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

PETITIONER F, A JUVENILE, ET AL — **APPELLANTS**

v.

BRIEF ON BEHALF OF APPELLEE

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

On appeal from Franklin Circuit Court
Civil Action No. 06-CI-00214
Judge Sam McNamara

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that true and accurate copies of this Brief have been hand delivered to Susan Stokley Clary, Clerk of the Kentucky Supreme Court, 209 Capitol Building, 700 Capitol Avenue Frankfort, Kentucky 40601, and copies were mailed to Judge Sam McNamara, Franklin Circuit Court, 218 St. Clair Street, Frankfort, Kentucky 40601; Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, 3rd Floor, Frankfort, Kentucky 40601; Timothy G. Arnold, Esq., Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601 and Gail Robinson, Esq. Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, all on this 16th day of March, 2009.

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Counsel for Appellee

STATEMENT CONCERNING ORAL ARGUMENT

Appellee does not request oral argument. While the issue is one of first impression, the issue is not complex and is solely a question of law. However, if the Court deems oral argument necessary, Appellee stands ready to appear.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATMENT OF CASE

This appeal involves a challenge against the Commonwealth's legal ability to collect DNA from juveniles adjudicated of certain offenses. The legislative history in this case is clear and reveals the intent of the General Assembly with respect to DNA collection. In 1992, approximately seventeen (17) years ago, the Commonwealth acknowledged that DNA should be collected from certain offenders. KRS 17.170(1) (1992). Even then, the General Assembly determined that the samples would be collected by the agency that had control of the offenders, but yet, the DNA samples should be maintained by a different state agency, Kentucky State Police. KRS 17.170(2) (1992). Furthermore, Kentucky State Police were directed by statute to promulgate administrative regulations regarding these DNA samples collected by the Department of Corrections and maintained by the Kentucky State Police. *Id.*

Over the years the Kentucky General Assembly maintained its commitment to DNA collection by amending KRS 17.170 and KRS 17.175. In 2002, the General Assembly considered and unanimously adopted House Bill 4 that expanded the DNA sampling program. The General Assembly enacted four new statutes regarding DNA collection. First, KRS 17.171, which provided:

> 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.

The second of these statutes is KRS 17.172, which provided:

> 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 511.020 or 511.030 or a felony attempt to commit one 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 17.173 is essentially identical to KRS 17.172, except that KRS 17.173 applied to different offenses—capital offenses and Class A or B felonies, as specified in the violent offender statute, KRS 439.3401. The last of these statutes enacted in 2002 which expanded the DNA sampling program is KRS 17.174, which provides:

> 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.

The adoption of House Bill 4 occurred in the regular session that immediately followed the Kentucky Court of Appeals decision in *J.D.K. v. Commonwealth*, 54 S.W.3d 174 (Ky. App. 2001), wherein the Kentucky appellate court held that if the legislature intended to include juvenile public offenders in the DNA sampling program then the language of the statutes needed to be amended to include such persons. The General Assembly revealed its intention for juveniles to be a part of the DNA sampling program and codified language in KRS 17.174 adding "adjudicated" juveniles into the DNA sampling statutory scheme.

Appellee issued a General Directive to follow the law as set forth in KRS 17.174 and collect DNA from adjudicated public offenders for the offenses listed in the statute. There was nothing underhanded about this Directive; rather, the Directive constituted an open and public record. Moreover, the agency was open to discussions with attorneys representing juveniles and at the conclusion of the discussions, an agreement could not be reached and the Department issued General Directive 06-02, on February 3, 2006. This directive was amended on February 16, 2006, by General Directive 06-05, wherein the Department replaced the list of offenses that was initially provided with General Directive 06-02 and noted the newly filed legal action challenging the DNA collection.

On February 15, 2006, Appellants filed a petition for writ of prohibition and declaration of rights. (TR I, 1-12). On March 7, 2006, Franklin Circuit Court entered an order allowing DNA collection to proceed, but directed DJJ to hold the samples until a final ruling was issued; and the trial court notably recognized that this case centered around "a substantial question of law that must be determined . . . as to whether KRS 17.174 permits DJJ to collect biological materials from youth who have been adjudicated guilty of a public offense."

In response to this order, Appellants filed an amended petition for writ of prohibition and declaration of rights, and Appellee filed a response with a motion for summary judgment. On October 26, 2006, Franklin Circuit Court issued a well-written 14-page order granting judgment to Appellee. (Appendix 2). The trial court found that "KRS 17.170 through KRS 17.174 clearly dictate the application of the DNA sampling program to juvenile offenders." (Appendix 2, p.12). The lower court went on to find that the DNA sampling of juvenile offenders was constitutional, that DJJ had not interfered with the implementation of regulations by the Kentucky State Police, and that such DNA sampling of juvenile offenders does not offend public policy. (Appendix 2).

Following this ruling Appellants requested injunctive relief pending appeal, this was denied by the Court of Appeals. However, on November 1, 2007, this Court partially granted the injunctive relief sought by Appellants. This Court reinstituted the temporary injunction originally issued by the Franklin Circuit Court, permitting the collection of DNA from juveniles, the submission of this information to the Kentucky State Police, and ordering that the information not be uploaded to the national database, and viewed only by such entitled employees of the Commonwealth of Kentucky.

The trial court stated that additional support for its finding is evidenced by the language of the Fiscal Note with House Bill 4.

> The Note states "HB 4 . . . creates a new section of KRS Chapter 17 . . . making all the previously mentioned statutes apply to public offenders in the custody of the Department of Juvenile Justice." Petitioners contend that Fiscal Note, while an indicator of legislative intent, does not bind this Court since it was not voted on by the legislature. This Court does not suggest it is bound by the Fiscal Note, but merely finds it persuasive.

(Appendix 2, p. 6). Appellants incorrectly argue that the trial court placed "much emphasis" on the language of the Fiscal Note. The trial court confirmed that it was not bound by the Fiscal Note. Moreover, the finding of the trial court stated that "the legislative history, relevant case law, and clear meaning of the statute are more than sufficient to support this [trial] [c]ourt's statutory interpretation." (Appendix 2, p. 6)

On February 22, 2008, the Court of Appeals issued an opinion to be published affirming in part and reversing in part and remanding in part. (Master Slip Opinion, MSO, Appendix 1.) The Court of Appeals held that DNA collection was authorized under KRS 17.174 that it did not violate the right to be free of unreasonable searches, as well as that DJJ did not violate any other law by following the law as authorized per KRS 17.174.

DNA collection and the use of a centralized database is well-established across the entire country. All states have enacted statutes to permit the DNA sampling of offenders for certain offenses and these samples are maintained in a centralized database which is included in the nationwide Federal database. *Validity, construction, and operation of state DNA database statutes*, 76 A.L.R.5th 239 § 14 (2000). There are a total of thirty-one (31) states that authorize DNA collection of juveniles.

Alabama	Ala. Code 1975 § 12-15-102
Alaska	AK ST § 44.41.035
Arizona	A.R.S. § 13-610
Arkansas	Ark. Stat. Ann. § 12-12-1109
California	West's Ann. Cal. Penal Code § 296
Colorado	Colo. Rev. Stat. Ann. § 19-2-925.6
Florida	West's F.S.A. § 943.325
Idaho	Id. Code §§ 10-13-6-1, 10-13-6-10
Illinois	730 Ill. Stat. Ann. 5/5-4-3
Iowa	I.C.A. § 81.10
Kansas	Kan. Stat. Ann. § 21-2511
Kentucky	KRS 17.174
Louisiana	LSA-R.S. 15:609
Maine	25 M.R.S.A. § 1574
Massachusetts	M.G.L.A. 22E § 3
Michigan	M.C.L.A. 712A.18K
Minnesota	MIN ST § 299C.105
Montana	MT ST 44-6-102
New Hampshire	N.H. Rev. Stat. § 651-C:2
New Jersey	N.J.S.A. 53:1-20.20
Ohio	OH ST § 2152.74
Oregon	OR ST § 419C.473
Pennsylvania	44 Pa. C.S.A. § 2316
South Carolina	SC ST § 23-3-620
South Dakota	SDCL § 23-5A-5
Tennessee	TN ST § 40-35-321
Texas	TX GOVT § 411.148
Utah	UT ST § 53-10-403
Virginia	VA ST § 16.1-299.1
Washington	WA ST 43-43-754
Wisconsin	WI ST 165.76

All of these statutes provide that such samples shall be included in the state's centralized database and these databases are provided to the Federal government to allow such samples to be available nationwide.

This Court should uphold the action of the General Assembly and affirm the decisions of the lower courts that this legislation is constitutional and applies to juvenile offenders.

ARGUMENT

I. LOWER COURTS CORRECTLY FOUND THAT DNA SAMPLING APPLIES TO JUVENILE PUBLIC OFFENDERS

A. KRS 17.174 Applies to Juvenile Public Offenders And Is Consistent With the Juvenile Code

The Kentucky General Assembly first passed legislation requiring DNA testing and establishing a centralized state DNA database in 1992. Subsequently, the legislature enacted KRS 17.170 and 17.175 to collect DNA identification samples from persons convicted of felony sex offenses under KRS Chapter 510 or KRS 530.020 (Incest).

In *J.D.K. v. Commonwealth*, 54 S.W.3d 174, 175 (Ky. App. 2001), the Court of Appeals recognized that:

> All fifty states and federal government have enacted DNA database legislation in some form or another. *See Landry v. Attorney General*, 429 Mass. 336, 709 N.E.2d 1085, 1087 (Mass. 1999); Anno. *Validity, Construction, and Operation of State DNA Database Statutes*, 76 ALR5th 239 (2000). The Kentucky General Assembly established a DNA database in 1992 when it created KRS 17.170 and 17.175. Our legislature expressed its purpose in creating and maintaining a DNA database as follows: to assist federal, state, and local criminal justice and law enforcement agencies within and outside the Commonwealth in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of sex-related crimes, violent crimes or other crimes and the identification and location of missing and unidentified persons.

In *J.D.K.*, the Commonwealth sought a blood sample from a juvenile public offender, pursuant to KRS 17.170[1], for DNA identification purposes. Ultimately, the appellate court held that juveniles adjudicated as public offenders were not subject to KRS 17.170 because they could not be considered "convicted." However, the court expressed 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.

[1] This was prior to the enactment of KRS 17.174.

The following Regular Session, the General Assembly unanimously enacted House Bill 4 ("HB 4"). The bill amended KRS 17.170, allowing an oral swab or other noninvasive procedures of DNA collection in addition to existing blood sampling methods. The bill also added KRS 17.171 through KRS 17.174. KRS 17.171 applies the DNA sampling provisions of KRS 17.170 to persons who have committed a violation of KRS 530.064, 531.310, and 531.320 or any felony attempt to commit one of those offenses. KRS 17.172 applies DNA sampling provisions to persons who have committed a violation of KRS 511.020 or 511.030 or any felony attempt to commit one of these offenses. The most significant statutory section added by the Legislature was the passage of the provisions of KRS 17.174. KRS 17.174 made the DNA collection laws applicable to juvenile public offenders, and it provides:

> KRS 17.171 and KRS 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.

Juvenile "public offenders" are those juveniles who have committed a public offense. A "public offense action" is defined as "an action, excluding contempt, brought in the interest of a child who is accused of committing an offense under KRS Chapter 527 or a public offense which, if committed by an adult, would be a crime, whether the same is a felony, misdemeanor, or violation, other than an action alleging that a child sixteen (16) years of age or older has committed a motor vehicle offense." KRS 600.020(46). A "public offender," as contrasted with a "youthful offender," is not convicted of an offense, but rather, adjudicated of the offense. An adjudication as a public offender can never be deemed a conviction. KRS 635.040. By specifically applying the provision of KRS 17.174 to "public offenders" who are adjudicated public offenders, or in the custody of the Department of Juvenile Justice, the legislature itself expressly defined the group of persons to whom DNA testing was to apply—and in doing so, it

plainly intended that juveniles adjudicated in district court on certain public offenses to be included in the DNA database.

Appellants contend that KRS 17.174 for DNA collection applies to those persons in the custody of the Department of Corrections ("DOC") and who committed a qualifying offense as a juvenile. Furthermore, Appellants contend that the interplay between KRS 17.170 through KRS 17.175 reveals that the DNA collection and the DNA sampling program does not apply to juvenile adjudicated public offenders. The Court of Appeals rejected both of these arguments. (Appendix 1, MSO, p. 4-6.) The plain language of the statute referring to those in the custody of DJJ reveals that Appellants contention is incorrect.

Appellee agrees that the juvenile criminal justice system has a rehabilitative focus, which is vastly different from the adult criminal justice system. Moreover, Kentucky law declares that a juvenile is entitled to treatment "reasonably calculated" for his/her improvement (KRS 600.010(2)(d)) and especially if criminal activity is involved that such laws should be interpreted to "promote the best interests of the child through ... treatment ... making the child a productive citizen ..., while maintaining public safety...." (KRS 600.010(2)(e)).

This Court has declared "a principle theory of juvenile law that an individual should not be stigmatized *with a criminal record* for acts committed during minority." *Jefferson County Dept. for Human Services v. Carter*, 795 S.W.2d 59, 61 (Ky. 1990) (emphasis added). KRS 17.174 has not violated this basic focus of juvenile law in Kentucky; rather, the General Assembly has determined that there is a need to maintain DNA samples from certain offenders, including juveniles. Such DNA sampling is not a stigmatization of juveniles and the statutory language maintains the distinctions between juvenile adjudications and adult criminal

convictions. Accordingly, the courts should assume the Legislature is aware of the purpose of the Juvenile Code. *Cook v. Ward*, 381 S.W.2d 168 (Ky. 1964).

In this case, Appellee is not advocating that a juvenile adjudication is the equivalent of a criminal conviction. Rather, Appellee contends that the General Assembly has acted constitutionally by enacting KRS 17.174 with respect to DNA collection of juveniles and such enactment does not violate the juvenile code. Furthermore, other courts have been faced with this similar question, and decided against juvenile offenders. The Illinois Supreme Court rejected this argument and held that the special considerations for juveniles in the state's juvenile justice system did not provide increased rights to juveniles. *In re Lakisha M.*, 227 Ill.2d 259, 882 N.E.2d 570, 577 (Ill. 2008).

Accordingly, this Court should affirm the decision of the Kentucky Court of Appeals and hold that KRS 17.174 applies to juvenile public offenders and is consistent with the Kentucky Juvenile Code.

B. Rules of Statutory Construction Require This Court to Interpret KRS 17.174 to Apply to Juvenile Public Offenders

The language of KRS 17.174 sets forth a clear intention to collect DNA from juveniles for the offenses described in KRS 17.170 and KRS 17.171. Appellants have mischaracterized the language of these statutes, arguing that the legislature omitted the term "adjudicated" in KRS 17.170 and 17.171, thus not intending to include juvenile public offenders. However, KRS 17.174 clearly adds adjudicated public offenders to existing classes of persons subject to DNA sampling for the offenses described in KRS 17.170 and KRS 17.171.

KRS 17.174 provides:

> 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.

The language of the statute is clear and unambiguous. A fundamental rule of statutory construction is that "[s]tatutes should be construed in such a way that they do not become ineffectual or meaningless." *Commonwealth v. Phon*, 17 S.W.3d 106, 108 (Ky. 2000) (citations omitted).When construing duly enacted statutes, it is "the seminal duty of a court . . . to effectuate the intent of the legislature." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). Additionally, "[i]t was long ago settled that the interpretation of statutes is a proper judicial function." *Masonic Widows and Orphans Home and Infirmary v. City of Louisville*, 217 S.W.2d 815, 822 (Ky. 1948).

Furthermore, the courts should view all related parts of the statutes "as a whole and in context with other parts of the law." *DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952 (Ky. 1999). Courts interpreting statutes "should look to the letter and spirit of the statute." *Combs v. Hubb Coal Corp.*, 934 S.W.2d 250, 254 (Ky. 1996). Apparent conflict between sections of the same statute should be harmonized if possible so as to give effect to both sections and should be construed so no part of the statute becomes ineffectual or meaningless. *DeStock No. 14*, at 957. Another fundamental rule of statutory construction is that the language in the act must be read in lights of the whole act. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 465 (Ky. 2004). Finally, it is well accepted that a reviewing court must not construe a statute in a manner which would effectively abolish it. *Commonwealth v. Wirth*, 936 S.W.2d 78 (Ky. 1996).

When viewed in light of these rules of statutory construction, KRS 17.174 dovetails neatly with KRS 17.170 and KRS 17.171. KRS 17.170 and KRS 17.171 provide that DNA collection shall occur and provide the offenses for which DNA sampling is applicable. KRS 17.174 merely adds "public offenders" or those who are adjudicated public offenders and who are in the custody of DJJ to the list of persons to which DNA sampling applies.

In conclusion, this the lower courts did not err by relying upon statutory construction and legislative history to find that DNA sampling applies to juvenile public offenders.

C. Court of Appeals Correctly Decided This Issue

The Court of Appeals decision provided analysis consisting of approximately three and one-half pages of discussion with respect to this issue. *See*, Appedix 1, MSO, p. 3-6. The lower courts did not add to nor remove any language from the statutory scheme setting forth DNA collection. Appellants argue that KRS 17.170 should have been incorporated into the language of KRS 17.174. (Appellants Brief, p. 22) The Court of Appeals response and the Appellee's response is that it did.

KRS 17.174 states that KRS 17.171 and 17.172 should apply to public offenders. The General Assembly chose to expand the offenses for DNA collection and identified those in KRS 17.171 and KRS 17.172. Furthermore, both statutes, KRS 17.171 and 17.172, correspond back to KRS 17.170, which sets forth DNA collection. As for the qualifying offenses for juveniles, the General Assembly stated that the offenses would be "any offense defined in KRS 17.170 or 17.171 or an attempt to commit one (1) of the named offenses." KRS 17.174. Therefore, the summation provided by the Court of Appeals is correct and the interplay between KRS 17.170

through KRS 17.175 supports Appellee's argument. As such, this Court should uphold the decision of the Kentucky Court of Appeals.

II. DNA COLLECTION OF ADJUDICATED PUBLIC OFFENDERS IS CONSTITUTIONAL

A. The Court of Appeals Correctly Decided Fourth Amendment Issue Under The Balancing Test That DNA Collection of Juveniles Is Reasonable and Does Not Violate Right To Be Free From Unreasonable Searches And Seizures

The lower courts both came to the same conclusion that DNA collection of juveniles adjudicated of certain offenses as set forth in the statutes KRS 17.170 through 17.175 is reasonable and does not violate Fourth Amendment. The Court of Appeals utilized the balancing test for determining that DNA collection of juveniles is not an unreasonable, warrantless search; and therefore, does not violate the rights provided by the Fourth Amendment. (Appendix 1, MSO, p. 9-12.) Franklin Circuit Court found that the Commonwealth's collection of "DNA samples from *known and adjudicated public offenders*, for use in determining any continued involvement in crimes certainly constitutes a special need and particular suspicion." (Appendix 2, p. 9 (emphasis in original)).

For Fourth Amendment purposes, blood extractions are searches. *Schmerber v. California*, 384 U.S. 757, 767 (1966). Some searches may be permitted without probable cause. *Terry v. Ohio*, 392 U.S. 1 (1968). Searches have been upheld "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by the requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602 (1989).

To date, all Fourth Amendment challenges to any DNA database statutes, either for adults or juvenile offenders, have failed. As explained below, regardless of the analysis used[2], all of the Courts, both state and federal, deciding this issue have upheld the DNA testing/database statutes in question on basis of the Fourth Amendment. *State v. Scarborough*, 201 S.W.3d 607, 617 (Tenn. 2006).[3]

Traditionally, courts evaluating the reasonableness of a search and seizure have applied a classic Fourth Amendment "balancing" analysis. Under the balancing analysis, a reviewing court determines whether the search was reasonable by weighing the government's interest in conducting the search and the degree to which the search actually advances that interest against the gravity of the intrusion upon personal privacy. *Brown v. Texas*, 443 U.S. 47, 51 (1979).

KRS 17.170 through 17.175 establish the Commonwealth's interest in maintaining identification of persons who have committed certain offenses. This DNA database maintained is not open to the public and is only to maintain DNA samples to identify biological specimens

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[2] Reviewing courts have used either a "balancing test" or a "special needs exception test" in determining whether the DNA statutes in question violated Fourth Amendment protections against unreasonable searches and seizures. Regardless of the test used, all of the Courts looking at the issue have upheld the statutes.

[3] See, e.g., *United States v. Conley*, 453 F.3d 674, 680-81 (6th Cir. 2006); *United States v. Kraklio,* 451 F.3d 922, 924-25 (8th Cir. 2006); *Nicholas v. Goord*, 430 F.3d 652, 655 (2d Cir. 2005); *United States v. Sczubelek*, 402 F.3d 175, 177 (3d Cir. 2005); *Padgett v. Donald*, 401 F.3d 1273, 1275 (11th Cir.2005); *Kincade*, 379 F.3d 813, 832 (9th Cir. 2004); *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004); *Groceman v. United States Dep't of Justice*, 354 F.3d 411, 413-14 (5th Cir. 2004) (per curiam); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003); *Velasquez v. Woods*, 329 F.3d 420, 421 (5th Cir. 2003) (per curiam); *Roe v. Marcotte,* 193 F.3d 72, 79-82 (2d Cir. 1999); *Shaffer v. Saffle*, 148 F.3d 1180, 1181 (10th Cir. 1998); *Schlicher v. Peters*, 103 F.3d 940, 943 (10th Cir. 1996); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996); *Rise v. Oregon*, 59 F.3d 1556, 1562 (9th Cir. 1995); *Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992); *Polston v. State*, 360 Ark. 317, 201 S.W.3d 406, (Ark. 2005); *In re the Appeal in Maricopa County Juvenile Action Nos. JV-512600 and JV-512797*, 187 Ariz. 419, 930 P.2d 496, 500-01 (Ariz. App. 1996); *People v. Adams*, 115 Cal.App.4th 243, 9 Cal.Rptr.3d 170, 183-84 (Cal.App. 6 Dist. 2004); *L.S. v. State*, 805 So.2d 1004, 1006-07 (Fl.Dist.Ct.App. 2001); *People v. Calahan*, 272 Ill.App.3d 293, 208 Ill.Dec. 532, 649 N.E.2d 588, 592 (1995); *State v. Martinez*, 276 Kan. 527, 78 P.3d 769, 775 (2003); *State v. Raines*, 857 A.2d 19, 21 (Md. 2004); *Landry v. Attorney General*, 429 Mass. 336, 709 N.E.2d 1085, 1092 (Mass. 1999); *Cooper v. Gammon*, 943 S.W.2d 699, 705 (Mo.Ct.App. 1997); *Gaines v. State*, 116 Nev. 359, 998 P.2d 166, 172 (Nev. 2000) (per curiam); *State v. Steele*, 155 Ohio App.3d 659, 802 N.E.2d 1127, 1137 (Oh.App. 2003); *State ex rel. Juvenile Dep't v. Orozco*, 129 Or.App. 148, 878 P.2d 432, 435-36 (Or.App. 1994) (en banc); *Dial v. Vaughn*, 733 A.2d 1, 7 (Pa.Cmwlth. 1999); *In re D.L.C.*, 124 S.W.3d 354, 373 (Tex.App. 2003); *Johnson v. Commonwealth*, 259 Va. 654, 529 S.E.2d 769, 779 (Va.App. 2000); *State v. Olivas*, 122 Wash.2d 73, 856 P.2d 1076, 1088 (Wash.App. 1993) (en banc); *Doles v. State*, 994 P.2d 315, 319 (Wyo. 1999).

from crime scenes, persons who commit certain offenses, as well as missing persons and close biological relatives of missing persons. KRS 17.175. The search conducted for this governmental purpose, DNA collection, is an effective method to obtain the information and make sure that the information is compatible for the national database. DNA collection is no more intrusive than a fingerprint. Juveniles are fingerprinted upon arrest or detention in a juvenile detention facility and these fingerprints are maintained in the same database as adult persons detained. KRS 441.046(1). For DNA collection, there has been a judicial finding beyond a reasonable doubt that the adjudicated youth has committed the act and "these individuals have been found to have a lesser expectation of privacy." (Appendix 1, MSO, p. 11 (citations omitted)). Therefore, under the balancing test, the search is reasonable and does not violate the Fourth Amendment.

Two recent United States Supreme Court cases, however, have caused some courts to question the continuing applicability of a pure traditional balancing test analysis as the proper test for determining the reasonableness of a search or seizure, at least in evaluating warrantless, suspicionless searches. In *City of Indianapolis v. Edmond*, 531 U.S. 32, 46-47 (2000), the Supreme Court held that a warrantless, suspicionless stop of random motor vehicles at a drug interdiction checkpoint for the purpose of an exterior canine sniff was unreasonable under the Fourth Amendment because the State failed to show a special need for the information acquired in the search apart from the normal need for law enforcement; indeed, the very purpose of the stop was law enforcement. In *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001), the Supreme Court held that a statute authorizing a state hospital to test the urine of pregnant women receiving prenatal care at the hospital was unreasonable under the Fourth Amendment because

the State failed to show a special need for the information acquired apart from the normal need for law enforcement.

An example of a summary of Fourth Amendment analysis with respect to juvenile DNA testing is found in *In re Leopoldo L.*, 99 P.3d 578 (Ariz. App. 2004). In *Leopoldo*, the juvenile in question had been adjudicated delinquent for committing public indecency to a minor. The juvenile challenged the statute on the grounds that DNA testing was not authorized for attempted sexual offenses, and the involuntary taking of a DNA sample under the Arizona statute was an unreasonable search that violated the juvenile's federal and state constitutional rights to privacy. The Arizona appellate court disagreed.

Prior to issuing the *Leopoldo* opinion, the Arizona Appellate Court upheld the Arizona DNA testing statutes in question in *Matter of Appeal in Maricopa County Juvenile Action Nos. JV-512600 and JV-512797*, 930 P.2d 496 (Ariz. App. Div.1 1996). However, in *Leopoldo*, the juvenile argued that the special-needs exception cases decided since *Maricopa* effectively overruled that decision. The court recognized that since the Supreme Court's decisions in *Edmond* and *Ferguson*, other courts "have grappled with identifying the correct analysis to use in deciding whether mandatory DNA testing of certain adult and juvenile offenders violates the Fourth Amendment." *Leopoldo*, at 583. *Leopoldo* court concluded that "[o]rdering DNA testing of juveniles adjudicated delinquent of sexual offenses is not the type of generalized crime control method that prevented the programs at issue in *Edmond*, *Ferguson*, and *Peterson* from falling within the special-needs exception." *Id.*

The Arizona Court also found that the *Edmond* and *Ferguson* programs were distinguishable from the Arizona statutes in question, because these statutes sought to deter a class of persons who committed enumerated offenses from re-offending. *Id.* Further, the Court

held that "[u]nlike the persons subject to search in those cases, the persons subject to DNA testing have been either convicted of or adjudicated delinquent for offenses that threaten the public safety. Thus, there is a special need to deter this class of persons from re-offending, which serves a government need distinct from the generalized and unfocused need for law enforcement." *Id.*, at 584 (citations omitted). Recognizing the fact as non-determinative, the *Leopoldo* court noted "that our decision today is consistent with those reached by the vast majority of other courts that have addressed this issue under either the special-needs exception or the totality of the circumstances balancing test." *Id.* Like the *Leopoldo* court conclusion, under either the "balancing test" or "the special needs exception test," KRS 17.174 does not violate the juvenile's right to be free from unreasonable search and seizure.

Appellants contend that under the "special needs" test DNA collection of juveniles violates the Fourth Amendment citing *Commonwealth v. Williams*, 213 S.W.3d 671 (Ky. 2006). The statutory scheme for DNA collection can be easily distinguished from the raids referenced in *Commonwealth v. Williams*. This Court's analysis focused on the fact that "the immediate objective of the searches was to generate evidence for law enforcement purposes." *Id.*, at 83. Appellants misconstrue the purpose of the database and rely upon the Directives issued by DJJ to determine the purpose of DNA collection as authorized by statute. The DNA collection and DNA database authorized by KRS 17.170 through KRS 17.175 does not generate criminal prosecutions, rather, the database is a centralized identification mechanism that if there is a pending criminal investigation the information contained in the database may be helpful. As compared to the searches in *Williams* that generated the basis for the criminal investigation and prosecution.

The Kentucky Court of Appeals did not find it persuasive to utilize the "special needs" doctrine with respect to this issue. Rather, the Court of Appeals analyzed the Fourth Amendment issue and held:

> [T]he Commonwealth has a strong interest in maintaining identifying information for certain convicted felons and adjudicated juveniles. The acceptance of fingerprinting these individuals is widely accepted, and DNA sampling is simply another form of identifying individuals. Indeed, DNA evidence may be helpful in some investigations in which fingerprinting evidence would not. Simply put, it is beyond argument that the Commonwealth has a profound interest in "the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of sex related crimes, violent crimes, or other crimes and the identification and location of missing and unidentified persons." (Appendix 1, p. 11 (quoting KRS 17.175(2))

In conclusion, this Court should uphold the decision of the Court of Appeals and find that DNA collection of juveniles is reasonable and does not constitute an unreasonable search or seizure.

B. Court of Appeals Correctly Held That DNA Collection of Juveniles Does Not Violate Fourteenth Amendment, Right to Privacy

Both lower courts analyzed the issue of whether DNA collection of juveniles violated their Fourteenth Amendment rights. Both courts reached the same conclusion, DNA collection of juveniles adjudicated of certain offenses does not violate their rights afforded by the Fourteenth Amendment. In *Colbert v. Commonwealth*, 43 S.W.3d 777, 780 (Ky. 2001), this Court reaffirmed that under the Kentucky Constitution the right to privacy is greater than that of the United States Constitution, however, this Court declared that this protection had not been broadened to search and seizures. Appellants fail to identify a Kentucky case expanding the right of privacy for juveniles and therefore finding that DNA collection would violate the youth's Fourteenth Amendment rights.

Appellants rely heavily upon *In re Lakisha M.*, 227 Ill.2d 259, 882 N.E.2d 570 (Ill. 2008), wherein the Illinois Supreme Court upheld the DNA collection of a juvenile offender. The Illinois Supreme Court acknowledged its decision in *People v. Garvin*, 219 Ill.2d 104, 847 N.E.2d 82 (Ill. 2006), where the Court held the DNA collection of adult felons was a reasonable search and the state's interest far outweighed the privacy interest of the adult felon. As in this case, the minor in *In re Lakisha M.* claimed that the privacy interest of a minor outweighed the state's interest. The Illinois Supreme Court disagreed:

> Lakisha acknowledges our holding in *Garvin*, but argues that when weighting the state's interest against the privacy interests of a minor adjudicated delinquent, rather than a convicted felon, different considerations inform the "reasonableness" inquiry and cause the balance to tip in the minor's favor. The State, however, maintains that the fourth amendment balancing test for determining reasonableness is the same for adjudicated minors as it is for adult felons and we should continue to follow our decision in *Garvin*. We agree with the State.

In re Lakisha M., 882 N.E.2d at 575. "Moreover, no court has ever held that a juvenile is entitled to greater fourth amendment protections by reason of her minority." *Id.* The Illinois Supreme Court as support with respect to all courts that have addressed the constitutionality of DNA collection for juveniles has upheld the collection, cites the following cases (*Id.* at 575-76): *In re Calvin S.*, 150 Cal. App. 4th 443, 58 Cal. Rptr. 3d 559 (Cal.App. 3 Dist. 2007); *A.A. ex rel. B.A. v. Attorney General*, 189 N.J. 128, 914 A.2d 260 (N.J. 2007); *In re T.E.H.*, 2007 PA Super. 193, 928 A.2d 318 (Pa. Super. 2007); *In re Leopoldo L.*, 209 Ariz. 249, 99 P.3d 578 (Ariz. App. Div.1 2004); *In re D.L.C.*, 124 S.W.3d 354 (Tex. App. Ft. Worth 2003); *L.S. v. State*, 805 So. 2d 1004 (Fla. App. 1 Dist. 2001); *In re Nicholson*, 132 Ohio App. 3d 303, 724 N.E.2d 1217 (Ohio App. 8 Dist. 1999); *Matter of Appeal in Maricopa County Juvenile Action Numbers JV-512600 & JV-512797*, 930 P.2d 496 (Ariz. App. Div. 1 1996); and *In re Orozco*, 129 Or. App. 148, 878 P.2d 432 (Or. App. 1994).

Appellants cite to cases referencing the difference between juvenile offenders and adult offenders. However, Appellee would ask this Court to take note of the same reasoning advanced in the Illinois Supreme Court in *In re Lakisha M.* upon which Appellants rely. The Illinois Supreme Court found this "reasoning to be faulty" and determined that a juvenile's possible lack of maturity "does not negate the fact that juvenile crime is a serious concern of the state." *In re Lakisha M.*, at 579.

The Kentucky Juvenile Code exemplifies that Commonwealth's concern regarding the conduct and treatment of juveniles. That is why the Juvenile Code is established to provide treatment and rehabilitation for juveniles following a decision by a neutral Judge determining that the act committed would be a criminal action, if the juvenile had been an adult. Therefore, Appellants reasoning is faulty and DNA collection in no way inhibits the purpose or focus of the Kentucky Juvenile Code.

In conclusion, this Court should reject Appellant's argument and affirm the decision of the Court of Appeals.

C. DNA Collection of Juveniles Does Not Violate Section 10 of the Kentucky Constitution

The Court of Appeals correctly held that DNA collection of juveniles does not violate Section 10 of the Kentucky Constitution. Section 10 does not afford any greater protection than the Fourth Amendment. *LaFollette v. Commonwealth*, 915 S.W.2d 747 (Ky. 1996). This point is even acknowledged by Appellants. Additionally, Appellants fail to reveal a justification for the expansion of Section 10 of the Kentucky Constitution. Accordingly, this Court should follow its own jurisprudence with respect to Section 10 of the Kentucky Constitution and hold that no

greater protection is afforded by Section 10 of the Kentucky Constitution as compared to the Fourth Amendment.

D. DNA Collection of Juveniles Does Not Violate Due Process

Appellee asserts that this Court should affirm the decision of the lowers courts. The Kentucky Court of Appeals and the trial court correctly decided that DNA collection of juveniles does not violate their right to due process.

Franklin Circuit Court correctly determined that DNA sampling is not violative of the youth's constitutional rights. The trial court appropriately notes that the Appellants themselves "point out that juveniles are not entitled to a jury in their public offender adjudication proceedings." (Appendix 2, p. 9) Furthermore, the trial court determined that "DNA sampling at issue here is not a punishment at all." (Appendix 2, p. 10). Moreover, the trial court continued its analysis and concluded that "[r]ather, [DNA sampling] is a simple recordkeeping, similar to a fingerprint or voice identification. As the DNA sample is not a form of criminal *punishment* and there is no *deprivation* of liberty or property, the due process right to a jury trial is irrelevant here." (Appendix 2, p. 10).

Appellants assert that the state must afford a juvenile due process and a jury trial prior to the state being authorized to collect DNA. (Appellants Brief, p. 34) It is a long-standing constitutional principle that juveniles are not entitled to a trial by jury in a juvenile proceeding. *Dryden v. Commonwealth*, 435 S.W.2d 457 (Ky. 1968). Furthermore, "[j]uvenile offenders are not afforded all the constitutional rights that adult offenders receive. They are afforded only the right to fair treatment." *Jefferson County Dept. for Human Services v. Carter*, 795 S.W.2d 59,

61 (Ky. 1990). Based upon well-established Kentucky jurisprudence, this Court should reject Appellants' argument and follow Kentucky law.

Moreover, other courts have rejected similar arguments and decided that the special characteristics of juvenile criminal justice system do not compel a different result. In the case of *In re Calvin S.*, 150 Cal. App. 4th 443, 58 Cal. Rptr. 3d 559 (Cal. App. 3 Dist. 2007), the California appellate court upheld DNA testing of a juvenile. Since the DNA testing statute in California had already been held as constitutional (*People v. Travis*, 139 Cal.App.4th 1271 (Cal. App. 1 Dist. 2006)), the juvenile argued that minors are entitle to special privacy interests which follow to a different conclusion regarding the constitutionality of DNA testing. This California court considered the special nature of juvenile proceedings in *In re Calvin S.*, *supra*, at 448, wherein the court stated:

> Thus, we agree the juvenile's relationship to the state and the state's public policy favoring confidentiality of juvenile proceedings are factors that should be considered in balancing the interests to which we have referred. The question is whether that relationship and the policy favoring confidentiality tip the scales to the point where Penal Code section 296 becomes unconstitutional when applied to a juvenile who has been convicted of a felony. We [hold] that they do not.

Accordingly, this Court should affirm the decision of the Kentucky Court of Appeals.

III. DJJ DID NOT VIOLATE KRS 13A

Appellants argue that Directive 06-02, Directive 06-05 and DJJ Policy 138 violate KRS 13A and specifically KRS 13A.100 (Appellants' Brief, p. 41). Appellants believe that DJJ is required to promulgate a regulation regarding DNA collection.

However, Appellants ignore the opening paragraph of KRS 13A.100 which sets forth that "any administrative body ***which is empowered*** to promulgate administrative regulations shall" promulgate such regulations. KRS 13A.100 (emphasis added). KRS 17.175 has always

empowered Kentucky State Police with the authority to promulgate regulations regarding DNA collection and DNA database.

KRS 13A.120(1)(a) provides "[a]n administrative body may promulgate administrative regulations to implement a statute only when the act of the General Assembly creating or amending the statute specifically authorizes the promulgation of administrative regulations." Appellee argues that DJJ is neither required nor permitted to promulgate regulations under KRS 17.170 through KRS 17.175. Appellants have failed to identify any act by the General Assembly authorizing DJJ to promulgate regulations regarding DNA collection. Rather, the General Assembly declared that "[t]he Department of Kentucky State Police ... shall promulgate administrative regulations necessary to carry out the provisions of the DNA database ... to include procedures for collection of DNA samples." KRS 17.175(6).

Appellants take issue with the Court of Appeals decision that only Kentucky State Police is required to promulgate regulations proclaiming that to be precisely the problem. (Appellants Brief, p. 44.) There is no statutory basis for DJJ to promulgate regulations regarding DNA collection. The General Assembly has empowered Kentucky State Police and no other Justice Cabinet agency with the authority to promulgate such regulations. In conclusion, this Court should uphold the decision of the Court of Appeals.

IV. APPELLEE DID NOT VIOLATE FINAL ACTION BY JUSTICE CABINET REGARDING THE IMPLEMENTATION OF DIRECTIVES 06-02 AND 06-05 AND DJJ POLICY 138

Appellants argue that DJJ violated the final action of the Justice Cabinet by creating Directive 06-02, Directive 06-05, and Policy 138. Upon this basis, Appellants argue that both

directives and the policy are null and void, and therefore, reversal is required. Appellants fail to provide any case law or statutory authority for this argument.

The letter issued on April 15, 2003, was prepared in accordance with KRS 17.177(3). The statute required written notification from the Secretary of the Justice Cabinet of implementation upon receipt of funding. Moreover, KRS 17.177(3) specifically did not require the Justice Cabinet to notify regarding the "date of implementation of testing." Therefore, the Directives and policies issued by DJJ as well as the Administrative Regulation changes made by Kentucky State Police in 2006 did not violate the final action of the Justice Cabinet. Rather, the Directives and regulations merely reflected the date of implementation of testing.

The Court of Appeals decision provided analysis to support its holding that the Directives were not prohibited. (Appendix 1, MSO, at 9.) Appellee contends that this issue argue by Appellants is meritless. Accordingly, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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