Prepared by the Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CENTER FOR GENETICS AND SOCIETY ET AL,

Petitioner,

v.

XAVIER BECERRA ET AL,

Respondent.

Case No. CPF-18-516440

ORDER ON MOTION FOR JUDGMENT

HEARING DATE: 02/10/2025

TIME: 9 A.M.

DEPT.: 502

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy.*" (Article I, Section 1 of the California Constitution, emphasis added.) As our understanding of, and potential use for, DNA grows, so does a person's privacy interest in protecting theirs. As observed in the California Supreme Court's seminal privacy case, *Hill*, Californians passed the privacy amendment to our constitution to prevent "government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us… The proliferation of government and business records over

which we have no control limits our ability to control our personal lives." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 18.) Today, the Court finds that the California Department of Justice's decision to retain indefinitely the DNA samples of those arrested for a felony but never charged, convicted, or worse, found factually innocent violates that privacy right.

Facts

Plaintiffs challenge Defendants' decision to indefinitely retain samples gained from DNA collection at arrest under California Penal Code Section 296, commonly known as the DNA Act ("the Act"). The Act provides that "any adult person who is arrested or charged with" a felony offense, "shall provide buccal swab samples, right thumbprints, and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to this chapter for law enforcement identification analysis."

Before the DNA Act was passed by citizen proposition, only those convicted of felonies were required to provide DNA samples. Thus, no expungement protocol existed. Now, "[t]he DNA Act provides that if an arrestee is cleared of charges and there is no other basis for keeping the information, the arrestee 'shall have his or her DNA specimen and sample destroyed and searchable database profile expunged from the databank program.'" (*People v. Buza* (2018) 4 Cal.5th 658, 667 *quoting* Pen. Code Section 299 subd. (a).) "To facilitate the expungement process, the Judicial Council has developed a form request and order." (*Center For Genetics and Society v. Bonta,* 2021 WL 2373436.) At some point, Defendants decided to keep the samples indefinitely, absent arrestee-initiated expungement. Plaintiffs challenge that decision as unconstitutional.

Legal Standard

A traditional writ of mandate under CCP Section 1085 is "a legal tool to compel a public

agency to perform a legal, typically ministerial, duty." (*California Privacy Protection Agency v. Superior Court* (2024) 99 Cal.App.5th 705, 721. "A ministerial duty is an act that a public agency is required to perform in a prescribed manner under the mandate of legal authority without the exercise of judgment or opinion concerning the propriety of the act." (*Id.*)

"Mandamus, rather than a mandatory injunction, is the traditional remedy for the failure of a public official to perform a legal duty." (*Common Cause v. Bd. Of Supervisors* (1989) 49 Cal.3d 432, 442.) To obtain the writ, Plaintiffs must show that (1) there is no other "plain, speedy, and adequate remedy," (2) "respondent has a clear, present, and ministerial duty to act in a particular way," and (3) Plaintiffs have "a clear, present and beneficial right to performance of that duty." (*Id.*) However, traditional mandate is not appropriate to "compel an official to exercise discretion in a particular manner." (*Id.*)

Traditional mandate can be used to challenge discretionary agency actions as abuses of that discretion. (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 561.) In this way, traditional mandate fills the statutory gap when there is no explicit statutory requirement for a hearing that would avail a petitioner of relief under CCP Section 1094.5 but when the agency's decision violates the law. (*Id.*)

Discussion

I. Mandamus is the appropriate vehicle for this petition, but the Court cannot mandate that Defendants exercise their discretion in a specific way.

Plaintiffs argue that Defendants abused their discretion in deciding to retain DNA samples indefinitely. Plaintiffs' argument is persuasive because Defendants' decision violates the right to privacy under the California Constitution, as will be addressed in Section II. However, Plaintiffs' requested relief overreaches. The Court cannot dictate an agency's exercise of discretion by creating a protocol for automatic expungement.

Plaintiffs have identified multiple ways that Defendants could cure the constitutional violation. For instance, Plaintiffs argue Defendants could start expunging samples over seven years old, among other avenues. To draft an expungement protocol would be to tell Defendants how to exercise their discretion in violation of the well-settled rule that traditional mandate does not "lie to command the exercise of discretion to compel some action upon the subject involved." (*Hollman v. Warren* (1948) 32 Cal.2d 351, 355-356 [holding that mandamus was inappropriate to force the governor to appoint more notaries public].) Compelling automatic expungement in any specific form would require the court to step into the shoes of the agency and choose how it should exercise its discretion. The Court cannot issue a writ of mandate laying out a plan for expunging samples. Instead, the Court holds that Defendants abused their discretion in deciding to retain the samples indefinitely.

Plaintiffs maintain that the Court is authorized to provide its requested relief and lay out a specific plan for the agency. This is unpersuasive. While courts have ordered such relief, they typically only do so to effectuate a specific statutory scheme. (*See Saleeby,* 39 Cal.3d 547, 561 [holding the State Bar's freedom to award relief to those injured by attorneys from a state fund is not unlimited and is subject to traditional mandamus review]; *Manjares v. Newton* (1966) 64 Cal.2d 365, 376 [holding school board exceeded authority when mandated to provide transport to every student]; *Thomas v. Shewry* (2009) 170 Cal.App.4th 1480, 1486 fn. 6 [noting that healthcare agency deciding whether a doctor could reenroll as a Medi-Cal provider could not consider a factor it was statutorily prevented from considering]; *CV Amalgamated LLC v. City of Chula Vista* (2022) 82 Cal.App.5th 265, 284 [holding that city plainly did not follow its own procedures when denying cannabis operation permit].) In the above cases, the agency decision-making was subject to this relief because the agency's conduct exceeded or strayed from their

statutory requirements. Here, by contrast, the violation is purely constitutional. Ordering a specific plan for the future of these samples would invade the agency's exercise of discretion.

Plaintiffs' reliance on *Common Cause* for the proposition that the Court can develop a procedure is misplaced. There, the trial court issued a peremptory writ ordering a county to deputize clerks as voting registrars. The trial court found that both statutes and the US Constitution's equal protection clause created a ministerial duty to do so. (*Common Cause*, 49 Cal. 3d at 437.) The California Supreme Court disagreed, holding that "[e]ven assuming arguendo that County's present outreach program…violates equal protection principles, the trial court's order requiring an employee deputization program over County's objection was not an available remedy for the alleged violation." (*Common Cause*, 49 Cal. 3d at 446.) *Common Cause* does not support Plaintiffs' position because that court specifically approved of the trial court's decision not to require "the adoption of any particular plan or system." (*Id.* at 445-446.) Plaintiffs ask for the adoption of a particular plan or system when they request a peremptory writ that dictates a specific procedure for expunging DNA samples. Plaintiffs other cited options that the Court should devise a plan or force Defendants to do so creates the same problem.

While Plaintiffs ask the Court to overstep its authority, Defendants' construction of CCP Section 1085 would render every agency decision unreviewable so long as there is discretion to do so. The Court agrees that "a writ requiring DOJ to automatically expunge arrestee DNA, or to take any particular course of action, would be inappropriate." (Supplemental Opposition, 18.) The Court is not doing so. Instead, the Court only finds today that the decision to retain the samples indefinitely was an abuse of discretion because it was unconstitutional.

II. Defendants' decision to retain DNA Samples indefinitely is unconstitutional under Article I Section 1 of the California Constitution because the *Hill* test is satisfied.

As a preliminary matter, Plaintiffs concede this is an "as-applied" challenge. While the

parties disagree about who the challenge applies to, the Court of Appeal was clear that Plaintiffs have stated facts sufficient to allege an as-applied challenge to keeping DNA samples and profiles of arrestees who are never convicted and have no prior qualifying convictions. (*CGS* at *11.) Thus, Defendants' claim that there is no valid as-applied challenge fails.

Plaintiffs have established the expungement practices of the department are unconstitutional under three prongs of the *Hill* test: (1) a prima facie case that there is a nontrivial invasion of a privacy interest, (2) the invasion is not justified, (3) the invasion is serious. (*Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th. 1, 35-40.)

a. Plaintiffs have stated a prima facie case showing a nontrivial invasion of a privacy interest under the first step of the *Hill* test.

To establish a prima facie case of a nontrivial invasion of a privacy interest, Plaintiffs must show (1) there is a legally protected privacy interest, (2) a reasonable expectation of privacy exists, and (3) there is a serious invasion of that privacy interest.

Under all these prongs, Defendants argue that *People v. Roberts* (2021) 68 Cal.App.5th 64, 104-108, squarely establishes there is no prima facie case. It does not. In *Roberts*, the court of appeal decided that the DNA Act, as applied to the defendant in a murder case, was constitutional under Article I, Section 13 of the California Constitution. (*Id.*) While the court found no constitutional violation in failing to automatically expunge DNA samples and profiles, it discussed that violation in the context of the Fourth Amendment. (*Id.* at 105.) There, the petitioner argued that each time the sample was checked against other profiles, it was "in effect, subjected to additional searches after his release." (*Id.*) While the court there also declined to find a constitutional violation under the right to privacy, it did so expressly "in the context of search and seizure." (*Id.* at 108.) Only in the search and seizure context is the privacy right coextensive with the right against unreasonable search and seizure. (*Id.*) Again, the Court is not

finding the DNA Act is unconstitutional under the right to privacy. This is an as-applied challenge. The violation is the decision to retain DNA samples indefinitely absent statutory authority.

1. There is a legally protected privacy interest in collecting and retaining DNA samples.

At the outset, the Court notes the Court of Appeal has addressed nearly this same issue. In reversing this Court's order sustaining Defendants' demurrer, the Court of Appeal held that the "expungement provisions implicate the right of privacy secured by our state constitution." (*CGS* at *12.) It noted, "we are not persuaded that an individual who is *no longer* an arrestee or a defendant, and who meets all the legal requirements to have his or her DNA information expunged, does not have a measurably greater privacy interest than does an arrestee in custody in his or her genetic information." (*Ctr. for Genetics & Soc'y v. Bonta*, at *12.) Thus, finding a privacy interest here would not be creating a new right out of whole cloth. Nor would the Court here be finding all petitioner-initiated relief, such as sealing an arrest record, unconstitutional. Rather, the Court of Appeal decision suggests that holding DNA samples indefinitely implicates a strong privacy interest due to the sensitive nature of DNA. This is all that *Hill* requires for this prong. (*Hill*, 7 Cal.4th 1 at 35.)

Defendants contend that automatic expungement does not implicate a privacy interest. This framing is too narrow. Only identification of a "specific, legally protected privacy interest" is required. (*Id.*) Here, the protected privacy interest is in the DNA samples themselves. Moreover, this first interest-identifying prong is only used to "weed out claims that involve so insignificant or de minimis an intrusion" on privacy that the court does not even need to balance the privacy interest against countervailing interests. (*Lewis v. Superior Ct.*, (2017) 3 Cal.5th 561, 571.) Here, Plaintiffs meet prong one by identifying a privacy interest in the DNA samples.

2. A reasonable expectation of privacy exists

Defendants misstate the law when they argue against the reasonableness of the program itself. Instead, the second prong tests whether a reasonable expectation of privacy exists generally for DNA samples. *Thompson* identified a reasonable expectation of privacy in DNA samples indefinitely given to third parties by the district attorney's office. (*Id.* at 459.) Here too, Plaintiffs have a reasonable expectation of privacy in having their DNA held indefinitely. Moreover, the Court of Appeal in this case implicitly found this prong was met when they decided there was at least a prima facie case for a privacy violation. Thus, prong two is met.

3. There is a serious invasion of privacy because the Department decided to retain DNA samples indefinitely.

On prong three, an invasion of privacy must be "sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." (*Hill*, 7 Cal.4th 1 at 37.)

Here, Plaintiffs have established a serious invasion of privacy exists under *Hill*. Given that DNA can reveal such sensitive data as "familial relations, predisposition for developmental disabilities or disease, physical characteristics, and ethnic ancestry," the Court finds the indefinite retention of DNA samples to be a serious invasion. (MPA, 10 *citing* Risher Decl. at 2 Para. 6.) Indeed, "the Department possesses DNA for 700,537 individuals born after 1975 with no felony convictions but who have an open arrest from more than six years ago, a time period that exceeds the statute of limitations for most offenses." (*Id.*) And few people eligible for expungement ever get their DNA samples expunged. (Frey Decl. V1 at 439:5-6 (PMQ) ["Q: What's the total number of expungements granted to date? A: I believe, when I consulted last week, it was 2,059."].) This shows gravity under *Hill*. Comparing the number of people eligible for expungement with the total expungements granted, the Court finds the invasion of privacy here is

serious.

Defendants erroneously argue that the requirement to apply for expungement "does not constitute a significant intrusion." (Opp. 18.) Defendants emphasize that arrestees merely need to fill out a short form to get the expungement, and that this process is not burdensome and complies with the law. But the decision to indefinitely keep eligible arrestee's samples in the system is the intrusion, not the statutory expungement procedure. Plaintiffs have satisfied this third prong.

b. Defendants have failed to establish a justification under the second step of the *Hill* test for retaining the DNA samples or profiles because none of Defendants' stated justifications outweigh the right to privacy.

Under step two, courts weigh the intrusion of privacy against the agency's countervailing interests. (*Hill*, 7 Cal.4th 1 at 38 ["Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest."].) The Court uses a general balancing test based on the "privacy interest involved and the nature and seriousness of the invasion." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 329.) The countervailing interests must be legitimate. (*Hill*, 7 Cal.4th 1 at 38.) Legitimate interests must "derive from the legally authorized and socially beneficial activities of government and private entities." (*Id.*) Then, "[t]heir relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." (*Id.*)

Here, the countervailing interests identified by Defendants are: (1) accurate identification, (2) assessing risk to staff, (3) ensuring suspect is available for trial, (4) assessing public danger,

and (5) exonerating innocent persons. Defendants cite *Maryland v. King* (2013) 569 U.S. 435, 449, for the proposition that these five identified interests are legitimate.

While the Defendants' stated interests are legitimate, they have not proven that their conduct furthers these interests. Thus, Defendants' stated interests do not outweigh Plaintiffs' right to privacy. First, accurately identifying a suspect is legitimate and important as one of the Department's central functions is identifying crime suspects. However, Defendants fail to prove retention furthers the goal of identifying suspects. For example, Defendants assert that:

> "The DNA Data Bank program has aided more than 123,000 investigations. Hits from the Arrestee Index to crime scene DNA have aided criminal investigations in the same proportion as hits from the Convicted Offender Index—about one-third of all subject profiles are from arrestees, and they account for about one-third of the investigations aided. Not only does the program help identify offenders and exonerate the innocent, but it likely has also prevented countless crimes."
>
> (Opposition, 9.)

Even if all these facts are true, they do not support the contention that the DNA Act's indefinite retention supports the goal of accurately identifying a suspect. While Defendants show that DNA bank broadly aids investigation, they have not shown that the indefinite retention policy furthers that goal. In other words, Defendants' claims that DNA generally assists identification, does not establish a causal link between indefinite retention of all DNA and accurate identification of suspects.

The same reasoning applies to stated interests two through four. That is, Defendants have not shown that indefinite retention helps them assess risk to staff, ensure a suspect is available for trial, or assess public danger.

The record is more developed on the fifth interest, exonerating innocent persons, because

Defendants assert that "the identification of *any* offender tends to exonerate the innocent—because it tends to eliminate everyone else." (Opp, 22 *citing* Schubert Decl. Para. 10, Sepich Decl. Paras. 17-18.)

In Schubert's Declaration, paragraph 10, she states that:

"The expansion of the California DNA Data Bank to include arrestee DNA samples allowed us to investigate and prosecute crimes smarter and more efficiently, not merely because we could focus on a likely offender, but because often we could quickly exonerate persons who may have been otherwise suspected of the crime."

Admittedly, Defendants have identified a few concrete examples of indefinite retention substantively furthering the interest of exonerating innocent persons. However, the Court is to weigh all the identified interests against the privacy right. Here, the identification of these few discrete examples, is not sufficient to outweigh the privacy interests of almost a million Californians.

In sum, Defendants fail to show that indefinite retention substantively furthers the first four legitimate goals. The fifth alone is not enough to tip the scale. After failing to establish a defense, the Court need not consider whether the Plaintiffs have proposed a feasible alternative to the current expungement program.

Lastly, the Court is cognizant of the implications of Defendants' argument that government interests are stronger than privacy rights in this instance. Under the government's framework, the DNA samples of every Californian might aid crime solving. After all, "[t]he more profiles in the database, the higher the likelihood of finding a match. If everyone in the country were in the database, we would presumably get a hit for most unsolved cases in which DNA is collected… the logic of including arrestees-if the purpose is simply to add more potential criminals to the database-is slippery. Why not also uphold a law that targets other sub-populations

shown to have higher rates of offending, such as those with serious mental illnesses or those under age twenty-five?" (Andrea Roth, *Maryland v. King and the Wonderful, Horrible DNA Revolution in Law Enforcement* (2013) 11 Ohio St. J. Crim. L. 295, 300.) Thus, the Court finds that Defendants' decision to retain DNA samples of arrestees never charged, never convicted, or found innocent indefinitely runs afoul of the California Constitutional right to privacy.

III. The writ of mandate is granted.

A peremptory writ shall issue directing Defendants to comply with Article I Section 1 of the California Constitution. Defendants are ordered to devise a plan to expunge samples such that the privacy rights of Californians are respected following the above reasoning. Though the Court may not exercise its judicial authority to compel the exercise of discretion in a specific way, "[a] refusal to exercise discretion is itself an abuse of discretion." (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 69.) Thus, Defendants are to devise such a plan within ninety calendar days of the date of this order. The parties are ordered to meet and confer to decide whether further hearings will be required.

IT IS SO ORDERED.

Dated: 2/10/2025

Honorable Victor Hwang
Judge of the Superior Court