

Calif. Court OKs Challenge To 'Spit And Acquit' DNA Collection

By **Marco Poggio**

Law360 (April 14, 2023, 5:37 PM EDT) -- A California state appellate court has found that a lower court wrongly dismissed parts of a lawsuit challenging the constitutionality of a controversial DNA collection program operated by the Orange County District Attorney's Office, ordering the case to proceed to discovery.

A three-judge panel of the California Court of Appeal said in an order Tuesday that the suit, brought by two professors at the University of California, Irvine, sufficiently alleged that the program, which authorizes county prosecutors to obtain DNA samples from people charged with misdemeanors, violates both the federal and state constitutions.

The opinion, penned by Justice Eileen C. Moore and joined by Justices Thomas M. Goethals and Joanne Motoike, overruled a decision by a Superior Court judge in Orange County who had dismissed the suit after noting that the alleged misdemeanants waived their rights to privacy and counsel when they agreed to participate in the DNA collection program.

"Plaintiffs have sufficiently alleged the [DNA collection] program, as implemented by the OCDA, is unconstitutional," the order says.

California law already mandates DNA collection from people convicted of felonies, as well as those who are arrested or charged with murder or manslaughter, or offenses requiring them to register as sex offenders or arsonists.

But through a separate program known colloquially as "Spit and Acquit," Orange County prosecutors dismiss or reduce misdemeanor charges against individuals in exchange for their agreement to have their DNA sampled. Once collected, the genetic material remains stored indefinitely in a database maintained by prosecutors for investigative purposes.

William Thompson and Simon Cole, who are both experts in scientific evidence and teach criminology courses at UCI, said in an amended complaint filed in June 2021 that the program coerces defendants to forfeit their constitutional rights as part of deals with prosecutors in which the defendants have little leverage.

The complaint, which names Orange County District Attorney Todd Spitzer, the county and members of the county's Board of Supervisors as defendants, alleges violations of the right to privacy protected by Article I of the California's constitution and of the rights to counsel and due process under the U.S. and

state constitutions.

In their suit, the professors alleged that the DNA collection program, which started in 2007, has proved ineffective: In 2018, only 0.67% of samples collected through the program matched past crime scene DNA profiles. Meanwhile, as of April 2019, prosecutors have acquired the DNA information of at least 182,000 people — nearly one every 16 residents of the county — through the program, according to the complaint.

In its opposition briefs, the Orange County DA's office argued that its DNA collection program is lawful, noting that misdemeanor defendants sign waivers in which they consent to give up DNA.

But Thompson and Jones say the program takes advantage of defendants — often unrepresented and facing the prospects of jail time and a criminal record — offering them take-it-or-leave-it deals to sign away the rights to their personal information in exchange for dismissal of charges.

"This program's coercive nature, coupled with its ineffectiveness as a crime prevention tool, is unauthorized by the California Penal Code and violates the U.S. and California Constitutions," the complaint says.

Thompson and Cole and their attorneys did not immediately respond to requests for comment Friday afternoon.

Kimberly Edds, a spokesperson for the Orange County District Attorney's Office, called the professors' claims "baseless" and noted in an email statement that the ruling in the appellate court did not address the merits of the DNA collection program.

"It is irrefutable that DNA collection has enabled us to solve unsolved crimes from the past and has been proven to be the greatest deterrent in preventing someone who has submitted their DNA profile from committing new crimes," Edds said.

"UCI could not produce a single defendant outraged over providing their DNA in exchange for a plea deal," she added. "Yet they filed a frivolous lawsuit using taxpayer dollars in an attempt to further recalibrate our criminal justice system to favor criminals over victims."

In 2013, the U.S. Supreme Court narrowly ruled in *Maryland v. King* that DNA swab tests for people arrested for certain crimes does not violate the Fourth Amendment because they serve a legitimate state interest and are not invasive to the point of requiring a search warrant. Numerous jurisdictions across the country currently collect and preserve DNA samples of criminal defendants.

In California, the state Supreme Court ruled in 2018 in *People v. Buza* that DNA can be collected from defendants who are arrested on probable cause for "serious" offenses. That decision created a legal framework for DNA collection programs to expand beyond their normal application to cases involving felonies, experts say.

Will Milliken of Sterne Kessler Goldstein & Fox PLLC, which represents a group of law professors who filed an amicus brief supporting Thompson and Cole, said the litigation over the Orange County program is a test case for a type of litigation that is likely to occur frequently in the future, as the technology surrounding DNA collection and analysis advances rapidly.

"What someone thinks is junk DNA today may not turn out to be junk DNA tomorrow," Milliken told Law360. "If we're going to have governmental entities trying to collect these large amounts of genetic information, what kinds of safeguards do we have to put in place in order to make sure that people's privacy rights aren't infringed?"

The UCI professors are represented by Michael Yoder and Abigail J. Formella O'Melveny & Myers LLP, Paul Hoffman, Melanie Partow and Eda Katharine Tinto of the University of California, Irvine School of Law, and John Washington of Schonbrun Seplow Harris Hoffman & Zeldes LLP.

The defendants are represented by Leon J. Page, Laura D. Knapp, D. Kevin Dunn, Rebecca S. Leeds and Golnaz Zandieh of the Orange County Office of County Counsel.

The case is William Thompson et al. v. Todd Spitzer et al., case number 30-2021-01184633, in the Superior Court of the State of California.

--Editing by Rich Mills.