

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2011-0486
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
DAJUAN EMERSON,	:	
	:	Court of Appeals
Defendants-Appellees.	:	Case No. 94413
	:	

MERIT BRIEF OF *AMICUS CURIAE*
OHIO ATTORNEY GENERAL MICHAEL DEWINE
IN SUPPORT OF APPELLEE STATE OF OHIO

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FILED
OCT 24 2011
CLERK OF COURT SUPREME COURT OF OHIO

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INTRODUCTION

Dajuan Emerson challenges the retention and use of a computer representation of certain portions of his DNA fingerprint as evidence in his murder trial. Because the retention and use trespassed no constitutional or statutory limits on criminal investigation and prosecution, the evidence was available during his prosecution.

Although exclusion is not appropriate, any rule fashioned in this case should not place on Ohio's Bureau of Criminal Identification and Investigation the task of determining whether forensic evidence, or, as here, electronic representations of forensic evidence, should be retained in BCII files or databases. The Bureau is not charged with monitoring the twists and turns of the legal cases associated with the evidence it analyzes. Nor does the Bureau have the resources to track the legal proceedings that may or may not arise from the analyzed evidence.

STATEMENT OF AMICUS INTEREST

This appeal considers certain uses of stored DNA profiles. A DNA profile is an electronic representation of certain portions of a person's DNA sequence created by analyzing a biological sample that contains DNA. These DNA profiles contain only a small subset of the person's genetic information. As recently detailed by the Third Circuit, DNA profiles used for criminal investigation contain only portions of the "junk" DNA that houses little or no information about an individual's traits, such as their race, national origin, or propensity for disease. *Mitchell v. U.S.* (C.A.3, July 25, 2011), No. 09-4718, 2011 U.S. App. Lexis 15272, at *37.

In Ohio, DNA profiles are stored in a few local databases, such as the Cuyahoga County Coroner's Office, and statewide, by BCH at the London location. These facilities, along with the federal repository, are often referred to as CODIS, the Combined DNA Index System. As the only statewide repository, and as Ohio's principle crime laboratory, BCII handles most of the DNA profiles in Ohio.

The Ohio Attorney General is Ohio's chief law officer, and oversees BCII. He therefore has a strong interest in the appropriate use of DNA evidence. He also has a keen interest in ensuring that BCII is not inappropriately tasked with tracking legal developments in matters connected to every bit of evidence it analyzes.

ARGUMENT

There is no statutory or constitutional basis to exclude the DNA profile evidence used in Emerson's trial. Accessing the DNA profile did not constitute a search; any search was reasonable; and any improper search should not be remedied through the exclusionary rule. More broadly, any proposition of law crafted in this case should not impose on BCII the burden of tracking criminal litigation to determine when to seal or expunge DNA profiles. The General Assembly has appropriately placed that burden on those who want to seal or expunge records.

Amicus Curiae Attorney General's Propositions of Law No. I:

Accessing an existing DNA profile comports with the Fourth Amendment

Emerson does not dispute that his DNA was lawfully collected and analyzed in 2005 in connection with a rape investigation. As a result of that investigation, an electronic representation of Emerson's DNA fingerprint was stored in a state database. What Emerson challenges is the state's retention and subsequent use of that profile to solve a 2007 murder. Yet Emerson points to no statute or constitutional provision that prohibited BCII's storage and use of the DNA profile legally secured in 2005. Nor does Emerson—even assuming a constitutional ban on the retention and storage—explain how the violation demands the extreme remedy of excluding the evidence that solved a murder.

A. The Ohio and Federal Constitutions prescribe a three-step inquiry for excluding evidence under Section 14, Article I or the Fourth Amendment.

This Court interprets the search-and-seizure clause of the Ohio Constitution in lockstep with the federal Fourth Amendment. E.g., *State v. Robinette* (1997), 80 Ohio St. 3d 234, 239 (“It is our opinion that the reach of Section 14, Article I, of the Ohio Constitution * * * is coextensive with that of the Fourth Amendment”) (internal quotation marks and citations omitted). The Fourth Amendment prohibits only unreasonable searches or seizures. See, e.g., *United States v. Knights* (2001), 534 U.S. 112, 118-119. The first inquiry in any Fourth Amendment analysis is whether there has been a search. If the answer is yes, the second question is whether the search or seizure was unreasonable. See, e.g., *Brower v. County of Inyo* (1989), 489 U.S. 593, 599-600. If the answer to both questions is yes, the final step is evaluating whether excluding the evidence is the appropriate remedy. See, e.g., *Illinois v. Krull* (1987), 480 U.S. 340, 347.

B. State retention of a DNA profile is not a Fourth Amendment search.

To determine if an act constitutes a Fourth Amendment search, courts ask “whether the individual has an expectation of privacy that society is prepared to recognize as reasonable.” *Kyllo v. U.S.* (2001), 533 U.S. 27, 34. Although the Eighth District used the term “standing” to describe this analysis, the U.S. Supreme Court has generally regarded these questions as “more properly placed within the purview of substantive Fourth Amendment law than within that of standing.” *Minnesota v. Carter* (1998), 525 U.S. 83, 87-88 (quoting *Rakas v. Illinois* (1978), 439 U.S. 128, 140)). Whatever the label, the test remains the same: does the individual have a subjective privacy expectation that is objectively reasonable?

Federal and state courts consistently reject the claim that subsequent use of a lawfully obtained DNA profile is a separate search under the Fourth Amendment (or, in the Eighth

District's words, gives that person Fourth Amendment standing). For example, the Sixth Circuit, analyzing Ohio's DNA collection statute, noted that a "claim premised on the retention and disclosure of personal DNA information . . . does not implicate the Fourth Amendment." *Wilson v. Collins* (C.A.6, 2008), 517 F.3d 421. The First Circuit recently collected federal authority "holding that the government's retention and matching of [a DNA] profile against other profiles in CODIS does not violate an expectation of privacy that society is prepared to recognize as reasonable, and thus does not constitute a separate search under the Fourth Amendment." *Boroian v. Mueller*, (C.A.1, 2010), 616 F.3d 67-68 (collecting cases). The District of Columbia Circuit has explicitly tied societal unwillingness to recognize a right of privacy in retained DNA to the burden on law enforcement. "[W]e conclude that accessing the DNA snapshots contained in the CODIS database does not independently implicate the Fourth Amendment. We note that the consequences of the contrary conclusion would be staggering: Police departments across the country could face an intolerable burden if every 'search' of an ordinary fingerprint database were subject to Fourth Amendment challenges. The same applies to DNA fingerprints." *Johnson v. Quander* (C.A.D.C., 2006), 440 F.3d 489, 499.

Courts around the country agree that there is no right of privacy in the subsequent law enforcement use of DNA profiles lawfully collected and created. See, e.g., *Patterson v. State*, 742 N.E.2d 4, 11 (Ind. Ct. App. 2000) ("society is not prepared to recognize as reasonable Patterson's continued expectation of privacy in blood samples lawfully collected by police."), clarified by 744 N.E.2d 945; *Pharr v. Commonwealth* (Va. Ct. App. 2007), 646 S.E.2d 453, 458 ("we conclude that appellant's continued subjective expectation of privacy in his DNA sample outside the context of the investigation of the 2001 offense is not one that society recognizes as reasonable.") (collecting cases); *People v. King* (1997), 663 N.Y.S.2d 610, 614-15 ("Privacy

concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person.”); see also LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004), §5.2(c) n.130 (A “defendant cannot object” to use of blood sample “lawfully obtained” in unrelated circumstances, but used in present prosecution).

Once law enforcement lawfully seizes a DNA sample and creates a DNA profile from that sample, there is “simply no subsequent search or seizure of [the defendant’s] person such that [she] could invoke a privacy interest or right.” *State v. Notti* (Mont. 2003), 71 P.3d 123, 1238. Even when the DNA profile is obtained from a lawfully collected sample in an *uncharged* crime, use of the profile in a subsequent case “require[s] no additional chemical analysis which might infringe any privacy interest Therefore, defendant suffered no additional intrusion, and . . . [the defendant’s] Fourth Amendment rights were not violated by the use of the DNA analysis in the present case.” *State v. Barkley* (N.C. Ct. App. 2001), 551 S.E.2d 131, 135. Emerson does not dispute that the DNA sample collected in 2005 was lawful; indeed, it was voluntary. “The law in this area consistently demonstrates that an individual’s consent to provide a DNA sample precludes any claim of constitutional malfeasance. If an individual consents to provide or voluntarily provides a sample in an unrelated case, there is no Fourth Amendment violation.” *Herman v. State* (Nev. 2006), 128 P.3d 469, 473. That is, the initial seizure and search “extinguish” any “expectation of privacy” in the DNA profile in subsequent investigations. *State v. McCord* (S.C. Ct. App. 2002), 562 S.E.2d 689, 693.

A defendant’s expectation of privacy in a lawfully obtained DNA profile is no greater than the expectation of privacy in other retained law-enforcement tools such as “photographs, handwriting exemplars, ballistics tests, etc., lawfully obtained in the course of an earlier

investigation,” which are “freely available to the police in the course of a new and unrelated investigation.” *Wilson v. State* (Md. Ct. App. 2000), 752 A.2d 1250, 1272. There is no “new Fourth Amendment intrusion” involved when using these previously gathered items. *Id.* A defendant cannot “plausibly assert any expectation of privacy with respect to the scientific analysis of a lawfully seized item of tangible property, such as a gun or a controlled substance. Although human blood, with its unique genetic properties, may initially be quantitatively different from such evidence, once constitutional concerns have been satisfied, a blood sample is not unlike other tangible property which can be subject to a battery of scientific tests.” *King*, 663 N.Y.S.2d 610, 614-15; see also *Bickley v. State* (Ga. Ct. Ap. 1997), 489 S.E.2d 167, 170 (“We agree with the trial court that ‘in this respect, DNA results are like fingerprints which are maintained on file by law enforcement authorities for use in further investigations.’”). That is, once DNA is used to create a profile, the profile becomes the property of the “state” and a defendant has “no possessory or ownership interest in it.” *Smith v. State* (Ind. 2001), 744 N.E.2d 437, 439. DNA profiling technology, which gives law enforcement “new and scientifically reliable investigative tool[s]” should “give rise, in any sane society, not to a cry of alarm but to a sigh of relief.” *Wilson*, 752 A.2d 1250, 1272.

C. Any search was constitutional because it was reasonable.

Even if the subsequent use of Emerson’s DNA profile qualified as a search, the comparison of the crime-scene DNA to the DNA profile generated from the sample lawfully obtained in 2005 was not an *unreasonable* search. Reasonableness is tested 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. 112, 119. The subsequent use of a lawfully obtained DNA profile is not an unreasonable search when conducted without a warrant.

In Ohio, the Third District directly faced this question, and found no constitutional problem. “[T]he trial court did not err in overruling the motion to suppress the DNA evidence that was collected and held by the State of Ohio in connection with another case where the sample was given voluntarily by the defendant for that other case and investigation.” *State v. Whitfield*, No. 1-04-80, 2005-Ohio-2255, ¶ 23. Decisions around the country concur: “It would not be reasonable to require law enforcement personnel to obtain additional consent or another search warrant every time a validly obtained DNA profile is used for comparison in another investigation. [L]ike a fingerprint, DNA remains the same no matter how many times blood is drawn and tested and a DNA profile can be used to inculcate or exculpate suspects in other investigations without additional invasive procedures.” *Commonwealth v. Gaynor* (Mass. 2005), 820 N.E.2d 233, 244 (citations and internal quotation marks omitted).

The Fourth Amendment does not prohibit “law enforcement from using lawfully obtained personal information in an unrelated criminal investigation. If that were the case, the commonplace practice of identifying a suspect based on fingerprints lawfully obtained during a previous criminal investigation would constitute a Fourth Amendment violation. The rule is no different because the identifying feature is DNA obtained pursuant to a court ordered blood sample.” *State v. Bowman* (Mo. 2011), 337 S.W.3d 679, 685. Once a DNA sample is validly collected, even in an unrelated case, the police are “not restrained from using the samples as evidence” in a different case. *Washington v. State* (Fla. 1994), 653 So. 2d 362, 364. Once law enforcement lawfully obtains a DNA profile, a defendant has “no additional constitutional protected privacy in that evidence and it may be used in the investigation of other crimes for identification purposes without the necessity of a separate warrant.” *State v. Glynn* (Kan.App.2007), 166 P.3d 1075, 1083; see also *People v. Collins* (Colo. Ct. App. 2010), 250

P.3d 668, 674 (consent to saliva collection for DNA analysis in one investigation did not bar use of DNA profile in different investigation).

Put simply, “the Fourth Amendment protects an individual's interest in retaining possession of property but not the interest in regaining possession of property.” *Fox v. Van Oosterum* (C.A.6, 1999), 176 F.3d 342, 351

D. Even if retention of Emerson’s DNA triggers Fourth Amendment or statutory scrutiny, the remedy is not exclusion.

Exclusion is “not a personal constitutional right,” nor is it designed to “redress the injury” occasioned by an unconstitutional search. *Davis v. U.S.* (2011), 564 U.S. ___, ___, 131 S. Ct. 2419, 2426 (internal punctuation and citation omitted). Exclusion of evidence “exacts a heavy toll on both the judicial system and society at large” because it “almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence.” *Id.* at 2427. “[I]ts bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment.” *Id.* Therefore, Supreme Court cases “hold that society must swallow this bitter pill when necessary, but only as a last resort.” *Id.* (internal quotation marks omitted).

The Court need not administer the bitter pill here because there was nothing culpable in the conduct of the BCII personnel who retained Emerson’s DNA profile. “Indeed, in 27 years of practice under . . . [the] good-faith exception, [the U.S. Supreme Court] ha[s] *never applied* the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct.” *Davis*, 131 S. Ct. 2419, 2429 (internal punctuation omitted). Emerson cites no statute, rule, or regulation that required BCII to delete or seal the records of his DNA profile. On the contrary, the General Assembly has established policies for sealing records related to charges that do not result in convictions. Statutory law places the burden on the acquitted defendant, not any arm of the state, to seal the records related to the investigation against future use. “Any

person, who is found not guilty of an offense . . . may apply to the court for an order to seal his official records in the case. R.C. 2953.52(A)(1). The request, though, is only a first step. Following the request, the court must “notify the prosecutor” and set a hearing. R.C. 2953.52(B)(1). Following the hearing, the records are only sealed if “the interests of the person in having the records pertaining to the case sealed are not outweighed by any legitimate governmental needs to maintain such records.” R.C. 2953.52(B)(3).

The federal model also places on the acquitted defendant the burden of sealing or expunging investigative records. Federal policy requires that the person seeking expungement “submit a written request” to the FBI, and include a “final court order” justifying expungement. See http://www.fbi.gov/about-us/lab/codis/codis_expungement (last visited Sept. 21, 2011).

Several states, like Ohio and the federal government, put the onus on the person seeking expungement to initiate the relevant procedures. See e.g., Ala. Code 36-18-26 (“Upon the reversal of conviction, the director shall be authorized and empowered to expunge DNA records upon request of the person from whom the sample was taken.”); Idaho Code 19-5513(1),(2) (“A person whose DNA profile has been included in the database and databank . . . may make a written request for expungement The court has the discretion to grant or deny the request for expungement.”); Ky. Rev. Stat. 17.175(5) (“The Department of Kentucky State Police shall expunge all identifiable information in the data bank pertaining to the person and destroy all samples from the person upon receipt of: [a] A written request for expungement pursuant to this section; and [b] A certified copy of the court order reversing and dismissing the conviction or adjudication”); N.Y.C.L. Exec. Section 995-c(b) (“if an individual, either voluntarily or pursuant to a warrant or order of a court, has provided a sample for DNA testing [and no conviction results] . . . such individual may apply to the supreme court or the court in which the judgment of

conviction was originally entered for an order directing the expungement of any DNA record . . .”).

Ohio law does not give “carte blanche [to] every defendant acquitted of criminal charges in Ohio courts” to have their records sealed. *Pepper Pike v. Doe* (1981), 66 Ohio St. 2d 374, 377 (discussing inherent authority to seal records). Sealing is, instead, “an act of grace created by the state,” it is not “a privilege, not a right.” *State v. Simon* (2000), 87 Ohio St. 3d 531, 533. Emerson never initiated 2952.53 proceedings, and he can point to nothing that requires automatic expungement of his DNA profile.

Because Emerson has no inherent right to have his records sealed after the acquittal in 2005, and because the General Assembly has decided that records are not automatically sealed on acquittal, BCII transgressed no constitutional or statutory right that would justify excluding the inculpatory DNA evidence used in Emerson’s 2007 conviction.

Several courts have concluded that, despite acknowledged constitutional or statutory violations in collecting DNA, the exclusionary rule is not an appropriate remedy. The California Supreme Court recently affirmed the use of DNA evidence collected in violation of state law. The court held that “application of the federal exclusionary rule would not be appropriate” for DNA evidence that would not have been collected if authorities had properly applied the state statute, even if the statutory violation also transgressed the Fourth Amendment. *People v. Robinson* (Cal. 2010), 224 P.3d 55, 67. The Indiana Supreme Court has likewise declined to “impose the major social cost” triggered by exclusion of “extremely valuable evidence in crimes that often leave little other trace,” even if the DNA profile was collected in violation of state statutes. *Smith v. State* (Ind. 2001), 744 N.E.2d 437, 442.

Cases in Maryland and Georgia follow this same reasoning and reject the exclusionary rule despite statutory or Fourth Amendment problems with the DNA collection. The Maryland federal court reasoned that “[a]ny deterrent effect that could be achieved by application of the exclusionary rule in this case would be vastly outweighed by the costs that would be incurred by suppression of the powerfully inculpatory and reliable DNA evidence.” *United States v. Davis* (D. Md. 2009), 657 F. Supp. 2d 630, 666. “The marginal deterrence that might be achieved by suppression of the evidence in this case . . . simply cannot justify keeping the DNA evidence from the jury and disrupting the truth-seeking function of a criminal trial.” *Id.* The Georgia court also rejected an argument for exclusion, noting that, even if the statute did not authorize retention of the DNA profile, no statute required “the State to purge lawfully collected forensic profiles from its database.” *Fortune v. State* (Ga. Ct. App. 2009), 685 S.E.2d 466, 471.

These cases fit comfortably within federal and Ohio precedent recognizing that the exclusionary rule does not mandate excising evidence from trial when law enforcement collected the evidence by relying on valid statutory law. *Illinois v. Krull* (1987), 480 U.S. 340, 352 (nothing indicates that excluding evidence obtained in accord with valid statute would deter official misconduct beyond other checks on unconstitutional legislation); accord *State v. Ferry*, 11th Dist. No. 2007-L-217, 2008-Ohio-2616, ¶ 24 (“evidence will not be suppressed where the officer has acted in good faith . . . on the constitutionality of the statute”). These cases recognize that any constitutional argument against Ohio’s statutes or practices for DNA retention could be remedied through either a 42 U.S.C. § 1983 action or an action “seeking a declaration that the statute is unconstitutional and an injunction barring its implementation.” *Krull*, 480 U.S. 340, 354.

Amicus Curiae Attorney General's Propositions of Law No. II:

Decisions regarding retention, use, and exclusion of DNA profiles are policy choices for the General Assembly.

Outside of the narrow constitutional exceptions dictated by the Fourth Amendment and Section 14, Article I, of the Ohio Constitution, the General Assembly controls how BCII handles DNA profiles submitted to it for analysis. This Court frequently reminds litigants that “[i]t is not the role of the courts to establish legislative policies or to second-guess the General Assembly’s policy choices.” *State ex rel. Cydrus v. Ohio Pub. Employees Ret. Sys.*, 127 Ohio St. 3d 257, 2010-Ohio-5770, ¶ 24; *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St. 3d 280, 2010-Ohio-1029, ¶ 35; *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546, ¶ 212. The General Assembly’s policy choices foreclose Emerson’s arguments.

The General Assembly has made several policy choices that compel affirmance. First, in R.C. 2953.52, the General Assembly placed the burden of sealing records related to investigations and criminal proceedings in the person who wants the records shielded from law enforcement’s typical use of those records. The person who wants their records sealed is charged with removing the records from the broad legislative authorization to BCII to “use or disclose information regarding DNA records” including the authority to “disclose information to a law enforcement agency for the administration of criminal justice.” R.C. 109.573(B)(2), (2)(a).

Second, the General Assembly has declared that the acquitted have no absolute right to removal of DNA profiles from databases. The statute conferring the right to seal records recognizes the countervailing interest of the public in maintaining records that a petitioner wants sealed. The statute empowers prosecutors with a right to object when someone seeks a judicial order sealing records of a criminal investigation or prosecution. R.C. 2953.52(B)(2)(c). The

statute also directs courts to weigh the government's "needs" in maintaining the records against the private interest in sealing them. R.C. 2953.52(B)(2)(d).

Finally, a 2010 addition to the statutes controlling BCII's handling of DNA information *prohibits* exclusion of DNA evidence retained or used in violation of the sealing statute. A violation of the sealing statute "shall not provide the basis to exclude or suppress" evidence "otherwise admissible in a criminal proceeding, including "DNA records collected in the DNA database" and "evidence that was obtained or discovered as the direct or indirect result of divulging or otherwise using DNA records in the DNA database." R.C. 2953.56.

Collectively, these statutes reflect a legislatively set public policy favoring retention of DNA profiles and disfavoring exclusion of DNA evidence from criminal proceedings, even if the DNA evidence was retained in violation of statute. Because neither the federal nor Ohio constitutions compel a different result, these policies mandate the result reached below: Emerson's DNA profile was admissible at his trial.

A. Because legislative policy regarding DNA profiles is continuously evolving, any constitutional pronouncement in this area should be narrowly cabined.

Ohio legislative policy governing DNA profiles is still evolving. In 2010, Senate Bill 77 in the 128th General Assembly expanded DNA collection to arrestees, refined the retention rules for biological material that might be analyzed for DNA evidence, and reworked the procedures for post-conviction DNA testing. The expansion of DNA collection to arrestees took effect only in July 2011. These changes, and the laws of other states, demonstrate that legislative policy regarding DNA testing and use should remain open and therefore any constitutional pronouncements on this issue should be narrow.

Statutes in other states show the kinds of policies that are not currently law in Ohio, but that should remain available as legislative policy choices. For example, Illinois's expungement

statute is limited to convictions overturned only for actual innocence. See 730 ILCS 5/5-4-3(f-1). Missouri extends the non-exclusion principle like that in R.C. 2953.56 to prohibit reversing a conviction based on any delay or failure to follow state expungement statutes. See Rev. Stat. Mo. Section 650.055(8)(4). North Dakota provides immunity to any actor who erroneously, but in good faith, retains DNA profiles in a database. N.D. Code, Section 31-13-07(3). And South Carolina requires that a responsible official involved in collecting a DNA sample inform the donor of the right to expungement. S.C. Code Ann. Section 23-3-660(E).

This array of policy choices open to legislatures should not be curtailed by broad constitutional rulings. That is especially true in this appeal because nothing in the Fourth Amendment or the Ohio Constitution compels excluding the inculpatory DNA evidence introduced at Emerson's trial.

B. Because BCII is not charged with monitoring the judicial proceedings related to the evidence it analyzes, a constitutional rule of automatic expungement is not appropriate in Ohio.

Emerson argues that BCII improperly retained the electronic DNA profile created during the investigation of the 2005 rape. Emerson suggests that BCII should have expunged that electronic information following his acquittal even though he never took advantage of the sealing statute (R.C. 2953.52) and even though current law prohibits excluding DNA profile evidence even if it was wrongly retained in a database. The rule Emerson seeks is inconsistent with BCII's statutorily defined role in Ohio's criminal justice system and would overburden its limited resources.

BCII's primary role in the criminal justice system is to aid criminal investigations. This mandate is set out in R.C. 109.52: "The bureau of criminal identification and investigation may operate and maintain a criminal analysis laboratory and mobile units thereof, create a staff of investigators and technicians skilled in the solution and control of crimes and criminal activity,

keep statistics and other necessary data, assist in the prevention of crime, and engage in such other activities as will aid law enforcement officers in solving crimes and controlling criminal activity.”

BCII is not tasked with tracking the progress through the courts of any case that may be associated with evidence analyzed in its laboratories. The General Assembly—like most other states—placed the burden on the defendant of removing a DNA profile from state records. See, e.g., Code of Ala. Section 36-18-26; Ariz. Rev. Stat. Section 13-610(M); Cal Pen Code Section 299; Conn. Gen. Stat. Section 54-102; 29I; Del. C. Section 4713(i); Idaho Code Section 19-5513; Ind. Code Ann. Section 10-13-6-18; Ken. Rev. Stat. Section 17.175; La. Rev. Stat. 15:614; Ann. Laws Mass. Gen. Laws ch. 22E Section 15; Rev. Stat. Neb. Section 29-4109; Rev. Stat. N.H. 651-C:5; N.J. Stat. Section 53:1-20.25; N.Y. Consol. L. Exec Section 995-c; N.C. Gen. Stat. Section 15A-148; N.D. Code Section 31-13-07; 44 Pa. Con. Stat. Section 2321; R.I. Gen. Laws Section 12-1.5-13; S.D. Cod. Laws Section 23-5A-28; Tex. Gov't Code Section 411.151; Va. Code Ann. Section 19.2-310.7; W. Va. Code Section 15-2B-11; Wis. Stat. Section 165.77; Wyo. Stat. Section 7-19-405.

BCII is not equipped to track the status of a case associated with the evidence samples it analyzes. BCII analyzes nearly 1,000 suspect DNA samples each year. Counting appeals and state and federal post-conviction relief, each criminal matter may result in nine different proceedings. BCII's staff of scientists and investigators do not have the resources to track these (sometimes) endless proceedings and the (occasional) back-and-forth character of convictions, sentencing, and reversals. Nor has the General Assembly appropriated money to BCII to cover the human and other capital that would be required to track these proceedings. Instead, the General Assembly has charged defendants with the responsibility to seal any record he may want

removed from relevant databases. That is a sensible and constitutionally permissible choice that this Court should not disturb.

A holding from this Court that required BCII to track criminal proceedings would “place an unreasonable burden on [BCII], which as a state agency would in turn place the burden on the public treasury.” *State ex rel. Bolin v. Ohio EPA* (9th Dist. 1992), 82 Ohio App. 3d 410, 414 (rejecting rule that would compel OEPA to conduct testing beyond that required by statute). The federal D.C. Circuit confronted an argument like Emerson’s and concluded that a rule of automatic purging would overtax the FBI’s resources. The court rejected a proposed holding that would have forced the FBI to “purge its files of information regarding an individual so requesting whenever it had closed a particular investigation” because that interpretation of the governing law “would place new and daunting burdens, both substantive and administrative, upon the FBI and other government agencies, with little or no gain to individual privacy.” *J. Roderick MacArthur Found. v. FBI* (C.A.D.C., 1996), 102 F.3d 600, 604.

CONCLUSION

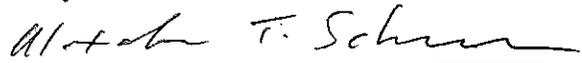
Emerson’s challenge to retention of his DNA profile founders on three independent grounds: the retention triggers no Fourth Amendment protection, any search was reasonable, and—even assuming an unconstitutional search—exclusion is not the proper remedy.

Regardless of the outcome of this specific appeal, BCII urges the Court to resist any judge-made rule that would place on BCII the burden to track and monitor every proceeding related to the evidence it analyzes to further law enforcement in Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Appellee State of Ohio was served by U.S. mail this 24th day of October, 2011 upon the following counsel:

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