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THE DNA AGE

Defense Lawyers Fight DNA Samples Gained on Sly

By [AMY HARMON](#)

The two Sacramento sheriff detectives tailed their suspect, Rolando Gallego, at a distance. They did not have a court order to compel him to give a DNA sample, but their assignment was to get one anyway — without his knowledge.

Recently, the sheriff's cold case unit had extracted a DNA profile from blood on a towel found 15 years earlier at the scene of the murder of Mr. Gallego's aunt. If his DNA matched, they believed they would finally be able to close the case.

On that spring day in 2006, the detectives watched as Mr. Gallego lit a cigarette, smoked it and threw away the butt. That was all they needed.

The practice, known among law enforcement officials as "surreptitious sampling," is growing in popularity even as defense lawyers and civil liberties advocates argue that it violates a constitutional right to privacy. Mr. Gallego's trial on murder charges, scheduled for next month, is the latest of several in which the defense argues that the police circumvented the Fourth Amendment protection against unreasonable search and [seizure](#).

Critics argue that by covertly collecting DNA contained in the minute amounts of saliva, sweat and skin that everyone sheds in the course of daily life, police officers are exploiting an unforeseen loophole in the requirement to show "probable cause" that a suspect has committed a crime before conducting a search.

"The law cannot tolerate such back-door methods, which seize something that any reasonable person expects to remain private," Mr. Gallego's lawyer, David Lynch, wrote in a motion to suppress the DNA evidence extracted from the cigarette butt.

The privacy implications of surreptitious DNA sampling may extend beyond individual investigations. The police, critics say, could collect DNA deemed "abandoned" from targeted individuals and monitor their movements even if they are not suspected of committing a serious crime. Innocent people whose DNA turns up unexpectedly may find themselves identified by a database file that they did not know existed.

"Police can take a DNA sample from anyone, anytime, for any reason without raising oversight by any court," said Elizabeth E. Joh, a law professor at University of California, Davis, who studies the intersection of [genetics](#) and privacy law. "I don't think a lot of people understand that."

Law enforcement officials say they are just trying to solve crimes. Over the last few years, several hundred

suspects have been implicated by the traces of DNA they unwittingly shed well after the crime was committed, according to law enforcement officials. Many more have been eliminated from suspicion without ever knowing that their coffee cups, tissues, straws, utensils and cigarette butts were subject to DNA analysis by the police.

“It’s a great tool,” said Micki Links, a sergeant in the Sacramento sheriff’s homicide division. “Our hands are tied on a lot of things as far as what we can do and what we can search, so when we find something that’s within the law, we’re going to use it.”

Sometimes the police dupe suspects into relinquishing their genetic identity by offering them a Coke during a routine interview and picking up the can. In Buffalo last year, undercover police waited until Altemio Sanchez, suspected of strangling and raping several women over a quarter-century, paid the check and left after dinner with his wife at a local restaurant before confiscating his glass. He later admitted killing three women and received a life sentence.

Variations on the technique are multiplying as the adoption of DNA processing technology lets crime laboratories derive a full profile from ever smaller amounts of biological material at relatively low cost.

In Mr. Gallego’s case, the detectives first checked the DNA extracted from the blood on the towel against the [F.B.I.](#) database of some 4 million convicted offenders. Finding no match, they turned to suspects in the unsolved murder of Leticia Estores, a hairdresser. Mr. Gallego, 49, was among them.

They could have asked a judge for a search warrant to compel him to give them a DNA swab, but there was no guarantee that the judge would agree. Also, Mr. Gallego had passed a lie detector test in which he denied any involvement in the murder, and had they asked him to volunteer a sample, he might have refused.

Instead, the supervising detective ordered “the surreptitious collection of a DNA sample,” according to his report.

Some legal experts advocate curbs on surreptitious sampling. Albert E. Scherr, a professor at Franklin Pierce Law Center in Concord, N.H., who has a grant from the [National Institutes of Health](#) to study the practice, suggests that the police be required to meet the “reasonable suspicion” standard before secretly collecting DNA. “You’re not asking them to let criminals go free,” he said. “You’re just asking them to investigate a little more.”

In the meantime, anyone with something to hide might want to keep in mind a recent decision by the Massachusetts Court of Appeals, which admitted as evidence DNA collected after a suspected rapist spit on the street.

“We conclude that under the circumstances, the expectorating defendant had no reasonable expectation of privacy in his spittle,” the court ruled, “or in the DNA evidence derived therefrom.”

The United States Supreme Court has yet to address whether there are constitutional limits on the covert collection of DNA. But with a few exceptions, lower court judges in over a dozen recent cases have ruled that DNA clinging to water bottles left in interrogation rooms, on restaurant glassware and on those ubiquitous cigarette butts are fair game for police inspection.

“There is no subjective expectation of privacy in discarded genetic material, just as there is no subjective expectation of privacy in fingerprints or footprints left in a public place,” Washington State’s [Supreme Court](#) wrote last year in denying an appeal by John N. Athan, whose murder conviction was based on surreptitiously collected DNA. Seattle police detectives posing as a law firm sent Mr. Athan a letter on fake stationery, asking him to join a lawsuit to recover overcharged parking tickets, of which they knew he had had many. DNA from saliva on the envelope that he sent back matched a semen sample from the 1982 murder and [rape](#) of a 13-year-old Seattle girl.

In a dissenting opinion, Justice Mary E. Fairhurst argued that the fingerprint analogy was inappropriate, because Mr. Athan’s DNA “provided the government with vast amounts of intimate information beyond mere identity” including race, gender, predisposition to disease and, perhaps, forms of conduct.

But Tim Bradshaw, a senior prosecuting attorney in King County, Wash., who worked on the case, said he had received calls from prosecutors around the country eager to employ a similar DNA ruse. (Courts generally allow the police to use all sorts of deception to obtain evidence from people they suspect of committing crimes.)

“The success of it has emboldened investigators, and it should,” Mr. Bradshaw said. “Just because something is very clever doesn’t make it illegitimate.”

In Los Angeles, a Superior Court judge last year rejected a motion by attorneys for a suspected serial killer, Adolph Laudenberg, to suppress DNA evidence that the police had acquired by inviting him to a doughnut shop to discuss an unrelated case. One detective set aside Mr. Laudenberg’s Styrofoam coffee cup, and an undercover officer retrieved it.

Several court opinions on surreptitious sampling cite the [United States Supreme Court](#) decision in *California v. Greenwood*, which held that the Fourth Amendment did not apply when the police searched trash bags left on the curb by a suspected narcotics dealer.

But the Greenwood analogy, critics of surreptitious sampling argue, ignores that most people have no idea 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, short of living in a bubble.

“Unlike garbage that can be withheld or destroyed before it is released into the world,” reads the motion to suppress the DNA evidence in the Gallego case, “we cannot do so with our biological tissues.”

A few courts have found that certain forms of surreptitious sampling do violate the Fourth Amendment.

DNA from a water bottle given to a suspected rapist, for instance, was deemed inadmissible in an Iowa court because a police officer had swapped the suspect’s water with a similar bottle when the man went to the bathroom. He retained a reasonable expectation of privacy, the court ruled, because he had not “abandoned” it.

And last year, the North Carolina Court of Appeals ordered a new trial for Blake J. Reed, a convicted burglar, because a police officer kicked a cigarette butt off his patio and later picked it up. The court said

Mr. Reed had an expectation of privacy at home.

Suspects may be wising up. After [smoking](#) another cigarette on the patio, Mr. Reed took apart the butt, removed the filter's wrapper and shredded it, according to court documents. He had seen the popular television show "CSI," where DNA often nails the suspect, he told the detective. Then he placed the remains in his pocket.

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