

## **Defense Lawyers Fight DNA samples taken on the sly**

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

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

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

Mr. Gallego's trial on murder charges, scheduled for next month, was made possible by a DNA match made from that cigarette butt. His defense argues that the police got the DNA without probable cause.

Before conducting a search of a home, car or backpack or person, police have to show probable cause. Probable cause is when the police have sufficient evidence to believe the person committed or is committing a crime. In short police can't just search you because they don't like the way you look or act; they have to have evidence.

Critics argue that by secretly collecting DNA that everyone sheds in the course of daily life, police are not showing "probable cause" that a suspect has committed a crime before conducting a search. Critics say that secret DNA sampling may extend beyond individual investigations. The police, critics say, could collect DNA deemed "abandoned" from anyone.

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

Law enforcement officials say they are just trying to solve crimes. Over the last few years, several hundred suspects have been implicated by the traces of DNA they unwittingly shed well after the crime was committed, according to law enforcement officials. Many more have been eliminated from suspicion without ever knowing that their coffee cups, tissues, straws, utensils and cigarette butts were subject to DNA analysis by the police.

"It's a great tool," said Micki Links, a sergeant in the Sacramento sheriff's homicide division.

In Buffalo last year, undercover police waited until Altemio Sanchez, suspected of strangling and raping several women over a quarter-century, paid the check and left after dinner with his wife at a local restaurant before confiscating his glass.

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

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

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