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American Society of Law Medicine & Ethics
DNA Fingerprinting and Civil Liberties Project
R01-HGH002836-02
Workshop 1 Presentation
May 14-15, 2004

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You'll have to bear with me because my computer skills are in the Flintstone era so I am going to do this the old fashioned way. I want to thank Ben Moulton for inviting me. But I think I really should get on my hands and knees to David. David has been giving signals to the previous speakers and they have all been following his instructions. Is that good? Can you hear me? Okay.

DNA testing is often criticized on grounds that it disproportionately burdens minority citizens, and laws requiring that all arrestees as Kim has talked about to provide DNA samples, at least according to one commentator would affect about 90% of urban black males while it would only affect about half as many white citizens. Similarly, DNA dragnet searches in which DNA samples are requested from individuals whom the police have no particular reason to suspect, may be employed when a suspect is black but not white simply because in some locales it would not be possible to test all the white citizens but it may be possible to test all black individuals.

Now I want to outline some of the constitutional challenges that Kim started to talk about but was really sort of pushed real quickly to finish and I'll probably get cut off as well but let me start. Anyway… the Fourth Amendment as Kim has discussed protects against unreasonable searches and seizures. Therefore if a DNA sample is to run afoul of the Fourth Amendment as Kim pointed out, first it must first be either a search or a seizure and second it must be unreasonable. Does DNA constitute, or does DNA sampling constitute, a search within the meaning of the Fourth Amendment?

Generally judges decide whether or not a particular police action is a search or seizure by asking two questions. One: does the individual have a subjective expectation of privacy? And then second, is that expectation one that society would consider as reasonable and that is the so-called "objective prong". Compelling an individual, for example, to provide a voice or handwriting exemplar is not considered a search because the physical characteristics of one's voice are constantly exposed to the public and consequently one could not have a reasonable expectation of privacy in one's voice. Does one have a reasonable expectation of privacy in a DNA sample?

Three factors need to be considered and these factors have been sort of culled from some of the court decisions that Kim has already discussed and described. First, the extent to which DNA is exposed to the public. Second, the extent of any bodily intrusion. And third, the nature of the information extracted. Exposure

to the public. Some courts have extended the exposure to the public rationale beyond that which is readily observable and is in common knowledge, such as the sound of one's voice. Courts have used this reasoning, for example, to find that fingerprinting is not a search within the meaning of the Fourth Amendment. Their logic is that fingerprints are an outward physical characteristic trait in which there can be no reasonable expectation of privacy.

Similarly, courts have held that examining an arrestee's skin under an ultraviolet light is not a search for Fourth Amendment purposes because it may be compared to a physical characteristic such as a fingerprint or one's voice which is constantly exposed to the public. If one construes this rationale broadly, DNA could be considered a physical characteristic that is constantly exposed to the public. We all shed our DNA by losing hair, by coughing, by exposing our saliva. This would mean that a warrant-less acquisition of a DNA sample would not be considered a search for Fourth Amendment purposes. Now let me just stop and say here that I'm now speaking generally of DNA acquisition. I'm not talking about parolees or probationers but this rationale could conceivably apply to all arrestees.

This position rather can be attacked, however, on two fronts. First, the cases that have applied for so-called public exposure rationale have involved only the discovery of limited information such as one of identification or the presence of chemicals transferred from stolen money. In contrast, we all know that DNA can provide, potentially, a broad array of personal information. Accordingly, courts in future cases might be wary of expanding this line of reasoning to encompass DNA sampling.

Second, in a relatively recent decision of the United States Supreme Court called "Kyllo", that's K-Y-L-L-O, Kyllo versus United States, a case involving the use of a thermal imager to detect heat emanations from the home of the defendant that was suspected of using high intensity lamps to grow marijuana, the Supreme Court declared that obtaining by sense-enhancing technology any information regarding the interior of the home that could not have been otherwise been obtained without a physical intrusion is a search within the meaning of the Fourth Amendment, at least where the technology in question is not in general public use. Now assuming that *Kyllo*'s rationale will not be limited to the home, and that's a big assumption because of course the Fourth Amendment concerns have been typically the highest with respect to the home, there is an argument that can be made that DNA sampling is sense-enhancing technology that is not generally available to the public and thus would constitute a search, even if DNA, like heat emanating from a home, is technically exposed to the public.

Now the intrusiveness factor: Any sampling method that involves a physical intrusion into the body such as using a needle to extract blood constitutes a search for Fourth Amendment purposes. In a 1965 case called Schmerber vs. California, a case which involved taking blood from someone who was suspected of drunk driving in a hospital setting. The Supreme Court said that such procedures quote "plainly constitute searches of persons."

Now, in a case that Kim referred to in 1989 case called Skinner vs. Railway Labor Executives Association, a case involving regulations authorizing drug testing of railroad employees, he principle of *Schmerber* was extended to include the taking of breath samples. Like withdrawing blood, taking breath samples went beneath the skin and implicated concerns about bodily integrity. Consequently, any DNA sampling procedure that penetrates the body will likely be considered a search. Less intrusive sampling methods such as acquiring saliva or scraping the skin present a much closer constitutional question. Accordingly, some have argued that these methods are analogous to fingerprinting and should not be considered a search under the Fourth Amendment.

Reliance on the fingerprinting cases however may be misplaced. Even if there is no physical intrusion, an argument can be made on the basis of *Skinner* that any DNA sampling still is a search within the meaning of the Fourth Amendment. In addition to blood and breath tests, some of the regulations at issue with *Skinner* authorize urine samples. *Skinner* recognized that urine samples were not physically intrusive yet still held that they constituted a search because urine like DNA, I'm sorry, like blood, can reveal a host of private medical facts. DNA sampling of course may involve a similar concern of privacy, which suggests that it might constitute a search even if obtained in a non-intrusive manner.

That being said, analogizing DNA sampling to a urine test does not necessarily mean that the judiciary would find that DNA sampling does constitute a search under the Fourth Amendment. *Skinner* can of course be distinguished on the grounds that there the privacy interst at stake, the monitoring of the urine samples, would not be present with any DNA sampling procedure. Moreover, it may be possible to limit the information that is obtained from a DNA sample, which of course would diminish any privacy concerns.

Now the third factor of course deals with the nature of the information. Now, the nature of the information obtained by the government may be significant in deciding whether or not DNA sampling constitutes a search under the Fourth Amendment. As we all know, DNA contains a wealth of personal information. If this information is made available to law enforcement officials, there are strong arguments that can be made that would it result in an unconstitutional search

based on such cases that Kim mentioned, *Skinner*, as well as a second case called Ferguson vs. the City of Charleston. If on the other hand, as some claim is possible, any information obtained can be limited to the identification of the donee, the constitutional balance may tip the other way as professors Rotisy and Carehan explained in their article. Under this rationale, an arrestee or felon's identity is a public concern and the DNA sampling is simply part of the arrest for conviction record.

Now, assuming there's a search, is it a reasonable search on a DNA sample? Now if DNA sampling is deemed to be a search it must be reasonable in order to comply with the Fourth Amendment. In most criminal cases, the general rule is that in order for a search to be reasonable there either has to be a warrant issued from a judge or at a minimum individualized suspicion authorizing or directing the police toward the individual.

Now because procedures, such as obtaining DNA samples from all arrestees for example, or from all persons swept up in a DNA dragnet search, generally do not require warrants and are not predicated on individualized suspicion. Such searches must fall within judicially recognized exceptions to the general rule.

Now, one such exception is the identity exception. Courts have generally recognized the importance of ascertaining the true identity of arrestees or reportedly routine booking measures such as taking fingerprints or mug shots do not implicate the Fourth Amendment. Given that DNA sampling can serve similar identification purposes, there is an argument that it should be permitted under this exception. Finding that DNA samples fit within the identity exception would be significant because as Professor Kay has pointed out in his article, evidence lawfully acquired for one purpose can be used subsequently for another so long as the additional use entails no future search procedure. That is why an arrestee's mug-shot for instance can be shown to victims of a crime. If the same logic were applied to DNA, once obtained for identification purposes it can analyzed for investigative purposes without constituting a new search or seizure.

Nonetheless there is a distinction that is important to bear in mind here. As already discussed, a DNA sample can potentially reveal much information that a fingerprint or mug-shot cannot. There is certainly a greater privacy interest at stake and a greater possibility of the abuse of the information – and of course the Justice Department claims that they won't do any such thing or allow such abuse to occur – which may counsel against shoehorning DNA sampling into the identity exception.

Now as Kim mentioned, there is also the special needs exception. Now a second exception to the Fourth Amendments warrant or individualized suspicion

requirement is the special needs exception. Now searches that fall into that category, Kim has already mentioned so I am not going to repeat that. Whether DNA sampling can be considered a special needs exception is a tough constitutional question due to the motivations behind obtaining the DNA sample. While sampling may be partially motivated by administrative concerns, such as the need to establish an identification record, it is also driven by more traditional law enforcement goals such as the hope that samples will aid in the investigation or prosecution of unsolved and future crimes.

Last summer, for instance, I'm sure that many of you know that after DNA was ultimately used to solve a serial killer case in Louisiana, state and local officials lamented the fact that if the samples had been available earlier at least three lives could be saved. Similarly last month, in an effort to drum up support for a law requiring that everyone arrested for felony provide a DNA sample, a Chicago police officer asserted, and I quote "DNA from arrestees will solve hundreds of unsolved murders and rapes while preventing thousands in the future."

Now, how should these mixed motives be distilled? Two Supreme Court cases suggest that if the primary motive is to serve law enforcement interests, the search cannot be considered a special needs search and thus unconstitutional under the Fourth Amendment. The first case is City of Indianapolis vs. Edmund where the court invalidated a narcotics checkpoint. In striking down the program, the court distinguished searches designed to serve special needs beyond the normal need for law enforcement from those whose primary purpose was to detect evidence of ordinary criminal wrong doing.

Now because the City in *Edmund* conceded that the primary purpose of the narcotics checkpoint was to interdict illegal drugs, the Court refused to exempt it from the Fourth Amendment's individualized suspicion requirement. And the Court declared and I quote now "the primary purpose of the Indianapolis narcotics checkpoint is in the end to advance the general interest in crime control. We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes." End of quote.

Similarly, as Kim mentioned in Ferguson vs. City of Charleston, the Court squashed a state hospital's policy, which conducted drug tests on pregnant women and forwarded results to the police so that the threat of prosecution could be used as a leverage to coerce the mothers into participating in substance abuse programs. The hospital defended its policy on the basis that its ultimate goal was the rehabilitation of the women. The Court rejected this argument, reasoning that while the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the

immediate objective of the searches was to generate evidence for law enforcement purposes.

Now, the Court concluded that the purpose served by the policy ultimately was indistinguishable from the general interest in crime control. Thus, if the primary purpose of DNA sampling is to further general interest in crime control - that is, to facilitate the investigation and prosecution of unsolved and future crimes, a strong argument can be made that, in the logic of *Edmund* and *Ferguson*, that it would not fall within the special needs exception.

Now, this of course, raises more questions than it answers. How does one derive the primary purpose behind a DNA search? What happens if several motives are equally desirable? And what if the program initially has a proper motive but comes to be dominated by an improper motive?

Now, the Supreme Court has only provided limited guidance in trying to resolve these issues. First *Ferguson* instructed that reviewing courts must consider all the available evidence.

Now the factors that were deemed important in *Ferguson* were the following: The document that codified the hospital's policy incorporated police operational guidelines. Local prosecutors and police officers were extensively involved in the day-to-day administration of the policy. And police took pains to coordinate the timing and circumstances of any arrest with hospital staff. Ultimately, the hospital policy, although it came out of the hospital was dominated by law enforcement interests.

Second, both *Ferguson* and *Edmund* recognized that there is a framing or abstraction problem. Because law enforcement always serves some broader social goal or objective, courts must be careful not accept a state's assertion of its special needs at face value. Otherwise, virtually any non-consensual suspicional search could be immunized under the special needs doctrine by simply defining the search solely in terms of its ultimate rather than its immediate purpose.

Ferguson illustrates this problem, I believe, by noting that if a search's purpose is abstracted too broadly any search to generate evidence for the police and enforcing general criminal laws would be justified by the reference to the broad social benefits that those laws might bring about. Now, of course as is the typical case with the courts, there is always another case. This term the Supreme Court decided a case called Illinois vs. Lidster (L-I-D-S-T-E-R) which demonstrated that this framing problem can cut both ways. One cannot render the special needs

exception a nullity by simply claiming that the police conduct is primarily intended to further general interest in crime control.

Now, in *Lidster*, the court distinguished a police roadblock whose purpose was to determine whether a vehicle's occupants were committing a crime. They distinguished that from a police roadblock whose purpose was to ask occupants for their assistance in providing information about a crime in all likelihood committed by others.

What happened in *Lidster* was that there was a hit-and-run accident that occurred in which a person was severely injured. One week later at the same spot, the police conducted a roadblock in which they passed out flyers asking for help in trying to identify who was the hit-and-run driver. Now the Supreme Court rationalized this distinction, this informational roadblock from a typical road-block in part on the grounds that the Fourth Amendment's concept of individualized suspicion has little role to play when the police are seeking information from the public. And the Court reasoned, and I quote now "like certain other forms of police activity, say crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual. In case it matters to anybody – I've got four minutes – Justice Breyer was the author of *Lidster*. Now, beyond instructing lower courts to consider all the available evidence and warning of possible framing problems, the Supreme Court has offered little direction as to how these cases should be resolved.

Now complicating matters further of course is the fact that some of the distinctions drawn by the Court seem razor-thin. Why, for example, is a sobriety checkpoint permissible but a narcotics checkpoint is not? Is it just because in the *Edmond* case, the City of Indianapolis was foolish enough to concede that the primary purpose of the checkpoint was for general law-enforcement purposes? In trying to ascertain whether DNA sampling fits into this special needs exception, the best one can do is to try and map it onto the spectrum of cases that the Supreme Court has already decided.

Now I can it get into it now and sort of distinguish *Lidster* or tell you why I think *Lidster* is not supportive of that. I don't have time to do that because David just flashed me. Let me just say a couple things about DNA and racial profiling and I think I probably won't have time to talk about the equal protection concerns.

Now turning away from the general question whether or not DNA sampling violates the Fourth Amendment. One of the common criticisms of DNA sampling at least with respect to dragnet searches is that it announced to racial profiling. Now just last month for instance a police investigative practice in Virginia, in Charlottesville, Virginia, came under fire. Police there had been investigating a

case of a serial rapist who had attacked at least six women. After traditional law enforcement techniques had been exhausted, police officers starting asking black males in the area to provide DNA samples. Officers requested samples whenever responding to a report that an individual who was alleged to either have resemble the composite sketch of the perpetrator or had been acting suspiciously. Nearly 200 black males had been stopped pursuant to this investigation and asked to provide cheek swab tissue samples. Now, although the Charlottesville police chief insisted that he would treat white males the same way if the subject had been described as a white perpetrator, the case highlights a salient point: while it may not be possible to sample every white male in a given locale, it may well be possible to sample every black male thus the specter of discrimination looms large.

Now, what constitutional arguments are available against this? As far as the Fourth Amendment is concerned, very little. And I will summarize here, David. In Whren vs. the United States, a 1996 decision, the Supreme Court took race off the table when it comes to the Fourth Amendment. The issue in *Whren* was whether a pretextual traffic stop violated the Fourth Amendment. In holding that the stop did not violate the Fourth Amendment , the Court explained that past cases foreclosed the argument that an officer's motive invalidates objectively justifiable police behavior. Thus, even if an officer has an improper intent such as racial animus, the Fourth Amendment is not violated so long as his actions remain objectively justifiable.

Now, this does not mean of course that police officers can go around and stop people for DNA samples when all they are using or all they are relying upon is race or ethnicity. The Court has said that's not permissible, of course. But the Court has made it clear though that where there is probable cause or reasonable suspicion or some other neutral reason for the stop like one of these special needs cases, there is no Fourth Amendment claim that can be made.

As I mentioned there is of course an equal protection argument. The problem there is, as some of you know from the Oneona(??) case, that the courts tend to interpret the equal protection clause with respect to these sort of race based stops in a rather narrow way. I am happy to talk about this in the Q&A session. I'll stop right now.