

On the Constitutionality of Mandatory Pretrial DNA Tests on Those Arrested or Indicted for a Felony

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Development of DNA-testing technology has helped exculpate innocent defendants.¹ Between 1989 and 2003, many of the 74 American prisoners sentenced to death were exonerated thanks to DNA evidence.² For instance, in cases where the identity of the perpetrator was the key, DNA evidence can be of “central importance,” especially when it is the only forensic evidence available.³ However, exculpation of innocent defendants does not provide a satisfactory rationale when the question is whether it is constitutional for governments to require DNA tests on all defendants arrested and charged with a felony.

Currently, some state statutes require DNA tests on all felony arrestees. For example, California’s DNA and Forensic Identification Data Base and Data Bank Act (hereinafter “California DNA Act”) requires that DNA samples be taken from all adults arrested for or charged with any felony offense “immediately following arrest, or during the booking . . . process or as soon as administratively practicable after arrest.”⁴ The statute was enacted out of “critical and urgent need . . . for accurately and expeditiously identifying, apprehending, arresting, and convicting criminal offenders and exonerating persons wrongly suspected or accused of crime.”⁵ Once officers collect the DNA sample pursuant to the statute, it is sent to a state laboratory.⁶ The laboratory then creates a DNA profile of the arrestee solely for identification purposes.⁷ It analyzes thirteen genetic markers known as “junk DNA,” which are non-genetic stretches of the DNA that are not linked to any known genetic traits.⁸ After the analysis using “short tandem repeat” technology, it creates a unique profile that law enforcement uses for identification.⁹ The laboratory then uploads the DNA profile into the Combined DNA Index System (CODIS), a nationwide collection of federal, state, and local DNA pro-

files.¹⁰ Once an arrestee’s DNA profile is uploaded into CODIS, it is compared with the DNA samples collected from crime scenes.¹¹ The statute provides some protection against misuse of the information obtained from the tests.¹² For example, only law-enforcement officials may access a DNA profile, and they may not use the DNA for purposes other than to identify criminal suspects.¹³ Moreover, state law punishes unauthorized access or disclosure of DNA information by up to a year in prison and a fine of up to \$50,000,¹⁴ and a DNA record may not be permanent and can be expunged under certain circumstances.¹⁵

There is a federal statute that is largely identical to the California statute. The DNA Fingerprint Act, amended in 2005 and 2006, allows the Attorney General to “collect DNA samples from individuals who are arrested, facing charges” of a federal felony.¹⁶ There are also other state laws that require DNA testing on all defendants arrested for and charged with a felony. For example, the Maryland DNA Collection Act requires the government to collect the DNA samples of people who are charged with felony burglary.¹⁷

Using California’s DNA Act as the model statute, this article will examine whether it is constitutional to require pretrial DNA testing on all felony arrestees under the Fourth Amendment as well as other parts of the Constitution, specifically the Fifth Amendment privilege against self-incrimination; the Sixth Amendment provision for effective assistance of counsel; substantive and procedural due process; and equal protection. The analysis will apply equally to federal and state courts, because all of these parts of the Constitution apply to states through the Due Process Clause of the Fourteenth Amendment.¹⁸

Footnotes

1. *Kansas v. Marsh*, 548 U.S. 163, 207-208 (2006).
2. 548 U.S. at 209 (Souter, J. dissenting) (citing Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson & Nicholas Montgomery, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 531 (2006)).
3. See *House v. Bell*, 547 U.S. 518, 540 (2006).
4. CAL. PENAL CODE §§ 296.1 (a)(1)(A), 296(a)(2)(C) (2007).
5. 2004 Cal. Legis. Serv. Proposition 69 § II(b) (West).
6. *Haskell v. Harris*, 669 F3d 1049, 1051-52 (9th Cir. 2012), *rehearing en banc granted*, 686 F3d 1121 (9th Cir. 2012).
7. 669 F3d at 1051-52.
8. *Id.*; see also *U.S. v. Mitchell*, 652 F3d 387, 400 (3d Cir. 2011).

9. *Haskell*, 669 F3d at 1051-52.
10. *Id.*
11. *Id.*
12. *Id.*
13. CAL. PENAL CODE §§ 295.1(a), 299.5(f) (2007).
14. CAL. PENAL CODE § 299.5(i).
15. See CAL. PENAL CODE § 299.
16. 42 U.S.C. § 14135a(a)(1)(A) (2006).
17. MD. CODE REGS. 29.05.01.04(A)(1)-(2) (2012); MD. CODE REGS. 29.14.22.02.02 (2012).
18. See generally WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, *CRIMINAL PROCEDURE* § 2.6 (5th ed. 2009).

I. FOURTH AMENDMENT

The Fourth Amendment requires that all searches and seizures be reasonable.¹⁹ Mandatory DNA testing constitutes a search under the Fourth Amendment.²⁰ It is settled law that the DNA-indexing statutes authorize both a physical intrusion to obtain a tissue sample and a chemical analysis to obtain private physiological information about a person and therefore are subject to the Fourth Amendment.²¹

Generally, a valid search under the Fourth Amendment requires a warrant issued upon probable cause.²² However a warrantless search can be reasonable even without probable cause or any individualized suspicion.²³ In determining whether a warrantless DNA search is reasonable, federal courts have used either the totality-of-the-circumstances test or the special-needs doctrine.²⁴

A. TOTALITY-OF-THE-CIRCUMSTANCES TEST VS. SPECIAL-NEEDS DOCTRINE

Under the totality-of-the-circumstances test, determining whether a search is reasonable involves balancing the degree of intrusion upon an individual's privacy and "the degree to which [the search] is needed for the promotion of legitimate governmental interests."²⁵ Similarly, the special-needs doctrine involves balancing the individual's privacy expectations against the government's interests.²⁶ The difference between the two tests is the degree of importance that the governmental interest carries. The totality-of-the-circumstances test does not require as strong an interest as the special-needs doctrine does.²⁷ Therefore, if requiring DNA testing for all people charged with a felony is to be constitutional under the Fourth Amendment regardless of which test a court uses, it must satisfy the special-needs doctrine.

B. APPLICATION OF THE TOTALITY-OF-THE-CIRCUMSTANCES TEST

Under the totality-of-the-circumstances analysis, courts are likely to allow governments to mandate DNA tests on all people arrested and charged with a felony. Balancing the intrusion on the arrestee's privacy interests against the government's interest in collecting and testing his DNA, courts have held that conducting pretrial DNA testing on felony

arrestees does not violate the Fourth Amendment.²⁸

First, the privacy intrusion involves invasion of bodily integrity and revelation of personal identity.²⁹ With regard to bodily intrusion, courts are likely to hold that intrusion on bodily integrity is minimal. For example, in *Haskell v. Harris*, the Ninth Circuit held that a buccal swab—a common method for collecting DNA samples—is a "de minimis" invasion because it gently sweeps along an arrestee's inner cheek.³⁰ Similarly, the Third Circuit held that the act of collecting a DNA sample is "neither a significant nor an unusual intrusion."³¹ The court noted that the U.S. Supreme Court has held that blood tests using venipuncture "do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity."³² It further explained that the FBI's current method of collecting a blood sample involves a finger prick, which is a far less invasive procedure than venipuncture.³³ The court held that this method, as well as the buccal swab, are both "minimal" and are not significant or unusual intrusions.³⁴

Regarding the second type of privacy invasion—revelation of identity and other personal information—defendants also face a difficult task. Although arrestees have a greater expectation of privacy than convicted defendants, they are "not entitled to the full panoply of rights and protections possessed by the general public."³⁵ Such diminished expectations of privacy are justified by the probable-cause finding, which is necessary for a valid arrest.³⁶ Therefore, arrestees have diminished privacy interests in their identity.³⁷ Moreover, profiles collected from DNA testing and entered into CODIS reveal only identity and no other significant personal information, such as familial lineage, predisposition to genetic conditions and diseases, or genetic markers for traits such as aggression, sexual orientation, substance addiction, and criminal tendencies.³⁸ Therefore, it is not likely that arrestee defendants can successfully claim misuse of DNA information in a way that violates their privacy interests.

Such diminished expectations of privacy are justified by the probable-cause finding, which is necessary for a valid arrest.

19. *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011).

20. *See United States v. Amerson*, 483 F.3d 73, 77 (2d Cir. 2007); *see also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989).

21. *Amerson*, 483 F.3d at 77; *see Skinner*, 489 U.S. at 616.

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

23. *Nat'l Treasury Emps. Union*, 489 U.S. at 665; *United States v. Conley*, 453 F.3d 674, 677 (6th Cir. 2006).

24. *Wilson v. Collins*, 517 F.3d 421, 425 (6th Cir. 2008).

25. 517 F.3d at 425 (quoting *Samson v. California*, 547 U.S. 843, 848 (2006)).

26. *Nat'l Treasury Emps. Union*, 489 U.S. at 665-66.

27. *See Wilson*, 517 F.3d at 427-28 ("[T]he governmental interests need not qualify as 'special needs' under the totality-of-the-circumstances test. . .").

28. *Haskell*, 669 F.3d at 1050-51; *U.S. v. Mitchell*, 652 F.3d 387, 389-

416 (3d Cir. 2011); *Haskell v. Brown*, 677 F.Supp.2d 1187, 1193-1201 (N.D. Cal. 2009) (district court opinion in case later styled *Haskell v. Harris*).

29. *Haskell*, 669 F.3d at pincite?; *Mitchell*, 652 F.3d at 406-07.

30. *Haskell*, 669 F.3d at 1050-51.

31. *Mitchell*, 652 F.3d at 406-07 (quoting *United States v. Weikert*, 504 F.3d 1, 12 (1st Cir. 2007)).

32. *Mitchell*, 652 F.3d at 406 (quoting *Winston v. Lee*, 470 U.S. 753, 762 (1985)).

33. *Id.* at 406-07.

34. *Id.* at 407.

35. *Haskell*, 669 F.3d at 1078 (quoting *United States v. Kreisel*, 508 F.3d 941, 947 (2007)(internal citations and quotation marks omitted)); *Haskell*, 677 F.Supp.2d at 1197.

36. *Mitchell*, 652 F.3d at 412.

37. *Id.*

38. *Id.* at 413, 424.

In sum, cases suggest that governmental interests outweigh the minimal degree of privacy intrusion from DNA testing.

Compared to this minimal privacy intrusion, courts have held that the government's compelling interests in conducting DNA tests outweigh the privacy invasion.³⁹ Such compelling interests include promoting increased accuracy in the investigation and prosecution of criminal cases, which involves identifying arrestees; solving past crimes; preventing

future crimes; and exonerating the innocent.⁴⁰ Particularly, DNA testing is a better and more accurate source of identification than fingerprinting—perpetrators can easily hide their fingerprints by wearing gloves, but they cannot mask their DNA.⁴¹ Moreover, DNA testing will help reduce recidivism because if a felony arrestee knows that his DNA is in the government's database, he is less likely to commit another crime.⁴²

In sum, cases suggest that governmental interests outweigh the minimal degree of privacy intrusion from DNA testing. Therefore, mandatory pretrial DNA tests are likely to be upheld under the totality-of-the-circumstances analysis. Nevertheless, further analysis is needed under the special-needs doctrine, which applies stricter standards in reviewing governmental interests.

C. APPLICATION OF THE SPECIAL-NEEDS DOCTRINE

Under the special-needs doctrine, an otherwise invalid warrantless search under the Fourth Amendment is reasonable if it serves special governmental needs, beyond the normal need for law enforcement.⁴³ In determining whether there are special government needs, it is necessary to balance the individual's privacy expectations against the government's interests.⁴⁴ If balancing the two factors leads to the conclusion that it is impractical to require a warrant or some level of individualized suspicion in the particular context, the warrantless search is considered reasonable.⁴⁵

In *Green v. Berge*,⁴⁶ the Seventh Circuit reviewed the spectrum of privacy interests that must be analyzed under the Fourth Amendment. At one end is the privacy interest of an unsuspected person not under any custody, whose interests receive the highest protection.⁴⁷ At the other end are the diminished privacy expectations of incarcerated felons.⁴⁸ Given this spectrum, the question is: On which side of the spectrum does the privacy interest of a person arrested and

charged with a felony fall? One recent case suggests that privacy expectations of such people are likely to be on the lower side of the spectrum.

In *United States v. Thomas*,⁴⁹ the U.S. District Court for the Western District of New York considered a federal statute that authorized the government to subject people charged with federal crimes to DNA tests. The court held that the privacy intrusion was “quite small” due to the defendant's status as an indictee.⁵⁰ Regardless of whether a person is under pretrial detention, “when a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it.”⁵¹ On the other hand, the government had a compelling interest in rapidly solving crimes by maintaining DNA records of arrestees' identities.⁵² Thus, the court upheld the federal statute because the governmental interests outweighed the minimal degree of privacy invasion.⁵³

It should be noted that *Thomas* suggests that governmental interests outweigh an indictee's privacy interests, regardless of whether the indictee is in pretrial custody or not. This logic of the court is proper for several reasons. First, because all indictees are treated the same regardless of whether they are in pretrial custody, the results of the analysis do not hinge on unfortunate happenstances. In other words, if the court came to different conclusions based on the assumption that detained indictees and undetained indictees have different privacy interests, results would depend on one's lawyer being competent enough to argue for pretrial release or perhaps on the arbitrariness of the judge at a bond hearing. Second, the logic not only promotes the government's interest of expedited disposition of cases but also furthers the defendant's interest in a speedy trial.

In determining whether a defendant's Sixth Amendment speedy-trial rights are violated, one of the balancing factors is whether the defendant is prejudiced by the delay of trial.⁵⁴ A defendant is deemed to be prejudiced by delay if he will suffer oppressive pretrial incarceration with accompanying idleness, loss of a job, and disruption of family life.⁵⁵ Moreover, even if the defendant is not under any pretrial custody or if he is released under bail, he will have to suffer anxiety, suspicion, and hostility also recognized in Sixth Amendment analysis.⁵⁶ This suggests that courts are concerned with the impact of Sixth Amendment violations on the private life of the defendant.

In a similar vein, the purpose of the Fourth Amendment is to protect the privacy and security of citizens.⁵⁷ The Fourth Amendment applies to searches conducted after a person is charged with a crime, just as the Sixth Amendment applies to

39. *Haskell*, 669 F.3d at 1051; *Mitchell*, 652 F.3d at 406-07.

40. *See Haskell*, 669 F.3d at 1062.

41. *Id.* at 1063.

42. *Id.* at 1064.

43. *Nat'l Treasury Emps. Union*, 489 U.S. at 665-66.

44. *Id.* at 665.

45. *Id.* at 665-66.

46. 354 F.3d 675 (7th Cir. 2004).

47. *See Green*, 354 F.3d at 678-79; *Amerson*, 483 F.3d at 80.

48. *See Green*, 354 F.3d at 678.

49. *United States v. Thomas*, 2011 WL 1599641 at *3 (W.D.N.Y. 2011), *approved*, 2011 WL 1627321 (W.D.N.Y. 2011).

50. *Thomas*, 2011 WL 1599641 at *9 (quoting *Amerson*, 483 F.3d at 87).

51. *See Thomas*, 2011 WL 1599641 at *8,*9 (quoting *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992); *accord Boling v. Romer*, 101 F.3d 1336, 1339-40 (10th Cir. 1996)).

52. *Thomas*, 2011 WL 1599641 at *9.

53. *Id.* at *10.

54. *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

55. *Id.*

56. *Id.* at 533.

57. *Skinner*, 489 U.S. at 639 (Marshall, J., dissenting).

people charged with a crime. Therefore, Fourth Amendment analysis must not be blind to the concerns embraced under Sixth Amendment analysis. That is, Fourth Amendment analysis should consider factors including the defendant's loss of freedom caused by pretrial custody, or, if the defendant is not under custody, the anxiety, suspicion, and hostility that he suffers.

This framework suggests that courts' decisions upholding mandatory pretrial DNA testing protect defendants from unwarranted intrusions on privacy. By expeditiously finding out the identity of the felon and confirming that the defendant is not the perpetrator, the government can protect the defendant from loss of liberty caused by pretrial incarceration or, if the defendant is not under pretrial custody, can protect the defendant from further suspicion, anxiety, and hostility.

II. FIFTH AMENDMENT

Under the Fifth Amendment right against self-incrimination, a person must not "be compelled in any criminal case to be a witness against himself."⁵⁸ If the prosecution obtains statements from the defendant (either exculpatory or inculpatory) through custodial interrogation initiated by the police without informing him of the procedural safeguards to protect his privilege against self-incrimination, the prosecution may not use such statements against the defendant once the legal proceeding begins.⁵⁹ The requirement of DNA testing raises a Fifth Amendment issue because the testing does not involve any prior *Miranda* warnings, such as a person being informed that he has "the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."⁶⁰

A. CUSTODIAL INTERROGATION

The threshold question would be whether "custodial interrogation" takes place when the government conducts DNA testing. First, a suspect is under "custody" when there is "a formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest."⁶¹ Incarceration of any form satisfies this test.⁶² On the other hand, a temporary and relatively nonthreatening detention, such as a traffic stop or *Terry* stop,⁶³ does not constitute *Miranda* custody.⁶⁴ Under the statute mandating DNA tests on all felony arrestees, the DNA test must be done "immediately following arrest, or during the booking."⁶⁵ In other words, DNA tests are likely to be done while the defendant is under pretrial custody.

B. TESTIMONIAL OR COMMUNICATIVE EVIDENCE

Assuming that DNA testing is done when a person is under custody, the next question is whether an interrogation took place. Interrogation encompasses express questioning, as well as any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.⁶⁶ DNA testing is not likely to involve express questioning. It would rather involve actions in an attempt to obtain identification information—which may, in effect, be incriminating. In that sense, DNA testing can be regarded as interrogation.

However, regardless of whether there is custodial interrogation, it is important to note that the right against self-incrimination applies only to testimonial or communicative evidence. The U.S. Supreme Court, however, has not provided a clear test as to what constitutes "testimony."⁶⁷ Yet, the court has noted that "[i]t is the 'extortion of information from the accused,' the attempt to force him 'to disclose the contents of his own mind,' that implicates the Self-Incrimination Clause."⁶⁸ This suggests, first, that the court defines "testimony" as substantive cognition—the product of cognition that results in holding or asserting propositions with truth-value,⁶⁹ and second, that the state must cause this cognition for the Fifth Amendment to be implicated.⁷⁰ In sum, the government may not compel defendants to reveal incriminating substantive results of cognition caused by the government.⁷¹

The question then becomes whether the results of DNA testing constitute testimony. The answer is likely to be no, because the tests involve examination of physiological features, and such features cannot be altered by change in the examinee's cognition or perception. Therefore, even if DNA testing is compelled by the government, analysis under the right against self-incrimination is likely to be implausible.

III. SIXTH AMENDMENT

The Sixth Amendment right to counsel includes the right to effective assistance of counsel.⁷² The right to effective assistance of counsel is recognized not for its own sake but because of the effect it has on the ability of the accused to receive a fair trial.⁷³

The right to effective assistance of counsel is violated when the accused is not able to receive a fair trial because the chal-

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58. *Schmerber v. California*, 384 U.S. 757, 760 (1966).

59. *Rhode Island v. Innis*, 446 U.S. 291, 297-98 (1980); *Chavez v. Martinez*, 538 U.S. 760, 766 (2003).

60. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

61. *Maryland v. Shatzer*, 130 S.Ct. 1213, 1224 (2010) (quoting *New York v. Quarles*, 467 U.S. 649, 655 (1984)).

62. *Id.* at 1224.

63. See *Terry v. Ohio*, 392 U.S. 1, 11-12 (1968).

64. *Shatzer*, 130 S.Ct. at 1224.

65. CAL. PENAL CODE §§ 296.1 (a)(1)(A), 296(a)(2)(C).

66. *Innis*, 446 U.S. at 300-01.

67. Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. Crim. L. & Criminology 243, 266-67 (2004).

68. Allen & Mace, *supra* note 66, at 266-67.

69. Allen & Mace, *supra* note 66, at 266-67.

70. *Id.* at 268.

71. *Id.* at 267.

72. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

73. *United States v. Cronin*, 466 U.S. 648, 658 (1984).

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lenged conduct has affected the reliability of the trial process.⁷⁴ A trial is unfair if the accused is denied counsel at a “critical stage” of his trial.⁷⁵ At such a critical stage, the government violates the accused’s right to counsel if it “interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”⁷⁶

A. SIXTH AMENDMENT IMPLICATIONS OF THE CURRENT STATUTE

California’s current DNA statute mandates all felony arrestees to be subject to DNA tests. In other words, even if an arrestee is afforded an attorney, counsel cannot advise the client as to whether he should subject himself to a DNA test. Considering that the results of the DNA test may yield inculpatory evidence, the government essentially prevents the defense counsel from making independent decisions about how to conduct the defense. As a result, a felony arrestee is not afforded effective assistance of counsel during the pretrial phase. Therefore, the important question would be whether the deprivation of the right to effective assistance of counsel takes place at a critical stage of the trial. If so, the government would be violating the defendant’s Sixth Amendment right to counsel.

B. CRITICAL STAGE OF TRIAL

Critical stages of trial include any stage of the prosecution, formal or informal, in or out of court, where counsel’s absence might detract from the accused’s right to a fair trial.⁷⁷ The scope of critical stages reaches pretrial phases because the presence of counsel at critical confrontations, such as at the trial itself, assures that the accused’s interests will be protected in a manner consistent with our adversary theory of criminal prosecution.⁷⁸

Such critical stages are distinguished from a “mere preparatory step” at which no right to counsel is guaranteed.⁷⁹ The Constitution does not guarantee the right to assistance of counsel in the prosecution’s preparatory step of gathering evidence.⁸⁰ This includes the government’s systematized or scientific analyzing of the accused’s fingerprints, blood sample, clothing, and hair.⁸¹ The rationale is that knowledge of rele-

vant scientific and technological techniques is sufficiently available, and there are few variables in techniques.⁸² Therefore, the accused has an opportunity for a meaningful confrontation with the government’s case at trial through cross-examination of the government’s expert witnesses and the presentation of evidence from his own experts.⁸³

This may at first glance suggest that the process of DNA testing falls under the mere preparatory step of gathering evidence. However, the Court was careful to note that the rationale behind this distinction is that the accused has the opportunity to meaningfully challenge the government’s case at trial. Therefore, to determine whether the mandated DNA test constitutes a critical stage or a mere preparatory step, the critical question is whether the defendant has an opportunity to meaningfully confront the government’s DNA evidence. The answer to the question is that there is no such opportunity.

For a defendant to have a fair trial, the government’s DNA analysis should be challenged. The results of DNA tests may be biased because DNA experts have intimate connections with the laboratories and financial interests in the DNA tests.⁸⁴ Sometimes the experts’ careers hinge on the success of the tests and the admissibility of test results.⁸⁵ Almost all crime laboratories are connected to law-enforcement agencies, which raises the risk that laboratories will be subject to police and prosecutor interests in obtaining convictions rather than pursuing objective truth.⁸⁶ Nevertheless, there is no opportunity for the defendant to meaningfully challenge the government’s DNA evidence at trial for several reasons.

First, a defense counsel may lack the scientific knowledge required to meaningfully examine the accuracy of the DNA evidence. To clearly explain to the jury what the DNA evidence shows, the defense counsel should know how to present the evidence and identify and refute the prosecutor’s failings.⁸⁷ However, defense counsel may not be familiar with specific scientific theories that are at issue in a case and may therefore be unable to provide the detailed analysis that an appointed expert might provide.⁸⁸ Moreover, defense counsel cannot testify in front of the jury.⁸⁹ Therefore, the only remedy would be to question the prosecution’s expert, who is unlikely to give testimony unfavorable to himself or his processes.⁹⁰

Second, the statute affects the ability of indigent defendants to put forth a meaningful defense in jurisdictions where courts do not appoint independent experts for indigent defendants. In some jurisdictions, an indigent defendant has no such right to appointment of an independent expert on the grounds that

74. *Id.*

75. *Id.* at 659.

76. *Strickland*, 466 U.S. at 686.

77. *United States v. Wade*, 388 U.S. 218, 226 (1967).

78. *Id.* at 226-27.

79. *Id.* at 227-28.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Ricardo Fontg, Comment, *DNA Fingerprinting: A Guide to*

Admissibility and Use, 57 MO. L. REV. 502, 529 (1992).

85. *Id.*

86. Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 915 (2011/12).

87. Kimberly Cogdell Boies, *Misuse of DNA Evidence Is Not Always a “Harmless Error”*: *DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction*, 17 TEX. WESLEYAN L. REV. 403, 421 (2011).

88. *Dubose v. State*, 662 So.2d 1189, 1197 (Ala. 1995).

89. *Id.*

90. *Id.* at 1197-98.

DNA experts can do no more than passively inform or educate a defense attorney.⁹¹ Because uncertainties and ambiguities may affect any DNA test, relying on one expert carries a significant risk that a jury will misunderstand or inaccurately evaluate the meaning or significance of DNA evidence.⁹² Experts present the results of a DNA test in “stark, black-and-white terms that do not fully reflect the potential problems that can affect any test.”⁹³ A jury is often simply informed that two samples match and that the match has a certain statistical significance.⁹⁴ Moreover, “an expert who exaggerates the significance of a declared match is not likely to explain how this significance is exaggerated.”⁹⁵ As a result, the absence of an independent analysis of the DNA sample will diminish the reliability of the results of the trial.

In sum, a felony arrestee will not have an opportunity to meaningfully confront the government’s evidence at trial. Thus, the moment at which he is subject to DNA test before trial is a critical stage of trial, rather than a mere preparatory step. Therefore, because the statute automatically requires DNA testing on all felony arrestees without any consultation with their counsels, the statute violates the defendant’s right to assistance of counsel.

IV. DUE PROCESS

In *Graham v. Connor*, the U.S. Supreme Court held that when “the Fourth Amendment provides an explicit textual source of constitutional protection. . . , that Amendment, not the more generalized notion of ‘substantive due process’” governs the analysis.⁹⁶ However, nine years later in *County of Sacramento v. Lewis*,⁹⁷ the court held that this holding in *Graham* does not bar the court from reaching the due-process question.⁹⁸ The court held that “if a constitutional claim is covered by a specific constitutional provision, such as the Fourth . . . Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.”⁹⁹ Therefore, if a claim involves “searches and seizures” covered by the Fourth Amendment, a due-process analysis is not appropriate.¹⁰⁰ However, the court cautioned that its holding applies only to executive actions as opposed to legislative enactments.¹⁰¹ That is, if an executive act is at issue and is covered by the Fourth Amendment, due-process analysis does not apply.¹⁰² An execu-

utive act in violation of the Fourth Amendment would constitute a due-process violation only if it is “arbitrary” and “shocking to the conscience.”¹⁰³ On the other hand, if a legislative enactment at issue, due-process analysis may apply.¹⁰⁴ The rationale behind the execu-

tive-act-versus-legislative-enactment distinction is that substantive due process is most apt when invoked to protect individual rights against systematic governmental invasion.¹⁰⁵

Under the framework set forth in *County of Sacramento v. Lewis*, a DNA statute mandating DNA tests on all people charged with felonies will be subject to due-process analysis if it is legislative enactment. The statute mandating DNA tests is undoubtedly a legislative enactment and therefore would not preclude substantive due-process analysis.

A. SUBSTANTIVE DUE PROCESS

The Due Process Clause protects fundamental rights and liberties that are “deeply rooted in this nation’s history and tradition.”¹⁰⁶ It “forbids the government to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”¹⁰⁷

Defendants might claim that liberty interests are affected either at pretrial stages or at trial. The pretrial rights affected at trial are privacy interests and the right not to offer inculpatory evidence. On the other hand, the right implicated at trial is the right to a fair trial.

1. Pretrial rights affected: Privacy interests and the right not to offer inculpatory evidence

Pretrial DNA testing involves an invasion of privacy because DNA sampling involves physical intrusion.¹⁰⁸ Privacy interests are protected as liberty interests under the Due Process Clause.¹⁰⁹ Concerning the development of DNA-testing technology and its accuracy, mandatory DNA tests may be inculpatory evidence. The defendant, however, has no duty to offer such inculpatory evidence.¹¹⁰ The Due Process Clause places the burden on the prosecution to prove beyond a reasonable

Defendants might claim that liberty interests are affected either at pretrial stages or at trial.

91. Jay A. Zollinger, Comment, *Defense Access to State-Funded DNA Experts: Considerations of Due Process*, 85 CALIF. L. REV. 1803, 1810 (1997); Polk v. State, 612 So.2d 381, 393 (Miss. 1992).

92. Zollinger, *supra* note 90, at 1835.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Graham v. Connor*, 490 U.S. 386, 395 (1989).

97. 523 U.S. 833 (1998).

98. The Supreme Court 1997 Term Leading Cases, *Constitutional Law: Due Process*, 112 HARV. L. REV. 192, 195 (1998).

99. *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (quoting *United States v. Lanier*, 520 U.S. 259, 272, n.7 (1997)).

100. *Lewis*, 523 U.S. at 843.

101. The Supreme Court 1997 Term Leading Cases, *supra* note 98, at 195-96.

102. *Id.*

103. *Id.*

104. *See Id.*

105. The Supreme Court 1997 Term Leading Cases, *supra* note 98, at 198 (citing Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 327 (1993)).

106. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 504 (1977)).

107. *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

108. *United States v. Amerson*, 483 F.3d 73, 84 (2d. Cir. 2007).

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

110. *See United States v. Turkish*, 623 F.2d 769, 774 (2d Cir. 1980).

[T]he result of applying the due-process balancing test is different for the defendant's right to a fair trial.

ment is depriving the defendants of those interests through pretrial DNA testing. The next question, then, is whether there is a compelling government interest for mandating pretrial DNA testing, and whether DNA testing is narrowly tailored to that government interest.

There is likely to be a compelling government interest because due process is designed to “enhance the search truth in the criminal trial” by assuring for both the defendant and the government ample opportunity to investigate facts that are crucial in determining guilt or innocence.¹¹³ DNA testing is narrowly tailored to this interest. DNA evidence has a high degree of accuracy in demonstrating a connection between evidence and a specific individual or source.¹¹⁴ For instance, in a murder case where the identity of the perpetrator is the key, DNA evidence can be critical, especially when it is the only forensic evidence available.¹¹⁵

In sum, privacy interests and the right not to offer inculpatory evidence are outweighed by the government interests. However, as demonstrated below, the result of applying the due-process balancing test is different for the defendant's right to a fair trial.

2. Rights affected at trial

a) Right to a fair trial: encompassing the right to an independent expert

A fair trial is a central constitutional goal.¹¹⁶ Part of what guarantees a fair trial is a defendant's right under the Sixth Amendment to confront witnesses as well as the right of compulsory process for obtaining witnesses in defendant's favor.¹¹⁷ The Due Process Clause protects both as fundamental rights essential to a fair trial.¹¹⁸

Under the Sixth Amendment, an accused can have a meaningful confrontation of the State's case at trial through the ordinary processes of cross-examination and the presentation of evidence from his own experts.¹¹⁹ “[T]he Confrontation Clause guarantees only “an opportunity for effective cross-examination, not cross-examination that is effective in what-

doubt all of the elements of the charged offense.¹¹¹ Therefore, a defendant has no duty to disclose whatever inculpatory evidence he discovers.¹¹² Because such liberty interests are protected under the Due Process Clause, the govern-

ever way, and to whatever extent, the defense might wish.”¹²⁰

However, the U.S. Supreme Court has noted that when the “[k]nowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, . . . the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts.”¹²¹

This suggests that even when the government's evidence involves science and technology, and knowledge about those fields is widely available, a defendant's meaningful challenge of the government's evidence should involve a separate expert witness for the defendant. Moreover, given that the Confrontation Clause guarantees an “opportunity for effective cross-examination,” the presence of the defense's own experts is also a part of preparing for effective cross-examination. It has been noted that DNA technology is complex, and thus it is “doubtful that a defense attorney will have the requisite knowledge to effectively examine autorads, laboratory books, quality control tests, copies of reports by the testing labs, standard deviations, contaminants, etc., without expert assistance.”¹²²

b) Lack of an independent expert in the context of DNA test results presented as evidence

i) Violation of the right to fair trial

As noted above, a DNA sample will be collected and analyzed by the government's experts, and an indigent defendant will have no opportunity to subject it to an analysis by an independent expert. This deprives the defendant of his right to a meaningful chance to confront the witness—the government's expert. Indeed, it might be argued that such a Confrontation Clause violation is only harmless error. Currently all 50 states have harmless-error statutes or rules, and the federal statute also provides that courts' “judgments shall not be reversed for ‘errors or defects which do not affect the substantial rights of the parties.’”¹²³ Under the harmless-error rule, not all federal constitutional errors are automatically deemed harmful. However, Confrontation Clause errors are subject to harmless-error analysis.¹²⁴ Moreover, Confrontation Clause violations will almost always constitute harmful errors.

First, there may be problems in a particular case with how the DNA was collected, examined in the laboratory, or inter-

111. *Patterson v. New York*, 432 U.S. 197, 210 (1977).

112. *Turkish*, 623 F.2d at 774.

113. *Williams v. Florida*, 399 U.S. 78, 82 (1970).

114. NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD S-5, 3-2 (2009), http://ag.ca.gov/meetings/tf/pdf/2009_NAS_report.pdf.

115. *See* *House v. Bell*, 547 U.S. 518, 540 (2006).

116. *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

117. *Pointer*, 380 U.S. at 403, 405; *Pennsylvania v. Ritchie*, 480 U.S. 39, 45 n.5 (1987).

118. *Ritchie*, 480 U.S. at 45 n.5; *Washington v. Texas*, 388 U.S. 14, 17-

18 (1967).

119. *See* *Gilbert v. California*, 388 U.S. 263, 267 (1967).

120. *United States v. Owens*, 484 U.S. 554, 559 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)).

121. *United States v. Ash*, 413 U.S. 300, 315 (1973) (quoting *Wade*, 388 U.S. at 227-28).

122. *Dubose*, 662 So.2d at 1196.

123. *Chapman v. California*, 386 U.S. 18, 21-22 (1967) (quoting 28 U.S.C. § 2111).

124. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

preted, including mixed samples, limited amounts of DNA, or biases due to the statistical interpretation of data from partial profiles.¹²⁵ Whether such contaminating factors are involved can be best explained by an independent expert. Although a lawyer is given an opportunity for cross-examination, he may not have a meaningful opportunity to cross-examine the witnesses because of the intricacies of the technology involved.¹²⁶

Second, without an expert of his own, the defendant will be subject to an unfair trial because of the powerful impact of scientific evidence presented by the government. Surveys of summoned jurors in Michigan gauged their attitudes toward scientific evidence. Jurors generally had high expectations that they would be presented with scientific evidence.¹²⁷ Moreover, jurors thought that DNA and other modern scientific techniques were extremely accurate.¹²⁸ Jurors viewed DNA evidence to have a “special aura of credibility.”¹²⁹ One study found that jurors rated DNA evidence as 95% accurate.¹³⁰

Therefore, by producing inculpatory evidence for the government without an analysis from an independent expert of his own, the defendant will be subject to an unfair trial. The next question then is whether there are compelling governmental interests and whether pretrial DNA tests are narrowly tailored to those interests.

ii) Balancing against governmental interests

The government’s interest is identical to the defendant’s interest—the search for truth, which can happen only through allowing meaningful examination of the facts by both the prosecution and the defendant.¹³¹ The Supreme Court has noted that discovery in search for truth must be a “two-way street.”¹³² Viewed in this manner, the balancing factors all go against mandatory pretrial DNA testing.

Moreover, such a conclusion is supported by the principle underlying due process. If there is a “reasonable probability” that prosecutorial argument undermines confidence in the outcome, the defendant’s substantive due-process rights are violated.¹³³ If powerful scientific evidence is persuading the fact-finders, and if the defense does not have an independent expert to challenge it, there is a reasonable probability that the prosecution’s DNA evidence will change the outcome—that is, to convict a defendant who would otherwise not be convicted. Therefore, the statute would result in a violation of the defendant’s due-process right to a fair trial.

B. PROCEDURAL DUE PROCESS

Even if a substantive due-process argument may not be viable, the defendant may still bring his claim under procedural due process. Procedural due process involves a two-step analysis: (1) Did the individual possess interests protected under the Due Process Clause? (2) Was the individual afforded an appropriate level of process?¹³⁴

Even if a substantive due-process argument may not be viable, the defendant may still bring his claim under procedural due process.

1. Does the defendant arrested and charged with a felony possess interests protected under the Due Process Clause?

Under the Due Process Clause of the Fifth and Fourteenth Amendments, a government may not “deprive any person of life, liberty, or property without due process of law.”¹³⁵ The Due Process Clause protects an individual’s property and liberty interests.¹³⁶ In the context of DNA testing, the question is whether the government violates any liberty interests of the person arrested and charged with a felony when it compels pretrial DNA testing.

There are two conceivable claims regarding a liberty-interest violation. First, pretrial DNA testing involves a privacy invasion because DNA sampling involves physical intrusion.¹³⁷ Second, mandatory DNA testing may violate the defendant’s right not to offer inculpatory evidence.¹³⁸ Even assuming that these interests are protected under the Due Process Clause, the question remains whether the defendant is afforded due process—that is, an appropriate level of process.

2. Was the individual afforded an appropriate level of process?

If a government requires all defendants charged with a felony to undergo DNA tests, the government is apparently not affording the defendants with an evidentiary hearing of any type before collecting DNA samples from them. Then the question is whether providing for such a hearing still satisfies procedural due process. Due process is a flexible concept that calls for procedural protections as each particular situation demands.¹³⁹ This flexibility is “necessary to gear the process to the particular need,” and therefore what process is due

125. NATIONAL RESEARCH COUNCIL, *supra* note 114, at 3-12.

126. *See Dubose*, 662 So.2d at 1197.

127. Hon. Donald E. Shelton, *Juror Expectations for Scientific Evidence in Criminal Cases: Perceptions and Reality about the “CSI Effect” Myth*, 27 T.M. COOLEY L. REV. 1, 5, 10 (2010).

128. Hon. Donald E. Shelton, *Twenty-First Century Forensic Science Challenges for Trial Judges in Criminal Cases: Where the “Polybutadiene” Meets the “Bitumen,”* 18 WIDENER L.J. 309, 377-78 (2009).

129. *Id.*

130. *Id.*

131. *Williams*, 399 U.S. at 82.

132. *Wardius v. Oregon*, 412 U.S. 470, 475 (1973).

133. *See Romine v. Head*, 253 F.3d 1349, 1366 (11th Cir. 2001).

134. *Ward v. Anderson*, 494 F.3d 929, 934 (10th Cir. 2007).

135. *Duncan v. Louisiana*, 391 U.S. 145, 147 (1968).

136. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571-72 (1972).

137. *Amerson*, 483 F.3d at 84.

138. *Turkish*, 623 F.2d at 774.

139. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

Due process is a flexible concept that calls for procedural protections as each particular situation demands.

depends on the need to minimize the risk of error.¹⁴⁰ To determine whether procedural due process is satisfied, courts must consider: “(1) the nature of the private interest at stake, . . . (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the government’s interests.”¹⁴¹ With regard to the first factor—the nature of the private interest at stake—

courts look into the degree to which the defendant is entitled to such interest.¹⁴² For example, a prisoner has only limited privacy interests. With regard to the second factor—the value of the additional safeguard—the defendant must explain the purpose that will be served by pre-deprivation hearings or other processes.¹⁴³

Under the framework, the first factor—nature of the private interest at stake—may be critical, as it would be the case with the right to fair trial. Nevertheless, the two remaining factors weigh against providing for a pre-deprivation hearing. First, the government has a compelling interest in seeking the truth in a criminal trial through identifying the defendant.¹⁴⁴ Moreover, pre-deprivation hearings or other additional safeguards are likely to serve that purpose. In *Wilson v. Collins*, the Sixth Circuit discussed a statute requiring collection of DNA samples from convicted felons. The court held that the lack of a pre-deprivation hearing does not violate procedural due process because the only criterion at the pre-deprivation hearing would be the conviction for a predicate offense.¹⁴⁵ Similarly, in a pre-deprivation hearing for a pretrial DNA test, the only criterion is whether the defendant is arrested or charged with a felony. Therefore, a pre-deprivation hearing would serve little purpose for the defendant arrested or charged with a felony. Lack of a pre-deprivation hearing for a pretrial DNA testing is unlikely to violate procedural due process.

V. EQUAL PROTECTION

Under the Equal Protection Clause of the Fifth and Fourteenth Amendments, a government must not “deny to any person within its jurisdiction the equal protection of the laws.”¹⁴⁶ Essentially, all people similarly situated should be treated alike.¹⁴⁷ Therefore, a government violates the

Equal Protection Clause if it makes a classification in a way that affects similarly situated groups in an unequal manner.¹⁴⁸ In the context of the DNA statute, the statute makes a classification between people arrested for or charged with felonies and people arrested for or charged with misdemeanors. The question is whether those two groups of people are similarly situated.

Caselaw suggests that people convicted of felonies or convicted of misdemeanors are not similarly situated.¹⁴⁹ A felon is uniquely burdened by diverse statutorily imposed disabilities long after his release from prison.¹⁵⁰ On the other hand, when misdemeanants conclude their sentences, they have no further obligations nor loss of civil rights.¹⁵¹ Moreover, it is the legislative function to draw a line between what classifies as a felony or a misdemeanor.¹⁵² Courts are not in the position to weigh the gravity of different criminal offenses and assess what commensurate action should be taken.¹⁵³

Likewise, people arrested for and charged with felonies and people arrested for and charged with misdemeanors would respectively be facing different obligations and risks of loss of civil rights. Therefore, a facial equal-protection challenge to the DNA statute is likely to be foreclosed because people charged with felonies and those accused of misdemeanors are not similarly situated. Nevertheless, a defendant may turn to a disparate-impact analysis.

Under the disparate-impact analysis, a statute otherwise neutral on its face must not be applied to invidiously discriminate an identifiable group.¹⁵⁴ Felony arrestees or inditees might claim that the facially non-discriminatory DNA statute has a disproportionate impact on, for example, racial minorities.¹⁵⁵ However, a disparate impact upon an identifiable group, while relevant, is not dispositive of whether a statute violates the Equal Protection Clause. Unless the disparate impact is traced to a discriminatory purpose, it may not support an equal-protection claim.¹⁵⁶ Therefore, unless there are facts connecting the disparate impact to any discriminatory intent on the part of the government, people arrested for or charged with felonies are not likely to persuade the court on their disparate-impact claims.

CONCLUSION

Current federal statutes and several state statutes require DNA testing on all felony arrestees and inditees. Beyond concerns about privacy of the defendants and the governmental interests of solving crimes, there are more profound concerns

140. *Greenholtz*, 442 U.S. at 13.

141. *Wade v. Brady*, 460 F.Supp.2d 226, 246 (D. Mass. 2006) (quoting *United States v. Ruiz*, 536 U.S. 622, 631 (2002)).

142. *See Wilson v. Collins*, 517 F.3d 421, 430-31 (6th Cir. 2008).

143. *See Wilson*, 517 F.3d at 430.

144. *Williams*, 399 U.S. at 82; *Haskell v. Brown*, 677 F.Supp.2d 1187, 1199 (N.D. Cal. 2009).

145. *Wilson v. Collins*, 517 F.3d 421, 430 (6th Cir. 2008) (citing *Rise v. Oregon*, 59 F.3d 1556, 1562-63 (9th Cir.1995)).

146. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

147. *Cleburne*, 473 U.S. at 439.

148. *People v. Travis*, 139 Cal.App.4th 1271, 1291 (Cal. Ct. App. 2006).

149. *Id.* at 1292.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Washington v. Davis*, 426 U.S. 229, 241 (1976); *Johnson v. State*, 965 So.2d 866, 872 (1st Cir. 2007).

155. *Johnson v. Quander*, 370 F.Supp.2d 79, 93 (D.D.C. 2005).

156. *Johnson*, 965 So.2d at 872; *see Johnson*, 370 F.Supp.2d at 94.

behind the statutes. Results of DNA tests can be tainted when laboratories are situated within law-enforcement agencies. Defense counsel may not be able to effectively tackle such tainted results when they are not sufficiently knowledgeable about the complex DNA science. Particularly, when an indigent defendant is not appointed an independent witness, his counsel may provide ineffective assistance at trial. Consequently, the DNA statutes result in depriving the defendant of the opportunity to meaningfully challenge the government's case at trial. That is, the effect of the DNA statutes reaches the criminal defendant's trial in the courtrooms. Because of concern that the DNA statutes violate the defendant's constitutional rights under substantive due process and the right to effective assistance of counsel under the Sixth Amendment, the constitutionality of such statutes should be re-evaluated.



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