
Advances in science have revolutionized crime detection, indelibly affecting Fourth Amendment jurisprudence. Forensic identification techniques are continually refined, and accordingly, the concomitant constitutional considerations continue to grow. As technological powers expand the use of deoxyribonucleic acid (DNA) evidence, society must grapple with technology’s effect on individual privacy. DNA identification is not physically invasive; therefore, an innocent person will find it increasingly difficult to demonstrate that his right to remain free from unwanted intrusions into his genetic privacy outweighs the government’s interest in collecting DNA evidence.

In *Commonwealth v. Draheim*, the Massachusetts Supreme Judicial Court (SJC)...


4. See Winston v. Lee, 470 U.S. 753, 767 (1985) (holding surgical intrusion to remove bullet lodged in defendant’s chest “unreasonable under Fourth Amendment”); Schmerber v. California, 384 U.S. 757, 767-68 (1967) (reserving judgment on whether nature of some evidence would make search and seizure categorically unreasonable). In Schmerber, the Court also considered the intersection of the Fourth and Fifth Amendments. Schmerber v. California, 384 U.S. 757, 767-68 (1967) (concluding compulsion of blood sample not testimonial under Fifth Amendment). The Court held that minor surgical intrusions, like collecting blood, do not violate the Fifth Amendment’s right against self-incrimination because blood is not testimonial in nature. *Id.* at 760-61. But see *id.* at 773 (Black, J., dissenting) (rejecting majority’s characterization of blood sample as not self-incriminating); see also James A. McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 Ind. L.J. 55, 83-84 (1977-78) (discussing relative weight of Fourth Amendment in relation to Fifth Amendment right against self-incrimination).

considered which standard trial courts should use when considering a motion to compel DNA evidence in a criminal matter from someone who is not a suspect, defendant, or witness. The SJC held that a trial court must find probable cause to believe in the commission of a crime and determine whether the search will likely provide evidence that will help prove the defendant’s guilt or innocence.

In Draheim, the Commonwealth alleged that the defendant, Nina Draheim (Draheim), engaged in sexual intercourse with two teenage boys. The Commonwealth sought DNA samples from Draheim, her two children, and the two alleged victims. The test results could scientifically establish paternity, proving that the rapes occurred.

At the hearing on the motion to compel, the Commonwealth supported its motion to obtain buccal swabs from Draheim’s two children and the two alleged victims using the same evidence of the alleged rapes presented to the grand jury during indictment. The Commonwealth presented oral testimony from Draheim’s former friend that Draheim admitted to “having sex” with one of the boys, and a police detective testified that “JG said he had sexual relations with Draheim.” The Commonwealth also presented CG’s “statements that he had sex with Draheim[,] . . . a handwritten statement from CG, and a videotape of a police interview.” The Commonwealth argued that “each [DNA] sample will probably produce evidence relevant to the defendant’s guilt, namely whether either complainant was the biological father of either of the defendant’s children.” The trial court denied the Commonwealth’s motion

6. Id. at 827 (describing issue before court).
7. Id. at 829 (reciting SJC’s holding).
8. Id. at 825-27 (describing indictments against Draheim).
9. 849 N.E.2d at 825 (explaining prosecutions argument of substantial potential each alleged rape produced child). Due to the age of the complainants, the court used the pseudonyms “JG” and “CG.” Id. at 824
10. Id. at 826 (listing arguments for administering swab). Kevin Draheim, Draheim’s husband at the time of the alleged rapes, is the named father on Abby’s birth certificate and has always acted as her father. Id. at 826-27. Draheim delivered her second daughter approximately forty to fifty-three weeks after the period of the alleged rapes stemming from CG, the second alleged victim. Id. at 827. Both the defendant and Kevin Draheim agree that the second child is not Kevin’s biological child. Id.
11. Id. at 827 (asserting need for buccal swab evidence to determine paternity of child).
12. Id. at 826 (illustrating Commonwealth’s evidence of first alleged rape).
13. 849 N.E.2d at 826 (describing evidence Commonwealth presented of second alleged rape).
14. Id. at 827 (explaining Commonwealth’s argument in motion to compel buccal swab from children).

The motions, supported with affidavits and grand jury transcripts, asserted that buccal swabs involve a “relatively minor intrusion” on those subjected to compliance. In an affidavit, a supervisor at the State police crime laboratory maintained that saliva from a buccal swab from the defendant, the victims, and the children “[would] allow [further] analysis[, . . . permit[ting]] expert opinion . . . about the paternity of the children.” A buccal swab test involves the rubbing of a swab on the interior surface of the cheek to obtain cells that are then evaluated . . . for deoxyribonucleic acid (DNA) analysis.” Doe v. Senechal, 725 N.E.2d 225, 228 n.4 (Mass. 2000) (explaining procedure of obtaining a buccal swab). Although the test implicates the Fourth Amendment’s provision against unreasonable searches and seizures, a buccal swab is not considered any more intrusive than a blood sample. Commonwealth v. Maxwell, 808 N.E.2d 806, 810 (Mass. 2004) (concluding unlike blood samples extracted by needles, buccal swabs do not intrude below skin).
for DNA from Draheim’s two children, concluding that the Commonwealth would have to go forward and prosecute the case “as if there [were] no child[ren].” The Commonwealth appealed the trial court’s ruling to the SJC, and the SJC held that the moving party’s burden requires a showing of “probable cause to believe a crime was committed” and a party must demonstrate the probability that any DNA test would reveal exculpatory or inculpatory evidence.

Compelling an individual to relinquish DNA is a search and seizure under the Fourth Amendment to the United States Constitution. The purpose of the Fourth Amendment is to protect personal privacy and individual dignity against unwarranted intrusion by the state; therefore, any justification for a search should be tailored to each individual. Each case is factually unique, thus the Supreme Court consistently describes Fourth Amendment questions as highly fact intensive, necessitating a totality of the circumstances review. The Court first considered bodily intrusion searches in Schmerber v. California. The Court held that a blood test conducted in a hospital after a car accident was reasonable because the police officers had probable cause to believe that the defendant was intoxicated, and waiting for a warrant would allow any evidence to naturally diminish. Subsequently, in Winston v. Lee, the Court held that a
court could not force a defendant to undergo surgery to recover a bullet lodged in his chest. 23 While balancing the individual’s privacy interests against the community’s need for evidence, the Court reasoned that the prosecution had ample evidence to prosecute the case without resorting to an invasive surgical procedure requiring the use of anesthesia. 24 The Supreme Court, however, has yet to decide the standard a party in a criminal matter must meet when attempting to compel someone other than a suspect or a defendant to relinquish a sample of DNA. 25

The Massachusetts Rules of Criminal Procedure proscribe the proper procedures in bringing a motion before a trial court requesting an order for an individual to furnish DNA evidence. 26 At a pre-trial hearing, the party requesting the evidence must show that a sample “will probably produce evidence relevant to the question of the defendant’s guilt.” 27 When considering the pre-trial motion, a court can evaluate the gravity of the crime, the value of the evidence, and the ability to obtain evidence without intrusion, weighed against the defendant’s liberty interest to remain free from unwanted bodily invasions. 28 South Carolina, the only other jurisdiction to answer a similar question presented by Draheim, held that the state must show “probable cause to believe a crime was committed[,] . . . a clear indication that material evidence relevant to the question of suspect’s guilt will be found[,]” and, lastly,

the state compels physical evidence from an individual and uses it as evidence, the state has violated the Fifth Amendment’s prohibition against self-incrimination. Id. at 174-79.


25. See 849 N.E.2d at 829 (citing South Carolina case law as highest court answering similar question). In State v. Register, the South Carolina Supreme Court considered the standard a party must demonstrate to compel non-testimonial evidence (i.e. DNA) from a witness who was neither a suspect nor defendant in a criminal matter. 419 S.E.2d 771, 773 (S.C. 1992) (balancing community’s need for evidence against intrusion on individual).

26. In re Jansen, 826 N.E.2d 186, 190-91 (Mass. 2000) (concluding saliva is an object under rule 17(a)(2) of Massachusetts Criminal Procedure). Rule 17(a)(2) mandates that “[a] summons may . . . command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein.” MASS. R. CRIM. P. 17(a)(2) (2005) (emphasis omitted). The SJC held that a judge, under rule 17(a)(2), may direct nonparties to relinquish documentary evidence or objects. See Commonwealth v. Lampron, 806 N.E.2d 72, 77 (Mass. 2004) (directing non-party to produce documents); Commonwealth v. Oliveira, 780 N.E.2d 453, 464 n.15 (Mass. 2002) (interpreting rule 17(a)(2) to permit defendant to summons objects from third party).


that any method of collecting this evidence is “safe and reliable.”29 It is unclear how courts would analyze cases where Fourth Amendment considerations collide with other liberty interests embodied in the Bill of Rights.30 Courts recognize the Fourteenth Amendment’s due process clause protects against government interference with an individual’s liberty interests.31 Innocent third parties are entitled to maximum permissible procedural and substantive due process protections because they have not violated the public trust by involving themselves in any wrongdoing.32

In *Draheim*, the SJC considered the burden a party in a criminal matter must satisfy to compel DNA evidence from someone other than a defendant or a suspect.33 The SJC held that the burden on the party moving to compel the DNA of a non-suspect is two-fold: first, a trial court must find probable cause to believe that a crime was committed; secondly, the moving party must demonstrate that the DNA test is material and relevant to a defendant’s guilt or innocence.34 The SJC further directed trial courts to weigh “the seriousness of

29. State v. Register, 419 S.E.2d 771, 773 (S.C. 1992) (announcing standard under which trial courts can order compulsion of evidence from third parties to criminal case). In *Register*, the State requested DNA evidence from the minor girlfriend of the defendant in a rape and murder case. *Id.* at 772. The State argued that bloodstains and pubic hair, found in the back of the defendant’s car, were likely from the victim, and not the defendant’s girlfriend, contradicting a potential defense of the defendant’s. *Id.*


32. See Winston v. Lee, 470 U.S. 753, 759 (1985) (explaining community’s interest in justice is justified by finding probable cause for a particular individual); see also Colb, *supra* note 18, at 1458-59 (describing how government justifies invasion into individual’s privacy when conduct injures another’s liberty). Thus, in cases like *Draheim*, the privacy rights of innocent third parties are not controlled by the third party; rather, the privacy interest can be overcome by the government or the suspect or defendant in a criminal case. *Cf.* 849 N.E.2d at 828 (declaring standard moving party must meet when compelling DNA from innocent third parties).

33. 849 N.E.2d at 825 (reciting issues considered by SJC). The court reaffirmed that rule 17(a)(2) of the Massachusetts Rules of Criminal Procedure is the proper avenue when compelling a buccal swab, explaining that the motion seeks to compel an “object.” *Id.* at 828.

34. *Id.* at 829 (announcing two-part inquiry when compelling samples from third party). In *Draheim*, the first inquiry was easily met because Draheim was indicted. *Id.* As to the second consideration, the SJC remanded the case back to the trial court for a hearing and finding of fact within the new standard. *Id.*
the crime, the importance of the evidence, and the availability of less intrusive means, against the privacy of the individual.\textsuperscript{35} The effects, however, of any compulsion order on the targeted individual and any parent-child relationship are “extraneous considerations.”\textsuperscript{36}

In \textit{Draheim}, the SJC failed to direct trial courts to conduct individualized and fact-intensive reviews when considering motions to compel DNA from innocent third parties.\textsuperscript{37} Instead, the SJC should have adhered to established Fourth Amendment review, directing trial courts to examine the totality of the circumstances.\textsuperscript{38} The factual scenarios are dynamic and unimaginable; thus, under the SJC’s standard, a trial court in future cases may ignore competing constitutional interests.\textsuperscript{39} The SJC missed an opportunity to provide a flexible, fact-intensive, and individualized test protecting future innocent third parties from government overreaching.\textsuperscript{40} If the government seeks to compel DNA from someone who is not a criminal defendant, suspect, or witness, the standard of proof required should be heightened in excess of that required to compel DNA from suspects and defendants, whose privacy interests are lawfully diminished.\textsuperscript{41} \textit{Draheim} fails to address when an individual’s liberty to

\textsuperscript{35} Id. (citing \textit{In re Lavigne}, 641 N.E.2d 1328 (Mass. 1994)) (listing factors trial judge could weigh during motion to compel from non-suspects or defendants).

\textsuperscript{36} Id. at 829 (describing factors courts can weigh and diminishing importance of other factors).

\textsuperscript{37} 849 N.E.2d at 829 (holding court can compel DNA upon probable cause, if evidence will help prove paternity).

\textsuperscript{38} See United States v. Drayton, 536 U.S. 194, 207 (2002) (affirming the “totality of circumstances must control” seizure determinations); Florida v. Bostick, 501 U.S. 429, 439-40 (1991) (explaining rigid Fourth Amendment test precludes review of all circumstances); Illinois v. Gates, 462 U.S. 213, 231-39 (1983) (holding courts should consider totality of circumstances for probable cause determinations); see also Ornelas v. United States, 517 U.S. 690, 696 (1996) (describing probable cause to arrest as “fluid concept”). The \textit{Ornelas} Court further explained that substantive Fourth Amendment considerations should be tailored to the “particular contexts” of each case. \textit{Ornelas} v. United States, 517 U.S. 690, 696 (1996). Furthermore, Fourth Amendment questions are mixed questions of law and fact, and therefore, future appellate reviews should give great deference to the trial judge’s findings because they have the ability to witness live testimony and make the most accurate factual findings. Id. at 696-97; see also Terry v. Ohio, 392 U.S. 1, 13 (1968) (citing \textit{Sibron} v. New York, 392 U.S. 40 (1968)) (explaining “Fourth Amendment limitation . . . will develop [with]in . . . concrete factual circumstances of individual cases”).

\textsuperscript{39} Compare Winston v. Lee, 470 U.S. 753, 760 (1985) (declaring “reasonableness of surgical intrusions beneath . . . skin depends on a case-by-case approach”), with 849 N.E.2d at 829 (directing trial court to ignore certain extraneous factual circumstances surrounding DNA compulsion of innocent third parties). The Court in \textit{Lee} considered whether major surgical intrusions, even if the police have probable cause, are unreasonable, and explained that the question whether “the community’s need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers.” Winston v. Lee, 470 U.S. 753, 760 (1985).

\textsuperscript{40} 849 N.E.2d at 827 (employing same test as South Carolina, the only other jurisdiction ruling on issue); see also supra note 38 (stressing Supreme Court’s Fourth Amendment jurisprudence demanding totality of circumstances review).

\textsuperscript{41} See Winston v. Lee, 470 U.S. 753, 759 (1985) (explaining importance of probable cause findings). When enforcement officials have probable cause to suspect a person committed a crime, the privacy protections embodied in the Fourth Amendment are lawfully diminished for that individual. Id. The daughter of the defendant in \textit{Draheim} was neither a suspect nor a defendant; therefore, a more stringent standard should be applied in reviewing her DNA compulsion order. See id. Third-party interest in genetic privacy should be
be free from unwanted intrusions outweighs the community’s interest, and this issue will likely need to be considered by other courts and legislative bodies.42

By explicitly rejecting the notion that the trial court should consider a competing constitutional consideration—a father’s relationship with his daughter—the SJC egregiously ignored family relationships and the particular factual scenario before the trial court.43 Trial courts should instead be directed to consider all compulsion orders of third parties on a case-by-case basis, while balancing the competing constitutional interests against the importance and relevance of the evidence, and availability of less invasive procedures of obtaining the evidence.44 Future application of the Draheim standard will potentially cause fundamental rights embodied in the Bill of Rights to be ignored by trial courts.45

Finally, Draheim displays how “the People” could take part in directly deciding what justice the community deserves.46 Draheim highlights the fairness of the Founders’ intention to allow juries to consider which searches are reasonable under the Fourth Amendment.47 By permitting juries to consider motions to compel DNA or other evidence from third parties, community members are involved in deciding what justice demands.48 Accordingly, this permits the community to decide whether the government should force an innocent child to surrender his DNA, an intimate characteristic, in the face of sufficient evidence obtained by prosecutors.49

greater than that of suspects and defendants. Compare 849 N.E.2d at 828-29 (concluding court must consider order compelling DNA from third party under same standard as defendants), with Winston v. Lee, 470 U.S. 753, 759 (1985) (explaining persons suspected of committing crimes partly relinquish their privacy rights for investigatory purposes).

42. Cf. 849 N.E.2d at 827 (holding trial court’s consideration of father’s upbringing right of innocent daughter as extraneous); Kerr, supra note 3, at 881-82 (stressing need for legislative rulemaking to maintain privacy protections).


44. See 849 N.E.2d at 828 (ignoring trial court’s findings regarding effect of compulsion upon family relationships). The trial judge weighed the effect of the order on the family relationship and ruled that the Commonwealth should have proved its case as if there were no child. Id.

45. Cf. 849 N.E.2d at 827 (holding trial court’s consideration of father’s right of direct upbringing of innocent daughter as extraneous); Kerr, supra note 3, at 881-82 (stressing need for legislative rulemaking for more effective privacy protection).

46. See supra note 30 and accompanying text (highlighting importance of increasing roles of juries in constitutional interpretation).

47. See Amar, Bill of Rights, supra note 30, at 1183 (explaining role of civil juries in Framers’ original understanding of Fourth Amendment).

48. See Amar, America’s Constitution, supra note 30, at 326 (highlighting Founders’ intent to allow jurors to decide reasonableness of warrants); Paulsen, supra note 30, at 691 (asserting citizens on juries could adequately consider Fourth Amendment reasonableness determinations).

49. See Amar, Bill of Rights, supra note 30, at 1183 (describing local juries’ role as protecting citizens from the overreaching of government); Paulsen, supra note 30, at 691 (supporting restoration of jury’s role in interpreting the Constitution); Thomas & Pollack, supra note 30, at 185 (arguing jury panels should replace
In Draheim, the SJC considered the standard applicable when a party in a criminal matter moves to compel DNA evidence from a third party. The SJC analogized the DNA of an innocent person to a mere object, thereby failing to direct trial courts to consider the totality of the circumstances and competing constitutional interests. When enforcement officials move to compel DNA from innocent third parties, the burden should be more rigorous than the test applied to defendants and suspects. Scientific advancements mitigating physical seizure of individual’s DNA should not lessen the constitutional guarantees embodied in the Bill of Rights. Technology, though a useful tool in the detection of crime, should not be used simply because society has the ability; rather, it should only be used when justice demands it.

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