the motion for discretionary review. A motion to dismiss them as appellants is being filed.

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STATEMENT OF THE CASE

This case involves both a facial and an "as applied" challenge to taking the DNA from children who have not been convicted of a crime and therefore some historical background on the use of DNA testing in Kentucky is necessary. In 1992, the General Assembly passed two statutes relating to the collection of DNA from offenders. The first, KRS 17.170, applied to "any person convicted . . . of a felony offense under KRS Chapter 510 or KRS 530.020" and directed that such inmates "shall have a sample of blood taken by the Department of Corrections for DNA . . . law enforcement identification purposes and inclusion in law enforcement identification databases." KRS 17.170(1)(1992). That section then prescribed that the samples be taken in a medically approved manner by a qualified person, and that they be "submitted in containers provided by the Department of State Police forensic laboratory in accordance with administrative regulations promulgated by the Department of State Police forensic laboratory." KRS 17.170(2)(1992).

The second statute, KRS 17.175, directed the Kentucky State Police to establish a "centralized database of DNA . . . identification records for convicted criminals, crime scene specimens, missing persons, and close biological relatives of missing persons . . .." KRS 17.175(1)(1992). This database was to be set up in a manner to facilitate "data exchange on a national level", for the purpose of permitting Kentucky records to be included in the FBI's National DNA Identification System (NDIS). *Id.* To that end, the statute directed that:

> The Department of State Police forensic laboratory shall receive, analyze, and classify samples of blood received from the Department of Corrections in compliance with KRS 17.170 and this section, and samples from other sources, and shall file the DNA results in the centralized databases for identification and statistical purposes. KRS 17.175(3)(1992).

This section provided for expungement of DNA records "on the grounds that the felony

conviction on which the authority for including the DNA profile was based, has been reversed and the case dismissed." KRS 17.175(5)(1992).

In 2000, a juvenile court in Jefferson County directed a youth who had been adjudicated guilty of a qualifying offense in juvenile court to submit a blood sample under KRS 17.170. In 2001 the Court of Appeals rejected that practice in *J.D.K. v. Commonwealth*, 54 S.W.3d 174 (Ky.App. 2001). In reaching that decision, that Court found that "KRS 635.040 nullifies the Commonwealth's attempt to characterize J.D.K.'s adjudication as a 'conviction' for the purposes of KRS 17.170." *Id.* at 176. The Court went on to find that if the legislature wished to include "adjudications" in KRS 17.170, it needed to amend the statute to include language similar to a Kansas statute which permitted DNA to be taken from "Any person convicted as an adult or adjudicated as a juvenile offender." *Id.* at 177, n 1 (quoting K.S.A. § 21-2511(a))(emphasis in original).

The 2002 General Assembly considered a number of bills directed at various issues related to DNA, including changing the language of KRS 17.170 to respond to the language in *J.D.K.* in order to include adjudicated public offenders. *See., e.g.,* Senate Bill 98 (02 BR 1347)(Amending KRS 17.170 to include "any child adjudicated a public offender" for certain offenses); House Bill 132 (02 BR 1057)(amending KRS 17.170 to apply to a "child convicted as a youthful offender or adjudicated a public offender" for certain offenses). Ultimately, the only DNA bill adopted by the General Assembly was House Bill 4, identified as "an act related to deoxyribonucleic acid evidence in criminal cases." 2002 Ky.Acts. Ch. 154. Most of that act related to the use of DNA evidence in capital cases, such as a procedure whereby a defendant could seek testing (§ 1), etc.. The "convicted . . . of a felony offense" language identified in *J.D.K.* was unaffected. However, at that time the General Assembly enacted four

smaller statutes expanding upon the DNA testing program. The first of these, which was codified at KRS 17.171[2], read that:

> Any person convicted on or after July 15, 2002, or who is in the custody of the Department of Corrections on or after July 15, 2002, for a violation of KRS 530.064, 531.310, or 531.320 or a felony attempt to commit one (1) of these offenses shall be subject to the provisions of KRS 17.170 relating to the collection and retention of deoxyribonucleic acid (DNA) evidence.

KRS 17.172 and 17.173 are essentially identical, except that they apply to different offenses – 17.172 to Burglary First Degree and Second Degree, or a felony attempt to commit one of those offenses, and 17.173 to capital offenses and Class A or B felonies which are covered under the violent offender statute, KRS 439.3401.

The fourth statute, KRS 17.174, read that:

> KRS 17.171 and 17.172 shall apply to a public offender adjudicated a public offender or in the custody of the Department of Juvenile Justice on or after July 15, 2002, for any offense defined in KRS 17.170 or 17.171 or an attempt to commit one (1) of the named offenses.

Notably, unlike KRS 17.171-17.173, which all made 17.170 directly applicable to another group of prisoners, KRS 17.174 did not directly state that the DNA collection statute (KRS 17.170) applied directly to juvenile offenders, nor did it change any of the language in 17.170 and 17.175, which required the samples be collected by the Department of Corrections from "convicted" offenders. Accordingly, it was not initially construed by the Justice Cabinet to require DNA testing for adjudicated juveniles who were in the care of the Department of Juvenile Justice.

Under what became KRS 17.177(3), the Secretary of the Justice Cabinet was directed to notify the Reviser of Statutes, in writing, as to the date each section of House Bill 4 was

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[2] KRS 17.171 through KRS 17.174 were repealed by 2008 Ky.Acts ch. 158, § 5-8. However, that act is now being challenged in a lawsuit in the Franklin Circuit Court on several grounds, including that the act was not properly promulgated because final passage of the act by the General Assembly did not occur until after midnight of the last legislative day.

implemented. On April 15, 2003, the Secretary of the Justice Cabinet notified the Reviser of Statutes that 17.171-17.174 had been "fully implemented" (TR I, 11-12; Appendix[3] ("App") 46-47). At that time, DJJ did not have a program for collecting DNA from any child committed to its custody, and its regulations specifically forbade DJJ employees from taking biological samples for forensic purposes, including DNA samples.

In the fall of 2005, DJJ quietly changed its regulations to permit its employees to take forensic samples from youth committed to DJJ (TR I, 69-81). On December 20, 2005, the Appellee issued a "General Directive" directing DJJ staff to take a blood sample from all youth adjudicated of certain specified offenses (including misdemeanor offenses) by February 15, 2006 (App. 30-31). Objections were raised by attorneys for the juveniles, including the absence of a regulation to govern the DNA testing program as required by KRS 17.175(6). On December 28, 2005, Appellee issued a second directive postponing implementation for "at least . . . a minimum of thirty (30) days)" (App. 32). On January 23, 2006, the Kentucky State Police promulgated an emergency regulation, offering as their statement of emergency that it was "necessary to enact this regulation by emergency order to circumvent any challenges to the ongoing collection of DNA samples for inclusion within the Department's database premised on noncompliance with KRS Chapter 13A" (App. 48). On February 3, 2006, the Appellee re-issued the "General Directive" requiring DJJ staff to obtain blood from youth adjudicated guilty of certain specified offenses (App. 35-37).

On February 15, 2006 Appellants filed a petition for writ of prohibition and declaration of rights requesting that Appellee be prohibited from applying DNA testing to them pursuant to Directives she had issued. (TR I 1-12; Appendices I and II and Code

[3] All documents included in the appendix to this brief are also in the Transcript of Record.

Sheet)[4]. The Appellants argued that the program was not authorized by statute, that it was not properly implemented, and that it was unconstitutional (Supplemental Record, 1). Appellants also filed a motion to certify this case as a class action on February 15, 2006 and that motion was held in abeyance based on the Appellee's agreement that she "will apply [a decision prohibiting DNA testing] to all public offenders for whom the Court has prohibited testing regardless of whether they are Petitioners in this action or not, pending resolution of this matter on appeal" (TR II 168-9). Appellee issued a third "General Directive" on February 16, 2006, the day after the lawsuit was filed, eliminating misdemeanors from the list of qualifying offenses (App. 39-40).

On March 8, 2006, the Franklin Circuit Court ordered this case to be briefed in the same manner as an administrative appeal (TR I 117-118). Pursuant to that order, on March 31, 2006, Appellants filed a 40 page "Memorandum of Law in support of Petition for Writ of Prohibition and for Declaration of Rights (TR II 122-161)." On May 26, Appellee filed a memorandum in response, and also filed a motion for summary judgment (TR II 170-204). Appellants filed their reply on June 12 (TR II 205-247). During that briefing process, the General Assembly considered and adopted House Bill 3, a comprehensive revision of laws principally related to sex offenders. That legislation, as originally drafted, would have amended 17.170 to apply to any person, "including a youthful offender . . . or an adjudicated public offender detained in the custody of the Department of Juvenile Justice . . .." House Document 06-5394, Proposed Amendment[5] to HB 3, pg 2. Ultimately, that bill was replaced

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[4] Pursuant to Appellants' motion Appendix I and the Code sheet were filed under seal in Franklin Circuit Court so that the juvenile Petitioners would not be publicly identified (TR I 13-15, 43-4). Appendices are included in the record but not bound in the TR.

[5] The original HB 3 was drafted by the Justice Cabinet, ostensibly in response to the recommendations of the Kentucky Coalition Against Sexual Assaults (K-CASA), and was considered by the House Judiciary Committee over several weeks. Apparently, certain provisions – including the DNA testing provision, were inadvertently omitted from the original draft. The amendment was then submitted to the House Judiciary Committee in the

by a committee substitute which read:

> Any person***, including a youthful offender as defined in KRS 600.020, detained in the custody of the Department of Juvenile Justice who is*** convicted[~~ on or after July 14, 1992,~~] of a felony offense under KRS Chapter 510 or KRS 530.020, shall, or who is in the custody of the Department of Corrections on July 14, 1992, under KRS Chapter 510 or KRS 530.020 may, have a sample of blood, an oral swab, or sample obtained through a noninvasive procedure taken by the Department of Corrections ***or the Department of Juvenile Justice, when appropriate,*** for DNA (deoxyribonucleic acid) law enforcement identification purposes and inclusion in law enforcement identification databases.

H.B. 3 (2006 B.R. 1509), § 2. When asked by the chair to explain the provision, the clerk of the House Judiciary Committee stated simply: "Section 2 clarifies that youthful offenders, who commit offenses for which an adult could have their DNA taken, will get their DNA taken." http://www.ket.org/cgi-bin/cheetah/watch_video.pl?nola=WGAOS+007186 , at 4:50-5:03.

On October 26, 2006, the Franklin Circuit Court entered a 14 page order, granting judgment in favor of Appellee (TR II 251-264; App. 16-29). The trial court rejected the arguments of the Appellants, principally finding that "[i]t is clear to this Court that the meaning of KRS 17.171, 17.172 and 17.174 read together, is to modify the language of KRS 17.171 and 17.172 and extend the group of detainees eligible for DNA sampling to juveniles" (App. 20). The court also rejected Appellants' constitutional and "as applied" challenges (*Id.*). An appeal to the Court of Appeals by the Petitioners adjudicated guilty of felony sex offenses or burglary first or second degree followed.

On January 12, 2007, Appellants filed a motion in the Court of Appeals asking that court to continue their temporary injunction pending their appeal. On February 7, 2007 a panel of the Court of Appeals, with one Judge dissenting, denied the motion. On February

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form of an amendment to the bill. The Committee reviewed the amendment section by section along with the rest of the bill.

14, 2007 Appellants filed a comparable motion in this Court. This Court granted the motion on November 1, 2007.

On February 22, 2008, after briefing and oral arguments had been completed, the Court of Appeals issued an opinion affirming in part and reversing and remanding in part. Master Slip Opinion, MSO, 1-15; App. 1-15). Glossing over the actual language of KRS 17.174 and the absence of relevant changes to KRS 17.170 and 17.175 and ignoring the legislative history supplied by Appellants, the Court of Appeals nevertheless concluded that the legislature must have intended to apply the DNA sampling and testing statutes to juvenile public offenders by enacting KRS 17.174[6]. That Court's superficial analysis did not address what the legislature meant by "KRS 17.171 and 17.172 (statutes dealing with convicted criminals) shall apply to a public offender adjudicated a public offender or in the custody of the Department of Juvenile Justice on or after July 15, 2002."[7] The Court accepted DJJ's invitation to pretend that KRS 17.174 really states the following:

> **KRS 17.170 and 17.175** ~~**KRS 17.171 and 17.172**~~ shall apply to a public offender adjudicated a public offender or in the custody of the Department of Juvenile Justice on or after July 15, 2002, for any offense defined in KRS 17.170, or 17.171, or **17.172** or an attempt to commit one (1) of the named offenses. ***For purposes of this statute, the Department of Juvenile Justice shall have the same authority to collect DNA samples as the Department of Corrections. The Kentucky State Police shall treat the samples collected in the same manner as samples collected from convicted persons.***

The Court of Appeals did little better with Appellants' substantial claim regarding

[6] *Petitioners F. et al v. Brown*, ____S.W.3d____(Ky. App. 2008, rendered February 22, 2008, Master Slip Opinion ("MSO") at 2-6).

[7] KRS 17.174 . Ironically, the Court of Appeals agreed with Appellants that the statutes do not permit samples to be taken from children adjudicated of burglary, finding that the portion of KRS 17.174 which states the statute applies to public offenders "for any offense defined in KRS 17.170 or 17.171 or an attempt to commit one (1) of the named offenses" effectively cancels out the portion which states that KRS 17.172 applies to public offenders. MSO at 6-7.

DNA collection violating their right to be free from unreasonable searches and seizures[8]. The Court principally relied on *State v. Scarborough*[9], a case involving convicted adult offenders which upheld DNA sampling[10]. The Court also cited cases involving convicted adults on probation or parole having a lesser expectation of privacy but did not address the significant difference between convicted adults and juvenile offenders who are being rehabilitated rather than simply incarcerated[11]. The Court endorsed a pure balancing test for DNA sampling and did not deal with the special needs exception most recently analyzed in *City of Indianapolis v. Edmond* and *Ferguson v. City of Charleston*[12].

On March 24, 2008, Appellants filed a "Motion for Discretionary Review" asking this Court to review the following issues:

> 1. Did [DJJ] erroneously apply the DNA sampling statutes to juvenile offenders who have not been convicted of a crime?
>
> 2. Does the collection of biological materials from adjudicated juvenile offenders violate their state and federal constitutional rights, including their right to be free from unreasonable searches and seizures, their right to privacy, their right to a jury trial and their right due process of law?
>
> 3. Did [DJJ] violate KRS Chapter 13A by failing to issue an administrative regulation concerning DNA sampling?
>
> 4. Did [DJJ] violate final action by the Justice Cabinet when she issued directives and policies instituting DNA sampling?

In that motion, Appellants argued that the Court of Appeals' analysis – which gave no consideration to the Appellants' status as juveniles – failed to correctly apply the rules of statutory construction, failed to address permissibility of DNA sampling for juvenile offenders post *Edmond* and *Ferguson*, and failed to apply the law of administrative

[8] MSO at 9-12.
[9] 201 S.W.3d 607, 617 (Tenn. 2006).
[10] MSO at 10-11.
[11] MSO at 10-11.
[12] MSO 9-12, citing *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) and *Ferguson v. City of Charleston* 532 U.S. 67 (2001).

procedures to the facts of this case. On October 16, 2008, this Court granted the motion, and directed briefing.

In 2008 HB 289 was proposed in the General Assembly. That bill began with language identical to that found in 2004 HB 119 and 2006 HB 116 and would have applied only to convicted "youthful offenders". However, a committee substitute supported by the Justice Cabinet changed the bill to permit DNA collection from both those juveniles convicted and those adjudicated of any felony offense. A revised version of that bill with a minimum age of thirteen and limitations on the eligible offenses for public offenders[13] became part of 2008 HB 683 which the House and Senate attempted to enact on the final day of the 2008 Regular Session. A petition for declaratory and injunctive relief was filed in Franklin Circuit Court on June 27, 2008 and a motion for summary judgment has been filed in that court seeking to void the DNA sampling provisions of HB 683 because of violations of Section 56 of the Kentucky Constitution.[14] On October 21, 2008 the Franklin Circuit Court granted the Petitioners' motion for temporary injunction to the extent that it incorporated this Court's November 1, 2007 order granting interlocutory relief in this case while the appeal is pending.

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[13] Eligibility for DNA sampling was limited to youth adjudicated guilty of offenses listed in the violent offender statute, KRS 439.3401, or the incest statute.

[14] *Petitioner A, A Juvenile, et al. v. Haws, et al.*, Franklin Circuit Court File No. 08-CI-1088.

ARGUMENT

I. THE LOWER COURTS ERRED BY FINDING THAT THE DNA TESTING STATUTES APPLIED TO CHILDREN WHO HAD NOT BEEN CONVICTED OF A CRIME.

Preservation: This issue is properly preserved for review by extensive briefing and argument in the circuit court and the Court of Appeals.

Argument:

There are only two statutes – KRS 17.170 and 17.175 – which purport to establish and regulate a program for the collection of DNA samples for inclusion in the "convicted offender database." KRS 17.171-17.173 do nothing more than expand the scope of persons who are subject to the collection procedures in 17.170, by directing the Department of Corrections to collect the blood of persons convicted of offenses not included in 17.170. KRS 17.174 – the statute at issue in this case – does nothing more than expand the scope of 17.171 and 17.172 to certain "adjudicated public offenders." Appellants asked the lower courts to adopt a literal interpretation of the relevant statutes to permit that the Department of Corrections obtain DNA samples from convicted persons who did not have a qualifying conviction, but who did have a qualifying juvenile adjudication. The lower courts disagreed, and instead concluded that, particularly in light of the timing of the enactment of 17.174, the legislature must have intended for DJJ to create and operated a Corrections-like program of DNA collection, for testing and placement in the "Convicted Offender Database." The lower courts' opinions misconstrued the history and purpose of this statute, and were inconsistent with the rules of statutory construction.[15]

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[15] To the extent that Argument II regarding the constitutionality of DJJ's interpretation could also support the view that the court should construe the statutes to avoid constitutional issues, that argument is incorporated herein by reference.

A. The DNA Testing Statutes are Inconsistent with the Purpose and Language of the Juvenile Code.

It is well established that Kentucky's juvenile justice system is rehabilitative in nature. Kentucky law expressly provides a juvenile with a right to treatment reasonably calculated to bring about an improvement in his condition. KRS 600.010(2)(d). The Department of Juvenile Justice is required to operate its programs "to train, develop, and educate the children to become good citizens and useful members of society." KRS 605.100(3). In operating these programs, DJJ is charged with ensuring that they provide "an effective and efficient program designed to treat and correct the behavior of delinquent youth and youthful offenders." KRS 15A.065(1)(g)5. The rehabilitative goals of that code have resulted in a system where "there are no distinctions made between felonies, misdemeanors, or violations for the purposes of providing options to the court for disposition." *A.E. v. Commonwealth*, 860 S.W.2d 790, 793 (Ky.App. 1993). All of this is consistent with the provisions in the Kentucky Constitution which charge the state with operating a separate "House of Reform" to rehabilitate delinquent youth. Ky. Const. § 252.

This rehabilitative model has a price for the youth who come before it. As this Court has explained:

> Traditionally, juvenile matters have been treated differently than adult offenses. The state is considered to be acting as *parens patriae* rather than as a prosecuting authority. It has been a principal theory of juvenile law that an individual should not be stigmatized with a criminal record for acts committed during minority. By providing young people with treatment oriented facilities rather than simple punishment, antisocial behavior can be modified and the offenders will develop as law abiding citizens. **Juvenile offenders are not afforded all the constitutional rights that adult offenders receive. They are afforded only the right to fair treatment.**

Jefferson County D.H.S. v. Carter, 795 S.W.2d 59, 61 (Ky. 1991); emphasis supplied. Among the rights that juvenile offenders are not provided is the right to a jury trial, KRS

610.070(1), *Dryden v. Commonwealth*, 435 S.W.2d 457 (Ky. 1968), *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971), and the right to pretrial release on bail, KRS 610.190. Naturally, the absence of these rights make a juvenile far more vulnerable to an inaccurate finding of guilt than a similarly situated adult would be. However, courts have justified precluding juveniles from accessing rights which would otherwise be deemed "sacred" on the grounds that exercising such a right would ultimately harm the child. As this Court put it: "A jury trial, with all the clash and clamor of the adversary system that necessarily goes with it, would certainly invest a juvenile proceeding with the appearance of a criminal trial, and create in the mind and memory of the child the same effect as if it were." *Dryden, supra* at 461.

Because of the emphasis on not treating juvenile offenders as "criminals", Kentucky courts have always recognized the significant differences between juvenile and adult proceedings, consistently refusing to equate a juvenile "adjudication" with a criminal "conviction." In *Alexander's Adm'r v. Kentucky Bankers Ass'n*, 237 Ky. 232, 35 S.W.2d 287 (1931), the court held that the juvenile court adjudication of four boys for acts of bank robbery:

> . . . was not a "conviction" within the meaning of the offer of reward [for the conviction of persons for robbing a particular bank], since it was not an establishment of the fact of guilt by a court having jurisdiction to punish the offense of robbery or attempt at robbery, and did not carry the consequences of such a conviction.

Id., 35 S.W.2d at 288. Likewise, in *Coleman v. Staples*, 446 S.W.2d 557, 560 (Ky. 1969), this Court found that "A juvenile delinquency proceeding results in the adjudication of a status rather than the conviction of a crime." This concept has been incorporated into Kentucky's juvenile code. Offenses under the juvenile code are not regarded as crimes in and of themselves, but rather as "an offense . . . which, **if committed by an adult**, would be a

crime." KRS 600.020; emphasis supplied. KRS 635.040 explicitly distinguishes between a juvenile adjudication and a criminal conviction, stating that:

> No adjudication by a juvenile session of District Court shall be deemed a conviction, nor shall such adjudication operate to impose any of the civil disabilities ordinarily resulting from a criminal conviction, nor shall any child be found guilty or be deemed a criminal by reason of such adjudication.

This provision has three separate clauses, each separated from the one before it by the word "nor"[16]. In order to get an accurate interpretation of each clause, they should be read separately:

- **No adjudication by a juvenile session of District Court shall be deemed a conviction . . .**: Taken literally, those things which are "deemed a conviction" shall not include an "adjudication of the juvenile session of District Court." This clause excludes juvenile court adjudications from the definition of the word "conviction." This section has been consistently interpreted to require the Commonwealth to expressly include juvenile adjudications whenever the term "conviction" or "convicted criminal" or "convicted of an offense" is employed. *See Phelps v. Commonwealth*, 125 S.W.3d 237 (Ky. 2004)(Juvenile adjudication is not a "conviction" for purpose of second offense enhancement for unauthorized use of a motor vehicle); *Manns v. Commonwealth*, 80 S.W.3d 439 (Ky. 2002)(Language in Kentucky Rules of Evidence permitting impeachment by prior "conviction" does not include "adjudication" of the juvenile court); *J.D.K. v. Commonwealth*, 54 S.W.3d 174 (Ky.App. 2001)(KRS 17.170 does not apply to adjudicated public offenders, but only to those "convicted . . . of a felony offense." Had the

[16] If the General Assembly had been willing to separate the clauses into separate sentences, the statute would read as follows:
(1) No adjudication by a juvenile session of District Court shall be deemed a conviction.
(2) No adjudication of the juvenile session of District Court shall operate to impose any of the civil disabilities ordinarily resulting from a criminal conviction.
(3) No child shall be found guilty or be deemed a criminal by reason of an adjudication by the juvenile session of District Court.

legislature wanted to include adjudicated public offenders, it would have included the phrase "or adjudicated" after the word "convicted").

- **. . . [N]or shall such adjudication operate to impose any of the civil disabilities ordinarily resulting from a criminal conviction . . .:** A person who is "convicted" of a felony offense loses the right to vote, Ky.Const., § 145, and the right to bear arms, KRS 527.040. He may be required to register as a sexual offender under "Megan's law", KRS 17A.500 *et.seq.*, and suffer countless other indignities as a result of his crimes. The manifest purpose of this provision, along with the strict confidentiality provisions of KRS Chapter 610, is to ensure that children whose cases are resolved in the juvenile court do not suffer such consequences for their youthful misadventures.
- **. . . [N]or shall any child be found guilty or be deemed a criminal by reason of such adjudication:** This provision clearly refers to those statutes which have, as an element, the defendant's status as a "felon" or a "criminal." An element of statutes such as Felon in Possession of a Firearm, KRS 527.040, and Persistent Felony Offender, KRS 532.080, is that the defendant be a "felon" or that they be a "criminal." *See Phelps*, *supra* at 240 (holding that a juvenile adjudication does not make one subject to a charge of Felon in Possession of a Firearm). Moreover, this provision could also be read to prohibit the commonplace civil disabilities resulting from such a conviction, such as having to disclose prior offenses on a job application.

Taken together, these three provisions clearly prevent a court from drawing any conclusions merely from the fact that conduct underlying a juvenile adjudication would have constituted a criminal offense. Rather, Kentucky Courts have consistently found that juvenile adjudications are not included in the word "conviction," and that to include a juvenile adjudication in a list of qualifying offenses the legislature must specifically provide that it applies to one who is "adjudicated" as well as one who is "convicted."

Of the decisions cited, *J.D.K.* is obviously the most relevant, in that it construes the statutes at issue in this case. In *J.D.K* the Court of Appeals was asked to determine whether language in the DNA collection statute (KRS 17.170) requiring the state to take biological material from any person "convicted . . . of a felony offense" applied to public offense adjudications. Reviewing KRS 635.040, the court found that such language did not apply to juvenile public offenders. The court reasoned that: "by employing the words 'convicted' and 'felony' – words which the legislature itself has expressly defined and to which it has given technical meaning – it plainly intended that juveniles adjudicated in district court not be included in the DNA database." *Id.* at 176 (emphasis added). The court went on to hold that "we believe that if the legislature had intended to include within the statute those minors adjudicated in juvenile court, ***it would have articulated that intent clearly and unambiguously*** as have legislatures in other jurisdictions." *Id.* at 177 (emphasis added). In support of this statement, the court cited a Kansas statute which stated that the statute applied to "any person convicted as an adult or adjudicated as a juvenile offender" as an example of what the legislature would have to do to collect DNA from adjudicated public offenders. *Id.*, n. 1 (citing K.S.A. § 21-2511(a)).

B. The Rules of Statutory Construction Require this Court to Interpret KRS 17.174 to Apply to Convicted Felons in Corrections, Not Juvenile Public Offenders, who have no Criminal Conviction.

On the face of it, KRS 17.174 is subject to at least two interpretations:

- ***Appellee's Interpretation:*** KRS 17.174 authorizes DJJ to forcibly take the blood of hundreds of children for inclusion in the "convicted offender database." When KRS 17.170 and 17.175 say "convicted" it really means "adjudicated", and when it says "Department of Corrections", it really means "Department of Juvenile Justice."

- ***Appellants' Interpretation:*** In addition to those offenders specifically identified in KRS 17.171 and 17.172, the statutes also apply to a person who is in the custody of the Department of Corrections on a conviction, if that person was as a juvenile adjudicated a public offender for one of the offenses enumerated in 17.174. Put differently, Corrections can consider a person's juvenile record in determining whether an adult felon is to have their DNA included in the "convicted offender database."

Of the two interpretations, the Appellants' is consistent with the rules of statutory construction, while Appellee's is not.

KRS 17.174 Did Not State that 17.170 Applies to Adjudicated Public Offenders: The most striking part of KRS 17.174 is what it did *not* say. ***It did not say "KRS 17.170 shall apply to an adjudicated public offender."*** If the General Assembly wished to modify KRS 17.170 by separate statute (a procedure which is frowned upon, to say the least) why didn't they simply say so? Rather that doing that, 17.174 states that 17.171 and 17.172 – two statutes dealing with convicted felons in the custody of the Department of Corrections – shall apply to a public offender based on an offense found in KRS 17.170 or 17.171.

"'No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every part of [an] Act.' *George v. Scent*, Ky., 346 S.W.2d 784, 789 (1961)." *McElroy v. Taylor*, 977 S.W.2d 929, 931 (Ky. 1998). To construe 17.174 to simply incorporate 17.170 to public offenders would be to write the language incorporating 17.171 and 17.172 out of the law. Clearly, the decision to reference 17.171 and 17.172, but not 17.170, was significant in the eyes of the legislature. Appellants' interpretation is the only one which is consistent with the legislature's chosen language. That interpretation credits the legislature's drafting by allowing 17.171 and 17.172 – both of which only apply to adult felons in the custody of the Department of Corrections – to be applied to adult felons in the custody of the Department of

Corrections for an offense which does not qualify for DNA collection, if they have a public offense which does qualify. Thus, all provisions of 17.174 are given significance.

The Failure to Change 17.170 to Include Persons Who Were "Adjudicated" Until 2008 at Which Time a Bill Applying Only to Older Juveniles With Qualifying "Violent Offenses" Was Adopted Supports Appellants' Position: The legislature is presumed to be aware of the state of the law – including authoritative judicial interpretations – when it adopts legislation. *Leadingham ex. rel. Smith v. Smith*, 56 S.W.3d 420 (Ky.App. 2001). With that premise in mind, logic dictates that where language in a statute has been authoritatively construed – as it was in *J.D.K.* – and the legislature reenacts the statute without changing the language, it is adopting that interpretation. In *Hughes v. Commonwealth*, 87 S.W.3d 850 (Ky. 2002), the court explained:

> "It is a generally recognized rule of statutory construction that when a statute has been construed by a court of last resort and the statute is substantially reenacted, the Legislature may be regarded as adopting such construction." . . . Further, "the failure of the legislature to change a known judicial interpretation of a statute [is] extremely persuasive evidence of the true legislative intent. There is a strong implication that the legislature agrees with a prior court interpretation when it does not amend the statute interpreted."

Id., at 855-56 (citations omitted). In this case, language in KRS 17.170 was authoritatively construed in *J.D.K.* to be inapplicable to juvenile public offenders. KRS 17.170 was reenacted twice (in 2002 and again in 2006) without adding the "or adjudicated" language required to address that interpretation. In each instance, the legislature had bills in front of it which would have done precisely what the Court of Appeals had directed, and chose not to adopt that language. In 2006, the legislature's actions clearly manifested a belief that the 2002 amendments did not provide for the testing of *any* juveniles, including "convicted" youthful offenders. Their belief on that score was reasonable, in light of the facts that (a) there was no provision authorizing DJJ to collect DNA from any person, and (b) the Justice

Cabinet had "fully implemented" the 2002 revisions, without starting such a program on their own.

Appellants acknowledge that 2008 HB 683 does contain language applying DNA sampling to adjudicated juveniles. However, the legislature rejected the bill supported by the Justice Cabinet which would have permitted sampling from any juvenile adjudicated of a felony offense regardless of age and chose a bill allowing sampling solely of youth adjudicated of offenses listed in KRS 439.401, the violent offender statute, or incest and who were thirteen or older at the time of the offense. The legislature's actions do not support Appellee's having authority to adopt a broad DNA sampling program without any age limitation via Directives.

DJJ's Interpretation Cannot Be Implemented Without Adding Language to the Statutes: It is well established that in interpreting statutes a court "must look to the express language of a statute rather than surmising what may have been intended by the legislature but was not expressed." *Coy v. Metropolitan Property and Casualty Ins. Co.*, 902 S.W.2d 73 (Ky.App. 1996). Even when empowered to interpret a statute at odds with its literal text in order to avoid a finding of unconstitutionality, a court "cannot go so far as to add additional words to give constitutionally permissible meaning where none would otherwise exist." *Diemer v. Commonwealth, Transportation Cabinet, Dept. of Highways*, 786 S.W.2d 861, 863-64 (Ky. 1990). Accordingly, this Court cannot adopt an interpretation of KRS 17.170 *et seq.* which requires the Court to add language to any of the statutes to make them work.

In this case, none of the challenged statutes related to collection of blood (KRS 17.170(1) and (2)), the testing of that blood (KRS 17.175(3)), the placement of test results in the DNA database (KRS 17.175(1) and (2)), or the removal of test results from the DNA

database upon dismissal of charges (KRS 17.175(5)), mentions juvenile adjudications or DJJ. Rather, these statutes speak exclusively of persons who have been "convicted" and are in the custody of the Department of Corrections. To interpret these statutes to also include DNA collected from children by the Department of Juvenile Justice would be to add substantially to what the legislature adopted.

The DNA Testing Statute Has No Application to Juveniles: Even if this court were to find that KRS 17.174 permitted the DNA **removal** statute (KRS 17.170) to apply to juveniles, there is no basis for claiming that the DNA **testing** statute (KRS 17.175) applies to juveniles. Neither KRS 17.171, 17.172 nor 17.174 makes any reference to KRS 17.175. KRS 17.175 by its express terms is limited to adult criminals in a number of ways:

- KRS 17.175(1) directs the creation of a DNA database for "***convicted criminals***, crime scene specimens, missing person, and close biological relatives of missing persons." KRS 17.175(1)(emphasis added).
- KRS 17.175(3) permits the Kentucky State Police to "receive analyze and classify samples of blood received from the Department of Corrections in compliance with 17.170 and this section . . .." Though it does permit blood to be submitted from "other sources" (such as missing persons cases), the language of the statute clearly does not recognize the Department of Juvenile Justice as having any authority to take blood under KRS 17.170.
- KRS 17.175(4) protects the records of DNA tests from disclosure under the Open Records Act, but does not acknowledge or incorporate the confidentiality provisions of the Kentucky Unified Juvenile Code. Under KRS 610.340(1)(a), records "of any nature generated pursuant to KRS Chapters 600 to 645 by any agency or

instrumentality, public or private, shall be deemed to be confidential and shall not be disclosed . . .." except to certain persons. There is no provision of KRS Chapters 600 to 645 to permit DNA test results obtained by the Department of Juvenile Justice to be used in subsequent criminal or juvenile proceedings. Consequently, it is an open question as to whether DNA tests obtained by the juvenile justice system would be admissible in a subsequent criminal trial.

- KRS 17.175(5) limits expungement provisions to a person who can establish that "the ***felony conviction*** on which the authority for including the DNA profile was based, has been reversed and the case dismissed." Implementation of that provision requires "A certified copy of the court order reversing and dismissing the ***conviction***." KRS 17.175(5) and (5)(b)(emphasis added).

In light of the foregoing, it is evident that KRS 17.175 does not permit the biological material collected under 17.170 to be tested and included in the DNA database. Consequently, even if KRS 17.174 was construed to incorporate KRS 17.170, it would be to no apparent purpose. Such an interpretation of KRS 17.174 would be absurd. "A statute should not be interpreted so as to bring about an absurd or unreasonable result." *Kentucky Indus. Utility Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 500 (Ky. 1998). The Appellants' interpretation solves that problem, by limiting application of KRS 17.174 to convicted felons, as 17.175 requires.

The "Fiscal Note" is Not an Aid to Construing These Statutes: In rejecting all of the foregoing claims, the lower courts placed emphasis on language in a "Fiscal Note" which accompanied 2002 House Bill 4 (the bill wherein the General Assembly adopted KRS 17.174). A fiscal note is a document intended to evaluate the fiscal impact of a statute, either

on the state treasury, or on local governments. KRS 6.955. In this case the Note was drafted by a Steve Mason, an accountant at the Legislative Research Commission, and made available to legislators and the public if requested. The Note described 17.174 as making all DNA statutes "apply to public offenders in the custody of the Department of Juvenile Justice" (TR I, 66). In the lower courts Appellee contended that this interpretation is the moral equivalent of an official commentary accompanying the act, and therefore should control its interpretation, and the lower courts appeared to agree with that contention.

The lower courts' ruling in this regard is error. Official commentaries can be used as a guide to interpreting the provisions of a statute or rule, though they are never binding on the court. *See Whittaker v. Commonwealth*, 895 S.W.2d 953, 956 (Ky. 1995)(declining to follow commentary to the Rules of Professional Responsibility). However, such commentaries have to be formally adopted by the body promulgating the rule or law, before they will have that effect. *See* KRS 500.100 (adopting commentary to the penal code); KRE 1104 (adopting commentary to the rules of evidence). In this case, the Fiscal Note relied upon by the Appellee was never voted upon by any body. A legislator who disagreed with its interpretation of the proposal – and in this case there may have been many – would have no practical way to make that disagreement known.

Moreover, the Fiscal Note is not prepared by an attorney, and the purpose of such document is not to render legal advice to the legislators regarding the interpretation to be given to the proposed bill. Such advice would clearly constitute the "practice of law" under SCR 3.020, which would in turn expose LRC staff to allegations that they were engaged in the unauthorized practice of law. KRS 524.130. Rather, the purpose of providing an interpretation of the act in the Fiscal Note is to define the accounting parameters -- i.e., what

costs are being included in the statute. Where, as here, those parameters are overbroad (i.e., including expenses not required by the act) that surplussage can be readily discounted by the members of the General Assembly in deciding how to vote on the substantive bill.

Certainly, there is nothing in the law which would support the view that by passing the bill the General Assembly endorsed the accountant's legal analysis contained in the fiscal note. In spite of the tens of thousands of fiscal notes which have been penned in the history of the General Assembly, no published case has ever relied upon one to help interpret a statute. Such an interpretation is unauthorized by statute and unsound in practice.

C. The Court of Appeals Did Not Properly Address These Issues.

The Court of Appeals resolved these statutory construction issues in a paragraph, stating that:

> [A]ppellants' arguments relating to the interplay among KRS 17.170 through KRS 17.175 do not compel a different result. Again, when a statute's words "are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as it is written." *Mondie v. Commonwealth*, 158 S.W.3d 203, 209 (Ky. 2005). Thus, the wording of the statutes surrounding KRS 17.174 does not compel a different result. MSO, at 6.

To the knowledge of the undersigned, there is no time in the history of Kentucky jurisprudence where a court has determined that a statute was incorporating one group of statutes for no other purpose than to incorporate a second (more directly relevant) set of statutes. Yet that is how KRS 17.174 has been construed in this case. That being the case, however one wishes to describe KRS 17.174, the terms "clear" and "unambiguous" do not seem to fit. To the contrary, the statutes appear to be highly ambiguous in both their intentions and their drafting. For example, if the General Assembly wanted DJJ to take DNA from adjudicated youth, why did they incorporate 17.171 and 17.172, but not 17.170 or

17.175 (both of which are more directly relevant)? Why did they not expressly provide DJJ with the authority to collect DNA from anybody (even youthful offenders, who are convicted felons whose DNA was clearly subject to collection from the beginning)? Why instead did they direct the Department of Corrections to take these samples from juveniles who Corrections has no responsibility for? And most of all, why would a General Assembly who has protected the rehabilitative nature of the juvenile court in other contexts (such as confidentiality) seek to undercut the rehabilitation of this population of youth?

As the language of the statutes is unclear, the Court of Appeals ought to have sought an interpretation which (a) does not require a court to add language to any provision, (b) gives effect to the entire statutory scheme, and (c) is consistent with a reasonable interpretation of the intentions of the General Assembly. If it had conducted that analysis, it would have found that the only interpretation of the statutes which meets all three criteria is the one offered by the Appellants.

As the lower courts have misconstrued the pertinent statutes, reversal is required.

II. THE COLLECTION OF BIOLOGICAL MATERIAL FROM ADJUDICATED PUBLIC OFFENDERS VIOLATES THEIR RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AND THEIR RIGHT TO PRIVACY.

Preservation: This issue was properly preserved for appellate review by inclusion in the Amended Petition (Supplemental Record).

Argument:

Appellee's Directives 06-02 and 06-05 and Policy 138 mandate the extraction of blood samples for DNA testing purposes from juvenile public offenders adjudicated guilty of a wide variety of offenses. This Court has not yet addressed DNA testing of convicted felons or juvenile public offenders. This case presents an important issue of first impression.

A. WARRANTLESS, SUSPICIONLESS SEARCHES

Unquestionably, blood extractions are searches for 4th Amendment purposes. *Schmerber v. California*, 384 U.S. 757, 767 (1966). Appellee's Directives thus clearly mandate searches of juvenile offenders in DJJ custody. In general, searches, even those that may be conducted without a warrant, must be based on probable cause to believe that violation of the law has taken place. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). However, under certain circumstances, searches may be conducted based on reasonable suspicion rather than probable cause. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Delaware v. Prouse*, 440 U.S. 648, 654-655 (1979). Finally, in a limited category of cases not involving law enforcement purposes, searches without any degree of suspicion have been held to comport with the 4th Amendment. *See Veronia School District 47J v. Acton* 515 U.S. 646 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

The search in question here – extraction of blood from juveniles for DNA testing – is performed without a warrant and without any degree of suspicion. Such searches violate the 4th and 14th Amendments, United States Constitution and Sections 10 and 11, Kentucky Constitution.

Appellate courts analyzing challenges to statutes authorizing DNA testing as illegal searches have applied two different tests – the traditional 4th Amendment balancing test and the "special needs" doctrine. *See Roe v. Marcotte*, 193 F.3d 72 (2nd Cir. 1999) where the court analyzed both tests and determined that the "special needs" doctrine had to be employed in the context of challenges to DNA testing because the cases where the Supreme Court has found that prisoners forfeit 4th Amendment rights deal with searches of their cells or persons for security reasons, a concern not implicated in DNA testing. In *People v. Garvin*, 847 N.E.2d 82, 89-90 (Ill. 2006) the Supreme Court of Illinois noted that the parties had presented

"two alternative analytical possibilities" with respect to its analysis of whether warrantless sampling and DNA testing of blood taken from convicted felons constituted a reasonable search – "the special needs test and the pure balancing test". Citing *Ferguson v. City of Charleston*, 532 U.S. 67, 69 (2001), the Illinois court explained the special needs test:

> Under the special needs test, nonconsensual warrantless searches are permitted without particularized suspicion only if a "special need" exists apart from general law enforcement needs. [citation omitted]. If a special need is found, then the court balances the parties' disparate interests to determine whether the intrusion is justified. If a special need is not found, the statute is deemed constitutionally infirm.
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> 847 N.Ed. 2d at 90.

As far as the "less rigorous pure balancing test", the court observed that "[i]n that test, courts perform only the balancing portion of the special needs test without requiring the showing of a special need apart from general law enforcement". *Id.* And the court noted that the United States Supreme Court has not addressed the propriety of either test in evaluating the constitutionality of DNA collection and analysis statutes. *Id.* That court then declined to guess what the Supreme Court's decision on that issue would be since it believed the outcome in the case would be the same under either test. *Id.*.

Appellee has contended in the courts below that the "special needs" exception permits blood extraction for DNA purposes, citing *In re Appeal in Maricopa Juvenile Action Nos. JV-512600 and JV-512797*, 930 P.2d 496, 499 (Ariz.App. 1996) and *In re Leopoldo L.*, 99 P.3d 578 (Ariz.App. 2004) (TR II 188-190). The term "special needs" first appeared in Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.*, 469 U.S. at 325. The Justice stated that limited exceptions to the probable cause requirement exist with reasonableness established by "a careful balancing of governmental and private interests" but that test applies only "in those exceptional circumstances in which special needs, beyond the normal need for

law enforcement, make the warrant and probable cause requirement impracticable". *Id.* The "special needs" exception has been used to uphold certain searches which are conducted for purposes other than solving and punishing crime.[17] The Court has also allowed the suspicionless searches established by some roadway checkpoint programs. *See Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) [highway sobriety checkpoints for public safety].

The Supreme Court revisited the special needs exception and limited its scope in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) and *Ferguson v. City of Charleston, supra.* In *Edmond* the Supreme Court considered a challenge to a highway checkpoint program permitting suspicionless stops and searches for illegal narcotics. That Court distinguished *Michigan Department of State Police v. Sitz, supra* which upheld highway sobriety checkpoints because those checkpoints were designed to reduce "the immediate hazard posed by the presence of drunk drivers on the highways", 531 U.S. at 39, and reasoned:

> [T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose. Rather, in determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue. We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends. 531 U.S. at 42-3, emphasis added.

The Court rejected the suspicionless highway narcotics searches on 4th Amendment grounds.

The Court reaffirmed *Edmond* a year later in *Ferguson, supra*, where the petitioners challenged a state hospital program which tested pregnant women for drug use and made the results of tests available to the police if a woman twice failed a test. 532 U.S. at 72. The

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[17] *See Board of Education v. Earls*, 536 U.S. 822 (2002) [urine testing of students for extracurricular activities to prevent health and safety risks from drug use]; *Skinner v. Railway Labor Executives Association*, 489 U.S. 602 (1989) [blood and urine testing of railroad employees to prevent accidents].

Court recognized that a significant goal of the program was to help women with drug abuse problems but noted "the immediate objective of the searches was to generate evidence for law enforcement purposes". *Id.* at 83. The Court observed that prosecutors and police were heavily involved in planning and implementing the program and held the drug tests violated the 4th Amendment.

Ferguson and *Edmond* clarify that the special needs doctrine applies only to a narrow category of cases to which traditional 4th Amendment requirements are inapplicable because they involve programs not designed to serve ordinary law enforcement needs. In accordance with that view, this Court has consistently viewed the "special needs" exception very narrowly. In *Commonwealth v. Buchanon,* 122 S.W.3d 565 (Ky. 2004), this Court considered whether a highway checkpoint was unconstitutional. In light of the conflicting testimony, this Court was uncertain whether the primary purpose of the checkpoint was to meet the general needs of law enforcement, or whether it was a permissible sobriety checkpoint. In finding the checkpoint to be unconstitutional, this Court interpreted *Edmond* to require that it "err on the side of caution when dealing with the most fundamental of those rights granted to our citizens to be free from unreasonable searches and seizures." *Id.*, at 570. In other words, just as with any other warrantless search, this Court will resolve any doubts about the purpose of the search in favor of the individual's right to be free from unreasonable intrusions.

Subsequently, in *Williams v. Commonwealth,* 213 S.W.3d 671 (Ky. 2006), this Court considered a warrantless raid conducted by the Board of Medical Licensure, along with local law enforcement, pursuant to KRS 311.605. Relying on *Ferguson,* this Court found the raid to be unconstitutional, finding that "(1) the raid in this case was conducted for the immediate and sole purpose of collecting incriminating evidence against Appellant; and (2) there was

excessive entanglement with law enforcement in both the Board's investigation of Appellant and in the resulting warrantless raid at his office." *Id.* at 676-677. As this Court stated, "neither Section 10 of Kentucky's Constitution nor the Fourth Amendment permits administrative statutes or agencies to be utilized or exploited as a means to conduct searches and seizures for law enforcement purposes without first obtaining (1) consent; or (2) a valid warrant." *Id.*, at 678.

In this case, the *Ferguson/Edmond* factors, particularly as interpreted by this Court in *Buchanon* and *Williams*, clearly weigh in favor of a finding that DJJ's DNA collection program is unconstitutional. There is absolutely no question that the purpose of this program is to facilitate criminal (or juvenile) prosecutions. Indeed, Kentucky law specifically provides that the information obtained through this program "***shall be used only for law enforcement purposes*** . . .." KRS 17.175(4)(emphasis added). In fact, the Commissioner's Directive 06-02 embraces that purpose as the basis for initiating this program:

> ***DNA collection*** improves public safety and ***is a valuable law enforcement tool*** in that it allows for comparison of crime scene DNA specimens with other samples contained in the Kentucky State Police database as well as with samples contained in the Federal bureau of Investigation's national database. ***Many serious crimes, such as murders and rapes, have been solved with DNA evidence.*** (A II 20; App 38)(emphasis added).

In fact, the DNA sampling program authorized by KRS 17.170 *et seq*. has no purpose other than to aid law enforcement with matching the DNA of those targeted with DNA from evidence which may be found at crime scenes and thus to determine if a person has committed a particular crime and to facilitate his prosecution and conviction. And, as DJJ has emphasized in its response to Issue III, it is the Kentucky State Police which is responsible for administering this program. Consequently, it is fair to say that the program is testing taken at the behest of law enforcement, for the purpose of securing incriminating evidence.

Accordingly, the DNA testing program outlined in Directives 06-02 and 06-05 cannot be justified by the "special needs" test as defined in *Edmond* and *Ferguson*, particularly as this Court has interpreted those tests in *Buchannon* and *Williams*.

B. DECISION OF THE COURT OF APPEALS

Citing primarily to an ALR Annotation[18] and *State v. Scarborough*, 201 S.W.3d 607 (Tenn. 2006), the Court of Appeals chose to apply the pure balancing test. MSO at 9-12. That Court found the extraction of blood to be "minimally intrusive" and noted that "convicted prisoners have a lesser expectation of privacy than non-convicted individuals". MSO at 11. The Court cited three cases involving adult convicted felons for the latter principle – *Crump v. Curtis*, 50 Fed. Appx. 217, 218 (6th Cir. 2002); *Bell v. Wolfish*, 441 U.S. 520 (1979 and *Samson v. California*, 547 U.S. ___, 126 S.Ct. 2193 (2006). The Court, citing KRS 17.175(2), then found that the Commonwealth has "a strong interest in maintaining identifying information for certain convicted felons and adjudicated juveniles". MSO at 11. With no further analysis the court found the collection of Appellants' DNA samples to be reasonable, declined to decide whether these were "special needs" searches, and held that Appellants' right to be free from unreasonable searches was not violated. MSO at 12. That Appellants are children rather than adults appeared to be irrelevant to the Court of Appeals.

C. CHILDREN ARE DIFFERENT FROM ADULT FELONS AND TAKING THEIR DNA AND PLACING IT IN A PERMANENT DATABASE VIOLATES THE 4TH AND 14TH AMENDMENTS, UNITED STATES CONSTITUTION AND SECTION 10, KENTUCKY CONSTITUTION.

Appellate courts[19] have determined whether DNA testing of adjudicated juveniles

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[18] Robin Cheryl Miller, Annotation, "Validity, construction, and operation of state DNA database statutes", 76 A.L.R. 5th 239 §14 (2000).

[19] Generally these have been mid-level appellate court decisions with only two Supreme Courts (Illinois and New Jersey) issuing decisions on this topic.

constitutes an illegal search in approximately nine states. A recent decision of the Illinois Supreme Court[20] analyzes most of those cases. Appellants acknowledge that, to date, adjudicated juveniles have not been successful in their challenges to DNA sampling. However, Appellants assert that the appellate courts which have reviewed the issue have obviously failed to appreciate the substantial differences between adjudicated juveniles and adult felons. Moreover, their decisions have little value because their state juvenile justice systems do not share the rehabilitative focus of Kentucky's.

Some of the courts which have upheld DNA sampling of adjudicated juveniles have essentially dismissed the notion that there are any meaningful differences between convicted felons and adjudicated juveniles for the purpose of analyzing the constitutionality of DNA sampling. *A.A. by B.A. v. Attorney General of New Jersey*, 914 A.2d 260, 264-265 (N.J. 2007) [court found "no justification to carve out a special exception for juveniles"]; *In re: T.E.H.*, 928 A.2d 318, 323 (Pa. Super. 2007) [court refused to find increased expectation of privacy for juveniles]; *L.S. v. State*, 805 So. 2d 1004, 1007-1008 (Dist. Ct. App. Fla. 2001) [adjudicated juveniles referred to as "convicted felons"]; *In re: Nicholson,* 724 N.E.2d 1217, 1221 (Ct. App. Ohio 1999) [court noted "inmate and/or probationer [referring to juveniles] has diminished constitutional rights"]; *In re: Orozco*, 878 P.2d 432, 435-436 (Or. App. 1994) [court failed to address impact of status as a juvenile on search and seizure claim]. None of those four courts discussed a rehabilitative mission for juvenile courts.

Other courts have discussed the impact of the appellant's status as a juvenile on a challenge to DNA sampling but actually given that status little weight. *See In re: Leopoldo L.*, 99 P.3d 578, 583-584 (Ct. App. Ariz. 2004) [court upheld DNA testing of juvenile sexual offenders, finding "a special need to deter this class of persons from re-offending]; *In re:*

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[20] *In Re Lakisha M.*, 882 N.E.2d 570, 575-576 (Ill. 2008).

D.L.C., 124 S.W.3d 354, 365 (Ct. App. Tex. 2003) [court upheld DNA testing of juvenile sex offenders, accepting the legislature's statement that its primary intent in establishing a DNA database is for identification of suspects in crimes]; *In re: Calvin S.*, 58 Cal. Rptr.3d 559, 562-563 (Ct. App. Calif. 2007)[court acknowledged balancing test must be performed differently for juvenile offenders, noting that they cannot be labeled criminals and access to their records is carefully limited, but found that DNA sampling is a minimal intrusion, the database furthers the rehabilitation and public protection goals of the juvenile code and the government's interest in law enforcement is substantial]. Two of those three courts did not mention juvenile court's rehabilitative mission.

Even in *Lakisha M., supra*, where the court explicitly acknowledged the juvenile's claim that the 4th Amendment balancing test for determining reasonableness is different where adjudicated minors are concerned, the court readily accepted the state's claim that the test is the same for those minors as for adult felons and held that *Garvin* controls. 882 N.E.2d at 575. That court did note that Illinois' Juvenile Court Act was "radically altered" in 1999 to allow for the terms "trial", "plea of guilty" and "sentencing", language which is comparable to that used with adult convictions. *Id.* at 576. And Illinois also permits jury trials in certain juvenile cases. *In re T.C.*, 894 N.E2d 876, 881-883 (Ill. App. 2008).

The United States Supreme Court recognizes that juvenile offenders differ dramatically from adult convicted felons and courts analyzing DNA sampling of adjudicated juveniles cannot ignore those differences. *See Roper v. Simmons*, 543 U.S. 551 (2005), 543 U.S. 551 (2005) where the Supreme Court explained that "our society views juveniles as 'categorically less culpable than the average [adult] criminal.'" *Simmons*, 543 U.S. at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)). Among the reasons supporting this

conclusion are that juveniles' lack of maturity "'result[s] in impetuous and ill-considered actions and decisions.'" *Simmons*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Thus, almost every state prohibits minors from voting, serving on juries, or marrying without parent's consent. *Simmons*, 543 U.S. at 569. And, compared to adults, juveniles are more susceptible to bad influence and have less formed personality traits. *Simmons*, 543 U.S. at 569, 570. The Court concluded that "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Simmons*, 543 U.S. at 570.

What distinguishes Kentucky from other states is the uniquely rehabilitative focus of its juvenile code. *See* Argument I, pages 11-14. Whenever this Court has been required to balance an assertion that a juvenile was entitled to certain rights as a matter of due process with the rehabilitative mission of the juvenile code, due process rights have been subordinated to promoting the welfare of the child. For example, in *A.W. v. Commonwealth*, 163 S.W.3d 4, 6 (Ky. 2005) this Court approved the decision of a juvenile court to impose a longer detention sentence for contempt than the sentence which had been probated at disposition, reasoning that the juvenile code "simply does not allow a court to give up on the rehabilitation of the juvenile who refuses to perform the terms of probation" and that the contempt power exists "to enable the court to help the juvenile become a productive citizen". And in *W.D.B. v. Commonwealth*, 246 S.W.3d 448, 449-452 (Ky. 2007) this Court held that the adoption of the juvenile code is "comprehensive in scope and rehabilitative in purpose". The Court held that upholding the common law presumption that children under a certain age lack criminal capacity "would frustrate the clinical and rehabilitative purposes of the juvenile code". *Id.* at 450.

Moreover, even in the context of youthful offenders, this Court has adhered to the code's rehabilitative purpose. Recently, in *Commonwealth v. Merriman*, 265 S.W.3d 196 (Ky. 2008) this Court referred to KRS 600.010, the purpose section of the juvenile code, and held that youthful offenders whose offenses are apparently designated as violent offenses under KRS 439.3401 cannot be denied the opportunity for probation at their eighteen year old hearing because such a policy would clearly undercut the rehabilitative purposes of the code.

As noted above, the rehabilitative purpose of the juvenile code comes at a price for the child, in that public offenders "are not afforded all the constitutional rights that adult offenders receive. They are afforded only the right to fair treatment." *Jefferson County D.H.S. v. Carter*, *supra*, at 61. The most important right sacrificed by a child in return for the state's benevolence is the right to a jury trial. That right is generally considered "sacred" and "inviolate" in Kentucky, *see* Ky.Const., § 7, but is nevertheless denied to juveniles accused of public offenses. *See* KRS 610.070(1); *Dryden v. Commonwealth*, *supra*; *McKiever v. Pennsylvania*, *supra.* As previously discussed, the rationale for depriving juveniles of a jury trial is that juvenile proceedings are different, and that the "clash and clamor" of a jury trial might lead the child to believe he was a criminal.

Appellee, through the implementation of this program, has sought to eradicate – or at the very least, ignore – the significant legal distinctions between a juvenile adjudication and a criminal conviction. The result of this decision is to subject a child to a form of criminal punishment, without affording him the solicitous due process rights which ordinarily precede that punishment. That the state act in the child's rehabilitative interest "must be the *quid pro quo* for society's right to exercise its *parens patriae* control over minors without the fundamental due process safeguards accorded adult offenders." *Collins v. Bensinger*, 374

F.Supp. 273 (N.D.Ill., 1974).

Put differently, the children whose biological material is at issue here were made a promise by the Commonwealth, a promise that the Commonwealth would act in their best interest at all times. Due process requires that the state be bound by that promise. *See Workman v. Commonwealth*, 580 S.W.2d 206 (Ky. 1979)(holding that due process prohibits the state from breaking its word). If the state will not be so bound, then it should be required to afford to the youth the due process rights to which he would have been entitled had he known that the state was no longer motivated purely by his best interest. In other words, before the state can take a person's DNA based on their criminal misconduct, it must afford the person a right to a jury trial. To hold otherwise would be to punish the child for relying on the state's assurance of rehabilitative treatment.

Employing even the 4th Amendment balancing test with respect to extracting DNA from juvenile offenders and placing that DNA in a national database, Appellants assert that their increased prospects for rehabilitation and confidentiality rights outweigh any interest the Commonwealth has in compiling a DNA database to solve past and future crimes. Since juveniles are less culpable than adults and have a greater chance to reform their behavior, it is incongruous to believe that their DNA will aide crime solving to the same degree as adults' DNA. And the message sent to these children is that society does not believe they can be rehabilitated and is thus "hedging its bets" by placing their DNA in a database. Considering the minimal value to society in placing juveniles' DNA in a database and juveniles' ongoing expectation of confidentiality and privacy which is not diminished as that expectation for adult felons is, DNA extraction from juvenile offenders does not constitute a reasonable search.

Appellee has relied heavily on *In re Leopoldo F.*, 99 P.3d 578 (Ariz. App. 2004) to distinguish *Ferguson/Edmond* (TR II 189-190). The *Leopoldo F.* court finds DNA testing for adjudicated public offenders distinguishable from suspicionless searches for generalized crime control purposes based on the alleged purpose of the law being a deterrent to re-offend. That analysis is superficial and inapplicable to Kentucky's DNA sampling program which was enacted specifically "for law enforcement purposes". *See* KRS 17.175(4); Appellee's Directive 06-02.

A comparable convoluted and unconvincing rationale was also asserted in *Ferguson, supra* but rejected by the Supreme Court. The government strongly urged that the goal of the drug testing program was to promote drug treatment for pregnant women but the Supreme Court rejected that claim, 532 U.S. at 82-6. The Court described as the "stark and unique fact" existence of a policy "designed to obtain evidence of criminal conduct by the tested patients that would be turned over to the police and that could be admissible in subsequent criminal prosecutions". *Id.* at 85-6. That description fits the Appellee's Directives 06-02 and 06-05 perfectly. Blood is obtained as possible evidence of criminal conduct and turned over to the state police; DNA evidence obtained from that blood may later be admitted in a criminal case. "The Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to such a policy". 532 U.S. at 86.

D. SECTION 10, KENTUCKY CONSTITUTION

Even if this Court determines that obtaining DNA from adjudicated juveniles does not violate the 4th Amendment, United States Constitution, Appellants request the Court to find that the procedure violates Section 10 of the Kentucky Constitution. Appellants acknowledge that in *LaFollette v. Commonwealth*, 915 S.W.2d 747 (Ky. 1996) this Court stated that

Section 10 provides no greater protection than the 4th Amendment. However, for the reasons contained in the concurring opinion of Justices Roach and Lambert in *Rainey v. Commonwealth*, 197 S.W.3d 89, 95-97 (Ky. 2006), the *LaFollette* court's view of Section 10 was overly narrow and should be abandoned. Appellants suggest that Section 10 does provide additional protections in certain cases, and specifically, that this Court is not required to follow the Federal Government into the abyss of 'special needs' searches.

There is very little question that this program would not have been approved under the original interpretation of the Fourth Amendment or what is now Section 10. In 1886, the United States Supreme Court interpreted the prohibition on "unreasonable searches and seizures" to be a limitation on the warrant requirement, rather than an invitation to warrantless searches. *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886). The Court described the purpose of the Fourth Amendment as prohibiting, among other things, the seizure of private papers, even those which contained the admission of a crime. In so doing, the Court stated that it "not the breaking of his doors and the rummaging of his drawers . . . ; but . . . the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense . . .." *Id.*, 116 U.S. at 630. 6 S.Ct. at 532. Subsequently, the High Court of Kentucky embraced the same view, finding that:

> It will be observed that the Constitution secures the people against "unreasonable search and seizure," and from the use of the word "unreasonable" it might be thought that a reasonable search and seizure, or one that was not unreasonable, would be allowed without a search warrant. But there is no foundation for this construction. The section does not permit any kind or character of search of houses, papers, or possessions without a search warrant.
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> *Youman v. Commonwealth*, 224 S.W. 860, 863 (Ky. 1920).

In the years that followed, this Court repeatedly reversed convictions on the ground that

officers had searched for evidence without a warrant, even when the circumstances certainly would have supported a finding of probable cause. *See, e.g.*, *Miller v. Commonwealth*, 235 Ky. 825, 32 S.W.2d 416 (1930)(finding that Section 10 was violated when Prohibition Officers, upon seeing a tub of mash in plain sight in the defendant's barn, entered the barn to examine the mash more closely). At the same time, this Court was drawing a distinction between the proceedings in juvenile court (which do not result in a "conviction") and the proceedings in adult court. *See Alexanders Adm'r, supra.* That being the case, it is hard to imagine pre-war Kentucky courts authorizing the extraction of DNA from juveniles who had never been convicted of any crime.

Since that time, the United States Supreme Court has carved more and more exceptions into the warrant requirement to meet the needs of modern law enforcement, and in each case this Court has followed suit. *Compare, e.g.*, *Wagner v. Commonwealth*, 581 S.W.2d 352 (Ky. 1979)(refusing to apply "automobile exception" to warrant requirement in Kentucky, citing Section 10) with *Estep v. Commonwealth*, 663 S.W.2d 213 (Ky. 1983)(overruling *Wagner* and applying exception). However, until *LaFollette*, this Court expressly retained the right to construe Section 10 at odds with the Fourth Amendment, if necessary. *See Crayton v. Commonwealth*, 846 S.W.2d 684, 687 (Ky. 1992)(noting that "this Court is under no obligation to follow the decisions of the Supreme Court of the United States as we interpret the Constitution of Kentucky."). Since *LaFollette* causally (and as Justice Roach pointed out in *Rainey*, incorrectly) found that Section 10 was coextensive with the Fourth Amendment, however, no court has seen fit to invoke Section 10 as an independent basis for striking down a search.

This Court has not previously been unwilling to interpret other state Constitutional

provisions more broadly then their federal counterparts. *See Baucom v. Commonwealth*, 134 S.W.3d 591 (Ky. 2004)(Kentucky constitution recognizes a right to hybrid representation); *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky.1989) overruled on other grounds, *Caudill v. Commonwealth*, 120 S.W.2d 635 (Ky. 2003)(right to personal confrontation can only be waived by the defendant personally, not by counsel). Would this court choose to find that Section 10 provides broader protections in some areas than does the Fourth Amendment, it would be in the company of twenty-eight other states which have done the same thing.[21] Certainly this case is an excellent vehicle for such a decision since Kentucky's jurisprudence concerning juveniles, with its emphasis on treatment and rehabilitation, is highly relevant in determining whether a search is reasonable.

The Commonwealth has created the juvenile justice system as a method of benefiting the child – and has forced the child to waive "sacred" rights in order to claim that benefit. It is hard to believe that Kentucky's Founding Fathers would permit such a program, steeped as it is in notions of privacy and the rehabilitative ideal, to also be used as a platform whereby the State Police could collect damning evidence for use in future prosecutions. Accordingly, even if this Court determines that the Federal Constitution is not violated, the Kentucky Constitution surely is. Accordingly, this Court should declare the DNA sampling program for

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[21] *Reeves v. State*, 706 P.2d 727, 734 (Alaska 1979); *State v. Sullivan*, 74 S.W.3d 215, 218 (Ark. 2002); *People v. Sporleder*, 666 P.2d 135, 140 (Colo. 1983); *State v. Mikolinski*, 775 A.2d 274, 278 (Conn. 2001); *Jones v. State*, 745 A.2d 856, 863 (Del. 1999); *State v. Tau'a*, 49 P.3d 1227, 1239 (Haw. 2002); *State v. Fees*, 90 P.3d 306, 313 (Idaho 2004); *State v. Jackson*, 764 So.2d 64, 71, n. 10 (La. 2000); *Jenkins v. Chief Justice of the Dist. Ct. Dep't*, 619 N.E.2d 324, 330 & n. 16 (Mass. 1993); *State v. Askerooth*, 681 N.W.2d 353, 361-62 (Minn. 2004); *Graves v. State*, 708 So.2d 858, 861 (Miss. 1997); *State v. Hardaway*, 36 P.3d. 900, 909 (Mont. 2001); *State v. Bayard*, 71 P.3d 498, 502 (Nev. 2003); *State v. Ball*, 471 A.2d 347, 350-53 (N.H. 1983); *State v. McAllister*, 875 A.2d 866, 873 (N.J. 2005); *State v. Gutierrez*, 863 P.2d 1052, 1056 (N.M. 1993); *People v. Robinson*, 767 N.E.2d 638, 642 (N.Y. 2001); *State v. Campbell*, 759 P.2d 1040, 1044, n. 7 (Or. 1988); *Jones v. City of Philadelphia*, 890 A.2d 1188, 1193 (Pa.Comm.Ct. 2006); *State v. Werner*, 615 A.2d 1010, 1012 (R.I. 1992); *State v. Forrester*, 541 S.E.2d 837, 841 (S.C. 2001); *State v. Schwartz*, 689 N.W.2d 430, 435 (S.D. 2004); *State v. Downey*, 945 S.W.2d 102, 106 (Tenn. 1997); *Heitman v. State*, 9815 S.W.2d 681, 690 (Tex.Crim.App. 1991); *State v. Debooy*, 966 P.2d 546, 549 (Utah 2000); *State v. Kirchoff*, 587 A.2d 988, 991-92 (Vt. 1991); *State v. McKinney*, 60 P.3d 46, 48 (Wash. 2002); *Smith v. State*, 557 P.2d 130, 132 (Wyo. 1976).

juvenile public offenders unconstitutional under Section 10 of the Kentucky Constitution.

E. PRIVACY AND DUE PROCESS

Even if this Court determines that the procedure for obtaining DNA does not violate either the 4th Amendment of the United States Constitution or Section 10 of the Kentucky Constitution, it should nevertheless find that the DNA sampling process mandated by Appellee's Directives 06-02 and 06-05 and DJJ Policy 138 violates the Appellants' right to privacy contrary to the requirements of the 14th Amendment, United States Constitution and Sections 1, 2 and 11, Kentucky Constitution.

The Supreme Court recognized in *New Jersey v. T.L.O., supra*, 469 U.S. at 387-8 that "a search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy". Clearly then extraction of a child's blood is an even more serious violation of a child's privacy expectations. This Court has recognized that the Kentucky Constitution guarantees an expansive right of privacy. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 492-499 (Ky. 1992). That Court cited Section 1 of the Kentucky Constitution guaranteeing people "certain inherent and inalienable rights" including "the rights of enjoying and defending their lives and liberties" and "the right of seeking and pursuing their safety and happiness" as well as Section 2 prohibiting the exercise of absolute and arbitrary power over the lives of citizens. *Id.* at 494. And it referred to the federal constitutional right of privacy created by the 14th Amendment to the United States Constitution. *Id.* at 493.

At bottom, the cases relied upon by the lower courts and DJJ treat the taking of DNA samples as a *de minimus* violation of privacy. That reasoning confuses the means by which the evidence was obtained, with the nature of the evidence itself, and it sets a terrible

precedent. If this program is merely useful, why not require it of all citizens? If not all citizens, why not require it as a condition of receiving public benefits, or of being a public employee, or a judge? After all, the interests in each of those examples is no different than the interests of the children whose cases are now before this Court. Science is increasingly showing that our genes affect every aspect of our life, and as we get better at identifying what genes correlate to what traits, it will some day be possible for a trained professional to reveal intimate secrets about a person based on nothing more than their genetic profile. The Commonwealth – who would like to voluntarily release this information to the Federal Government and others with no promise that it will not be redisclosed – cannot assure any citizen that their genetic profile, once obtained, will remain private. All citizens, including Appellants ,have a privacy interest in preserving the anonymity of their genetic information, and protecting that information from scrutiny from individuals (including government officials) who might wish to use that information to do them harm. As such, their right to privacy is violated by the non-consensual extraction of blood for DNA testing purposes. Therefore, this Court should declare DJJ's DNA testing program unconstitutional and reverse.

III. Appellee Has Violated KRS Chapter 13A By Failing To Issue An Administrative Regulation Concerning DNA Sampling.

Preservation: This issue was properly preserved for appellate review by inclusion in the Amended Petition (Supplemental Record).

Argument:

DJJ is attempting to implement DNA sampling through "Directives" issued by the Appellee and a policy promulgated outside KRS Chapter 13A procedures. Appellee first issued "Directive 06-02" on February 3, 2006 (A II 20-3; App 35-38). The Directive, which was effective immediately, stated that samples would be collected from youth currently

committed or probated to DJJ and those committed or probated since May 2003 (A II 21). The Directive listed the offenses for which blood would be drawn for DNA testing which included both felonies and misdemeanors (A II 23). After the Petition was filed, Appellee on February 16, 2006 issued Directive 06-05 postponing testing pending the trial court's decision on the motion for temporary injunction and providing a revised list of offenses for which DJJ would perform DNA sampling, eliminating misdemeanor offenses (TR I 61-2; App. 39). Moreover, DJJ issued an internal "Administration" policy, DJJ 138, effective February 3, 2006 outlining the DJJ DNA sampling process and the offenses to which DNA sampling would apply, including misdemeanors (TR I 99-104; App. 41-45). That Policy mirrored Directive 06-02.

DJJ is required to promulgate an administrative regulation concerning the DNA sampling program. KRS 13A.100(1) requires an administrative body – "shall" – to promulgate administrative regulations governing:

> Each statement of general applicability, policy, procedure, memorandum, or other form of action that implements; interprets; prescribes law or policy; describes the organization, procedure, or practice requirements of any administrative body; or affects private rights or procedures available to the public.

In this case, DJJ Directives 06-02 and 06-05 and DJJ Policy 138 are clearly statements of general applicability which interpret a statute, prescribe policy related to that statute, and describe the procedures for implementing that statute. The statute undeniably relates to the private rights of the children affected. That being the case, DJJ is prohibited from adopting this practice outside of the regulatory process. A General Directive, like any other internal memorandum, may not substitute for a regulation where one is required. KRS 13A.120(6); KRS 13A.130(2). Neither may an internal "administration" policy such as Policy 138. *Id.*

The initial regulation on DNA sampling was issued by the KSP on January 23, 2006[22]. 502 KAR 32:010E was issued on an emergency basis "to circumvent any challenges to the ongoing collection of DNA samples for inclusion in the Department's database premised on noncompliance with KRS Chapter 13A" (A II 25).[23] That regulation barely mentions DJJ and provides no guidance on identifying a "qualifying offender" other than reference to KRS 17:170 – KRS 17.174. 502 KAR 32:010 E Section 1 (14). Moreover, the forms incorporated by reference are obviously drafted for adults or youthful offenders, not juvenile public offenders (A II 56-9). The "DNA Sample Information Sheet" refers to the "inmate number", the circuit court case number and the "parole eligibility date" (A II 56-9). The "qualifying offense" list includes offenses clearly not included in DNA sampling of public offenders such as murder, manslaughter 1st degree and assault first degree[24] and lists the following: inmate number, KY SID number, "conviction" county, parole eligibility date and serve out date (A II 58).

The regulation and directives leave many unanswered questions. The most critical is who makes the decision that a youth is probated or committed to DJJ on a "qualifying offense"? Is it the local worker? The Classification Branch? The superintendent of a group home or YDC? And which of the several lists floating around will that person rely on when making this critical decision? What happens if a youth already in DJJ's custody does not consent to DNA sampling? Are there program consequences for him or her in the DJJ facility? What if a youth's case is on appeal? What if the adjudication of guilt is reversed?

[22] A revised version of 502 KAR 32:010 was adopted in July 2008 but that regulation does not clear up the deficiencies in the original regulation.

[23] Corrections had apparently been collecting DNA contrary to the requirements of KRS 17.170(2) for more than eight years (A II 2-9). Appellee originally issued Directive 05-08 implementing DNA sampling effective January 1, 2006 but then postponed implementation for at least thirty (30) days once the undersigned questioned the program's legality (A II 13-17).

[24] Those offenses are contained in KRS 17.173 which is not referenced by KRS 17.174.

Directive 06-02 mandates that DNA sample collection be included as a requirement for probation or supervised placement if the youth has a "qualifying offense" but does not specify who makes that determination (A II 20-3). The "JSW" or "JSS" notifies detention or youth development center (YDC) "facility staff and/or nurse" when the youth is probated or committed on a "qualifying offense". Directive 06-02 states that "if an eligible youth refuses to cooperate with the DNA sample collection process, the JSW or JSS shall notify the committing court of a possible contempt charge of refusing to comply". Additionally, the Directive specifies that a finding of contempt "shall be considered a directive to obtain a DNA sample", presumably by force. But the Directive does not state how that will be accomplished or by whom. Nor does it address what occurs if a youth's case is reversed on appeal.

The trial court rejected this claim, finding that the statutes are "clear" about which offenses are subject to DNA testing and "the adjudicator" makes the determination (App. 26). If the statutes were clear Appellee would not have had to issue a new directive substantially revising the list of offenses for which DJJ will perform DNA testing. Moreover, the critical gap here is between the court's order finding a youth guilty of an offense and the local worker's initiation of DNA sampling. Does the local worker review a court order and determine if the offense qualifies? Entrusting legal interpretation to such a non-lawyer is clearly inappropriate.

The trial court's response to the inapplicability of the language of the regulation to DJJ is that the regulation was written before the enactment of KRS 17.174, any DJJ regulation would be duplicative and "the current procedures may easily be extrapolated to clarify the proper application of KRS 17.170 to juvenile offenders" (App. 27). The regulation became effective on January 23, 2006, several years **after** KRS 17.174 was enacted. And

"extrapolating" from an administrative regulation drafted for DNA testing of adults to determine how DNA testing of juveniles should occur is impermissible.

The opinion of the Court of Appeals addressed this issue only briefly, MSO at 7-8. That Court found that only the KSP, not DJJ, was required to issue an administrative regulation concerning DNA testing. But that is precisely the problem. KSP has enacted a regulation about the mechanics of sending samples to its agency, the testing process and uploading results to the databases. That regulation does not address how DJJ (or Corrections) should identify qualifying offenders or what the consequences are if any individual does not comply with an order to provide a sample or how an individual proceeds if his conviction or adjudication is reversed and he wishes to have his DNA removed from the database. These are matters of policy and procedure implementing the DNA sampling law, *see* KRS 13A.100, and a regulation issued by DJJ was required.

DJJ clearly has the authority to promulgate regulations on DNA sampling and KRS 13A.100 requires DJJ to do so. Appellee's Directives 06-02 and 06-05 and DJJ Policy 138 are therefore void and reversal is necessary.

IV. Appellee Has Violated Final Action By The Justice Cabinet By Issuing Directives And Policies Instituting DNA Sampling.

Preservation: This issue was properly preserved for appellate review by inclusion in the Amended Petition (Supplemental Record).

Argument:

The legislature directed the Secretary of the Justice Cabinet to report when KRS 17.174 and the adjacent statutes were implemented. KRS 17.177(3). On April 15, 2003, the Secretary sent a letter to the Reviser of Statutes to comply with that requirement (App 48-49). In the letter, the Secretary explained that the "Kentucky offender DNA database was

established in 1992 for samples collected from persons convicted under KRS 510 pursuant to KRS 17.170." The Secretary interpreted House Bill 4 to require "the expansion of the State Police laboratory system's DNA database for mandate[d] groups of convicted individuals confined by the Department of Corrections." He further explained that "The legislation mandates that the Kentucky State Police develop and maintain a database of the DNA profiles of these individuals under submission of DNA samples by the Department of Corrections . . .." Based on this interpretation of the act, the Secretary ruled that "the applicable sections of the act (i.e. Sections 5 through 9) be effective May 1, 2003." (KRS 17.174 – which is the statute on which DJJ now relies – was section 8 of that act). **At that time, there was no program for collecting blood from juveniles for the purpose of DNA testing, and the Secretary made no mention of any obligation to seek DNA from non-convicted juveniles.**

This letter is significant for two reasons. First, it reflects the Justice Cabinet's interpretation roughly a year after the bill was passed that KRS 17.174 did not mandate collection of DNA from juveniles. Such evidence is strong support for the Appellants' construction of this statute. Second, the General Assembly charged the Justice Cabinet, not DJJ, with ensuring the implementation of these provisions. The Justice Cabinet has made a final agency ruling that KRS 17.174 is "fully implemented." DJJ cannot supersede that ruling. To hold otherwise would not only be contrary to KRS 17.177, but would also be contrary to the organization of the Justice Cabinet itself, in that it would allow the Commissioner of the Department of Juvenile Justice to supersede the decisions of her boss, the Secretary of the Justice Cabinet. *See* KRS Chapter 15A.

The trial court did not mention this issue and the Court of Appeals barely addressed the claim. It simply held that the Secretary's April 2003 notification "did not prohibit further

action in maintaining the DNA database"[25]. That was not the issue presented by Appellants. Appellee's Directives 06-02 and 06-05 and DJJ Policy 138 are therefore void and reversal is necessary.

CONCLUSION

For the reasons set forth in this Brief Appellants respectfully request this Court to reverse the decision of the lower court and to hold that they may not be subjected to DNA sampling.

Respectfully submitted,

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Gail Robinson

Timothy G. Arnold

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[25] MSO at 8-9.