

Casenote

Padgett v. Donald: Why Not So Special

In *Padgett v. Donald*,¹ the Eleventh Circuit Court of Appeals unanimously held that a state statute,² permitting compelled collection of saliva samples from incarcerated felons for DNA profiling, does not violate the federal Constitution's Fourth Amendment,³ the search and seizure provisions of the state constitution,⁴ or the felons' rights to privacy under the federal or state constitutions.⁵ The circuits are split whether to apply the special needs analysis or the balancing test to DNA profiling statutes.⁶ In this case of first impression for the circuit, the Eleventh Circuit applied the balancing test.⁷ This decision is important because it opens up the possibility for the courts to disregard the special needs analysis and through the traditional balancing test balance away individuals' freedoms.

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1. 401 F.3d 1273 (2005).
 2. O.C.G.A. § 24-4-60 (1995 & Supp. 2005).
 3. U.S. CONST. amend. IV.
 4. GA. CONST. art. I, § 1, para. 13 (2005).
 5. 401 F.3d at 1274-75.
 6. *Id.* at 1278.
 7. *Id.* at 1280.

I. FACTUAL BACKGROUND

In 2000 the Georgia General Assembly amended O.C.G.A. section 24-4-60⁸ (the “Statute”) to require convicted, incarcerated felons to provide a sample of their deoxyribonucleic acid (“DNA”) to the Georgia Department of Corrections (“GDOC”) for analysis and storage in a data bank maintained by the Georgia Bureau of Investigation (“GBI”).⁹ Federal, state, and local law enforcement officers have access to the data bank when they are engaged in an official investigation of any criminal offense.¹⁰ The Statute covers all convicted felons incarcerated on or after July 1, 2000, as well as all felons incarcerated as of July 1, 2000.¹¹

Pursuant to the Statute, the GDOC can obtain an incarcerated felon’s DNA sample by taking blood, swabbing the inside of his or her mouth

8. O.C.G.A. § 24-4-60.

9. *See id.*

10. O.C.G.A. § 24-4-63(a) (1995 & Supp. 2005).

11. O.C.G.A. § 24-4-60. The Statute provides in relevant part:

In addition, on and after July 1, 2000, any person convicted of a felony and incarcerated in a state correctional facility shall at the time of entering the prison system have a sample of his or her blood, an oral swab, or a sample obtained from a noninvasive procedure taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. The provisions and requirements of this Code section shall also apply to any person who has been convicted of a felony prior to July 1, 2000, and who currently is incarcerated in a state correctional facility in this state for such offense. The provisions and requirements of this Code section shall also apply to any person who has been convicted of a felony in this state on or after July 1, 2000, and who is incarcerated in a private correctional facility in this state for such offense pursuant to a contract with the Department of Corrections upon entering the facility, and for any person convicted of a felony prior to July 1, 2000, and who is incarcerated in a private correctional facility in this state pursuant to contract with the Department of Corrections. The analysis shall be performed by the Division of Forensic Sciences of the Georgia Bureau of Investigation. The division shall be authorized to contract with individuals or organizations for services to perform such analysis. The identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the bureau in a DNA data bank and shall be made available only as provided in Code Section 24-4-63. . . . [For the purposes of this Code section], the term “state correctional facility” means a penal institution under the jurisdiction of the Department of Corrections, including inmate work camps and inmate boot camps; provided, however, that such term shall not include a probation detention center, probation diversion center, or probation boot camp under the jurisdiction of the Department of Corrections.

Id. § 24-4-60(b) & (a).

for saliva, or using any other noninvasive procedure.¹² The GDOC's policy is to obtain DNA samples through saliva from oral swabs.¹³ The samples are then sent to the GBI for typing and placement in the DNA database.¹⁴ Inmates refusing to submit to the test are subjected to disciplinary reports followed by hearings and possible disciplinary action.¹⁵ Upon refusal to cooperate, the prison staff forcefully takes the sample.¹⁶

On July 15, 2001, Roy Padgett, a Georgia state prison inmate, tried to avoid giving his DNA sample by filing a *pro se* civil rights action in which he challenged the constitutionality of the Statute.¹⁷ As the suit was pending, Paul Boulineau and John Burney (the "intervenor-appellants"), prison inmates convicted of felonies prior to July 1, 2000, intervened, and counsel was appointed.¹⁸ After the appellants' intervention, Padgett, the original challenger, consented to the taking of the DNA sample shortly before the release from incarceration and became a non-party to the appeal after he was dismissed from the action.¹⁹

More than a year after the original action was filed, the appellants filed an amended complaint seeking a declaratory judgment against GDOC, GBI, and the Commissioner of the GDOC, alleging, among other claims, that the Statute violated their federal and state constitutional protections from unreasonable searches as well as their right to privacy.²⁰ The appellants also sought an injunction to prevent the GDOC from taking the DNA samples without inmates' consent.²¹

On cross-motions for summary judgment, the United States District Court for the Northern District of Georgia denied the appellants' motion and granted the GDOC, the GBI, and the Commissioner's motion.²² The district court held that the plaintiffs abandoned their allegations against the GDOC and the GBI.²³ On appeal, the appellants did not challenge this part of the district court's holding.²⁴ Thus, the appellate court considered the district court's holding only with respect to the

12. *Id.*

13. *Padgett*, 401 F.3d at 1275.

14. *Id.*

15. *Id.* at 1275-76.

16. *Id.* at 1276.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1276 n.3.

Commissioner's motion regarding the appellants' right to privacy and unreasonable searches.²⁵ Under the Eleventh Amendment,²⁶ the Commissioner could claim immunity, but failed to do so.²⁷ The appellate court did not raise the issue of the Commissioner's immunity *sua sponte* and decided the appellants' state constitutional claims on their merits.²⁸

Regarding the unreasonable searches claim, the district court rejected the appellants' "special need" analysis and instead applied the traditional Fourth Amendment balancing test to uphold the Statute.²⁹ Regarding the privacy rights claim, the district court held that the appellants' right to privacy was not infringed because the state's interest in having a DNA data bank outweighed the appellants' privacy rights in their identities.³⁰ The district court reasoned that because the appellants are already subject to other invasions due to their incarceration, the bodily intrusions caused by the Statute are minimal.³¹

The appellants presented two issues on appeal. First, whether the district court should have concluded that warrantless extraction and analysis of the appellants' DNA under the Statute was unconstitutional under the United States and Georgia Constitutions' search and seizure provisions.³² Second, whether the Statute violated the appellants' rights to privacy.³³

II. LEGAL BACKGROUND

The court of appeals had the choice of which test to apply in deciding whether the Statute allowing forced collection of DNA samples was constitutional. The first test is the traditional Fourth Amendment balancing test, which determines reasonableness of the search by weighing the private interests of the individual against the government's interests without a finding of a special need.³⁴ The second test is a relatively new special needs analysis, which allows suspicionless search if the government has a special need that goes beyond general law

25. *Id.*

26. U.S. CONST. amend. XI.

27. 401 F.3d at 1276 n.3.

28. *Id.*

29. *Id.* at 1276.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 1277-78 (citing *Jones v. Murray*, 962 F.2d 302, 306-07 (4th Cir. 1992); *Groceman v. United States Dep't of Justice*, 354 F.3d 411, 413 (5th Cir. 2004); *United States v. Kincade*, 379 F.3d 813, 832 (9th Cir. 2004)).

enforcement,³⁵ such as maintaining order within prisons,³⁶ protecting the United States' borders,³⁷ or achieving certain administrative purposes.³⁸ The term "special needs" entered the legal arena twenty years ago in Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.*,³⁹ where he agreed with the Court that the probable cause requirement has exceptions.⁴⁰ However, the exceptions are allowed only if "special needs, beyond the normal need for law enforcement, make the warrant and probable [] cause requirement impracticable. . . ."⁴¹ Subsequently, the Court adopted the new terminology, and thus created a new test in *O'Connor v. Ortega*⁴² and *Griffin v. Wisconsin*.⁴³ In those cases the Court held that, in limited circumstances, a search may be constitutional even if unsupported by a warrant or probable cause when special needs, other than the normal need for law enforcement, provide sufficient justification for the search.⁴⁴ The Fourth, Fifth, and Ninth Circuits apply the traditional Fourth Amendment balancing test.⁴⁵ The Second, Seventh, and Tenth Circuits apply the special needs analysis.⁴⁶

A. *Special Needs Analysis*

A federal challenge concerning searches and seizures starts with the Fourth Amendment of the United States Constitution, which prohibits unreasonable searches and seizures.⁴⁷ A State of Georgia challenge begins with the amendment in the Georgia Constitution which is equivalent to the United States Constitution's Fourth Amendment. The Fourth Amendment reads:

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,

35. *Id.*

36. *Hudson v. Palmer*, 468 U.S. 517, 527 (1984).

37. *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

38. *New York v. Burger*, 482 U.S. 691, 702-04 (1987).

39. 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

40. *Ferguson v. City of Charleston*, 532 U.S. 67, 76 n.7 (2001).

41. *Id.*

42. 480 U.S. 709, 720 (1987) (plurality opinion).

43. 483 U.S. 868, 873 (1987).

44. *Ferguson*, 532 U.S. 67, 76 n.7.

45. *Padgett*, 401 F.3d at 1278.

46. *Id.*

47. U.S. CONST. amend. IV.

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴⁸

The Fourth Amendment and the Georgia Constitution's amendment on searches and seizures are written essentially with the same language.⁴⁹ The Eleventh Circuit acknowledged that "the statutorily required extraction of saliva for DNA profiling constitutes a 'search' within the meaning of the [Fourth] Amendment."⁵⁰ Georgia's standard for evaluating reasonableness of searches under the state's Constitution—the "totality of the circumstances" test—is identical to the Fourth Amendment federal standard.⁵¹ Thus, because both amendments provide the same amount of protection to individuals, extraction of saliva for DNA profiling purposes constitutes a search within the search and seizure amendments of both the federal Constitution and the Georgia Constitution.

1. The Fourth Amendment Reasonableness Requirement. The Fourth Amendment proscribes only those searches and seizures that are unreasonable.⁵² Traditionally, for a search or seizure to be reasonable and, thus, constitutional under the Fourth Amendment, the government must produce a warrant supported by probable cause, unless an exception that justifies the absence of the former is available.⁵³ Under the new approach, in certain areas the courts move away from requiring a warrant supported by probable cause and proceed to balance individuals' and states' interests without a warrant supported by probable cause. Thus, reasonableness also "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."⁵⁴ Moreover, "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."⁵⁵ Thus, "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."⁵⁶

48. *Id.*

49. *Id.*; GA. CONST. art. I, § 1, para. 13 (2005).

50. *Padgett*, 401 F.3d at 1277.

51. *Wells v. State*, 348 S.E.2d 681, 683 (1986).

52. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

53. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

54. *Skinner*, 489 U.S. at 619 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

55. *Id.* at 624 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)).

56. *Id.*

The principle demonstration of a reasonable search lacking even a reasonable suspicion of a criminal wrongdoing is *Skinner v. Railway Labor Executives' Ass'n*.⁵⁷ There, the Federal Railroad Administration (the "FRA") promulgated regulations mandating blood and urine tests of railroad employees involved in certain train accidents.⁵⁸ Moreover, the FRA authorized railroads to administer breath and urine tests to employees who violated certain safety rules.⁵⁹ The FRA justified its regulations on the premise that alcohol and drug abuse by railroad employees presents a serious threat to safety.⁶⁰ Railway labor organizations filed suit to enjoin the FRA's regulations, arguing that allowing the collection of blood, breath, and urine for testing violates the railroad employees' constitutional rights.⁶¹

Granting certiorari, the United States Supreme Court held that the regulations fell within the reach of the Fourth Amendment.⁶² To reach this result, the Court concluded that blood tests, breathalyzer tests, and the taking of urine constitute searches within the meaning of the Fourth Amendment.⁶³ After holding that the regulations were within the reach of the Fourth Amendment, the Court looked at whether the regulations were reasonable under the Fourth Amendment.⁶⁴ What is reasonable "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."⁶⁵ Thus, whether the search is permissible "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."⁶⁶ Because the Court concluded that the government had a compelling interest in testing the railroad employees even without a reasonable suspicion of impairment, the interest outweighed the rights of the employees against unreasonable searches.⁶⁷ Therefore, the FRA's regulations were reasonable within the meaning of the Fourth Amendment.⁶⁸

57. 489 U.S. 602 (1989).

58. *Id.* at 606.

59. *Id.*

60. *Id.*

61. *Id.* at 612.

62. *Id.* at 633.

63. *See id.* at 616-17.

64. *See id.* at 618-19.

65. *Id.* at 619 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

66. *Id.* (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

67. *Id.* at 633.

68. *Id.* at 634.

2. Prisoners' Rights under the Fourth Amendment. In the context of the prison regulation, suspicionless searches have been upheld as well. In *Hudson v. Palmer*,⁶⁹ the Court held that the Fourth Amendment has no applicability to a prison cell.⁷⁰ In *Hudson* two officers at the correctional facility entered an inmate's cell to conduct a "shakedown" in the search for contraband.⁷¹ The inmate claimed that he had a right of privacy in his prison cell, protected by the Fourth Amendment against unreasonable searches in the cell.⁷² After analyzing what rights are afforded to an imprisoned individual and what rights are taken away as a result of loss of freedom, the Court concluded that an inmate does not have a reasonable expectation of privacy that would enable him or her to invoke the protections of the Fourth Amendment.⁷³ Thus, an officer is not required to have a warrant, supported by probable cause, or even reasonable suspicion to search an inmate's cell.

Although an inmate may not harbor expectations of privacy within a prison cell, an inmate still retains the right to bodily privacy. In *Fortner v. Thomas*,⁷⁴ the Eleventh Circuit held that a prisoner retains the right to bodily privacy, subject, however, to the reasonableness of furthering the government's legitimate penological interests.⁷⁵ In *Fortner* female correctional officers viewed nude male inmates when they showered or used the toilet.⁷⁶ The court of appeals reasoned that "most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.'"⁷⁷ Thus, if the compelled nudity is not designed to further legitimate penological interest such as institutional security, inmates retain their constitutionally protected right to privacy in their bodies.⁷⁸

69. 468 U.S. 517 (1984).

70. *Id.* at 536.

71. *Id.* at 519.

72. *Id.* at 522.

73. *Id.* at 526.

74. 983 F.2d 1024 (11th Cir. 1993).

75. *Id.* at 1030.

76. *Id.* at 1027.

77. *Id.* at 1030 (citing *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)).

78. *Id.* Like fingerprinting and photographing, however, a DNA sample can be considered as a means for identification stored in the government's data base to assist in crime solving. *Nicholas v. Goord*, 430 F.3d 652, 671, 675 (2d Cir. 2005). Thus, "the state's purpose in keeping DNA records is comparable to the state's purpose in keeping fingerprints and photographs." *Id.* at 671 n.31 (emphasis in original). Because the statute spells out the limits on the collection, analysis, and use of DNA samples, "the intrusion on privacy [imposed] by the statute [is] similar to the intrusion wrought by the maintenance

3. Purpose for DNA Samples Collection. The special needs analysis requires that in the absence of individualized suspicion, the collection of DNA samples must be for purposes beyond general law enforcement.⁷⁹ For example, in *City of Indianapolis v. Edmond*⁸⁰ and *Ferguson v. City of Charleston*,⁸¹ the government failed to show that its conduct served purposes beyond general law enforcement. In *Edmond* the city of Indianapolis set up vehicle checkpoints on Indianapolis roads to interdict unlawful drugs.⁸² Motorists who had been stopped at checkpoints filed a suit against the city alleging that the checkpoints violated their Fourth Amendment rights.⁸³ The Supreme Court agreed and stated that because the primary purpose of the checkpoints was to find narcotics, which is an ordinary criminal wrongdoing, the checkpoints fell within general crime control and stops had to be justified by individualized suspicion.⁸⁴ The Court was quick to point out, however, that it does recognize the special need to search borders and places like airports and government buildings to maintain public safety, which differs from general crime control.⁸⁵

In *Ferguson* pregnant women's urine was collected without their consent for illegal drugs analysis if a patient met one of nine criteria set out in the hospital policy.⁸⁶ Ten women filed suit after being arrested for testing positive for cocaine while receiving obstetrical care at the hospital.⁸⁷ The women claimed that the warrantless and nonconsensual drug tests performed on them in the hospital violated their Fourth Amendment rights because the tests were unconstitutional searches.⁸⁸ The city of Charleston, law enforcement officials who helped to develop and enforce the hospital policy, and representatives of the Medical University of South Carolina, which operated the hospital, argued that the policy was in place solely for medical purposes, such as curtailing the medical complications and medical costs tied to maternal cocaine use, and did not serve general law enforcement goals of helping police officers

of finger print records." *Id.* at 671.

79. *Padgett*, 401 F.3d at 1278.

80. 531 U.S. 32 (2000).

81. 532 U.S. 67 (2001).

82. *Edmond*, 531 U.S. at 34.

83. *Id.* at 36.

84. *Id.* at 47.

85. *Id.* at 47-48.

86. 532 U.S. at 71.

87. *Id.* at 73.

88. *Id.*

to identify criminals.⁸⁹ The Supreme Court disagreed and held that because: (1) the law enforcement's involvement was essential to the success of the program; (2) the medical staff collected evidence for law enforcement purposes by testing the patients' urine for drugs; (3) women who tested positive were turned over to the police for criminal purposes; and (4) law enforcement officers' involvement with the policy was overwhelming, the policy does not qualify as a special need category and may not be executed based on warrantless, nonconsensual, and suspicionless searches.⁹⁰

B. *Traditional Balancing Test*

As noted previously, under the traditional Fourth Amendment balancing test, the courts balance the interests of the state against the interests of the individuals under the totality of the circumstances in deciding the constitutionality of statutes.⁹¹ In the context of warrantless searches of an individual connected with governmental correctional facilities, *United States v. Knights*⁹² spells out how to apply the balancing test in such a circumstance.⁹³ The United States Supreme Court decided *Knights* after it decided *Edmond* and *Ferguson*, and the Court used the balancing test to evaluate warrantless searches of probationers who, like prisoners, have limited Fourth Amendment rights due to their relationship with the state.⁹⁴ The question in *Knights* was whether the Fourth Amendment limits searches pursuant to the probation condition to only those searches that have a "probationary" purpose.⁹⁵ Three days after *Knights* was placed on probation, a power transformer and an adjacent telecommunications vault were set on fire, causing substantial damages.⁹⁶ A detective became suspicious of *Knights* when the detective realized that the acts of vandalism coincided with *Knights*'s court appearances on a theft charge.⁹⁷ Moreover, *Knights* was seen near the scene of the arson a week prior to the incident, and a sheriff's deputy noted that the hood of the truck parked at *Knights*'s place of residence was warm after the arson.⁹⁸ These incidents gave the detective a reasonable suspicion of *Knights*'s

89. *Id.* at 75.

90. *Id.* at 85.

91. *See Padgett*, 401 F.3d at 1278.

92. 534 U.S. 112 (2001).

93. *Id.*

94. *Padgett*, 401 F.3d at 1279.

95. *Knights*, 534 U.S. at 116.

96. *Id.* at 114.

97. *Id.* at 115.

98. *Id.*

involvement with the acts of vandalism. Because the detective had a probation order providing for searches, the detective did not obtain a separate warrant to search Knights's residence.⁹⁹ Knights contended that unless the detective was searching Knights's residence in view of a special need, a warrantless search would not satisfy the Fourth Amendment.¹⁰⁰ The Supreme Court disagreed.

The United States Supreme Court reasoned that by virtue of Knights's status as a probationer subject to searches, he was aware that the reasonableness of searches under the Fourth Amendment 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."¹⁰¹ Further, the Court likened the status of a probationer to the status of a prisoner in that "[i]nherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'"¹⁰² Thus, the Court held that when there is reasonable suspicion that a probationer subject to search condition is engaging in criminal activity, the probationer may be searched because there is a great likelihood that the criminal activity is indeed occurring.¹⁰³ Because the probationer already has diminished privacy interests and is subject to searches, the society's interest in preventing the criminal conduct makes a warrantless search reasonable under the Fourth Amendment.¹⁰⁴

III. COURT'S RATIONALE

The Eleventh Circuit Court of Appeals could choose to apply a balancing test or a special needs analysis. The appellate court chose the balancing test. One reason for the court's choice in favor of the balancing test is because the notion that the collection of inmates' DNA samples was not for general law enforcement purposes is difficult to comprehend. Thus, the special needs analysis was difficult to apply. The court instead applied *Knights* and held that Georgia had a legitimate interest in creating a permanent identification record of convicted felons for the purposes of general law enforcement.¹⁰⁵ As such, the state interest outweighed the minor intrusion into the already diminished prisoners' rights by taking their saliva for storing in the

99. *Id.*

100. *Id.* at 117.

101. *Id.* at 118-19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

102. *Id.* at 119 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)).

103. *Id.* at 121.

104. *Id.*

105. *Padgett*, 401 F.3d at 1280.

DNA data base.¹⁰⁶ The court recognized that the search in *Knights* was based on the reasonable suspicion that the probationer engaged in criminal wrongdoing.¹⁰⁷ The court also relied on the principle that prisoners retain only those constitutional rights that are not inconsistent with their status as prisoners, but at the same time recognized the principle from *Hudson*, which stated that prisoners do not have Fourth Amendment protection against prison cell searches.¹⁰⁸

When prisoners are incarcerated, they automatically become subject to limitations on their Fourth Amendment rights.¹⁰⁹ For example, prisoners are not protected by the Fourth Amendment against searches of their prison cells.¹¹⁰ Moreover, prisoners must also undergo routine tests of their blood, hair, urine, or saliva for the presence of drugs.¹¹¹ These intrusions are considered minimal compared to the interests of the state. Thus, the court distinguished *Edmond* and *Ferguson* from the case at bar, because those cases involved a general law enforcement goal directed at free individuals who are afforded complete rights under the Fourth Amendment.¹¹² Here, the Statute applies to incarcerated prisoners who retain limited rights under the Fourth Amendment. Therefore, even though they still retain limited rights that are consistent with their incarceration,¹¹³ they may not count on more. The court did not look into the Statute's penological purpose that would justify warrantless search of the appellants' bodies because penological purpose is only analyzed under the special needs approach.¹¹⁴

Regarding the reasonableness of taking saliva samples for storage in a DNA data base under the Georgia Constitution, the court applied the balancing test as well. Because the standards under the federal and state constitutions are the same, the Georgia Constitution was not violated for the same reasons that the Fourth Amendment of the federal Constitution was not violated.¹¹⁵

The court of appeals applied the same balancing of interests test to the appellants' right to privacy claim. It is a well-established principle that the United States Constitution does not expressly guarantee a right to

106. *Id.*

107. *Id.* at 1278 n.5.

108. *Id.* at 1278.

109. *See id.*

110. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984).

111. *Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004).

112. *Padgett*, 401 F.3d at 1279.

113. *See Harris v. Thigpen*, 941 F.2d 1495, 1513 (1991).

114. *Padgett*, 401 F.3d at 1280.

115. *Id.*

privacy.¹¹⁶ The right was derived from the word “liberty” in the Fourteenth Amendment.¹¹⁷ Furthermore, “only personal rights that . . . [are] ‘fundamental’ or ‘implicit in the concept of ordered liberty’” can be protected by the United States Constitution.¹¹⁸ In *Fortner v. Thomas*,¹¹⁹ the Eleventh Circuit held that prisoners have a right to bodily privacy when it comes to exposing their naked bodies before female correctional officers because “most people have ‘a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.’”¹²⁰ *Fortner* limited governmental intrusion of governmental nudity in that prisoners did retain some rights while in prison, namely the right to their private bodily parts not to be unnecessarily exposed before officers of the opposite sex.¹²¹ *Fortner* did not involve governmental intrusion. That particular bodily privacy against certain compelled nudity, which is retained by inmates, and which is spoken of in *Fortner* was not implicated in this case, because here the prisoners are, in fact, confronted with governmental intrusion.¹²² Therefore, the court concluded that the appellants’ right to prevent the state from getting their saliva is not a fundamental right, nor is it implicit in the concept of ordered liberty.¹²³ Because the appellants are already subject to routine tests that can be classified as bodily intrusions while they are in prison, the taking of saliva samples does not violate their right to privacy.¹²⁴ First, the federal Constitution does not explicitly provide for a right to privacy.¹²⁵ Second, because it is so, it is sufficient for the government to have a valid reason for intruding on the prisoners’ right to privacy to overcome that right and not violate the federal Constitution.¹²⁶

Although under the Georgia Constitution the right to privacy is considered a fundamental right, it may still be infringed upon if the state has “a compelling state interest . . . which is narrowly tailored to

116. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

117. *See id.* at 152-53; U.S. CONST. amend. XIV.

118. 410 U.S. at 152.

119. 983 F.2d 1024 (11th Cir. 1993).

120. *Id.* at 1030 (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)).

121. *Id.*

122. *Padgett*, 401 F.3d at 1281.

123. *See Roe*, 410 U.S. at 152.

124. *Padgett*, 401 F.3d at 1281.

125. *Roe*, 410 U.S. at 152.

126. *See Knights*, 534 U.S. at 118-19.

promote only that interest."¹²⁷ Therefore, even though the appellants are incarcerated, the Georgia Constitution guarantees their right to bodily privacy.¹²⁸ The state interest in promotion of law enforcement, however, is a compelling state interest which is narrowly tailored to achieve the Statute's goals because it is directed only at a limited population of prisoners and the DNA data base is only accessible for law enforcement purposes.¹²⁹ Therefore, the compelled collection of saliva for purposes of storing the analyses in a DNA data base does not violate the appellants' rights to bodily privacy under the Georgia Constitution.¹³⁰

IV. IMPLICATIONS

The implications of the Eleventh Circuit Court of Appeals holding in *Padgett v. Donald* can be far reaching indeed. In the context of prisoner rights, the appellate court delivered a sensible holding by balancing the state interests against the prisoners' interests. Nevertheless, the decision raises several concerns implicated by the manner in which the appellate court reached its decision. Although the court of appeals realized that the appellants' case did not squarely fit the logic of *Knights* or *Hudson*, the unanimous court, nevertheless, extended the holdings of *Knights* and *Hudson*. The appellate court balanced away the right to bodily privacy by holding that a warrantless search may be reasonable even without a reasonable suspicion. On the other hand, the appellate court did not go as far as to say that prisoners lose their right to bodily privacy altogether like they lose the right to privacy in their cell, according to the holding in *Hudson*. Nevertheless, this holding further limited prisoners' rights under the Fourth Amendment. This holding makes one wonder what might be the next right within the Fourth Amendment to be balanced away.

Moreover, the appellate court appears to have given too much weight to the appellants' status as prisoners. Not every member of the class can be characterized with the same qualities. Not every prisoner is going to go back on the same path of criminal wrongdoing once he or she paid the necessary dues to society. Thus, if the trend of class classification continues, it is only a matter of time before the next class of individuals may be branded as more likely to engage in criminal wrongdoing than the other class, the likelihood of engaging in criminal

127. *Padgett*, 401 F.3d at 1282 (quoting *King v. Georgia*, 272 Ga. 788, 189, 535 S.E.2d 492, 494 (2000)).

128. *Id.*

129. *Id.*

130. *Id.*

activity being one of the factors the appellate court considered in reaching its holding. Although the opinion is limited to prisoners, the possibility of spilling over onto other classes of individuals is always present. Thus, would this opinion remain limited to prisoners alone?

If the appellate court's balancing test is interpreted broadly, the courts could easily balance away people's freedoms by finding governmental interest directed toward eradication of some evil. By not applying the special needs analysis, the appellate court seems to have taken an easy way out to balance away the rights at issue. However, the concern that arises is that the holding might extend beyond prisons and allow the government to search ordinary people. Thus, although the concern that the appellate court moved closer toward the general lack of freedom is a valid concern, the appellate court did not make a giant step in the direction that would allow the government to apply this balancing test to free individuals. Along the same lines, the United States Supreme Court writ of certiorari in this case was denied. The fact that the appellate court constrained its analysis to prisoners makes it less of a fear that free individuals will be subjected to the same balancing test. But is it only a matter of time for the courts to cover great distance with small steps?

VICTORIYA KULIK