



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**MARIO W., et al. v. STATE OF ARIZONA  
CV-11-0344-PR**

**PARTIES:**

*Petitioners:* Juveniles Mario W. and Eric R.

*Respondent:* Real Party in Interest State of Arizona

*Amicus Curiae:* Arizona Attorneys for Criminal Justice

**FACTS:**

A.R.S. § 8-238 requires that, if a juvenile is arrested for a violation of any of four listed categories of major offenses and is required to appear at an advisory hearing, the judicial officer shall order him or her to provide, within five days, a DNA sample for testing. If the juvenile does not comply with the order, the court “shall revoke the juvenile’s release.”

Seven juveniles sought special action relief in the court of appeals regarding the necessity of complying with the DNA sampling requirements under the statute. The juvenile court found probable cause to believe that five of the juveniles, including Mario W. and Eric R., who filed the Petition for Review in this Court, had committed the offenses with which they were charged, and which required DNA testing under A.R.S. § 8-238. In the cases of Bailey J. and Devon C., who are the subject of the State’s Cross-Petition for Review, no probable cause finding was made that either of these two juveniles had committed a relevant offense.

At least six of the juveniles filed motions in the juvenile court to stay the orders requiring DNA testing. Some of the motions were granted, and others were not. The court of appeals stayed the orders relating to the juveniles whose motions the juvenile court had denied.

By a vote of 2 to 1, the court of appeals’ panel ruled the taking of DNA samples from five of the juveniles was constitutional in light of the judicial determination of probable cause to believe they committed the crimes charged. Judges Gemmill and Orozco joined in this conclusion but wrote separate opinions. Judge Norris dissented.

The panel also split on the disposition of the claims in which no probable cause finding was made. Judge Gemmill agreed with Judge Norris that taking DNA samples from these two juveniles would be unconstitutional, while Judge Orozco would have declined to address the constitutionality of the statute as applied to them.

**Judge Gemmill** concluded the taking of a DNA sample constitutes a search, but not an unreasonable one. In general, a search is considered unreasonable unless a warrant has been issued

following a finding of probable cause. Applying the totality of the circumstances test, which balances the juveniles' rights against the State's interest in conducting a DNA test, Judge Gemmill found an exception to the general rule with respect to five of the juveniles.

Other courts have upheld compulsory DNA samples from individuals, including juveniles, convicted of serious offenses. The rationale is that a person convicted of a crime has reduced privacy rights; at the same time, the government has a considerable interest in deterring future crimes and completing unresolved investigations using DNA evidence. Similar to a conviction, the judicial findings of probable cause distinguish the five juveniles in this case from the general public. Additionally, DNA testing by buccal swab entails only a minor physical invasion, and Arizona law restricts the use of DNA samples obtained under A.R.S. § 8-238 to specific limited purposes.

In contrast, Judge Gemmill found A.R.S. § 8-238 to be unconstitutional as applied to the two juveniles who had not had judicial findings of probable cause in their cases. Application of the statute to those two juveniles constituted an unreasonable search and seizure.

Finally, Judge Gemmill rejected the juveniles' contention that the taking of DNA samples violated their right to privacy under the state and federal constitutions. He deemed the infringement on the juveniles' right to privacy was outweighed by government interests.

**Judge Orozco** (agreeing with Judge Gemmill) wrote separately to emphasize her view that under the statute the State's use of a juvenile's DNA is like its use of a fingerprint and is accordingly constitutional. In cases in which probable cause to detain a juvenile has been found, the juvenile's privacy expectation, particularly in his or her identity, becomes less than that of the ordinary citizen. That DNA contains a vast amount of information and that there is a risk of such information being abused does not outweigh the substantial government interest of accurate identification.

Addressing the cases of the juveniles who were not subject to probable cause findings, Judge Orozco observed that Juvenile Rule 23(D) requires a probable cause finding for a juvenile to be detained at all. Thus, A.R.S. § 8-238 must be read to require a finding of probable cause before DNA is taken. In the absence of such finding, a juvenile does not face detention and the statute is inapplicable. Judge Orozco would therefore decline to consider the constitutionality of the statute as applied to situations in which no judicial probable cause finding has been made.

**Judge Norris** (dissenting) believed A.R.S. § 8-238 is unconstitutional as applied to all the juveniles under the state and federal constitutions. The statute entitles the State to obtain a DNA sample as a condition of pretrial release without either a warrant or any showing of probable cause to believe the DNA sample will lead to evidence of a crime. Judge Norris disagreed with the majority's view that juveniles have a diminished expectation of privacy due to their arrest and probable cause finding. She noted that under other Arizona statutes, the results of the DNA test will be shared with the National DNA Index System, giving entities involved in the national database access to the information.

United States Supreme Court precedent permits individuals to be searched as a condition of release under the totality of the circumstances test, but only after they have been convicted of a crime. The juveniles in this case are only arrestees, not convicts, and thus they still enjoy a

presumption of innocence until they are proven guilty by the State.

Further, the contention that DNA testing is no more intrusive than the usual restrictions on juvenile arrestees after the probable cause finding is not persuasive. Not only are those restrictions different in kind from bodily intrusions, but they also differ in scope. The DNA sample taken from an arrestee is turned into a profile, searchable indefinitely by law enforcement through the state and federal databases. Thus, there is essentially another search and invasion of privacy in creating a profile for use in these systems. Nor is DNA testing comparable to fingerprinting, which discloses only the identity of the individual to whom they belong. A DNA sample reveals massive amounts of private data and is also an inefficient mechanism for identification purposes. The sample must be analyzed and turned into a profile, whereas fingerprinting takes only seconds to compare to millions of other prints.

Finally, Judge Norris disagreed that the State's interests are sufficient under the totality test. First, the State has not claimed the identity of these juveniles is at issue, or that it has had difficulty attempting to identify other juveniles absent use of the DNA databases. Moreover, use of the databases to identify the juveniles at all requires a prior sample in the database, or no comparison confirming the juvenile's identity is possible. Second, the State's interest in using DNA for other criminal investigations is based on the assumption that a person arrested and accused of a crime is more likely to commit crimes than other members of the public, without an individualized determination to that effect. This assumption belies the presumption of innocence granted to individuals until they are proven guilty.

## **ISSUES:**

### *Petition for Review (Mario W. and Eric R.):*

Whether A.R.S. § 8-238 violates federal and Arizona constitutional protections against unreasonable searches.

### *Cross-Petition for Review (State of Arizona):*

A.R.S. § 8-238 operates to compel submission of a DNA sample only where a juvenile is subject to detention. No juvenile may be detained without a judicial determination of probable cause. Did the majority err in vacating the orders requiring the two juveniles, Bailey and Devon, to submit to DNA testing because there was no judicial determination of probable cause at the time of the orders?

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