MINISTERIO DE JUSTICIA MINISTERIO DE JUSTICIA M
DE JUSTICIA MINISTERIO DE JUSTICIA MINIST
MINISTERIO DE JUSTICIA MINISTERIO D
DE JUSTICIA MINISTERIO DE JUST
MINISTERIO DE JUSTICIA M
DE JUSTICIA MINIST
MINISTERIO D
DE JUST

GUIDE TO THE FORENSIC USE OF DNA

NATIONAL COMMISSION FOR THE FORENSIC USE OF DNA

2019

GOBIERNO DE ESPAÑA
MINISTERIO DE JUSTICIA

Recommended citation: Guide to the Forensic Use of DNA. National Commission for the Forensic Use of DNA. Ministry of Justice. Madrid. 2019.

Coordination:

Ignacio José Fernández Soto. *Magistrado. Vocal de la Comisión Nacional para el Uso Forense del ADN y coordinador de su Grupo Jurídico y Bioético*

Yolanda Gutiérrez García. *Fiscal. Vocal de la Comisión Nacional par el Uso Forense del ADN*

Antonio Alonso Alonso. *Director Nacional del Instituto de Toxicología y Ciencias Forenses. Vicepresidente de la Comisión Nacional para el Uso Forense del ADN*

Secretariat of the National Commission for the Use of DNA
National Institute of Toxicology and Forensic Sciences
José Echegaray 4. 28232 Las Rozas. Madrid.

Website:
https://www.mjusticia.gob.es/cs/Satellite/Portal/es/ministerio/organismos-ministerio-justicia/instituto-nacional/comision-nacional-para-forense

e-mail:
cnusoforenseadn@mjusticia.es

Catálogo de publicaciones de la Administración General del Estado
http://cpage.mpr.gob.es

Edita:
Ministerio de Justicia. Secretaría General Técnica.

Maquetación:
Subdirección General de Documentación y Publicaciones

NIPO:
051-19-069-8

FOREWORD

The *Guide to the Forensic Use of DNA* was approved by the National Commission for the Forensic Use of DNA at its meeting of 24 October 2019 on the basis of the preparatory work carried out by the Legal and Bioethics Group and the Permanent Technical Committee of the aforementioned commission.

The purpose is to foster knowledge of the forensic use of DNA among professionals within the scope of the Justice Administration (judges, public prosecutors, lawyers of the justice administration, forensic medical examiners, DNA experts at toxicology and forensic science institutes, State and authonomic security forces and bodies among others).

With this objective, the guide offers an approach to different legal precepts and scientific standards relating to the DNA evidence, describing the legal regulations, scientific procedures and good practices through different phases of the process: sample collection, analysis of the DNA, database searches, conservation and deletion of the sample, the expert report, and the assessment of the sample.

The guide contains best-practice proposals and recommendations that are the fruit of the professional experience of the members of the National Commission for the Forensic Use of DNA. The annexes include the documentation approved by the commission in relation to sampling, the recommendations of the Legal and Bioethics Group on new DNA markers of biogeographic origin and external phenotypic traits, and a brief jurisprudential review with judgments on the validity and assessment of DNA expert evidence in criminal proceedings.

The contents of this guide have no binding or regulatory status, nor is it intended as an academic work. Its sole purpose is strictly educational, to advise on good practices.

My thanks and recognition to Esmeralda Rasillo López, former director general of relations with the Justice Administration and president of the National Commission for the Forensic Use of DNA, for her resolute commitment and drive during her tenure in the preparation of this guide.

PRESIDENT OF THE NATIONAL COMMISSION FOR THE FORENSIC USE OF DNA

Concepción López-Yuste Padial

Director-General for the Public Justice Service

CONTENTS

I. INTRODUCTION

DNA analysis has become a hugely important form of evidence in criminal law for the investigation and prosecution of crimes, for the identification of corpses and investigation of missing persons, as well as in civil law for the resolution of filiation proceedings.

DNA techniques allow us to determine, a genetic profile based on the traces left by the perpetrator of a crime (unknown sample), and select a unique individual from all others, constituting essential evidence, both for charging and exonerating, by checking it against the genetic profile of the suspect (known sample). The development of DNA databases has grown the field of investigation by allowing not just for the cross-checking of an unknown DNA sample with the DNA of the suspect (direct or one-to-one matching) but also the comparison of the sample or the unknown samples with the profiles of suspects or those previously convicted who have been added to a database (comparison of several against several), allowing cases in which, a priori, there are no indications of criminality against a specific person, to be solved.

Its scientific reliability has made it a most coveted form of evidence in the investigation of the most serious crimes, by potentially providing an objective indication of the participation in the criminal act and, conversely, allowing for the exoneration of suspects whose identity was determined by classic, less scientifically reliable, forms of evidence. This is proven in the review of cases solved via final judgements in which DNA evidence has led to the exoneration of persons convicted and, more recently, the solving of cases thanks to more modern DNA techniques, which allow the analysis of new markers to assess the possible biogeographic ancestry and determine certain phenotypic traits of the suspect.[1]

For all of these reasons, the importance of the expert DNA evidence is today undeniable in the field of forensics, as is the need for comprehensive legislation that ensures the scientific reliability and the appropriate weighting of the interests and fundamental rights at play, such as the protection of genetic information, the right to privacy[2] and the risks of using data with racial or ethnic biases.[3] The starting point of our legislation is the

1 Eva Blanco Case (1997), A detailed analysis of this case can be found in *Making Sense of Forensic Genetics* (page 37), authored by Sense about Science in collaboration with EUROFORGEN and ISFG. Direct access: https://senseaboutscience.org/wp-content/uploads/2019/04/SaS-ForensicGenetics-spanish-translation-WEB-spreads-13_03-amend.pdf (accessed on 27 July 2019)

2 Article 8.2 of the European Declaration of Human Rights states: 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

3 As STS 734/2014 asserts, in reflecting on the need for legal representation for the detainee to provide their informed consent for biological sampling via buccal swab: '... despite the simplicity and relatively innocuous nature of the form of access to the raw material suitable for determining DNA, it is true that this area hosts genetic information of extraordinary breadth and a richness of very

distinction between coding and non-coding DNA, in the understanding that the latter is neutral in terms of information not related to the purpose of identification, while the analysis of the formers must be ruled out so as not to 'reveal any other genetic data or characteristic' (preamble of Organic Law 10/2007, regulating police databases on markers obtained from DNA). Today, however, we know that there are several variations in non-coding DNA that provide genetic information other than that which merely identifies the subject, as well as that information on phenotypic traits and biogeographic ancestry that are useful as a means of investigation and do not affect sensitive genetic information can be found in coding DNA.

Spanish legislation is concentrated in Organic Law 10/2007, of 8 October, regulating the police database on markers obtained from DNA and various articles of the Criminal Procedure Act and the Criminal Code. The international regulations that form part of our domestic legislation must also be considered.

Organic Law 15/2003, of 25 November, introduced a third additional provision to the Criminal Procedure Act, which entrusts the government with legislation via royal decree for the structure, composition, organisation and functioning of the National Commission for the Forensic Use of DNA, which was created by Royal Decree 1977/2008, of 28 November. Article 1.1 regulates the composition and functions that configure it as a collegiate body and organisational unit of the Ministry of Justice, reporting to the State Secretariat for Justice. Its function, in general terms, is to combine scientific and technological advances in DNA with legislative proposals that respect the rights and freedoms of persons. These proposals, once the necessary legislative reviews have been carried out, will allow for their legal implementation, contributing to the good functioning of the Justice Administration in the public interest.

The commission is comprised of a Judicial and Bioethics Group and a Permanent Technical Committee, whose coordinated work makes possible a comprehensive and detailed study of the questions and problems, both scientific and legal, which might arise in relation to DNA. The initiative to draft a document came from the National Commission for the Forensic Use of DNA, intended primarily at judicial and prosecutor careers, setting out the basic lines of the scientific foundations of DNA testing and the legislation governing its practice and application to legal proceedings, primarily in the criminal area. The result of all this work is this guide to the forensic use of DNA.

Let us conclude by expressing our sincerest thanks and our compliments on a genuine, rigorous and objective work carried out over the last ten years by all the members of the National Commission for the Forensic Use of DNA and, specifically, in the drafting of this guide, and to the group of experts and collaborators on whom we have been able to rely on in the course of the work.

personal data, which makes it a scope worthy of maximum protection.'

II. APPLICABLE LEGISLATION

We can divide the legislation on DNA into two main blocks: domestic and European.

Domestic legislation:

—Articles 282, 326, 363, 520.6 c) and the Third Additional Provision of the Criminal Procedure Act.

https://www.boe.es/buscar/pdf/1882/BOE-A-1882-6036-consolidado.pdf (accessed on 22 July 2019)

—Article 129 bis of the Criminal Code.

https://www.boe.es/buscar/pdf/1995/BOE-A-1995-25444-consolidado.pdf (accessed on 22 July 2019)

—Organic Law 10/2007, of 8 October, regulating the police database on markers obtained from DNA.

https://www.boe.es/boe/dias/2007/10/09/pdfs/A40969-40972.pdf (accessed on 22 July 2019)

—Royal Decree 1977/2008, of 28 November, regulating the composition and functions of the National Commission for the Forensic Use of DNA.

https://www.boe.es/boe/dias/2008/12/11/pdfs/A49596-49598.pdf (accessed on 22 July 2019)

—Organic Law 5/2000, of 12 January, regulating the Criminal Liability of Minors and its implementing regulations created by Royal Decree 1774/2004, of 30 July.

https://www.boe.es/boe/dias/2004/08/30/pdfs/A30127-30149.pdf (accessed on 22 July 2019)

—Organic Law 3/2018, of 5 December, on Personal Data Protection and Guarantee of Digital Rights.

https://www.boe.es/boe/dias/2018/12/06/pdfs/BOE-A-2018-16673.pdf (accessed on 22 July 2019)

—Organic Law 15/1999, of 13 December, in particular Article 22 and its implementing regulations.

https://www.boe.es/boe/dias/1999/12/14/pdfs/A43088-43099.pdf (accessed on 22 July 2019)

—Decree 32/2009, of 6 February 2009, approving the national protocol for forensic medical and Scientific Police actions in incidents with multiple victims (BOE 06/02/2009).

https://www.boe.es/boe/dias/2009/02/06/pdfs/BOE-A-2009-2029.pdf (accessed on 22 July 2019)

—Standards for the preparation and shipment of samples subject to analysis by the National Institute of Toxicology and Forensic Sciences, Order JUS/1291/2010, of 13 May (BOE 19/05/2010).

https://www.boe.es/boe/dias/2010/05/19/pdfs/BOE-A-2010-8030.pdf (accessed on 22 July 2019)

—Law 23/2014, of 20 November, on the mutual recognition of criminal resolutions in the European Union (transposing Directive 2014/41/EU), reformed by Law 3/2018.

https://www.boe.es/boe/dias/2018/06/12/pdfs/BOE-A-2018-7831.pdf (accessed on 22 July 2019)

—Law 26/2015, of 28 July, modifying the system for the protection of children and adolescents.

https://www.boe.es/buscar/pdf/2015/BOE-A-2015-8470-consolidado.pdf (accessed on 22 July 2019)

—Royal Decree 1110/2015, of 11 November, approving the Mortuary Sanitary Police Regulation.

https://www.boe.es/boe/dias/2015/12/30/pdfs/BOE-A-2015-14264.pdf (accessed on 22 July 2019)

—Royal Decree 2394/2004, of 30 December, approving the Protocol for the recovery, identification, transfer and burial of the mortal remains of members of the Armed Forces, Civil Guard and National Police Force deceased outside the national territory.

https://www.boe.es/eli/es/rd/2004/12/30/2394

European legislation:

—Council Resolution 97/C 193/02, of 9 June 1997, on the exchange of DNA analysis results.

https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:31997Y0624(02)&from=ES (accessed on 22 July 2019)

—Recommendation (92) 1 of the Committee of Ministers to Member States on the Use of DNA within the Framework of the Criminal Justice System.

https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804e54f7 (accessed on 22 July 2019)

—Council Resolution 2009/C 296/01, of 30 November 2009, on the exchange of DNA analysis results.

https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:296:0001:0003:ES:PDF (Accessed on 22 July 2019)

—Agreement on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, signed in Prüm on 27 May 2005.

https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/prumtr.pdf (Accessed on 22 July 2019)

https://www.boe.es/boe/dias/2006/12/25/pdfs/A45524-45534.pdf (Accessed on 22 July 2019)

—Council Decision 2008/615/JHA, of 23 June 2008, on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:32008D0615&from=ES (Accessed on 22 July 2019)

—Council Decision 2008/616/JHA, of 23 June 2008, on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

https://www.boe.es/doue/2008/210/L00012-00072.pdf (Accessed on 22 July 2019)

—COUNCIL FRAMEWORK DECISION 2009/905/JHA of 30 November 2009 on Accreditation of forensic service providers carrying out laboratory activities.

https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:322:0014:0016:ES:PDF (Accessed on 22 July 2019)

—Directive 2014/41/EU of the European Parliament and of the Council, of 3 April 2014, regarding the European Investigation Order in criminal matters.

https://www.boe.es/doue/2014/130/L00001-00036.pdf (Accessed on 22 July 2019)

III. SAMPLE COLLECTION

Obtaining the biological samples for subsequent analysis is the first problematic question to be tackled in DNA testing, particularly sampling carried out by the Judicial Police.

A. Obtaining biological traces from the crime scene or from the victim's body

The collection of traces whose biological analysis may contribute to clarifying the incident under investigation (unknown sample) may be agreed by the investigating judge or may be decided directly by the Judicial Police, as expressly provided for in the Criminal Procedure Act (hereinafter LECrim as per the Spanish). The jurisprudential interpretation also allows for the collection of abandoned samples attributed to the suspect under investigation (attributed sample).[4]

Article 326, paragraph three, of the LECrim[5] states: 'When it becomes clear that there exist prints or remains whose biological analysis may contribute to the clarification of the facts being investigated, the Investigating Judge shall adopt, or shall order the Judicial Police or Forensic examiner to adopt the measures necessary to ensure the collection, custody and examination of those samples is verified in conditions that guarantee authenticity, without prejudice to the provisions of Article 282' Furthermore, Article 282 grants the Judicial Police the power to 'collect all effects, instruments or evidence of the crime at risk of disappearance, making them available to the judicial authority'.

With regard to these three articles, the Agreement of the Plenary Session of the 2nd Chamber of the Supreme Court of 31 January 2006 adopted as a criterion, incorporated subsequently in different Judgements[6] that 'The Judicial Police may collect genetic remains or biological samples abandoned by the suspect with no requirement for judicial authorisation'.

The Third Additional Provision of Organic Law 10/2007, of 8 October, regulating the police database on identifiers obtained from DNA (hereinafter also referred to as LO 10/2007) enshrined this interpretation, stating that 'For the investigation of the crimes listed in letter a) of section 1 of Article 3, the Judicial Police shall proceed with the

4 Attributed samples, unlike reference samples, are not taken directly from the donor with the relevant guarantees established in law, which may result in problems arising if the regularity of sampling is questioned. This sees the nature of attributed samples closer to that of unknown samples. The use of attributed samples for crosschecking against reference samples in criminal investigation has been on the wane ever since the legislation allowed for forced sampling of the person under investigation or defendant.

5 Introduced by Organic Law 15/2003, first express regulation in criminal procedural legislation on DNA sampling.

6 SSTS 179/2006, of 14 February; 355/2006, of 20 March, 7710/2009, of 3 December; 11/2017 of 19 January.

collection of samples and fluids from the suspect detainee or accused and from the scene of the crime.'

The legal reference to section 1 of Article 3 of LO 10/2007 allows us to establish the catalogue of crimes for which biological samples may be taken for investigations:

- Major crimes, in accordance with the classification of legal infractions provided for in Article 13 of the current Criminal Code in relation to Article 33 of the cited legal text.
- Less serious crimes that affect the life, liberty, sexual freedom or indemnity, the integrity of persons or their property, provided that they were carried out using force or violence or intimidation against persons or in the cases of organised crime, are understood to include, in all cases, the term organised crime as used in Article 282 bis, section 4 of the Criminal Procedure Act in relation to numerous crimes.

Nevertheless, it is prudent to seek judicial authorisation in the unlikely case where the collection of samples does not require urgent action, as the reform of Article 363 has not altered the working of Article 282, which, as transcribed, makes the existence of a danger of disappearance a condition of the collection of traces without judicial control.

Whether or not judicial authorisation is required for samples collected by the police and the inclusion of the genetic profile obtained on a database has been subject to debate. The Criminal Procedure Act does not establish this requirement for analysis, nor does Organic Law 10/2007, regulating the police database on identifiers obtained from DNA, for the inclusion of the genetic profile affected. On the contrary, in the cases of reference samples, the law only requires consent for the sampling, but not for the inclusion of the genetic profile on the database.

Under the current legislation, and without prejudice to some reflections supporting an in-depth reform of this legislation,[7] both the Supreme Court and the Constitutional Court have validated the police actions that agreed the shipment of samples to the laboratory and the inclusion of the profile of the suspect under investigation on databases without requesting judicial authorisation.[8]

In any case, under ordinary law, where the sample is taken by forensic examiners we understand the it will be within the framework of criminal proceedings and, therefore, under the management and control of the investigating judges as, unlike the Judicial Police, the legal provisions cited do not envisage any action by such parties without

7 See STS 777/2013, of 7 October.

8 STS 1311/2005, 355/2006 and STS 949/2006 can be understood in the same manner; the third considers that not only sampling but the analysis agreed by the Judicial Police without authorisation, even where there is a risk of losing the sample, is in essence a procedural irregularity that does not invalidate the evidence. For its part, the Constitutional Court considered that the right to privacy was not violated in Judgement 1999/2013, of 5 December, appeal for protection against STS 1311/2005.

procedural cover. For the same reasons, it is advisable that judicial control extends to a specific decision that agrees the analysis of the sample and the inclusion of a genetic profile based on the DNA data[9].

In the ambit of the jurisdiction of minors, the prosecutor, in their dual capacity as guarantor of the law and the rights of minors, who shall personally direct the investigation of the facts and who orders the Judicial Police to complete due diligence for the investigation of a crime and the determination of the participation of a minor in same, in accordance with articles 6 and 16.2 of Organic Law 5/2000, of 12 January, on the Criminal Liability of Minors (hereinafter LORPM).

B. Obtaining reference samples with bodily intervention

1. Concept and legal requirements

Reference samples are biological samples of known origin that allow us to establish, for comparison, the identity of certain human remains, the origin of a certain biological trace or a determined relationship of filiation. In the criminal ambit, they will normally come from the victim or victims of the crime and the suspect or suspects of the criminal act.

The law starts from the general principle that known samples are obtained with the consent of the party affected. In the absence thereof, and where the sample requires inspections, recognition or bodily intervention, judicial authorisation shall be required. The procedural legislation starts with the principle that sampling requires the consent of the affected party and, in the absence thereof, judicial authorisation. Thus, the Third Additional Provision of LO 10/2007 establishes that 'the taking of samples that requires inspections, recognitions and bodily interventions without the consent of the affected party shall require judicial authorisation via an order setting out the grounds for the same, in accordance with the provisions of the Criminal Procedure Act.' The law states (Article 363): that 'Provided that there are valid grounds to do so, the Investigating Judge may agree, via a resolution setting out the grounds for same, to obtain biological samples that are indispensable for determining the DNA profile.'

2. Individuals that provide reference samples

a) Victims

The law does not expressly provide for the possibility of coercive sampling and therefore it is a general opinion that sampling is only possible with the Individual consent. The Judicial and Bioethics Group of the National Commission for the Forensic Use of DNA ruled on this in 2014. It must also be considered that normal procedure would be for

9 Where the judicial documentation is not sufficiently expressive, the National Toxicology Institute issues a form to the judicial body to inform of whether or not to proceed with the genetic profile, where applicable, on the DNA database, proceeding to do so if there is no response within the term specified. It is advisable, for reasons of speed and legal certainty, to respond promptly to said request.

victim to collaborate with the criminal investigation, and that in any case their refusal would result in a favourable assessment for the defendant in relation to the signs of criminality.

This opinion does allow for qualifications. The Criminal Procedure Act establishes, for witnesses and plaintiffs, a general duty to collaborate with the Justice Administration of a higher order than the passive subject of the criminal proceedings (for example, with regard to the duty to declare), which may be imposed coercively and, therefore, a judicial decision in this regard cannot be discounted.[10] It would seem impossible, however, to agree on acts of physical compulsion, provided for solely in the procedural law for the suspect, person under investigation or defendant.

We understand that, in any case, the victim's profile may not be included on a database without their consent. Sampling should only serve to verify direct evidence (one-to-one) of DNA.

With regard to victims who are minors, their consent must be obtained if they are aged 14 and over (see Article 7 of the Law on Personal Data Protection and the Guarantee of Digital Rights), and the consent of their legal representatives must be obtained in the case of those aged under 14.

With regard to victims with an intellectual disability, it is assumed that they have full capacity to act and, therefore, capacity to provide their own informed consent regarding biological sampling, except where the judicial amendment of their capacity to act is duly accredited by a judgement, in which case it will be within the scope and content of the legal ruling. In this case, the informed consent of the person who exercises guardianship or reformulated or extended parental authority must be obtained for the biological sampling (see Article 25 of the Criminal Code).

To help the understanding of a victim with intellectual disability, an easy-to-read informed consent document should be prepared, or the presence of a facilitator should be arranged if deemed necessary.

b) Accused persons and defendants

In the case of accused persons and defendants, their consent shall be requested after duly informing them of the importance of this process.

With regard to the accused person under arrest, the most frequent scenario to collect

10 In the unlikely event that that victim does not consent to providing a sample that is decisive in clarifying who perpetrated a criminal act —for example where there is an inconclusive profile with a mixture of the victim's and the perpetrator's DNA— the imposition of the conduct by the judicial body cannot be ruled out, given the scant impact of sampling on the physical integrity of the victim or the plaintiff. Consider an extraordinary review trial, in which the burden falls on the plaintiff, and therefore a negative assessment might be insufficient for judgement by default. Logically, that must be adopted via a judicial ruling providing grounds, weighing the interests at play and the importance of DNA testing in terms of solving of the case.

reference samples, Article 520 6. c) LECrim, as amended by Organic Law 13/2015, of 5 October, includes the obligation that consent be provided with the assistance of legal assistance. The legal opinion enshrines the ruling of the Supreme Court in the agreement of the non-jurisdictional plenary meeting of 24 September 2014, according to which 'the biological sampling for the practice of DNA testing with the consent of the accused, where the accused is under arrest, requires the assistance of legal representation or, in its absence, judicial authorisation. However, it is valid to compare samples obtain in the case being prosecuted with data obtained from the police database, originating from a different case, even without legal representation where the accused does not question the legality and validity of these data during the investigation phase'[11]. Basing its ruling on said agreement, the Supreme Court has rejected the objection to the legality and validity of sampling without legal representation where such question is expressed for the first time in the written submission of the defence.[12]

Legal representation is mandatory at the moment in which the accused under arrest is requested to provide a biological sample, and its function is to provide the accused under arrest with the information necessary on the scope and the resulting consequences both in the case of providing consent and in the event of rejecting said investigative process, that is, the possibility of forced samples being taken, in the terms established under letter c) of Article 520.6 of the LECrim. Said assistance is not required for the act of taking the sample.[13]

11 In this regard, the decision of the Supreme Court gives rise to significant doubts in the case of the nullity of DNA testing obtained from a suspect under arrest with their consent but without legal assistance. In the event that sample was obtained in the same proceedings, based on the suspicion of the accused's participation in the criminal act, the possibility of repeating the sample at the pre-trial stage, with the full guarantees established in the legislation, would appear to be permitted under Supreme Court Ruling 834/2016, of 3 November. There is greater argument over whether the sample can be removed in the event that the illegality occurred in another case and the connection of the defendant has been determined exclusively by the inclusion of his profile in the DNA database. In this case, the legality of the testing should lead to the cancellation of the profile and the impossibility of its repetition to validate the DNA testing in the case in which they are the accused or defendant and Antonio del Moral's dissenting opinion on STS 834/2016 refers to this. However, *obiter dictum*, it does hypothetically admit that the nullity due to lack of legal representation would be remedied by the new sampling in the proceedings as per STS 120/2018, of 16 March.

12 STS 734/2014, of 11 November, and 834/2016. The dissenting votes of Antonio del Moral on STS 834/2016 and of Perfecto Andrés Ibáñez on STS 734/2014 differ on this opinion.

13 Neither the law nor legal precedent requires this assistance for the accused or defendant where not under arrest, although the normal context, before or after the declaration, would imply legal representation. STS 465/2017 expressly rejects the nullity of DNA testing due to lack of legal representation, on the grounds that the defendant was not under arrest and the sample was taken with their informed consent. Similarly, STS 120/2018, of 16 March, by deeming it not to be demonstrated that the accused was under arrest at the time of the sampling, rejects the nullity of the sample.

This consent can be replaced by judicial authorisation via a reasoned order considering the criteria of proportionality and reasonableness expressly established in Article 363 of the LECrim, which establishes: 'Provided that there are detailed grounds justifying it, the Investigating Judge may agree, in a reasoned resolution, the biological sampling of the suspect that is essential for determining their DNA profile. For such purpose, it may decide the practice of those acts of inspection, recognition and bodily intervention that are appropriate under the principles of proportionality and reasonableness'. For the deliberation of the judicial decision, one must consider that the sampling must adhere to the needs of the specific investigation, but may also be exclusively due to the purposes of Organic Law 10/2007, regulating the police database on identifiers obtained from DNA, that is, to enter the genetic profile of the suspect based on their participation in a serious crime. In this case, the court order that replaces the consent shall require stronger grounds that take into consideration the serious nature of the acts or the risk of repeat offending, as its purpose is to obtain an indication of the facts being investigated, except where the genetic profile of the suspect is added to the database and it is used for the prevention or solving of other crimes.

With regard to accused persons of legal age with intellectual disability, it is presumed that they have full capacity to provide consent, and, as in the case of victims with intellectual disability, they shall be informed of their rights to be assisted in a manner adapted to their intellectual disability, ensuring that they understand the scope and meaning of their rights. If there is any doubt, the Public Prosecutor's Office must ensure the rights of these persons.

In the case of an accused of legal age with judicially modified capacity, the information on their rights shall be communicated to the person who holds guardianship or the de facto guardian, informing the Public Prosecutor's Office of the same, in accordance with the third paragraph, section 4, Article 520 of the LECrim. They must also inform the person with intellectual disability, in comprehensible language that is accessible given their disability, of the scope of their rights and, specifically, the acts to be carried out for the sampling, in accordance with section 2 bis of Article 520 of the LECrim. The informed consent of the person who exercises guardianship or reformulated or extended parental authority must be obtained for the biological sampling.

With regard to accused persons who are minors,[14] biological sampling for DNA analysis must at all times adhere to the principle of the greater interest of the minor, which in all

14 For the interpretation of the regulation applicable in relation to DNA in the scope of the jurisdiction of minors, the following documents have been taken into account over the course of drafting of this Guide:

– Report of 20 September 2010 of the children's court prosecutor of the Public Prosecutor's Office on certain extremes of DNA investigation within the framework of the criminal processing of minors on the part of the children's court prosecutor.

– Report of 5 March 2015 submitted by the acting public prosecutor assigned to the children's court prosecutor of the Public Prosecutor's Office on the police conservation and use of police DNA profiles once they reach legal age and the need, where applicable, for legislative reform in this area.

cases shall require the practice of such process where essential for the investigation of a crime, adhering to the criteria of proportionality and reasonableness, as required in Article 363 of the LECrim, and provided that it is one of the crimes of section 1 of Article 3 of OL 10/2007.

Nevertheless, if the suspect is a minor aged under 14 years, in accordance with Article 1.1 LORPM, they shall be exempt from criminal responsibility in general and the biological sampling shall not proceed, remaining subject to the protection measures provided for in the Criminal Code, Organic Law 1/1996, of 15 January, on the Judicial Protection of Minors (hereinafter LOPJM), and other provisions in force in accordance with legal remission established in Article 3 of the LORPM. In the exceptional case of the collection of DNA samples, this is only admissible for purely identifying purposes and for the sole purpose of adopting the protection measures appropriate where applicable.

The assistance of legal representation for minors aged 14 and over who are under arrest is compulsory, in accordance with Article 17 of the LORPM, including at the time of providing informed consent for the taking of biological samples for the referral under said provision to Article 520 of the LECrim.

Where the aforementioned circumstances occur, we may encounter the following scenarios:

a) The minor gives their informed consent (non-transferable right) themselves, which, in general terms, shall be fully valid and effective with no requirement for the presence or acquiescence of their parents or legal representatives.

b) If the minor, in the judgement of the intervening parties, lacks sufficient maturity to understand the scope and consequences of DNA sampling, the informed consent of their legal representatives, i.e. those who hold parental authority, or in the absence thereof, their legal guardians shall be required. That shall be no impediment to minor jointly exercising their right to have their view heard and listened to in relation to biological sampling, even where they lack sufficient maturity, in accordance with articles 2.5 and 9 of the LOPJM.

c) Where a minor with sufficient maturity or, where applicable, their legal representatives, refuse to provide informed consent, the children's judge may enforce it via legal order, providing grounds for the same, subject to the request of the investigating prosecutor for the review file initiated, in accordance with Article 23.3 of the LORPM.

c) Convicts

The Criminal Code provides for agreement for biological sampling and the completion of analysis to obtain DNA markers as an incidental consequence of the conviction of certain crimes.

– Instruction No. 1/2017, of the State Secretariat for Security, updating the 'Protocol for Police Action with Minors' repealing Instruction of the State Secretariat No. 11/2007.

Article 129 bis[15] states: 'In the case of convictions for serious crimes against the life, the integrity of persons, freedom, sexual freedom or identity, terrorism or any other serious crime that carries with it a risk to the life or physical integrity of persons, where it can be assessed, from the circumstances of the act, background, assessment of their personality or other available information, that there exists a significant danger of re-offending, the judge or court may agree to biological sampling of their person and the completion of an analysis to obtain DNA markers and registration of same on a police database. The necessary analysis may only be carried out to obtain the markers that exclusively provide genetic information that reveals the identity of the person and their sex'[16]

The precept provides: 'If the affected party opposes the collection of samples, enforced execution may be imposed using the minimum enforcement measures essential to the execution thereof, which must, at all times, be proportional to the circumstances of the case and respectful of dignity.'

3. Coactive or forced execution of sampling

Where they accused refuses to provide their consent to sampling, the judge or court may authorise acts of inspection, recognition or bodily intervention that are appropriate to the principles of proportionality and reasonableness, including enforcement of the measure.[17] Article 520 of the LECrim, in relation to the detained, refers to the refusal to provide a buccal swab, a legal provision that can be extrapolated to the case of suspects not under arrest.

Judicial authorisation in the pre-trial phase is possible for both obtaining a sample and for investigating the specific crime in question, that is, to compare the profile of the suspect with a sample that might be linked to the crime, and the inclusion of the genetic profile on the DNA database, in accordance with the provisions of Organic Law 10/2007, regulating the police database of markers obtained from DNA. Given that in these cases, judicial deliberation is required, in the latter, the level of requirement of the enabling resolution shall be greater and must assess, especially, the seriousness of the criminal act allegedly committed by the accused person. Case law understands that this enabling resolution, based on Article 363 of the LECrim, may not legitimise the practice of violent acts or personal coercion, subject to explicit legal provision —currently non-existent—

15 Introduced via Organic Law 1/2015 for the purpose of incorporating the provisions of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, signed in Lanzarote on 25th October 2007, and the case law of the European Court of Human Rights

16 Paradoxically, the Criminal Code has greater requirements for entry on the DNA database of the genetic profile of a person convicted of a crime than those established in Organic Law 10/2007 to enter the genetic profile of a suspect or accused person, as, in addition to the more restrictive catalogue of crimes, it required the judge or court to assess the existence of a relevant danger of re-offending. An additional limitation may arise from the requirements of the accusatorial procedure in the event that the indictments do not include this request.

17 Article 363, paragraph two, Article 520.6.c), paragraph two, LECrim; Article 129 bis of the Criminal Code.

that legitimises the intervention, without it being understood that the open clause provided for in Article 549.1.c) of the Organic Law on Judicial Power fulfils the constitutional requirement imposed for the sacrifice of the rights affected.[18]

Nevertheless, the reading of the updated Article 520. 6 of the LECrim makes it possible to state that the legislator deems it appropriate, in line with constitutional case law, to subject to a judgement of proportionality, under the jurisdictional guarantee, the subjecting of the accused to the minimum actions necessary to enforce the obtaining of the saliva samples that allow genetic identification. The same opinion has inspired the sampling of those already convicted, under the terms provided for in Article 129 bis of the Criminal Code.[19]

In the case of those convicted, the enforced sampling in the case of refusal of consent shall not require any special grounds, as it is a consequence of a final conviction.

In all cases, the measures must be proportional to the circumstances of the case and respectful of dignity. The execution of the measure shall correspond, ordinarily, to the judicial police officer making the request to the forensic medic assigned by the Public Prosecution or arises from the execution of a conviction.

C. Scientific standards for sampling

Documentation for sampling

The National Commission for the Forensic Use of DNA recommends amending the scientific standards for sampling (both known reference samples and unknown biological traces and bodily remains) to ensure:

(1) The protection and preservation measures for the samples

(2) The procedure for the identification of same and

(3) The maintenance of the chain of custody, which ensures the integrity and authenticity of same. shipment

From the regulatory perspective, the following must be considered:

—Royal Decree 32/2009, of 6 February 2009, approving the national protocol for forensic medical and Scientific Police action in incidents with multiple victims (BOE 06/02/2009).

—Standards for the preparation and shipment of samples subject to analysis by the National Institute of Toxicology and Forensic Sciences, Order US/1291/2010, of 13 May (BOE 19/05/2010).

18 Supreme Court rulings 685/2010, of 7 July, 827/2011, of 25 October, 709/2013, of 10 October, 948/2013, of 10 December.

19 STS 11/2017, of 19 January, and 120/2018, of 16 March.

—The recommendations for the collection and sending of samples for the purposes of genetic identification, prepared by the Spanish and Portuguese Group of the ISFG (GEP-ISFG) in Madeira on 2nd June 2002.[20]

For live individuals, obtaining epithelial cells from buccal mucosa by swabbing is an adequate model for the extraction of DNA, minimally invasive and easy to conserve. Its use has become widespread today and there are numerous types of standardised swabs and kits for this form of biological sampling. Sampling must be carried out ensuring the preservation, conservation and integrity of the sample.

Procedure for the documentation of the sampling

It is highly recommended that sampling be documented in a form recording at least the identification data of the person, identification and type of sample, and the chain of custody.[21]

The chain of custody constitutes a procedural guarantee that must certify that the biological sample collected at the scene of the act investigated or the biological sample taken from the alleged perpetrator is the same one that has been analysed and assessed by the expert in the drafting of the expert DNA report, which requires that it is processed in accordance with a duly documented procedure, thus preventing the nullity or invalidation of the expert evidence which shall be ratified by the expert in the trial hearing, acquiring the status of evidence.

To guarantee the integrity of the basic demand of the chain of custody as expressly established in Article 338 of the LECrim:

'Without prejudice to the provisions of Chapter II bis of this title, the instruments, weapons and effects referred to in Article 334 shall be compiled in such a manner that guarantees their integrity, and the Judge shall agree to their retention, conservation or assignment to the appropriate body for storage.'

Indicated below are some specific forms for sampling live persons with informed consent, which vary based on their status in the criminal procedure (accused, detainee, victim):

a) Form for accused persons or detainees

In the case of detainees and those accused of serious crimes, in accordance with the recommendations of the National Commission for the Forensic Use of DNA, the form for these cases must include at least the following: (1) The nature of the DNA profiles; (2) The use and transfer of DNA profiles; (3) Laboratories qualified to carry out analyses; (4)

20 https://www.mjusticia.gob.es/cs/Satellite/Portal/1292428320425?blobheader=application%2Fpdf&blobheadername1=ContentDisposition&blobheadername2=Grupo&blobheadervalue1=attachment%3B+filename%3DRecomendaciones_para_la_recogida_y_envio_de_muestras_con_fines_de_identificacion_genetica._Grupo_Es.PDF&blobheadervalue2=INTCF

21 Recommendations for the collection and sending of samples for the purposes of genetic identification of the Spanish and Portuguese group of the ISFG (GEP-ISFG) in Madeira, 2, June 2002.

The conservation of samples; and (5) The rights to erasure, rectification and access to data.

Legal assistance is compulsory for detainees at the time of informed consent in accordance with the aforementioned Article 520.6 of the LECrim, in line with the criteria set out in Supreme Court Ruling 827/2011.[22]

b) Form for victims[23]

c) Form for family members in incidents with multiple victims

To make the genetic identification of victims in a catastrophe possible, the collection of reference samples from family members of the deceased is fundamental. To do that it is necessary to know which family members are available and which are appropriate for the analysis. Section 2.4 of Annex VII of Royal Decree 32/2009, of 6 February 2009, specifies the order of priority for suitability of family members.[24]

d) Form for the abduction of newborn children[25]

D. Cross-border criminal evidence: obtaining DNA samples in another state

1. In the scope of the European Union, the European Evidence Warrant shall apply. It is regulated by Directive 2014/41/EU of the European Parliament and of the Council, of 3 April 2014, regarding the European Investigation Order in criminal matters, and implemented in Spain in Law 23/2014, of 20 November, on the mutual recognition of criminal resolutions in the European Union, in Title X.[26]

It is also of interest to ascertain the provisions of Article 7 of Decision 615/2008/JAI, on the collection of genetic material and transmission of DNA profiles:[27]

Where, in ongoing investigations or criminal proceedings, there is no DNA profile available for a particular individual present within a requested Member State's territory,

22 The plenary meeting of the National Commission for the Forensic Use of DNA approved, in 2011, a form 'Sampling of Detainees or Persons Accused of Criminal Offences', amended on 24th October 2019. Contained in Annex I.A. In this last plenary session, a model was also approvedfor use by the Institutes of Legal Medicine (Annex I.B)

23 The plenary meeting of the National Commission for the Forensic Use of DNA approved, on 24 October 2019, two firms on «Sampling of victims of criminal offences», the first for such use by the Security Forces (Annex I.C.) and the second for use in the Institutes of Legal Medicine (Annex I.D).

24 The form for the collection reference DNA samples from family members, published in Royal Decree 32/2009, of 6 February 2009, is contained in Annex I.E.

25 The specific request form for the «collection of biological samples to obtain genetic profiles for the INTCF and the registration on the DNA profiles of persons affected by the abduction of newborn children» is published in Order JUS/2146/2012 and contained in Annex I.F.

26 Amended by Law 3/2018, of 11 June.

27 To date, there is no knowledge of any Prüm country making use of the request of Article 7 of Decision 615/2008/JAI..

the requested Member State shall provide legal assistance by collecting and examining cellular material from that individual and by supplying the DNA profile obtained, if:

a) the requesting Member State specifies the purpose for which this is required;

b) the requesting Member State produces an investigation warrant or statement issued by the competent authority, as required under that Member State's law, showing that the requirements for collecting and examining cellular material would be fulfilled if the individual concerned were present within the requesting Member State's territory; and

c) under the requested Member State's law, the requirements for collecting and examining cellular material and for supplying the DNA profile obtained are fulfilled.

2. Outside the European Union, it is essential that the investigating magistrate issues the corresponding international letter rogatory based on an agreement for judicial assistance in bilateral or multilateral criminal matters that allows for the practice of this investigation procedure.

IV. DNA ANALYSIS

A. Accredited laboratories for DNA analysis for registration on the police databases

The samples or traces that are subject to biological analysis in the scope of Organic Law 10/2007, regulating the police database of identifiers obtained from DNA, must be sent to accredited laboratories, as required under Article 5 of said law. DNA analysis may only be carried out for the genetic identification of the cases considered in this law at laboratories accredited for such purposes by the National Commission for the Forensic Use of DNA which pass the periodic controls to which they are subject.

Article 3 of Royal Decree 1977/2008, of 28 November, regulating the composition and functions of the National Commission for the Forensic Use of DNA, states: 'Laboratories that did not previously hold the quality certification granted by the corresponding accreditation body shall not be accredited.' To such end, the National Commission for the Forensic Use of DNA shall establish, in accordance with the criteria proposed by the Permanent Technical Committee, the scientific standards, accreditation systems and official quality controls to which the laboratories completing DNA analysis, in accordance with the specialisations they will work on, and providing genetic profiles to the police database of identifiers obtained from DNA shall be subject.

One of the first tasks of the commission was the approval of the agreement on the accreditation and quality control of the laboratories regulating the assessment procedure for DNA analysis laboratories. Said agreement establishes two fundamental measures to guarantee the reliability and quality of the DNA analyses carried out by the laboratories that provide profiles to the national DNA database.

- One, the duty of the laboratories to pass at least one annual external quality control from among those recognised by the International Society for Forensic Genetics (GHEP-ISFG exercise) or by the European Network of Forensic Science Institutes (GEDNAP exercise).
- Two, the obligation of the laboratories to undergo a process of assessment of technical competence conducted by the National Accreditation Body (ENAC) to obtain and periodically renew its accreditation under Standard EN ISO/IEC 17025 referring to the general requirements of technical competency of testing and calibration laboratories.

B. DNA markers of forensic use and their forensic applications

The DNA markers used by a large number of laboratories are the following:

a) Autosomal STR markers. Short tandem repeats

With simple Mendelian inheritance (inherited 50% from mother and father).

Short DNA regions are those located outside the gene codifying regions ('non-codifying') They vary considerably in size among the different individuals. The simultaneous study of various STRs offers a very high power of individual discrimination. The analysis of STR

profiles is the most-used method in criminal research worldwide, as it makes it possible to establish, with great reliability, the identity of the biological traces at the scene through comparison of their STR profile with that obtained from a conclusive sample of an accused person or with a database of DNA profiles of those accused of serious crimes. at present, there are more than 100 million STR profiles across different national criminal investigation databases and the level of the exchange of profiles between the different DNA databases, on the global level is increasing daily, thanks to the different agreements signed (PRÜM, Interpol) and domestic legislation.

The Resolution of 30 November 2009, on the exchange of DNA analysis results (2009/C 296/01), established a new set of 12 STR markers (D1S1656, D2S441, D3S1358, FGA, D8S1179, D10S1248, TH01, vWA, D12S391, D18S51, D21S11 y D22S1045) for the exchange of DNA data between the different databases of national DNA data of the Member States of the European Union.

The plenary meeting of the National Commission for the Forensic Use of DNA, at the suggestion of the Permanent Technical Committee, agreed to the effective implementation of the new set of 12 European STR markers on the Spanish police database on markers obtained from DNA with a deadline of 2012.

At present, all the institutions that register profiles on the DNA database meet this standard of 12 STR regions, and in most institutions, up to 21 STR markers are analysed simultaneously in each of the samples.

b) Y-chromosome STR markers

Unlike autosomal STRs, these are specific DNA markers of the male that are only inherited from father to son. They are also repetitive DNA short regions with variation in size between the individuals of the population. Within the scope of the criminal investigation, they are particularly useful in cases of sexual assault and homicide committed by males, in which the male DNA is mixed with the female DNA (victim) as a minor proportion, as the application of STR-Y markers allows for the detection of male DNA specifically without interference from the female DNA.

The Y chromosome is only transmitted from fathers to sons, and therefore, all male relatives on the paternal side of the family usually share the same Y chromosome. All Y-chromosome STRs applied in forensic genetics are transferred in block (without recombination) comprising of a genetic profile (haplotype). Due to the preceding, the genetic variability of the STR-Y markers is lower than the autosomal STRs, and therefore, the power of discrimination is also lower. Do not forget that the genetic analysis of the Y chromosome allows us to differentiate lineage but not individuals.

STR-Ys, due to their form of patrilineal inheritance, are also DNA markers recommended for parentage studies among males in the identification of disappeared persons and human remains in different situations (incidents with multiple victims, abduction of newborns).

c) Hypervariable mitochondrial DNA regions

In addition to nuclear DNA, the cells contain a small circular genome DNA in a large number of copies found within the mitochondria and inherited exclusively via maternity: the mitochondrial DNA.

There are three regions within human mitochondrial DNA designated as hypervariable (HVR1, HVR2 and HVR3), accumulating much of the variability of the mitochondrial genome, and whose study focusses on forensic analyses where it is necessary to resort to the study of this type of DNA.

Mitochondrial DNA analysis, more sensitive than nuclear DNA analysis, is applied in many cases in which it is not possible to obtain nuclear DNA, such as DNA identification via hair fragments or genetic identification of old human remains or those subject to nuclear DNA degradation processes.

The genetic variability of mitochondrial DNA is lower than that observed through the analysis of nuclear STR DNA regions. Because of lower variability, the genetic profile (haplotype) obtained through the study of mitochondrial DNA generally presents a much more limited power of discrimination. As mitochondrial DNA is passed on from mothers to children, all the members of a family who share the same maternal lineage will have the same mitochondrial DNA. That is, this type of DNA allows for the identification of maternal lineage, but not individuals.

Due to their form of matrilineal inheritance, the analysis of hypervariable mitochondrial DNA regions is also recommended for kinship studies among family members of the maternal line in the identification of missing persons and human remains in different situations (incidents with multiple victims, abduction of newborns, etc.).

C. Conservation, post-custody and destruction of DNA samples

The conservation of the sample or trace from which the biological material has been extracted for obtaining DNA is subject to judicial decision, as expressly stated in Article 5.1 of LO 10/2007.[28]

In accordance with Article 3 of Royal Decree 1977/2008, of 28 November, the National Commission for the Forensic Use of DNA is responsible for the preparation and approval of official technical protocols on obtaining and the conservation and analysis of the samples, including the determination of homogenous markers on which the accredited laboratories shall conduct their analysis, as well as the determination of the security conditions for their custody and the establishment of all measures that guarantee strict confidentiality and the reservation of samples, the analysis and the data obtained from same, in accordance with the provisions of the legislation.

28 The samples or traces taken which are subject to biological analysis shall be sent to duly accredited laboratories. The judicial authority shall be responsible for pronouncing on the conservation of said samples or traces.

In practice, with certain frequency, it is verified that the judicial bodies do not pronounce on the conservation of the sample. This silence or this absence of instructions on the period of conservation or the conditions of same causes important problems, such as saturation of storage capacity and poor conservation of the laboratories or facilities of the Security Forces, the National Institute of Toxicology and Forensic Sciences or the Institutes of Legal Medicine.

The DNA samples that have been subject to analysis during conservation shall not lose efficiency or viability due to the mere passing of time, provided they are conserved in secure conditions that ensure compliance with the chain of custody, excluding any form of contamination with other samples or with external agents.

The legal authority is responsible for destroying the samples and/or biological remains. Direct communication is advisable between the judicial authority and the analysis laboratories, especially in those cases where the prescription applies to the offences or there is a full acquittal, for both known and unknown samples.

V. DNA IDENTIFIER FILES AND DATABASES

A. DNA databases for forensic use and their interoperability

We can distinguish between databases with genetic information that exist today for forensic use:

1) DNA database for criminal investigation and identification of missing persons (CODIS: Combined DNA Index System of the Federal Bureau of Investigation, USA).

Organic Law 10/2007 states in its preamble that its fundamental objective was the creation of a database to store the identifying data obtained from the DNA analyses carried out in the framework of a criminal investigation or in the procedures for the identification of cadavers or the identification of missing persons.

This database belongs to the Ministry of the Interior, specifically the State Secretariat for Security (Art 2. LO 10/2007).[29]

It is comprised of two files:[30]

INT-SAIP file

Its purpose is cooperation with the Justice Administration through the genetic identification of biological remains and the identification of samples of known origin, in investigations carried out by the Ministry of the Interior. (Criminal Interest Database).

INT-FÉNIX file:

Genetic identification of missing persons and unidentified corpses, for scientific, public interest, social and judicial purposes, in the investigations of the Ministry of the Interior. (Social Interest Database).

The DNA profiles (associated with an anonymous identifier code and a laboratory code) are structured systematically in different search and systematically compared on the national server. For the purpose of systematic comparison, the DNA database for criminal investigation and identification of missing persons uses the CODIS systems (CODIS Combined DNA Index System of the Federal Bureau of Investigation, USA).

The database is structured within a CODIS hierarchy with the following forming part of it: the local server network (LDIS, local nodes) managed by three state institutions (General Commissariat of the Judicial Police, Forensic Service of the Guardia Civil and the Institute of Toxicology and Forensic Sciences) and three Autonomous institutions (the Scientific Police Unit of the Ertzaintza, the Scientific Police Division of the Mossos de Esquadra and the Scientific Police Division of the Navarra). The police laboratories, through the

29 In 2019, the Report on the Police Database of Markers obtained from DNA was published, which can be consulted on the website of the Ministry of the Interior. REPORT ON POLICE DATABASE OF DNA MARKERS.

30 Created by Order INT/177/2008, OF 23 January, BOE no. 30, of 4 February.

POLICIAL secure network, and the Institute of Toxicology and Forensic Sciences, through the SARA secure communications network, are connected to the state server (SDIS, national node), which is managed by the State Secretariat for Security, Ministry of the Interior, and is fed with information supplied by the participating institutions and laboratories (local nodes). It is the only national point containing all the genetic marker profiles obtained from DNA.

The CODIS local nodes all have their own local database, within which intra-laboratory searches can be carried out. Profiles are then 'raised to the higher level' or CODIS national node for the inter-laboratory search. CODIS automatically sends the matches found on the national node to the local nodes involved, which are responsible for validation.

The CODIS national node is responsible for the international exchange of genetic profiles in the scope of Prüm (EU). The matches found in this international exchange are also sent from CODIS to the local nodes involved.

Since the establishment of the CODIS hierarchy through the connection of the National Police Force and Guardia Civil DNA databases for the first time in 2004, the national database has been established in the State Secretariat for Security state server (SDIS, national node) also creating COMSIGENI: the Committee for the Regulation and Coordination of the National Management System for identifiers Obtained from DNA.

This committee is comprised of the chair (the deputy director general of information systems and communications for security of the SES), institutional spokespersons (a representative of each institution with an LDIS system) and secretary (a civil servant of the Subdirectorate-General of Information Systems and Communications for Security of the SES).

The principal functions of the committee are: to advise the chair on all questions relating to identifiers obtained from DNA it is aware of; the drafting, approval and, where applicable, amendment of the Framework Document and the Technical Procedure Manual; the drafting and approval of the coordination standards between the LDIS that participate in the system; and the decision on the expansion of the system to potential new institutional LDIS that meet the conditions required.

2) The National Institute of Toxicology and Forensic Sciences (INTCF) - a dependent body of the Ministry of Justice - also maintains the following databases:[31]

Database of persons affected by abduction of new born children

The purpose is to identify possible genetic relations between persons affected by the possible abduction of newborn children, who expressly consent to their genetic data being entered in this database to search for matches with other entries.

31 Order JUS/2146/2012 of 1 October.

B. Inclusion of results of analysis in the database

Only those data that provide genetic information that reveals the identity of the person and their sex will be included in the database (Article 4 LO 10/2007).

Today, through DNA analysis, science allows us to obtain information relating to the hair colour, eye colour, type and/or form of head hair, facial morphology, height, etc. However, these indicators may not be registered on the database.

It is particularly important to detail what requirements are necessary so that the DNA indicators can be registered.[32]

In this regard, in accordance with Article 3 of LO 10/2007, the identifying data extracted may be registered on the police database of identifiers.

1. Without the need to rely on the consent of the affected party in the case of major crimes and, in any case, in the case of crimes affecting life, liberty, sexual freedom or identity, the integrity of persons or property, provided they are committed with force or violence or intimidation against persons, and in cases of organised crime. Notification must be given in writing of all rights with respect to the inclusion on the database and a record of same must be kept in the procedure.

2. In the case of patterns obtained in the procedures for the identification of remains or the identification of disappeared persons.

3. With the express consent of the party affected in other cases.

C. Use of data to be entered

The markers obtained from DNA may be used by the units of the Judicial Police of the State Security Forces, both the National Police and Guardia Civil and the Autonomous Community police forces (Ertzaintza, Mossos D'Esquadra and Policía Foral Navarra), the National Institute of Toxicology and Forensic Sciences; and the authorities and prosecutors, in the investigation of the crimes listed under letter a) of the first section of Article 3 of LO 10/2007.

When the processing is carried out for the identification of corpses or the identification of missing persons, the data included on the database subject to Organic Law 10/2007, regulating police databases of markers obtained from DNA, may only be used in the investigation for which they were obtained (Article 7.3 LO/2007).

In the scope of the jurisdiction of minors, Article 2.8 of Royal Decree 1774/2004, of 30 July, approving the Regulation of Organic Law 5/2000, of 12 January, regulating the Criminal Responsibility of Minors, referred to the police files recording the identity and other data affecting privacy, states: 'The files on minors not referred to in this article

32 Moreover, the identifying data (genetic profiles) to be registered on the database must meet the technical conditions cited in the Technical Procedure Manual of the COMSIGENI.

shall not be used in adult proceedings relating to subsequent cases in which the same person is implicated.'

This provision led to doubts regarding the possibility of using DNA markers obtained when the subject was a minor once they reach legal age, the first response being a negative one, given the literal content of the provision.

However, given that neither Organic Law 10/2007, regulating police databases of markers obtained from DNA, nor Royal Decree 95/2009, on the regulation of the system of administrative registers for support to the Justice Administration provide for the erasure of these data or the destruction of the files on minors,[33] the General State Prosecutor's Office content, in its report of 5th March 2015 on the conservation and police use of DNA profiles of minors, has sustained that it is possible to access them for investigative purposes.

As expressly indicated in the aforementioned report of the FGE, It remains a contracditio in terminis that the storage of such data beyond legal age is not prohibited so that their use cannot be then permitted without possible exception.'

The Supreme Court has also ruled on this, stating that Article 2.2 of RD 1774/2004 is a case of 'regulatory overprotection'[34] of a fundamental right which does not correspond to Organic Law 5/2000, of 12 January, regulating the Criminal Responsibility of Minors, a consequence of the merely literal transcription, without qualification, of certain international standards intended to shield the past life of the offender when they reach legal age.

Therefore, the General State Prosecutor's Office maintains that this overregulation enables, through an integrated interpretation of Article 2.8 in relation to the Constitution, specific legislation (LO 10/2007 and LORPM) and Article 2.3 of the same regulation to allow, on an exceptional basis, judicial authorisation of the use of these data, provided that:

A. The legal limits set out in LO 10/2007 are strictly adhered to, excluding the data that should be regarded as cancelled.

B. There is a legitimate constitutional purpose, such as that of investigation of future crimes.

C. Said measure, in all cases, is proportional to the seriousness of the crime to be solved, weighing the conflicting interests.

In conclusion, on first glance at the current legislation, any access to data on DNA identifiers of minors that have reached legal age shall require judicial authorisation

33 Article 24 provides for a term of cancellation of entries of sentences on minors aged under ten when they reach legal age, provided that the measures have been fulfilled or the statute of limitations applies.

34 STS, 2nd Chamber no. 249/2014, of 14 March.

weighing the conflicting interests and shall not, under any circumstances, be appropriate in any case where the data should be cancelled.

D. Cancellation of data. Data protection regulation

Until May 2018, the data protection regulation applicable was constituted by Organic Law 15/1999, of 13 December, on Personal Data Protection. Article 8 of LO 10/2007, regarding the level of security, indicates that all files comprising the database are subject to the high security level, in accordance with the provisions of Organic Law 15/1999, of 13 December.

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), has been in force since 25th May 2018, although said regulation is not applicable to criminal offences. Organic Law 3/2018, of 5 December, on Personal Data Protection and Guarantee of Digital Rights. Relating to the protection of natural persons implemented this regulation and repealed LO 3/1999, of 13 December, except for the processing actions subject to Regulation (EU) 2016/680, specifically Article 22 and its implementing provisions, until such time as the law transposing the provisions of said directive into Spanish Law comes into force.[35]

Directive (EU) 2016/680 is applicable with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. Said directive ought to have been transposed in May 2018, and is currently in the pre-legislative phase.

If the severity criterion determines the inclusion of DNA identifiers on a database, respect for private life requires that limits be established in relation to the conservation of such data.[36]

Article 9 of LO 10/2007 sets cancellation periods whose duration shall depend:

1. On the type of crime and

2. On the judicial resolution finalising the criminal procedure

Thus, the conservation of the identifiers obtained from DNA on the database subject to this law shall not exceed:

35 Fourth Transitional Provision of Organic Law 3/2018, of 5 December.

36 The Judgement of the European Court of Human Rights (Grand Chamber), in the case of S. and Marper v. the United Kingdom, of 4 December 2008, considered that the legislation of England and Wales that allowed for DNA data to be retained indefinitely and without consideration of the seriousness of the offence constituted disproportionate violation of the right to a private life of the complainants. The judgement states: 'The retention of cellular samples is particularly intrusive given the wealth of genetic and health information contained therein.'

a) In the case of unknown owners and suspects not charged: the time set out in law for the application of the statute of limitations to the offence.

b) In the case where the owner is known with a definitive conviction or acquittal due to lack of imputability or guilt: the time indicated in the law for the cancellation of criminal records (except where there is a judicial resolution to the contrary).

The destruction of the data shall proceed at all times where the case is dismissed or an acquittal is ruled for reasons other than those mentioned above, once such judgements are final.

In the event that there several entries on a database for the same person, corresponding to different crimes, the data and identificative patterns entered shall be retained until the longest limitation period has expired.

Finally, with regard to data belonging to deceased persons obtained in the processes of identification of corpses or Identification of missing persons, the data registered shall not be destroyed while they remain necessary for the completion of the corresponding procedures.

Article 9 refers to Organic Law 15/1999 and its implementing regulations for the exercise of the rights to access, rectification and cancellation in relation to the police database of identifiers obtained from DNA.

In any case, with regard to the DNA profiles registered in judicial proceedings, removal depends on the course pursued in the procedure, as the limitation periods depend on the manner in which the proceeding was concluded and the nature of the definitive judgement. For this reason, it is important that, where DNA reports are included in the procedure, judges and courts inform local nodes and/or the national nodes, of those judgements handed down on the continued retention of genetic profiles in the database, especially in the cases of dismissal of the case or acquittal where the immediate destruction of the genetic profile is appropriate, but also in cases of conviction in which the continued retention of the profile in the database depends on the parameters set in Article 9. Today, with the absence of a regulatory procedure for destruction, almost all cases of removal come at the request of the subject, despite the fact that, in criminal proceedings, as a general rule, the impetus comes ex oficio.[37]

In the scope of the jurisdiction of minors, the periods of limitation established in Article 15 of Organic Law 5/2000, of 12 January, on the Criminal Responsibility of Minors, shall be followed for crimes and measures that, in general terms, are shorter than those established in the Criminal Code for Adults.[38]

37 The failure to remove may not only lead to long-term operating complications in the management of the database but also problems regarding the legality of th evidence in the event of a match with profiles which should have been removed ex oficio in application of Organic Law 10/2007.

38 The National Commission for the Forensic Use of DNA covered the problem of the destruction of profiles of minors in the year 2014. Initially, the Judicial Bioethics Group suggested that the profiles

Nevertheless, given that the regime that follows Organic Law 10/2007, regulating the police database on identifiers obtained from DNA, and the adult Criminal Code clashes with the spirit of Organic Law 5/2000, of 12 January, regulating the Criminal Responsibility of Minors, which guides the current system of criminal responsibility of minors towards special prevention, not generating criminal records once they have reached legal age in this jurisdiction without a personal administrative file, the dominant doctrine understands that the removal of the entry of the genetic DNA profile of the minors aged under 14 shall take place, as well as for the general reasons of dismissal of the charge or acquittal, due to compliance with the measure imposed, without taking into account the limitation periods for criminal records. For that reason, once the measure is fulfilled, destruction shall proceed.

That is consistent, in the case of a final conviction, with the doctrine set out by the General State Prosecutor's Office in Circular 1/200, of 18 December, on the criteria for the application of Organic Law 5/2000, of 12 January, regulating the Criminal Responsibility of Minors, which provides that 'the supplementary application of the Criminal Code shall be imposed once again and, more specifically, taking into consideration that the measures of the LORPM are not, strictly speaking, penalties and the most favourable cancellation regimes is that of the security measures, Article 137 shall apply, according to which the notes of the security measures imposed in accordance with the provisions [...] in other criminal laws shall be destroyed once the relevant measure has expired, without additional terms'.

Therefore, the regime providing for the cancellation of the measures shall apply for the destruction of DNA indicators, that is, once fulfilled or once the limitation has elapsed, the entry on the database must be cancelled.

should be cancelled upon the subjects reaching legal age. However, the plenary meeting of the commission did not accept this opinion and, in light of the legislation set out in the previous section, the police representatives stated that they would proceed to retain the DNA profiles of minors even where confirmed that the subject had reached legal age, while they would notify the judge of possible matchs between traces and profiles obtained from minors, so that the judicial authority could make a ruling; and in the case of their arrest having once reached legal age, their genetic profile would be obtained again to replace that appearing in the database as a minor. The above is without prejudice to the destruction that is appropriate in accordance with Organic Law 10/2007. Instruction 1/2019 of the Directorate-General for Relations with the Justice Administration has indicated to the INTCF that it must retain genetic profiles obtained from minors once they reach legal age, without prejudice to the cancellation that is appropriate in accordance with Law 10/2007 and royal decrees 95/2009 and 1115/2015.

E. International transfer and exchange between DNA databases

In accordance with Article 7.3 of LO 10/2007, the identifiers obtained from DNA may be transferred in accordance with the following rules:

a) To the judicial, fiscal or police authorities of third countries in accordance with the provisions of the international agreements ratified by Spain and which remain in force.

b) To the National Intelligence Centre, which may use the data for compliance with its functions relating to the prevention of such crimes in the manner provided for in Law 11/2002, of 6 May, regulating the National Intelligence Centre.

The applicable regulation is the instrument of ratification of the agreement relating to the improvement of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, signed at Prüm on 27th May 2005, between seven European Union Member States.

The Prüm Convention establishes the legal framework for improving cross-border cooperation between Member States in combating terrorism, cross-border crime and illegal migration. More specifically, it provides for the exchange of DNA profiles, among other data, between parties. The purpose is to intensify and accelerate the exchange of information between authorities. The Prüm Convention does not create a European database but rather provides for the databases of each Member State being made available to the rest of the Member States.

According to Article 2 of the treaty, the Member States commit to creating and maintaining national DNA analysis databases for the purposes of pursuing crimes. The processing of the data stored on these files is carried out in accordance with the domestic law in force for each type of processing.

For the purposes of the execution of the treaty, the Member States shall ensure the availability of reference data relating to the data contained on the national DNA analysis databases. Reference data shall only include DNA profiles established from the non-coding part of DNA and a reference. Reference data must not contain any data from which the data subject can be directly identified. Reference data not traceable to any individual (untraceables) must be recognisable as such.

According to Article 4, the Member States shall, in mutual agreement and through the national points of contact, compare the DNA profiles of the untraceables with all DNA profiles contained in the reference data of the other national DNA analysis files for the purposes of pursuing crimes.

The transfer and comparison is carried out on an automated basis. The transfer for the purposes of comparison of DNA profiles of untraceables shall only take place in cases in which such transfer is provided for in the domestic law of the requesting contracting party.

On 23rd June 2008, the European Union, through decisions 2008/615/JAI and 2008/616/JAI, incorporated the tenets of the Prüm Convention into European law, thus obliging all Member States.

At the international level, we cannot forget what is known as the 'INTERPOL platform', which acts only as a channel for the exchange of information on known or unidentified criminals who are active on an international scale, through what is known as the INTERPOL DNA platform, which does not contain nominal data that link a DNA profile to any person. Rather, Member States have access to the availability of the profile data in accordance with their national legislation.

INTERPOL is limited to providing information in the fight against criminality and terrorism, through what is known as the G8 I-24/7 network, which is a global protected police communication system.

In accordance with Article 3 of Royal Decree 1977/2008, of 28 November, regulating the composition and functions of the National Commission for the Forensic Use of DNA, with regard to the international institutional collaboration in this area, the commission shall perform the following functions:

e) The maintenance of collaborative relationships with the bodies of other states responsible for the analysis of the DNA for the purposes of the investigation and prosecution of crimes and the identification of corpses or the identification of missing persons, without prejudice to the actions corresponding to the ministries of Justice and of the Interior with regard to such matters.

VI. OTHER CENTRAL REGISTERS OF CRIMINAL INTEREST

1. Central Sex Offenders Register of the Ministry of Justice[39]

The Central Sex Offenders Register shall contain all the general information on the Central Convictions Register and the Central Register of Judgements of Criminal Responsibility of Minors, with regard to who has been convicted by definitive sentence for any crime against sexual freedom or integrity or for human trafficking for the purposes of exploitation, under the terms established in Article 5 of RD 1110/2015, of 11 December, which according to the final point of section one 'must record the identification code of the genetic profile (DNA) of the convicted person when agreed by the judicial body. The identification data of the victim shall not be entered on the register with the exception of, where applicable, their status as a minor.'

2. Register of Definitive Sentences of Criminal Responsibility of Minors

In accordance with the LORPM: 'A Register of definitive sentences dictated in application of the provisions of this Law shall be maintained by the Ministry of Justice, the data on which may only be used by Children's Court Judges and the Public Prosecutor's Office in accordance with the provisions of Articles 6, 30 and 47 of this Law, taking into account the provisions of Organic Law 15/1999, of 13 December, on the Protection of Personal Data and the complementary provisions.'[40]

Therefore, only the children's court judge and the investigating children's prosecutor familiar with the proceedings provided for in Organic Law 5/2000, of 12 January, regulating the Criminal Responsibility of Minors, may access this register and for use in these procedures alone, not being authorised to transfer said data once the subjects have reached legal age.

39 Regulated in Law 26/2015, of 28 July, on the modification of the childhood and adolescence protection system and Royal Decree 1110/2015, of 11 December, regulating the Central Sex Offenders Register.

40 Organic Law 15/1999 was repealed by Organic Law 3/2018, of 5 December, on Personal Data Protection and the Guarantee of Digital Rights, except in relation to processing for the prevention, investigation, detection or judgement of penal infractions or the execution of criminal sanctions, regulated in Directive (EU) 2016/680.

VII. USE OF DNA ANALYSIS AS A FORM OF EVIDENCE

A. Standards for analysis and interpretation of expert evidence

With regard to scientific standards for the interpretation of DNA evidence (autosomal STR, Y-chromosome STR and mitochondrial DNA), the CNUFADN recommends following the scientific recommendations of different standardisation groups: International Society of Forensic Genetics (ISFG) (https://www.isfg.org), European Network of Forensic Science Institutes (ENFSI) (http://enfsi.eu), and The Scientific Working Group on DNA Analysis Methods (SWGDAM) (https://www.swgdam.org).

These contain scientific standards on:

(1) The nomenclature of DNA markers

(2) The quality assurance analysis systems

(3) The interpretation of the evidence

(4) The different applications of DNA evidence.

Where, as a result of genetic matching, a match or compatibility arises between unknown samples and reference samples, it shall be necessary for the report to reflect a statistical evaluation of said match or compatibility. At the international level, it is recommended to employ a likelihood ratio as it allows for joint assessment of the results of the genetic analysis under the hypotheses put forward by the parties involved in the judicial proceedings (the prosecution and the defence).

Similarly, the biostatistical evaluation of paternity/parentage must use the paternity indices based on likelihood ratios.

Furthermore, the National Commission for the Forensic Use of DNA has drafted other, more specific, guides on the criteria for the interpretation of DNA evidence, specifically:

- GUIDE FOR RECOMMENDATIONS ON THE VALIDATION AND INTERPRETATION OF MIXED DNA PROFILES, covering the following aspects: (1) Accreditation criteria and quality assurance measures; (2) Recommendations on internal validation studies; (3) Anti-contamination controls and characterisation of the drop-in effect; (4) Mixed DNA profile analysis and interpretation criteria; (5) Statistical evaluation; (6) Expert report.[41]
- RECOMMENDATIONS FOR GENETIC IDENTIFICATION STUDIES IN CASES OF IRREGULAR ADOPTION AND THE ABDUCTION OF NEWBORN CHILDREN. The CTP, conscious of the technical difficulty of some genetic identification studies in cases of the abduction of newborns, drafted general recommendations to ensure the quality and reliability of genetic identification in cases of irregular adoption and abduction of newborn children, both in the search for matches between live individuals through DNA databases and the analysis of genetic identification of the

41 The document was approved by the plenary meeting of the CNUFADN of 17/09/2013.

exhumed remains of newborn children. The recommendations cover the following points: 1. Selection and collection of Reference Samples; 2. Selection and collection of Exhumed Samples of Corpses of Newborn Children; 3. Genetic Analysis and Accreditation of Laboratories; 4. Entry and Search on DNA Databases; and 5. Criteria for the Interpretation and Communication of Matches.[42]

- RECOMMENDATIONS FOR THE DRAFTING OF EXPERT FORENSIC GENETICS REPORTS AND THE PRESENTATION OF RESULTS, which includes the following aspects:

(1) International recommendations and standards of both accreditation bodies and international forensic genetics societies;

(2) Structure and format of expert report;

(3) Presentation of results (preliminary analysis and genetic analysis); and

(4) Assessment of results (preliminary analysis, assessment of matches in criminal investigation, assessment of matches on DNA database, assessment of matches in kinship studies).[43]

B. Assessment of expert evidence in criminal proceedings

Like all elements of evidence that are admissible in line with respect for the fundamental rights of the defendant[44] and arise in relation to the ordinary legality, expert DNA evidence shall be subject to the assessment of the competent court. Expert testing is completed where scientific knowledge is advisable or necessary but shall not be exempt from evaluation on the part of the court, not being subject to appraised evaluation, without prejudice to the fact that this requires a minimum knowledge of the scientific basis thereof.

As noted in previous sections, the DNA evidence consists of comparing the sample or unknown sample linked to the criminal act with an unknown sample of the person under investigation or accused or others involved in the proceeding. In the case of autosomal STR markers, the analysis is based on regions of genetic material that vary greatly between one individual and another. A complete genetic profile is obtained when it is possible to obtain the number of STR markers indicated in previous sections. If the profile matches that obtained from a reference sample, that is a match of genetic profiles.

42 Said recommendations were approved by the plenary meeting of the CNUFADN of 16/05/2012.

43 Said recommendations were approved by the plenary meeting of the CNUFADN of 27/10/2015, on the proposal of the CTP. The texts of all the documents can be found on the website of the CNUFADN: http://www.mjusticia.gob.es/cs/Satellite/Portal/es/ministerio/organismos-ministerio-justicia/instituto-nacional/comision-nacional-para-forense.

44 Article 11 of the Organic Law on Judicial Power establishes that evidence obtained by directly or indirectly violating fundamental rights or freedoms shall not be admissible. The study of cases of violation of such rights in obtaining or providing evidence constitutes the bulk of the case law of the Supreme Court on the matter.

Even in this case, the match does not equate to full scientific certainty on the identity of the subject as, unlike fingerprints, this match is expressed in terms of probabilities. Thus, the lack of a match allows the exclusion of the possibility that the sample belongs to the subject, but in the affirmative case, the laboratory, through the use of statistical indices (usually likelihood ratio), shall note in the report the probability of finding the matching genetic profile supposing that it was left by the suspect, compared to the probability of such a match arising purely randomly or in the event that it were not left by the suspect but another member of the population.

On the other hand, it is possible that the unknown sample, due to the DNA being deteriorated or insufficient, does not allow identification of all the genetic markers studied. This would result in a partial genetic profile. When subject to comparison with a reference sample, the likelihood ration would produce a lower value.

In the case of Y-chromosome STR markers, a genetic profile (haplotype) is obtained which is common to all males who share the same paternal lineage. This identifies a masculine lineage, not a person's genetic profile. Similarly, where what is analysed are hypervariable mitochondrial DNA regions, due to it not being possible to obtain nuclear DNA data, what is obtained is a common haplotype of a maternal lineage with, consequently, a lower power of discrimination.

In addition to the above, we must add that the finding of DNA does not necessarily imply that the genetic profile identified corresponds to a person involved in the criminal act. The high sensitivity of DNA detection techniques allows the detection of DNA deposited prior to the crime being committed (commonly referred to as background DNA) and even DNA transferred by a person who was at the crime scene and who had contact with another person or with an object they touched ('secondary DNA transfer'). Finally, this high sensitivity does not make it possible to rule out that the DNA was the result of accidental contamination in the laboratory during the analysis process, a possibility that the rigorous procedures and protocols for the collection, analysis and custody of samples attempt to prevent.[45] All of that indicates that the DNA samples should be assesses in the context, paying special attention to aspects such as the place where the DNA was deposited or the size or nature of the sample, for the purposes of determining its link to the criminal act.

The foregoing lead us to the conclusion that the result of the DNA testing cannot always constitute full evidence of the participation of a person in a criminal act. Even in the event of a match of a complete genetic profile, from a sample obtained from the crime scene or from the victim, the evidential value is that of circumstantial evidence that would require the concurrence of other elements of evidence that link the suspect,

45 A detailed consideration of these questions, with real cases, can be found in the guide *Interpretando la Genética Forense*, a recent Spanish translation and adaptation of the original guide in English *Making Sense of Forensic Genetics*, drafted by Sense about Science in collaboration with EUROFORGEN and ISFG. Direct access: https://senseaboutscience.org/wp-content/uploads/2019/04/SaS-ForensicGenetics-spanish-translation-WEB-spreads-13_03-amend.pdf

person under investigation or accused with the criminal act. DNA evidence indicates the individual source of the evidence with a high probability, but in general, it tells us nothing about how the clue reached the scene of the crime.

The greater scientific reliability of DNA evidence for the determination of identity with respect to other forms of evidence must not be confused with the value of finding it: on its own, the match of a genetic profile is not sufficient to claim the participation of a person in a criminal act. The determination of identity via the matching of the DNA of the suspect with that found at the crime scene does not exclude evidence in defence, but the court must assess the elements of evidence overall, and the plausibility of the version of the defendant and the evidence in defence presented by the defence.[46]

For the same reason, the evidential value of finding partial, mixed or haplotype profiles cannot be dismissed. Even though, in isolation, they shall have lesser circumstantial value, they may constitute objective corroboration of direct accusatory evidence, such as incriminatory testimony against a person or, on the contrary, they may be used as decisive evidence in defence in the case of profiles that are incompatible.[47]

C. Evaluation of expert evidence in parentage proceedings in the civil sphere

In parentage proceedings, a random search of a database is never conducted. Rather, the proceedings is directed towards a specific person to whom an affiliation is attributed.

If, after completing the DNA testing, the result of checking both DNA profiles is negative, this allows the exclusion of paternity/maternity with full scientific certainty. If it is positive, it allows the determination with a sufficiently high likelihood ratio to, together with the rest of the evidence, corroborate the parentage.

The most pertinent problems of evaluation do not arise in the practice of DNA testing itself but when the defendant does not agree to the testing, which, unlike in criminal

46 See the judgement of the Provincial Court of Barcelona, Section 22, of 29 July 2014, absolving an accused person whose genetic profile on the database matched one obtained from an unknown sample of sperm in a rape case, in light of the resounding refusal of the victim to identify him as the guilty party. In the absence of a reference sample in the same proceedings the court expressed doubt about the reference sample which led to the profile being entered on the database.

47 See the judgement of the Provincial Court of Madrid, Section 7, of 6 February 2017, assessed the finding of a Y-chromosome haplotype in conjunction with the rest of the testimonial evidence to conclude as to the guilt of the accused. The subsequent STS 14/2018, of 16 January, supported the inference despite challenging the probative value of the finding. The judgement of the Provincial Court of Tarragona, Section 4, of 30 May 2014, assessed the finding of incomplete profiles together with the witness testimony and the declaration of the accused stating: 'While in international protocol terms, in the case of samples with a mixture of more than two profiles , a definitive identifying value cannot be attributed to the DNA results obtained, however, in the case of the three profiles identified, they allowed the detection of the presence of 16 alleles of each of the donors, corresponding to Mr Hipólito Francisco, Mr Balbino Olegario and Mr Eulogio Onésimo, which placed the corresponding threshold of identification at the level of highly probable.'

proceedings, is always voluntary, without prejudice to the evaluation of such an unjustified refusal to the test.[48]

In the event of refusal to allow testing, jurisprudence does not consider it sufficient evidence of biological affiliation if there is not sufficient significant evidence that would allow for such inference. But, given the minimally invasive nature of testing and the interests at stake, for the circumstantial evaluation it will be sufficient to demonstrate that there did exist a relationship with the other progenitor and that there is a probability, albeit a weak one, to declare that such paternity or maternity is true.[49] It is not necessary to prove the existence of a sentimental relationship between the parties; a simple relationship of familiarity is sufficient to infer the possibility of procreation. It is in doubtful cases and not those where there is sufficient evidence to determine the affiliation without the need for DNA evidence, where refusal can allow the declaration of paternity or maternity.

The jurisprudence of the Constitutional Court supports the use of DNA evidence and the inference of paternity or maternity in the event of refusal on the part of the defendant to allow testing in parentage proceedings, rejecting the argument that an unjustified refusal would be covered under the law on physical integrity or privacy. The Constitutional Court indicates that in these trials, there is a clash between the fundamental rights of the different parties involved and that what prevails is the public interest and that of public order underlying paternity declarations, in which the rights to food and inheritance of the children are at stake, which come under special protection in Article 39.2 of the Spanish Constitution, which prevails over the rights alleged by the individual affected, where the certainty of legal judgement is also at stake.[50]

48 This is apparent from the wording of Article 767.4 of the Law on Civil Procedure.

49 Judgement of the Supreme Court, Civil Chamber, no. 420/2017, of 18 July.

50 Judgement of the Constitutional Court 7/1994, of 17 January, which adds: 'Without converting the constitutional rights to privacy and physical integrity into a sort of enshrining of impunity, without knowledge of the charges and duties arising from the conduct of an intimate partner with respect to possible family links.'

VIII. NEW GENETIC ANALYSIS TECHNOLOGIES

We are witnessing a new technological revolution in the field of forensic genetics. It consists of the growing implementation in laboratories (both public and private) of the massively parallel sequence (MPS) methodology. There are, at present, a growing number of forensic genetics centres, public and private, that are researching and beginning to implement this new technology for: (1) the analysis of 'classic' forensic DNA markers (that is, STR DNA and mitochondrial DNA control region) used throughout the world in forensic cases; and (2) for the study of other DNA makers such as SNPs (single nucleotide polymorphisms) and INDELs (insertion/deletion), which are small deletions and insertions of nucleotides.

SNPs/INDELs can be used for both the study of forensic individual identification (identity SNP), such as ancestry or biogeographic descent (ancestry SNP), and to determine certain phenotypic features (skin, eye and hair colour) (phenotypic traits SNP). One of the most ambitious current European projects in the field of forensics is the VISAGE project (http://www.visage-h2020.eu), the main objective of which is to develop and validate massive parallel sequnce systems for the study of markers of biogeographic origin and phenotypic traits for their use in forensic sciences.

Many of these new DNA markers are located in regulating regions or in the genes themselves (genome coding regions), unlike to other forensic DNA markers (identifying STR, identification SNP and mitochondrial DNA regions), which are located in non-coding genome regions. This presents a new challenge in the field of forensic sciences as, in most current European legislation, this use is not regulated as, normally (such as in Spain), these are database laws.

Another important difference between these new DNA markers (of ancestry and phenotypic traits) and classic (STR and identification SNP) DNA markers in forensic genetics is that the former have only predictive or inference value with probability values (70-90%) far from those we are accustomed to when there is a match in the comparative genetic analysis of STR and/or identification SNP profiles. For this reason, they are currently used exclusively as an investigative tool.

In addition we must also mention the progressive commercialisation of 'genetic ancestry tests' on the part of a number of companies (AncestryDNA, 23andMe, FamilyTreeDNA and MyHeritage) that offer customes the possibility of building their family histories and determining the geographic origins of their ancestors. Many of these genetic tests are based on the study of hundreds of thousands of SNPs in the entire genome and, therefore, offer an enormous power of discrimination and an enormous potentiality as tools for solving crimes, as has happened in the famous case of the 'Golden State Killer', solved thanks to the use of the open-source website GEDmatch (https://www.gedmatch.com/), where users of the aforementioned commercial kits can enter their data to contact with possible family members, originating a new scientific discipline referred to as 'forensic genealogy'. In contrast, these public use databases developed by private

companies, whose use is not covered by any legal regulation, present bioethical questions of major importance, such as the lack of privacy of genetic data or the commercialisation of genetic information.

For more information on this subject, the Permanent Technical Committee has drafted a report (*Report and Recommendations of the CTP on New Genetic Analysis Technologies and New DNA Markers of Biogeographic Origin and External Phenotypic Features*) in which they identify the DNA markers and methods validated in forensic genetics for making inferences of biogeographic origin and phenotypic appearance and listing a series of recommendations with regard to their future use in forensic cases in this country.

Finally, the Legal and Bioethics Groups has drafted a document on the use of these new DNA markers, which is included in ANNEX II.

IX. GLOSSARY

Useful terms used in the guide:

DNA: Abbreviation of deoxyribonucleic acid, a molecule that hosts genetic information in the majority of organisms, including humans.

Autosomal DNA: DNA that contains 22 pairs of chromosomes not linked to the sex present in the nucleus of the cells.

coding and non-coding DNA: Non-coding DNA is any DNA sequence that does not codify amino acids (in general, proteins). Much of non-coding DNA can be found between the 'genes' and the 'chromosome'. Additionally, there are non-coding DNA sequences, called introns that are found within the genes. Non-codifying DNA plays an important role in the regulation of genetic expression. In contrast, coding DNA Is the DNA sequence that codifies amino acids and, therefore, proteins. Legal orders usually assume that coding DNA contains the sensitive genetic information, while non-coding DNA contains non-sensitive information that allows for the individualisation of the individual and their sex. For these reasons, the possibilities of criminal investigation are usually limited to this DNA. Today, we know that coding DNA also has sensitive information and that non-coding DNA can offer non-sensitive information on phenotypic traits and ancestry that can be useful for criminal investigations.

Y-chromosome DNA: DNA comprising the Y chromosome, which is present exclusively in males. It is transmitted by the paternal progenitor to male descendants in a practically invariable manner. It is found in the nucleus of the cell.

Mitochondrial DNA: DNA located in the mitochondria, which are small factories of energy located in the cells (outside the nucleus). As cells contain many mitochondria, their DNA is present in a greater number of copies and can be detected with greater probability of success when the DNA of the nucleus is damaged or insufficient. It is DNA that is inherited exclusively via maternal lineage, from mothers to sons and daughters in a practically invariable manner.

Nuclear DNA: Found in the nucleus of the cell and codifies the majority of an organism's genes. Nuclear DNA that includes autosomal DNA and Y-chromosome DNA is commonly used in DNA analysis for the purposes of human identification.

Allele: Each of the forms (or variants) adopted by a gene that is located in a specific position of a chromosome, in a certain population of individuals.

Chromosomes: Structures of the interior of the cell that contain the packaged genetic information. The human genome is comprised of 23 pairs (a total of 46 chromosomes), and each one contains hundreds of thousands of genes and non-coding DNA.

Phenotype: The physical characteristics of a person are the result of the expression of their genes and the influence of environmental factors. The forensic determination of the phenotype consists of the prediction, based on DNA, of one or several externally

visible aspects of these physical characteristics such as, for example, hair and eye colour.

Genes: Segments of the chain of DNA that contain the information to produce or regulate the expression of proteins and are responsible for the phenotypic traits of the individual.

Haplotype: Set of DNA polymorphisms located in the same chromosome, which are inherited as a set.

Genetic marker: A gene or DNA sequence in a specific position of a chromosome that due to its variability in the population can be used for the purposes of human identification.

Unknown biological sample: Biological material recovered from a crime scene, or from persons or objects related to the crime.

Reference biological sample: Biological material whose donor is known and which is used for the purposes of comparison.

Genetic profile: Describes the allelic expression of the genetic markers that have been analysed from the DNA of a person or a trace or biological evidence.

Mixed DNA profile: Genetic profile resulting from the contribution of two or more contributors; for example, of the victim and the suspect.

Partial DNA profile: Incomplete DNA profile in which no results were obtained for some of the genetic markers analysed. That may be due to the fact that the DNA is deteriorated, due to exposure to heat, water or micro-organisms, or because the DNA is present in such low levels that precise information on the markers cannot be obtained.

Single-nucleotide polymorphisms (SNPs): Variation of the sequence of human DNA. On their own, they cannot provide information on specific genes and simply indicate a chromosomal location.

Likelihood ration (LR): Mathematical index recommended internationally by the scientific community and used to statistically assess situations of coincidence or compatibility between unknown and reference genetic profiles.

Short tandem repeats (STRs): Small fragments of DNA distributed by the genome, which are comprised, at the same time, of short sequences of nucleotides repeated in tandem. The number of times this sequence repeats (and, also, the length of the final sequence) usually differs between people. At present, the analysis of this type of polymorphism constitutes the basis of study in most investigations for the purposes of genetic identification.

Initialisms and acronyms of bodies and databases that appear in the guide:

CNUFADN: National Commission for the Forensic Use of DNA (Comisión Nacional de Uso Forense del ADN).

CODIS: Combined DNA Index System. IT system developed by the FBI to support the management of DNA databases including missing persons, criminals and forensic samples from crime scenes.

COMSIGENI: Committee for the Regulation and Coordination of the National Management System for Markers Obtained from DNA.

INTCF: National Institute of Toxicology and Forensic Sciences (Instituto Nacional de Toxicología y Ciencias Forenses).

INT-FÉNIX. Public interest file of the database of DNA from missing persons and unidentified corpses.

INT-SAIP: Criminal interest file of the DNA Database of the Ministry of the Interior.

ANNEX I. FORMS

A. Police form for persons under investigation or defendants

FORM/RECORD OF BIOLOGICAL SAMPLE COLLECTION OF PERSON UNDER INVESTIGATION/DEFENDANT WITH INFORMED CONSENT AS PART OF CRIMINAL INVESTIGATION.

1. DETAILS OF THE ACTION

Police: ..... Investigation; ..... no.: ..... Date of investigation: .....

Investigating unit: ..... Professional license number: .....

Judicial Investigation no.: ..... Court: .....

Criminal offence under investigation: .....

2. DATA OF THE DONOR OF THE SAMPLE

Name and surnames: .....

DNI/Passport/Identification document: ..... Country: .....

Date and place of birth: .....

Address: .....

Legal representative authorising the sampling (in the case of minors and persons with judicially modified capacity).

Name and surnames: .....

DNI/Passport/Identification document: ..... Country: .....

Date and place of birth: .....

Address: .....

SAMPLING DATA. CONSENT CLAUSE

In ....., at the headquarters of the judicial body indicated above, at ..... on ..... 20..., consent is requested to proceed with biological sampling for a reference sample, within the framework of the criminal investigation indicated, consisting of a buccal swab (USING [X] STERILE SWABS), for the completion of DNA analysis that provides, exclusively, genetic information on the identity of the person and their sex and the completion of comparative studies necessary for the judicial investigations referenced above.

In accordance with Organic Law 10/2007, regulating police DNA databases, and Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights, and EU Regulation 2016/679, the following information is provided:

1. The police and judicial purpose of the sampling and analysis of biological samples is to identify the perpetrator of a crime, bringing them before the court, clarify the crime and so that the judicial authority in the criminal proceeding may determine the responsibility of the perpetrator of criminal offences or their innocence.

2. Samples taken for which biological analysis should be carried out shall be analysed in laboratories duly accredited by the National Commission for the Forensic Use of DNA, it being the responsibility of the judicial authority to pronounce on any other retention of such samples or traces.

3. The data and results obtained after the completion of said analysis may be used for the genetic identification of merely identifying DNA, in the present investigation and in others, previous or future, following the committing of those crimes for which current legislation authorises the regime and processing of DNA profiles, using such information on police databases for cases.

4. The use and possible assignment of data adheres to the legislation in force and the specific regulation on the databases on which said information is registered, by virtue of the provisions of Article 7 of Organic Law 10/2007, so that the data contained on the databases and subject to this law may only be used by the units of the judicial police and the state security forces and the judicial and public prosecution authorities. Furthermore, the data contained on the database may be transferred to the judicial, public prosecution or police authorities of third countries in accordance with the provisions of international agreements ratified by Spain and which are in force; to regional police forces with statutory competency for the protection of persons and property and for the maintenance of public security, for the investigation of the crimes listed under letter a of section 1 of Article 3 of this law; and to the National Intelligence Centre, which may use the data in fulfilling its functions in relation to prevention of such crimes in the manner provided for in Law 11/2002, of 6 May, regulating the National Intelligence Centre.

5. The removal from the database of identifiers obtained from DNA shall be carried out in accordance with the provisions of Article 9 of Organic Law 10/2007 and shall encompass the removal of the DNA profile, personal data and the sample. The retention of markers obtained from DNA on the database subject to this law shall not exceed:

- the time indicated in the statute of limitations of the crime

- the time indicated in the law for the expiry of criminal records, if a definitive conviction is handed down, or acquittal for extenuating causes, for lack of immutability or guilt, except where there is a judicial resolution to the contrary.

Removal shall proceed in all cases where there is a ruling of dismissal of the case or acquittal for reasons other than those mentioned in the above paragraph, once such rulings are definitive.

6. The affected party may exercise their right to cancellation, rectification, erasure, limitation and portability of the data, in the cases provided for in articles 12 to 18 of

Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights regulations.

The rights to access, rectification and cancellation of data can be exercised before the Ministry of the Interior, State Secretariat for Security, c/ Amador de los Ríos nº 2, 28071 Madrid [1].

7. Provided that the person under investigation/defendant has been arrested, this consent shall be provided with legal representation.

Informed of the above, I PROVIDE MY EXPRESS CONSENT for:

The taking of a biological sample, its analysis and checking in the judicial investigation in question, and its inclusion on the DNA database regulated by Organic Law 10/2007.

Signed: (person from whom the sample is taken)

Signed: Legal representative (minor/limited capacity)

Witnessed by:
Counsel:
Signed: Investigating Judge

Signed: Clerk of Court

FINGERPRINTS	
Left index finger	Right index fingerd

[1] The different institutions involved may also specify the address of the administrator of the local database.

B. Form for persons under investigation or arrested for Institutes of Legal Medicine

FORM/RECORD OF BIOLOGICAL SAMPLE COLLECTION OF PERSON UNDER INVESTIGATION/DEFENDANT WITH INFORMED CONSENT AS PART OF CRIMINAL INVESTIGATION.

GENERAL INFORMATION

Preliminary: .....Proceedings/Indictment: ..... no.; .....

Court: .....

Criminal offence under investigation: .....

Counsel :..... Professional licence no.: .....

Donor of the sample: .....

Legal representative authorising the sample (in the case of persons with judicially modified capacity).

Name and surnames: .....

DNI/Passport/Identification document: ..... Country: .....

Date and place of birth: .....

Address: .....

SAMPLING DATA. CONSENT CLAUSE

In ....., at the headquarters of the judicial body indicated above, at ..... on ..... 20...., consent is requested to proceed with biological sampling for a reference sample, within the framework of the criminal investigation indicated, consisting of a buccal swab (USING [X] STERILE SWABS), for the completion of DNA analysis that provides, exclusively, genetic information on the identity of the person and their sex and the completion of comparative studies necessary for the judicial investigations referenced above.

In accordance with Organic Law 10/2007, regulating police DNA databases, and Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights, and EU Regulation 2016/679, the following information is provided:

1. The police and judicial purpose of the sampling and analysis of biological samples is to identify the perpetrator of a crime, bringing them before the court, clarify the crime, and so that the judicial authority in the criminal proceeding may determines the responsibility of the perpetrator of criminal offences or their innocence.

2. Samples taken for which biological analysis should be carried out shall be analysed in laboratories duly accredited by the National Commission for the Forensic Use of DNA, it being the responsibility of the judicial authority to pronounce on any other retention of such samples or traces.

3. The data and results obtained after the completion of said analysis may be used for the genetic identification of merely identifying DNA, in the present investigation and in others, previous or future, following the committing of those crimes for which current legislation authorises the regime and processing of DNA profiles, using such information on police databases for cases.

4. The use and possible assignment of data adheres to the legislation in force and the specific regulation on the databases on which said information is registered, by virtue of the provisions of Article 7 of Organic Law 10/2007, so that the data contained on the databases and subject to this law may only be used by the units of the Judicial Police and the State Security Forces and the judicial and public prosecution authorities. Furthermore, the data contained on the database may be transferred to the judicial, public prosecution or police authorities of third countries in accordance with the provisions of international agreements ratified by Spain and which are in force; to regional police forces with statutory competency for the protection of persons and property and for the maintenance of public security, for the investigation of the crimes listed under letter a of section 1 of Article 3 of this law; and to the National Intelligence Centre, which may use the data in fulfilling its functions in relation to prevention of such crimes in the manner provided for in Law 11/2002, of 6 May, regulating the National Intelligence Centre.

5. The removal from the database of markers obtained from DNA shall be carried out in accordance with the provisions of Article 9 of Organic Law 10/2007 and shall encompass the removal of the DNA profile, personal data and the sample. The retention of markers obtained from DNA on the database subject to this law shall not exceed:

- the time indicated in the statute of limitations of the crime

- the time indicated in the law for the expiry of criminal records, if a definitive conviction is handed down, or acquittal for extenuating causes, for lack of imputability or guilt, except where there is a judicial resolution to the contrary.

Cancellation shall proceed in all cases where there is a ruling of dismissal of the case or acquittal for reasons other than those mentioned in the above paragraph, once such rulings are definitive.

6. The affected party may exercise their right to cancellation, rectification, erasure, limitation and portability of the data, in the cases provided for in articles 12 to 18 of Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights and its implementing regulations.

The rights to access, rectification and cancellation of data can be exercised before the Ministry of the Interior, State Secretariat for Security, c/ Amador de los Ríos nº 2, 28071 Madrid or before the National Institute of Toxicology and Forensic Sciences, located at Calle José Echegaray 4, Las Rozas de Madrid, 28232.

7. Provided that the person under investigation/defendant has been arrested, this consent shall be provided with legal representation.

Informed of the above, I PROVIDE MY EXPRESS CONSENT for:

The taking of a biological sample, its analysis and checking in the judicial investigation in question, and its inclusion on the DNA database regulated by Organic Law 10/2007.

Signed: (person from whom the sample is taken)

Signed: Legal representative (minor/limited capacity)

Witnessed by:
Signed: Counsel
Signed: Forensic Medic

Signed: Counsel for the Justice Administration

C. Police form for victims

FORM/RECORD OF BIOLOGICAL SAMPLE COLLECTION OF VICTIM WITH INFORMED CONSENT AS PART OF CRIMINAL INVESTIGATION.

1. DETAILS OF THE ACTION

Police Investigation no.: ..... Date of investigation: .....

Investigating unit: ..... Professional licence number: .....

Judicial Investigation no.: ..... Court: .....

Criminal offence under investigation:.....

2. DATA OF THE DONOR OF THE SAMPLE

Name and surnames: .....

DNI/Passport/Identification document: ..... Country: .....

Date and place of birth: .....

Address: .....

Legal representative authorising the sampling (in the case of minors and persons with judicially modified capacity).

Name and surnames: .....

DNI/Passport/Identification document: ..... Country: .....

Date and place of birth: .....

Address: .....

SAMPLING DATA. CONSENT CLAUSE

In ....., at the facilities of ..... located at ....., at ..... on ..... 20...., consent is requested to proceed with biological sampling for a reference ample, within the framework of the criminal investigation indicated, consisting of a buccal swab (USING [X] STERILE SWABS), for the completion of DNA analysis that provides, exclusively, genetic information on the identity of the person and their sex and the completion of comparative studies necessary for the judicial investigations referenced above.

In accordance with Organic Law 10/2007, regulating police DNA databases, and Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights, and EU Regulation 2016/679, the following information is provided:

1. The police and judicial purpose of the sampling and analysis of biological samples is to identify the perpetrator of a crime, bring them before the court, clarify the crime, and so that the judicial authority in the criminal proceeding may determine the responsibility of the perpetrator of criminal offences or their innocence.

2. Samples taken for which biological analysis should be carried out shall be analysed in laboratories duly accredited by the National Commission for the Forensic Use of DNA, it being the responsibility of the judicial authority to pronounce on any other retention of such samples or traces.

3. The data and results obtained after the completion of said analysis may be used for the genetic identification of merely identifying DNA, exclusively in the present investigation.

4. The use and possible assignment of data adheres to the legislation in force and the specific regulation on the databases on which said information is registered, by virtue of the provisions of Article 7 of Organic Law 10/2007, so that the data contained on the databases and subject to this law may only be used by the units of the Judicial Police and the State Security Forces and the judicial and public prosecution authorities, in the investigation of the crime at the centre of the investigation.

5. The removal from the database of markers obtained from DNA shall be carried out in accordance with the provisions of Article 9 of Organic Law 10/2007 and shall encompass the removal of the DNA profile, personal data and the sample.

6. The affected party may exercise their right to cancellation, rectification, erasure, limitation and portability of the data, in the cases provided for in articles 12 to 18 of Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights and its implementing regulations.

The rights to access, rectification and cancellation of data can be exercised before the Ministry of the Interior, State Secretariat for Security, c/ Amador de los Ríos nº 2, 28071 Madrid. [1]

Informed of the above, I PROVIDE MY EXPRESS CONSENT for:

The taking of a biological sample, its analysis and checking in the judicial investigation in question.

Signed: (person from whom the sample is taken)	Signed: Legal representative (minor/limited capacity)

The inclusion in the police database of identifiers obtained from DNA regulated in Organic Law 10/2007 and the use and transfer for use exclusively in the investigation for which the sample is taken.

Signed: (person from whom the sample is taken)

Signed: Legal representative (minor/limited capacity)

Witnessed by:
Signed: Investigating Judge

Signed: Clerk of Court

(OPTIONAL for the operating force)

FINGERPRINTS	
Left index finger	Right index finger

[1] The different institutions involved may also specify the address of the administrator of the local database.

D. Form for victims for institutes of legal medicine

FORM/RECORD OF BIOLOGICAL SAMPLE COLLECTION OF VICTIM WITH INFORMED CONSENT AS PART OF CRIMINAL INVESTIGATION.

GENERAL INFORMATION

Preliminary Proceedings/Indictment no.: ..... Court: .....

Criminal offence under investigation: .....

Counsel: .....Professional licence no.: .....

Donor of the sample: .....

Legal Representative authorising the sample (in the case of persons with judicially modified capacity)

Name and surnames: .....

DNI/Passport/Identification document: ..... Country: .....

Date and place of birth: .....

Address: .....

SAMPLING DATA. CONSENT CLAUSE

In ....., at the facilities of ..... located at ....., at ..... on ..... 20...., consent is requested to proceed with biological sampling for a reference sample, within the framework of the criminal investigation indicated, consisting of a buccal swab (USING [X] STERILE SWABS), for the completion of DNA analysis that provides, exclusively, genetic information on the identity of the person and their sex and the completion of comparative studies necessary for the judicial investigations referenced above.

In accordance with Organic Law 10/2007, regulating police DNA databases, and Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights, and EU Regulation 2016/679, the following information is provided:

1. The police and judicial purpose of the sampling and analysis of biological samples is to identify the perpetrator of a crime, bringing them before the court, clarify the crime, and so that the judicial authority in the criminal proceeding may determine the responsibility of the perpetrator of criminal offences or their innocence.

2. Samples taken for which biological analysis should be carried out shall be analysed in laboratories duly accredited for the National Commission for the Forensic Use of DNA, it being the responsibility of the judicial authority to pronounce on any other retention of such samples or traces.

3. The data and results obtained after the completion of said analysis may be used for the genetic identification of merely identifying DNA, exclusively in the present investigation.

4. The use and possible assignment of data adheres to the legislation in force and the specific regulation on the databases on which said information is registered, by virtue of the provisions of Article 7 of Organic Law 10/2007, so that the data contained on the databases and subject to this law may only be used by the Units of the Judicial Police and the State Security Forces and the judicial and public prosecution authorities, in the investigation of the crime at the centre of the investigation.

5. The removal from the database of markers obtained from DNA shall be carried out in accordance with the provisions of Article 9 of Organic Law 10/2007 and shall encompass the removal of the DNA profile, personal data and the sample.

6. The affected party may exercise their right to cancellation, rectification, erasure, limitation and portability of the data, in the cases provided for in articles 12 to 18 of Organic Law 3/2018, of 5 December, on the Protection of Personal Data and Guarantee of Digital Rights and its implementing regulations.

The rights to access, rectification and cancellation of data can be exercised before the Ministry of the Interior, State Secretariat for Security, c/ Amador de los Ríos nº 2, 28071 Madrid, or before the National Institute of Toxicology and Forensic Sciences, located at Calle José Echegaray 4, Las Rozas de Madrid, 28232.

Informed of the above, I PROVIDE MY EXPRESS CONSENT for:

The taking of a biological sample, its analysis and checking in the judicial investigation in question.

Signed: (person from whom the sample is taken)	Signed: Legal representative (minor/limited capacity)

The inclusion in the police database of identifiers obtained from DNA regulated in Organic Law 10/2007 and the use and transfer for use exclusively in the investigation for which the sample is taken.

Signed: (person from whom the sample is taken)	Signed: Legal representative (minor/limited capacity)
Witnessed by:	
Signed: Forensic Medic	Signed: Counsel for the Justice Administration

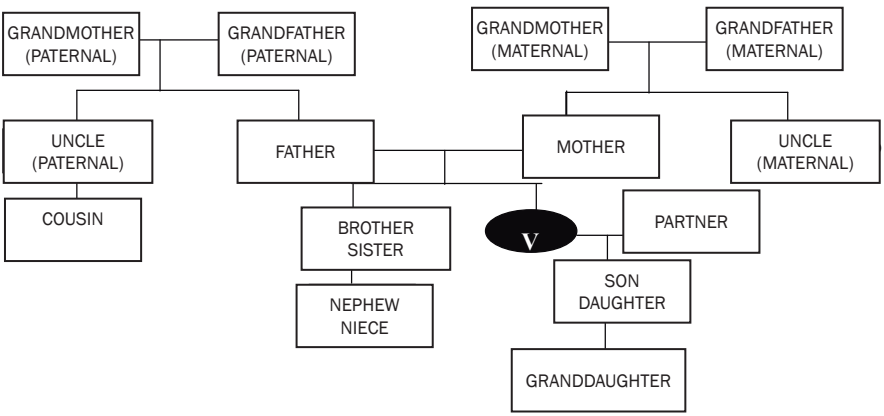
E. Form for family members in incidents with multiple victims

OFFICIAL FORM FOR THE COLLECTION OF REFERENCE SAMPLES OF DNA FROM FAMILY MEMBERS (II)

NAME AND SURNAMES OF FAMILY MEMBER OF REFERENCE:

FAMILY RELATIONSHIP WITH THE VICTIM:

NAME AND SURNAMES OF THE VICTIM:



FAMILY RELATIONSHIP WITH THE VICTIM:

NAME AND SURNAMES OF THE VICTIM:

F. Form requesting biological sample collection to obtain genetic profiles for the INTCF and their recording in the database of DNA profiles of persons affected by the abduction of newborn children

– Details of the donor:

Sample code: .....

Name: .....

First surname: .....

Second surname: .....

D.N.I.: ..... Date of birth: .....

Sex: ..... Nationality: .....

– Preferred channel of communication or address for the purposes of notifications:

□ Home address □ Email

Address: ..... No.: .....

Stairwell: .....Floor: ..... Letter: .....

City: ..... Province: .....

Postcode: .....

Email: .....

Telephone 1: ..... Telephone 2: .....

– Donor's link to the investigation:

□ Son/Daughter searching for biological mother or father.

□ Mother searching for biological son/daughter.

□ Father searching for biological son/daughter.

□ Other (please specify):

I request that the Ministry of Justice, through the INTCF, proceed to take the necessary biological samples to determine my biological profile for the purpose of entering it In the DNA database of persons affected by the abduction of newborn children managed by said public body.

□ Proof of payment of public fee. Proof of payment document.

Consent clause:

By completing this form, you provide your consent for the taking of a biological sample (buccal saliva swab) on the part of the National Institute of Toxicology and Forensic

Sciences (INTCF) for the analysis of DNA markers for the sole purpose of investigating the genetic identity of children subject to irregular adoption.

In accordance with the provisions of Organic Law 15/199, of 13 December, on Personal Data Protection, you are informed that the data will be added to the database of 'DNA of persons affected by the abduction of newborn children', the controller of which is the National Institute of Toxicology and Forensic Sciences, for the purpose of verifying the existence of relevant matches that may indicate biological family relationships between your genetic profile and the other persons included on the database or who may be entered in the future.

Similarly, you give your consent for the National Institute of Toxicology and Forensic Sciences to communicate the results of the tests carried out to the Ministry of Justice for the purpose of entering them in the database of 'Requests for Administrative Information from Persons Affected by the Abduction of Newborn Children', the controller of which is the Directorate-General for Relations with the Justice Administration and which is regulated by the aforementioned ministerial order, for the purpose of compiling the information necessary for the request submitted in relation to the case and in order to communicate the results obtained in relation thereto.

Similarly, you consent that, where a match is found as referred to above, your identification data shall be communicated to the person with whom you share a genetic relationship.

You may, nonetheless, revoke your consent, granted by means of this form, at any time and exercise your rights to access, rectification, cancellation and opposition in relation to your personal data, in accordance with Organic Law 15/1999, before the National Institute of Toxicology and Forensic Sciences, Calle José Echegaray, 4 (esquina Jacinto Benavente), Parque Empresarial, 28232, Las Rozas, Madrid. Nevertheless, you are informed that the data obtained or those ultimately arising from the research or investigations may constitute prima facie evidence of possible claims or claims contesting affiliation that may be brought before the courts and tribunals.

Furthermore, with regard to the data relating to your genetic profile and in accordance with the provisions of Organic Law 10/2007, of 8 October, regulating the police database of markers obtained from DNA, you are informed of the following:

– Only those DNA profiles that reveal, exclusively, the identity and sex of the subject may be entered.

– The use and ultimate assignment of the data shall adhere to the applicable regulation and the singular regulation of the databases on which the information is entered. The data included on the database subject to this law may be used in the investigation for which they were obtained.

– The samples or specimens taken in respect of which the biological analysis is to be conducted shall be issued directly to the accredited laboratories of the INTCF.

– The data shall be conserved for the time necessary for the completion of the corresponding procedures.

In any case, the cancellation of the database of markers obtained from DNA shall include the erasure of the DNA profile and the destruction of the original biological sample.

....., ... 20.....

Signature of the donor

ANNEX II. RECOMMENDATIONS OF THE LEGAL AND BIOETHICS GROUP ON THE USE OF NEW DNA MARKERS

1. Firstly, there is a need for a legal regulation that covers this type of phenotypic analysis, reviewing the concepts of codifying and non-codifying DNA, with the use and purpose of the information obtained.

2. This type of phenotypic analysis should only be used where, having obtained DNA samples from the scene of the crime or from the victim, a matching profile is not found on the database (that is, it would be clearly unknown samples), and the other avenues of investigation have been exhausted.

3. It is necessary that the legislator ensures the minimum intrusion in the sphere of the rights of the individual, ensuring confidentiality and the use of this type of analysis.

4. It shall only be used as an investigative tool to reduce the circle of potential suspects but shall not be used as evidence in an oral trial. The results of said analyses should not be made public, to prevent ethnic discrimination towards minority groups in the population.

5. Once suspicions are centred on a certain individual, an analysis of the match via traditional STR DNA markers will remain necessary.

6. The catalogue of crimes for which this avenue of investigation may be pursued should be established. One possible criterion would be to use the provisions of Organic Law 10/2007, although it may prove too broad.

7. Prior judicial authorisation is required in all cases to proceed with these studies. The judge shall be responsible for deciding upon the corresponding proportionality in each specific case. Whenever the prosecutor assumes management of the case, we believe that the judge overseeing the case shall be the one to issue said authorisation and that the order of the prosecutor alone should not be sufficient.

8. The law must define the features that may be inferred, limited to markers of ancestry and external visible features. It should be considered whether these should be features visible from birth, along with the possibility of extending it to other factors such as age. Under no circumstances may highly sensitive data be included, such as susceptibility to certain diseases.

9. It is necessary to foresee the possibility of regulating this type of analysis, not only for the purposes of criminal investigation, but also for humanitarian reasons.

10. The legislator should consider whether a specific regulation of the database of phenotypic data is necessary, whether these be for forensic and/or civil purposes.

11. The right to privacy must be protected in respect of the results of the phenotypic analyses, including in the sphere of the companies that carry out these inferences for the purpose of family searches, controlling access of the information to their own databases.

12. In all cases, it is necessary to ensure the rights of access, rectification, cancellation and opposition to these types of data (ARCO rights).

13. The training of judicial operators in this area (forensic application of new DNA markers and new analysis technologies) is imperative. Judges, prosecutors, lawyers, etc. must understand the scope of these scientific advances and their possible impact on people's rights.

ANNEX III. JUDICIAL RULINGS OF INTEREST

EUROPEAN COURT OF HUMAN RIGHTS (GRAND CHAMBER)

CASE OF S. AND MARPER V. THE UNITED KINGDOM. Judgement of 4 December 2008, ECHR 2008\104

Commentary: The judgement found the legislation in England and Wales, which allows for the indefinite retention of DNA samples on databases, including in the case of suspects acquitted or archived cases, to be a disproportionate measure that violated the right to private and family life of the subjects affected and therefore a violation of Article 8 of the Convention. The retention of cellular samples is considered particularly intrusive given the wealth of genetic and health information contained therein. There is a clear risk of stigmatisation. It highlights the repercussions in the case of minors and ethnic minorities.

In this respect, the Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales ... irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender ... The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the national database or the materials destroyed ... .

The Court further considers that the retention of the unconvicted persons' data may be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society. The Court has already emphasised ... the special position of minors in the criminal-justice sphere and has noted, in particular, the need for the protection of their privacy at criminal trials ... The Court shares the view of the Nuffield Council on the impact on young persons of the indefinite retention of their DNA material and notes the Council's concerns that the policies applied have led to the over-representation in the database of young persons and ethnic minorities who have not been convicted of any crime ... .

In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.

CONSTITUTIONAL COURT

Judgement of 5 December 2013 (Roj: STC 199/2013 - ECLI:ES:TC:2013:199)

Resolution No.: 199/2013. Appeal No.: 9530/2005. Reporting judge: FRANCISCO PEREZ DE LOS COBOS ORIHUEL

Procedure: Amparo appeal

Commentary: The appeal was lodged against STS 1311/2005, which dismissed the legality of the sampling of the accused, consisting of saliva, for the analysis of DNA and checking against reference samples. The court rejects the arbitrary nature of the change in opinion of the Supreme Court with regard to a previous judgement, which required judicial authorisation for the taking of samples, the change in case law being justified. The need for the judicial authorisation for the collection of samples is rejected, in accordance with the provisions of legislation in force, as no constitutional right is violated in the course of same nor is the right not to incriminate oneself, as it consists of a voluntary act. The judicial authorisation for DNA analysis is not deemed constitutionally enforceable, because even though it constitutes an invasion of privacy due to the potential for use to obtain sensitive information in accordance with the case law of the ECHR, it is consistent with the Constitution as it intends a legitimate purpose that is legally covered, and the judicial intervention is not justified due to slight (if any) material impact on the privacy of the appellant, it being limited to non-codifying regions of DNA, in view of the urgency of the proceedings, as there is legal provision for judicial authorisation and because its subsequent contribution to the proceedings allowed the taking of evidence to be under judicial control. The measure was proportional to the circumstance of the case. There was no violation of the right to non-disclosure of personal information as the only data entered in the DNA database was the genetic profile that identifies the individual. This judgement establishes the constitutional doctrine that to be applied in subsequent appeals. Dissenting votes on the lack of the need for judicial authorisation, given the non-existence of legal authorisation for sampling attributed to Law 15/2003, of 25 November and Organic Law 10/2007.

Judgement (Plenary) of 30/01/2014 (Roj: STC 13/2014 - ECLI:ES:TC: 2014:13)

No.: 13/2014. Appeal No.: 10616/2006. Reporting judge: FRANCISCO PEREZ DE LOS COBOS ORIHUEL

Procedure: Amparo appeal

Commentary: Analyses and resolves complaints against the legality of DNA testing in the criminal proceedings in terms similar to STC 199/2013. It is considered that the presumption of innocence was not violated in evaluating the clue consisting of the matching of the genetic profile of the appellant with the reference sample, it being reasonable to infer guilt based on this indication of the perpetrator, further taking into account the inconsistence of the alibi. Dissenting votes.

Judgements 14/2014, 15/2014 and 16/2016 of the same date, dismiss other amparo appeals against the same judgement in the same manner.

Judgement of 27 March 2014 (Roj: STC 43/2014 - ECLI:ES:TC:2014:43)

Resolution No.: 43/2014. Appeal No.: 5016/2006. Reporting judge: ENCARNACION ROCA TRIAS

Procedure: Amparo appeal

Commentary: Summary of the case law to date, with the most interesting resolutions of the Constitutional Court (TC) and the European Court of Human Rights (ECHR).

In the recent judgement STC 199/2013, of 5 December, and the Constitutional Court judgements STC 13/2014, STC 14/2014, STC 15/2014, and STC 16/2014, all of 30 January, we concluded that the analysis of biological samples of the appellant for amparo constitutes an invasion of privacy due to the potential risks that may arise from such analysis (legal ground 6 in the summary of STC 199/2013 cited in the first place and legal ground 3 in the other judgements). The case law of this Court in relation to the right to privacy is recalled, with particular attention to the resolutions dictated in relation to bodily interventions or inspections (STC 207/1996, of 16 November; STC 196/2004, of 15 November; STC 25/2005, of 14 February; and STC 206/2007, of 24 September), as well as certain pronouncements of the European Court of Human Rights, which make it clear that the right to a private life is compromised by the mere retention and storage of biological samples and DNA profiles (ECHR Judgement of 4 December 2008, case of S. and Marper v. the United Kingdom; and the decision as to inadmissibility in the case of Van der Velden v. the Netherlands).

a) Starting with the requirement that the measure constituting a violation of the right to privacy must adhere to a constitutionally legitimate purpose, the European Court of Human Rights considers the practice of such analysis legitimate where it 'pursues the aim of linking a particular person to the particular crime of which he or she is suspected' (ECHR of 4 December 2008, case of S. and Marper v. the United Kingdom, §100; and in the same vein, STC 199/2013, of 5 December, FJ 8). In the present appeal, the expert evidence of the obtaining of non-codifying DNA that does not allow for the obtaining of any data other than simply identifying data, took place with aim of being compared to biological traces found in hoods used in the commission of a criminal act, the only aim being the identification of the person who had used the aforementioned garments in the perpetration of terrorist damage, and therefore there is no doubt as to the legitimate purpose of the measure adopted by the Judicial Police.

b) With regard to the legal cover for the expert investigative procedures carried out by the Judicial Police, we must start, as per STC 199/2013, of 5 December , legal ground 9, with the fact that the acts having been committed prior to the reform implemented in Organic Law 15/2003, of 25 November, that legal cover is found in articles 282 and 363 of the Law on Criminal Prosecution and Article 11.1 of Organic Law 2/1986, of 13 March, on the Security Forces. Firstly, it consists of the technical and expert reports

referred to in section g); and secondly, the practice naturally fits the purpose for which police powers are conferred by the legislator, that is, the detection of crimes and the bringing of the suspected perpetrators before the courts, and finally, because the low intensity of the interference with fundamental rights, to which we refer later, allows a relative relaxing of the clarity requirements in the legislation which provides cover for the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms. So we have stated, in Judgement STC 34/2010, of 19 July, citing the ECHR judgement in the case of Plon v. France, of 18 May 2004, with regard to the minimal nature of the interference due to the precautionary measures restricting a fundamental right (where applicable, those recognised in Article 20.1 of the Spanish Constitution).

c) In terms of the need for judicial authorisation, we concluded, again in Judgement STC 199/2013, of 5 December, that even where the DNA analysis carried out was not judicially ordered, the appellant's right to personal privacy was not violated, for reasons, among others, expressed in legal ground 10, to which we refer, applying the same argument in this case.

Judgement of 8 September 2014 (Roj: STC 135/2014 - ECLI:ES:TC: 2014:135)

No.: 135/2014. Appeal No.: 6811/2010. Reporting judge: LUIS IGNACIO ORTEGA ALVAREZ

Procedure: Amparo appeal

Commentary: Examines the extent to which the right to privacy is affected by the taking of bodily samples. Analyses the allegation that a sample was taken without informed consent or judicial authorisation, rejecting it in view of the content of the judicial proceedings. Sufficiency of DNA evidence, combined with other corroborations, to determine the guilt of the appellant.

It is worth summarising that this last ruling [ruling of inadmissibility of 7 December 2006 in the case of Van der Velden v. the Netherlands], the European Court of Human Rights ... accepted that the obtaining of a buccal sample could constitute an intrusion of the privacy of the appellant, given that the systematic retention of this material and the DNA profile exceed the scope of neutral identification of traits such as fingerprints and is sufficiently invasive to be considered an interference with privacy in the terms of Article 8.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (§ 2).

We have stated that for consent to be deemed sufficient, it must be free and voluntary (STC 211/1996, of 7 March), and moreover, as a pre-condition for validity, for consent to be considered free and voluntary, it must be informed consent (STC 37/2011, of 28 March ,legal ground 5) ... the informed nature of the consent is a consequence arising from the purpose of the investigation procedure: the obtaining of a biological sample for subsequent expert analysis of DNA is a criminal investigation procedure. Its purpose is to obtain information (identifying profiles) that allow the investigation of criminal acts,

past or event future (through the retention of same on a database) ... The sampling was carried out within the framework of a criminal investigation for the purpose of determining the possible participation of the appellant in the offences being charged. The examination of the police report on obtaining the biological sample allows us to note that the appellant was informed not only of the type of bodily intervention that was to be carried out (a buccal swab using a cotton swab) but also the purpose of the procedure ... Information that proved sufficient for the purpose of the procedure to be carried out. At the same time, the appellant was informed that the genetic profiles would be checked against existing reference samples on the DNA database.

Definitively, the present case shows evidence for the conviction of the appellant for the aforementioned criminal offences of homicide and aggravated assault ... , consistent with the result of the DNA analyses carried out, corroborated by the legal weight of other evidence, from which the guilt of the appellant can be reasonably inferred.

Judgement of 14 February 2005 (Roj: STC 29/2005 - ECLI:ES:TC:2005:29)

No.: 29/2005. Appeal No.: 6002/2002. Reporting judge: VICENTE CONDE MARTIN DE HIJAS

Procedure: Amparo appeal

Commentary: The judgement recalls the doctrine established in STC 7/1994 on the value of the refusal to submit to provide a biological paternity sample and its adherence to the constitutional provision. In this case, it grants amparo against the ruling of the Supreme Court, which declared paternity based solely on grounds of the refusal, with no other supporting evidence, finding it contravention of a consolidated line of case law violating the right to equality. It incorporated the doctrine of the Supreme Court (civil) on the value of the refusal to submit to paternity testing.

The conclusion reached is identical to STC 95/1999, of 31 May, in which the Court, in accordance with the doctrine contained in STC 7/1994, of 17 January, and, moreover, reiterating the previous constitutional doctrine, declared that 'where a judicial body, assessing the refusal of the subject to submit to biological testing, together with the rest of the facts demonstrated over the course of the proceeding, reaches the conclusion that there exists a paternal relationship denied by the person who refused to submit to biological testing, it is a case of determination of paternity, permitted under Article 35, *in fine*, of the Civil Code, and which is not contrary to the right to effective judicial protection of Article 24.1 of the Spanish Constitution (AATC 103/1990 and 221/1990)' [Legal Ground 2].

Thus, the Civil Chamber of the Supreme Court, in the Judgement under amparo appeal, in attributing the now appellant the paternity claimed based solely and exclusively on his refusal to submit to biological testing, dismissing other evidence in the process of the overall assessment thereof, has, on an isolated and ad hoc basis, strayed from a consolidated line of case law comprising, among others, the Judgements cited in the contested Judgement itself, and which, moreover, the appellant for amparo invokes,

which was not only maintained with normal and full uniformity prior to the adoption of this divergent decision now under amparo appeal, but which has also continued subsequently and has persisted today. Case law according to which, as we have opportunity to reflect, the refusal to submit to biological paternity testing is no basis for assuming a *ficta confessio*, even if it represents or might represent a valuable indication that, in relation to or combined with other evidence gathered in the proceeding, might allow for the declaration of paternity as claimed, despite that evidence alone or in itself not being sufficient to provea paternity which is itself impossible to prove in absolute terms (as per the Supreme Court judgements of 8 March 1995; 11 and 28 May 1999; 26 June 1999; 2 September 1999; 17 November 1999; 22 May 2000; 22 November 2000; 24 May 2001; 3 November 2001; 27 December 2001; 17 July 2002; 7 July 2003; 11 March 2003; 11 September 2003; 1 October 2003; 29 June 2004; 2, 6, 7, 9, 15 and 16 July 2004; 1 September 2004).

SUPREME COURT (SECOND CHAMBER)

JUDGEMENT of 14 October 2005 (ROJ: STS 6158/2005 - ECLI:ES:TS:2005:6158)

No.: 1311/2005. Appeal No.: 739/2005. Reporting judge: JOSE ANTONIO MARTIN PALLIN

Commentary: The judgement validates the collection of the sample expelled by the suspect, with no requirement for judicial authorisation in a case, which occurred prior to the entry into force of Organic Law 10/2007. The claim of violation of the right to privacy is dismissed because, even taking into account the potential for use of the sample to obtain sensitive genetic data, the sole purpose of obtaining the genetic profile was the identification of the subject.

As the appellant himself emphasises, we are not dealing with the obtaining of bodily samples directly from the suspect but surreptitious sampling arising from a voluntary act of expulsion of organic material on the part of the subject of the investigation, without any intervention or intrusionary action affecting bodily integrity.

In such cases, the consolidated doctrine of the necessary judicial intervention to authorise, in certain cases, a possible banal and non-aggressive intervention does not enter into question. Reference sampling is carried out on a purely random basis and in light of a completely unforeseeable event. The remnants of saliva spat out thus become an object originating in the body of the suspect, but obtained in a completely unexpected manner. ...

4. The first aspect reported is related to the possible effect on the privacy of the accused, as genetic profiles not only serve for the identification of persons but can also store data relating to health that are eminently sensitive. We do not question this claim, which we accept, in general terms, for its undeniable scientific basis, but, in the present case, it was obtained for the sole purpose of identification through a random sample and for the purposes of investigating a crime. It is not stated in the action that the subsequent storage process includes data beyond those necessary for police investigation actions.

In any case, if the excessive and unnecessary storage of data prejudices or contravenes the regulation of the Law on Personal Data Protection, the Data Protection Agency shall be responsible for investigating the database and reducing it in accordance with the law. None of the above shall affect the prior identification carried out with the appropriate judgement, which makes judicial authorisation unnecessary, as it does not constitute any bodily intrusion whatsoever.

Judgement of 14 February 2006 (ROJ: STS 760/2006 - ECLI:ES:TS:2006:760)

No.: 179/2006. Appeal No.: 566/2005. Reporting judge: JOSE RAMON SORIANO SORIANO

Commentary: Right to privacy: does not affect this right where the analysis of the DNA is carried out for identification purposes within the police investigation of a serious crime. It confirms the decision of the non-jurisdictional plenary of January 2006. Mere procedural irregularity shall not invalidate the sample in the event of infraction of Article 282 LECrim.

But it is true that after the 2003 reform, and as an opinion permissible before and after that reform, it can be concluded that the intervention of a judge, except in cases where fundamental rights are affected, should not impede possible police action in the sphere of the investigation and the inquiry into crimes for which it holds powers of autonomous action.

This was the decision of the Second Chamber, of the non-jurisdictional plenary which took place on 31st January of the current year ... .

5. In accordance with that doctrine it turns out that, in the collection of samples with no requirement for bodily intervention for the practice of analysis of the DNA, in accordance with Article 326 LECrim, the competency shall be of the judge and the police, given the common obligation to investigate and discover crimes and criminals. The measures to guarantee the authenticity of the proceedings must be adopted, in the following order of preference:

—the investigating judge in normal cases.

—in cases where there is a danger of the disappearance of the evidence, the judicial police in accordance with Article 326 in reference to Article 282.

Notwithstanding the foregoing, this Chamber deems it appropriate to interpret the powers attributed to the police in a flexible manner, given the obsolescence of paragraph 1 of the aforementioned Article 282 to which Article 326 refers, which must be enriched with a harmonious interpretation in line with the current legislative context, in line with the broader powers granted to a specialised scientific and better prepared police force, with functions relevant to the investigation of the crimes (see Organic Law on the State Security Forces of 13 March 1986, Article 11.1.g; and Royal Decree on the Judicial Police of 19 June 1987, Article 4).

It would still be necessary to re-examine the circumstances in which without the order of the investigating judge and without any risk of the evidence being lost or disappearing, the police intervene and in accordance with their protocols, proceed with the collection and documented recording of the process, informing the judge and passing on results to the case.

In these cases we are faced with a procedural infraction, which would not result in the nullity of the proceedings, without prejudice to the devaluation guaranteeing authenticity for the formal deficit that might be reached up to the total disqualification of the expertise if the chain of custody does not offer full guarantees, as in the case contemplated in the summarised judgement of this Chamber no. 501 of 19 April 2005.

JUDGEMENT of 4 October 2006 (ROJ: STS 6190/2006 - ECLI:ES:TS:2006:6190)

No.: 949/2006. Appeal No.: 10203/2006. Reporting judge: JUAN RAMON BERDUGO GOMEZ DE LA TORRE

Comment: Reiterating the previous case law in relation to the right to privacy and *habeas data*. No judicial intervention is required for the collection of cigarette butts abandoned spontaneously for the determination of DNA using saliva, as said objects become *res nullius* and may be seized by the police without judicial authorisation. Assessment of DNA as a relevant clue, not as sole evidence of the perpetrator of the crime. The lack of alternative plausible explanation for the crime shall underpin the judgement based on inference.

The case law established in Judgement 501/2005 of 19.4 has been reviewed by this Chamber following the subsequent Judgement 1311/2005, of 14.10, which distinguished between obtaining bodily samples taken directly from the suspect, and surreptitious sampling arising from a voluntary act of expulsion of organic material on the part of the subject of the investigation, without the intervention of invasive methods or practices with regard to bodily integrity, stipulating that in these cases, the consolidated doctrine of the necessary judicial intervention to authorise, in certain cases, a possible banal and non-aggressive intervention does not enter in the question. Reference sampling is carried out on a purely random basis and in light of a completely unforeseeable event. The remnants of saliva on cigarette butts or a glass thus become an object originating in the body of the suspect, but obtained in a completely unexpected manner. The problem that may arise here is that relating to the demonstration that the sample was produced by the accused who is being charged.

SEVEN: However, in the current case, there is a particularly significant clue, which is that the genetic profile found on the clothing worn by the perpetrators of the crime to conceal their faces coincides with the samples collected from the appellants. The primacy of DNA constitutes full proof when demonstrating that the person referred to has been in contact with the object where the sample was found ... .

Meanwhile, the connection between these data and attribution of participation in the criminal act to the person to whom the genetic profile found in the sample belongs

requires, nevertheless, a solidly constructed logical inductive judgement from which it can be deduced, beyond rational doubt, that due to the place in which the sample was found or the set of concurrent circumstances, this was necessarily left by the perpetrator of the criminal act.

On the contrary, where DNA evidence is the only existing evidence and it is feasible to establish alternative feasible conclusions based on the uncertainty or on the indeterminacy, the deliberative process must lead to acquittal.

Judgement of 3 December 2009 (ROJ: STS 7710/2009 - ECLI: ES:TS:2009:7710)

Appeal No.: 10663/2009. Resolution No.: 1190/2009 Reporting judge: JUAN RAMON BERDUGO GOMEZ DE LA TORRE

Commentary: The Judicial Police may collect traces of the criminal act with no requirement for the presence of an attesting judicial official. The chain of custody may be verified via documentary or testimonial evidence. Assessment of the evidence: inference of guilt based on evidence together with DNA evidence: the lack of an alternative explanation strengthens the evidence.

As already stated in STS 1337/2005 of 26.12 and 1281/2006 of 27.12, the intervention of the court clerk is not required for the visual inspection carried out by the Guardia Civil. The Judicial Police is mandated by constitutional imperative (Article 126) to investigate the crime and identify the perpetrator, meaning that it is responsible for carrying out the pertinent investigative actions for the identification of the punishable offence and its perpetrator, and for the effectiveness thereof it is assigned the power to collect effects, instruments or evidence proving the perpetration of the crime as expressly stated in Article 282 of the Criminal Procedure Act, which expressly grants powers to the Judicial Police to collect effects, instruments or evidence of the crime in danger of disappearing, making them available to the Judicial Authority ... .

In this regard, the judgements of this Chamber of 7.10.94, 9.5.97 and 26.2.99, 26.1.2000 which recall articles 326 and 22 of LECrim, must be considered in relation to articles 282 and 786.2 (current Article 770.3) of the same Legal Text and to Royal Decree 769/87 of 17.6, regulating the Judicial Police, the combined application of which can establish that the mission of police officers extends to the collection of all effects, instruments or evidence of the crime at risk of disappearance, making them available to the judicial authority. An estimation that does not violate Article 326 LECrim, nor cause any lack of defence, adue to the fact that the traces found by specialists in identification are issued to the respective scientific bodies ... .

Therefore, the presence of the clerk is a necessary requirement for the validity of this action as preconstituted evidence, but not for the validity of a police action as a mere act of investigation and thus as mere acts of investigation they lack, in and of themselves, any evidentiary value, even where reflected on a documentary basis in a police declaration. Therefore, the evidentiary elements that may arise therefrom must be incorporated in the oral hearing as a form of evidence acceptable in law, for example, the

testimony of the duly intervening agents, taking place in the trial with the guarantees of challenge and immediacy.

THREE: With regard to the chain of custody, the problem that arises is how to guarantee, given the traces related to the crime are collected until they are confirmed as evidence at the time of trial, that the evidence subject to the immediacy, publicity and contradiction of the parties and trial of the court are the same. The guarantee of 'identicality' is satisfied via the chain of custody. It has been stated in the case law that the chain of custody is a concept taken from reality which is assigned juridical value for the purposes of this case, to identify the seized object, as on needing to be sent to different places to verify the corresponding examinations, it is necessary to have certainty that what is transferred and analysed is the same at all times, from collection at the crime scene to the final moment of study and, where applicable, its destruction.

Judgement of 22 February 2010 (ROJ: STS 913/2010 - ECLI:ES:TS:2010:913)

No.: 151/2010. Appeal No.: 2005/2009. Reporting judge: MANUEL MARCHENA GOMEZ

Commentary: The court assesses the refusal of the accused to submit to DNA testing. That in itself is not an indication of the acts to be proven, but it may strengthen the inference on the part of the court with regard to the perpetrator. There is no violation of the right not to incriminate oneself nor of one's physical integrity by submitting to DNA testing.

In the criminal sphere, STS 1697/1994, of 4 October, assessed the refusal to submit to DNA testing, together with other indicative elements, as a probative activity ... sufficient to set aside the interim truth of innocence of which the *iuris tantum* presumption of innocence consists'. In a similar vein, STS 107/2003, of 4 February, recalls that: 'Where the refusal to submit to DNA testing lacks sufficient justification or explanation, taking into account the fact that it is a form of collection of evidence that does not involve any physical damage and has an ambivalent effect, that is, it may be implicatory or completely exculpatory, nothing prevents the rational an logical assessment of this approach to the procedure as an element that, in and of itself, has virtually no probative value, but which, in conjunction with the rest of the evidence, may strengthen the conclusions drawn by the court. The judgement of the European Court of Human Rights of 17 December 1996 (case of Saunders v. the United Kingdom) may also be used, which in paragraph 69 states that the right to silence does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers, such as, *inter alia*, blood and urine samples ... .

Beyond the debatable classification by some of this silence or of the implausible explanations as circumstantial evidence, it is certainly the case that the adequate weighing up is necessary, not as an indictment or contradiction but as an element of support for the probative inference obtained by the Court based on the true evidence. Reiterating the case law established in Judgement 1736/2000, of 15 November,

criminal participation cannot be deduced from the lack of plausible explanation on the part of the person protected by the presumption of innocence, but from the result of a logical process, the starting point of which is the set of basic facts comprising the prima facie evidence with capacity, in and of itself, via a logical deductive process, to reach a conclusion called a consequent fact.

Judgement of 02 February 2010 (ROJ: STS 925/2010 - ECLI:ES:TS: 2010:925) no.: 158/2010. Appeal No.: 11183/2009. Reporting judge: ADOLFO PREGO DE OLIVER TOLIVAR

Commentary: The judgement rejects the evaluation of authorship of the lower court, given that, despite the judicial recognitions, the DNA evidence refutes the involvement of the accused in one of the three rapes attributed to him. The DNA evidence, in this case, has a powerful exonerating effect.

THREE. 2. Secondly, upon examining the exonerating evidence, the Chamber incorrectly assessed the data provided in the expert DNA reports: The report ... established two conclusions: 1) that the genetic profile obtained from the first sample 'is not compatible' with the second; and 2) that the Y-chromosome haplotype in the reference samples 'does not match' that obtained on the remains of the sweater. A second report ... agreed in relation to the first conclusion, establishing as a final conclusion that 'the genetic profile obtained from the unknown sample' from the accused 'DOES NOT MATCH with the mixture of genetic profiles obtained from the sweater, analysis of which was the subject of the expert report' by the Police.

Where the two expert reports coincide is in maintaining that the genetic profiles of both samples are not compatible. This necessarily means that it is impossible for the prostatic traces left by the attacker on the sweater of the victim to belong to the accused.

The appellant is also right in highlighting that the genetic profile is unique in each individual and always identical in each cell of same. Where that of the accused does not match the biological sample of the traces found, the science fundamentally and unwaveringly states that the possibility that these traces belong to the accused must be excluded. Where they do not match, as is the case here, there is absolute certainty that they do not belong to him.

The lower court is mistaken in not differentiating between DNA testing with obtaining the Y-chromosome with few markers and which may give rise to reservations or doubts, and the obtaining of a genetic profile clarifying any doubt as it is unique for each individual.

Judgement of 07 July 2010 (ROJ: STS 3971/2010 - ECLI:ES:TS:2010:3971)

No.: 685/2010. Appeal No.: 558/2010. Reporting judge: MANUEL MARCHENA GOMEZ

Commentary: Reiterates and summarises the case law on the powers of the police to collect samples of crimes and the regime for the collection of reference samples. There was no break in the chain of custody. DNA testing was not the only evidence against the accused persons.

This provision [Article 363 LECRIM], despite the fact that it leaves a number of pending questions that are decidedly tackled in the compared law unresolved, has the virtue of adopting the opinion already proclaimed by this Court, the legal regime for the collection of samples for the purpose of obtaining DNA. In accordance with its content, it is essential to distinguish between several clearly differentiated circumstances.

A) Firstly, in the case of the collection of prints, biological traces or remains abandoned at the crime scene, the Judicial Police, on its own initiative, may collect such clues, describing them and adopting the necessary prevention measures for their conservation and their submission to the court. The same conclusion must be reached with regard to the samples that may belong to the victim found on the personal objects of the accused.

b) Where, on the contrary, the samples and fluids require bodily intervention and, therefore, the collaboration of the indicted party, their consent shall be the true source of legitimacy of the state interference the collection of such samples represents.

In these cases, if the indicted party is arrested, this consent shall require legal assistance. This guarantee shall not be enforceable, even where the subject is under arrest, if the sampling is obtained not from an intervention that claims the consent of the affected party, but from traces or excrescences left by the accused.

c) On those occasions where the police do not have the collaboration of the accused or they refuse to give their consent for the acts of inspection or bodily intervention required to obtain the samples, legal authorisation shall be required. This enabling resolution may not legitimise the practice of violent acts or personal coercion, subject to explicit legal provision —currently non-existent— that legitimises the intervention, without it being understood that the open clause provided for in Article 549.1.c) of the LOPJ, fulfils the constitutional requirement imposed for the sacrifice of the rights affected.

Judgement of 22 June 2011 (ROJ: STS 4570/2011 - ECLI:ES:TS:2011:4570)

No.: 680/2011. Appeal No.: 11074/2010. Reporting judge: FRANCISCO MONTERDE FERRER

Commentary: It reiterates the case law on the regime for the collection of samples. It analyses the allegation of irregularities in the collection of the reference samples that determined the genetic profile of the accused, obtained in a different proceeding, concluding that it cannot be assumed that it did not adhere to legal measures. This challenge came in the form of a written submission on the part of the defence, without specifying the assumed irregularities.

ONE ... Thus, the conclusion reached must be the opposite of that reached by the appellant; in principle and until demonstrated to the contrary —and let it not be forgotten that the person claiming the irregularity must prove it— the actions carried out in the course of a judicial investigation should be regarded as legally carried out.

Put another way, there is not the slightest reasos to think that the extraction of saliva samples from the accused would not have been expressly authorised or otherwise ordered by the acting Judge.

But ultimately, what is questioned here is the normality of samples used in the Data Banks that the Administration created under the Law of 13 December 1999, which establishes an important scope for the protection and safeguarding of persons, except 'for the investigation of terrorism and other serious crimes'.

It is obvious that such purpose does not serve as an excuse for any form of proceeding with the collection of data and their entry on the registers created, but it is nevertheless clear that any potential irregularities committed should be denounced in the manner established.

Judgement of 26 July 2011 (ROJ: STS 5782/2011 - ECLI:ES:TS:2011:5782)

No.: 880/2011. Appeal No.: 202/2011. Reporting judge: JULIAN ARTEMIO SANCHEZ MELGAR

Commentary: Use of pre-existing data on the DNA database: reiteration of the case law established in STS 827/2011. Absence of challenge at the appropriate moment. Furthermore, the voluntary contribution of the sample in the first process was accredited. The inference of guilt made by the lower court as to the participation in the terrorist attack is considered appropriate, based on the finding of the genetic profile on latex gloves found beside the explosive device.

In sum, access to the database was not challenged at the appropriate time in the proceedings, the print was obtained with full guarantees in that the accused volunteered for said analysis and, consequently, the provisions of Article 363 of the Criminal Procedure Act were not necessary. There is a rebuttable assumption of the accuracy of the database or register in terms of the data included thereon, where they are not challenged at the appropriate time in the proceedings for their checking, and in this case, the sampling and the obtaining of data and its entry on the database were carried out in a different procedure to the one taking effect, where the fingerprint appeared as a reference sample.

From this perspective, the reasonableness of the inference is clear: the experience and logical discourse reach the conclusion that, if the latex gloves belong to the accused, the conclusion is that it was the accused who placed the devices, and the complex alternatives offered in the course of the appeal shall not be assessed ... .

Judgement of 25 October 2011 (ROJ: STS 7287/2011 - ECLI:ES:TS:2011:7287)

No.: 827/2011 - Appeal: 10759/2011. Reporting judge: MANUEL MARCHENA GOMEZ

Commentary: Use of pre-existing data on the DNA database. A new sampling of the reference sample obtained where there is a profile on the database, without prejudice to the challenge at the appropriate stage in the proceeding. Reiterated the case law on

sampling from STS 685/2010. The DNA testing is assessed, along with other evidence, as a corroborating element of the responsibility, determined by line-up identification and identification during the oral proceedings of the perpetrator.

In effect, the DNA analysis methodology, starting with the creation of the police database on genetic markers, can be understood as adhering perfectly to the requirements imposed by its own scientific significance where the reference genetic profile is obtained from the data and files included on this register, without the need to conduct a second reliability test, acting subsequently on the saliva samples of the defendant. It is obvious that no obstacle can be maintained against the converging practice of both checks, but it is also obvious that the genetic identification on the database, when compared to other unknown biological samples, normally found at the crime scene, allows a conclusion on this genetic match that must later be subject to judicial assessment.

It is undeniable that the accused can expressly reject the expert conclusion on their own genetic identification, where this is achieved on the basis of pre-existing data on the DNA file created by Organic Law 10/2007, of 8 October. The possibility of an error between the genetic profile found on the file and the personal identification data is one, not the only, possible reason for challenging. However, in order to prosper, this challenge must be declared at the appropriate time in the proceeding. It is not about emphasising the meaning of the principle of estoppel which, at its heart, is just one criterion for procedural acts and, therefore, of a lower axiological range than other converging values and principles in the criminal code. The aim should be to remember that the destruction of the rebuttable presumption that comes with the genetic information on this database —as authorised by the scientific reliability of the technique for obtaining genetic profiles from DNA samples and the legal regime for access, rectification and cancellation, authorised by Organic Law 10/2007, of 8 October—, may only be possible using other corroborating evidence that, due to its nature, shall only be suitable during the investigation.

The judgement of the Court with regard to the appellant is supported by a more than solid probative basis. On the one hand, its fundamental basis is the declaration of the victim, who during the oral hearing identified the accused with no hesitation, this reasserting the line-up identification during the investigation ... .)

The surrender of the knife used by the appellant —who has not exercised his right to testify and thus offer an alternative version placing him in a place other than the crime scene— is another corroborative element that strengthens the credibility of the victim's testimony. If we add to that the match between the result of the analysis of the biological DNA sample obtained from the biological remains identified by the Police at the crime scene, and the genetic profile of the accused, which was entered in the police database of markers obtained from DNA, the assertion of Eutimio's guilt is nothing more than the result of the probative conclusion reached in accordance with the rules governing the rational evaluation of evidence.

Judgement of 20 December 2011 (ROJ: STS 8847/2011 - ECLI:ES:TS:2011:8847)

No.: 1367/2011. Appeal No.: 11088/2011. Reporting judge: FRANCISCO MONTERDE FERRER

Commentary: Reiterates the case law on the legal activation of the police for the collection of samples and the regularity of the chain of custody, despite the fact that in the case, the garment with the biological sample was provided by the victim through their counsel, who submitted it to the court, with the chain of custody accredited up to its arrival at the laboratory. Evaluation of the DNA sample: where applicable, it is corroborating evidence of the reality and authorship of the crimes, determined based on the statement of the victim.

In this case, there was no record of the visual inspection, and therefore, the cited Article 326 paragraph 3 LECrim has no application, as it assumes that the Judge is present at the scene of the crime completing this investigation procedure. The criminal proceeding seeks the material truth and in the case of clothing not abandoned at the crime scene with biological remains, it would be normal for it to be found in the home of the person who had worn it, and in crimes against sexual freedom, in the possession of the victim, who submits it to the police or the judicial authority, as occurred in this case, in which Ms Otilia submitted the garment to her lawyer, who presented it to the Court.

Judgement of 09 July 2012 (ROJ: STS 4844/2012 - ECLI:ES:TS:2012:4844)

Judgement: 607/2012. Appeal No.: 10127/2012. Reporting judge: JULIAN ARTEMIO SANCHEZ MELGAR

Commentary: The judgement reiterates the case law on the police collection of biological samples, in a case in which biological samples attributed to the accused were obtained from two bottles of water used by one of them in the court, testing it against those abandoned by the alleged perpetrator of a crime of homicide. It analyses in great detail the consistency of the chain of custody of the aforementioned samples and the case law with regard thereto. The markers obtained were partial but were sufficient to asses guilt, together with other probative elements.

It must be taken into consideration that the markers obtained on the cup were not full samples, but were sufficient to establish the statistical comparisons of this type of scientific evidence, which, as in the case of fingerprints, offer the procedural outline of indirect evidence by placing the suspect at the scene of the crime. The aforementioned probabilities, one of every four Spaniards fits the genetic sequence, which is some 11.4 million, and even with the expert evidence of the defence, one in every 5.68 million, they offer great identifying value, which is even greater where it is an act proven by witness testimony that the person who fired the shots was a male.

We must recall that the assessment of this type of evidence is free, as in the rest of the body of evidence before the Court, while it is, nonetheless, highly incriminating based on its reliability. As we have seen, it is part of the nature of indirect evidence that it does not

in and of itself prove the assertion of guilt, but substantial data can be inferred from the results for the clarification of the participation of the accused, as it clearly proves full identification of the accused at the scene of the crime, or his direct link to the purpose of the proceeding, which constitutes a substantial starting point for assessment of the rest of the body of evidence.

Judgement of 15 January 2013, (ROJ: STS 61/2013 - ECLI:ES:TS:2013:61)

No.: 3/2013. Appeal: 10851/2012. Reporting judge: MIGUEL COLMENERO MENENDEZ DE LUARCA

Commentary: Assessment of DNA testing as an indication of perpetration of terrorist attack. Genetic profile obtained in a hood made from a section of the sleeve of a shirt belonging to the appellant, left by one of the perpetrators , in the area of the mouth. Combined with other factors, among them the links between the accused and the terrorist group ETA, it is considered sufficient evidence of his participation in the act.

The DNA traces were sought, intentionally, and found in the area that would have come into contact with the mouth of the user of the balaclava fashioned from a piece of the sleeve of a T-shirt. Only DNA traces of the victim were found here ... This data authorises and excludes, in a manner very close to absolute certainty, the use of the balaclava by others, given the extremely unlikely possibility that they would not have left organic traces, if anyone had used it to commit the act and flee on foot as the perpetrators did, according to the result of the judgement.

Furthermore, according to the judgement, the appellant is a person linked to the terrorist environment ... It is clear that this data, on its own, demonstrates nothing with regard to his participation in the acts, but it does not allow us to consider the appellant someone entirely removed from behaviours and attitudes of this nature, which upon occurring would have weakened the demonstrative power of the evidence.

Consequently, it can be asserted that, in this case, the evidence consisting of traces of DNA left by the accused and only the accused, in the area corresponding to the mouth of the balaclava used by one of the perpetrators to conceal their identity when committing the offence has significant and special probatory power, and therefore the Lower Court understood correctly that the evidence available undermined the presumption of innocence.

Judgement of 31 May 2013 (ROJ: STS 3146/2013 - ECLI:ES:TS:2013:3146)

No.: 491/2013. Appeal No.: 11091/2012. Reporting judge: JOSE MANUEL MAZA MARTIN

Commentary: The consolidated case law on the validity of the collection of samples by the police. Assessment of an incomplete genetic profile as evidence: Starting with the legality of the test, the Court confirms the guilt determined based on an incomplete genetic profile, considering that it has the same identifying value that is not complete but is sufficient when corroborated by other concurrent evidence.

TWO. ... Then the fact that the analysis carried out, in particular the quality of the unknown sample used in this case, does not comply with the requirements required today, in accordance with the current state of the art and to reach almost a degree of absolute certainty, does not mean, obviously, that the result taken at that time, complying with all requirements then in force, lacks any identification value.

This value will be lesser than that which could be obtained in other circumstances, but nonetheless provides a relatively high degree of reliability ... All the more if we take into account the fact that we are not dealing with a general and random search but the identification of a person who matches the elements, circumstances and links, making the possibility of error due to an unfortunate coincidence even more remote.

In reality, we are faced with a percentage of certainty enormously superior to that which, on occasion, unfortunately, must be used by the criminal Courts as the basis of their probative conclusions, in order to identify the perpetrator of a criminal act.

Judgement of 10 July 2013 (ROJ: STS 4006/2013 - ECLI:ES:TS:2013:4006)

No.: 600/2013. Appeal: 10079/2013. Reporting judge: MIGUEL COLMENERO MENENDEZ DE LUARCA

Commentary: Application of the Agreement of Chamber II of 26 May 2009, on the validity of investigations carried out in other proceedings provided by testimony, to the reference sampling in an other proceedings, rejecting the extemporaneous challenge.

The existence of the appropriate temporaneous approach has prevented adequate debate on the current case if the conditions in which the requirement and subsequent collection of such samples (the reference samples, obtained in another case) was carried out let it be understood that the appellant had the legal representation considered necessary, prior to granting consent or not, in a manner that would exclude any coercive situation in the conduct of that investigation.

Judgement of 07 October 2013 (ROJ: STS 5677/2013 - ECLI:ES:TS:2013:5677)

No.: 777/2013. Appeal No.: 10448/2013. Reporting judge: ANTONIO DEL MORAL GARCIA

Commentary: The judgement charts the evolution of the case law and legislation on sampling, as well as the considerations established in the courts of law on how it affects the right to privacy, stating that it is not necessary to be accused in order to be a passive subject of sampling, and that the status of suspect is sufficient. The judgement analyses whether or not judicial authorisation is required for the analysis, concluding with the suitability of said authorisation, given the existing doubts and the interests at stake, that the law does not explicitly require it, and therefore, its absence is at most a mere irregularity that does not meet the threshold of evidence for nullity. Greater impact on the right to privacy would advise the need for judicial authorisation where, in addition to the 'one-to-one' testing, it is intended to enter it in the database.

FIVE. ... the collection of samples authorised by the Third Additional Provision is preapproved for analysis. Splitting the regime of one and another is not covered by this rule or the Agreement of the Chamber. Understanding that the doctrine of this Chamber does not require authorisation to obtain the sample where there is no bodily intervention and no reasons of urgency, and nevertheless, it does require such authorisation for the identification of non-codifying DNA for the sole purpose of one-to-one testing, is not consistent. The aforementioned Law 10/2007 would appear to start with this assumption: power to obtain the sample implies power to carry out analysis. It is true however, and the objection is serious, that there is a significant difference between obtaining the sample and the analysis (the latter invades privacy) which could justify a different legal regime ... .

... the aforementioned additional provision makes it possible to deduce:

«a) That it is not necessary to be 'accused' to carry out actions aimed at obtaining samples to determine the genetic profile. And the reform of 2003 would refer to the 'suspect' which is now reiterated as a level below formal accusation ... .

b) That the regime must be different based on whether a bodily inspection or intervention is required or not. Only is this case in judicial authorisation required.

c) That the ensuing analysis is inherent to the logic of the provision, as a natural follow-up to this collection of samples, with no explicit requirement for legal authorisation.

It is evident that there is a need for a new, clearer and, if desired, even stricter regulation in response to measures that potentially constitute gross intrusion ... Certainly, this analysis, separate from judicial intervention and purely a police matter, without prejudice to the inescapable obligation to provide subsequent information to the Examining Magistrate, must remain outside the database: it may only be used for 'one-to-one' testing referring to the specific case in which suspicions justifying the sampling have arisen ...

SIX. The basis for the rejection of the plea has been established. But compilation, not only conclusive but also complementary, is necessary.

a) The collection of samples by the police for the purpose of biological examination where it is done with no need for bodily intervention does not in itself affect anyone's fundamental right, which means that, judicial authorisation is not essential. It is a subject that is different from the consequences that to guarantee the authenticity of testing and the possible impact on the right to a trial with full guarantees, may lead to questions such as the breaking of the chain of custody.

b) In terms of the analysis of this sample for the purposes of identifying the DNA, we operate at a higher level at which greater demands would ideally be advisable. There exists a certain impact on privacy, which will be lower where the analysis, as is common, is limited to merely identification indicators and very aggressive if it extends to the full genetic map (which, in principle, must be considered contrary to the Constitution for

violation of the principle of proportionality). Is judicial authorisation necessary? There are reasons to consider the advisability of this requirement, but it cannot be deduced, even from the Constitution, nor has the law enforced it, at least not in a clearly discernible manner. Even if, exercising scruples, we wanted to introduce a non-explicit but nonetheless inherent rule in the regulation which would require this jurisdictional authorisation, in this case, given the state of the question in the law and in case law, this would not, under any circumstances, determine the nullity of this evidence in this case (STC 22/2003, of 10 February) ...

c) There is a third case which must be treated with greater rigour, which is the comparison of this merely identifying DNA not with a sample obtained from acts in respect of which the subject appears as a suspect due to certain indications against him, u indiscriminately (inclusion on the database). In this case, the right to informational self-determination, which has come to acquire the status of fundamental autonomous right in the case law, is compromised. On this level, as the impact on fundamental rights is greater, the constraints must be increased. A more restrictive interpretation must be taken, subject to the provision of the 2007 legislation and the guidelines set by international case law ...

As can be observed, there is a qualitative change between obtaining the genetic profile to compare it in a specific investigation with that attributable to the unknown perpetrator (one-to-one), and retaining it and entering it in a database.

Judgement of 10 October 2013 (ROJ: STS 5078/2013 - ECLI:ES:TS: 2013:5078)

No.: 709/2013 - Appeal 10203/2013. Reporting judge: JUAN RAMON BERDUGO GOMEZ DE LA TORRE

Commentary: The judgement presents the case law on sampling and requirements in depth, following the line of STS 685/2010. It also repeats the case law referring to the use of reference profiles on the database in another proceeding, and the possibilities of the challenging of same. Evaluation of DNA evidence: in this case, the prosecution evidence constitutes a statement from the victim, the match with the unknown profile found on the nail of the victim, who had scratched the attacker, and other peripheral evidence corroborating their version.

Judgement of 10 December 2013 (ROJ: STS 6351/2013 - ECLI:ES:TS:2013:6351)

No.: 948/2013. Appeal No.: 10342/2013. Reporting judge: CANDIDO CONDE-PUMPIDO TOURON

Commentary: The Supreme Court reproduces the doctrine on sampling and the regime for the expunging of the entry on the police database where the crosscheck is carried out with a reference sample in another proceeding. In this case, in the preliminary phase, the appellant repeatedly objected to said entry and offered to provide a sample which would lead to a new analysis to obtain their genetic profile. However, this test was rejected. For this reason, the proceedings are declared invalid, resuming

proceedings at the point of the offer of sampling, so that the expert evidence sampling called for by the defence can be carried out.

However, said sample cannot be considered sufficien, for the purposes of justifying the rejection of the sample requested by the defence, as unnecessary, where the accused questions the results and expressly requests, as part of his right to a defence, the sampling in the current proceedings, offering to provide a sample. In this case, there is no reason whatsoever for the DNA test, manifestly decisive and requested by the accused, to not be carried out in the case being tried, with full guarantees, judicial control and the participation of the parties, insofar as applicable, and for it to be replaced by a simple check carried out based on a sample taken from a previous case. Even more so when the possibility of error, although slight, cannot be ruled out, and where there may be flaws that affect the previous sampling, flaws that might be easily remedied by acceding to the probative request made by the accused.»

Judgement of 11 November 2014 (Roj: STS 4722/2014 - ECLI:ES:TS:2014:4722)

No.: 734/2014. Appeal No.: 289/2014. Reporting judge: PERFECTO AGUSTIN ANDRES IBAÑEZ

Commentary: The Non-jurisdictional Plenary Agreement of 24 September 2014 is applied, recognising the need for legal assistance for reference sampling, in this case obtained in other proceedings, giving rise to the entry of the genetic profiles on the database, with a preclusive limit: the preliminary phase. In this case, the objection was announced in the written submission of the defence and was developed in the course of the previous questions, outside the term indicated, and therefore rejecting the allegations of illegality and revoking the acquittal of the lower court so that the genetic evidence could be assessed. Dissenting opinions of Perfecto Andrés Ibáñez rejecting the preclusive limit and Juan Manuel Berdugo questioning the need for legal representation for the collection of samples.

In effect, despite the simplicity and relative harmlessness of the form of accessing the raw material suitable for determining DNA, it is certain that this area hosts genetic information of extraordinary breadth and a richness of personal data, making it worthy of maximum protection. Similarly, for example, the home, as a privileged space for the exercise of privacy, is similarly protected from any type of intrusion, even those that may have a banal effect in their ultimate consequences ...

For this reason and, by analogy with occurrences in the event of house searches, the consent of the detainee must be with counsel (SST 96/1999, of 21 January, and 1962/2001, of 23 October). In effect, it is about a potential guarantee of the right to defence in and against the possible result of the investigation procedure, which, if incriminating, is difficult to dispute later in contradictory form in the trial. From the perspective of guaranteeing the right to privacy in the home, as has already been said, it would matter little that the action were normal or were exclusively aimed at a purpose

representing a minimal, even insignificant, effect on same, given the provision for protection is unconditional and is not subject to any assessment of that nature.

The lower court understands that the period used by the parties was a procedurally active and apt period to allow the dispute arising from the objection of the defence to have developed with respect to the rules of procedural good faith. However, while this is true, it is also true that, on the other hand, once this intrusion concludes and within the oral hearing, at that moment there was no possibility of appealing the legal alternative just referred to. Nor the practice of other possible investigation procedures of interest for the other parties in the matter.

Judgement of 10 March 2015 (Roj: STS 1398/2015 - ECLI:ES:TS: 2015:1398)

No.: 160/2015. Appeal No.: 10716/2014. Reporting judge: JOAQUIN GIMENEZ GARCIA

Commentary: The irregularities of the chain of custody or violations of the established protocols or regulatory standards do not vitiate the expunging of the evidence, as what is relevant for the court is to guarantee the 'sameness of the evidence'. In this case, the witness and expert statements were sufficient to accredit the chain of custody.

With regard to the 'manner' or protocol that must be respected in the tasks of taking, conservation, handling, transport and delivery to the final laboratory of the substance subject to examination, which is the process which can be correctly generically referred to as the 'chain of custody', it is merely instrumental in nature, and only serves to guarantee that the sample analysed is the same and complete material taken —STS of 4 June 2010— ...

The case law of the Court is reiterated in the doctrine set out in STS 587/2014, of 18 July, in direct reference to Order of the Ministry of Justice 1291/2010, of 13 May, which is cited by the appellant, it being declared that the Protocol of said Order in no way determines the validity or nullity of the procedural acts of testing, because compliance with the protocol for collecting the evidence for transfer to the National Institute of Toxicology and Forensic Sciences, which seeks to guarantee the 'sameness' of the traces, cannot be subordinated to strict compliance with regulation that by its own nature cannot influence the jurisdictional conclusion in relation to the integrity of this custody, and was also declared in STS 600/2013, the witness statements may qualify to accredit the maintenance of the chain of custody, excluding reasonable doubts in relation to the identity and matching of the samples obtained.

Judgement of 03 November 2016 (Roj: STS 4726/2016 - ECLI:ES:TS: 2016:4726)

Resolution No.: 834/2016. Appeal No.: 838/2016. Reporting judge: LUCIANO VARELA CASTRO

Commentary: The judgement describes the basic lines of the case law in regard to the legality of obtaining probative sources and subsequent use of forms of evidence linked thereto, distinguishing between the different levels of intervention and their requirements (obtaining samples, analysis, inclusion on the database). Where

applicable, it is permitted to obtain the reference sample from another proceeding in which there was no legal representation, which affects the legality of collection even if it occurs after the agreement of the plenary of 24, September 2014, which required legal representation, as said agreement is not constitutive but merely declarative and therefore, lacks any retroactive application. However, the allegation of the defence was lodged once the investigation was complete and the concluding ruling of the summary issued, and therefore, it is not admissible, which led to the appeal of the Public Prosecutor's Office being granted, ordering the Court to evaluate the genetic evidence. The judgement sustains the possibility that, where applicable, the reference sample may have been withdrawn in the investigation phase. Dissenting opinion (Antonio del Moral): disputes the illegality of the evidence given the existing doubts regarding legal assistance prior to the plenary agreement of the Supreme Court. He also objects that the illegality is dependent on the report made in the investigation phase and not at any other time in the proceedings and of the possibility.

In conclusion:

The legislation in force at the time of the extraction of the reference samples from the accused did not authorise the foregoing of legal representation if the suspect was under arrest.

The Case Law pronounced based on the agreement of the Plenary of the Second Chamber of this Supreme Court had no constitutive nature and is merely declarative of the current legislation. And consequently, the adoption of same from then to cases from previous dates does not constitute any retroactive application.

The claim of violation of fundamental rights must be admitted, given the axiological significance of these, with the greatest flexibility possible.

The estoppel, of a lower axiological range as a merely procedural principle, must be imposed in the context of the defence of other values such as contradiction. In this regard, where the complaint is submitted in valid time so that an effective activity of contradiction can be arranged, it is considered temporary.

Dissenting opinion:

My dissenting opinion is structured in three assertions that must be stated in this text:

a) Prior to the reform, the law did not require legal representation, nor could it be clearly deduced from the inherent principles of the system. So, it was understood by the Constitutional Court, with all ensuing consequences (Article 5.1 LOPJ).

b) Even from the contrary position —legal advice from a lawyer ought to be required— the question was presented in such a confusing manner on the date the bodily intervention challenges here took place (2010) that the correct interpretation of the legislation could not be imposed on the members of the Guardia Civil who acted in accordance with what was then standard practice. This obliges the modulation (exception of good faith) of the nulling mandate of Article 11.01 LOPJ.

c) In any case and aside from the specific matter, in general, the nullities arising from the entering of a profile on the police DNA database should not be able to be recognised due to the fact that they have not been reported in a specific phase of the proceedings. Upon being reported, the remedy via reiteration of the interference and subsequent comparison of genetic profiles already under judicial protection should not be permitted, when the connection between the accused and the criminal punishable offence investigated lay exclusively in the DNA match detected based on the inclusion on the database.

Judgement of 19 January 2017 (Roj: STS 189/2017 - TC: ES:TS: 2017:189)

Resolution No.: 11/2017. Appeal No.: 10371/2016. Reporting judge: CANDIDO CONDE-PUMPIDO TOURON

Commentary: The challenge against the DNA evidence leads the judgement to draft a broad review of the case law on obtaining DNA samples and the legal guarantees thereof, and concludes with a mention of the possibility of measures of personal compulsion, which will reproduce STS 12/2018, analysed below. The challenge is rejected on the grounds that the reference sample was not obtained in other process but in the same proceedings with full guarantees of legal representation. The chain of custody and the indicative value of the DNA evidence are also analysed. Evaluation of the evidence: in this case, the circumstances whereby the genetic profile was found mixed with that of the victim allows us to infer his responsibility for the crime of murder.

A reading of the reforme. 520. 6 of LECrim allows the assertion that the Legislator has considered it appropriate, in line also with the constitutional case law, to submit the subjecting of the person under investigation to the minimal and indispensable acts of personal compulsion to obtain saliva samples that allow for genetic identification to a judgement of proportionality covered by the jurisdictional guarantee. The same criterion has inspired the sampling of those already convicted, under the terms provided for in Article 129 bis of the Criminal Code. And consequently, it is especially important that, the refusal of the person investigated or convicted to voluntarily provide this evidence, is shown in such a manner that it does not allow for supervening interpretations —where comparison is already inviable— based on the lack of acceptance of what, nevertheless, is ultimately accepted. Above all, if it were before Counsel who, in the legitimate exercise of the right to legal representation, did not consider it appropriate to reflect a formal protest in the act whereby this investigation procedure was documented.

From the perspective of probative effectiveness of the DNA analysis in this case, there is no doubt whatsoever. The traces of DNA of the accused were found at two points of the rope used to tie the hands of the victim, mixed with the DNA of the victim, which highlights, in agreement with the rules of logic, experience and scientific knowledge, that the bodies came into contact, from which it can be deduced that it was the accused who used the rope to tie up the victim, which constitutes a rational and logical conclusion, especially when there is no other sample of DNA on the ropes and where the traces do not appear at a single point but at two, in both cases with the DNA of the victim.

Judgement of 18 October 2017 (Roj: STS 3738/2017 - ECLI:ES:TS: 2017:3738)

No.: 682/2017. Appeal No.: 10129/2017 Reporting judge: JUAN RAMON BERDUGO GOMEZ DE LA TORRE

Commentary: The judgement assesses the relevance of DNA evidence as a relevant indication, which requires a deductive logical judgement to conclude as to the responsibility for the criminal acts.

In effect it must be recalled —according to *STS 286/2016 of 7.4* —that DNA analyses form part of the expert evidence that, as such, must be evaluated. In this case, the questions that are scientifically incontrovertible must thus be held by the Judge. For examples, where genetic markers of one person compared against those fund at the crime scene do not coincide, the science definitively asserts that it should be ruled out that the biological samples found at the scene belong to the suspect. On the contrary, if both sample match, the science gives us a high statistical probability. The expert DNA evidence is evidence based on scientific knowledge and subjected to the evaluation of the Judge within the limitations indicated, as the principle of free evaluation of evidence does not allow the Judge to take contrary paths to those which are scientifically indisputable, which could be contested via Article 849.2 LECrim ...

«In conclusion, with regard to the probative value of DNA evidence, it must be considered an especially significant indication of 'a singular demonstrative value' and its effects should be admitted to override the presumption of innocence insofar as it constitutes full evidence with regard to demonstrating the presence of a specific person at the location where their genetic profile was found, if this is a fixed object, or allow for secure clarification with close to absolute certainty that their hands —as in this case— have been in contact with the surface of the object on which they appear, in this case, items of mobile furniture.

The connection between these data and attribution to the owner of the genetic profile of participation in the criminal act requires, nevertheless, a solidly constructed logical inductive judgement from which it can be deduced, beyond rational doubt, that due to the place in which the sample was found or the set of concurrent circumstances, this was necessarily left by the perpetrator of the criminal act. On the contrary, where DNA evidence is the only existing evidence, and it is feasible to establish alternative plausible conclusions based on the uncertainty or on indeterminacy, the deliberative process must lead to acquittal.

Judgement of 21 June 2017 (ROJ: STS 2569/2017 - ECLI:ES:TS:2017:2569)

Resolution No.: 465/2017. Appeal No.: 2161/2016. Reporting judge: CARLOS GRANADOS PEREZ

Commentary: The Judgement rejects that the need for legal representation for informed consent in the taking of biological samples from a detainee, determined in the case law and required by Article 520.6 c) LECrim, extends to the accused not under arrest.

The evaluation of evidence carried out by the Lower Court cannot be questioned due to the fact that the conclusions of the expert DNA report would have been taken into account, as there was no irregularity in the collection of biological samples from the detainee. Thus, having examined pages 59 and following of the proceedings, it can be confirmed that the biological sampling of the detainee D. Evaristo with his informed consent, consisting of a buccal swab using sterile swab for the purpose of completing DNA analysis, with the due information on the scope of said sampling, with the accused expressly granting his consent, confirmed with multiple signatures, it not being true, as claimed in the appeal, that he was under arrest, a situation that never arose at any point, as can be verified with a reading of the proceedings.

Judgement of 16 March 2018 (Roj: STS 869/2018 – ECLI:ES:TS: 2018:869)

No.: 120/2018. Appeal No.: 10625/2017 Reporting judge: JUAN RAMON BERDUGO GOMEZ DE LA TORRE

Commentary: The judgement describes the case law on obtaining samples and legal guarantees, chain of custody and different general questions on DNA evidence, citing the most relevant resolutions on the matter: Supreme Court judgements of 7 July 2010, no. 685/2010, 709/2013 of 10 October, 948/2013 of 10 December, STS 11/2017 of 19 January, among others. In this specific case, the challenge on the grounds of lack of consent for the taking of reference samples in the process leading to entry on the database, different from the current case, is rejected on the grounds that it is not clearly proven that the appellant was under arrest, meeting the criteria of the Supreme Court judgement of 21 June 2017, no. 465/2017, analysed above. Moreover, in the hypothetical case of demonstrating that the appellant was under arrest, it is considered that the sample taken in the same process with full legal guarantees would remedy the aforementioned invalidity of the initial sample.

And in any case, even if the challenges of the appellant in relation to lack of accreditation of this claim were accepted, as there is no record of the exact time the trial was held or the moment in which provisional release was agreed, and in relation to the fact that the challenge on the manner in which the reference sample was obtained without the assistance of the state, it was recorded in other written documents in the personal situation record. It is certain that it appears in the proceedings that after the arrest of Segundo, a new sample of saliva was taken on 20th November 2014, page 26, volume IV, the result of which is recorded on page 198, volume V, and Segundo's genetic profile matches that found in the unknown samples taken from the leggings and black glove found in the vicinity of the crime scene. Collection of samples with legal assistance and interpreter for which the accused provided his consent.

PROVINCIAL COURTS (CRIMINAL)

PROVINCIAL COURT OF CASTELLÓN DE LA PLANA, Section 1

Judgement of 20 March 2013 (ROJ: SAP CS 288/2013 – ECLI: ES: APCS: 2013: 288)

Appeal No.: 983/2012. Resolution No.: 94/2013. Reporting judge: AURORA DE DIEGO GONZÁLEZ.

Commentary: The chamber recalls that Organic Law 10/2007, of 8 October, regulating the police database of markers obtained from DNA, establishes that the entry on the database of markers obtained from DNA referred to in section 1 of Article 3 of said law does not require the consent of the subject, who shall be informed in writing of all their rights with regard to the inclusion on said database, with a record of same being recorded in the proceedings. Even before said law, the case law of the Supreme Court had not established that the Judicial Police could collect genetic traces or biological samples abandoned by the suspect without the need for judicial authorisation, especially when there was no record whatsoever, not even an indication, that Mr Benito had not provided his consent for the sample contained on the database. Furthermore, his defence did not even interrogate in this regard, which is indicative of the merely administrative nature of the grounds for nullity claimed, which do not reflect the reality of a defective investigation.

The study of the proceedings and in particular, the statement give in the plenary session by Police Officer NUM000, demonstrates that the aforementioned test was carried out with a match found between the DNA traces found on a balaclava seized by the public forces in the vicinity of the scene of the robbery and the DNA database. The misgivings of the appellant refer to the reference sample, arguing that there is no record in the case documents of how said sample was taken and the guarantees observed in its conservation, custody, etc. There was no record whatsoever, not even an indication, that Mr Benito had not provided his consent for the sample contained on the database. Furthermore, his defence did not even interrogate in this regard, which is indicative of the merely administrative nature of the grounds for nullity claimed, which do not reflect the reality of a defective investigation. In the investigation phase, the appellant ought to have expressed his suspicions, calling for the records pertaining to the taking of the reference sample to be produced, as he is identified in the legal proceeding in which said samples were acquired. Rather, he accepted such proceedings and questioned them at the beginning of the oral hearing, without any probative contribution supporting the objection, and in the appeal phase, also without any probative contribution. Therefore, we are presented with a challenge of the validity of the forms of evidence claiming violation of procedural good faith that has no invalidating effect on the DNA evidence in question.

PROVINCIAL COURT OF BILBAO, Section 2.

Judgement of 09 December 2013 (ROJ: SAP BI 2043/2013 – ECLI: ES: APBI: 2013:2043)

No.: 78/2013. Appeal No. 8/2013. Reporting judge: MANUEL AYO FERNÁNDEZ

Commentary: The DNA, taken by forensic medics who attended to the detainee, shall not be considered, as the detainee did not receive legal representation.

In this case, the taking of samples from the accused —from the hair, urine and buccal mucosa— was not agreed judicially, nor was the accused required by the Investigating Judge to provide consent for the sample, and it was carried out by forensic medics who examined the accused, who was under arrest, in the exercise of his right to be examined by forensic medic, providing before these professional what in the report issued (page 128) is considered informed consent, which may have medical legal validity but not in proceedings that respect all procedural guarantees. By providing consent in this manner, the accused was not assisted by his counsel, violating both the right to defence and, more specifically, the right to legal representation of the detainee in Article 17.3 of the Constitution, as well as the right to a trial with full guarantees, and therefore the reports on the genetic results issued may not be considered valid or have any probative effect ...

PROVINCIAL COURT OF BARCELONA, Section 22.

Judgement of 29 July 2014 (ROJ: SAP B 9819/2014 – ECLI: ES: APB: 2014: 9819)

Appeal No.: 2/2014. Resolution No.: 353/2014. Reporting judge: PATRICIA MARTÍNEZ MADERO.

Commentary: Evaluation of DNA evidence. In a rape case, a genetic profile of an unknown sperm sample was obtained, which coincided with that of the accused, registered on the database from other proceedings. However, the victim denied that the person identified was the perpetrator of the offence. Therefore, the court acquitted him in light of the doubts regarding how the first identification was conducted by the Mossos d'Esquadra.

The dilemma facing the Court is precisely that faced by the Public Prosecutor's Office in its report: grant greater probative value to this expert evidence against the testimony of the victim, who roundly denied that the person charged was her attacker, or, in the face of the doubts, acquit the charged. And as we have already announced, the Court leans towards acquittal in the consideration of the doubts that might arise as to how the identification of the genetic profile was conducted by the Mossos d'Esquadra in Police Investigation no. NUM005, and which was attributed to Romulo. And after analysing the entire case, there is no record of any testimony of such proceedings, and therefore, we cannot verify the identifying data of the defendant in such proceedings, and that is relevant, as in the case of undocumented foreign nationals, there is only their word as to what their name is. Nor is there any fingerprint profile in this case or in the police investigations from which the genetic profile was obtained. Therefore, there is no guarantee that it was the same person.

The Court understands that the result of the line-up identification, at which the victim denied that the person identified in the database was her attacker, must determine that the DNA of the party charged, Romulo, who was before the investigating judge, be taken again and the reference sample obtained from the person who appeared as charged in the case be compared with the genetic profile obtained from the samples collected from Edurne.

PROVINCIAL COURT OF ZARAGOZA, Section 6

Judgement of 21 November 2014 (ROJ: SAP Z 2443/2014 – ECLI: ES: APZ: 2014: 2443)

No.: 327/2014. Appeal No.: 249/2014. Reporting judge: ALFONSO BALLESTÍN MIGUEL

Commentary: The comparison of the genetic profile obtained from an unknown sample with the existing genetic profile on the database, which was entered from other proceedings with the consent of the subject, is valid. If the expert evidence from the activity of the Official State Laboratories was not expressly challenged by the defence, its ratification at the act of the oral hearing is not necessary. The party challenging the expert report must present the grounds and reasons for the challenge.

The validity of the evidence regarding DNA, that is, the report of the Scientific Police, detailed in pages 53 and following of the proceedings, is challenged, but the truth is that, as stated in same, the traces of substance collected with due guarantes from the windscreen of the vehicle in which the robbery took place were analysed shortly after the offences took place, finding DNA coinciding with that of said appellant, as can be verified by comparing it with the profile that had been obtained from a reference sample of the same individual, after being arrested for alleged participation in another aggravated robbery that occurred in March 2012.

In these cases, in which the accused has consented to the sampling of their DNA for the purposes of identifying comparisons, the entry of same on the police databases is perfectly valid, and it is because of that entry that, appearing in the proceedings of the expert report drafted for this case by the Provincial Squad of the Scientific Police of Barcelona, confirmed during the trail by the police officer who did so, and in which it has been demonstrated that a genetic profile checked against the database of biological reference traces proved to be that of the accused, the Court considers that the result of said evidence is equally valid.

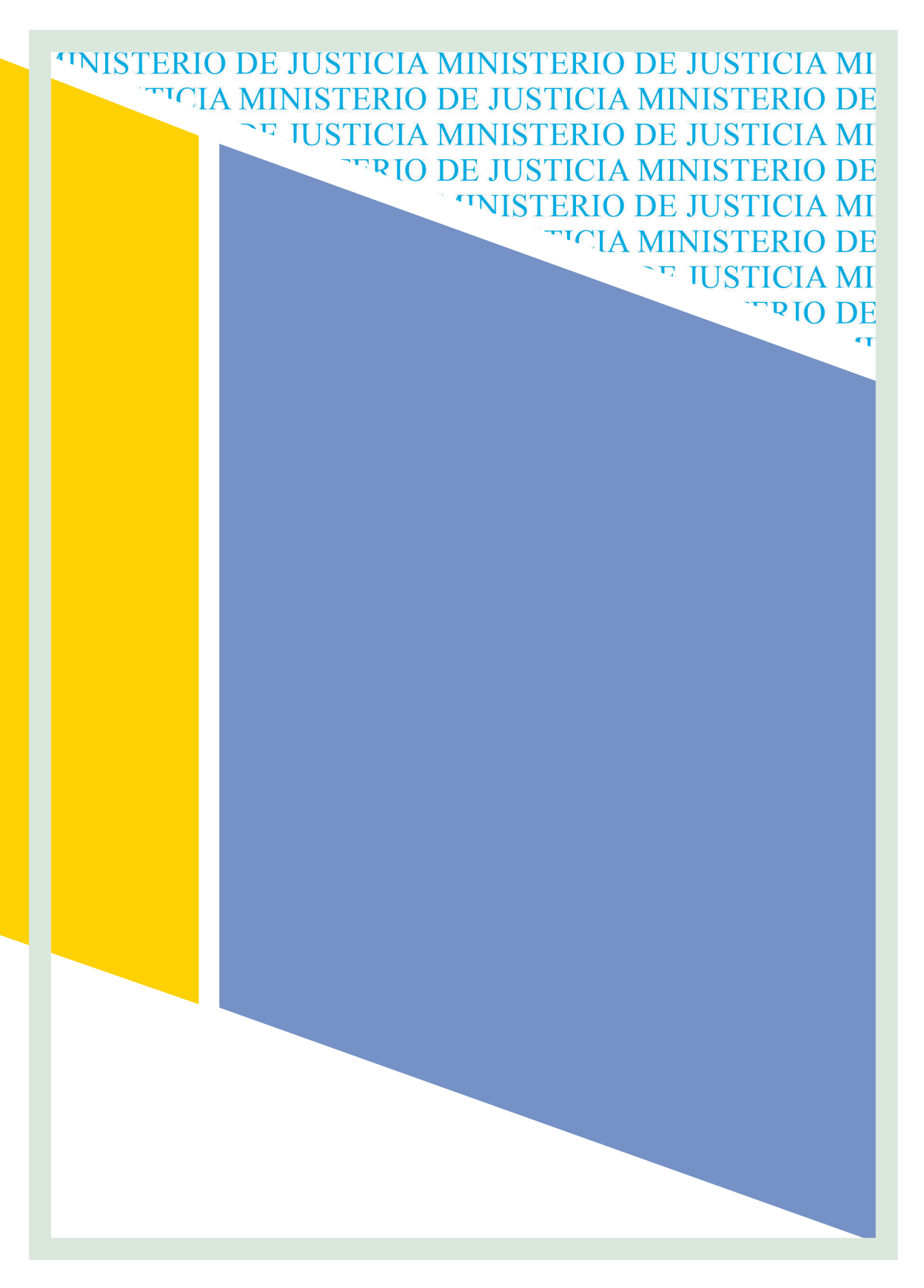
Madrid, Section 7, of 6 February 2017 (ROJ: SAP M 108/2017 - ECLI:ES:APM:2017:108)

No.: 70/2017. Appeal No.: 1703/2015. Reporting judge: FRANCISCO JOSE GOYENA SALGADO

Commentary: Identifying value of Y chromosome: although it has a lower identifying power, the possibility that other males from the same paternal lineage of the accused were involved in the acts is excluded, and there is other evidence of guilt. Confirmed by STS 14/2018, of 16 January.

Furthermore, given that the sample obtained was the Y-chromosome haplotype, the Police conducted the relevant procedures in relation to family members on the paternal side, ascendants and descendants, and were able to verify that the only living males of the paternal lineage of the accused at the time the drimes were committed were a paternal uncle, Jesús, and the two male sons of the accused (p 2772 and following).

The investigation ruled out the above relatives, demonstrating that they could not have been hypothetical perpetrators of the acts, as not only the minor TP 3 but also TP 4 and TP 5 were in different locations. This was confirmed to by the aforementioned uncle in his statement in the trial and the investigation of the location of the mobile phones of the aforementioned individuals.


MINISTERIO DE JUSTICIA MINISTERIO DE JUSTICIA MI
TICIA MINISTERIO DE JUSTICIA MINISTERIO DE
DE JUSTICIA MINISTERIO DE JUSTICIA MI
TERIO DE JUSTICIA MINISTERIO DE
MINISTERIO DE JUSTICIA MI
TICIA MINISTERIO DE
DE JUSTICIA MI
TERIO DE