

**2008 JUDSON A. FALKNOR APPELLATE ADVOCACY
COMPETITION**

APRIL 22nd – APRIL 24th, 2008

COMPETITION PROBLEM

PRESENTED BY
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In the Supreme Court of the United States

ALISON HUXLEY,
PETITIONER,

v.

STATE OF WYTHE,
RESPONDENT.

*ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF WYTHE*

RECORD ON APPEAL

STATE OF WYTHE
v.
ALISON HUXLEY

No. 1693, September Term, 2004

**COURT OF SPECIAL APPEALS OF
WYTHE**

December 17, 2004, Filed

Argued before Cash, Fierson, and Hayt, JJ.

Opinion by Fierson, J.

On September 2, 2004, Appellant Alison Huxley was convicted of statutory burglary in the Circuit Court for Austin County. At trial, the State focused on two pieces of evidence to prove Huxley's guilt. First, a Certificate of Analysis stating DNA found on a cigarette butt recovered at the crime scene matched Huxley's DNA (the "DNA evidence"); and second, Huxley's silence in the face of her mother's vituperations immediately preceding Huxley's arrest. Huxley now appeals arguing 1) the judge erred in denying her motion to suppress the DNA evidence and 2) the State's use of her pre-arrest, pre-*Miranda* silence violated due process and her Fifth Amendment right against self incrimination. For the reasons discussed below, we agree and order Huxley's conviction be vacated and remand for a new trial.

I. Facts

The background for this case begins with Huxley's arrest for a misdemeanor two months prior to her arrest for burglary. The facts surrounding that event were revealed during the August 16th suppression hearing on the DNA evidence. On May 8, 2004, an officer of the Winston Police Department

arrested Huxley for "refusal to obey a lawful order."¹ Huxley was transported to Austin County Jail. Once there, the arresting officer swore out a complaint before the magistrate on duty, who issued a misdemeanor arrest warrant for Huxley. Huxley was then turned over to an intake officer who escorted her to the processing area where various identifying information, such as her name, date of birth, Social Security number, address, phone number, and physical characteristics were entered into the city's computerized criminal records database.²

After her preliminary information was recorded, Huxley had her photograph taken and her fingerprints digitally scanned. This information also became part of Huxley's record. Huxley was then taken to a private room where she was ordered to undress down to her undergarments under the observation of two female officers. Huxley was given a jumpsuit to wear and her property was catalogued and stored. Next, Huxley was escorted to jail infirmary where a nurse performed a preliminary health check and withdrew a sample of Huxley's blood pursuant to Wythe's DNA Fingerprint and Analysis Act ("DNA Act").³

¹ We. Code, § 2-483 of the Criminal Law Article provides in pertinent part:

(c) Prohibited....

(3) A person may not willfully fail to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance to the public peace....

(d) Penalty. A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 60 days or a fine not exceeding \$ 500 or both.

² The city's criminal records database also forms part of a statewide network known as the Wythe Criminal Information Network (WCIN). WCIN is operated and maintained by the Wythe Department of State Police and is a searchable index of all criminal records within the state.

³ We. Code, § 4-81 of the Criminal Procedure Article requires:

The next morning, Huxley posted bond and was discharged from the jail. On May 15th, she appeared before a district court magistrate for her preliminary hearing. It was at this time that the State's Attorney, without explanation, moved to dismiss the charge. The magistrate granted the motion.

In the interim, Huxley's blood sample had been sent to the state Crime Lab for analysis. Because of a backlog at the lab, Huxley's sample was not analyzed until two months later. Once the analysis was complete, Huxley's DNA profile was entered into the state DNA database.⁴ At this time, the State Police determined that Huxley's DNA profile matched a DNA sample recovered from an unsolved burglary that had occurred on April 29, 2004. The State Police notified the Winston Police Department, in whose district the crime occurred, of the match.

Detective Tigh of the Winston Police Department was the investigating officer originally assigned to the burglary. Relying exclusively upon the DNA match, Det. Tigh obtained an arrest warrant for Huxley. On July 28, 2004, Det. Tigh, accompanied by two uniformed officers, went to Huxley's home to execute the arrest warrant. After

A person who is arrested shall have a DNA (deoxyribonucleic acid) sample drawn or taken at the same time he is fingerprinted pursuant to the booking procedure in order to determine identification characteristics specific to the person. The analysis shall be performed by the Wythe State Criminal Laboratory or other entity designated by the Laboratory. The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the Department of State Police in a DNA database and shall be made available as provided in § 82 of this Title.

⁴ Wythe's DNA Act does not provide for the destruction and expungement of DNA profiles and samples should a defendant be found not guilty or have the charge against him dismissed.

knocking and announcing their presence, Huxley's mother, Julia Winston, allowed Det. Tigh and the officers into the home. Det. Tigh located Huxley in the living room and informed her that he was there to arrest her for burglary.

Immediately upon hearing this, Ms. Winston became exceedingly emotional. She began striking Huxley with her open hands and shouted at her, demanding to know why she committed the crime and why Huxley had "ruined her life." One of the uniformed officers restrained Ms. Winston while Huxley was placed in handcuffs and escorted out of the house. Outside, Huxley asked for a lawyer. She was taken to the Winston Police Department where she was advised of her rights as required by *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966). She repeated her request for a lawyer and was provided one. After conferring with her counsel, Huxley declined to answer any of Det. Tigh's questions.

Prior to trial, Huxley's attorney moved to suppress the DNA evidence. The circuit court motions judge denied the motion. On September 2, 2004, Huxley was tried before the Circuit Court of Austin County for burglary under § 8-210 of the Criminal Law Article. During his testimony, Det. Tigh stated that while processing the scene for evidence, he located a cigarette butt in the master bedroom. Because the victim did not smoke and no one else had permission to be in the house that day, Det. Tigh concluded that the cigarette butt had come from the burglar. Det. Tigh further testified that he recovered the cigarette butt and sent it to the Wythe State Criminal Laboratory for DNA analysis. At this time, the State's Attorney moved into evidence the Certificate of Analysis from the lab which stated the probability that the DNA from the cigarette

butt did not come from Huxley equaled one in six billion.

The State's Attorney then proceeded to question Det. Tigh regarding Huxley's arrest. Specifically, the State's Attorney, over objection, brought out the fact that Huxley remained silent immediately prior to being placed under arrest and while being assaulted and questioned by her distraught mother.⁵ Later, in his closing argument, the State's Attorney harped on Huxley's silence, asking the jury to infer Huxley's guilt from the fact:

The defendant was told she was being arrested for burglary. Any one of us, Ladies and Gentlemen, would have said, "No way. I didn't do anything." That is, if it she hadn't really done anything. But she didn't respond to that. What's more, even after seeing how much anguish she

⁵ [State's Attorney]: Did the defendant say anything after you told her you had a warrant to arrest her for burglary? ...

Det. Tigh: No.

[State's Attorney]: Did she deny her guilt?

Det. Tigh: No.

[State's Attorney]: Did she have any reaction at all?

Det. Tigh: She just stood there. She didn't look surprised or upset.

[State's Attorney]: Did Ms. Winston have any reaction?

Det. Tigh: Yes. Once I informed Ms. Huxley of why I was there, Ms. Winston, who was standing nearby, became very emotional.

[State's Attorney]: How so?

Det. Tigh: She appeared to be half angry and half crying. She began to striking and slapping Ms. Huxley.

[State's Attorney]: Did she say anything to the defendant? ...

Det. Tigh: She was screaming, "Why'd you do it? What'd you ruin your life for?"

[State's Attorney]: And what, if anything, did the defendant say in response?

Det. Tigh: Nothing; she just stood there until we secured Ms. Winston.

was causing her mother, even after her mother demanded an explanation as to why she did this, she still said nothing. If she were innocent, don't you think the defendant would have said, "Mom, I didn't do this. It's a mistake."?

The jury returned a verdict of guilty. The trial judge sentenced Huxley to twelve months in jail with six months suspended conditioned upon five years of uniform good behavior. Huxley subsequently noted her timely appeal to this court.

II. Discussion

A. The DNA Sample

We first address Huxley's challenge to the admission of the DNA evidence on the grounds that the reference sample which served as the source of Huxley's "entry" in the DNA database was obtained in violation of the Fourth Amendment's prohibition on unreasonable searches and seizures. The State concedes that if Huxley's DNA sample were taken illegally, then any "fruits" of that search, including the Certificate of Analysis, should have been excluded. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

In any unreasonable search challenge, the first question is whether a search has in fact occurred. The State concedes that it "searched" Huxley when it withdrew a sample of her blood. This concession is reasonable given the Supreme Court's holding in *Schmerber* that the administration of a blood test plainly constitutes a search within the meaning of the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

Huxley's DNA was taken without a warrant. Warrantless searches are

presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 585 (1980). Though the State of Wythe has never addressed the issue, other courts have applied two different tests in analyzing the taking of DNA samples from convicted felons. One approach involves determining whether such searches fall within the “special needs” exception to the warrant and individualized suspicion requirements. *See, e.g., Green v. Berge*, 354 F.3d 675, 677-79 (7th Cir. 2004). Other courts apply a reasonableness balancing test, derived from the Supreme Court’s opinion in *Bell v. Wolfish*, 441 U.S. 520 (1979). *See, e.g., United States v. Kincade*, 379 F.3d 813, 832 (9th Cir. 2002) (en banc). Though every court has upheld the taking of DNA from convicted felons, *see Maryland v. Raines*, 857 A.2d 19, 26-28 (Md. 2004) (citing cases), none have addressed the issue in the context of arrestees.

1.

We first consider whether the DNA Act falls within the “special needs” exception. This exception waives the ordinary requirement of individualized suspicion when “special needs, beyond the normal need for law enforcement make the warrant and probable-cause requirement impracticable.” *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

The key to the special needs exception, of course, is that the asserted government interest must be “beyond the normal need for law enforcement.” Two recent Supreme Court cases have reinforced this point. *Indianapolis v. Edmond*, 531 U.S. 32 (2000), invalidated highway roadblocks designed to detect illegal narcotics through the use of visual inspections and drug dogs. The Court

distinguished its prior cases upholding roadblocks designed to detect drunk drivers or intercept illegal aliens near borders because they were not a “checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” *Id.* at 38. Though the *Edmond* checkpoints had a lawful secondary purpose of removing impaired drivers from the road, it was not enough to justify the checkpoint. Otherwise, the Court reasoned, “authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check.” *Id.* at 46.

In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the Court declared unconstitutional a state hospital’s practice of testing pregnant women for cocaine and providing the results to the police. The Court distinguished *Ferguson* from its prior cases upholding mandatory drug screenings in the student athlete, DEA employee, and railroad engineer contexts because here “the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.” *Id.* at 80. Thus, though the ultimate goal of the program was “beneficent,” its immediate objective “was to generate evidence for law enforcement purposes.” *Id.* at 81, 82-83.

Our inquiry into the purposes of the DNA Act reveals that its primary purpose is for normal law enforcement. Originally, the DNA Act applied only to convicted felons. *See* We. Code, § 4-80 of the Criminal Procedure Article. In 2004, Delegate Powers introduced the amendment that would expand the Act to its current scope. Del. Powers’ statement to the House of Delegates when introducing the amendment indicates his motivation was purely law enforcement-oriented:

When police retrace the history of a serial predator after he is finally caught, they often find that he never had a prior criminal conviction, but did have a prior arrest. That means the only way they are likely to catch such a perpetrator after his first crime—rather than his 10th—is if authorities can maintain a comprehensive database of all those who are arrested, just as we do with fingerprints.

Moreover, this law enforcement motivation is expressed in the language of the Act itself. In its statement of purposes, the DNA Act emphasizes the importance of DNA in criminal investigations and the policy of the State to assist law enforcement investigations.⁶ Any other beneficent purposes served by the DNA Act are insufficient to save it. In light of *Edmond* and *Ferguson* the DNA Act does not qualify for the special needs exception to the Fourth Amendment.

2.

⁶ We. Code, § 4-79 of the Criminal Procedure Article, captioned as “Legislative Findings and Objectives,” states:

The Wythe Legislature finds and declares that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of criminal investigations or prosecutions, and in deterring and detecting recidivist acts. Moreover, it is the policy of this State to assist federal, state, and local criminal justice and law enforcement agencies in the identification and detection of individuals in criminal investigations and in the identification of missing persons, to assist in the recovery or identification of human remains from disasters, and to assist with other humanitarian identification purposes. It is therefore in the best interest of the State to establish a DNA database and a DNA databank containing DNA samples submitted by individuals arrested, convicted, or presently incarcerated.

Because the DNA does not fall within the “special needs” exception, we must determine whether it is otherwise reasonable under the totality of the circumstances standard. That standard requires us to balance a search’s intrusion upon an individual’s privacy with its promotion of a legitimate state interest. *United States v. Knights*, 534 U.S. 112, 119 (2001) (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). In *Knights*, the Supreme Court upheld the warrantless search of probationers’ homes, stating that such searches required no more than reasonable suspicion. *Id.* at 121.⁷

Though an arrestee, Huxley still retained at least some expectation of privacy. This is obvious merely by looking at, for example, *Chimel v. California*, 395 U.S. 752 (1969). In that case, the Supreme Court addressed searches incident to arrest and to what extent the police may search an arrestee and his home when armed with an arrest warrant. *Chimel*, 395 U.S. at 753-55. Though the Court upheld a search of the area within an arrestee’s immediate control, it found it unreasonable for the police to search to search other areas of his home. *Id.* at 762-63. Therefore, limits still exist upon the government’s ability to search a person despite his status as an arrestee.

Here, Huxley has two privacy interests. The first is her freedom from

⁷ We note that the Court expressly declined to decide whether a search of a probationer’s home could occur absent *any* particularized suspicion. *Knights*, 534 U.S. at 120 n.6. However, on September 27, 2005, the Court granted certiorari to *California v. Samson*, 2004 Cal. App. Unpub. LEXIS 9304 (Cal. App. 1 Dist. 2004), which will allow it to answer the question. We believe the Court should not and will not apply the totality of the circumstances test to suspicionless searches but require of them a non-law enforcement purpose. Because our judgment is the same in either event, we proceed with the analysis.

unwanted bodily intrusions: specifically, the withdrawal of her blood. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989) (“In light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable.”) (internal quotation marks omitted), *see also Schmerber*, 384 U.S. at 772 (“The integrity of an individual's person is a cherished value of our society.”).

Second, and most importantly, is the enormous amount of personal and private information contained within her DNA. Huxley’s expectation that this information is private is both legitimate and reasonable.

Though the statute is named the “DNA Fingerprint and Analysis Act,” there is a significant difference between the State knowing the pattern of whirls and swirls that make up a person’s fingerprint and knowing the genetic code that makes up her DNA. With a copy of Huxley’s genetic code, the State can do far more than conclusively identify her. It can determine what diseases she suffers from and her potential of developing future disease, it can reveal maternity and other family relationships, and it can provide information on other physical, mental, and behavioral traits she possesses. *See Kincade*, 379 F.3d at 850-81 (Reinhardt, J., dissenting). And because Huxley’s DNA sample will remain in permanent storage at the Crime Lab,⁸ the information the State can learn from Huxley’s DNA will only

⁸ We. Code, § 4-83 of the Criminal Procedure Article provides that:

The remainder of a blood, saliva or tissue sample submitted for analysis and inclusion in the database pursuant to § 80 or § 81 of this Title shall be securely stored by the Criminal Laboratory in a databank in accordance with specific procedures adopted by regulation of the Criminal Laboratory to ensure the integrity and confidentiality of the samples.

increase as genetic research advances. *See id.*

The State’s interest in obtaining Huxley’s DNA is admittedly not insubstantial. The State points out that the DNA database can be used to solve past and future crimes and that the mere presence of the database may deter criminals from committing offenses in the first instance. Additionally, the State argues that obtaining an arrestee’s DNA profile allows it to conclusively identify persons it has in custody.

Although Huxley was an arrestee and not a free person at the time of the search, we nevertheless conclude that her privacy interests outweigh those of the State. At the outset, we do not see how the State’s “true identity” justification is any different than an ordinary interest in law enforcement. The only reason why the State would want the ability to forever identify those it has arrested is so that it can tie them to other crimes. Though law enforcement is a great state interest, such interest existed at the adoption of the Fourth Amendment and its limitations upon the power of the state in that area. If the State must obtain a warrant founded upon probable cause to obtain the information found in one sentence on one page of a person’s papers, we do not see why the State, absent any individualized suspicion, should be allowed to obtain an arrestee’s DNA, containing vast amounts of personal and private information. Such a search—with no limitation on scope and with no tie to the investigation of a specific crime—smacks of a general warrant. The DNA Act cannot withstand *Knights’* totality of the circumstances test.

B. Huxley’s Pre-Arrest Silence

Huxley also argues the State's introduction of her pre-arrest, pre-*Miranda* silence as substantive evidence of her guilt violated due process and her Fifth Amendment privilege against self-incrimination. The Supreme Court has never addressed the issue and both the states and federal circuits are divided. *See Combs v. Coyle*, 205 F.3d 269, 282 (6th Cir. 2000) (citing federal cases), *Idaho v. Dee Moore*, 965 P.2d 174, 180 (Id. 1998) (citing state cases and holding silence is inadmissible), *Wisconsin v. Adams*, 584 N.W.2d 695, 699 (Wis. 1998) (citing state cases and holding silence is admissible).

It is well established that the government may not comment upon a defendant's refusal to testify at trial. *See Griffin v. California*, 380 U.S. 609 (1965). Griffin was on trial for murder and did not testify—a fact which the prosecutor emphasized in her closing argument to the jury. *Id.* at 609-11. The Court found that commenting on a defendant's refusal to testify was “a remnant of the inquisitorial system of criminal justice, which the Fifth Amendment outlaws.” *Id.* at 614 (internal quotation omitted).

After *Griffin*, the Court next took up the issue of using a defendant's silence after being advised of his rights under *Miranda* not to prove guilt but to impeach a defendant's testimony at trial. *Doyle v. Ohio*, 426 U.S. 610 (1976). Doyle was arrested for possession of marijuana. *Id.* at 612. At trial, he testified that he had been framed. *Id.* at 613. The state then attempted to impeach his story with his post-arrest, post-*Miranda* silence. *Id.* at 614. The Court gave two justifications for holding such practice impermissible. First, the silence is “insolubly ambiguous” because it may mean nothing more than a defendant is exercising his rights. *Id.* at 617. Second, admitting the

silence would violate fundamental fairness and due process because the *Miranda* warnings carry an implicit guarantee that exercise of those rights carries no penalty. *Id.* at 618.

We believe *Griffin* and *Doyle* dictate the result in this case. Huxley was aware of her rights when Det. Tigh executed the arrest warrant. Only two and one half months earlier, Huxley was given her *Miranda* warnings when she was arrested for failure to obey. Indeed, when Det. Tigh took her into custody, Huxley invoked her right to counsel—before being advised of her rights. Furthermore, we agree with Maryland's high court that the *Miranda* warnings have been engrained in our social consciousness—both through school civic lessons, the media, and popular entertainment. *Maryland v. Weitzel*, 863 A.2d 999, 1004 (Md. 2004) (prohibiting the use of pre-arrest silence under the state's evidentiary laws). Thus, “the average citizen is almost certainly aware that any words spoken in police presence are uttered at one's peril.” *Id.* at 1005. We therefore conclude that the State effectively punished Huxley for exercising her Fifth Amendment right in violation of due process.

We conclude further that by commenting upon her pre-arrest silence, the State violated Huxley's Fifth Amendment right against self-incrimination. The State argues that Huxley had no Fifth Amendment right at the time of her silence because she was not in custody and therefore lacks any government compulsion to remain silent. We reject this argument. All persons at all times have the right not to incriminate themselves before the police. The right is not summoned into existence only upon the click of handcuffs or incantation of the *Miranda* warnings. *See United States ex rel.*

Savory v. Lane, 832 F.2d 1011, 1018 (7th Cir. 1987), *Dee Moore*, 965 P.2d at 180.

Moreover, to adopt the State's position would undermine Fifth Amendment policies of:

our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; ... [and] our sense of fair play which dictates a fair state-individual balance ... by requiring the government in its contest with the individual to shoulder the entire load.

Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964) (internal citation omitted). If we were to hold that a defendant's silence is only protected after recitation of the *Miranda* warnings, we can envision the police never advising defendant's of their rights thereby opening the door for prosecutors at trial to always comment upon the defendant's failure to assert her innocence. We do not see how the concerns that motivated the result in *Griffin* are any less implicated here.

The State argues that the Supreme Court's holdings in *Jenkins v. Anderson*, 447 U.S. 231 (1980) and *Fletcher v. Weir*, 455 U.S. 603 (1982) compel a different result. Both cases are distinguishable from the one before us because they concern the admissibility of pre-*Miranda* silence for impeachment purposes only. They rely on the premise that by taking the stand a defendant opens herself to impeachment because it furthers the truth-seeking process. See *Lane*, 832 F.2d at 1017-1018. Huxley did not testify at her trial.

C. Harmless Error

The State conceded during oral argument that the admission of the DNA evidence and Huxley's pre-arrest, pre-*Miranda* silence would constitute reversible error if either or both were found to be unconstitutional.

JUDGMENT OF THE CIRCUIT COURT FOR AUSTIN COUNTY VACATED; CASE REMANDED FOR NEW TRIAL. COSTS TO BE PAID BY AUSTIN COUNTY.

STATE OF WYTHE
v.
ALISON HUXLEY

No. 101, September Term, 2004

COURT OF APPEALS OF WYTHE

May 5, 2005, Filed

Argued before Reliant, C.J., Clements, Toly,
Toms, Aber, Burroughs, and Deeds, JJ.

Opinion by Reliant, C.J.

In this case we are asked to resolve two questions regarding the constitutional protections afforded to criminal defendants. First, whether the State can require that every person arrested and booked into jail provide a sample of their DNA for the purpose of accurately establishing the arrestee's identity. Second, whether the State, consistent with due process and the Fifth Amendment, may introduce at trial as substantive evidence of guilt a defendant's silence before she had been arrested and advised of her *Miranda* rights. We answer yes to both questions.

I.

On September 2, 2004, Respondent Alison Huxley was convicted of burglary in the Austin County Circuit Court and sentenced to twelve months in jail with six months suspended. The daytime burglary occurred on April 29, 2004 in the home of a Winston city resident while she was at work. The only piece of evidence linking Respondent to the burglary was a cigarette butt recovered from the master bedroom. Because the victim did not smoke and no one else had permission to be in the home that day, logically the cigarette butt must have come from the burglar. The cigarette butt was sent to Wythe State Criminal

Laboratory and processed for DNA. DNA was successfully recovered, but the profile did not match any entry in the State database or CODIS.¹

A little over a week later, Respondent was arrested in Winston for failing to obey a lawful order of a police officer. Pursuant to Wythe's DNA Fingerprint and Identification Act ("DNA Act"), We. Code, § 4-79 *et seq.* of the Criminal Procedure Article, Respondent had a sample of her blood drawn at booking for the purpose of creating a DNA profile of Respondent for entry into Wythe's DNA database.

Once Respondent's DNA profile was complete and entered into the database, it was discovered that it matched the DNA found on the cigarette butt recovered from the April 29th burglary. On July 28, 2004, Det. Tigh of the Winston Police Department, accompanied by two uniformed officers, executed an arrest warrant for Respondent at her home. Respondent's mother admitted the three into the home. Prior to taking Respondent into custody, Respondent's mother became upset, slapped Respondent and demanded she account for herself. Respondent did not reply and Det. Tigh took her into custody, handcuffed her, and escorted her out of the home. Respondent was read her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966) and Respondent requested a lawyer. After conferring with her lawyer, Respondent invoked her right to remain silent. The police never questioned Respondent.

¹ For a brief overview of the FBI's Combined DNA Indexing System (CODIS) and DNA databases in general, see Sandra Carnahan, *The Supreme Court's Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database*, 83 Neb. L. Rev. 1, 3-6 (2004).

At trial, the State's Attorney introduced a Certificate of Analysis from the Crime Lab that stated Respondent's DNA matched the DNA on the cigarette butt recovered from the crime scene. Additionally, on direct examination the State's Attorney elicited from Det. Tigh Respondent's silence immediately prior to her arrest. Because these two pieces of evidence constituted the principle parts of the State's case-in-chief, they figured prominently in the State's Attorney's closing argument. The jury returned a verdict of guilty.

Respondent appealed her conviction to the Court of Special Appeals. That court found the State had violated Respondent's Fourth, Fifth, and Fourteenth Amendment rights and vacated Respondent's conviction. *State v. Huxley*, No. 1693 (We. App. 2004). The State petitioned this Court for certiorari and we accepted.

II.

The State advances two independent reasons why the DNA Act comports with the Fourth Amendment.² First, the State argues the DNA Act falls within the special needs exception to the Fourth Amendment because the collection and storage of DNA profiles of arrestees serves "a special need beyond the ordinary need for law enforcement." Alternatively, the State, citing *United States v. Knights*, 534 U.S. 112

² The Fourth Amendment was made applicable to the states through the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961). The Amendment guarantees:

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

(2001), argues that the search is reasonable under the totality of the circumstances. Specifically, the State asserts that its interests in knowing Respondent's identity, deterring and solving crime, and maintaining public safety outweigh her reduced expectation of privacy as an arrestee. We agree that the DNA Act falls within the special needs exception and therefore do not need to determine whether the search is otherwise reasonable under the Fourth Amendment.

The Supreme Court summarized the special needs doctrine in *Von Raab*, stating that while a warrant founded upon probable cause is the normal prerequisite for a search, neither a warrant nor any type of individualized suspicion "is an indispensable component of reasonableness in every circumstance." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). Instead, when a search "serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Id.* at 665-66.

The Court has upheld suspicionless searches under the special needs doctrine in many instances. *See, e.g., Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) (drug testing of high school student athletes to protect their health), *Von Raab*, 489 U.S. 656 (mandatory drug testing of DEA employees in certain sensitive positions), *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (mandatory drug testing of locomotive engineers following a railway accident). In the law enforcement context, the primary special needs case is *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

There, the Court upheld a Wisconsin program that authorized warrantless search of probationers' home when their probation officer had "reasonable grounds" to believe contraband was present. *Id.* at 870-71. The Court stated that supervision of probationers is a "special need" necessary to ensure that probation restrictions are in fact observed, that the probation serves as a genuine rehabilitation period, and that the community is not harmed by the probationer's being at large. *Id.* at 873-75. Requiring a warrant or probable cause would undermine the probation system, the Court opined, because, *inter alia*, it "would reduce the deterrent effect that the possibility of expeditious searches would otherwise create." *Id.* at 876.

We do not dispute Respondent's claim that information stored in the DNA database may be used in future criminal investigations. However, crime solving is not the DNA Act's primary purpose. As the DNA Acts states, the purpose of collecting an arrestee's DNA is "to determine identification characteristics specific to the person[s]" the State has in custody. We. Code. § 4-81 of the Criminal Procedure Article. In this sense, the DNA Act is no different than requiring arrestees submit to fingerprinting.

Responds argue that the Supreme Court's holding in *Indianapolis v. Edmond*, 531 U.S. 32 (2000) and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) preclude our finding that the DNA Act satisfies the special needs exception. *Edmond* dealt with a roadblock program whose primary purpose was to detect evidence of illegal narcotics trafficking. *Edmond*, 531 U.S. at 40. Similarly, the hospital program in *Ferguson*, though it had the ultimate goal of encouraging drug-addicted mothers into substance abuse counseling, its immediate

purpose was to use urinalysis results to obtain evidence for criminal prosecution. *Ferguson*, 532 U.S. at 83. In distinguishing these cases, we are guided by the Seventh Circuit's analysis in *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004). In *Edmond* and *Ferguson*, the primary purpose was to see if an individual was there and then engaged in illegal activity. *See Berge*, 354 F.3d at 678. Wythe's DNA Act, on the other hand, is not designed to gather evidence to convict the arrestees but to establish a means of accurately identifying them.

Even if the State's secondary goal of solving and deterring future crime is an "ordinary law enforcement" purpose, we do not think *Edmond* compels us to find the DNA Act violative of the Fourth Amendment. We note that Justice O'Connor in her opinion specifically left open the possibility that a program with a permissible primary purpose can have a secondary law enforcement purpose. *Edmond*, 532 U.S. at 47 n.2. A possibility that is reinforced by *Ferguson*, which distinguished between "immediate" and "ultimate" purposes. *Ferguson*, 532 U.S. at 82-84.

Finally, we cannot overlook that the DNA database's secondary purposes is not limited to just solving and deterring future crime. As § 4-79 plainly states, the database is also to be used for identifying missing persons and human remains and "other humanitarian identification purposes." We. Code, § 4-79 of the Criminal Procedure Article. In light of the important state interests discussed, we find no cause to invalidate the DNA Act.

III.

As part of the State's case-in-chief, the State's Attorney brought out

Respondent's silence immediately prior to her arrest by Det. Tigh. Additionally, during his close, the State's Attorney asked the jury to conclude Respondent's silence indicated her guilt, especially since Respondent maintained her silence despite her mother's demand for an explanation of her behavior. The Court of Special Appeals found these actions violated both Respondent's due process and her Fifth Amendment right against self incrimination.³ Before this Court, the State argues no such error occurred because Respondent did not rely upon an implied promise not to use her silence against her and it occurred in the absence of government compulsion.

In *Griffin v. California*, the Supreme Court declared unconstitutional the practice of commenting upon a defendant's failure to testify at his trial, stating such comments were "a remnant of the inquisitorial system of criminal justice, which the Fifth Amendment outlaws." *Griffin v. California*, 380 U.S. 609, 614 (1965) (internal citation omitted).

After *Griffin*, the Court went on to allow the use of a defendant's pre-*Miranda* silence for impeachment purposes. *Jenkins v. Anderson*, 447 U.S. 231 (1980) dealt with the use of defendant's pre-arrest, pre-*Miranda* silence. The defendant in that case was on trial for murder. *Jenkins*, 447 U.S. at 232. When he took the stand to explain he had killed in self-defense, the prosecution cross-examined him about his failure to inform the police of his story until two weeks after the killing. *Id.* at 233. In upholding the impeachment, the Court

³ This clause of the Fifth Amendment was made applicable to the states through the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The Amendment guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself...."

explained that there was no "fundamental unfairness" that violated due process because no government action (i.e. reading the defendant his *Miranda* rights) induced the defendant to remain silent. *Id.* at 238-39. For the same reason the Court upheld the use of post-arrest, pre-*Miranda* silence in *Fletcher v. Weir*, 455 U.S. 603 (1982). Because the defendant had not yet been read his *Miranda* rights, he too could not rely upon an implicit promise within the warnings that his silence would not be used against him. *Weir*, 455 U.S. at 607.

In the case before us, Respondent did not rely upon any government action. Not only had Respondent not been read her *Miranda* rights, she was not even in custody. We respectfully decline to adopt the intermediate appellate court's opinion that movies and television programs serve the equivalent of government action in notifying a defendant of their protected rights. We therefore hold that "fundamental fairness" is not offended when the State use a defendant's pre-arrest, pre-*Miranda* silence in its case-in-chief.

Respondent cites *Doyle v. Ohio*, 426 U.S. 610 (1976), for supporting the opposite conclusion. However, the facts of *Doyle* are inapposite to this case and its holding only strengthens our reasoning here. *Doyle* prohibited the use of post-arrest, post-*Miranda* silence for impeachment purposes. Respondent's silence occurred both before her arrest and before being read her *Miranda* rights. Furthermore, *Doyle*, like *Jenkins* and *Weir*, is based on the due process reliance theory. *See Doyle*, 426 U.S. at 618. As we stated above, Respondent had no occasion to rely upon any government action.

We are equally unpersuaded that use of Respondent's silence violated her Fifth Amendment right against self-incrimination.

If a defendant's non-custodial *speech* can be used against her, *see Beckwith v. U.S.*, 425 U.S. 341 (1976), there should be no reason why the same rule would not allow admission of a defendant's non-custodial silence. We believe Justice Stevens was correct when he stated:

[T]he central purpose of the Fifth Amendment privilege is to protect the defendant from being compelled to testify against himself at his own trial.... These reasons have no application in a prearrest context.... When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment.

Jenkins, 447 U.S. at 243-244 (1980) (Stevens, J., concurring). Det. Tigh never questioned Respondent. Consequently, she was never compelled to decide whether to speak or remain silent. "The self-incrimination clause was intended as a 'limitation on the investigative techniques of government, not as an individual right against the world.'" *U.S. v. Oplinger*, 150 F.3d 1061, 1067 (9th Cir. 1998) (quoting *U.S. v. Gecas*, 120 F.3d 1419, 1456 (11th Cir. 1997)).

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED AND CASE REMANDED TO THAT COURT WITH DIRECTIONS TO AFFIRM JUDGMENT OF THE CIRCUIT COURT FOR AUSTIN COUNTY.

Concurring opinion by Deeds, J.

Though I join the Court's opinion as to the use of pre-arrest silence, I find the Court's opinion that the DNA Act falls within the special needs exception disingenuous. Therefore, though I concur in the judgment reached by the Court, I do so for a different reason.

I agree with the Court of Special Appeals that the primary purpose of the DNA Act is ordinary law enforcement. A reading of the plain language of § 4-79 supports as much. However, the DNA Act is reasonable under the totality of the circumstances test the Supreme Court applied in *United States v. Knights*, 534 U.S. 112 (2001). The Court in *Knights* confronted the warrantless search of a probationer's home by a police officer. In analyzing the constitutionality of such searches, the Court outlined its balancing approach:

The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'"

Knights, 534 U.S. at 119 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). The *Knights* Court remarked that probation was a form of punishment and when the state sentences a person to such, it can impose conditions upon his freedoms. *Id.* at 119. On the state-interest side, the Court recognized two interests. *Id.* at 120-21. First, rehabilitation of the probationers. *Id.* at 121. Second, protecting the community

from any criminal acts a probationer, who has a greater chance of recidivism, commits. *Id.* Balancing these interests, the Court concluded the search of Knights' home was reasonable. *Id.*

Though Respondent is not a probationer, as an arrestee she does have a lesser expectation of privacy than an ordinary citizen. For example, merely a person's status as an arrestee authorizes a search incident to arrest without any showing the arresting officer feared for his safety or destruction of evidence. *United States v. Robinson*, 414 U.S. 218, 236 (1973). Though the Court of Special Appeals describes Respondent's booking in detail, it never considered how the process enlightens the *Knights'* analysis. Respondent did not just have her blood withdrawn. She was fingerprinted, photographed, ordered to strip to her undergarments while being watched by two officers, and had all of her identification information permanently recorded and published on WCIN. After being subjected to all this, it strains credulosity that Respondent argues the taking of a sample of blood to accurately establish her identity excessively intruded upon her expectation of privacy.

Respondent argues that giving the State access to her genetic code does more than identify her but also gives the State a window into the secrets of her person. Likewise, she lists a parade of horrors—the State will release health information to insurance companies, employers will gain access to the database and discriminate against certain applicants, or the State will use samples for genetic research. However,

our job is to analyze the DNA Act as it now stands, not Respondent's nightmares.⁴

What *is* real is the State's compelling interest in knowing the identity of the person's within its custody. Additionally, by developing the DNA database, the State also gains a valuable tool in crime fighting: it now has a far greater ability to conclusively tie individuals to the commission of crimes and the mere existence of the database may deter crimes from being committed in the first instance.

I believe the balance is properly struck in favor of State and adopt the Fourth Circuit's reasoning when it addressed this issue in the federal context:

When a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it. We accept this proposition because the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes. This becomes readily apparent when we consider the universal approbation of "booking"

⁴ Indeed, We. Code, § 82(b) of the Criminal Procedure Article punishes unauthorized distribution of DNA information:

Any person who, without authority, disseminates profiles contained in the database or samples stored in the databank shall be guilty of a Class 3 misdemeanor. Any person who disseminates, receives, or otherwise uses or attempts to so use information in the database or samples in the databank, knowing that such dissemination, receipt, or use is for a purpose other than as authorized by law, shall be guilty of a Class 1 misdemeanor.

procedures that are followed for every suspect arrested for a felony, whether or not the proof of a particular suspect's crime will involve the use of fingerprint identification. Thus a tax evader is fingerprinted just the same as is a burglar. While we do not accept even this small level of intrusion for free persons without Fourth Amendment constraint, *see Davis v. Mississippi*, 394 U.S. 721, 727 (1969), the same protections do not hold true for those lawfully confined to the custody of the state. As with fingerprinting, therefore, ... the Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken from [those in its custody] for the purpose of identifying them.

Jones v. Murray, 962 F.2d 302, 306-07 (4th Cir. 1992).

IN THE SUPREME COURT OF THE UNITED STATES

Alison HUXLEY,)
Petitioner,)
v.) No. 05-1701
State of WYTHE,)
Respondent.)

ORDER

Petition for Writ of Certiorari is GRANTED as to the following questions:

1. Whether a state statute requiring the collection of a DNA sample from every arrestee violates the Fourth Amendment's prohibition on unreasonable searches.
2. Whether a defendant's pre-arrest, pre-*Miranda* silence may be used in her trial as substantive evidence of guilt.