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The Piranha is as Deadly as the Shark: A Case for the Limitation on Deceptive Practices in DNA Collection

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THE PIRANHA IS AS DEADLY AS THE SHARK: A CASE FOR THE LIMITATION ON DECEPTIVE PRACTICES IN DNA COLLECTION

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INTRODUCTION

Police deception tactics are utilized throughout the United States as a way to catch unsuspecting criminals.\textsuperscript{2} Although criticized in many respects, most deceptive police techniques are not only legal, but are actually encouraged.\textsuperscript{3} Deoxyribonucleic acid (“DNA”) collection and analysis is no exception—techniques are frequently used by law enforcement officers in an effort to collect a suspect’s genetic specimen without having to conform to the requirements of the Fourth Amendment’s warrant clause.\textsuperscript{4} While some police deception tactics may be required in order to maintain a safe society, DNA deception tactics circumvent the protections embodied within the Fourth Amendment.\textsuperscript{5} To be sure, courts have been upholding these warrantless searches by utilizing various exceptions to the warrant requirement.\textsuperscript{6}

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\textsuperscript{2} \textit{See infra} Part II.A.

\textsuperscript{3} \textit{See infra} Part II.A.

\textsuperscript{4} \textit{See infra} Part II.B.

\textsuperscript{5} \textit{See infra} Part III.

\textsuperscript{6} \textit{See infra} Part III.
This Note argues that DNA deception tactics, as employed today, violate the Fourth Amendment. Part I discusses the significance of DNA in the law enforcement context, the inception of the Fourth Amendment, and two frequently applied exceptions. Part II discusses deceptive techniques used for DNA collections and three particular cases involving these tactics where courts have analyzed and upheld such searches. Part III argues that the Fourth Amendment exceptions which courts are utilizing when upholding DNA collection and analysis through police trickery are misguided. Finally, Part IV proposes the abandonment of the totality of the circumstances test in cases where DNA is collected absent a warrant and through fraudulent methods. Further, Part IV proposes a bright-line rule which would provide guidance to law enforcement officers, the courts, and society as a whole.

I. Background

A. DNA and How is it Useful to Law Enforcement

DNA is a component of every cell in the human body and contains an individual’s entire genetic makeup. While the chemical structure in everyone’s DNA is the same, the order of the chemical bases is different in all people. These bases pair up with each other to form what is

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7 See infra Part III.


called base pairs. Every person can be identified by the sequence of their base pairs; however, because there are millions of base pairs (the analysis of which would be a time-consuming procedure), scientists are able to use a shorter method that analyzes repeating patterns of DNA.

This method—whereby scientists can analyze a select set of DNA base pairings that typically vary among individuals is sufficient to search for matches and to determine whether two DNA samples are from the same person, related people, or non-related people.

DNA samples contain a multitude of information regarding an individual. This information is not limited to the identity of an individual; rather, it also can contain private information such as familial lineage or a person’s predisposition to genetic disorders. In


10 NATIONAL INSTITUTES OF HEALTH, supra note 9. The chemical bases pair up in base pairs: the adenine with the thymine and the guanine with the cytosine. Id. It is “[t]he order, or sequence, of these bases [that] determines the information available for building and maintaining an organism, similar to the way in which letters of the alphabet appear in a certain order to form words and sentences.” Id.

11 What is DNA Fingerprinting?, supra note 9.

12 Id.

13 Id.


15 Id. at 188; Elizabeth E. Joh, Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy, 100 NW. U. L. REV. 857, 878 (2006).
addition, DNA samples also contain genetic markers for different traits such as aggression, substance abuse, sexual orientation, and an individual’s criminal disposition.\textsuperscript{16}

DNA typing or fingerprinting, the method which scientists extract and identify those genes that differ among individuals,\textsuperscript{17} has revolutionized forensic science and law enforcement techniques.\textsuperscript{18} Law enforcement began analyzing DNA samples and using it as a tool in the 1980s.\textsuperscript{19} Since DNA is found in every cell of the human body, it is particularly useful to law enforcement because it can be extracted from blood, skin tissue, saliva, hair, and bone.\textsuperscript{20} Additionally, DNA is a powerful tool because every individual’s DNA differs with the exception of identical twins so “DNA collected from a crime scene can either link a suspect to the evidence or eliminate a suspect.”\textsuperscript{21} Criminals in the United States are linked to DNA evidence found at crime scenes throughout the country by way of a national database.\textsuperscript{22} DNA is an effective tool

\textsuperscript{16} Harlan, \textit{supra} note 14, at 187-88.

\textsuperscript{17} \textit{See} \textbf{John M. Butler, Forensic DNA Typing, Biology, Technology, and Genetics of STR Markers} 2-3 (2d ed. 2005).

\textsuperscript{18} \textit{Id.} at 2.


\textsuperscript{21} \textbf{DNA Initiative, supra} note 8.

\textsuperscript{22} \textit{Id.}
because crimes once thought to be unsolved can be reopened using preserved DNA evidence that can survive for decades when stored under the right conditions.\textsuperscript{23}

B. \textit{A Brief Fourth Amendment Historical Overview}

The Fourth Amendment of the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\textsuperscript{24}

The Framers of the Fourth Amendment enacted the Fourth Amendment in response to various English legal practices and abuses perpetrated upon the citizens of England in an effort to police activities Parliament deemed illegal.\textsuperscript{25} One such practice was the crown’s issuance of warrants and writs of assistance, which “were issued without any suspicion of illegal activity and permitted those holding a writ to go anywhere they chose.”\textsuperscript{26} Officers were allowed to “enter into any vessel, house, warehouse, or cellar, search in any trunk or chest and breach any bulk whatsoever.”\textsuperscript{27} Law enforcement officers—without any system of verification by neutral

\begin{flushright}
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\textsuperscript{23} See id.\\
\textsuperscript{24} U.S. CONST. amend. IV.\\
\textsuperscript{25} See THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 27 (2008).\\
\textsuperscript{26} Id. at 28.\\
\textsuperscript{27} Id. at 28-29 (citing NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 30 (1937)) (alterations in original) (internal quotation marks omitted).
\end{flushright}
magistrates—imprisoned many people, their homes and persons were searched, and their items
seized.28

Following American Independence, many states adopted protections against
unreasonable searches and seizures in their constitutions.29 After the Articles of Confederation
failed,30 Antifederalists resisted ratification of a Constitution absent amendments protecting the
rights of people (the Bill of Rights).31 The Fourth Amendment, modeled after Article Fourteen of
the Massachusetts Declaration of Rights of 1780, was later enacted by both Houses of Congress
and ratified by the states to protect citizens against unreasonable searches and seizures.32

C. Fourth Amendment Jurisprudence

28 Id. at 29. This led to the writs of assistance cases where James Otis advocated for a group of
Boston merchants in opposition to the suspicionless writs. Id. at 32. Although Otis lost this case,
his speech was regarded as the first link in a chain of events which led to the American
Revolution. Id. at 34; Parker P. Simons, James Otis’s Speech on the Writs of Assistance 2
(Albert Bushnell Hart & Edward Channing, eds., 1906).

29 Clancy, supra note 25, at 38.

30 For an interesting discussion on the failures of the Articles of Confederation, see Emerson
David Fite, History of the United States 166-78 (2d ed. 1919).

31 Otis H. Stephens & Richard A. Glenn, Unreasonable Searches and Seizures: Rights
And Liberties Under the Law 47-48 (2006). For a brief history on Antifederalist opposition,
who they were, and what they stood for, see David J. Siemers, The Antifederalists: Men of

32 Clancy, supra note 25, at 41-42.
When a government official or agent intrudes upon an individual’s expectation of privacy, that intrusion may constitute a search and seizure under the Fourth Amendment. An individual has a privacy interest in their “persons, houses, papers, and effects.” An individual’s right to be secure in their “persons” includes the physical integrity of a person meaning “human dignity and privacy.” A person’s right to be secure in their “houses” is a right against unreasonable government intrusion into a home—one of the most sacred places of an individual. Someone’s right to be secure in their “papers” includes any documents, writings,

33 See Katz v. United States, 389 U.S. 347, 351-52 (1967). Originally, the Supreme Court defined Fourth Amendment rights in terms of property rights. CLANCY, supra note 25, at 469. However, in 1967, following the Supreme Court’s ruling in Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, it was found that the Fourth Amendment was premised largely on privacy and not property. CLANCY, supra note 25, at 470.

34 U.S. CONST. amend. IV.; see Warden, 387 U.S. at 301.

35 THOMAS K. CLANCY, supra note 25, at 120; see also Schmerber v. California, 384 U.S. 757, 767-68 (1966). Courts have found that searches of persons include: having an individual open their mouth for inspection, requiring a government employee to submit to urine analysis, extracting a blood sample from a driver for intoxication analysis, collecting fingernail scrapings, and collecting breath samples for field sobriety tests. 1 PETER J. HENNING ET AL., MASTERING CRIMINAL PROCEDURE: THE INVESTIGATIVE STAGE 31 (2010).

records, and computer files. Finally, “effects” constitute any personal property not deemed real property. There are two ways in which the government can intrude upon an individual’s effects that violates the Fourth Amendment: (1) where “a seizure implicates a person’s right to possess the effect”; and (2) where “a search implicates the person’s reasonable expectation of privacy in that object.”

The Supreme Court has recognized that a search occurs for Fourth Amendment purposes where police intrude on an individual’s subjective expectation of privacy that society is willing to recognize as reasonable (“Katz test”). If a police officer or government agent pursues an individual’s belongings absent a warrant, the Court will forbid admission (absent the “good faith exception”) of the seized property into evidence against the defendant at trial, a remedy

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37 CLANCY, supra note 25, at 139.

38 Id. at 140. Effects include such tangible property as clothing, toothbrushes, vehicles, and other like objects, but do not include illegal contraband. Id.

39 Id. (citing United States v. Karo, 468 U.S. 705, 712 (1984)).

40 Id. (citing United States v. Jacobsen, 466 U.S. 109, 114 (1984)).


42 MICHAEL A. PETRILLO, CONSTITUTIONAL POLICE PROCEDURE 92 (2010). The “good faith exception” says that if an officer performed a search pursuant to a defective search warrant, the evidence will not be suppressed so long as the officer was acting in good faith. Id.; see, e.g. United States v. Leon, 468 U.S. 897, 920-22 (1984).
referred to as the exclusionary rule. Excluded evidence used to obtain a warrant will be precluded as “fruits of the poisonous tree.”

A subjective expectation of privacy is dictated by the facts of each case and the inquiry involves asking whether such a person had an actual expectation of privacy. If a person takes reasonable measures to protect an item or communications from public exposure, then such action will be deemed to meet the first prong of the Katz test. However, if such information is

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43 See Weeks v. United States, 232 U.S. 383, 392 (1914), overruled on other grounds by Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule is proper remedy under the Fourth Amendment to illegal searches carried out by government agents); see also Mapp, 367 U.S. at 655 (exclusionary rule of the Fourth Amendment binding on the states through the Fourteenth Amendment).

44 See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920); see also Mark S. Bransdorfer, Miranda Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine, 62 IND. L.J. 1061, 1100 n.6 (1987) (“Illegally obtained evidence (the poison tree) is sometimes used to generate derivative evidence (the poison fruit). Since the poison tree's first generation evidence must be suppressed, the fruit of the poisonous tree doctrine argues that derivative generation evidence should also be suppressed.”).

45 Compare Katz, 389 U.S. at 353 (listening to defendant’s conversations in a phone booth violated his expectation of privacy in that booth), with California v. Greenwood, 486 U.S. 35, 40 (1988) (no expectation of privacy where a person places garbage bags on the curb for pickup and knowingly exposes it to the public).

46 HENNING, supra note 35, at 27.
not protected from public exposure, the first prong will not be satisfied, the government action will not be deemed a search, and the Fourth Amendment inquiry ends there.\textsuperscript{47}

If a person has a subjective expectation of privacy, the Court must next determine whether society is willing to recognize this expectation of privacy as reasonable,\textsuperscript{48} evaluating it under traditional standards of reasonableness.\textsuperscript{49} If society is willing to recognize the subjective expectation as reasonable, then it is deemed a search.\textsuperscript{50} The court will then evaluate whether the government action—the warrantless search or seizure—is reasonable.\textsuperscript{51} In determining whether a search is reasonable under the Fourth Amendment within the deception context, the totality of the circumstances test is the test primarily utilized by the courts to uphold DNA collection.\textsuperscript{52} The totality of the circumstances test determines reasonableness “by assessing, on the one hand, the

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{See} United States v. Knights, 534 U.S. 112, 118 (2001); \textit{see also} United States v. Knotts, 460 U.S. 276, 281 (1983) (concluding that a person has no reasonable expectation of privacy when driving on a public thoroughfare).

\textsuperscript{49} Wyoming v. Houghton, 526 U.S. 295, 299 (1999); \textsc{Henning}, \textit{supra} note 41. This objective reasonableness is not a yes-or-no determination and appears to include a continuum of privacy expectations taking into consideration such things as the status of the individual and the type of evidence gathered. \textit{Id.} at 6.

\textsuperscript{50} \textsc{Henning}, \textit{supra} note 41, at 6.

\textsuperscript{51} \textit{Id.} (citing \textit{Knights}, 534 U.S. at 118).

\textsuperscript{52} \textit{See, e.g.}, United States v. Mitchell (\textit{Mitchell II}), 652 F.3d 387, 402-03 (3d Cir. 2011); State v. Athan, 158 P.3d 27, 36 ¶ 32 (Wash. 2007).
degree to which [a search or seizure] intrudes upon an individual's privacy and, on the other, the
degree to which it is needed for the promotion of legitimate governmental interests.”

Except in well-defined circumstances, searches and seizures absent a judicial warrant
based upon probable cause are deemed unreasonable. Such exceptions include, but are not
limited to, a search incident to an arrest and items in plain view. However, in those
circumstances, the government interests are balanced against the privacy interests of the
individual to assess whether the search is reasonable. Although society may demand that
individuals give up certain rights to further society’s interests in advancing law enforcement,

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53 HENNING, supra note 41, at 7 (quoting Samson v. California, 547 U.S. 843, 848 (2006)).
54 See BLACK’S LAW DICTIONARY 1321 (9th ed. 2009) (defining probable cause as “[a]
reasonable ground to suspect that a person has committed or is committing a crime . . . . [it]
amounts to more than a bare suspicion but less than evidence that would justify a conviction”).
includes a search of the person as well as the immediate area where the arrest took place. Seth
57 See Warrantless Searches and Seizures, 37 GEO. L.J. ANN. REV. CRIM. PROC. 39, 68-72
(2008). As long as officers are lawfully in a place (such as through the execution of search
warrant, arrest warrant, or a valid warrantless search) anything incriminating they can see in
plain view is subject to seizure. Id. at 68-69.
58 Skinner, 489 U.S. at 619 (citations omitted).
when such a forfeiture of rights implicates individuals’ expectations of privacy to such a considerable degree, the intrusion may be unreasonable.\textsuperscript{59}

\section*{D. Consent to a Search and the Scope of Such a Search}

Police frequently use consent as a means to search an individual’s person, home, papers, and effects, bypassing the warrant clause of the Fourth Amendment.\textsuperscript{60} Many police officers consider consent an easy alternative to the procedural constraints of a warrant.\textsuperscript{61} Further, consent reduces the risk of evidence being suppressed pursuant to the exclusionary rule.\textsuperscript{62} Thus, it is deemed as “[t]he most important tool in a police officer’s arsenal against crime . . . . [since it] need not be supported by any quantity of cause or any individual suspicion.”\textsuperscript{63} However, even


\textsuperscript{60} \textit{See} 4\textsc{ }\textsc{Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment} \textsection 8.1, at 4 (4th ed. 2004).

\textsuperscript{61} \textit{Id.} at 4-5.

\textsuperscript{62} \textit{Id.} at 4-5. “The exclusionary rule provides that any evidence obtained by the government in violation of the Fourth Amendment guarantee against unreasonable search and seizure is not admissible in a criminal prosecution to prove guilt.” \textsc{Rolando V. del Carmen, Criminal Procedure: Law and Practice} 92 (8th ed. 2010). “[T]he primary purpose of the exclusionary rule is to \textit{deter police misconduct.”} \textit{Id.} at 93 (emphasis in original). There are eight situations where the exclusionary rule does not apply when police do not follow protocol: violations of the “knock and announce” rule; searches conducted by non-governmental entities; grand jury investigations; sentencing; probable cause arrests that violate state law; violations of agency rules; noncriminal proceedings; parole revocation hearings. \textit{Id.} at 111.

\textsuperscript{63} \textsc{Ronald F. Becker, Criminal Investigation} 93 (3d ed. 2009).
when police have probable cause to obtain a warrant, consent is still seen as a better solution with an added benefit—when the consenting party does not condition or limit the consent, the search following the consent can be much more expansive than that given pursuant to a warrant. \(^{64}\) Also, consent cures any defect in the search that does not rise to the level of probable cause, or even if probable cause is altogether lacking. \(^{65}\) Thus, seeking and obtaining an individual’s consent is often times attractive to police officers. \(^{66}\)

For consent to be valid, it must be voluntary and free of coercion or duress. \(^{67}\) If consent is valid, the next question becomes: What is the authority or scope granted by the individual who consented to the search? \(^{68}\) This inquiry is not focused upon the subjective state of the individual or the officer performing the search; rather, it “is that of ‘objective’ reasonableness—what would a reasonable person have understood by the exchange between the officer and the suspect?” \(^{69}\) When an individual fails to limit the scope of a search—failing to object when the search exceeds that of which he subjectively consented to—the objective reasonableness standard dictates that the search was within the scope of consent, no matter how broad the search

\(^{64}\) LAFAVE, supra note 60, at 5.

\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) See Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (“[T]he question whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.”).

\(^{68}\) See supra note 60, § 8.1(c), at 19.

becomes. However, silence alone is not construed as an expansion of an otherwise limited consent; rather, the “expressed object” usually defines the scope of consent.  

There are also limits to the consent to search a person. The principle that the expressed object defines the scope of the search cannot be literally applied to searches of a person. For instance, a pat-down does not include an extensive search of a person’s body. Similarly, consent to generally search the person for the presence of drugs does not extend to a search of everything including an individual’s body cavities.

The most common limitation on the scope of consent to search is the purpose of the search. Government agents may not obtain consent to search for particular items and use that

70 United States v. Gordon, 173 F.3d 761, 766 (10th Cir. 1999). It should be noted neither silence nor failure to object constitutes that consent was given. FEDERAL BUREAU OF INVESTIGATION, LEGAL HANDBOOK FOR SPECIAL AGENTS § 5-4.9, at 20 (photo. Reprint 2003), available at http://vault.fbi.gov/Legal%20Handbook%20for%20FBI%20Special%20Agents; see also CARMEN, supra note 62, at 208. However, when general consent is given, “failure to object when the search exceeds what [a person] later claims was a more limited consent, is an indication the search was within the scope of consent.” Gordon, 173 F.3d at 766 (citations omitted).

71 LAFAVE, supra note 60, § 8.1(c), at 20.

72 Jimeno, 500 U.S. at 251.

73 LAFAVE, supra note 60, § 8.1(c), at 28.

74 Id.

75 Id.


77 LAFAVE, supra note 60, § 8.1(c), at 32.
consent to conduct a general exploratory search. Additionally, consent to search usually indicates permission to search at that given time. Consent to search does not mean consent to search at the time consent is granted as well as weeks into the future. It similarly does not mean consent to search until the search yields illegality.

E. The Abandoned Property Exception

Another way that officers conduct a search absent a warrant is through a search of abandoned property. Abandoned property—property that when searched is considered to be no invasion of privacy—is without Fourth Amendment protection and can be seized without a warrant.

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78 United States v. Dichiarinte, 445 F.2d 126, 129 (7th Cir. 1971). However, when such a limited search uncovers other unlawful items, which are for instance in “plain view,” such a seizure of those items will be permissible. Id. at 30.

79 LAFAVE, supra note 60, § 8.1(c), at 41-42.

80 Id. at 42.

81 Id. at 42-43.

82 See, e.g., Abel v. United States, 362 U.S. 217, 241 (1960) (“[I]t [was not] unlawful to seize the entire contents of the wastepaper basket . . . . So far as the record shows, petitioner had abandoned these articles. . . . There can be nothing unlawful in the Government's appropriation of such abandoned property.”); California v. Greenwood, 486 U.S. 35, 39-40 (1988) (exposing garbage to the public defeats a claim to Fourth Amendment protection since defendants did not manifest a subjective manifestation of privacy in their abandoned property which society would accept as objectively reasonable).
warrant or probable cause.\textsuperscript{83} Whether property is considered abandoned is a question of intent—based upon the objective facts available to the officers performing the search, not the subjective intent of the defendant.\textsuperscript{84}

Whether the defendant intended to abandon property is a question of voluntariness.\textsuperscript{85} If it was coerced by unlawful police action, then it cannot be voluntary.\textsuperscript{86} However, lawful police conduct is not considered coercive.\textsuperscript{87} An individual who rids himself of property based upon such lawful conduct will be deemed to have abandoned such property for all intensive purposes.\textsuperscript{88}

\section{DNA Collection, Police Deception Tactics, and the Fourth Amendment}

\subsection{The Application of Fourth Amendment to Police Deception Tactics}

Deception is frequently used by police officers as a tactic or stratagem.\textsuperscript{89} It is also a routine practice of law enforcement in an effort to effectuate a search.\textsuperscript{90} Police officers generally

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\textsuperscript{83} 1 WILLIAM E. RINGEL, SEARCHES & SEIZURES: ARRESTS AND CONFESSIONS § 8.4(a), at 8-42 (2nd ed. 2001).

\textsuperscript{84} Id. at 8-43. For instance, when a person who exhibits a subjective expectation in property places the property in an area where expectation of privacy is objectively unreasonable, courts will find that the property was in fact abandoned. Id. at 8-47.

\textsuperscript{85} Id. at 8-43.

\textsuperscript{86} Id.

\textsuperscript{87} Id. at 8-44.

\textsuperscript{88} Id.

\textsuperscript{89} 68 AM. JUR. 2D SEARCHES AND SEIZURES § 85 (2011).
\end{footnotesize}
assume the suspect is guilty, which undermines the guiding principle behind the American justice system where an individual is “innocent until proven guilty.” The use of deception does not in and of itself violate constitutional principles and at certain times does not even constitute a search and seizure for Fourth Amendment purposes. If police officers use deception, fraud, or trickery in their Fourth Amendment searches, courts review these searches on a case-by-case basis to determine whether the search was proper.

While the use of police deception is proper at certain times, other times courts determine deception as improper. Some deceptive investigation techniques approved by the courts include: police posing as criminals themselves; the use of informants as a means to gather information; lying to a person in certain circumstances; and using subterfuge to gain access to a suspect’s home in an effort to observe the interior. However, in cases where a government

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92 *Searches and Seizures, supra* note 89; see United States v. Garcia, 997 F.2d 1273, 1280 (9th Cir. 1993) (“[G]eneral Fourth Amendment principles apply: the ruse becomes a search if it intrudes on the person’s reasonable, subjective expectation of privacy.”).


95 32 N.J. PRAC., CRIMINAL PRACTICE AND PROCEDURE § 16:96 (2011-2012 ed.).
agent knowingly misrepresents his or her purpose\textsuperscript{96} or the nature of the investigation,\textsuperscript{97} courts may deem the consent to search as invalid.\textsuperscript{98} Indeed, “any misrepresentation or omission of \textit{pertinent information} regarding the purpose of a warrantless statutory search [also] vitiates consent.”\textsuperscript{99} Some jurisdictions deem deception as improper unless it is based on justifiable and reasonable circumstances; however, in other jurisdictions deception is reasonable unless fundamentally unfair so as to deny due process.\textsuperscript{100}

\textsuperscript{96} See United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990) (quoting Lewis v. United States, 385 U.S. 206, 211 (1966)) (when an officer gains access to search through means of a ruse, that officer’s search is limited to the purposes contemplated by the suspect and the officer may not “conduct a general search for incriminating materials”); State v. Pi Kappa Alpha Fraternity, 491 N.E.2d 1129, 1132-33 (1986) (search is not valid absent a warrant where police are deceptive to their purpose in entering a home).

\textsuperscript{97} Cf. United States v. Turpin, 707 F.2d 332, 335 (8th Cir. 1983) (consent was not negated where officers neither misrepresented that they were investigating a homicide nor that they did not have a search warrant).

\textsuperscript{98} Searches, supra note 93.

\textsuperscript{99} Id. (emphasis added).

\textsuperscript{100} Id. Compare State v. Ahart, 324 N.W.2d 317, 319 (Iowa 1982) (“[A] search is patently unreasonable as an arbitrary intrusion when it is based upon consent obtained by deception unless there is a justifiable and reasonable basis for the deception.”), with People v. Entzminger, 163 A.D.2d 138, 141 (N.Y. Sup. Ct. 1990) (quoting People v. Tarsia, 50 N.Y.2d 1, 11 (1980)) (“[T]he use of police strategies will not vitiate the voluntariness of the consent to a search.
B. **Police Deception Tactics Employed to Collect DNA and Justifications Used by Courts in Upholding Such Stratagem**

1. *People v. Thomas*

   In *People v. Thomas*, the defendant was a suspect in a series of burglaries occurring from 2006 to 2008. During investigations relating to these crimes, government officials recovered genetic material from the crime scenes. On December 1, 2008, the defendant was pulled over for a traffic violation. Upon being pulled over, officers observed that the defendant’s eyes were bloodshot and watery. After performing field sobriety tests, the defendant consented to a preliminary alcohol screening (“PAS”) test to determine the level of alcohol in his system.

   The PAS breath test required the defendant to place his mouth over a plastic tip connected to the PAS device and blow into it. The test results revealed that the defendant tested under the legal limit and he was subsequently released from police control. Instead of discarding the mouthpiece of the defendant, the officers decided to preserve it for DNA testing. The DNA test of the mouthpiece linked the defendant to two burglaries. Following

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101 132 Cal. Rptr. 3d 714, 715 (2011).

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 See *Thomas*, 132 Cal. Rptr. 3d at 715.

108 *Id.*
the arrest of the defendant, officers obtained an additional DNA sample which linked the defendant to additional burglaries.\textsuperscript{110} Following the search of his home, officers found additional evidence.\textsuperscript{111}

The defendant was charged with six counts of first-degree burglary as well as prior felony enhancements under California law.\textsuperscript{112} After the defendant’s motion to suppress the evidence was denied, he pled no contest to a single burglary count and was sentenced to 17 years in prison under the plea agreement.\textsuperscript{113} He appealed the denial of his motion to suppress contending that the DNA test of his saliva deposited on the PAC device following the testing of his intoxication level was an illegal search under the Fourth Amendment of the U.S. Constitution.\textsuperscript{114}

The Second District Court of Appeal of California—denying the defendant’s appeal of his motion to suppress—declared that although the defendant had a privacy interest in his DNA, because he discarded his DNA on the mouthpiece of the PAC device, any privacy interest the defendant had in his DNA had diminished.\textsuperscript{115} The court stated that the saliva deposited on the PAS device, the use of which the defendant consented to, was incidental in nature;\textsuperscript{116} thus, the

\begin{flushleft}
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Thomas, 132 Cal. Rptr. 3d at 715.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 717.
\textsuperscript{116} Id. at 719.
\end{flushleft}
defendant did not have a privacy interest in his saliva, and as such the subsequent DNA testing of
the saliva was not deemed a search under the Fourth Amendment.\textsuperscript{117}

2. \textit{Wyche v. State}

In another case, \textit{Wyche v. State}, the police used deceptive tactics as a means to collect the
defendant’s DNA for testing.\textsuperscript{118} In \textit{Wyche}, police detained the defendant and requested his saliva
sample.\textsuperscript{119} The officers told the defendant that he was a suspect in a burglary at a local area
supermarket.\textsuperscript{120} They promised the defendant that if he consented to a DNA test, it would clear
his name in the burglary.\textsuperscript{121} This allegation, however, was completely falsified and officers were
actually trying to collect the defendant’s DNA sample for a sexual assault investigation.\textsuperscript{122} After
finding that the DNA did not result in a positive match for the sexual assault investigation, the
officers cleared the defendant as a suspect of the sexual assault.\textsuperscript{123}

Following the defendant’s exoneration, another officer was investigating a burglary in a
gift shop in the same town.\textsuperscript{124} The officer investigating the gift shop robbery obtained the sample
of the defendant’s DNA from the original officers who collected it to test against blood drops

\begin{itemize}
\item \textsuperscript{117} \textit{Id.}
\item \textsuperscript{118} 987 So. 2d 23, 23-29 (Fla. 2008).
\item \textsuperscript{119} \textit{Id.} at 24.
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.} at 61 (Lewis, J., dissenting).
\item \textsuperscript{122} \textit{Id.} at 24 (majority opinion).
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Wyche}, 987 So. 2d at 24-25.
\end{itemize}
taken from the crime scene of the gift shop.\textsuperscript{125} A comparison of the samples resulted in a match and the defendant was subsequently charged with the crime.\textsuperscript{126} The trial court denied the defendant’s motion to suppress and he was convicted of burglary, grand theft, and criminal mischief.\textsuperscript{127} The defendant appealed the denial of his motion to suppress and argued that his consent was invalid since it was based upon fraud and deceit by the officers in creating a fictitious burglary.\textsuperscript{128}

After analyzing case law, the Florida Supreme Court held that the police deception did not render the consent involuntary.\textsuperscript{129} The court concluded that the deception in \textit{Wyche} was proper and upheld his conviction.\textsuperscript{130}

3. \textit{State v. Athan}

In \textit{State v. Athan}, the defendant was a suspect in an unsolved rape and murder of a 13 year old girl in 1982.\textsuperscript{131} Twenty years later, the Seattle Police Department’s cold case unit reexamined the case and sent preserved biological evidence to the Washington State Patrol Crime Lab which was able to isolate a male DNA profile.\textsuperscript{132} Although the sample was tested

\textsuperscript{125} \textit{Id.} at 25.

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.} at 25, 28.

\textsuperscript{129} \textit{Id.} at 28-29.

\textsuperscript{130} \textit{Wyche}, 987 So. 2d at 31.

\textsuperscript{131} 158 P.3d 27, 31 ¶ 2-3 (Wash. 2007).

\textsuperscript{132} \textit{Id.} ¶ 4.
against state and federal databases, no match was found.\textsuperscript{133} Because the defendant was a suspect at the time of the original investigation, the police decided to locate his whereabouts and collect a DNA sample.\textsuperscript{134} The police located the defendant in New Jersey and reasoned that since he had family in Greece, he was a flight risk.\textsuperscript{135}

Officers created a ruse which they believed would get them a DNA sample of the defendant without tipping him off about their investigation.\textsuperscript{136} Posing as a fictitious law firm, the officers sent the defendant a letter inviting him to take part in a class action lawsuit.\textsuperscript{137} Believing the lawsuit to be true, the defendant signed and returned the class action authorization form.\textsuperscript{138} After police received the reply envelope, without opening it, it was sent to the crime lab for analysis.\textsuperscript{139} The crime lab technicians obtained the defendant’s DNA sample from the saliva on the flap of the envelope.\textsuperscript{140} The DNA sample linked the defendant to the semen found on the victim’s body in the sexual assault crime.\textsuperscript{141}

Following the defendant’s arrest, officers obtained a second DNA sample from the defendant pursuant to a warrant, which matched the sample from the envelope and the victim’s

\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id. \S 5.
\textsuperscript{136} Id.
\textsuperscript{137} Athan, 158 P.3d at 31 \S 5.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 32 \S 6.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
body.\textsuperscript{142} The State filed first-degree murder charges against the defendant and the Washington state trial court denied the defendant’s motion to dismiss and motion to suppress.\textsuperscript{143} The defendant was subsequently found guilty of second-degree murder and was sentenced to 10 to 20 years in prison.\textsuperscript{144}

On appeal, the defendant contended his bodily privacy and his privacy of mail rights were violated under the Fourth Amendment.\textsuperscript{145} The Washington Supreme Court rejected the defendant’s arguments concluding that the DNA evidence was admissible.\textsuperscript{146} The court declared that the defendant’s abandoned genetic sample was akin to an abandoned fingerprint or footprint and the individual had no subjective expectation of privacy in the sample.\textsuperscript{147} As such, it was not deemed a search under the Fourth Amendment.\textsuperscript{148}

\textbf{ANALYSIS}

Once deception gets entrenched in culture, it is rarely, if ever justifiable.\textsuperscript{149} Permitting subterfuge (especially in the context of DNA collection) as a way to circumvent Fourth Amendment protections is reprehensible and undermines the public’s trust in government.\textsuperscript{150}

\textsuperscript{142} \textit{Id.} ¶ 7.

\textsuperscript{143} \textit{Athan}, 158 P.3d at 32 ¶ 8.

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Id.} at 36 ¶ 31.

\textsuperscript{146} \textit{Id.} at 43 ¶ 60.

\textsuperscript{147} \textit{Id.} at 37 ¶ 35.

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} Slobogin, \textit{supra} note 90, at 815.

\textsuperscript{150} \textit{Id.} (discussing trust as being necessary to an effective government).
“Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”\textsuperscript{151} Deception and misrepresentation practices employed when collecting DNA samples undermine and destroy the integrity of the criminal justice system.\textsuperscript{152} Government and the criminal justice system require the public’s cooperation, which is only achieved through the public’s trust of government.\textsuperscript{153} Because of the Fourth Amendment’s protections and government’s need for the trust of its citizens, limitations on police stratagem are not only proper, but are necessary.\textsuperscript{154} “Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”\textsuperscript{155}

III. Trickery, Fraud, and Deception are not Justifiable Within DNA Collection.

A. Consent to Search For a Fabricated Crime Corrodes the Fourth Amendment.

Because of the advantages of retaining DNA samples, governments and law enforcement personnel seek to collect DNA from individuals through various methods.\textsuperscript{156} Additionally, search

\textsuperscript{151} Mapp v. Ohio, 367 U.S. 643, 659 (1961).

\textsuperscript{152} Wyche v. State, 987 So. 2d 23, 32 (Fla. 2008) (Bell, J., concurring); see also Khasin, supra note 91, at 1033 (“The use of deception hurts not only the innocent suspect but also the lying police officer, the prosecuting attorney, and the criminal justice system as a whole.”).

\textsuperscript{153} See Slobogin, supra note 90, at 799 n.132.

\textsuperscript{154} Id. at 815.

\textsuperscript{155} Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

\textsuperscript{156} See Kelly Lowenberg, Applying the Fourth Amendment When DNA Collected for One Purpose is Tested for Another, 79 U. CIN. L. REV. 1289, 1298 (2011).
and seizure requirements have become less stringent in connection with law enforcement’s perceived needs.\textsuperscript{157} Some collection methods, however, remain illegal: For instance, obtaining consent through deception such as telling someone they should consent because “a warrant is on the way.”\textsuperscript{158} Similarly, the Supreme Court has chosen to preserve the principles of the Fourth Amendment prohibition against unreasonable government intrusion, which is enshrined in American culture for the purpose of maintaining the sanctity of a home.\textsuperscript{159} The sanctity of a person’s body—especially when dealing with a person’s genetic composition—should encompass the same, if not more protection than a home is afforded.\textsuperscript{160} This is because the information found in the DNA of a person surpasses any information which could be obtained from an arbitrary search of a home.\textsuperscript{161} When police use subterfuge to gain entry to a place where

\textsuperscript{157} STEPHENS & GLENN, supra note 31, at 60.

\textsuperscript{158} THOMAS N. McINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 100 (2009). Although the general rule, this is not always true as undercover agents can gain access to premises by means of consent to buy illegal contraband since prohibiting this would “undermine the ability to use such agents and get results.” \textit{Id.}


\textsuperscript{160} See supra notes 14-16 and accompanying text.

\textsuperscript{161} See supra notes 14-16 and accompanying text. One report even noted that “[t]he possibility exists to test DNA acquired specifically for identification purposes for disease information and to include that information in a database. This option may become more attractive over time, especially as the number and types of probes for genetic disorders increase.” OFFICE OF TECH.
they are not lawfully allowed to be, such entry is unlawful and any evidence obtained cannot be admitted as fruits of the poisonous tree.¹⁶²

1. Ruses to Obtain Consent Undermine the Fourth Amendment Framers’ Intentions.

“[T]he [Fourth] Amendment's proscription of ‘unreasonable searches and seizures’ must be read in light of ‘the history that gave rise to the words’—a history of ‘abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution.’”¹⁶³ A rule embodied in the Fourth Amendment is that wherever reasonably practical, police must obtain a search warrant when seizing goods and articles.¹⁶⁴ When police use a ruse to obtain a person’s DNA, similar to the facts present in Wyche, it undermines the Framers’ Fourth Amendment intent when deciding

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¹⁶² People v. Quilon, 54 Cal. Rptr. 294, 298 (1966). “[I]f an officer enters a house pursuant to a warrant to search for evidence of one crime when he is really interested only in seizing evidence relating to another crime, for which he does not have a warrant, his search is ‘pretextual’ and the fruits of that search should be suppressed.” Horton v. California, 496 U.S. 128, 147 (1990) (Brennan, J., dissenting).


¹⁶⁴ Id. at 758.
to protect citizens from unreasonable government intrusion.\textsuperscript{165} The purposes of the Fourth Amendment’s warrant requirement is the desirability of having unbiased magistrates determine the reasonableness and permissibility of searches and seizures while placing limitations on such searches.\textsuperscript{166} “To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.” \textsuperscript{167} Accordingly, deception violates the Fourth Amendment’s Framers’ intentions when adopting the Fourth Amendment as a way to protect the people.\textsuperscript{168}

2. Police Trickery Frustrates the Public’s Trust in Law Enforcement

While citizens have a duty to cooperate with law enforcement,\textsuperscript{169} citizens can and must be able to rely upon the representations of a police officer.\textsuperscript{170} There is a correlating duty on the part of the police officer (bearing the insignia of a police officer)—as an agent of the government—to be truthful to the citizens they come in contact with.\textsuperscript{171} If the representations

\textsuperscript{165} See supra Part I.B. In \textit{Wyche v. State}, the defendant allowed officers to collect his DNA to clear his name in a fictitious crime, which inevitably implicated him in another crime. 987 So. 2d 23, 24 (Fla. 2008).
\textsuperscript{166} \textit{Chimel}, 395 U.S. at 758.
\textsuperscript{167} Id. at 758-59.
\textsuperscript{168} See supra text accompanying notes 25-32.
\textsuperscript{171} Id. at 149.
made by these officers prove to be willfully false (which is a breach of that duty) then the subsequent consent and search is inherently unlawful. Fraudulent tactics, when constructed by law enforcement as a means for procuring a suspect’s consent, are a flagrant disregard for that individual’s rights. These rights are stripped away if consent is allowed to be manipulated by deceitful police tactics. When fraud is used as a means to induce someone into a contract, a court will not hesitate to undo such a contract. So too here, consent must be invalid since such consent is not a byproduct of the norms of voluntariness nor is it devoid of artifice. Finding these tactics reasonable and legal within the bounds of the Fourth Amendment undermines the basis of the American criminal justice system.

3. Consent Obtained by Misrepresentation is Not Voluntary and Not Valid.

Since the American criminal justice system is accusatorial and not inquisitorial, tactics employed in an effort to collect inculpatory evidence must fall within the constitutional

172 Id. at 142, 149-50; see McTaggert, supra note 169; see also United States v. Tweel, 550 F.2d 297, 299 (5th Cir. 1977) (holding consent to search is clearly unreasonable when obtained through trickery, fraud, or deception).

173 Tweel, 550 F.2d at 299.

174 Motion to Suppress at 6, State v. McCord, No. 00012550CF A02 (Fla. Cir. Ct. Sept. 25, 2001), WL 36103359.

175 Alexander v. United States, 390 F.2d 101, 110 (5th Cir. 1968).

176 Id.

boundaries and guarantees of fundamental fairness.\textsuperscript{178} When a government agent obtains access to a suspect’s DNA through consent, based upon a misrepresentation of the scope of the DNA testing or the crime for which it will be tested, such access violates the Fourth Amendment’s bar against unreasonable searches and seizures.\textsuperscript{179} Although a government official may conceal his identity in an effort to gain consent to otherwise inaccessible areas in an effort to uncover crime,\textsuperscript{180} “when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry[, this] cannot be justified by

\textsuperscript{178} Id.; see Khasin, supra note 91, at 1060 (“For a system of justice that seeks to presume innocence, the routine assumption of guilt and practice of dishonesty by police as a means to uncovering truth hardly seems fitting.”).

\textsuperscript{179} United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990) (alteration in original) (quoting United States v. Little, 753 F.2d 1420, 1438 (9th Cir. 1984)) (“[A]ccess gained by a government agent . . . violates the fourth amendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation.”); see also SEC v. ESM Gov’t Secs., Inc., 645 F.2d 310, 316 (5th Cir. 1981) (“When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. . . . [I]t [is] clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust.”).

This is because upholding the search based upon consent requires the consent to be valid. The validity of the consent turns to whether or not it was voluntary. Consent is voluntary when “it [is] the result of a free and unconstrained choice.” A person, from whom a government agent is seeking to collect DNA, must be aware of the actual purpose his or her DNA is being sought after before consent can be considered voluntarily, knowingly, and intelligently given. Consent is not freely given to search a suspect’s DNA (or that such a search was reasonable) when such consent was based upon stealth.

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181 Bosse, 898 F.2d at 115 (citing United States v. Phillips, 497 F.2d 1131, 1135 n.4 (9th Cir. 1974)).

182 Henning, supra note 35, at 154.

183 Id. at 155.

184 Federal Bureau of Investigation, supra note 70, § 5-4.5, at 19. The FBI Legal Handbook for Special Agents, although not an authoritative source, is based upon Supreme Court decisions and other federal case law. Id. § 0-1, at 1. Merriam-Webster defines voluntariness as “proceeding from the will or from one’s own choice or consent . . . unconstrained by interference . . . .” Merriam-Webster’s Collegiate Dictionary 1402 (11th ed. 2003).

185 See United States v. Phillips, 497 F.2d 1131, 1135 n.4 (9th Cir. 1974). A half truth, also, is as damning as a full lie. Hirsch, supra note 170, at 147 (2008); see also State v. Schweich, 414 N.W.2d 227, 231 (Minn. Ct. App. 1987) (holding it an illegal police practice where police gain consent to search by revealing only one purpose but hiding the full purpose of their investigation).

Similarly, pre-Miranda voluntariness factors applied to confessions control Fourth Amendment consent-search determinations.\textsuperscript{187} These include promises, inducements, improper influences,\textsuperscript{188} misrepresentation, deception, and fabrication.\textsuperscript{189} Obtaining consent to collect and analyze DNA through deceptive techniques is akin to utilizing the same means to procure confessions—means which are inherently illegal.\textsuperscript{190} In a case where a crime is fabricated such as in Wyche, even if police do not promise exoneration, the person will clearly submit to a DNA analysis test in an attempt to exonerate themselves knowing that they are innocent.\textsuperscript{191} In a police dominated atmosphere, where these psychological pressures are induced, the underlying consent is unconstitutional.\textsuperscript{192}


The Supreme Court has never addressed whether a government agent’s deception relating to the purpose of the investigation affects the voluntariness of a defendant’s consent to search.\textsuperscript{193} Even so, a search and seizure based upon such deceptive methods is just as illegal and as much


\textsuperscript{190} See Wyche, 987 So. 2d at 44 (Anstead, J., dissenting).

\textsuperscript{191} See supra text accompanying notes 119-123.

\textsuperscript{192} See Henning, supra note 35, at 228.

\textsuperscript{193} Wyche, 987 So. 2d at 38 n.12 (Anstead, J., dissenting) (citing LAFAVE, supra note 60 § 8.2(n), at 133).
against a person’s will as obtaining consent to search based upon force or coercion.\footnote{Gouled v. United States, 255 U.S. 298, 305-06 (1921) abrogated on other grounds by Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967); see also Wyche, 987 So. 2d at 38 (Anstead, J., dissenting) (cautioning “that voluntariness may be negated and suppression of evidence mandated where the defendant makes a showing of ‘physical or psychological coercion, intentional deception, or a violation of a constitutional right’” (emphasis in original) (quoting Johnson v. State, 660 So. 2d 637, 642 (Fla. 1995)). Force or coercion is “the lynchpin of the voluntariness determination.” HENNING, supra note 35, at 157.} In actuality, obtaining consent to search DNA through deceptive techniques \textit{is} coercion.\footnote{See Commonwealth v. Slaton, 608 A.2d 5, 9 (Pa. 1992) (“Consent must be freely and intelligently given, however, and is not voluntary if it is obtained through deception, as deception amounts to implied coercion, which negates the necessary element of willingness.” (emphasis added) (citing United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970)); United States v. Turpin, 707 F.2d 332, 334 (8th Cir. 1983) (“Misrepresentations about the nature of an investigation may be evidence of coercion.”); SEC v. ESM Government Securities, Inc., 645 F.2d 310, 316 (5th Cir. 1981) (“We think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust.”); People v. Daugherty, 514 N.E.2d 228, 233 (1987) (“Where, as here, the law enforcement officer without a warrant uses his official position of authority and falsely claims that he has legitimate police business to conduct in order to gain consent to enter the premises when, in fact, his real reason is to search inside for evidence of a crime, we find that this deception under the circumstances is so unfair as to be coercive and renders the consent invalid.”); State v. Schweich, 414 N.W.2d 227, 230 (Minn. App. 1987)
coercion is defined as: “compel[ling] an act or choice,”\textsuperscript{196} when an individual is coerced into giving consent through pressure, whether express or implied, the underlying consent will be deemed involuntary and any subsequent search will be deemed unreasonable.\textsuperscript{197} “For, no matter how subtly the coercion was applied, the resulting ‘consent’ would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.”\textsuperscript{198} Just as physical force and threats render consent involuntary; fraud, deceit, or misrepresentation taints the consent also because the effect is the same: The defendant would not have consented but for

\begin{quote}
(“Tacit misrepresentation of the purpose of a search can rise to such a level of deception to invalidate the consent.”); State v. McCrorey, 851 P.2d 1234, 1240 (Wash. App. Ct. 1993), \textit{abrogated on other grounds by} State v. Head, 136 Wash.2d 619, 964 P.2d 1187 (1998) (distinguishing between undercover police activity and police acting in their official capacity actively misstating their purpose for gaining consent); Commonwealth v. Haynes, 577 A.2d 564, 572 (1990) (consent by defendant to be transported to the stationhouse was invalid where police deceived the defendant as to the true purpose of the trip); United States v. Giraldo, 743 F.Supp. 152, 154 (E.D.N.Y. 1990) (defendant's consent was invalid where officer gained entry to home by claiming to be checking for a possible gas leak).
\end{quote}

\textsuperscript{196} \textsc{Merriam-Webster’s}, \textit{supra} note 184, at 240.

\textsuperscript{197} \textsc{Henning}, \textit{supra} note 35, at 156; \textsc{Wayne LaFave, 2 C}r\textsc{im. P}roc. \textsection 3.10(c) (3d ed. 2011) ("[W]hen the police misrepresentation of purpose is so extreme that it deprives the individual of the ability to make a fair assessment of the need to surrender his privacy, . . . the consent should not be considered valid.").

\textsuperscript{198} Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).
the stratagem employed.\textsuperscript{199} Indeed, coercion is not only physical, but can be psychological as well.\textsuperscript{200} Undoubtedly, most, if not all suspects would consent to such a search if they knew they were innocent and it meant that they would no longer remain a suspect in the “investigation.”\textsuperscript{201} It is apparent that innocent individuals would give up their rights, consenting to a search seeking to exculpate themselves.\textsuperscript{202} If the individuals were apprised of the actual purpose of the police investigation, would they consent to a collection and search of their DNA?\textsuperscript{203} Therefore, if a defendant consents to submitting his DNA to police officers, but was tricked into surrendering the DNA, this is a form of coercion and is a violation of the Fourth Amendment.\textsuperscript{204}

\begin{justify}
\textsuperscript{199} \textsc{FEDERAL BUREAU OF INVESTIGATION, supra} note 70, § 5-4.5, at 19; \textit{see also} United States v. Mapp, 561 F.2d 685, 689 (7th Cir. 1977) (“[A] misrepresentation made . . . as to the nature of an investigation can be strong evidence of coercion.”).
\textsuperscript{200} Blackburn v. Alabama, 361 U.S. 199, 206 (1960); \textit{see also} Wyche v. State, 987 So. 2d 23, 56 (Fla. 2008) (Lewis, J., dissenting) (“Relatedly, \textit{Schneckloth} and half a century of . . . cases have recognized that police coercion may be “implied,” “subtle,” and “psychological.””).
\textsuperscript{201} Wyche, 987 So. 2d at 53 (Anstead, J., dissenting); \textit{see} State v. McCord, 833 So. 2d 828, 830 (Fla. Dist. Ct. App. 2002) (explaining that the defendant only consented to collection of his DNA because he wanted to clear himself of a fictitious crime in which he knew he was not guilty).
\textsuperscript{202} 1 \textsc{JOHN WESLEY HALL, JR., SEARCH AND SEIZURE} § 8.3, at 488 (3d ed. 2000).
\textsuperscript{203} \textit{See} \textsc{HENNING, supra} note 35, at 161 (“One issue that frequently arises in consent search cases is whether the suspect actually consented. . . . caus[ing] many to wonder why any person would voluntarily consent to a search when they know they have drugs or other contraband that will be discovered.” (citations omitted)).
\textsuperscript{204} \textit{See supra} text accompanying notes 193-203.
\end{justify}
5. Consent Procured by Artifice Falls Outside the Scope of the Actual Purpose.

Assuming *arguendo* that such deceptive techniques would not be deemed coercive in nature, such searches should still be held invalid because the scope of consent is surpassed when police fabricate a crime as a means to collect and analyze DNA for comparison in another crime scene.\(^{205}\) A search, reasonable at its inception, may end up violating the Fourth Amendment by exceeding the scope of the consent.\(^{206}\) The scope of consent is determined by an objective reasonableness standard\(^{207}\) — what the person would have understood the scope to be under the circumstances present at the time of the consent.\(^{208}\) To determine reasonableness, courts must consider what the individual knew at the time the individual consented to the search and what the individual believed to be the object of the search.\(^{209}\)

When a government agent misrepresents an investigation, baiting an individual to consent in reliance of the government agent’s assertions, the scope is exceeded since the individual might never have consented if aware of the true nature of the investigation.\(^{210}\) Similarly, the scope of a

\(^{205}\) *See* HENNING, *supra* note 35, at 155 (objective reasonableness is the standard to measure the validity of consent).


\(^{207}\) *See* Florida v. Jimeno, 500 U.S. 248, 251 (1991) (holding that objective reasonableness is the standard for determining the scope of a suspect’s consent).

\(^{208}\) HENNING, *supra* note 35, at 155.

\(^{209}\) State v. Odom, 722 N.W.2d 370, 373 (N.D. 2006).

\(^{210}\) *See, e.g.*, United States v. Little, 753 F.2d 1420, 1438 (9th Cir. 1984) (“[A]ccess gained by a government agent, known to be such by the person with whom the agent is dealing, violates the
search justified by consent is limited by the circumstances which rendered it permissible in the first place. 211 Under the objective reasonableness standard, the defendant in Wyche did not believe the government would retain his samples indefinitely and use it for whatever purpose they deemed permissible. 212 The defendant was only trying to exonerate himself from a crime which he knew he was innocent. 213 Since the officers in Wyche obtained the defendant’s DNA for a “burglary” and analyzed it against samples taken from a rape scene (where the defendant was exonerated), it is unjustifiable to keep using the sample indefinitely against other crime scenes until a match is found. 214 These subsequent uses of DNA are actually additional searches which fall outside the defendant’s scope of the consent. 215

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fourth amendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation.”); see also HENNING, supra note 35, at 161 (“One issue that frequently arises in consent search cases is whether the suspect actually consented. . . caus[ing] many to wonder why any person would voluntarily consent to a search when they know they have drugs or other contraband that will be discovered.” (citations omitted)).

211 Terry, 392 U.S. at 19.

212 See United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990) (“Special limitations apply when a government agent obtains entry by misrepresenting the scope, nature or purpose of a government investigation.”).

213 See supra notes 119-123 and accompanying text.

214 See supra notes 119-126 and accompanying text.

215 See supra notes 119-126 and accompanying text.
Where consent to search a home based upon deceptive tactics (i.e. claiming to have a warrant) can be deemed unreasonable, a collection of a person’s DNA based upon the same stratagem should be illegal.\textsuperscript{216} Although Wyche did not involve a claim of a warrant, it is significantly analogous since police promised exoneration from an investigation where police claimed the defendant was the suspect—an investigation of which the defendant wanted to clear his name.\textsuperscript{217} In these circumstances, anyone who is innocent will feel they have no other option (similar to police claiming to have a warrant) but to consent to the DNA test and quickly clear their name of any future suspicions.\textsuperscript{218} If continued, these tactics will undermine and lead to the wholesale abandonment of our accusatorial system.\textsuperscript{219} DNA collection justified even under these coercive and deceptive police tactics must be curtailed unless we as a society are willing to tolerate a diminished expectation in our privacy interests.\textsuperscript{220} Thus, upholding the collection and analysis of DNA obtained by consent tainted with fraudulent practices corrodes the Fourth Amendment.\textsuperscript{221}

\textbf{B. Obtaining DNA Through Deceptive Techniques and Equating it to Abandonment is Unreasonable.}

\textsuperscript{216} See Bumper v. North Carolina, 391 U.S. 543, 550 (1968) (holding a consent to search a home invalid because the consent-giver was told that police had a warrant which amounted to coercion).


\textsuperscript{218} \textit{Id.} at 61 (Lewis, J., dissenting).

\textsuperscript{219} \textit{Id.} at 46 (Anstead, J., dissenting).


\textsuperscript{221} See supra Part III.A.1III.A.5.
Courts have frequently upheld deceptive techniques in DNA collection utilizing the doctrine of abandonment, reasoning that individuals have no reasonable expectation of privacy in their DNA contained in bodily fluids which they have abandoned.\textsuperscript{222} This is true even if the DNA is abandoned through subterfuge.\textsuperscript{223} Thus, according to this reasoning, so long as police do not obtain an individual’s DNA through a seizure—that is, interfering with a person’s possessory interest in their bodily fluids through the application of force\textsuperscript{224}—then it will likely not be deemed a search for Fourth Amendment purposes.\textsuperscript{225} This reasoning, however, is misguided because a person not only has a privacy interest in their bodily fluids, but they also have a privacy interest in their bodily integrity, DNA, and genetic code, which contains vast amounts of personal information about the individual.\textsuperscript{226} Thus, merely equating the privacy interest to the bodily fluid alone and utilizing abandonment as a justification for DNA analysis presents a


\textsuperscript{223} See, e.g., Bly, 862 N.E.2d at 356-57; Wickline, 440 N.W.2d at 253; Athan, 158 P.3d at 38.

\textsuperscript{224} Joh, supra note 15, at 863.

\textsuperscript{225} Cf. People v. Thomas, 132 Cal. Rptr. 3d 714, 716 (2011) (“When an individual is compelled to provide a biological sample for analysis, the collection and subsequent analysis of the sample are treated as separate searches because they intrude on separate privacy interests.”) (emphasis added)).

\textsuperscript{226} Athan, 158 P.3d at 49 ¶ 86 (Fairhurst, J., dissenting); see supra notes 14-16 and accompanying text.
multitude of problems for society and its Fourth Amendment protections. The proper test does not involve merely determining whether the property has been abandoned, but also involves considering if the individual retained a reasonable expectation of privacy in the property which the government alleges to have been abandoned.

1. A Misguided Analysis of “Abandoned DNA”

While many courts analyze the individual’s privacy interest in their “discarded” genetic material (i.e. saliva or blood) rather than in their actual DNA, this analysis is misguided. Even in Athan, the court framed the question as “whether persons retain a reasonable expectation of privacy in their saliva after they lick an envelope and place it in the mail.” Although a clever attempt to validate a deceptive search, the Athan court failed to consider that the defendant’s genetic sample was really never exposed to the public; rather it was tucked underneath the flap of

227 See, e.g., Thomas, 132 Cal. Rptr. 3d at 719 (“We conclude that defendant has no legitimate privacy interest in the saliva he deposited on the mouthpiece of the PAS device.”)(emphasis added)).


229 See, e.g., Athan, 158 P.3d at 37 ¶ 35; Thomas, 132 Cal. Rptr. 3d at 719; Commonwealth v. Perkins, 883 N.E.2d 230, 240 (Mass. 2008).

230 In Athan, police created a fictitious class action lawsuit and sent a letter to the defendant with a return envelope in an effort to obtain his DNA in an unsolved rape and murder investigation from twenty years earlier. 158 P.3d at 31-32.

231 Id. at 37 ¶ 35.
the sealed envelope.\textsuperscript{232} In order to extract this sample, three-and-one-half inches had to be cut from the sealed envelope flap and the interior of its contents utilized for the DNA testing.\textsuperscript{233}

Further, classifying discarded genetic material in the same category as an “abandoned” fingerprint or footprint is a poor analogy and is “pure folly.”\textsuperscript{234} The analysis of the DNA far exceeds a fingerprint or footprint; it reveals much more information than an analysis of a fingerprint can yield.\textsuperscript{235} The analysis of an abandoned fingerprint or footprint involves nothing more than the examination of something already exposed to the public, whereas the analysis of discarded genetic material involves delving into material to uncover genetic or identifying

\textsuperscript{232} See id. at 32 ¶ 6.

\textsuperscript{233} Reply Brief of Appellant at 5, State v. Athan, 158 P.3d 27 (Wash. 2007) (No. 75312-1), 2006 WL 811740, at *5.


\textsuperscript{235} James F. Van Orden, DNA Databases and Discarded Private Information: “Your License, Registration, and Intimate Bodily Details, Please”, 6 N.C. J. L. & TECH. 343, 352 (2005); see also Mitchell II, 652 F.3d at 425 (Rendell, J., dissenting); Athan, 158 P.3d at 44 ¶ 62 (Alexander, C.J., concurring) (“A person’s DNA, whether it be contained, for example, in his saliva, in a droplet of blood, or in a strand of hair, is not, as the majority suggests, equivalent to a person’s thumbprint or the cadence of his voice-physical characteristics that truly speak to our identity only. Rather, a person’s DNA goes beyond who we are to what we are.”).
information; an area unexposed to the public.\textsuperscript{236} The footprint or fingerprint already exposes the identifying information, where further analysis (i.e., a search) of the saliva or blood is needed to obtain the identifying information.\textsuperscript{237}

Courts using reasoning similar to the court in \textit{Athan} are utilizing poor reasoning by relying on the doctrine of abandonment to validate suspicionless searches in these circumstances.\textsuperscript{238} The inevitable conclusion is that nobody has an expectation of privacy in their DNA since everyone leaves some trace of genetic material containing DNA wherever they go, exposing it to the public.\textsuperscript{239} For instance, if you mail in your tax return, is it reasonable for the government to collect the DNA sample off of a stamp licked by the taxpayer?\textsuperscript{240} How about skin cells that every human being sheds naturally?\textsuperscript{241} What about when an individual blows their nose through their nose?

\textsuperscript{236} \textit{Mitchell II}, 652 F.3d at 425 (Rendell, J., dissenting). Although there is some identification information exposed to the public (e.g., hair color, sex, race), the identification information unexposed to the public still warrants protection. \textit{See supra} notes 14-16 and accompanying text.

\textsuperscript{237} \textit{Athan}, 158 P.3d at 52 ¶ 113 (Fairhurst, J., dissenting); \textit{see also HENNING}, \textit{supra} note 41, at 5-6 (2010) (blood, urine, and other fluids are not “knowingly exposed” to the public where fingerprints are).

\textsuperscript{238} \textit{See infra} text accompanying notes 239-246.

\textsuperscript{239} \textit{See Athan}, 158 P.3d at 37 ¶ 35.

\textsuperscript{240} \textit{See Joh, supra} note 15, at 857 (“When you've licked a stamp on your tax return you've sent the government a DNA sample.” (quoting Victor Weedn, Head of Armed Forces DNA Identification Laboratory)).

\textsuperscript{241} Mike Silvestri, \textit{Naturally Shed DNA: The Fourth Amendment Implications in the Trail of Intimate Information We All Cannot Help but Leave Behind}, 41 U. BALT. L. REV. 165, 175
on a tissue and discards it in the trash; drinks a cup of coffee at a restaurant; chews a piece of gum and disposes of it in a public receptacle; or smokes a cigarette and places it in an ashtray when they are finished?\(^{242}\) Since these are commonplace activities for individuals, it cannot be reasoned that people do not have an expectation of privacy in their DNA simply because they engage in these activities.\(^{243}\) Otherwise, in an effort to prevent government intrusion into commonplace items, people would have to remain in possession of every item and piece of trash they have ever come into contact with.\(^{244}\) The privacy interest is in their DNA, not in the discarded bodily fluids that contains the DNA.\(^{245}\) Thus, courts are using misguided reasoning when analyzing the expectation of privacy in the abandoned genetic material rather than the DNA.\(^{246}\)

2. Abandonment Must Be Intentional and Voluntary

"Abandoned property’ is that to which the owner has voluntarily relinquished all right, title, claim, and possession, with the intention of terminating his or her ownership, but without vesting ownership in any other person, and with the intention of not reclaiming any future rights

\(^{242}\) Joh, supra note 228, at 666.

\(^{243}\) See supra text accompanying notes 238-242.

\(^{244}\) Silvestri, supra note 241, at 175.


\(^{246}\) See supra text accompanying notes 229-245.
therein.”

In order for a person to have abandoned property, the individual must have intentionally relinquished a known right. To determine this, an objective analysis of the act and intent must be undertaken. This means considering the individual’s actions, words, and any other situations surrounding the circumstances of the alleged abandonment. Since the discharge of genetic material is impossible to prevent, no intent to abandon is implicated.

The individual must also have voluntarily abandoned his specimen. “Actions are ‘voluntary’ if they are ‘done by design or intention: not accidental: intentional,’ or the person is ‘acting of oneself: not constrained, impelled, or influenced by another: spontaneous, free.’” As in Thomas, when someone gets pulled over for driving while under the influence and consents to a breathalyzer test, absent a demand for the mouthpiece or an act of wiping off their saliva, they

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247 1 Am. Jur. 2d Abandoned, Lost, and Unclaimed Property § 3 (2004). “Abandonment is the intent to leave, quit, renounce, resign, surrender, relinquish, vacate, or discard, and denotes the absolute giving up of an object, often with the further implication of its surrender to the mercy of something or someone else.” Id. Intent is defined as “[t]he state of mind accompanying an act, especially a forbidden act. . . . [or] the mental resolution or determination to do [an act].”

BLACK’S LAW DICTIONARY 881 (9th ed. 2009).

248 Abandoned, Lost, and Unclaimed Property, supra note 247, § 9.

249 Silvestri, supra note 241, at 172.

250 Id.

251 See supra notes 239-244 and accompanying text.


253 Id. ¶ 108 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2564 (2002)).
have no choice but to abandon the mouthpiece that they blew into. In these instances, the defendant does not voluntarily abandon his property. Even though the defendant did not take steps to retrieve his mouthpiece or to make sure that he did not leave any DNA, the defendant did not forfeit any privacy rights in his DNA; thus, subsequent searches of the DNA are unreasonable.

3. Abandonment Alone Does Not Warrant Police Intrusion

Even if a court deems DNA was intentionally and voluntarily abandoned, that does not end the inquiry. Fourth Amendment protection is not constrained to property law. Rather,

254 See supra notes 103-108 and accompanying text; see also State v. Reichenbach, 101 P.3d 80, 86 (2004) (“[P]roperty is deemed to be involuntarily abandoned and thus cannot be seized absent a warrant or an exception to the warrant requirement if the defendant shows (1) unlawful police conduct and (2) a causal nexus between the unlawful conduct and the abandonment.”).


256 Contra id.


258 Id.; see also LAFAVE, supra note 60 § 2.6(c), at 691 (“A justified expectation of privacy may exist as to items which have been abandoned in the property law sense, just as it is true that no such expectation may exist on some occasions even through the property has not been abandoned. This is because under Katz the question is not whether there has been abandonment in the property law sense, . . . but rather whether there has been abandonment of a reasonable expectation of privacy as to the area searched or the property seized.” (internal quotation marks omitted)).
“the Fourth Amendment protects people, not places.” Thus, it must also be determined whether the individual had a subjective expectation of privacy in his or her “abandoned DNA” that society is willing to recognize as reasonable.

The Supreme Court has determined police rummaging through a suspect’s garbage left on the curb for pickup is not a search for Fourth Amendment purposes since there is no subjective expectation of privacy in the garbage. Indeed, most courts liken “abandoned DNA” to trash left curbside. However, in a case like Thomas, there is still a subjective expectation of privacy since the DNA is extracted from cells that are within the saliva. Thus, the DNA is not exposed


260 For the purposes of this Note, “‘Abandoned DNA’ [refers to] any amount of human tissue capable of DNA analysis [that is] separated from a targeted individual’s person inadvertently or involuntarily, but not by police coercion.” Joh, supra note 15, at 859.

261 See Greenwood, 486 U.S. at 39; Joh, supra note 15, at 868 n.60 (“The proper test for abandonment is not whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the [property] alleged to be abandoned.’ In making that determination, however, it is still relevant to consider a defendant’s property interest.” (alterations in original) (quoting United States v. Stevenson, 396 F.3d 538, 546 (4th Cir. 2005))).

262 Greenwood, 486 U.S. at 37.


264 Brian Smith, Rinse, Swab or Spit—What’s the Real Source of DNA in Saliva?, DNA GENOTEK’S SAMPLE COLLECTION BLOG (Mar. 31, 2010, 10:00 AM),
to the public; rather, the saliva is exposed to the public.\textsuperscript{265} This expectation of privacy is reasonable because of the amount of private information that DNA contains about a particular individual and this is information an individual would want protected.\textsuperscript{266} Therefore, in terms of DNA, there is a subjective expectation of privacy that society is willing to deem as reasonable, and a search of abandoned DNA falls within Fourth Amendment bounds.\textsuperscript{267}

\textsuperscript{265} See \textit{People v. Thomas}, 132 Cal. Rptr. 3d 714, 719 (2011).

\textsuperscript{266} See \textit{supra} notes 14-16 and accompanying text; see also HENNING, \textit{supra} note 41, at 9 (“Courts have uniformly held that compulsory DNA collection and analysis constitutes a search, and thus triggers Fourth Amendment rights.”). Contra Joh, \textit{supra} note 15, at 875 (“[T]he Fourth Amendment does not appear to restrict the initial collection of abandoned DNA for any reason.”). Similarly, although courts find it a small step to conclude that warrantless collection of abandoned DNA does not undermine Fourth Amendment protections, these courts may also want to consider the fact that DNA is not really exposed to the public since not anyone can just pick up discarded material and test the DNA. Imwinkelried \& Kaye, \textit{supra} note 263, at 439. This argument, however, will be weakened if and when society enters an era where DNA test kits are as readily available as home pregnancy tests. \textit{Id.} at 437. Indeed, many legislatures have begun to recognize the privacy interests in genetic information (less commonly with genetic samples though) and have begun to draft legislation deeming this information as “unique” or “exclusive property” of the individual. Joh, \textit{supra} note 15, at 868 n.61.

\textsuperscript{267} See \textit{supra} text accompanying notes 41-50. Although there are inherent Fourth Amendment concerns when police collect DNA off of abandoned cigarettes without a warrant, this Note is
Although most courts analogize abandoned DNA to garbage left curbside, garbage and DNA are not sufficiently analogous.\(^{268}\) When someone abandons garbage, they intend to relinquish control of the garbage.\(^{269}\) However, when someone abandons DNA, it is an unconscious activity.\(^{270}\) Abandonment of DNA cannot be avoided.\(^{271}\) “[I]gnorance, inadvertence, or unawareness militate against a finding of abandonment.”\(^{272}\) Abandonment cannot and does not apply if the individual did not intend to abandon the property in question.\(^{273}\) Thus, abandonment of a bodily fluid alone does not justify the seizure and analysis of an individual’s DNA.\(^{274}\)

4. DNA Analysis Implicates More than Just One Fourth Amendment Search.

DNA Collection and Analysis Involves Various Searches and Seizures.\(^{275}\) For instance, in \textit{Thomas}, there were four separate government actions which implicated the Fourth Amendment: the seizure of his person, the testing of his breath on the PAC device,\(^{276}\) the seizure of the so-

\(^{268}\) Imwinkelried & Kaye, \textit{supra} note 263, at 437.

\(^{269}\) \textit{Id.}

\(^{270}\) \textit{Id.}

\(^{271}\) \textit{Id.}

\(^{272}\) \textit{Abandoned, Lost, and Unclaimed Property, supra} note 247, § 9.

\(^{273}\) 1 C.J.S. \textit{Abandonment} § 8 (2012).

\(^{274}\) See supra text accompanying notes 257-273.

\(^{275}\) See infra text accompanying notes 276-278.

\(^{276}\) See United States v. Dionisio, 410 U.S. 1, 8 (1973) (“[T]he obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two levels—the ‘seizure’ of
called “abandoned” saliva,\textsuperscript{277} and the eventual DNA analysis of that saliva.\textsuperscript{278} Although the first two searches were lawful as stipulated by the defendant, it is illogical to conclude that the latter two searches were as well.\textsuperscript{279} The court exceeded the scope of the defendant’s consent,\textsuperscript{280} and also went to great lengths to validate the officers’ deceptive techniques when they narrowly framed the question as “whether a defendant may assert a privacy interest in a DNA sample that the police surreptitiously obtain from a publicly discarded item or material.”\textsuperscript{281}

\begin{footnotesize}
\begin{enumerate}
\item[277] Cf. People v. Thomas, 132 Cal. Rptr. 3d 714, 716 n.2 (2011) (refusing to accept Defendant’s contention that the collection of his saliva was an unreasonable seizure for Fourth Amendment purposes).
\item[278] See id. at 716-17 (2011) (“[E]ven when used solely for purposes of identification, DNA testing intrudes on the reasonable expectation of privacy that a defendant not yet in police custody would have in his identifying information.”). Cf Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 616-17 (1989) (holding that both collection and analysis of urine samples for mandatory suspicionless drug testing of railroad employees were searches because passing urine is traditionally done in private and urine analysis can reveal private medical facts).
\item[279] See Thomas, 132 Cal. Rptr. 3d at 719 (reasoning that the defendant did not challenge his consent to the PAC test or the legality of the traffic stop).
\item[280] See supra notes 205-215 and accompanying text.
\item[281] Thomas, 132 Cal. Rptr. 3d at 717.
\end{enumerate}
\end{footnotesize}
Allowing these deceptive police tactics undermines the public’s trust in law enforcement and could yield to resistance in police cooperation.\footnote{See Slobogin, \textit{supra} note 90, at 815.} It was these same practices that led to distrust in government and inevitably contributed to the American Revolution.\footnote{See \textit{supra} Part I.B. “To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.” \textit{Olmstead v. United States}, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).} Indeed, a person interacting with a law enforcement officer could not help but feel that the police were really seeking to collect their private information.\footnote{Steven L. Frazier, \textit{The Loss of Public Trust in Law Enforcement}, \textit{California Commission on Peace Officer Standards and Training} (2007), http://libcat.post.ca.gov/dbtw-wpd/documents/cc/40-frazier.pdf (describing how the public’s trust and confidence in police performance has been diminishing and what follows is suspicion of any aspect of police conduct).} Allowing these police tactics grants law enforcement officers permission to collect DNA from anyone, anywhere, with a vague suspicion, or none at all.\footnote{Joh, \textit{supra} note 15, at 874.} Therefore, abandonment does not justify the collection and analysis of DNA when dishonest police practices are exercised.\footnote{See \textit{supra} text accompanying notes 222-285.}

\textbf{IV. One Possible Solution: The “First Act” Rule}

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the

\footnote{282 See Slobogin, \textit{supra} note 90, at 815.}
\footnote{283 See \textit{supra} Part I.B. “To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.” \textit{Olmstead v. United States}, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).}
\footnote{284 Steven L. Frazier, \textit{The Loss of Public Trust in Law Enforcement}, \textit{California Commission on Peace Officer Standards and Training} (2007), http://libcat.post.ca.gov/dbtw-wpd/documents/cc/40-frazier.pdf (describing how the public’s trust and confidence in police performance has been diminishing and what follows is suspicion of any aspect of police conduct).}
\footnote{285 Joh, \textit{supra} note 15, at 874.}
\footnote{286 See \textit{supra} text accompanying notes 222-285.}
Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.  

Most searches manipulated by police ruses are analyzed under the totality of the circumstances test. However, courts utilize different methods when applying this test; some even draw a bright line permitting police misrepresentation. Courts have great latitude when determining the significance of each factor within the totality of the circumstances analysis. While the totality of the circumstances test is a workable test, the test is easily manipulated to justify what courts deem as reasonable in the context of DNA collection. Most courts analyze the facts and circumstances with their “thumb pressing heavily on the government’s side of the scale.”

Therefore, this test has no place in the context of police deception tactics and DNA collection because courts do not take into account the expectations of privacy that individuals have in their DNA and how police subterfuge serves to undermine these interests; interests the Fourth Amendment was designed to protect. Instead, a workable bright-line rule is needed to aid the courts, to aid law enforcement, and to aid society as a whole.

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289 Khasin, supra note 91, at 1049.

290 Id.


292 CLANCY, supra note 25, at 495.

293 See id.; supra Part I.B.I.C.
The First Act Rule is based on provocation: Who took the first action?\textsuperscript{295} Bright-line rules are necessary for law enforcement officers who are at the front lines of crime and thus must make split-second decisions.\textsuperscript{296} The First Act Rule is a bright-line rule that balances both society’s interests and the individual’s interests.\textsuperscript{297} This Rule presumes an individual’s subjective expectation of privacy in their DNA.\textsuperscript{298} Because of the issues inherent in DNA collection, the

\textsuperscript{294} Oliver v. United States, 466 U.S. 170, 181 (1984) (“This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an \textit{ad hoc}, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances.”); Dunaway v. New York, 442 U.S. 200, 213-14 (1979) (“A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.”); \textit{Id.} at 219-20 (1979) (White, J., concurring) (“But if courts and law enforcement officials are to have workable rules, this balancing must in large part be done on a categorical basis-not in an \textit{ad hoc}, case-by-case fashion by individual police officers.” (internal citations omitted)).

\textsuperscript{295} It should be noted here that this test does not argue against officers collecting somebody else’s DNA from a suspect’s body in an exigent circumstance without a warrant; rather, it is considering the warrantless search of the suspect’s own DNA through deceptive tactics. \textit{See} State v. Madplume, 150 P.3d 956, 959 ¶¶ 13-15 (Mont. 2007) (exigent circumstances called for the warrantless swabs of the defendant’s fingertips containing DNA from a victim where the defendant could have destroyed the evidence as easily as licking his fingers).


\textsuperscript{297} \textit{See infra} text accompanying notes 298-306.

\textsuperscript{298} \textit{See} State v. Athan, 158 P.3d 27, 49 ¶ 86 (2007) (Fairhurst, J., dissenting).
burden should be on the government to prove the legality of the warrantless DNA search.\textsuperscript{299} Under the first prong of the First Act Rule, the court will determine who took the first action—that is, it will determine whether the police initiated some act of deception to induce the defendant into providing his DNA or if the defendant provided it on his own volition.\textsuperscript{300} If it was the defendant who took the first action, then the warrantless DNA search is \textit{per se} legal.\textsuperscript{301} If it is the government, then further analysis is needed.\textsuperscript{302}

If the government took the first action, then the court should consider whether the officer “knowingly” deceived the defendant.\textsuperscript{303} If the officer knowingly deceived the defendant, then the

\begin{itemize}
\item \textsuperscript{300} See infra text accompanying notes 301-306.
\item \textsuperscript{301} See, e.g., Pharr v. Commonwealth, 646 S.E.2d 453, 454 (Va. Ct. App. 2007) (defendant’s voluntary consent to a DNA test for one crime can be used for other crimes where defendant did not limit the scope of the consent). \textit{Compare} Commonwealth v. Cabral, 866 N.E.2d 429, 433 (Mass. App. Ct. 2007) (no expectation of privacy when spit was recovered off of a public sidewalk and tested for DNA), \textit{with} State v. Reed, 641 S.E.2d 320, 321 (N.C. Ct. App. 2007) (unreasonable search of defendant’s DNA when he flicked a cigarette on his patio area while talking to police and an officer proceeded to kick the cigarette into a grassy common area only to collect it later).
\item \textsuperscript{302} See infra text accompanying notes 303-306.
\item \textsuperscript{303} See, e.g., Wyche v. State, 987 So. 2d 23, 24 (Fla. 2008).
\end{itemize}
warrantless search of the DNA is per se illegal.\textsuperscript{304} However, if the officer did not knowingly deceive the defendant, or if it cannot be determined from the record, then an objective test should be utilized: Whether under these circumstances, this is a search that society is willing to accept as reasonable.\textsuperscript{305} If society is willing to recognize the search as reasonable, then the warrantless search is legal for all intensive purposes.\textsuperscript{306}

Consider this example: Cop follows Defendant, a suspect in a rape case.\textsuperscript{307} While following Defendant, Cop notices Defendant spit on a public sidewalk.\textsuperscript{308} Cop immediately collects Defendant's saliva and sends it to a laboratory for DNA analysis which inevitably links

\textsuperscript{304} See, e.g., United States v. Little, 753 F.2d 1420, 1438 (9th Cir. 1984); United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990); State v. Schweich, 414 N.W.2d 227, 231 (Minn. Ct. App. 1987).

\textsuperscript{305} See, e.g., Kyllo v. United States, 533 U.S. 27, 27 (2001); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). This objective standard should take note of such factors as individualized suspicion and probable cause when determining if society is willing to recognize the search as reasonable. See Clancy, supra note 25, at 471-73.

\textsuperscript{306} See, e.g., California v. Greenwood, 486 U.S. 35, 39-42 (1988). The First Act Rule “gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.” Mapp v. Ohio, 367 U.S. 643, 660 (1961).


\textsuperscript{308} Id.
Defendant to the crime. Although this is a warrantless search, since Defendant took the unprovoked first act (i.e., spitting on the sidewalk), the warrantless search of the DNA is legal.

Consider another example: Cop asks Defendant to come down to the station because Cop suspects Defendant as being a suspect in a rape investigation. While conferring with Defendant, Cop fabricates a burglary to entice Defendant into consenting to a DNA swab of his saliva. Because Defendant knows he did not commit this burglary and wants to clear his name in the investigation, he submits to the DNA swab, which subsequently clears his name in the rape case and the burglary case, but is used to convict him in a wholly unrelated burglary case which he was never a suspect to begin with. Under the first prong of the First Act rule, the government took the first action so more analysis is needed. Because Cop knowingly deceived Defendant, the warrantless search of Defendant’s DNA is illegal.

Consider one more example: Cop is following Defendant because he is a suspect in a string of burglaries. While following Defendant, Cop pulls Defendant over for traffic

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309 Id. at 68-69.
310 See supra text accompanying note 301.
311 See Wyche v. State, 987 So. 2d 23, 24 (Fla. 2008).
312 See id.
313 See id.
314 See supra text accompanying note 302.
315 See supra text accompanying notes 303-304; see also State v. McCord, 833 So. 2d 828, 830 (Fla. Dist. Ct. App. 2002) (holding police deception of a fabricated crime invalidated the defendant’s consent to search his DNA).
violations and notices his eyes are bloodshot and watery.\textsuperscript{317} Cop has Defendant perform field sobriety tests and blow in a breathalyzer.\textsuperscript{318} After Defendant passes all tests, Cop lets Defendant leave but retains the mouthpiece to test for DNA.\textsuperscript{319} Here, Cop took the first action, thus further analysis is needed.\textsuperscript{320} Because the underlying stop was legal and Defendant consented to the breathalyzer test, it cannot be determined whether Cop knowingly deceived Defendant.\textsuperscript{321} Thus, it must be determined whether this is a search that society is willing to deem as reasonable—an officer retaining a mouthpiece from a breathalyzer test for DNA analysis.\textsuperscript{322}

**CONCLUSION**

DNA collection and analysis implicates the Fourth Amendment because of the information and privacy interests present in DNA.\textsuperscript{323} Police across the country are using various deceptive techniques in an effort to collect individuals’ DNA and circumvent the Fourth Amendment.\textsuperscript{324} Courts that hold fraudulent tactics used to collect DNA passes the totality of the

\textsuperscript{317} See id.

\textsuperscript{318} See id.

\textsuperscript{319} See id.

\textsuperscript{320} See supra text accompanying note 302.

\textsuperscript{321} See Thomas, 132 Cal. Rptr. 3d at 715.

\textsuperscript{322} See supra text accompanying note 305-306.

\textsuperscript{323} See supra notes 14-16 and accompanying text.

circumstances test because the ends justify the means are jeopardizing the principles of the
Fourth Amendment. Indeed, such deceptive techniques both undermine the public’s
confidence in law enforcement and undermine the protections found in the Fourth Amendment’s
text and history: mainly, an individual’s privacy interests—the *sine qua non* of the Fourth
Amendment. The totality of the circumstances test has been proven ineffective in the context
of warrantless DNA collection and it should thus be abandoned and the First Act Rule should be
adopted.

The First Act Rule provides an easy-to-follow guide for both courts and law enforcement
when deciding whether a warrantless search of DNA is legal. Such a rule would thus aid law
enforcement, protect society’s interests in catching criminals, and protect individuals from
unreasonable searches and seizures which the Fourth Amendment was designed to protect.
“Liberty—the freedom from unwarranted intrusion by government—is as easily lost through

a coffee shop with defendant in order to collect his DNA, after defendant left the detective
retained his coffee cup and napkin for DNA testing); State v. Christian, No. 04–0900, 2006 WL
2419031, at *1 (Iowa Ct. App. Aug. 23, 2006) (police tested DNA from a fork and water bottle
that they handed defendant and he “abandoned” after their interview).

325 *See supra* Part II.
327 *See supra* notes 288-294 and accompanying text.
328 *See supra* Part IV.
329 *See supra* Part IV.
insistent nibbles by government officials who seek to do their jobs too well as by those whose purpose it is to oppress; the piranha can be as deadly as the shark.”

ABSTRACT

Police deception tactics are utilized throughout the United States as a way to catch unsuspecting criminals. Although criticized in many respects, most deceptive police techniques are not only legal, but are actually encouraged. DNA collection and analysis is no exception—techniques are frequently used by law enforcement officers in an attempt to collect a suspect’s genetic specimen in the interest of solving crimes. While law enforcement officers typically have the best interests of society in mind, the current practices employed by officers to collect suspects’ DNA violate the Fourth Amendment.

The Fourth Amendment provides protection against unreasonable searches and seizures, and prescribes that when there is a warrant, it must be based on probable cause describing the places to be searched and the persons or things to be seized. The Fourth Amendment is a paramount protection embedded in our country’s foundation; without its protections, citizens’ privacy rights are greatly diminished. When courts permit law enforcement officers to bypass this protection by upholding warrantless collection of individuals’ DNA obtained through trickery, they circumvent the protections embodied within the Fourth Amendment.

This Note argues that when law enforcement officers use deceptive practices to collect DNA and courts uphold these searches as valid, this violates the Fourth Amendment. It critiques and criticizes the application of traditional exceptions to the warrant requirement which many courts employ in the context of DNA collection. This Note calls for a wholesale abandonment of the traditional test applied in these circumstances and proposes a bright-line rule which would acquiesce to Fourth Amendment protections and provide guidance to law enforcement officers, the courts, and society as a whole.

330 United States v. $124,570 U.S. Currency, 873 F.2d 1240, 1246 (9th Cir. 1989).