DNA PROFILING AND FOURTH AMENDMENT PRIVACY

By

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This thesis was prepared under the direction of the candidate’s thesis advisor, Dr. Mark Tunick, and has been approved by the members of her/his supervisory committee. It was submitted to the faculty of The Honors College and was accepted in partial fulfillment of the requirements for the degree of Bachelor of Arts in Liberal Arts and Sciences.

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ABSTRACT

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Institution: Wilkes Honors College of Florida Atlantic University
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Degree: Bachelor of Arts in Liberal Arts and Sciences
Concentration: Law and Society
Year: 2009

DNA profiling is a newly developed technique used by law enforcement agencies in the United States as a form of individual identification to prove whether a suspect is guilty. Due to the fact that it is a newly developed technology there is little legislation to regulate its proper uses and restrictions. Therefore restrictions are largely determined by court decisions as to whether DNA profiling violates constitutional rights. Current decisions in state and federal district courts tend to permit use of DNA profiling without a warrant. These decisions violate principles of privacy guaranteed by the US Constitution as interpreted in pre-DNA fourth amendment cases. By drawing on fourth amendment case law and commentaries, I shall argue that while in some cases no warrant is required for DNA profiling—when it is conducted upon people who have been convicted of a felony—for all other people, a warrant should be required.
ACKNOWLEDGMENTS

To Mom and Dad
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**Introduction**

People in the United States of America and its territories have a fourth amendment constitutional right to privacy and protection from illegal search and seizure by government. The advancement of law enforcement technology in the last century, such as DNA profiling, has led to numerous questions of how far government can infringe on these fourth amendment rights. Specifically, do we hold a right to privacy in the information contained in our DNA? Should the federal, state and local governments have the right to collect data for a database without probable cause or a warrant?

DNA profiling, which makes use of a "genetic fingerprint", is a technique used to identify DNA pattern types. Courts use this technique to analyze and match DNA evidence. DNA profiling has proved to be a more reliable form of identification of a person than fingerprinting. DNA profiling greatly supersedes classic fingerprinting in reliability as proven by numerous cases that will be discussed later. There are many instances where post-conviction DNA evidence has proven that the convicted individual was not guilty of the crime accused, leading to an exoneration of the conviction. In the United States, according to recent court decisions, the use of DNA profiling without a search warrant as evidence does not violate the Fourth Amendment “search and seizure” clause or the right to privacy. DNA profiling has been used as a more reliable and exact form of classical fingerprinting, which is generally regarded as a
valid means of identification for those who have been arrested or are on parole.\(^1\) I feel that certain court cases have improperly upheld certain procedures of DNA profiling and that these police procedures violate the Fourth Amendment and the right to privacy. I will argue that there is a right to privacy that protects most people from DNA profiling without a warrant and that DNA samples should only be collected from a person who has been arrested, is on parole, convicted of a felony, or is a probable suspect for whom a warrant can be obtained. I do not believe that DNA profiling should be collected from anyone other than those listed above. Furthermore, I feel that DNA profiles should only be collected from felons of specific crimes, such as, sex crimes and violent crimes. I will argue that convicted felons, whose DNA profile is in a government database, do not have the right to have their record and profile expunged. Even though felons have served their time and paid their debt to society, ex-felons still have limited rights in all states.\(^2\) In the majority of states felons cannot vote\(^3\), apply for a government job\(^4\), or own a gun\(^5\). In a recent case, John Doe v. Prosecutor, Marion County, a federal district court held that felons who were no longer on probation could not be forced to consent to searches of their computers in their homes.\(^6\) DNA profiling is different than a computer search. A computer search is much more intrusive and

\(^1\) Courts have allowed for the collection of fingerprints without a warrant. See Hayes v. Florida, 470 U.S. 811 (1985)


\(^5\) U.S. v. Jester, 139 F.3d 1168

\(^6\) John Doe v. Prosecutor, Marion County, 566 F.3d 862 (2008)
causes greater inconvenience than collecting a DNA profile. The main purpose of DNA profiling is identification. Due to the fact that a DNA profile contains intimate information it should be limited to the above criteria. I will argue that felons are pre-disposed to commit crimes; therefore placing ex-convicts’ DNA profiles in government databases acts as a deterrence to commit any further crimes. These databases are only accessible by limited government agencies. While some question the security of DNA profiles and records in these databases, I feel that the threat toward security is minor and that the benefits of having these databases outweigh the risk of exposure. Finally, I will discuss why law enforcement’s procedures for collecting DNA evidence, violates the fourth amendment, and possible remedies to the police’s “unconstitutional” conduct.
Chapter 1

1.1 What is DNA and what is its Purpose?

For the purpose of this paper I will be specifically looking at human DNA. DNA or deoxyribonucleic acid is contained in every human cell. The DNA contains instructions that are accountable for the construction of human cells, tissue, organs and body. DNA also contains information that can be used to discover paternity, health issues that may occur and, heritage. The DNA contains hereditary information that is passed on to every successive generation. A variation in DNA causes changes in the characteristics of a human species. DNA is composed of four base chemicals, adenine, guanine, cytosine, and thymine. Human DNA is composed of three billion of these bases. Humans share 99.9 percent similar bases. Genetic differences between one individual and another individual is due to this .1 percent difference. Scientists have been able to isolate this .1 percent difference in DNA and it is used for the purpose of identification.

1.2 What is DNA Fingerprinting?

DNA fingerprinting is the process of isolating and analyzing DNA that is distinct to a particular individual and to create a genetic profile. The first step in creating a DNA fingerprint is a process called PCR (polymerase chain reaction). PCR replicates

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small amounts of DNA and creates a larger sample for analysis. After a larger sample of DNA is created the sample goes through a process known as RFLP (restriction fragment length polymorphism). This is a six step procedure (see figure 1)\(^9\):

- White and Red blood cells are separated.
- DNA is extracted from the white blood cells.
- The DNA is cut into fragments.
- The fragments are placed in an agarose gel (seaweed) with electrodes.
- An electric current is used to organize the fragments by length.

\(^9\) <http://www.kathyreichs.com/images/dnapro1.jpg>
• A sheet of Nylon is used to dab the DNA. The sheet becomes stained, allowing the DNA to become visible. The sheet is exposed to radiation to preserve the image.

**Genetic Fingerprints**

Forensic scientists analyze 13 specific places, or loci, on human chromosomes to obtain a complete DNA profile. A sample of deteriorated DNA may allow for the analysis of just some of the loci, which will produce a partial DNA profile.

What results from this process is a sheet with multiple bars. This sheet is compared with other sheets to look for a correlation with someone else’s DNA profile (Figure 2)\(^\text{10}\). This profile can be placed in a database and compared and checked with other suspects or felons for a match.

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1.3 The Difference Between a fingerprint and a DNA fingerprint

Taking a fingerprint differs from taking a DNA sample and creating a DNA “fingerprint”. According to the committee of DNA Technology in Forensic Science:

Fingerprints are two-dimensional representations of the physical attributions of our fingertips. They are useful only as a form of identification purposes, but the DNA itself represent far more than a fingerprint. Indeed, it trivializes DNA data banking to call it a genetic fingerprint.11

DNA holds important information about the individual, whereas a fingerprint does not. Furthermore, a DNA profile is much more reliable then a common fingerprint comparison.12 The chances of two people sharing all thirteen loci are 1 in four quadrillion. The chances of sharing three to four loci are one in several thousand.13 Authors such as Erin Murphy have exposed certain issues with the accuracy of DNA profiling14. This is an argument for why we do not want law enforcement to take DNA without a warrant. Limiting DNA profiling allows for better accuracy. This is because with less DNA profiles to be analyzed, the forensic analysts will not be overworked and will be able to analyze the profiles with a lower risk of error. The DNA samples can provide insights into the most personal family relationships and the most intimate workings of the human body, including the likelihood of the occurrence of thousands of genetic conditions and diseases. There are many apparent cases in which DNA

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12 Ibid. 174
evidence has superseded classical fingerprinting. In 1998, Stephan Cowan was convicted of murder and sentenced to 30-45 years in prison for shooting a police officer.\textsuperscript{15} Classical fingerprints were the main source of evidence used in his conviction. In 2000 the case was re-evaluated and DNA profiling proved that Stephan Cowan was not the shooter and he was exonerated. Fourteen Percent of all cases in which new DNA evidence is brought up are reversed.\textsuperscript{16} In the United States forty-three states have passed legislation allowing access to DNA test after conviction of a felony.\textsuperscript{17}

### 1.4 DNA Databases

Every state has passed legislation to create a database that contains DNA profiles.\textsuperscript{18} CODIS or Combined DNA Index System is one particular piece of software that has been developed to index the DNA profile of convicted offenders. The database was created in the late 1980s and was funded by the Federal Bureau of Investigations.\textsuperscript{19} The CODIS database is used by local, state, and national law enforcement agencies. The purpose of the database is to link serial crimes that have been committed. CODIS itself uses two indexes, the convicted offender index (known DNA samples) and the Forensic


\textsuperscript{17} Ibid.

\textsuperscript{18} Asplen, Christopher H. "From Crime Scene to Courtroom." Judicature 83 (Nov. 1999): 3.

index (unknown DNA samples). The database itself was made legal by the DNA Investigation Act of 1994, which authorized the FBI to operate, maintain and set standards for the database.\textsuperscript{20}

Statistics given by the FBI hold that as of May 2007, CODIS held 177,870 forensic profiles and 4,582,516 convicted offender profiles.\textsuperscript{21} This makes CODIS the largest DNA database in the world. Furthermore, according to FBI statistics, as of December 2008, CODIS has assisted in solving more than 80,900 investigations. CODIS, currently contains DNA profiles obtained during investigations, and of those arrested or on parole. Law enforcement has also expanded their database by including those that have been arrested or detained but have not yet been convicted in a court of law.\textsuperscript{22} Instances where law enforcement can acquire a DNA sample without a warrant include when someone is arrested for a felony. The Governor of Colorado, Bill Ritter Jr., recently signed a law requiring those arrested for a felony to submit a DNA sample. Individuals not charged within 90 days can request for their DNA records to be removed from the database.\textsuperscript{23}

1.5 Exoneration

\textsuperscript{20} Ibid
\textsuperscript{21} Ibid
One of the main benefits of DNA profiling is its use to exonerate the innocent. Since 1989 there have been 238 post-convicted exonerations.\textsuperscript{24} Of the 238 people that were exonerated, 17 people served time on death row.\textsuperscript{25} With the aid of DNA profiling of the 238 cases of exoneration, 103 of those cases used DNA profiling to find the true perpetrator.\textsuperscript{26} Since 1989, there have been tens of thousands of cases where prime suspects were identified and pursued—until DNA testing (prior to conviction) proved that they were wrongly accused.\textsuperscript{27}

A DNA profile holds a variety of information. This information can be used to help solve cases more accurately. Although DNA profiling is much more accurate than classical fingerprinting, there is always the underlying issue of human error. Limiting DNA profiling to convicted felons and those on parole would lower the risk of error. To further support this criteria I will begin an analysis of pre-DNA cases.

\textsuperscript{25} Ibid.
\textsuperscript{26} Ibid.
\textsuperscript{27} Ibid.
Chapter 2

2.1 Fourth Amendment

I shall focus on whether DNA Profiling without a search warrant violates the Fourth Amendment. The fourth amendment states:

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

2.2 Pre-DNA Cases

Before discussing the constitutionality of DNA profiling without a search warrant, it is imperative to look at case law in which the right of privacy was applied. This paper will examine landmark cases decided by the Supreme Court and other courts. Three main cases will be examined as they set the bar for privacy in the United States: Katz v. United States, Kyllo v. United States and California v. Greenwood.

2.3 Katz v. United States

FBI agents became suspicious that Charles Katz was placing gambling bets over the telephone. The FBI agents used a parabolic eavesdropping device to listen in on Katz’s telephone conversation in a public telephone booth, without a search warrant. No physical penetration of the interior of the telephone booth was made. The device was placed outside of the telephone booth. It was discovered that Katz was placing
gambling bets over the phone to Miami and Boston, which is against federal law.\textsuperscript{29} He was convicted in California court on eight counts of illegal transmission of gambling information. Katz challenged the conviction on the grounds that the FBI’s recording of his telephone conversation was an invasion of his privacy.

The issue brought to the Supreme Court was whether the use of a parabolic device, used to amplify the sounds emanating from the phone booth was a violation of the search and seizure clause of the fourth amendment. The Supreme Court Justices held that Katz did have a right to privacy in his telephone conversations in the phone booth. Justice Stewart wrote, “No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment.”\textsuperscript{30} The reach of the amendment now went as far as a person's reasonable privacy expectation - the reach of the amendment was no longer defined solely by property limits.\textsuperscript{31} The most important aspect in the Katz case was the concurring opinion of Justice Harlan. Justice Harlan developed the criteria according to which we determine whether a search and seizure is illegal. The Supreme Court later adopted Justice Harlan’s two part test. The test was adopted in many cases such as California v. Greenwood\textsuperscript{32} and Smith v. Maryland\textsuperscript{33}. His test states that for a search and seizure to be considered illegal the:

\begin{itemize}
\item \textsuperscript{29} 18 U.S.C. § 1084
\item \textsuperscript{30} Katz v. United States, 389 U.S. 347 (1967), 511-512
\item \textsuperscript{31} Friedman, Leon. The Justices of the United States Supreme Court: Their Lives and Major Opinions, Volume V. Chelsea House Publishers. 1978. Page 292
\item \textsuperscript{32} California v. Greenwood, 486 U.S. 35, (1988)
\item \textsuperscript{33} Smith v. Maryland, 442 U.S. 735 (1979)
\end{itemize}
(1) Governmental action must contravene an individual’s actual, subjective expectation of privacy;

(2) and that the expectation of privacy must be reasonable, in the sense that society in general would recognize it as such.34

From this case, the court created the standard that one can reasonably expect privacy in the contents of their phone conversations within a telephone booth. When the government listened in on Katz’s telephone conversation they violated the fourth amendment.

2.4 Kyllo v. United States

Federal Agents suspected that Danny Kyllo was growing marijuana in his home. The federal agents used thermal imaging devices to determine the amount of heat emanating from the home. High levels of heat were found in certain areas of the house, which suggested plant heating lamps. This information was used to obtain a warrant and search Kyllo’s home. Federal Agents discovered over one-hundred marijuana plants growing in the home. Kyllo was charged, but argued that the thermal imaging device used to scan his home constituted an illegal search and seizure. The district court argued that the device did not “penetrate walls or windows to reveal conversations or human activities. The device recorded only heat being emitted from the home.”35

Justice Scalia held in the majority opinion that, “[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the

34 Katz v. United States, 389 U.S. 347 (1967), 361
35 Kyllo v. United States, 533 U.S. 27 (2001), 30
surveillance is a 'search' and is presumptively unreasonable without a warrant.”36 The majority opinion also holds:

While it may be difficult to refine the Katz test in some instances, in the case of the search of a home's interior-the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. Thus, obtaining by sense-enhancing technology any information regarding the home's interior that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area,” constitutes a search—at least where (as here) the technology in question is not in general public use.37

The important principal behind Justice Scalia's majority opinion is about using a device that is not in general public use without a warrant. This principal is important because DNA profiling, similarly to the FLIR in the Kyllo case, is not in general public use. Lower courts have held that law enforcement agencies are allowed to DNA profile without a warrant. This creates a contradiction. How is the use of a thermal imaging devices without a search warrant illegal, but creating a DNA profile which has an abundance of information not considered illegal? Although collecting a DNA profile is different than the search of a home, there is a common principle. This common principle is the unlawful use of a technology that is not available to the public that is used to uncover sensitive information.

37 Ibid. 28
2.5 California v. Greenwood

In 1984 the Laguna Beach Police department was anonymously told that Billy Greenwood was selling drugs out of his single-family home. The main investigator for the case, Jenny Stracner, instructed the neighborhood’s trash collector to specifically hold the trash from Greenwood’s home that was placed on the curb. The trash showed evidence of cocaine and marijuana use. Another investigator conducted the same search, resulting in similar evidence. Based on the investigations of the trash, a search warrant for the house was issued. The search resulted in the finding of evidence of drug trafficking of cocaine and marijuana. The case was taken to the Supreme Court to determine whether the Fourth Amendment prohibited the warrantless search and seizure of garbage left for collection outside the curtilage of a home. The Supreme Court held that the fourth amendment did not protect against the search and seizure of trash left on the curb.

Justice White wrote the majority opinion. He states that “The warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable.” Justice White argues that there is no expectation of privacy in garbage left on the curb. Although Greenwood might have had an expectation of privacy in his trash, society does not regard that expectation as reasonable. He argues:

Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoopers, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage “in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it,” respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.39

In his dissenting opinion, Justice Brennan, objected to the Court's denial of a reasonable expectation of privacy in contents of the garbage bags. He states that, “A trash bag, like any of the abovementioned containers, “is a common repository for one's personal effects” and, even more than many of them, is “therefore ... inevitably associated with the expectation of privacy.””40 The possibility the police or other “unwelcome meddlers” might rummage through the trash bags “does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home.”41

This case is important because it is often used to uphold DNA profiling cases.42 I will argue that there is a major difference between garbage and DNA. Garbage can be shredded or burned to prevent discovery. The analogy is often made between garbage and a DNA profile. The issue with DNA profiling is that “most people have no idea

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40 Ibid, 1634
41 Ibid, 1654
that they risk surrendering their genetic identity to the police by, for instance, failing to
destroy a used coffee cup. Moreover, even if they do realize it, there is no way to avoid
abandoning one’s DNA in public.”43 Although burning trash is often illegal in many
municipalities, certain precautions can be taken to remove sensitive material from one’s
garbage.

3.1 DNA Cases

In the previous cases, the Supreme Court Justices developed the principle of reasonable expectation of privacy. Now I turn to how these principles have been applied in lower courts that have dealt with police use of DNA profiling without a warrant. These case decisions allow for questionable collection of DNA samples and use of a DNA profile. Examining the facts of the pre-DNA cases and the facts of the following cases-- Commonwealth v. Cabral, Commonwealth v. Perkins and State v. Athan, will allow for a proper analysis of the validity of DNA collection without a warrant.

3.2 Commonwealth v. Cabral

Raul Cabral was accused of raping a mentally challenged woman. The family of the women requested multiple suspects to provide a DNA sample. All complied except Cabral. The family of the mentally challenged women hired a private investigator, who was on sick leave from the New Bedford police department. He was sent to follow Cabral around in order to collect a DNA sample. The private Investigator retrieved the DNA sample from saliva that Cabral had spit out onto a sidewalk. Cabral was unaware that the investigator had been on the case and was surveilling him. The saliva sample was sent for testing and came back as a match. With this information in hand, the investigator sought an order from the District Court requiring the defendant to submit a
DNA sample. A District Court judge issued the order without an explanatory opinion. Eventual testing identified the defendant as the father of both of the victim's children.

The court ruled that “the expectorating defendant had no reasonable expectation of privacy in his spittle, or in the DNA evidence derived there from.” This was derived by applying Justice Harlan’s reasonable expectation of privacy test from Katz. Furthermore, the court held that the defendant had no expectation of privacy in his saliva because he had made no attempt to recover the spittle on the sidewalk. The public street was freely accessible to others and therefore the right of privacy was not protected by the fourth amendment. Moreover, there is no indication that the defendant took affirmative action to recover the saliva once it had left his mouth. This is important because it violates the Supreme Court’s decision in Katz. Although Katz’s conversation was freely accessible in the sense that anyone could walk right by it and hear the conversation, the Supreme Court ruled that the FBI had indeed violated Katz’s reasonable expectation of privacy. The Supreme Court rationalized this by stating that the fourth amendment protected people not places. Justice Stewart wrote that "No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment." Just because Cabral expectorated on the public sidewalk does not mean that he did not have a reasonable expectation of privacy in the information contained in his saliva.

3.3 Commonwealth v. Perkins

The body of the victim (Sally) was found in March 1990. The victim was found dead from a murder/rape. The investigating officers collected sperm evidence and conducted a DNA profile. No further evidence was found, such as fingerprints. The suspect was a Lee Perkins who had met Sally in 1989 and had visited with her throughout the years. In 1996 with the advancement of DNA profiling, Boston Police Department’s Cold Case squad interviewed Perkins. The investigating officers read Perkins his Miranda rights and Perkins agreed to be interviewed. During the interview the defendant denied ever having contact with Sally. In the interview room, Perkins smoked two cigarettes and drank a can of soda. When the interview was done the officers informed the defendant that the victim was dead. The officers then took the two cigarettes and the can of soda and sent it for DNA testing.

CBR determined that the DNA profile of the female aspect of the vaginal swab matched that of the known sample of Sally's blood, and that the DNA profile of the male aspect of the vaginal swab matched the DNA profile of the cells left on the cigarette butts that the defendant smoked. Employing the DNA tests here, the probability that another African-American individual randomly selected from the population would have the same genetic profile as the defendant is one in 21,677.46

A warrant was issued and Perkins was arrested. At the trial Perkins tried to suppress the evidence arguing that he had a reasonable expectation of privacy in the DNA contained on the cigarette butts and the soda can. He argued that the evidence was

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fruit of the poisonous tree. The judge held about the evidence obtained by the cigarette butts:

That the cigarette butts had been abandoned by the defendant. Nothing prevented the defendant from bringing them with him after the interview had ended, as he had done with the balance of the pack of cigarettes. Whatever reasonable expectation of privacy he may have had in the cigarette butts was abandoned under both the State and Federal Constitutions.47

On the issue of the soda can the judge held that:

The defendant did not have a reasonable expectation of privacy in that item (soda can), where he knew that he could not take it with him because guards at the institution reasonably would consider it contraband capable of being made into a weapon. We note that the defendant made no attempt to sanitize the item or exert control over it, and therefore it, too, could be considered abandoned. 48

The court sustained the evidence and Perkins was convicted of murder/rape.

The case shows a violation of the right of privacy protected by the fourth amendment as held in Pre-DNA cases. This case contradicts the decision of Katz v. United States. Katz made no attempt to protect his sound waves but he had a reasonable expectation of privacy. Another important issue to examine is the rationale of abandonment. It is impossible to abandon information that you are unaware that you are abandoning.

3.4 State v. Athan

On Nov. 12th, 1982, Washington Police officers found the body of 13 year old Kristen Sumstad. Semen from Sumstad’s body was collected and analyzed for DNA

47 Ibid, 6
48 Ibid, 6
testing. Police claimed that Athan’s brother reported seeing Athan transporting a “large box” on a grocery cart near the area where Sumstad was found the night of the murder. The police department requested that Athan provide a DNA sample but he refused. Detectives posed as a fictitious law firm inviting him to join a class action law suit. Athan signed and dated the form, and licked the envelope. The DNA on the envelope matched the DNA from the crime scene. Athan was arrested. A search warrant was issued to take a second DNA sample from Athan. The DNA from the envelope matched the DNA evidence collected at the crime scene. At trial Athan tried to suppress the DNA evidence that was derived from the saliva sample, arguing that it violated his right to privacy and the sample was collected under false pretense. The judge held that there was no inherent privacy interest in saliva and therefore Athan had no privacy interest in the saliva left behind on the envelope.49 Furthermore, the judge held that the detectives did not violate the due process or state constitution by posing as a fictitious law firm.50

One important factor of this case is the issue of mission creep. Mission creep is when an organization goes further than its allowed goals. Law enforcement pushed the boundaries of the law when they posed as a fictitious law firm. Another important aspect of this case is the dissenting opinion that argued that a DNA profile provided vast amounts of intimate information that could be considered damaging.52 Although the use of deception adds to the issue in this case, the use of deception is not the central

49 State v. Athan. 160 Wash.2d 354, 158 P.3d 27 (2006), 367
50 Ibid., 389
52 Ibid, 398
issue. The central issue in this case is whether Athan had a reasonable expectation of privacy in the information contained in his saliva. I will argue in Chapter 4 that Athan did have a reasonable expectation of privacy in his saliva and that the law enforcement agency violated his right to privacy by extracting a DNA profiling from the envelope.
Chapter 4

4.1 The Issue of DNA Profiling Without a Warrant

We’ve seen that recent cases have held that there is no reasonable expectation of privacy in one’s DNA. However, that position is inconsistent with the principles the Court laid out in privacy cases decided before DNA profiling was used. By analyzing Pre-DNA cases and DNA profiling cases inconsistencies become apparent. This requires us to question the constitutionality of law enforcement taking a DNA sample from a suspect without a warrant. The DNA case decisions create discrepancies with the decisions in the pre-DNA cases.

The lower courts deny that there is a reasonable expectation of privacy in one’s DNA, but I will argue that there is a reasonable expectation of privacy in the information contained in a DNA sample. Why is privacy important? Before delving any further it is important to determine the value of privacy. Privacy is an inherent human right, and a requirement for maintaining the human condition with dignity and respect. The question “why is privacy important?” needs to be answered. According to Charles Fried, privacy is a prerequisite for the development of intimate relationships. Furthermore he writes that privacy as related to the development of relationships, is not just about keeping people out, it’s about keeping people in.

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After establishing that privacy is crucial it is important to recognize that the lower courts draw on an incorrect reading of the pre-DNA cases. In the case of State v. Athan, the dissenting opinion holds that a DNA sample provides the government with vast amounts of intimate information beyond mere identity. This includes race, gender, pre-disposition to disease and, perhaps, forms of conduct. Keeping this information private is important because if it were ever exposed to the public it would be damaging. Exposure could lead to denial of insurance policies and the discovery of true paternal relationships. Athan, Perkins and Cabral all had a reasonable expectation of privacy in this information by applying the principles of the pre-DNA cases. None of these suspects had reason to believe that their DNA would have been extracted from the items that they used. Individuals in our society have a reasonable expectation of privacy in the information contained in DNA. The best way to establish this reasonable expectation of privacy is to examine similar social practices in society. In the United States we go through great trouble to keep our medical records private. Countless legislation has been passed in order to keep our medical visits and records to ourselves. Placing our records on a national database undermines this practice. According to Mark Tunick, to determine whether there is a violation in the right to privacy “it is essential for us to turn both to existing norms and practices and to principles that might be critical of existing practices”. By using this principle, it can be determined that

55 State v. Athan 160 Wash.2d 354, 158 P.3d 27 (2006), 387
citizens of the United States have a reasonable expectation that the government will not extract the DNA from items they leave behind in public or otherwise.

One criterion for whether we can reasonably expect privacy in information is whether the means of uncovering this information is readily available to the public. As held in Kyllo v. U.S. use of any device used that is not in general public use constitutes a search. “To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.”57 DNA testing is not available to the public. Although DNA is used by hospitals/doctors the DNA is not placed on a database for others to view. Therefore, collection of a DNA sample is a violation of the Fourth Amendment Search and Seizure clause.

One common argument for the right of law enforcement to take a DNA sample without a warrant is that presented in the decision California v. Greenwood. As discussed previously, trash is often compared to DNA samples. It is argued that a DNA sample is abandoned just like trash and therefore there is no reasonable expectation of privacy in its contents. Abandonment is defined as the surrender, relinquishment, disclaimer, or cession of property or of rights. It is the voluntary relinquishment of all right, title, claim, and possession, with the intention of not reclaiming it.59 There is a great difference between trash and a DNA profile. Greenwood had complete knowledge of the information contained in his trash. The trash was placed on the curb with his knowledge. He was completely aware of the illegal items the trash bags

contained and the possibility of people rummaging through it. Many people do not understand the amount of information contained in DNA. This therefore throws out the court’s rationalization of their decisions of upholding DNA profiling by appealing to the similarities in California v. Greenwood. This intimate information could be very damaging in the wrong hands. Also, it is impossible to avoid leaving DNA behind. DNA can be extracted from almost any item we touch. Unlike trash that can be shredded or burned or blacked out with a marker, a DNA trail is impossible to avoid. Advancements in DNA profiling technology allows for the extraction of a DNA sample from simple sweat. This allows for the ability to extract DNA from almost anything a person comes into contact with. Humans leave a DNA trail throughout the day. Leaving this trail cannot be avoided. The government has to use intrusive methods to extract this DNA and create a profile. Collection of the sweat itself is not intrusive, but the extraction of the DNA profile to uncover intimate information is intrusive. Allowing law enforcement to have carte blanche on the collection of DNA would be allowing for exposure of intimate information and possibly erroneous collection, leading to a wrongful conviction.

Another issue that has developed by the decisions of the cases is threat of legal and ethical practices of investigations by law enforcement. As stated by Justice Thurgood Marshall, “Good police work is something far different from catching the criminal at any price. It is equally important that the police, as guardians of the law, fulfill their responsibility to obey its commands scrupulously. For "in the end life and liberty can be as much endangered from illegal methods used to convict those thought
to be criminals as from the actual criminals themselves.” 60 The DNA cases require us to question how far law enforcement can go in their investigation practices? Allowing law enforcement to collect a DNA profile without a warrant creates mission creep. DNA collection practices have become more intrusive. For example, in State v. Athan, the police department posing as a fictitious law firm. The impersonation of a lawyer or law firm is a federal crime in the United States. In the case this fraudulent behavior is outweighed by the crime. This is opening the flood gates for law enforcement to use illegal means to collect evidence.

4.2 Analysis of Commonwealth v. Cabral, Commonwealth v. Perkins and State v. Athan

4.2 Analysis of Commonwealth v. Cabral, Commonwealth v. Perkins and State v. Athan

Athan

One of the main faults in the opinion of Commonwealth v. Cabral, Commonwealth v. Perkins and State v. Athan is the idea that people abandon their DNA and so police may acquire it without frustrating any privacy interest. In Katz v. United States, Justice Harlan creates the two part test for a search and seizure to be considered illegal. The first part of the test states that the governmental action must contravene an individual's actual, subjective expectation of privacy. Cabral, Perkins and Athan all had a subjective expectation of privacy in their saliva. If they would have had knowledge that their discarded materials were being collected for DNA analysis, they would have certainly not have left these samples behind. The second part of the

60 Spano v. New York, 360 US 315, 320-321
test states that the expectation of privacy must be reasonable, in the sense that society in
general would recognize it as such. The public has a reasonable expectation that their
saliva or items that they have made physical contact with will not be collected from a
public area for DNA analysis. Society as a whole has a reasonable expectation of
privacy in the information that their DNA contains and also has an expectation that it
will not be extracted from bodily fluids left behind in public or otherwise.

Two things must occur for property to be abandoned: (1) an act by the owner
that clearly shows that he or she has given up rights to the property; and (2) an
intention that demonstrates that the owner has knowingly relinquished control over it.61
All of the DNA cases show aspects of the first element of abandonment. All of the
defendants in the DNA cases clearly show that they have given up their property. The
second element of abandonment is where the owner has knowingly relinquished the
property. This element lacks in all of the DNA cases. In none of the DNA cases do the
defendants knowingly relinquish control of the information contained in their DNA.

Another issue is that raised in Kyllo v. United States. Citizens do not have the
ability to collect other citizen’s DNA, create a profile, and match it against a database.
As established in Kyllo v. United States DNA profiling would constitute a search. In
the DNA cases the law enforcement’s taking of a DNA sample constitutes a search
without a warrant.

Also the composition of the DNA in Cabral, Perkins and Athan’s saliva is unknowable without physical intrusion. The DNA evidence has to be tested and broken down into a DNA profile. Without this testing the information held is not visible with the naked eye or an onlooker. It would be impossible for an ordinary citizen to collect a DNA sample and convert it into a DNA profile.

**Proposed Solution**

As developed in this paper the collection of a DNA sample in Commonwealth v. Cabral, State v. Athan and Commonwealth v. Perkins conflicts with the decisions of pre-DNA cases. These DNA cases need to be overturned and/or proper legislation needs to be instated to protect the right of privacy in the informational data of a person’s DNA sample. This information is sensitive and is not openly available for the viewing of the public. I am not advocating the complete ban of DNA profiling. Nor do I advocate placing everyone’s DNA in a national database. DNA profiling takes an important role in law enforcement today. A DNA profile should only be collected with a court ordered warrant for those that are suspects in a case. Those who have been convicted of felony crimes or are on parole should also provide a DNA profile without a necessary warrant. Law enforcement collecting a DNA profile from someone who is not a convicted felon should not have to provide a DNA sample without a warrant. As discussed previously, DNA contains intimate information about an individual and therefore should not be taken on law enforcement’s slightest whim. This DNA profile
in a national database would deter felons from committing any further crimes. This beneficial deterrence factor will be discussed in the paper later in Chapter 5.
Chapter 5

5.1 The benefits of DNA profiling

I have considered reasons for thinking that DNA profiling without a warrant should be considered a violation of the right to privacy. It is important to consider the benefits of DNA profiling with a warrant. A complete ban of DNA profiling would harm society. It is important to keep the technology of DNA profiling and DNA profile databases but to create proper restrictions on DNA profiling.

5.2 Deterrence

As discussed in brief previously, law enforcement creating a DNA profile from a convicted felon and placing it in a database has a deterrent effect. When a felon’s DNA profile is placed in a national database accessible to all law enforcement in the United States any DNA left by the felon at any further crime scenes, is easily traceable back to the felon. With this deterrent effect, felons will be able to be rehabilitated back to society and strongly discouraged from committing further crimes. Discouraging criminals from committing further crimes allows for them to obtain honest jobs and become a positive and honest member of society.

5.3 Tax-Payers and Time Consumption

Besides the benefit of having a deterrent effect, there is also an economical and faster investigation time benefit. DNA profile databases allow investigating law enforcement to save tax payers money in investigating a case. This is done by requiring
law enforcement only to sample DNA evidence and not the known felon who already was DNA profiled and match the profile to the database. It also saves law enforcement time. By only sampling DNA evidence and matching it to other known felons in a database, saves investigators time in the case, due to not having to investigate the known felon further and not having to get a court ordered warrant from a judge. This creates a more reliable form of investigation and conviction and quickly weeds out suspects that do not match the DNA profile.
Conclusion

Current DNA cases violate the fourth amendment and Pre-DNA case decisions. The lower courts have misapplied the decisions of the pre-DNA cases, creating contradictory rulings on the usage of DNA profiling. This allows law enforcement to collect a DNA profile without a warrant. It also allows for mission creep to occur. Moreover, there is also the risk of confidential and intimate information being exposed to the public. This exposure violates the social practices of our society which is the best way to determine whether privacy should be reasonably expected. Therefore DNA profiling must be applied with limits. DNA profiling with a warrant can be beneficial to society. DNA profiling is much more accurate than classic fingerprinting. The innocent can be easily exonerated from crimes they did not commit by using DNA profiling. It also allows for criminals to be deterred from the life of crime and allows for them to be better incorporated into society. From the tax-payers perspective it allows for lower expenditure by utilizing DNA profiles that are already stored in the database. By changing legislation and overturning DNA case decisions, DNA profiling can be better applied to become more beneficial to society.
Bibliography


Doe v. Prosecutor, Marion County, 566 F.3d 1168 (1988)

Charles Fried "Privacy,” *The Yale Law Journal* 77


U.S. v. Jester, 139 F.3d 1168
