Constitutional Law—Supreme Court of Minnesota Upholds Warrantless DNA Sample of Individual Convicted of Misdemeanor—*State v. Johnson*, 813 N.W.2d 1 (Minn. 2012)

The Fourth Amendment of the U.S. Constitution and article I, section 10 of the Minnesota Constitution protect an individual's privacy right from an unreasonable search or seizure.[1] However, courts have upheld the constitutionality of some searches when an individual's expectation of privacy is outweighed by a legitimate governmental interest.[2] In *State v. Johnson*,[3] the Supreme Court of Minnesota considered whether a Minnesota statute violated an individual's right to privacy by authorizing DNA collection from an individual charged with a felony offense but convicted of a misdemeanor arising from the same conduct.[4] The court held that the statute, as applied to the defendant in this case, did not violate the United States or Minnesota constitutional protection against unreasonable searches and seizures.[5]

1. *See* U.S. CONST. amend. IV (declaring constitutional right against unreasonable searches and seizures); MINN. CONST. art. I, § 10 (guaranteeing state constitutional right against unreasonable searches and seizures). The Fourth Amendment and article I, section 10 state that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV; MINN. CONST. art. I, § 10; *see also* Kahn v. Griffin, 701 N.W.2d 815, 828 (Minn. 2005) (concluding Minnesota Constitution ordinarily interpreted same as U.S. Constitution when language matches).

2. *See, e.g.*, Samson v. California, 547 U.S. 843, 857 (2006) (holding Fourth Amendment does not prohibit police officer from conducting suspicionless search of parolee); United States v. Knights, 534 U.S. 112, 121 (2001) (holding balance of privacy expectation and governmental interests required reasonable suspicion to search probationer's home); State v. Bartylla, 755 N.W.2d 8, 17 (Minn. 2008) (concluding suspicionless search proper when of individual convicted of felony).

3. 813 N.W.2d 1 (Minn. 2012).

4. *See id.* at 5 (stating issue presented upon appeal); *see also* MINN. STAT. ANN. § 609.117(1)(1) (West 2012) (authorizing DNA sample of individual convicted of misdemeanor arising from felony charge). The Minnesota DNA sampling statute provides, in pertinent part, that:

> If an offender has not already done so, the court shall order an offender to provide a biological specimen for the purpose of DNA analysis as defined in section 299C.155 when: (1) the court sentences a person charged with committing or attempting to commit a felony offense and the person is convicted of that offense or of any offense arising out of the same set of circumstances . . . .

MINN. STAT. ANN. § 609.117(1)(1); *see also id.* § 299C.155 (limiting DNA collection to law enforcement identification purposes only). The Minnesota DNA collection statute explicitly states that information stored in the DNA data bank can only be accessed by law enforcement officials and can be used only for criminal identification purposes. *Id.*; Bureau of Criminal Apprehension Forensic Sci. Lab., *Guide to DNA Analysis*, MINN. DEP'T OF PUB. SAFETY (Mar. 2003), http://projects.nfstc.org/fse/pdfs//DNAbroc03.pdf [hereinafter *Guide to DNA Analysis*] (explaining DNA collection process). DNA samples may be obtained using a cheek swab method, where a sterile cotton swab is gently brushed along the inside of the cheek. *Guide to DNA Analysis*, *supra*.

5. 813 N.W.2d at 3 (finding DNA collection statute constitutional when applied to specific facts of

In September 2008, Randolph Johnson Jr. was charged with felony domestic assault by strangulation.[6] Johnson was also charged with misdemeanor fifth-degree assault for actions arising out of the same incident.[7] Prior to trial, Johnson accepted the State's plea bargain and pled guilty to misdemeanor domestic assault, rather than the felony domestic assault charge.[8] When informed that he was required to submit a DNA sample in accordance with Minnesota's DNA sampling statute, Johnson signed the guilty plea on the condition that it could be withdrawn if the district court denied his motion to declare the DNA sampling statute unconstitutional.[9] Johnson argued that the DNA sampling statute violated constitutional protections against unreasonable searches and seizures, because requiring DNA samples from individuals convicted of misdemeanor offenses constitutes a warrantless and suspicionless seizure.[10]

At the sentencing hearing, the district court rejected Johnson's argument and held that the statute was constitutional, but stayed the order to submit a DNA sample pending appeal.[11] He was subsequently placed on probation after a stay of his ninety-day sentence.[12] Johnson's probation was subject to several conditions, including the requirement that he submit to random urinalysis testing.[13] On appeal, the Minnesota Court of Appeals affirmed the district

case).

6. *See* MINN. STAT. ANN. § 609.2247(2) (prohibiting individual from assaulting family or household member by strangulation); State v. Johnson, 777 N.W.2d 767, 768 (Minn. Ct. App. 2010) (describing events leading to felony domestic assault charge), *aff'd*, 813 N.W.2d 1 (Minn. 2012). Johnson allegedly punched and strangled A.J., a family or household member, while intoxicated. 813 N.W.2d at 3.

7. *See* MINN. STAT. ANN. § 609.224(1) (prohibiting individual from intentionally inflicting or attempting to inflict bodily harm on another); State v. Johnson, 777 N.W.2d 767, 768 (Minn. Ct. App. 2010) (identifying misdemeanor charge against Johnson), *aff'd*, 813 N.W.2d 1 (Minn. 2012).

8. *See* MINN. STAT. ANN. § 609.224(1) (prohibiting individual from intentionally causing another to fear immediate bodily harm); 813 N.W.2d at 3 (recounting plea agreement between State and Johnson).

9. *See* State v. Johnson, 777 N.W.2d 767, 768 (Minn. Ct. App. 2010) (stating procedural history relating to Johnson's challenge of DNA sampling statute), *aff'd*, 813 N.W.2d 1 (Minn. 2012).

10. *See* State v. Johnson, 777 N.W.2d 767, 769-70 (Minn. Ct. App. 2010) (analyzing Johnson's and State's constitutional arguments), *aff'd*, 813 N.W.2d 1 (Minn. 2012). Johnson claimed that an individual must be convicted of a felony or predatory offense to be subject to a warrantless, suspicionless DNA collection. *See id.* at 770. Advancing three separate arguments in support of his contention, Johnson argued that: the Minnesota Supreme Court had previously indicated that misdemeanants did not have the same reduced expectation of privacy as felons; requiring mere probable cause of a felony offense to authorize a DNA sample violates the Constitution; and national case law only recognizes felons and predatory offenders as those subject to DNA testing. *See id.* Finally, Johnson contended that the DNA sampling statute deprived him of his right to equal protection under the law. *See id.* at 772.

11. *See* State v. Johnson, 777 N.W.2d 767, 769 (Minn. Ct. App. 2010) (rejecting Johnson's constitutional challenge), *aff'd*, 813 N.W.2d 1 (Minn. 2012). Johnson decided not to withdraw his guilty plea following the court's decision, and a judgment of conviction was entered. *Id.*

12. *See* State v. Johnson, 777 N.W.2d 767, 769 (Minn. Ct. App. 2010) (summarizing district court's sentencing), *aff'd*, 813 N.W.2d 1 (Minn. 2012).

13. *See* 813 N.W.2d at 3 (discussing probation conditions of Johnson's misdemeanor conviction). Additional conditions of Johnson's probation included: "(1) that he not commit another assault, violate a protection order applicable to him, or interfere with a 911 call; (2) that he complete a domestic violence

court's ruling, holding that the Minnesota DNA sampling statute did not violate the search and seizure provision of the Fourth Amendment when applied to individuals convicted of a misdemeanor arising from the same set of circumstances as a charged felony.[14] Upon granting Johnson's petition for review, the Supreme Court of Minnesota held that, as a result of Johnson's significant reduction in his expectation of privacy, the State's interests in deterring recidivism and identifying offenders of past and future crimes significantly outweighed Johnson's privacy expectation; therefore, the statute was constitutional under the totality-of-the-circumstances test.[15]

The cornerstone analysis of the Fourth Amendment is the reasonableness of the government's intrusion into an individual's privacy, which is usually measured by compliance with the Warrant Clause and its requirement of probable cause.[16] However, the United States Supreme Court has relaxed the probable cause standard under certain conditions.[17] In *United States v. Knights*, the Court applied the totality-of-the-circumstances test to a Fourth Amendment

education program; . . . and (4) that he abstain from alcohol and non-prescribed drugs." *Id.*

14. *See* State v. Johnson, 777 N.W.2d 767, 771-72 (Minn. Ct. App. 2010) (holding Minnesota DNA sampling statute constitutional as applied to Johnson), *aff'd*, 813 N.W.2d 1 (Minn. 2012). The court of appeals applied the totality-of-the-circumstances test to the specific facts and concluded that the substantial state interests in DNA sampling outweighed Johnson's diminished expectation of privacy as a misdemeanant, and therefore, the DNA sample did not violate the search and seizure provisions of the United States or Minnesota Constitutions. *Id.* The court of appeals also rejected Johnson's Fourteenth Amendment equal protection argument, holding Johnson failed to identify the category of persons similarly situated. *Id.* at 772.

15. *See* 813 N.W.2d at 11 (holding Minnesota DNA sampling statute constitutional). The Minnesota Supreme Court applied the totality-of-the-circumstances test to determine that the substantial state interests heavily outweighed Johnson's reduced expectation of privacy. *Id.* Additionally, the court denied Johnson's equal protection argument on the grounds that he failed to demonstrate, in all relevant areas, that he was treated differently from others to whom he was similarly situated. *Id.* at 12.

16. *See, e.g.*, United States v. Knights, 534 U.S. 112, 118-19 (2001) (asserting reasonableness established by balancing invasion of privacy against legitimate governmental interests); Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977) (discussing reasonableness as touchstone analysis of Fourth Amendment); United States v. U.S. Dist. Court for E. Dist. of Mich., 407 U.S. 297, 315-16 (1972) (stating importance of Warrant Clause in measuring reasonableness under Fourth Amendment); *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 550-52 (1999) (discussing historical foundation and interpretation of Fourth Amendment). The Framers likely intended for the Fourth Amendment to require all searches and seizures conducted by government officials to be reasonable given the circumstances of the search. Davies, *supra*, at 550. The Framers were primarily concerned with the unreasonableness of general search warrants. *Id.* at 551.

17. *See, e.g.*, New York v. Burger, 482 U.S. 691, 702 (1987) (finding suspicionless search of commercial premises in closely regulated industries constitutional); New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (permitting school search because of special law enforcement need for greater flexibility); Terry v. Ohio, 392 U.S. 1, 27 (1968) (finding officer may stop and frisk without probable cause provided reasonable suspicion of armed individual); *see also* Davies, *supra* note 16, at 551-52 (discussing Framers' intention behind adoption of Fourth Amendment). General expansion of the search warrant requirement can be partly explained by analyzing the Framers' concern over general search warrants. Davies, *supra* note 16, at 551. As a result of this primary concern, the Framers did not address warrantless intrusions in adopting the Fourth Amendment. *Id.* The Framers simply did not believe that a warrantless search conducted by an officer posed a serious threat to an individual's privacy. *Id.* at 552.

challenge of a warrantless search pursuant to a felony probation condition.[18] Balancing the privacy interests of the defendant against the government's interest in the search, the Court held that under the foregoing test, the Fourth Amendment merely required reasonable suspicion to uphold the felony probation search.[19] Expanding upon this holding, the United States Supreme Court again addressed the issue of a warrantless search as a condition of parole in *Samson v. California*.[20] Applying the totality-of-the-circumstances test, the Court held that, despite significant opposition, parolees have severely limited expectations of privacy; therefore, they can be subject to a suspicionless search as a condition of their parole.[21]

Minnesota courts have adopted many of the principles applied in the United States Supreme Court decisions involving warrantless searches resulting from a parole or probation condition, including the totality-of-the-circumstances test.[22] Recognizing that warrantless residential searches and seizures are

18. 534 U.S. 112, 118 (2001) (upholding constitutionality of warrantless search supported by reasonable suspicion and condition of probation).

19. *See* United States v. Knights, 534 U.S. 112, 121 (2001). The defendant was placed on felony probation that included a condition requiring the defendant to submit his person, property, place of residence, vehicle, and personal effects to a search at anytime, with or without a search warrant or reasonable cause. *Id.* at 114. The defendant argued that the search condition was only constitutional if conducted as a "special needs" search to ensure that the defendant was in compliance with his probation conditions. *Id.* at 117. However, the Court held that a warrantless search was reasonable under the Fourth Amendment if the legitimate governmental interests in the search outweighed the degree of intrusion upon the individual's privacy. *Id.* at 118-19. Analyzing the defendant's right to privacy, the Court held probation was one point on a continuum of possible punishments that ranged from solitary confinement in a maximum security prison to a couple of hours of community service. *Id.* at 119. "Inherent in the very nature of probation is that probationers do not enjoy the absolute liberty to which every citizen is entitled." *Id.* (internal quotation marks and citation omitted). Applying the totality-of-the-circumstances test to this reduced expectation of privacy, the government's interests of rehabilitation and recidivism severely outweighed the defendant's reduced privacy interests. *Id.*

20. *See* 547 U.S. 843, 846 (2006) (examining constitutionality of suspicionless search of individual on felony parole).

21. *See* Samson v. California, 547 U.S. 843, 852 (2006) (applying totality-of-the-circumstances test). California law requires every prisoner eligible for parole to agree to be subject to a warrantless, suspicionless search, anytime during the day or night. *Id.* at 846. Looking again at the continuum of possible punishments, the Court stated that parolees have less of an expectation of privacy than do probationers because parole is more closely related to imprisonment. *Id.* at 850. As a result of its close proximity to imprisonment, an individual on parole does not have a legitimate expectation of privacy. *Id.* at 852; *see also* United States v. Amerson, 483 F.3d 73, 86 (2d Cir. 2007) (holding probationer's expectation of privacy severely diminished). In contrast, a state's interest in enforcing parole conditions and reducing recidivism is substantial. Samson v. California, 547 U.S. 843, 853 (2006). *But see* Rachael A. Lynch, Notes, *Two Wrongs Don't Make a Fourth Amendment Right:* Samson *Court Errs in Choosing Proper Analytical Framework, Errs in Result, Parolees Lose Fourth Amendment Protection*, 41 AKRON L. REV. 651, 652 (2008) (suggesting recent Supreme Court decisions have eroded Fourth Amendment protections). "The Samson Court reached an inappropriate decision by ignoring the importance of Fourth Amendment rights—even for parolees—and overestimating the state's interests." *Id.* Suspicionless searches were the main concern of the Framers when they adopted the Fourth Amendment—outside of limited circumstances they did not intend for state interests to supersede an individual's right to privacy. *Id.* at 674.

22. *See* State v. Bartylla, 755 N.W.2d 8, 17 (Minn. 2008) (applying totality-of-the-circumstances test to suspicionless taking of defendant's DNA); State v. Anderson, 733 N.W.2d 128, 139 (Minn. 2007) (recognizing diminished expectation of privacy by virtue of status as probationer).

presumptively unreasonable, Minnesota courts have required that the government's interest in intruding into the individual's right of privacy must outweigh the individual's expectation of privacy to uphold a warrantless search.[23] Additionally, the courts have recognized that an individual on probation has a reduced expectation of privacy as a result of probationary status.[24] Originally, Minnesota courts followed the holding in *Knights*, that reasonable suspicion was required to uphold a warrantless search as a condition of a probation agreement.[25] However, like the Supreme Court in *Samson*, the standard was expanded to support suspicionless searches if the condition was included in a felony probation agreement.[26]

While the United States Supreme Court has not specifically addressed the constitutionality of suspicionless DNA sampling through the authorization of state and federal DNA indexing laws, the Court has stipulated that the collection of a DNA sample constitutes a search and is subject to the requirements of the Fourth Amendment.[27] A majority of federal and state courts have adopted the totality-of-the-circumstances test in analyzing suspicionless DNA sampling and have routinely held such a search

23. *See* State v. Anderson, 733 N.W.2d 128, 140 (Minn. 2007) (holding State's interest outweighed privacy interest of individual on misdemeanor probation).

24. *See* State v. Anderson, 733 N.W.2d 128, 136-37 (Minn. 2007) (recognizing probation conditions significantly diminish defendant's reasonable expectation of privacy); *cf. In re* Welfare of M.L.M., 781 N.W.2d 381, 385 (Minn. Ct. App. 2010) (concluding juvenile convicted of misdemeanor has diminished expectation of privacy).

25. *See* State v. Anderson, 733 N.W.2d 128, 137-38 (Minn. 2007) (requiring reasonable suspicion to uphold warrantless search). The Supreme Court of Minnesota held that a warrantless search of the defendant on misdemeanor probation was reasonable under the Fourth Amendment because the probation officer received reliable information that the defendant had guns at his residence. *Id.* at 138. The court did not go so far as to say that warrantless probation searches without reasonable suspicion were constitutionally valid. *Id.* at 137-38.

26. *See* State v. Bartylla, 755 N.W.2d 8, 17 (Minn. 2008) (expanding constitutionality of warrantless searches to include search without reasonable suspicion). The defendant challenged the suspicionless and warrantless taking of his DNA pursuant to the Minnesota DNA sampling statute, which at the time authorized DNA samples from individuals convicted of burglary. *Id.* at 14. The court applied the totality-of-the-circumstances test to conclude that as a result of the defendant's felony conviction, the suspicionless taking of his DNA did not violate the Fourth Amendment. *Id.* at 17. In reaching this decision, the court considered the number of federal districts that adopted the suspicionless search standard articulated by the U.S. Supreme Court. *Id.* at 16-17. Recognizing the continuum of possible punishments outlined by the U.S. Supreme Court, the court held that because the defendant was an incarcerated prisoner, he had an even lower expectation of privacy than a probationer, parolee, or conditional releasee. *Id.* at 17.

27. *See* Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 618 (1989) (recognizing collection and analysis of biological samples as Fourth Amendment search). The Court reasoned that the taking of biological samples intrudes upon expectations of privacy that society has long since found to be reasonable. *Id.* at 617; *see also* Michael J. Crook, Comment, *Sacrificing Liberty for Security: North Carolina's Unconstitutional Search and Seizure of Arrestee DNA*, 34 CAMPBELL L. REV. 473, 504 (2012) (discussing various invasions of privacy associated with DNA sampling statutes). When a DNA buccal swab is performed, the individual's jaw is opened and a swab is forcibly scraped against the inside of his or her mouth. Crook, *supra*. "Certainly this type of invasive procedure—both physically invasive and informationally invasive—is what the Fourth Amendment protects against." *Id.*

constitutional when it is a condition of felony probation or parole.[28] The Supreme Court of Minnesota has also applied the totality-of-the-circumstances test to suspicionless DNA sampling, concluding that the State's DNA sampling statute does not violate the Fourth Amendment when applied to a convicted felon.[29] Regarding the individual's expectation of privacy, the court recognized the minimal physical intrusion of a DNA buccal swab and affirmed the lower expectation of privacy for convicted felons.[30] Additionally, the court held that the State had substantial interests in DNA sampling relating to the conditions of probation or parole and to helping solve past and future crimes.[31] However, Minnesota courts have not left DNA sampling unchecked, as the court of appeals recently ruled that a DNA sample from an arrestee was a violation of the Fourth Amendment.[32]

28. *See, e.g.*, United States v. Stewart, 532 F.3d 32, 33-34 (1st Cir. 2008) (applying totality-of-the-circumstances test to uphold DNA sample of individual on felony probation); United States v. Kraklio, 451 F.3d 922, 924-25 (8th Cir. 2006) (applying totality-of-the-circumstances test to uphold DNA sample of individual on federal probation); Padgett v. Donald, 401 F.3d 1273, 1280 (11th Cir. 2005) (applying totality-of-the-circumstances test to uphold DNA sample of felony inmate); *see also* Robert Molko, *The Perils of Suspicionless DNA Extraction of Arrestees Under California Proposition 69: Liability of the California Prosecutor for Fourth Amendment Violation? The Uncertainty Continues in 2010*, 37 W. ST. U. L. REV. 183, 194 (2010) (analyzing various Fourth Amendment approaches to DNA sampling statutes). Despite disagreement amongst the circuits as to which test to apply, all circuits come to the same conclusion that there is no Fourth Amendment violation for DNA samples taken from prisoners, probationers, and supervised releasees. *See* Molko, *supra*.

29. *See* State v. Bartylla, 755 N.W.2d 8, 17 (Minn. 2008) (applying totality-of-the-circumstances test to DNA sampling of convicted felon); Derek Regensburger, *DNA Databases and the Fourth Amendment: The Time Has Come to Reexamine the Special Needs Exception to the Warrant Requirement and the Primary Purpose Test*, 19 ALB. L.J. SCI. & TECH. 319, 358 (2009) (suggesting totality-of-the-circumstances test proper standard to uphold validity of special needs exception). Analyzing the various approaches to a Fourth Amendment reasonableness determination, a majority of circuits apply the totality-of-the-circumstances test to DNA-indexing statutes. *See* Regensburger, *supra*, at 357.

30. *See* State v. Bartylla, 755 N.W.2d 8, 17-18 (Minn. 2008) (finding lower expectation of privacy and minimally invasive test factored against Fourth Amendment challenge). Fundamental to the court's holding was the fact that the sample was to be utilized for identification purposes only. *Id.* at 18; *see also* Jessica A. Levitt, Note, *Competing Rights Under the Totality of the Circumstances Test: Expanding DNA Collection Statutes*, 46 VAL. U. L. REV. 117, 165-66 (2011) (suggesting DNA samples stay limited to identification purposes to remain minimally invasive).

31. *See* State v. Bartylla, 755 N.W.2d 8, 18 (Minn. 2008) (explaining State's interests in DNA sampling). *Bartylla* asserted several compelling interests associated with DNA sampling including: exonerating the innocent, deterring recidivism, identifying offenders of past and future crimes, and bringing closure for victims of unsolved crimes. *Id.*; *see also* Paul M. Monteleoni, Note, *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L. REV. 247, 253 (2007) (asserting substantial benefits DNA sampling statutes can have on law enforcement). Not only does DNA sampling provide the obvious benefits of providing law enforcement with highly accurate leads, but also it benefits the innocent significantly. *See* Monteleoni, *supra*. Innocent suspects are saved the embarrassment of a false charge, if the officers are able to apprehend the perpetrator through DNA matching, and will be far less likely to be wrongly convicted. *Id.*

32. *See In re* Welfare of C.T.L., 722 N.W.2d 484, 492 (Minn. Ct. App. 2006) (holding DNA sample of juvenile arrestee violation of Fourth Amendment). The court asserted that an arrestee has not yet suffered a diminished expectation of privacy. *Id.*; *see also* Aaron B. Chapin, Note, *Arresting DNA: Privacy Expectations of Free Citizens Versus Post-Convicted Persons and the Unconstitutionality of DNA Dragnets*, 89 MINN. L. REV. 1842, 1856 (2005) (arguing constitutionality of compelled DNA collection from free citizens). DNA

In *State v. Johnson*, the Supreme Court of Minnesota applied the totality-of-the-circumstances test to affirm the constitutionality of the DNA sample.[33] The court first examined the nature of the physical intrusion on Johnson's bodily integrity and his reasonable expectation of privacy in his identity.[34] After analyzing the DNA collection process, the court held that the physical intrusion into Johnson's bodily integrity was minimal, especially when compared to the other provisions of his probation, such as the random urinalysis.[35] Moreover, the court recognized the hierarchy of expectations of privacy ranging from incarcerated prisoners to probationers and held that Johnson's status as a probationer significantly reduced his expectation of privacy in his identity.[36]

Transitioning to the second prong of the totality-of-the-circumstances test, the court looked at the State's interest in DNA collection.[37] Applying past precedent, the court found that the State had substantial interests in DNA collection, including: exonerating the innocent, deterring recidivism, identifying offenders of past and future crimes, and bringing closure for victims of unsolved crimes.[38] These interests apply equally whether the offender is a convicted felon or, like Johnson, is convicted of a misdemeanor arising out of the same set of circumstances as a felony charge.[39] Balancing these substantial state interests against Johnson's significantly reduced expectation of privacy in his identity, the court held that the Minnesota DNA sampling statute, as applied to the specific facts of this case, did not violate the Constitution's search and

sampling statutes largely pass constitutional scrutiny as a result of the individual's reduced expectation of privacy. *See* Chapin, *supra*. When an individual does not have a reduced expectation of privacy, the state's interest in DNA sampling fails to outweigh the individual's legitimate expectation of privacy. *Id.*

33. *See* 813 N.W.2d at 11 (applying totality-of-the-circumstances principle set forth by United States Supreme Court).

34. *See id.* at 9 (discussing diminished expectation of privacy).

35. *See id.* (comparing DNA sampling to urinalysis). The court determined that the process of obtaining a DNA sample, a buccal swab inside Johnson's cheek, was no more invasive or intrusive than the random urinalysis testing that Johnson was already required to submit to as part of his probation agreement. *Id.* The urinalysis testing demonstrates that Johnson had a reduced expectation of privacy prior to the implementation of the DNA buccal swab. *Id.*; *see also supra* note 4 (discussing DNA buccal swab process).

36. *See* 813 N.W.2d at 9 (applying United States Supreme Court precedent of hierarchy of punishments); *see also* United States v. Amerson, 483 F.3d 73, 86 (2d Cir. 2007) (holding severely diminished expectation of privacy for probationers). The Minnesota Supreme Court applied the Second Circuit's conclusion in *Amerson* that probationers have a severely diminished expectation of privacy in their identity. 813 N.W.2d at 9.

37. *See* 813 N.W.2d at 9-10 (addressing State's interests in totality-of-the-circumstances analysis).

38. *See id.* (analyzing State's interests in DNA sampling); *see also CODIS-NDIS Statistics*, FED. BUREAU OF INVESTIGATION (Nov. 2012), http://www.fbi.gov/about-us/lab/codis/ndis-statistics (demonstrating success of DNA databases on law enforcement efforts). The National DNA Index System (NDIS) contains over ten million prior offenders' DNA profiles. *See CODIS-NDIS Statistics*, *supra*. The database, run by the Federal Bureau of Investigation (FBI), measures success based upon the number of criminal investigations in which DNA profiling has added value to the investigative process. *Id.* Nationally, DNA profiles have aided more than 187,700 investigations; while in Minnesota, 3208 investigations have benefited from the use of DNA profiles. *Id.*

39. *See* 813 N.W.2d at 11 (applying state interests to particular facts of case).

seizure provision.[40]

The decision in *State v. Johnson* represents a substantial expansion of existing Minnesota law regarding constitutional challenges to DNA sampling statutes.[41] However, given the recent trend in constraining the powers of the Fourth Amendment, it is unsurprising that the court upheld the validity of the statute.[42] In both state and federal courts, constitutional challenges under the Fourth Amendment to DNA sampling statutes have been almost universally rejected when applied to convicted felons.[43] Following Supreme Court precedent, courts have avoided the traditional Fourth Amendment standard of probable cause by applying the expansive totality-of-the-circumstances test to DNA challenges.[44] While this test undoubtedly limits the historical protection provided by the Fourth Amendment, when applied to DNA sampling, it enables courts to account for the substantial benefits of DNA indexing, thereby allowing them to uphold statutes that will have a substantial, positive impact on law enforcement officials.[45]

The Supreme Court of Minnesota correctly balanced Johnson's reduced expectation of privacy with the government's substantial interest in DNA indexing to find the DNA sampling statute constitutional as applied to the facts of this case.[46] The court heavily focused its analysis on the prior conditions of Johnson's probation, specifically the random urinalysis, to hold that the DNA sample did not constitute a further intrusion into his expectation of privacy.[47]

40. *See id.* (holding Minnesota DNA sampling statute constitutional when applied to specific facts of case).

41. *See* State v. Bartylla, 755 N.W.2d 8, 18-19 (Minn. 2008) (holding DNA sampling constitutional for felony conviction). Prior to the decision in *Johnson*, the Supreme Court of Minnesota upheld the constitutionality of DNA sampling only as applied to felony convictions. *Id.*

42. *See* Samson v. California, 547 U.S. 843, 856 (2006) (holding suspicionless search of parolee constitutional under Fourth Amendment); United States v. Amerson, 483 F.3d 73, 89 (2d Cir. 2007) (holding suspicionless search of probationer does not violate Fourth Amendment); *see also* Lynch, *supra* note 21 (arguing *Samson* decision eroded Fourth Amendment rights). In holding that all parolee searches are reasonable, the *Samson* Court established the most recent example of the Court's erosion of Fourth Amendment protections by creating an additional broad exception to the Fourth Amendment Warrant Clause. *See* Lynch, *supra* note 21, at 677.

43. *See supra* note 28 (examining federal courts' analysis of DNA sampling statutes).

44. *See supra* note 28 (identifying federal circuits applying totality-of-the-circumstances test to uphold DNA sampling). *But see* Lynch, *supra* note 21, at 681-83 (suggesting courts have gone too far in expanding exceptions to Fourth Amendment).

45. *See* State v. Bartylla, 755 N.W.2d 8, 18 (Minn. 2008) (recognizing substantial benefits of DNA sampling); Monteleoni, *supra* note 31, at 253 (articulating substantial benefits of DNA databases). "In addition to aiding efficient apprehension of the guilty, DNA databases also benefit the innocent." *See* Monteleoni, *supra* note 31, at 253.

46. *See* 813 N.W.2d at 8-10 (applying totality-of-the-circumstances test); *see also* Regensburger, *supra* note 29, at 322-23 (suggesting courts routinely uphold constitutionality of DNA sampling statute regardless of which test used).

47. *See* 813 N.W.2d at 7-9 (discussing defendant's right to privacy); *see also* Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 617 (1989) (recognizing collection of urine intrudes upon long-recognized expectations of privacy).

This analysis is substantiated by the fact that Minnesota's DNA indexing statue is explicitly limited to identification purposes only.[48] This limiting factor makes the DNA sample the equivalent of an individual's fingerprint, eliminating the concern over the expansive personal information that could be found in a DNA sample.[49] The court correctly upheld the statute as applied to the facts pertaining to Johnson because the substantial benefits of DNA indexing in preventing future crime outweighed his diminished expectation of privacy.[50]

While the totality-of-the-circumstances test was the correct test to apply in this case, the individualistic nature of the analysis inherent in the test has led to a very narrow holding that will likely lead to further litigation on the issue.[51] Minnesota courts have drawn a bright line in rejecting the constitutionality of DNA samples taken from an individual who does not have a reduced expectation of privacy.[52] Because the court's holding was limited to the specific facts of the case, however, the court failed to determine whether the DNA sampling statute will be upheld under all constitutional challenges when an individual has a reduced expectation of privacy.[53]

In *State v. Johnson*, the Supreme Court of Minnesota considered whether the collection of a DNA sample from an individual convicted of a misdemeanor arising out of the same facts as a felony charge violates the Fourth Amendment's right to privacy. Applying the totality-of-the-circumstances test, created by the United States Supreme Court, the court held that the State's interest in DNA sampling was justified given the reduced expectation of privacy resulting from a probation sentence. By expanding the reach of DNA sampling in Minnesota, the decision follows the growing trend in both state and federal courts of rejecting constitutional challenges to DNA sampling statutes, and represents a proper analysis of the Fourth Amendment under the totality-of-the-circumstances test.

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48. *See* 813 N.W.2d at 9-10 (limiting scope of DNA sample to identification purposes only).

49. *See* Levitt, *supra* note 30, at 119 (articulating limited privacy concerns when DNA samples limited only to identification). The author suggests that the public policy arguments in support of DNA sampling favor an expansion of DNA sampling to all individuals upon arrest, as long as the sample is limited to identification purposes only, and the database is only accessible by authorized law enforcement officials for law enforcement purposes. *Id.* at 166.

50. *See* Samson v. California, 547 U.S. 843, 848-49 (2006) (holding warrantless and suspicionless search constitutional). The U.S. Supreme Court suggests that a suspicionless search should be held constitutional whenever the governmental interests in the search outweigh the individual's right to privacy. *Id.*

51. *See* 813 N.W.2d at 11 (emphasizing impact probation conditions had on reduced expectation of privacy). The Supreme Court of Minnesota explicitly limited its holding to the specific facts of this case. *Id.* The court emphasized the substantial effect that the random urinalysis had on Johnson's expectation of privacy. *Id.*

52. *See supra* note 32 and accompanying text (finding free citizens have full expectation of privacy).

53. *See* 813 N.W.2d at 11 (limiting holding to specific facts of case).