DNA Privacy Case Highlights List of 3rd Circuit En Banc Arguments

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The 3rd U.S. Circuit Court of Appeals is scheduled to sit en banc on Wednesday to rehear three significant appeals on the issues of privacy rights in the collection of DNA samples, the entitlement to attorney fees in constitutional rights cases, and whether to approve a $295 million settlement in an antitrust suit alleging price-fixing in the market for diamonds.

The en banc panels listed to hear the cases vary in size. Although the DNA case is set to be argued to a 14-judge panel that includes all of the court's active judges, the antitrust case has been assigned to be argued before a panel of nine judges due to five recusals, and the attorney fees case is slated to be argued to a 16-judge panel that includes two senior judges from the original three-judge panel.

In *United States v. Mitchell* , the court will review a November 2009 decision by U.S. District Judge David S. Cercone of the Western District of Pennsylvania that said prosecutors cannot, without a warrant, routinely collect DNA samples from arrestees for inclusion in a national database.

At issue in the appeal is whether routine DNA sampling should be considered no different from fingerprinting or photographing, or whether the government ought to be required to get a warrant or wait for a conviction before taking a genetic sample.

The Justice Department's appeal of Cercone's ruling was initially argued before a three-judge panel in April 2010. But the court took the rare step of slating the case for en banc reargument without releasing a decision from the three judges.

Cercone held that DNA sampling of arrestees violates the Fourth Amendment, rejecting the government's argument that Congress authorized such DNA sampling of arrestees and that it serves the compelling government interest of identifying a suspect even better than fingerprints or photographs.

DNA testing prior to any conviction goes too far, Cercone found, because a genetic sample can reveal much more than a suspect's identity. Although arrestees have a "diminished expectation of privacy," Cercone concluded that the practice of routinely obtaining genetic samples from all arrestees must be struck down as unconstitutional.

"To compare the fingerprinting process and the resulting identification information obtained therefrom with DNA profiling is pure folly," Cercone wrote. "Such oversimplification ignores the complex, comprehensive, inherently private information contained in a DNA sample."

Courts, including the 3rd Circuit, have already held that those convicted of certain crimes may be subjected to DNA sampling, but Cercone said that he found "no compelling reason to unduly burden a legitimate expectation of privacy and extend these warrantless, suspicionless searches to those members of society who have not been convicted, are presumed innocent, but have been arrested and are awaiting proper trial."

Instead, Cercone concluded that defendant Ruben Mitchell had "the highest expectation of privacy" in his genetic code, and that this was not outweighed by any governmental interest in collecting the information.

Cercone ruled that the presumption of innocence — which he described as the "moral polestar of our criminal justice system" — requires a determination of guilt beyond a reasonable doubt to overcome defendants' "compelling and fundamental interests in human dignity and privacy" related to their DNA.

The appeal was initially argued before a three-judge panel that included 3rd Circuit Judges Marjorie O. Rendell and Julio M. Fuentes and U.S. District Judge Robert B. Kugler of the District of New Jersey, sitting on the 3rd Circuit by invitation. But the panel never released an opinion. Instead, the 3rd Circuit announced that it had voted sua sponte to rehear the case before all 14 active judges on the court.

Attorney Fees

The dispute over attorney fees in *Singer Management Consultants Inc. v. Milgram* stems from a court battle over modern-day rights to the names of two 1950s doo-wop groups — The Platters and The Coasters.

The appeal is an important one because it will set the rules for deciding when a plaintiff is entitled to fees in cases where the government defendant ultimately concedes defeat and moots the case.

The case started when New Jersey officials threatened to take action against a music promoter who was selling tickets for an August 2007 concert series in Atlantic City featuring The Platters (best known for "Only You" and "The Great Pretender") and The Coasters (whose greatest hit was "Yakety Yak").

The officials warned that New Jersey's Truth in Music Act prohibits advertising such concerts without identifying it as a "tribute" or "salute." But Live Gold Operations Inc. insisted that it had the right to advertise the two musical groups however it saw fit because it was the rightful owner of the trademarks for both names.

At an emergency injunction hearing, U.S. District Judge Dickinson Debevoise of the District of New Jersey sided with the promoter and issued a TRO that enjoined the state from "interfering in any way" with the concert.

The case was poised to proceed to further injunction hearings, and it seemed at first that the state would be defending its right to enforce the law. In its brief, the state argued that an unregistered trademark satisfied the Truth in Music Act only if the performing group obtained express authorization from an original group member, or included an original member.

When Debevoise made clear that he was rejecting the state's arguments, the state capitulated, effectively adopting Live Gold's interpretation of the law.

Live Gold's lawyer said in the hearing that the state had made "a 180-degree shift in position," and Debevoise agreed, declaring that the state would now be "bound" by its newly announced interpretation of the law.

But when Live Gold's lawyers petitioned for attorney fees, Debevoise refused, saying the state's decision to concede the case had left the plaintiff without a judgment in its favor and therefore unable to claim the status of "prevailing party."

On appeal, Live Gold won a ruling that said it should be entitled to fees when the 3rd Circuit, by a 2-1 vote, declared that Debevoise was too strict in his reading of the U.S. Supreme Court's 2001 decision in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources* .

In *Buckhannon* , the justices declared that a "voluntary change in conduct" lacks the necessary judicial imprimatur, and that a plaintiff does not become a prevailing party solely because his lawsuit causes a voluntary change in the defendant's conduct.

Writing for the majority, Senior Judge Jane R. Roth, joined by Senior Judge Ruggero J. Aldisert, concluded that *Buckhannon* did not control because New Jersey did not concede its position until Debevoise made clear that he was poised to rule in Live Gold's favor.

But in a lengthy dissent, Judge Thomas L. Ambro said he believed his colleagues were wrong to ignore the clear mandate of *Buckhannon* .

"Because no enforceable judgment on the merits was issued in this case, and the state's actions that mooted the case were voluntary, I believe Buckhannon tells us that Live Gold was not a prevailing party," Ambro wrote.

Ambro's dissent was apparently persuasive because the 3rd Circuit swiftly voted to vacate the opinion and set it for en banc reargument.

Antitrust Settlement

In *Sullivan v. DB Investments Inc.* , the court is reconsidering a July 2010 ruling in which a three-judge panel set aside a $295 million settlement of a class action antitrust suit alleging a price-fixing conspiracy in the international market for diamonds that was allegedly orchestrated by the De Beers Group of companies headquartered in South Africa.

The original panel ruled that the settlement must be vacated because the lower court had improperly certified a

nationwide class of indirect purchasers, despite recognizing that some of those plaintiffs would be barred from pursuing such indirect claims under the laws of their own states.

As a result, Judge Kent A. Jordan found that a single objector from Texas had identified a fatal flaw in the lower court's class certification analysis by showing that the common issues did not "predominate."

"The objection regarding the lack of predominance of class issues in this case raises an insurmountable hurdle to certification of the indirect purchaser class," Jordan wrote in an opinion joined by visiting U.S. District Judge Donetta Ambrose of the Western District of Pennsylvania..

Rendell agreed there were reasons to remand the case, but said she disagreed with Jordan's decision to undertake his own analyses of predominance and the plaintiffs' entitlement to injunctive relief, rather than allowing the lower court on remand to evaluate these issues in the first instance.

Rendell complained that Jordan mistakenly focused on whether "variations among state antitrust statutes" defeat predominance, and whether there is an "overriding common cause of action under a common body of law."

Instead, Rendell said, "the question is whether the liability of De Beers is capable of proof on a class-wide basis."

The ultimate issue, Rendell said, was whether "the common issues of fact and law presented by plaintiffs' claims, when examined together, outweigh any individual issues, such that a nationwide class of indirect purchasers can be certified."

Although she agreed with Jordan that Rule 23 requires each class member to have a cause of action, Rendell said that "nothing in our decisions requires that everyone in the class have precisely the same cause of action."

In the suits, the plaintiffs alleged that De Beers, a privately held group of foreign-based companies, had monopolized the international diamond business through its control of mines and a web of agreements with diamond suppliers in other countries.

Under the terms of the indirect purchaser settlement, De Beers agreed to pay $272.5 million to settle claims by indirect purchasers and $22.5 million to settle direct purchasers' claims. In May 2008, U.S. District Court Judge Stanley R. Chesler granted final approval to the settlement. •