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Nontestimonial Identification Orders For DNA Testing

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I. THE DUKE LACROSSE CASE

What came to be known as the "Duke Lacrosse Case" began with a student party and a false accusation of rape. On March 14, 2006, a woman claimed that she had been sexually assaulted at the party. A Sexual Assault Nurse Examiner (SANE) at Duke Hospital Emergency Room obtained cheek scrapings, oral swabs, vaginal swabs, rectal swabs, and pubic hair combings. The nurse also collected a pair of white panties and other items of clothing. On March 16, 2006, the Durham police executed a search warrant at the residence of three lacrosse players, the location of the party. More evidence was collected, including false fingernails in a trash can in the bathroom where the rape allegedly occurred.

Five days later, the prosecutors obtained a Nontestimonial Identification Order (NTO)² to compel the players to be photographed and to provide DNA reference samples. The next day, all forty-six Caucasian members of the team complied with the order by providing cheek (buccal) swabs. The players did not contest the order. Indeed, they believed that DNA testing would exonerate them. "We have nothing to hide," was how one of the players, Kyle Dowd, summed it up.³ Their attorney agreed, although he "thought that the order might well be unconstitutional."⁴ Another lawyer, who was not representing anyone in the case, told a reporter: "I can’t imagine a scenario where this would be reasonable to do . . . so early in the investigation.

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³ TAYLOR & JOHNSON, supra note 1, at 60.
⁴ TAYLOR & JOHNSON, supra note 1, at 59.
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It seems unusual, it seems overbroad, and it seems frightening that they’re invading the privacy of so many people.”

The use of North Carolina’s Nontestimonial Identification statute is an aspect of the case that has been generally overlooked. Only a handful of jurisdictions have comparable provisions. This article examines the legal basis for these provisions.

II. FIFTH AMENDMENT

The phrase “nontestimonial order” derives from Fifth Amendment jurisprudence; the privilege against self-incrimination is limited to testimonial statements and does not extend to physical evidence. The leading case on the applicability of the privilege to the collection of physical evidence is Schmerber v. California. While being treated at a hospital for injuries sustained in an automobile collision, Schmerber was arrested for driving under the influence of alcohol. At the direction of the investigating police officer, a physician obtained a blood sample from Schmerber. Although the defendant objected to this procedure on the advice of counsel, his blood was extracted and analyzed for alcoholic content. Before the Supreme Court, Schmerber argued that the extraction of blood violated the privilege against self-incrimination. Rejecting this argument, the Court held that the privilege covers only communicative or testimonial evidence, not physical or real evidence. According to the Court:

It is clear that the protection of the privilege reaches an accused’s communications, whatever form they might take ... On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling “communications” or “testimony,” but that compulsion which makes a suspect or accused the source of “real or physical evidence” does not violate it.

The Court cited Justice Holmes’ opinion in Holt v. United States, in which compelled modeling of a blouse found at the crime scene was held to be outside the scope of the privilege: “[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.”

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8 TAYLOR & JOHNSON, supra note 1, at 57.
Subsequent Supreme Court cases reaffirmed the testimonial-physical evidence distinction recognized in *Schmerber*. In *United States v. Wade*, the Court held that compelling an accused to exhibit his person for observation during a lineup was compulsion "to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have" and thus not proscribed by the privilege. In *Gilbert v. California*, the Court concluded that the compelled production of a "mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the Fifth Amendment's] protection." Similarly, in *United States v. Dionisio*, the Court ruled that compelling defendants to speak for the purpose of voice analysis did not violate the Fifth Amendment because the "voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said."

The Court's last decision on the topic, *Pennsylvania v. Muniz*, involved evidence of slurred speech and lack of muscular coordination revealed by an arrestee during sobriety tests at a traffic stop. A police officer asked Muniz to perform a horizontal gaze nystagmus test, a walk-and-turn test, and a one-leg-stand test. A videotape of his performance was shown at trial. The Supreme Court wrote:

Under *Schmerber* and its progeny, ... any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to Officer Hosterman's direct questions constitute nontestimonial components of those responses. Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, see *Dionisio* ..., does not, without more, compel him to provide a "testimonial" response for purposes of the privilege.

Under *Schmerber* and its progeny, obtaining evidence for most forensic

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14 A traffic stop by itself does not amount to custody under *Miranda*. Therefore, incriminating statements made to the police before arrest are admissible. *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). Such statements are testimonial, but without custody there is no "compulsion" within the meaning of the Fifth Amendment. Accordingly, *Miranda* warnings are not required. For example, Muniz's verbal admissions during the roadside dexterity tests were admissible. 496 U.S. at 588 n.3.

16 496 U.S. at 592. The Court also held that routine booking questions fell outside the protection of the Fifth Amendment. Muniz was asked his name, address, height,
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techniques is free from Fifth Amendment concerns because these techniques involve physical, not testimonial, evidence. Thus, the lower courts have applied Schmerber to cases involving handwriting exemplars, fingerprints, voice exemplars, dental impressions, urine samples, sobriety tests, weight, eye color, date of birth, and current age. Four justices believed that these routine booking questions were not testimonial. Four other justices disagreed but believed routine booking questions fell within an exception to the Fifth Amendment. Muniz’s inability to answer when he was requested to state the date of his sixth birthday, however, amounted to a testimonial response and should have been excluded. 496 U.S. at 586. See also Doe v. U.S., 487 U.S. 201, 210, 108 S. Ct. 2341, 101 L. Ed. 2d 184, 88-2 U.S. Tax Cas. (CCH) P 9545, 25 Fed. R. Evid. Serv. 632, 62 A.F.T.R.2d 88-5744 (1988) ("[I]n order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information.").

16 A suspect’s refusal to submit to a nontestimonial identification procedure may result in a contempt citation. See U.S. v. Rudy, 429 F.2d 993, 994 (9th Cir. 1970) (handwriting samples); U.S. v. Hammond, 419 F.2d 166, 168 (4th Cir. 1969) (lineup); U.S. v. Doc, 405 F.2d 436, 438-39 (2d Cir. 1968) (handwriting examiner).


18 E.g., In re Doe, 860 F.2d 40, 46, 26 Fed. R. Evid. Serv. 1258 (2d Cir. 1988); U.S. v. Thomann, 609 F.2d 560, 562, 5 Fed. R. Evid. Serv. 614 (1st Cir. 1979); Appeal of Maguire, 571 F.2d 675, 677 (1st Cir. 1978) (ordering use of reasonable force to compel fingerprinting); State v. Taylor, 422 So. 2d 109, 116 (La. 1982); State v. Burch, 490 So. 2d 552, 554 (La. Ct. App. 4th Cir. 1986) (fingerprinting defendant in open court before the judge is permissible).

19 E.g., Burnett v. Collins, 982 F.2d 922, 38 Fed. R. Evid. Serv. 39 (5th Cir. 1993) (live voice exemplar in presence of jury); U.S. v. Delaplane, 778 F.2d 570, 575, 19 Fed. R. Evid. Serv. 1347 (10th Cir. 1985); In re Grand Jury Proceedings, Hellmann, 756 F.2d 428, 431 (6th Cir. 1985); U.S. v. Williams, 704 F.2d 315, 320, 12 Fed. R. Evid. Serv. 1327 (6th Cir. 1983) (live voice exemplar in presence of jury); Fuller v. State, 858 S.W.2d 528, 531-32 (Tex. App. Eastland 1993), petition for discretionary review refused, (Oct. 2, 1993) (requiring defendant to repeat words used by assailant for the purpose of voice identification does not violate state constitution); State v. Hubanks, 173 Wis. 2d 1, 496 N.W.2d 96 (Ct. App. 1992) (defendant’s refusal to provide in-court voice exemplar of specific words was a proper subject of jury instruction concerning such refusal). But see U.S. v. Olivera, 30 Fed. 1195, 1198 (9th Cir. 1994) (requiring defendant to speak in the presence of jury the words uttered during a robbery violated due process under the facts of this case).

20 E.g., U.S. v. Maceo, 873 F.2d 1, 5-6 (1st Cir. 1989) (examination of teeth); U.S. v. Holland, 378 F. Supp. 144, 154 (E.D. Pa. 1974), aff’d, 506 F.2d 1053 (3d Cir. 1974) and aff’d, 506 F.2d 1050 (3d Cir. 1974); State v. Evans, 44 Conn. App. 307, 689 A.2d 494, 501 (1997) ("[B]ecause the order to display one’s teeth, whether prior to or at trial, does not involve communications or testimony, the defendant’s claim is not of constitutional magnitude . . . ."); Brewer v. State, 725 So. 2d 106,
gunshot residues, hair samples, and other techniques. Recent cases have focused on DNA samples for databases.

III. FOURTH AMENDMENT

Although the privilege against self-incrimination does not preclude the use of nontestimonial orders, such procedures raise important search and seizure issues. There are two potential Fourth Amendment concerns present when physical evidence is obtained from a suspect for the purpose of DNA analysis. First, there may be a “seizure” of the person, which brings the suspect under the control of the police. Second, there is the subsequent search and seizure of biological specimens from that suspect. The second issue will be addressed first.

130 (Miss. 1998) (“[T]he trial court’s admission of the dental impression into evidence was proper as the impression was nothing more than evidence identifying a physical characteristic—very similar to fingerprints . . . .”).

21 E.g., U.S. v. Edmo, 140 F.3d 1289, 1292 (9th Cir. 1998) (“Being required to comply with Officer Boone’s request for a urine sample did not deprive Edmo of his Fifth Amendment privilege . . . .”); Lucero v. Gunter, 17 F.3d 1347, 1350 (10th Cir. 1994) (“[U]rine samples used for drug testing constitute nontestimonial evidence and therefore do not implicate Plaintiff’s Fifth Amendment right against self-incrimination.”).


26 E.g., Shaffer v. Saffle, 148 F.3d 1180, 1181 (10th Cir. 1998) (Oklahoma statute) (“We rejected the Fifth Amendment self-incrimination claim because DNA samples are not testimonial in nature.”); Schlicher v. (NFN) Peters, I & I, 103 F.3d 940 (10th Cir. 1996) (Kansas statute); Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996) (Colorado statute).
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A. Seizing Biological Evidence From a Person

In United States v. Dionisio,27 after ruling that the compelled appearance of a person before a grand jury was not a "seizure" within the meaning of the Fourth Amendment, the Supreme Court considered whether the taking of a voice exemplar constituted a search. The Court wrote:

The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.

Accordingly, there was no search. In United States v. Mara,28 the Court reached the same conclusion with respect to handwriting: "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice."

All evidence of physical characteristics, however, is not beyond Fourth Amendment protection. In Schmerber, which was decided before Dionisio, the Court had held that the extraction of blood for the purpose of scientific analysis "plainly constitutes searches of the 'persons' "29 within the meaning of the Fourth Amendment. In Dionisio, the Court distinguished, rather than overruled, Schmerber: "The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in Schmerber."30 Hence, the difference between Dionisio and Schmerber turns on the bodily intrusion involved in the extraction of blood samples. In Skinner v. Railway Labor Executives' Association,31 the Court once again noted that "it is obvious that this physical intrusion, penetrating beneath the skin,

29 384 U.S. at 767.
30 Schmerber, 410 U.S. at 14.
infringes an expectation of privacy that society is prepared to recognize as reasonable.\textsuperscript{32}

The collection of saliva by means of buccal swabs is another common method of collecting DNA samples. Although not as invasive as the extraction of blood, the courts have generally characterized the taking of saliva samples as a search under the Fourth Amendment.\textsuperscript{33}

B. Seizing Suspects to Obtain Biological Samples

Before biological samples, either blood or saliva, can be obtained, the donor must come under the control of the police. This can be accomplished by several different methods: (1) consent,\textsuperscript{34} (2) search warrant,\textsuperscript{35} (3) grand

\textsuperscript{32} In addition, an ensuing chemical analysis of the blood sample to obtain physiological data "is a further invasion" of privacy interests—informational privacy. 489 U.S. at 616-17. The Court in \textit{Skinner} also considered the collection of urine samples. Even though this procedure does not involve a bodily intrusion, the Court held that it was a search. Like blood, the chemical analysis of urine can "reveal a host of private medical facts," including whether a person is epileptic, pregnant, or diabetic. \textit{See also} Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1449 (9th Cir. 1986) ("[T]he administration of a breath test is a search within the meaning of the Fourth Amendment . . .").


A saliva sample can provide a significant amount of genetic identity information and it is generally not an item in the public domain. Yet, expectorating is not viewed with the same disfavor nor concealed behind closed doors as urinating; consider the commonplace sight of athletes expectorating on national television on a daily basis . . .

It is typically the case that a saliva sample is obtained by swabbing the inside of the subject's mouth with a pad of some sort. Such a scenario, wherein a citizen is directed to submit to an intrusion into his body, is properly viewed as implicating his dignitary interests. This factor, combined with the private identifying information contained in the sample suggests that a proper compliance with the requirement of the Fourth Amendment is mandated.


\textsuperscript{34} If a suspect consents, neither a warrant nor probable cause is required. \textit{See} Brent v. White, 398 F.2d 503, 505 (5th Cir. 1968) (consent to blood extraction); United States ex rel. U. S. ex rel. Parson v. Anderson, 354 F. Supp. 1060, 1088 (D. Del. 1972), order aff'd, 481 F.2d 94 (3d Cir. 1973).

\textsuperscript{35} The emergency exception recognized in \textit{Schmerber} for intoxication testing would not apply in this context. When blood is sought for the purpose of genetic testing (including DNA profiling), the physical characteristic remains constant. \textit{See}-
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jury subpoena, and (4) nontestimonial identification order. The remainder of this article focuses on the latter method. Unlike a search warrant (which requires probable cause), a nontestimonial identification order typically requires only reasonable suspicion, a lesser standard.

1. Davis v. Mississippi

In Terry v. Ohio, the Supreme Court first recognized that the detention of a suspect on less than probable cause may satisfy the Fourth Amendment’s "reasonableness" requirement. The importance of Terry and its progeny, defining the scope of the "stop and frisk" doctrine, to the collection of physical evidence for the purpose of scientific analysis turns on dictum in Davis v. Mississippi. The Court in Davis held that the detention of numerous suspects, during which fingerprints were obtained, on less than probable cause was unconstitutional. However, Justice Brennan commented:

Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense . . . . Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper lineup and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.

He then added: "We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by nar-


35 See infra text accompanying notes 76-79.

37 Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

rowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. . . . "

Although the Supreme Court has yet to directly address the issue, in Hayes v. Florida, it wrote that it had "not abandon[ed] the suggestion in Davis . . . that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting." The Court also noted that the state courts were divided on this issue. For example, some had sanctioned the use of NTOs, while others had refused to uphold the issuance of such orders. None of these cases, however, involved a "narrowly circumscribed" nontestimonial-order statute, which raises a different issue than whether a court has inherent authority to issue such an order.

In 2003, the Court once again noted the issue in passing: "We have . . . left open the possibility that, 'under circumscribed procedures,' a court might validly authorize a seizure on less than probable cause when the object is fingerprinting." The dicta in the Supreme Court cases focused on fingerprinting, which the Court emphasized was not an intrusive procedure. The issuance of a nontestimonial identification order for more intrusive procedures, such as the extraction of blood, may conflict with Schmerber, in which the Court required a more demanding standard when blood is obtained. In contrast, buccal swaps, although protected by the Fourth Amendment, do not involve the penetration of the skin, and thus may be subject to less stringent requirements than blood.

2. Statutes & Court Rules

The invitation contained in the Davis dictum did not go unanswered for

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39 394 U.S. at 728 (emphasis added).
44 See supra note 33.
long. Based on that dictum, a number of states adopted (by statute or court rule) provisions authorizing detentions for the purpose of nontestimonial identification procedures: Alaska, Arizona, Colorado, Idaho, Iowa, Nebraska, North Carolina, Utah, and Vermont.

The Arizona statute, for example, provides for the issuance of judicial orders for obtaining "fingerprints, palm prints, footprints, measurements, handwriting, handprinting, sound of voice, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance, or photographs of an individual." Such an order may be issued if the following conditions are satisfied:

1. Reasonable cause for belief that a specifically described criminal offense punishable by at least one year in the state prison has been committed.
2. Procurement of evidence of identifying physical characteristics from an identified or particularly described individual may contribute to the identification of the individual who committed such offense.
3. Such evidence cannot otherwise be obtained by the investigating officer from either the law enforcement agency employing the affiant or the criminal identification division of the Arizona department of public safety.

Unlike other provisions, the Arizona statute does not specify the quantum of evidence required to subject a person to such an order. The "reasonable cause" provision in that statute relates to the crime, not the suspect. In contrast, an Idaho statute provides that a nontestimonial identification order may be issued if "[r]easonable grounds exist, which may or may not amount to probable cause, to believe that the . . . individual committed the criminal offense." In other words, the "reasonable suspicion" test of Terry v. Ohio.

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46 Alaska R. Crim. P. 16(c)(2) (discovery rule).
47 Colo. R. Crim. P. 41.1. See also Colo. R. Crim. P. 41.1(c)(2) ("reasonable grounds, not amounting to probable cause to arrest, to suspect that the person . . . committed the offense").
48 Idaho Code § 19-625 (2005). See also Idaho Code § 19-625(B) (2004) ("[r]easonable grounds exist, which may or may not amount to probable cause, to believe that the . . . individual committed the criminal offense").
49 Iowa Code Ann. § 810.1-.2 (West 2003).
53 Vt. R. Crim. P. 41.1. See also Vt. R. Crim. P. 41.1(c)(2) ("reasonable grounds . . . to suspect").
56 Idaho Code § 19-625(B) (2005). See also Colo. R. Crim. P. 41.1(c)(2) ("reasonable grounds, not amounting to probable cause to arrest, to suspect that the person
The Commissioners on Uniform State Laws\textsuperscript{57} and the American Law Institute (ALI)\textsuperscript{58} promulgated comparable provisions. The ALI commentary sets forth the following rationale:

A strict adherence to the standard of probable cause for detentions to conduct identification procedures not only hinders the police in their efforts to gather evidence, but also encourages them to use arrests in cases where there may not be reasonable [probable] cause. In many cases the police have sufficient evidence to justify a lawful arrest, yet further investigation is called for before a decision to institute criminal proceedings is warranted. Since, under generally prevailing law, sufficient grounds to arrest are required to obtain identification evidence, the police may arrest before conducting such procedures and then determine whether to charge the suspect with the crime. If, as a result of the evidence obtained from such post-arrest procedures, the suspect is found to be innocent of the crime under investigation and released without further judicial proceedings, he still has an arrest on his record.\textsuperscript{59}

A federal rule was proposed in 1971\textsuperscript{60} but never adopted—apparently because its constitutionality was suspect. A Judicial Conference report commented that "the committees believes that before a procedural rule on this subject is recommended to the Supreme Court, the committee and the Conference should have the benefit of more experience with such procedure in the states and in the District of Columbia and of judicial consideration of the Constitutional questions involved."\textsuperscript{61}

ABA Discovery Standard 3.1 is sometimes cited as also providing for nontestimonial orders, but the issue appears more complex.\textsuperscript{62} This Standard is a discovery provision, not an investigatory rule, as are most of the state

\textsuperscript{57} UNIF. R. CRIM. P. 436 (1987).
\textsuperscript{58} MODEL CODE OF PRE-ARRAIGNMENT P. art. 170 (Official Draft 1975) (hereinafter MODEL CODE).
\textsuperscript{59} MODEL CODE, supra note 58, cmt. at 462.
\textsuperscript{60} FED. R. CRIM. P. 41.1 (Proposed Draft), 52 F.R.D. 462 (1971).
\textsuperscript{61} U.S. v. Holland, 552 F.2d 667, 674 (5th Cir. 1977), opinion withdrawn, 565 F.2d 383 (5th Cir. 1978).
\textsuperscript{62} The provision reads:

(A) Upon motion by either party, if the court finds that there is good cause to believe that the evidence sought may be material to the determination of the issues in the case, the court should, in advance of trial, issue compulsory process for the following purposes:

(ii) To obtain from a third party fingerprints, photographs, handwriting exemplars, or voice exemplars, or to compel a third party to appear, move or speak for identification in a lineup, to try on clothing or other articles, to permit the taking of specimens of blood, urine, saliva, breath, hair, nails, or other materials of the body, to submit to a reasonable physical or medical inspection of the body, or to participate in other reasonable and appropriate procedures. Such process should be issued if the court finds that: (1) the procedure is reason-
provisions. By the time discovery rules apply, the suspect has been charged by indictment or information. Nevertheless, Standard 3.1 permits a prosecutor or defendant to obtain blood and saliva samples from third parties. It specifies a "reasonableness" standard. The Commentary states: "To grant such a request, the court must first find that the proposed procedure is reasonable and will not involve an undue intrusion of the body or affront to the person's dignity. For example, requiring persons to provide fingerprints, photos, handwriting or voice exemplars, or other evidence of outward appearance are procedures which are held to be reasonable and non-intrusive. Other procedures may involve greater intrusions, but may nonetheless be considered reasonable if the evidence sought is highly material." Here, the Commentary cites Winston v. Lee, noting that "[a] finding of 'reasonableness' for such bodily searches may be required by the Fourth Amendment." Winston involved the surgical removal of a bullet from a suspect for the purpose of firearms (ballistics) identification. According to the Court:

The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case, the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers.

A number of law review commentaries—often written by students

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64 470 U.S. at 760. The Court relied principally on two factors to determine that surgery would be unconstitutional in Winston. First, the Court referred to the risk to the defendant's health as a "crucial factor." For example, "a search for evidence of a crime may be unjustifiable if it endangers the life or health of the suspect." The Court later noted that the record showed uncertainty about the medical risks involved. Second, the Court found that the prosecution's need for the evidence was not compelling. There was substantial additional evidence that could be introduced to establish the defendant's guilt; the victim had made a positive and spontaneous identification of the accused, and the accused had been found near the scene of the crime, with a bullet wound, soon after its commission.

addressed the subject at the time the nontestimonial procedure provisions were first adopted. In addition, several scholars have looked at the issue, generally approving such procedures. One leading Fourth Amendment expert, Professor LaFave, has written: "As a general proposition, it may be said that the procedures contemplated by the Davis-Hayes dictum do not violate the Fourth Amendment." Similarly, the ALI drafters concluded that "it appears likely that the inclusion of such orders would be upheld." The issue resurfaced decades later with the advent of DNA evidence.

3. Constitutionality

Several constitutional challenges to nontestimonial orders provisions have been made. Many of the early cases did not involve blood or saliva samples. For example, in upholding the constitutionality of the state statute, the Arizona Supreme Court wrote:

The degree of intrusion into the person's privacy is relatively slight. Photographs, more so than fingerprints, involve none of the probing that the Davis court found to mark a search of an unreasonable nature. Similarly, clipping several head hairs is only the slightest intrusion upon the body, if any at all, and does not constitute anything unreasonable.

The Colorado Supreme Court also upheld its rule in a case involving handwriting exemplars:

These cases suggest that limited intrusions into privacy on less than probable cause are reconcilable with Fourth Amendment guarantees when the following conditions exist. First, there must be an articulable and specific basis in fact for suspecting criminal activity at the outset. Second, the intrusion must be limited in scope, purpose and duration. Third, the intrusion must be justified by substantial law enforcement interests. Last, there must be an opportunity at some point to subject the intrusion to the neutral and detached scrutiny of a judicial officer before the evidence

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68 MODEL CODE, supra note 58, cmt. at 483.

69 The DNA articles include: Angus J. Dodson, Comment, DNA "Line-Ups" Based on a Reasonable Suspicion Standard, 71 U. COLO. L. REV. 221, 253-54 (2000) (arguing that DNA sampling and profiling are "closely analogous to fingerprinting" and should be permitted under Davis standard); Clare M. Tande, Note, DNA Typing: A New Investigatory Tool, 1989 DUKE L.J. 474.

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obtained therefrom may be admitted in a criminal proceeding against the
accused. 71

In contrast, the Nebraska Supreme Court construed its statute to require
probable cause in order to avoid any constitutional issues, 72 believing that
later cases "effectively dispel any speculation created by the [Davis] dictum."

The more recent cases involve DNA analysis. In In re Non-Testimonial
Identification Order Directed to R.H., 73 the Vermont Supreme Court upheld
a nontestimonial order that required saliva samples from a murder suspect,
ruling that the state statute requiring only reasonable suspicion was
constitutional. There was no direct evidence linking the suspect with the
nine-year-old murder. Nevertheless, he lived in the area and had a long his­
tory of sexual assaults on women, including in one instance a comparable
method of attack as in the murder case. The court wrote:

We recognize that the decisions of the United States Supreme Court have
involved the narrow question of obtaining fingerprints. We conclude that
the basic elements of saliva sampling for DNA are similar to the
characteristics of fingerprinting as described in Davis. Like fingerprinting,
saliva sampling involves no intrusion into a person's life or thoughts; it
can not be used repeatedly to harass; it is not subject to abuses like the
improper line-up or the third degree. DNA comparison "is an inherently
more reliable and effective crime-solving tool than eyewitness identifica­
tions or confessions." (quoting Davis).

In Bousman v. Iowa District Court, 74 the Iowa Supreme Court wrote:
"A nontestimonial identification order issued [for oral swabs] pursuant to
chapter 810 must be constitutionally reasonable. This requirement means
that the order must be supported by reasonable grounds to suspect that the
subject of the order committed the crime under investigation. Probable cause
to believe that the subject of the order actually committed the crime is not
necessary."

Although there is no federal statute, one federal case may deserve
attention. In United States v. Ingram, 75 a prosecutor requested a court order
to compel the defendant, who had been released on bail, to provide hair
samples. The court ruled that such an order implicated the Fourth Amend-

71 People v. Madson, 638 P.2d 18, 31-32 (Colo. 1981) (en banc). See also People
v. Davis, 669 P.2d 130, 133-35 (Colo. 1983) (nontestimonial order for photographs,
fingerprints, and voice exemplar based on informant's tip upheld); People v. Harris,
1988).

required for fingerprints and palmprints).

73 In re Nontestimonial Identification Order Directed to R.H., 171 Vt. 227, 762

74 Bousman v. Iowa Dist. Court for Clinton County, 630 N.W.2d 789, 801 (Iowa
2001). The order in the case, however, was deficient because it did not contain
required information about the unnamed informant.

ment in two respects—the compulsion of the defendant to appear and the seizure of the hair. Both intrusions had to be justified by reasonable suspicion (not probable cause): The prosecution “will only need to show a reasonable suspicion, based upon specific and articulable facts and the inferences rationally drawn from those facts, that (1) Mr. Ingram has committed a crime, and (2) that the taking of hair samples will provide evidence connecting him to the crime that he allegedly committed.” In addition, a neutral judicial officer would determine whether this standard had been satisfied: “The requirement of prior judicial approval will best safeguard the individual’s privacy interests without placing a significant burden on prosecutors or the court system.”

4. Grand Jury Subpoenas

Consideration of other methods to obtain biological samples may provide some helpful background in this context. In several cases, prosecutors have sought grand subpoenas. In re Grand Jury Proceedings Involving Vickers involved a request for fingerprints, hair, and saliva. The district court found that the Fourth Amendment was not implicated in the request for fingerprints and hair. The saliva sample, in the court’s view, was different: “[A] grand jury subpoena compelling a citizen to provide saliva samples does implicate his or her Fourth Amendment rights. Therefore, it is necessary to balance the grand jury’s legitimate interest in conducting a thorough investigation and obtaining relevant evidence against respondents’ constitutionally protected interests, to determine whether what is effectively a search and seizure is, nevertheless, reasonable.” In upholding the order, the court went on to elaborate: “[D]uring its inquiry into the ‘reasonableness’ of the challenged subpoena, the court will balance the legitimate and protected privacy interests of those subpoenaed against the grand jury’s legitimate need to conduct its investigation and obtain evidence relevant to its inquiry into possible criminal wrongdoing.”

In In re Shabazz, another district court wrote: “[A]lthough a showing of probable cause is not necessary, the grand jury subpoena duces tecum requiring a saliva swab must be based on reasonable individualized suspicion that Petitioner was engaged in criminal wrongdoing.”

5. ABA Standards on DNA Evidence

The recent ABA Standards on DNA Evidence approve of nontestimo-
NONTESTIMONIAL IDENTIFICATION ORDERS FOR DNA TESTING

External DNA identification procedures. Under Standard 2.2, DNA may be collected from a suspect in a non-invasive manner (e.g., saliva samples) if there is "reasonable suspicion" that the suspect committed the crime, and in an invasive manner (e.g., blood samples) if there is "probable cause" that the suspect did so. In either instance there must be probable cause that a serious crime has been committed.

The judicial-order approach was considered superior to alternative procedures, such as dragnets and the surreptitious collection of so-called "abandoned" DNA, because the decision whether to issue the order is made on notice (absent exigent circumstances), on the record, in open

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80 ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE, Standard 2.2 (2007) (hereinafter ABA STANDARDS—DNA EVIDENCE). The author was the Reporter for the DNA Standards.

81 In contrast, a search warrant directing the collection of a DNA sample must be issued based upon a showing of probable cause both (1) that a crime was committed and (2) that the suspect committed it, regardless of the intrusiveness of the means by which the sample is obtained.

82 See Pam Belluck, To Try to Net Killer, Police Ask A Small Town's Men for DNA, N.Y. TIMES, Jan. 10, 2005, at A1 ("Raising concerns among civil libertarians and prompting resistance from some men in Truro, the state and local police began collecting the generic samples last week, visiting delicatessens, the post office and even the town dump to politely ask men to cooperate."). The killer was later arrested but not as a result of the dragnet. As a trash collector, his DNA had been taken earlier but was not analyzed for several months, during which time the dragnet occurred.

See Roberto Iraola, DNA Dragnets—A Constitutional Catch?, 54 DRAKE L. REV. 15 (2005). Iraola reports that eighteen such "dragnets" or "sweeps" have been conducted thus far in the United States since 1990, id. at 18, and that the first recorded DNA dragnet occurred in 1986 in Narborough, England, where the targeted pool comprised of 4,500 men in the area surrounding the village where the crimes under investigation occurred. "The practice then moved to other parts of Europe, with the largest mass sweep taking place in 1998 when samples were taken from 16,400 persons in Struecklingen, Germany, in connection with the murder and rape of an eleven-year-old girl." Id. at 21-22 (footnotes omitted).


84 Examples of exigent circumstances that would excuse the notice requirement include situations where there is a risk of flight or where a child is missing. Cf. Cupp v. Murphy, 412 U.S. 291, 296, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973) (circum-
court, and by a neutral and detached magistrate. Counsel is provided as another safeguard, both to explain the proceedings to the person subject to the order and to assert that person's rights.\textsuperscript{85}

The issuance of a judicial order on notice and after a hearing is also superior to the usual ex parte procedure applicable to the issuance of a search warrant. With NTOs, an ex parte procedure is generally not required because genetic markers, unlike blood-alcohol content, remain constant.\textsuperscript{86}

The ABA Standards also address another unresolved issue. Standard 2.2 permits collecting biological samples from non-suspects.\textsuperscript{87} In rape cases, biological evidence typically involves a mixture of semen and epithelial vaginal cells. Consequently, elimination samples from the victim are required. Similarly, elimination samples from the victim's husband or other consensual sexual partners may be needed. Typically, elimination samples are provided voluntarily. Sometimes they are not.

The Standard would permit the issuance of a court order to a non-suspect if there is probable cause that a serious crime has been committed, and "a sample is necessary to establish or eliminate that person as a contributor to or source of the DNA evidence or otherwise establishes the profile of a person who may have committed the crime."\textsuperscript{88}

The requirements of Standards 2.2(c) and 2.2(d) are somewhat anomalous: non-suspects have the same Fourth Amendments rights as suspects but

\textsuperscript{85} The constitutional right to counsel may not have attached at this point. See Fellers v. U.S., 540 U.S. 519, 523, 124 S. Ct. 1019, 157 L. Ed. 2d 1016 (2004); Kirby v. Illinois, 406 U.S. 682, 689, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972) (right to counsel attaches only after the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment").

\textsuperscript{86} See Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (because the alcohol content of blood diminishes with the passage of time, the Court recognized an "emergency" exception to the warrant requirement, which was necessary to preclude the destruction of evidence).

\textsuperscript{87} In In re Jansen, 444 Mass. 112, 826 N.E.2d 186 (2005) (abrogated by, Com. v. Dwyer, 448 Mass. 122, 859 N.E.2d 400 (2006)), the court held that a trial judge was authorized to issue a subpoena for a buccal swab of a third party. The indicted defendant claimed that Jansen, not he, was the rapist. A defense investigator secured bottles from Jansen's trash and had them tested; the DNA matched the crime scene evidence. The court found that the proposed test had "significant relevance and evidentiary value" of an exculpatory nature. Interestingly, the court found that the Fourth Amendment was not implicated because the search was "private."

\textsuperscript{88} ABA Standards—DNA Evidence, supra note 80, Standard 2.2(b)(ii). This Standard could be met, for example, if the DNA evidence collected at a crime scene appeared to include DNA contributed by more than one person, and determining the DNA profile of a non-suspect (perhaps the victim of the crime, or, in the case of a rape, a person who recently had consensual sex with the victim) would assist in determining which alleles in the DNA profile developed from the crime scene evidence had been contributed by the perpetrator of the crime.
reasonable suspicion is not required for non-suspects, since there can be, by definition, no reason to suspect such a person. Instead, the standard requires "necessity" for the sample. Courts have ordered blood tests to resolve civil paternity actions, a somewhat similar situation. In Commonwealth v. Draheim, the Supreme Judicial Court of Massachusetts ruled that the prosecution could obtain buccal samples from two children in a rape case: "[W]here the third parties are not suspects, in order to respect the third parties' constitutional rights, the Commonwealth must show probable cause to believe a crime was committed, and that the sample will probably provide evidence relevant to the question of the defendant's guilt . . . . Additional factors concerning the seriousness of the crime, the importance of the evidence, and the unavailability of less intrusive means of obtaining it are germane."

CONCLUSION

In the Duke case, there was no question that the state lacked probable cause to require forty-six players to provide buccal samples for DNA analysis. Whether there was reasonable suspicion is an interesting issue. Unlike the N.C. provision, statutes in other states permit use of a NTO only if the evidence cannot be "otherwise" obtained, a requirement consistent with the Fourth Amendment's reasonableness prescription. For example, in the absence of a flight risk, the police should first seek to obtain the samples

See Ind. Code Ann. § 35-38-7-15 (West 2002) (allowing the collection of elimination samples from third parties under "extraordinary circumstances").

See Doe v. Senechal, 431 Mass. 78, 725 N.E.2d 225 (2000) (holding patient made necessary showing that staff person's paternity was "in controversy," and made the requisite showing of "good cause," and buccal swab paternity test met the Fourth Amendment's standard of reasonableness).

See Margaret A. Berger, Lessons from DNA: Restriking the Balance between Finality and Justice, in DNA AND THE CRIMINAL JUSTICE SYSTEM 110, 117 (David Lazer ed., 2004) ("As yet there is virtually no law on obtaining elimination samples from third persons, or on the consequences of such a sample's not being available."); Cynthia Bryant, When One Man's DNA Is Another's Exonerating Evidence: Compelling Consensual Sexual Partners of Rape Victims to Provide DNA Samples to Post-Conviction Petitioners, 33 Colum. J. L. & Soc. Pol'y 113 (2000).

Com. v. Draheim, 447 Mass. 113, 849 N.E.2d 823 (2006). See also State v. Register, 308 S.C. 534, 419 S.E.2d 771 (1992) (holding State could compel blood, hair, and saliva samples from third-party non-suspect where state showed probable cause crime committed by particular suspect and "a clear indication that material evidence relevant to the question of the suspect's guilt will be found").

849 N.E.2d at 829 (citing Matter of Lavigne, 418 Mass. 831, 641 N.E.2d 1328 (1994)).

E.g., ARIZ. REV. STAT. ANN. § 13-3905(A) (2006). On the other hand, the North Carolina statute contains discovery and right-to-counsel provisions that are absent from many of the other NTO statutes.
by consent. Moreover, in the Duke case, "[s]ome players could prove they had been nowhere near the party that night." 95

Despite the deficiencies in the Duke case, nontestimonial identification orders based on reasonable suspicion—properly applied—have merit. Such orders satisfy the Fourth Amendment reasonableness requirements if they are based on a carefully drawn statute or rule that provides certain safeguards. Unlike an ex parte application for a search warrant, NTO procedures should involve a hearing in which counsel is provided and a judicial finding that no reasonable alternative means of obtaining the evidence are available. Moreover, if blood samples are ordered, they should be taken by medical personnel. 96 Finally, the suspect should have a right to receive the test results.

95 TAYLOR & JOHNSON, supra note 1, at 57.

96 In Schmerber, the Court held that the scientific procedure chosen as well as the manner in which it is performed are both subject to the Fourth Amendment's reasonableness requirement. With respect to the procedure, the Court commented, "we are satisfied that the test chosen to measure petitioner's blood alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol." Schmerber v. California, 384 U.S. 757, 771, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). The Court also found that the "record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices." Id. See also Winston v. Lee, 470 U.S. 753, 760, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985) (involving surgical removal of a bullet from a suspect for the purpose of firearms (ballistics) identification).