
SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN NICHOLAS ATHAN,

Appellant.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES

UNION OF WASHINGTON

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE.....	1
ARGUMENT.....	2
A. There Is a Privacy Interest in DNA on Envelopes.....	4
1. Licking an Envelope Does Not Voluntarily Expose One’s DNA to the Public	4
2. Sending a Letter Does Not Relinquish Privacy Rights in DNA.....	6
3. DNA Is Not Voluntarily Abandoned	7
B. Genetic Information Is Highly Sensitive	11
C. Effective Law Enforcement Use of DNA Does Not Require Intrusion Into Private Affairs.....	14
CONCLUSION.....	16

TABLE OF AUTHORITIES

State Cases

<i>In re Personal Restraint of Maxfield</i> , 133 Wn.2d 332, 945 P.2d 196 (1997).....	6
<i>Shew v. Coon Bay Loafers, Inc.</i> , 76 Wn.2d 40, 455 P.2d 359 (1969).....	8
<i>State v. Boland</i> , 115 Wn.2d 571, 800 P.2d 1112 (1990).....	6, 7, 10
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)	6
<i>State v. Jackson</i> , 150 Wn.2d 251, 76 P.3d 217 (2003)	3, 5, 17
<i>State v. Myrick</i> , 102 Wn.2d 506, 688 P.2d 151 (1984).....	3
<i>State v. Nettles</i> , 70 Wn. App. 706, 855 P.2d 699 (1993).....	7
<i>State v. Rankin</i> , 151 Wn.2d 689, 92 P.3d 202 (2004).....	3
<i>State v. Reynolds</i> , 144 Wn.2d 282, 27 P.3d 200 (2001)	7, 8
<i>State v. Young</i> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	3, 5

Constitutional Provisions

Wash. Const. art. 1, § 7.....	passim
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Other Authorities

Anne Lederberg, <i>Marked for Life</i> , Sci. World, Mar. 9, 1998	9
David Concar, <i>Fingerprint Fear</i> , New Scientist (May 2, 2001) < http://www.newscientistspace.com/article/dn694 >	13
David Ewing Duncan, <i>DNA as Destiny</i> , Wired Magazine, Nov. 2002	11

Dean Hamer et al., <i>A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation</i> , 261 <i>Science</i> 321 (1993).....	11
Elizabeth E. Joh, <i>Reclaiming “Abandoned” DNA: The Fourth Amendment and Genetic Privacy</i> , 100 <i>Nw. U. L. Rev.</i> (forthcoming 2006) < http://ssrn.com/abstract=702571 >.....	2
Erik Stokstad, <i>Violent Effects of Abuse Tied to Gene</i> , 297 <i>Science</i> 752 (2002).....	11
<i>Forensic Paternity</i> (visited Dec. 4, 2005) < http://www.paternityexperts.com/forensic.html >.....	10
National Commission on the Future of DNA Evidence, National Institute of Justice, <i>What Every Law Enforcement Officer Should Know About DNA Evidence</i> (1999)	8, 9
Pamela Sankar, <i>Topics for our times: The proliferation and risks of government DNA databases</i> , 87 <i>Am. J. Pub. Health</i> 336 (1997)	13
Phoebe Zerwick, <i>New Suspect, New Clues</i> . Winston-Salem Journal, Dec. 21, 2003	12
Rachel Ross, <i>A Trail of Genetic Evidence Follows Us All</i> , <i>Toronto Star</i> , Feb. 2, 2004, at D03	9
Ricki L. Rusting & Mia Schmiedeskamp, <i>Hair: Why it grows, why it stops</i> , <i>Sci. Am.</i> , Jun. 1, 2001	9

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

STATEMENT OF THE CASE

This case asks whether it is constitutional for law enforcement officers to collect and analyze DNA samples from a suspect without a warrant.¹

Mr. Athan was a potential suspect in a cold case for which DNA evidence had recently been isolated. To obtain a DNA sample from Mr. Athan to compare with the evidence, the police sent him a letter, posing as a law firm. When Mr. Athan sent a letter in response, the police obtained a DNA sample from the dried saliva where Mr. Athan had licked the

¹ The parties devote much of their argument to the question of whether law enforcement is allowed to pose as a law firm. The ACLU agrees with Mr. Athan and other *amici* that such impersonation of attorneys is outrageous conduct that imperils the integrity of the justice system. In this brief, however, we address only the question of DNA collection and analysis, which has a much wider impact on the public.

envelope. Apparently, these detectives routinely collect and analyze people's DNA without judicial authorization; a ruse was only used in this case because "the police could not employ their *usual methods* of obtaining a clandestine sample of his DNA." Brief of Respondent at 9 (emphasis added).

Upon finding a match between that sample and the DNA evidence, the police arrested and charged Mr. Athan. He moved to suppress the DNA sample. The trial court denied the motion, and Mr. Athan was subsequently convicted. This Court granted direct review to determine whether the DNA sample was obtained illegally.

ARGUMENT

Notwithstanding the argument over impersonation of a law firm, at its heart the issue raised in this case is quite basic: May people participate in daily modern life, including normal activities such as sending letters through the mail, without the fear that traces of their activity will be subjected by the government to sophisticated biotechnological processes to extract and analyze their DNA?

This is a case of first impression in Washington, and possibly the nation. The question is just now beginning to receive attention in the academic legal literature. *See, e.g.*, Elizabeth E. Joh, *Reclaiming*

"Abandoned" DNA: The Fourth Amendment and Genetic Privacy, 100 Nw. U. L. Rev. (forthcoming 2006) <<http://ssrn.com/abstract=702571>>. In Washington, the answer will be found under Article 1, Section 7 of the Washington Constitution, which guarantees that "[n]o person shall be disturbed in his private affairs." It is well settled that Article 1, Section 7 protects individual privacy rights more than the Fourth Amendment, so no *Gunwall* analysis is needed. *See, e.g., State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). Since the facts are undisputed, this Court reviews *de novo* whether Article 1, Section 7 has been violated. *See id.*

The proper analysis under Article 1, Section 7 "focuses on those privacy interests which citizens of this state have held, and should be entitled to hold," regardless of "advances in surveillance technology." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984); *see also State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994); *State v. Jackson*, 150 Wn.2d 251, 260, 76 P.3d 217 (2003). Surreptitious collection of DNA samples by the government fits this standard perfectly. DNA reveals a vast amount of highly private information, implicating not only identity, but also present and possible future medical conditions—information that can be detected from minute samples. It is virtually impossible for an individual to physically protect his DNA without retreating entirely from modern life. Article 1, Section 7 is the bulwark that protects the privacy of

Washington citizens from the indiscriminate use of such invasive technology.

A. There Is a Privacy Interest in DNA on Envelopes

The State does not deny that one's DNA is normally part of one's private affairs. Instead, it advances three related theories why Mr. Athan had no privacy interest in the DNA from his dried saliva where he licked the envelope: the DNA was "voluntarily exposed" to the public; the DNA was provided to a third party; and Mr. Athan voluntarily abandoned his DNA. Brief of Respondent at 12-16. None of these theories withstands scrutiny.

1. Licking an Envelope Does Not Voluntarily Expose One's DNA to the Public

The State argues that Athan voluntarily exposed his DNA to the public, and thus had no privacy interest in it, once he licked the envelope and mailed it. Brief of Respondent at 12-16. This formalistic view disregards social and physiological reality. When a person sends a letter, he or she reasonably expects whatever is written on the outside of the envelope to be seen by many people, and also reasonably expects the recipient to open the envelope, and *see* anything inside, especially the contents of the enclosed letter. But that is *all* that is expected. There is no

expectation, nor should there be, that the envelope is going to be delivered to a DNA lab, and subjected to biotechnological procedures, using expensive and advanced equipment. to extract DNA samples.

This Court confronted a similar use of advanced technology a decade ago in the form of a thermal imaging device. *See State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994). *Young* clarified that an object is only “voluntarily exposed” when the object is “observable without the use of enhancement devices.” *Id.* at 182. Gathering information by means of “a particularly intrusive method of viewing” could constitute a violation of Article 1, Section 7. *Id.* Since thermal imaging “goes well beyond an enhancement of natural senses” (unlike binoculars) and enables surreptitious surveillance. its use is “particularly invasive.” *Id.* at 183.

More recently, the advanced technology at issue was a GPS tracking device. *See State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003). Extending the *Young* principles beyond the home, the Court held that warrantless use of such advanced surveillance technology was a violation of Article 1, Section 7. Even though the technology only provided a record of movements made outside the home, it was nonetheless unconstitutionally intrusive because it enabled secret surveillance. In essence, *Jackson* reiterated that “voluntary exposure to the public” means exposure to an ordinary member of the public not equipped with unusual

technology. Hence, DNA on an envelope flap is not voluntarily exposed to the public, since it is only accessible via the use of very advanced technology that generates information that could not otherwise ever be perceived by the natural senses.

2. Sending a Letter Does Not Relinquish Privacy Rights in DNA

The State also cites cases dealing with “disclosure to a third party,” which is really just a variant of “exposure to the public.” Brief of Respondent at 12-16. It is well settled that one does not lose reasonable expectations of privacy simply because one surrenders control of property or delivers it to a third party for a particular limited purpose. *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) (a caller retains privacy interest in telephone dialing information after it is provided to the telephone company); *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990) (privacy interest exists in garbage left at the curb for collection); *see also In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 945 P.2d 196 (1997) (recognizing privacy interest in electrical consumption records).

The unifying theme in all of these cases is that Washingtonians are entitled to participate in activities “necessary to the proper functioning of modern society”—including such activities as using electricity, telephones

and garbage collection—without sacrificing their privacy rights or fearing governmental use of advanced technologies against them. *Boland*, 115 Wn.2d at 581. Sending a routine letter, especially to what one believes to be a law firm, must fall into the same category; communications to a lawyer are at least as protected as the information incidentally revealed to a telephone company or garbage collector. One should be entitled to send a letter without it being deemed a waiver of privacy rights in whatever DNA may adhere to that letter, whether in dried saliva on the flap or in a few dead skin cells sloughed off and falling within the envelope.

3. DNA Is Not Voluntarily Abandoned

The State's final theory is that Mr. Athan voluntarily abandoned his DNA by licking the envelope and sending it. This theory is immediately refuted by *Boland*. Sending a letter is no more an act of abandonment than is placing garbage at the curb to be collected.

To support its theory, the State cites cases dealing with voluntary abandonment of relatively large, tangible, pieces of property that could be observed by any bystander using their unassisted senses. *See State v. Reynolds*, 144 Wn.2d 282, 27 P.3d 200 (2001) (coat containing methamphetamine and drug paraphernalia); *State v. Nettles*, 70 Wn. App. 706, 855 P.2d 699 (1993) (baggie of cocaine). Leaving this type of object

unattended in a public place is far different than the routine shedding of invisible and microscopic samples of genetic information.

Most significantly, neither of those cases questioned whether the item at issue had actually been abandoned; all sides conceded abandonment—in *Reynolds*, the defendant explicitly denied ownership of the coat. The only question was whether that abandonment was in response to illegal police conduct. By contrast, the DNA in the present case was not abandoned at all.

Abandonment cannot be determined unless supported “by clear, unequivocal and decisive evidence.” *Shew v. Coon Bay Loafers, Inc.*, 76 Wn.2d 40, 50, 455 P.2d 359 (1969). The primary element of abandonment “is an actual intent to relinquish or part with the right or rights claimed to be abandoned.” *Id.* Mr. Athan demonstrated no intent to relinquish his privacy rights in his DNA: he merely intended to send a letter.

Extension of the abandonment doctrine to the extent urged by the State threatens the privacy of all Washingtonians. DNA is present in “virtually every cell in the human body.” National Commission on the Future of DNA Evidence, National Institute of Justice, *What Every Law Enforcement Officer Should Know About DNA Evidence 2* (1999). Not many cells are needed to create a DNA profile; even with today’s technology, “only a few cells can be sufficient to obtain useful DNA

information.” *Id.* at 3; *see also* Rachel Ross, *A Trail of Genetic Evidence Follows Us All*, Toronto Star, Feb. 2, 2004, at D03 (less than one billionth of a gram “is all that’s required for a good sample”). One can only assume that the sample size needed will continue to shrink in the coming years.

Unlike the objects at issue in the above cases, body cells are routinely “abandoned” by humans all the time, certainly in sufficient quantity to be the microscopic amount necessary for DNA analysis. “Everywhere we go, doing anything we do, we leave behind a trail of genetic evidence: cells that are naturally shed over time.” Ross, *supra*. For example, the average human sheds over one million skin cells—each containing DNA—every hour. Anne Lederberg, *Marked for Life*, *Sci. World*, Mar. 9, 1998, at 9. Similarly, the average person sheds over 50 hairs each day. Ricki L. Rusting & Mia Schmiedeskamp, *Hair: Why it grows, why it stops*, *Sci. Am.*, Jun. 1, 2001, at 71. And only one of these 50—a single hair, even without the root— is sufficient to extract DNA. National Commission on the Future of DNA Evidence, *supra*, at 3. Other normal bodily processes, ranging from urination to bleeding from a scratch to sneezing or blowing one’s nose, produce larger DNA samples. None of this can realistically be described as “voluntary” abandonment; most is largely involuntary, and preventing these cells from escaping would require living in a bubble suit.

It must be emphasized that the concern about so-called “abandoned” DNA is far from hypothetical, or limited to a few, rare instances. Already, consumer-level DNA testing is common (and relatively inexpensive), and can be done with a wide variety of seemingly-innocuous objects from daily life. For example, one provider, Paternity Experts, offers to extract DNA from such objects as Band Aids, feminine products, diabetic glucose sticks, hair, dentures, toothbrushes, baseball caps, razors (both electric and manual), toothpicks, inhalers, dried saliva, Christmas cards or other envelopes (as here), used Kleenex, ear wax, cigarette butts, chapstick, gum, dental floss, and urine. *Forensic Paternity* (visited Dec. 4, 2005) <<http://www.paternityexperts.com/forensic.html>>. Presumably, advanced forensics laboratories are capable of extracting DNA from even smaller or more inconspicuous items.

Under the State’s theory, a person has no privacy interest in the DNA on any of these (often disposable) objects once discarded. Indeed, the State seems to believe that a person using a public restroom does so at his or her own risk that the government may have rerouted the plumbing to divert urine or fecal matter for DNA extraction! This is entirely contrary to this Court’s holding that Washingtonians are entitled to participate in activities “necessary to the proper functioning of modern society” without sacrificing their privacy rights. *Boland*, 115 Wn.2d at 581.

B. Genetic Information Is Highly Sensitive

There can be no question about the sensitivity of genetic information—information that the State argues they have a right to collect without a warrant, probable cause, or any judicial supervision. Unlike a fingerprint, a DNA sample contains far more information about an individual than mere identity. With current technology, DNA reveals a huge array of information, including both known and unknown medical conditions. And it reveals this information not just about the person whose DNA it is, but that person's family as well. Scientists regularly discover new uses for DNA analysis. Even though the police used the dried saliva in this case only to derive an identification profile, the State's theory would place no restrictions on how biological samples are used once they are gathered.

As of today, there are known links between one's DNA and a variety of medical conditions, including cancer, Alzheimer's disease, heart disease, and schizophrenia. *See, e.g.,* David Ewing Duncan, *DNA as Destiny*, *Wired Magazine*, Nov. 2002. DNA is also linked to personality traits. *See, e.g.,* Erik Stokstad, *Violent Effects of Abuse Tied to Gene*, 297 *Science* 752 (2002) (violence gene). Some researchers believe sexual orientation is associated with genetic makeup. *See, e.g.,* Dean Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male*

Sexual Orientation, 261 *Science* 321 (1993). DNA would reveal the birth gender of a post-operative transsexual. And, of course, physical characteristics of an individual, including racial and ethnic background, are closely tied to DNA—which may in turn implicate religious beliefs since there is a high correlation between some ethnic groups and religions. Since the technology and scientific research continues to evolve, it is simply impossible to predict how much information will eventually be able to be deduced about an individual solely from his or her genetic makeup.

The intrusion caused by the extraction and analysis of DNA is not simply an intrusion into the subject's own private affairs; it is also an intrusion into the private affairs of all of that person's relatives, since their genetic makeups are linked. This is not hypothetical speculation; DNA databases are already being searched for "near matches" to identify new suspects. *See, e.g.,* Phoebe Zerwick, *New Suspect, New Clues*, *Winston-Salem Journal*, Dec. 21, 2003. And, of course, besides identification, all of the other potential uses of genetic information (e.g., examination of potential medical conditions) also intrude into the relative's private affairs.

All of this sensitive information is at risk if warrantless collection of DNA is permitted. Indeed, history provides reason for us to fear that DNA samples collected for one purpose (such as identification) will soon

be used for other purposes if no restrictions are placed on their collection and analysis. A few years after the military began collecting DNA samples from soldiers solely for identification purposes, it was already considering proposals to allow medical researchers to use those samples. See Pamela Sankar, *Topics for our times: The proliferation and risks of government DNA databases*, 87 Am. J. Pub. Health 336, 337 (1997). Nor should we be reassured by a claim that identification profiles from DNA use only so-called “junk” DNA segments, with no medical or other significance. Already, scientists have discovered a link between a segment of DNA widely used for identification profiles and susceptibility to Type 1 diabetes; even the inventor of DNA identification technology now “believes further troubling links between DNA fingerprints and disease will emerge as scientists probe the completed draft of the human genome.” David Concar, *Fingerprint Fear*, New Scientist (May 2, 2001) <<http://www.newscientistspace.com/article/dn694>>.

Under the State’s theory, there would be no limit on governmental collection and use of highly sensitive DNA information. The government could freely analyze DNA it obtained without judicial authorization for any purpose it desired, not just identification. The results could be stored in a databank, creating over time a complete genetic profile of every Washingtonian—all compiled without authority of law. If the State’s

position is correct, one wonders why there is legislative and judicial debate over the constitutionality of compulsory DNA collection from some people (e.g., convicted felons); the government could easily create the same DNA database simply by collecting DNA routinely “abandoned” by these individuals.

C. Effective Law Enforcement Use of DNA Does Not Require Intrusion Into Private Affairs

There can be no doubt that DNA identification technology has been one of the great developments in criminal forensic science. Many crimes have been solved by matching DNA found at a crime scene with the DNA of suspects. And many other innocent individuals have been cleared of suspicion or exonerated after conviction when their DNA has been found not to match the evidence. Both of these results—rightful conviction of the guilty, and exoneration of the innocent—must be applauded by anyone committed to the cause of justice. Neither of them need rely on the surreptitious collection of DNA by ruses or scavenging.

The single most important source of DNA for analysis is the crime scene. Police can freely collect all evidence from a crime scene *without* implicating anyone’s privacy interests. At the time it is found at a crime scene, DNA is not associated with a particular individual; instead, it is associated with the crime itself, and a yet-to-be-determined perpetrator.

Since it is not associated with anyone, nobody has a privacy interest in this DNA—an individual only has a privacy interest in items associated with that individual.

It is only when obtaining a DNA sample from a suspect for the purpose of matching the DNA found at a crime scene that privacy interests come into play. Naturally, this does not mean that criminal investigations must come to a screeching halt. Instead, police detectives have a variety of ways to proceed. They can interview the suspect and ask for a voluntary DNA sample. Or, if they have probable cause to believe the suspect is associated with the crime, they can ask a magistrate to issue a warrant to collect DNA from the suspect, either through open compulsion or by surreptitious means—exactly the same rules as apply to other evidence.

The *only* path barred to the police is intrusion into the private affairs of suspects by collecting and analyzing their DNA without judicial authorization. Judicial oversight is necessary to protect the privacy interests of individuals and to rein in overzealous police tactics. The present case, where the police pursued the legally suspect method of impersonating a law firm, amply demonstrates the problems that may result from proceeding without judicial oversight. Had the police brought a request for a warrant before a judge, at the very least the judicial review would have channeled the police investigation into methods with less

hazardous public policy consequences for the relationship between lawyers and clients.

CONCLUSION

This is not the first time this Court has been asked to examine the interplay between Article 1, Section 7 and the indiscriminate use of new, sophisticated technologies. Just two years ago, the technology at issue was GPS tracking devices:

If police are not required to obtain a warrant under article I, section 7 before attaching a GPS device to a citizen's vehicle, then there is no limitation on the State's use of these devices on any person's vehicle, whether criminal activity is suspected or not. The resulting trespass into private affairs of Washington citizens is precisely what article I, section 7 was intended to prevent. It should be recalled that one aspect of the infrared thermal imaging surveillance in *Young* that troubled us was the fact that if its use did not require a warrant, there would be no limitation on the government's ability to use it on any private residence, at any time, regardless of whether criminal activity is suspected.


As with infrared thermal imaging surveillance, use of GPS tracking devices is a particularly intrusive method of surveillance, making it possible to acquire an enormous amount of personal information about the citizen under circumstances where the individual is unaware that every single vehicle trip taken and the duration of every single stop may be recorded by the government.

We conclude that citizens of this State have a right to be free from the type of governmental intrusion that occurs when a GPS device is attached to a citizen's vehicle, regardless of reduced privacy expectations due to advances in technology.

Jackson, 150 Wn.2d at 263-64 (citations omitted). The same dangers posed by warrantless use of GPS tracking devices are present with warrantless DNA collection and analysis; the only difference is the exact nature of the sensitive and private information at risk.

For the foregoing reasons, the ACLU respectfully requests the Court to reverse the trial court and hold that warrantless collection and analysis of DNA samples from individuals is an unreasonable governmental intrusion into private affairs, and violates Article 1, Section 7 of the Washington State Constitution.

Respectfully submitted this 19th day of December 2005.

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