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Beyond the Davis Dictum: Reforming Nontestimonial Identification Evidence Rules and Statutes

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BEYOND THE *DAVIS* DICTUM: REFORMING NONTESTIMONIAL IDENTIFICATION EVIDENCE RULES AND STATUTES

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In the 1970s, Colorado and five other states built on Justice Brennan's famous dictum in Davis v. Mississippi *to create "nontestimonial identification evidence" statutes and rules of criminal procedure. These statutes and rules enable police to gather physical evidence such as fingerprints, hair samples, and bodily fluids from individuals reasonably suspected of having committed a felony. While the states followed the* Davis *dictum in requiring a court order for this evidence-gathering, they also followed the dictum's suggestion that nontestimonial identification procedures might be constitutionally acceptable even in the absence of probable cause to arrest. Thus, although they provide the states with an invaluable tool of criminal investigation, the rules and statutes may violate Fourth Amendment standards for invasive searches and seizures. This Comment offers a possible reform that would both maintain the investigatory power of the rules and statutes and ensure that they pass constitutional muster. It also urges the U.S. Supreme Court to grant certiorari on a nontestimonial identification evidence case, to settle the legacy of the* Davis *dictum and provide the states with much-needed constitutional guidance.*

INTRODUCTION

Nearly forty years ago, in what was to become a famous dictum within Justice Brennan's majority opinion in *Davis v. Mississippi*, the Supreme Court suggested that detention for fingerprinting might be permissible without probable cause, provided that the procedure is pre-authorized by a judicial or-

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der.[1] Within six months of the *Davis* decision, the Senate Judiciary Committee was considering codifying the dictum in a statute, and the Colorado Supreme Court had adopted the state's first version of Rule 41.1 of Criminal Procedure, later named "Court Order for Nontestimonial Identification."[2] By the mid-1970s, Colorado and five other states had built on the *Davis* dictum—and on a proposed federal rule of criminal procedure that never was adopted—to create statutes and rules allowing police, once they have obtained a court order, to gather nontestimonial identification evidence[3] from those reasonably suspected of having committed a felony.[4]

These rules and statutes have obvious, powerful appeal for criminal investigators, especially in jurisdictions without grand juries. In those jurisdictions, nontestimonial identification evidence provisions are particularly critical because investigators cannot use the grand jury power of subpoena to gather evidence. Even in jurisdictions with grand juries, such provisions create a tremendously valuable resource for investigators. However, in requiring only reasonable suspicion rather than probable cause for a court order to issue, a number of the current rules and statutes may violate Fourth Amendment standards for invasive searches and seizures.

Part I of this Comment explores the source of the states' nontestimonial identification evidence rules by analyzing what the Court said—and did not say—in *Davis v. Mississippi*, a case now most famous for Justice Brennan's dictum.[5] Part II

1. 394 U.S. 721, 727–28 (1969). For a discussion of the *Davis* dictum and the broader opinion within which it appeared, see *infra* Part I.

2. *See infra* notes 31–44 and accompanying text.

3. State statutes and rules of criminal procedure generally define "nontestimonial identification evidence" as including some variation on the following: fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, specimens of material under fingernails, other reasonable physical or medical examinations, handwriting exemplars, voice samples, photographs, and appearances in lineups. *See, e.g.*, COLO. R. CRIM. P. 41.1. For a survey of the state statutes and rules, see *infra* notes 43–57 and accompanying text. At least one state supreme court—Utah's—has held that handwriting samples are communicative and thus protected by the state's privilege against self-incrimination. *See* Mark P. Asselta, Note, *The Constitutionality of Compulsory Identification Procedures on Less Than Probable Cause: Reassessing the* Davis *Dictum*, 89 DICK. L. REV. 501, 501 n.3 (1985).

4. *See infra* Part II.A.

5. 394 U.S. at 727–28. For commentary on the *Davis* dictum in relation to nontestimonial identification evidence rules, see Asselta, *supra* note 3; Paul C. Crane, Comment, People v. Harris, *Rule 41.1, and the Constitutionality of Investigatory Detentions on Less Than Probable Cause*, 61 U. COLO. L. REV. 815 (1990);

examines the uneasy legacy of the *Davis* dictum: nontestimonial identification evidence statutes and rules of criminal procedure in Colorado, Arizona, Idaho, Iowa, Nebraska, and North Carolina. It goes on to address live issues that have reached state appellate courts—but never the U.S. Supreme Court—as a result of those statutes and rules. Part III turns to the Fourth Amendment, analyzing Supreme Court holdings that are broadly germane to nontestimonial identification evidence and more narrowly applicable to the live issues discussed in Part II. Part IV proposes an approach to reforming current rules and statutes, offering a model nontestimonial identification evidence rule that would both serve the interests of the criminal justice system and pass constitutional muster. The Comment concludes by urging that the Supreme Court grant certiorari on a nontestimonial identification evidence case, so as to establish clear boundaries for the use of such evidence. The Court has left the *Davis* dictum hanging for almost four decades; the time is right to provide the states with constitutional guidance.

I. *DAVIS V. MISSISSIPPI*

The facts of *Davis*—but not the Court's decision—turned on a racial dragnet carried out by the Meridian, Mississippi police in late 1965, after a rape victim "could give no better description of her assailant than that he was a Negro youth."[6] Over a span of roughly ten days, and without warrants, the police transported at least two dozen young black men to police headquarters, "where they were questioned briefly, fingerprinted, and then released without charge."[7] During the same period, the police also questioned "40 or 50" other young black men at police headquarters, at school, or on the street.[8]

Note, *Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure*, 72 COLUM. L. REV. 712 (1972) [hereinafter Note, *Detention to Obtain Physical Evidence*]; Angus J. Dodson, Comment, *DNA "Line-ups" Based on a Reasonable Suspicion Standard*, 71 U. COLO. L. REV. 221 (2000); P. Michael Drake, Comment, *Detention for Taking Physical Evidence Without Probable Cause*, 14 ARIZ. L. REV. 132 (1972).

6. 394 U.S. at 722.

7. *Id.*

8. *Id.*

Fourteen-year-old John Davis was among those transported to the police station for fingerprinting and questioning.[9] He subsequently was questioned by officers both at police headquarters and elsewhere, several times "exhibited" to (but not identified by) the victim in her hospital room, and ultimately transported to and confined in the Jackson city jail, again without a warrant or probable cause.[10] After being returned to confinement in the Meridian jail, Davis was again fingerprinted.[11] This second set of fingerprints, along with the prints of the twenty-three other young black men still under suspicion, was sent to the FBI for comparison with prints lifted from the windowsill of the victim's house.[12] Upon an FBI report that Davis's prints matched those taken from the window, Davis was indicted, tried, and convicted; the fingerprint evidence was admitted over defense objections that it was the fruit of an unlawful detention.[13]

It is worth noting that despite the opinion's academic reputation for having condemned racial dragnets,[14] in neither its Fourth Amendment holding nor its famous dictum did *Davis* more than fleetingly allude to the dragnet conducted by the Meridian police.[15] Indeed, the dictum suggests that such a

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9. *Id.*

10. *Id.* at 722–23. Davis occasionally had been employed by the victim to work in her yard, and his "confrontations" with the victim in her hospital room putatively were intended by police to help the victim "sharpen[]" her description of her attacker by providing her with "'a gauge to go by on size and color.'" *Id.* at 723.

11. *Id.*

12. *Id.* When the police began investigating the crime and, one day after the rape occurred, began bringing in suspects for fingerprinting, their only lead (aside from the victim's description of her rapist) lay in the fingerprints and palm prints lifted from the window through which the rapist apparently entered the victim's home. *Id.* at 722.

13. *Id.* at 723.

14. *See, e.g.*, Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 336 n.241 (2002) (citing *Davis* for having condemned dragnets as "overbroad and over-inclusive"); Sally E. Renskers, Comment, *Trial by Certainty: Implications of Genetic DNA Fingerprints*, 39 EMORY L.J. 309, 329 n.137 (1990) (citing *Davis* as authority for the proposition that the Fourth Amendment "vigorously protects against any mass 'round up' investigations by requiring at least some amount of individualized suspicion").

15. The sole, noncommittal reference to the dragnet in the majority's Fourth Amendment analysis lies in the observation that "the detention at police headquarters of petitioner and the other young Negroes was not authorized by a judicial officer." 394 U.S. at 728. Only Justice Harlan made explicit mention of the dragnet, in objecting to the majority opinion's dictum: "There may be circum-

dragnet could be perfectly acceptable "under narrowly defined circumstances."[16] In its Fourth Amendment analysis leading to that dictum, the Court quickly disposed of Mississippi's claim that fingerprint evidence is not subject to the strictures of the Fourth or Fourteenth Amendments.[17] The Court then turned to the question of whether fingerprints were validly obtained from Davis during his first detention by the police.[18] When they transported Davis to headquarters for fingerprinting on the day after the rape, the Meridian police had no consent from Davis, no warrant, and no probable cause for his arrest.[19] Mississippi argued unsuccessfully that the police procedure was constitutional because detention solely for the purpose of fingerprinting does not require probable cause.[20]

It was precisely that argument that provoked the lengthy dictum that has since become *Davis*'s uneasy legacy:

> Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting

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stances, falling short of the 'dragnet' procedures employed in this case, where compelled submission to fingerprinting would not amount to a violation of the Fourth Amendment even in the absence of a warrant . . . ." *Id.* at 728–29 (Harlan, J., concurring).

16. *Id.* at 727.

17. *Id.* at 725.

18. Mississippi had conceded that the fingerprints obtained during Davis's detention at the Jackson jail—the evidence that was offered at trial—were constitutionally invalid, as the fruit of an arrest made without a warrant or probable cause. *Id.* The State argued, however, that if the fingerprints obtained during Davis's first detention were valid, the evidence offered at trial need not be excluded. *Id.* The Court did not reach a decision on this exclusionary rule question, as it held that Davis's first detention for fingerprinting also violated his Fourth Amendment rights. *Id.* at 725–26.

19. *Id.* at 726.

20. *Id.*

> is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.[21]

Having suggested that detentions for fingerprinting might, in certain circumstances, be constitutionally permissible even in the absence of probable cause, Justice Brennan provided crucial reasoning to explain why: unlike other, more invasive, "intrusion[s] upon personal security," fingerprinting does not involve "probing into an individual's private life and thoughts."[22] Furthermore, fingerprinting detention cannot be used to harass, as it is a one-time event that can be scheduled and so need not be demanded "unexpectedly" or "at an inconvenient time."[23] Finally, while fingerprinting detentions might sometimes be permissible even in the absence of probable cause, they still require pre-detention authorization by a judicial officer.[24]

Thus, according to the *Davis* dictum, the Meridian police's racial dragnet failed not because it was overbroad or based on race, but because it included interrogation, was used "repeatedly to harass" individuals by subjecting them to multiple fingerprinting sessions, came "unexpectedly or at an inconvenient time," and was not preceded by a judicial order. And while the opinion declared that the Court did not need to reach a decision on the issue raised in the dictum, its constitutional holding rested explicitly on violations of standards laid out in that dictum.[25]

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21. *Davis*, 394 U.S. at 727–28 (citations omitted).

22. *Id.* at 727.

23. *Id.* Davis, of course, was fingerprinted twice by the Meridian police. *Id.* at 722–23.

24. *Id.* at 728. Justice Harlan's concurrence took exception with this final "sweeping proposition" in the dictum, suggesting that the Court should leave open the question of whether fingerprinting detentions—"falling short of the 'dragnet' procedures employed in this case"—might be constitutionally permissible even without a judicial order. *Id.* at 728–29.

25. *Id.* at 728.

What *Davis* said in both its holding and its dictum, then, seemingly was simple: detentions for fingerprinting fall under the protections of the Fourth Amendment, and such detentions *might* be constitutional even with something less than "traditional" probable cause, provided that certain procedural safeguards are in place. And, as a number of student commentators have emphasized, the Court's musing, in its dictum, turned on the "unique," non-intrusive nature of fingerprinting as identification evidence.[26] What the decision did *not* say, in its holding or its dictum, was that the possibility of constitutionally permissible detentions with less than probable cause might extend to state pursuit of other identification evidence "that involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."[27]

> We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. For it is clear that no attempt was made here to employ procedures which might comply with the requirements of the Fourth Amendment: the detention at police headquarters of petitioner and the other young Negroes was not authorized by a judicial officer; petitioner was unnecessarily required to undergo two fingerprinting sessions; and petitioner was not merely fingerprinted . . . but also subjected to interrogation.

Id.

26. *Id.* at 727. Justice Stewart, writing in dissent, offered another crucial perspective on what distinguishes fingerprint evidence from "conventional" evidence such as "weapons or stolen goods": "Like the color of a man's eyes, his height, or his very physiognomy, the tips of his fingers are an inherent and unchanging characteristic of the man." *Id.* at 730 (Stewart, J., dissenting). His understanding of identification evidence would come to the foreground of the Court's Fourth Amendment jurisprudence in a pair of decisions handed down several years after *Davis*, *United States v. Mara*, 410 U.S. 19 (1973), and *United States v. Dionisio*, 410 U.S. 1 (1973). *See infra* notes 175–80 and accompanying text.

For student commentary on the *Davis* dictum, see, for example, Asselta, *supra* note 3; Crane, *supra* note 5; Note, *Detention to Obtain Physical Evidence*, *supra* note 5; Dodson, *supra* note 5; Drake, *supra* note 5. Why the *Davis* dictum and the nontestimonial identification evidence rules it spurred have not received more attention from legal scholars poses an interesting question. The answer may well lie in the apparently limited national implications of the rules, in terms of constitutional questions. The absence of a federal rule, in other words, may have allowed the state rules and statutes to fly somewhat below the academic radar. In light of intensified public debate about civil liberty issues arising from detention of and evidence-gathering from suspects in the post-September 11 United States, however, the rules' and statutes' implications seem worthy of equally intensified attention in the legal academy.

27. *Davis*, 394 U.S. at 727.

Nor did it declare—or even suggest—that racial dragnets would constitute an unacceptable incarnation of such detentions.

Interestingly, some decade and a half after he authored *Davis*, Justice Brennan emphatically protested the *Hayes v. Florida* majority's suggestion that briefly detaining suspects in the field for "onsite fingerprinting" might be acceptable without probable cause or judicial authorization.[28] In *Hayes*, the Court both affirmed the *Davis* constitutional holding and declined to "abandon" the *Davis* dictum.[29] Concurring in the judgment, Brennan criticized the *Hayes* dictum:

> Ordinarily—outside the Fourth Amendment context, at any rate—we wait for a case to arise before addressing the application of a legal standard to a set of facts. I disagree with the Court's apparent attempt to render an advisory opinion concerning the Fourth Amendment implications of a police practice that, as far as we know, has never been attempted by the police in this or any other case.[30]

In *Hayes*, Justice Brennan thus betrayed anxiety that a dictum might provoke potentially troubling new practices by the police. Had he looked closely at the state rules on nontestimonial identification evidence that had sprung up in response to his own dictum in *Davis*, he would have discovered that anxiety to be well founded.

II. *DAVIS*'S UNEASY LEGACY: NONTESTIMONIAL IDENTIFICATION EVIDENCE RULES AND STATUTES

A. Proposed Federal Rule of Criminal Procedure 41.1 and State Rules and Statutes on Nontestimonial Identification Evidence

A mere five months after the Supreme Court handed down its decision in *Davis*, Senator John McClellan attempted to codify the *Davis* dictum in a bill designed to facilitate federal col-

28. Hayes v. Florida, 470 U.S. 811, 819, 820 (1985) (Brennan, J., concurring in the judgment).

29. *Id.* at 815–16, 817.

30. *Id.* at 820 (Brennan, J., concurring in the judgment).

lection of "identifying physical characteristics."[31] As the Fifth Circuit dryly noted in *United States v. Holland*, Senator McClellan's proposed bill "was referred to the Committee on the Judiciary and was never heard of again."[32] Roughly a year and a half later, the Advisory Committee on Criminal Rules of the Judicial Conference of the United States drafted a proposed amendment to the Federal Rules of Criminal Procedure: Rule 41.1 on "Nontestimonial Identification."[33] The rule seemingly was modeled in part on Colorado's Rule 41.1 of Criminal Procedure, which the Colorado Supreme Court had adopted in October of 1969, and in part on Senator McClellan's failed bill.[34]

Had it been approved, the federal rule would have authorized magistrates to issue orders, upon successful application by federal law enforcement officers or government attorneys, requiring the person named in an order to submit to "nontestimonial identification procedures."[35] A successful applicant would have been required to demonstrate, in an affidavit,

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31. S. 2997, 91st Cong., 1st Sess. (1969). *See* United States v. Holland, 552 F.2d 667, 673 (5th Cir. 1977), *cited in* Barry Jeffrey Stern, *Warrants Without Probable Cause*, 59 BROOKLYN L. REV. 1385, 1441 n.113 (1994); *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts*, Advisory Committee Note, 52 F.R.D. 409, 467 (1971) [hereinafter Advisory Committee Note]; *see also* Note, *Detention to Obtain Physical Evidence*, *supra* note 5, at 715.

32. *Holland*, 552 F.2d at 673, *cited in* Stern, *supra* note 31, at 1441 n.113.

33. *See id.;* Note, *Detention to Obtain Physical Evidence*, *supra* note 5 (quoting and analyzing proposed Rule 41.1).

34. The Advisory Committee Note to proposed Federal Rule 41.1, which was circulated "[t]o the Bench and Bar" in the spring of 1971, pointed out that the Colorado Supreme Court had "[f]ollow[ed] the suggestion in *Davis*" in adopting its new Rule 41.1, "a procedure for obtaining prior judicial approval of the taking of the fingerprints of a suspect." Advisory Committee Note, *supra* note 31, at 467. Colorado's original Rule 41.1 ("Court Order for Fingerprinting") thus was limited strictly to the terms of the *Davis* dictum; it did not venture beyond fingerprinting. *See* People v. Harris, 762 P.2d 651, 653 n.3 (Colo. 1988) (explaining that Colorado's original Rule 41.1, limited to fingerprinting, was adopted in 1969, and that the state's current—expanded—version of the rule was adopted in 1974). Senator McClellan's proposed bill (S. 2997, 91st Cong., 1st Sess. (1969)), by contrast, was "extended to deal with nontestimonial identification procedures generally." Advisory Committee Note, *supra* note 31, at 467.

35. Note, *Detention to Obtain Physical Evidence*, *supra* note 5, at 713 n.5. The draft federal rule is reprinted in full in *id.* It is also available from Westlaw, complete with the Advisory Committee Note, in the Federal Rules Decisions for April, 1971. *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts*, 52 F.R.D. 409, 462–72 (1971) [hereinafter Draft Rule 41.1].

> (1) that there [was] probable cause to believe that an offense [punishable by imprisonment for more than a year] [had] been committed; (2) that there [were] reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and (3) that the results of specific nontestimonial identification procedures [would] be of material aid in determining whether the person named in the affidavit committed the offense.[36]

The rule would have permitted nontestimonial identification procedures for "fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical or medical examination, handwriting exemplars, voice samples, photographs, and lineups."[37] It also provided for a return to the magistrate who issued the order, within forty-five days of the identification procedure, of an inventory of all products of the procedure.[38] Upon the return, if there was no probable cause to believe that the suspect committed the named offense or some other offense, the suspect would have been "entitled to move" that all "products of the . . . procedures, and all copies thereof, be destroyed."[39] "Except for good cause shown," the issuing magistrate would have been required to grant that motion.[40] The proposed rule did not include a provision for entitlement to counsel during the procedure or the return.

Draft Rule 41.1 met its end before ever being submitted to the Supreme Court for approval.[41] The Judicial Conference's Committee on Rules of Practice and Procedure quashed the draft rule because it "evoked a number of serious questions which require further study," and because the Conference wished to benefit from "experience with such procedure in the states and . . . [from] judicial consideration of the Constitu-

36. Draft Rule 41.1(c)(1)–(3), 52 F.R.D. at 463.
37. Draft Rule 41.1(l)(3), 52 F.R.D. at 466–67.
38. Draft Rule 41.1(j), 52 F.R.D. at 465.
39. *Id.* at 466.
40. *Id.*
41. United States v. Holland, 552 F.2d 667, 673–74 (5th Cir. 1977), *cited in* Stern, *supra* note 31, at 1441 n.113. Senator McClellan's failed bill was reintroduced in early 1971, but it was not acted on pending consideration of proposed Rule 41.1. Note, *Detention to Obtain Physical Evidence*, *supra* note 5, at 715.

tional questions involved."[42] The failed proposal is instructive, however, not only because of the Judicial Conference's nervousness about its constitutionality, but also because it provided a model for the states, which the Conference clearly considered as a testing ground. Indeed, draft Rule 41.1's broad expansion of the *Davis* dictum—from fingerprints to the far more intrusive procedures of blood specimens, urine specimens, and saliva samples—and its standards for issuing an order were followed closely by Colorado, Arizona, Idaho, Iowa, Nebraska, and North Carolina in their rules and statutes on nontestimonial identification evidence.[43] Those state rules and statutes are the direct legacy of the *Davis* dictum.[44]

A summary of the shared requirements of the state provisions, as well as several of their idiosyncrasies, provides a useful departure point for an analysis of the constitutional, procedural, and policy issues that those provisions have generated in the state courts. With the exception of Arizona's, each of the state statutes requires probable cause to believe that an offense has been committed (with offenses defined as those punishable

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42. *See Holland*, 552 F.2d at 673–74. The *Holland* court noted in 1977 that "[n]either the proposed new Rule 41.1 nor any similar Rule" was ever adopted at the federal level, *id.* at 674, and the same remains true today.

43. Colorado's original rule, from which the Advisory Committee seemingly adopted its proposed numbering of 41.1, had been limited to fingerprinting; in 1974, however, the rule was revised and extended. *See* People v. Harris, 762 P.2d 651, 653 n.3 (Colo. 1988). The 1974 revisions were in accordance with the draft federal rule.

For the state rules and statutes, see COLO. R. CRIM. P. 41.1 (Court order for nontestimonial identification, adopted in its current version in 1974); ARIZ. REV. STAT. ANN. § 13-3905 (West, Westlaw through first 2007 Sess.) (Detention for obtaining evidence of identifying physical characteristics, adopted in 1971 and given current numbering in 1977); IDAHO CODE ANN. § 19-625 (LexisNexis through 2007 Sess.) (Detention for obtaining evidence of identifying physical characteristics, adopted in 1972); IOWA CODE tit. XVI, subtit. 2, § 810 (LexisNexis through 2006 legislation) (Nontestimonial identification, adopted in 1976); NEB. REV. STAT. § 29-3301 to -3307 (West, Westlaw through second 2006 Sess.) (Identifying physical characteristics, adopted in 1971); N.C. GEN. STAT. § 15A-271 to -282 (LexisNexis through 2006 Sess.) (Nontestimonial identification, adopted in 1973).

44. *See* State v. Madson, 638 P.2d 18, 31 (Colo. 1981) (observing that Colorado Rule of Criminal Procedure 41.1 "was an outgrowth of dicta in *Davis*"); State v. Grijalva, 533 P.2d 533, 536 (Ariz. 1975) (identifying *Davis*'s pronouncements on the necessity of a judicial order as the key to A.R.S. § 13-1424 (Arizona's original nontestimonial identification evidence statute)); State v. Hoisington, 657 P.2d 17, 22 n.2 (Idaho 1983) (citing IDAHO. CODE. ANN. § 19-625 as an illustration of the *Davis* dictum); State v. Evans, 338 N.W.2d 788, 792 (Neb. 1983) (identifying the *Davis* dictum as the "progenitor" of statutes such as NEB. REV. STAT. § 29-3301).

by imprisonment of more than a year, typically felonies and class 1 or A1 misdemeanors); Arizona's statute requires only reasonable cause.[45] With the exception of Nebraska's, each state's rule also requires some variation on "reasonable suspicion," which may or may not amount to probable cause, to believe that the person named in the affidavit is guilty of the named offense.[46] Nebraska's statute requires probable cause in this regard.[47] Each of the state rules requires a version of draft Rule 41.1's mandate that the requested evidence have probative value for determining whether the person named in the affidavit committed the offense named there.[48] And in a clear attempt to adopt the gist of the *Davis* dictum, each also requires an order issued by a judge or magistrate, authorizing the named person's temporary detention for the purpose of obtaining specified nontestimonial identification evidence.[49]

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45. COLO. R. CRIM. P. 41.1(c)(1); IDAHO CODE ANN. § 19-625(1)(A); IOWA CODE tit. XVI, subtit. 2, § 810.6(1); NEB. REV. STAT. § 29-3303; N.C. GEN. STAT. § 15A-273(1); ARIZ. REV. STAT. ANN. § 13-3905(A)(1). Iowa's provision includes the stipulation that it must also be reasonable, in view of the seriousness of the offense, to subject the person named in the order to the requested procedures. IOWA CODE tit. XVI, subtit. 2, § 810.6(1).

46. COLO. R. CRIM. P. 41.1(c)(2); IDAHO CODE ANN. § 19-625(1)(B); IOWA CODE tit. XVI, subtit. 2, § 810.6(2); N.C. GEN. STAT. § 15A-273(2). While Arizona's statute requires reasonable cause for belief that a felony has been committed, *see supra* note 45 and accompanying text, it does not explicitly require reasonable cause for belief that the named suspect committed the felony. Instead, it requires that "[p]rocurement of evidence of identifying physical characteristics from an identified or particularly described individual may contribute to the identification of the individual who committed such offense." ARIZ. REV. STAT. ANN. § 13-3905(A)(2). Nonetheless, in a Fourth Amendment challenge to the statute based on its lack of a probable cause standard for the suspect's connection to the crime, the Arizona Supreme Court held somewhat vaguely that "[r]easonable cause, which is something less than probable cause, is sufficient to invoke A.R.S. § 13-3905." State v. Rodriguez, 921 P.2d 643, 651 (Ariz. 1996). Earlier, the Arizona court had held in *State v. Grijalva* that the statute impliedly required that a "nexus" be established between the named suspect and the named crime. 533 P.2d 533, 536 (Ariz. 1975).

47. NEB. REV. STAT. § 29-3303. Nebraska's statute was amended to require probable cause after the state supreme court held in *State v. Evans* that nontestimonial identification procedures comprised unconstitutional seizures under the Fourth Amendment where they were carried out on the basis of reasonable suspicion. 338 N.W.2d. 788, 792–94 (Neb. 1983).

48. COLO. R. CRIM. P. 41.1(c)(3); IOWA CODE tit. XVI, subtit. 2, § 810.6(3); N.C. GEN. STAT. § 15A-273(3). Arizona's, Idaho's, and Nebraska's provisions require that the evidence "may contribute to the identification of the person who committed the offense." ARIZ. REV. STAT. ANN. § 13-3905(A)(2); IDAHO CODE ANN. § 19-625(1)(C); NEB. REV. STAT. § 29-3303.

49. ARIZ. REV. STAT. ANN. § 13-3905(A); COLO. R. CRIM. P. 41.1(a); IDAHO CODE ANN. § 19-625(1); IOWA CODE tit. XVI, subtit. 2, § 810.6(2-3); NEB. REV. STAT. § 29-3302; N.C. GEN. STAT. § 15A-271.

The six states adopted draft Rule 41.1's list of included identification procedures almost wholesale,[50] with several interesting exceptions. Only Colorado and North Carolina adopted the draft rule's provision for "other reasonable physical or medical examination."[51] Only Colorado, Iowa, and North Carolina adopted the provision for appearing in lineups (this despite Justice Brennan's warning in the *Davis* dictum that lineups are susceptible to abuse in ways fingerprints are not).[52] Colorado included additional procedures for procuring specimens under fingernails and trying on articles of clothing;[53] and Iowa included additional procedures for ultraviolet or blacklight examinations and paraffin tests.[54]

In terms of required procedure, the states again followed the draft rule to differing degrees. While each of the six states adopted at least a barebones return provision, only Colorado, Iowa, and North Carolina followed draft Rule 41.1 in entitling suspects (automatically or by motion) to have all products of nontestimonial identification procedures destroyed if, at the time of return, there is no probable cause to arrest.[55] In an-

50. For subsections of the state provisions listing acceptable nontestimonial identification evidence procedures, see COLO. R. CRIM. P. 41.1(h)(2); ARIZ. REV. STAT. ANN. § 13-3905(G); IDAHO CODE ANN. § 19-625(4); IOWA CODE tit. XVI, subtit. 2, § 810.1; NEB. REV. STAT. § 29-3303; N.C. GEN. STAT. § 15A-271.

51. Draft Rule 41.1(l)(3), 52 F.R.D. at 467; COLO. R. CRIM. P. 41.1(h)(2); N.C. GEN. STAT. § 15A-271. North Carolina's statute reads "other reasonable physical examination," omitting the words "or medical." N.C. GEN. STAT. § 15A-271.

52. Davis v. Mississippi, 394 U.S. 721, 727 (1969); COLO. R. CRIM. P. 41.1(h)(2); IOWA CODE tit. XVI, subtit. 2, § 810.1; N.C. GEN. STAT. § 15A-271.

53. COLO. R. CRIM. P. 41.1(h)(2).

54. IOWA CODE tit. XVI, subtit. 2, § 810.1. Iowa's provision for paraffin tests presumably is in the service of detecting gunpowder residue, but the procedure has been discredited. *See* Alfred H. Novotne, *The Advocate for Military Defense Counsel: Scientific Evidence: Challenging Admissibility*, ARMY LAW., Oct. 1988, 23, at 27–28; Anthony Pearsall, Comment, *DNA Printing: The Unexamined "Witness" in Criminal Trials*, 77 CALIF. L. REV. 665, 703 (1989). While North Carolina's statute does not include gunshot residue tests in its list of acceptable procedures, the North Carolina Court of Appeals has held on several occasions that such tests are "nontestimonial identification procedure[s] 'comparable to handwriting exemplars, voice samples, photographs, and lineups.'" State v. Page, 609 S.E.2d 432, 436 (N.C. Ct. App. 2005) (quoting State v. Coplen, 530 S.E.2d 313, 318 (N.C. Ct. App. 2000)).

55. COLO. R. CRIM. P. 41.1(f)(7); IOWA CODE tit. XVI, subtit. 2, § 810.16; N.C. GEN. STAT. § 15A-280. Arizona's statute requires only that a return be made within thirty days to the court that issued the order, indicating the type of evidence taken from the suspect, and that a copy of the return be given to the suspect. ARIZ. REV. STAT. ANN. § 13-3905(C). Idaho's provision is similar, but requires the return to be made within fifteen days. IDAHO CODE ANN. § 19-625(3).

other significant departure from the draft federal rule, three of the six state provisions stipulate that the suspect has a right to counsel during detention for the identification procedure, and that counsel will be provided for indigent suspects.[56] Finally, the Arizona, Idaho, and Iowa provisions mandate that evidence may be collected under the nontestimonial identification evidence rule only if the evidence "cannot otherwise be obtained" by the investigating officer.[57]

B. Live Issues in the State Appeals Courts

The United States Judicial Conference, having had ample opportunity to avail itself of the benefit of the states' experience with nontestimonial identification evidence procedures,[58] has never again considered draft Rule 41.1 or submitted it to the Supreme Court for approval.[59] However, the states have encountered a number of live issues deriving from their incarnations of that rule. As the majority observed in *Hayes v. Florida*, the states have not been in accord in resolving those issues.[60] Nonetheless, the Supreme Court has not yet granted certiorari on a case arising under one of the rules or statutes. State court appeals on nontestimonial identification evidence rules can be grouped into four categories: (1) challenges to the constitutionality of the rules in broad terms, (2) the definition and/or application of the reasonable suspicion standard, (3) the consequences of statutory violations, including deprivation of the right to counsel, and (4) the kinds of evidence permissibly sought under the identification procedures.

Nebraska's is also similar to Arizona's, but does not require that the suspect be given a copy of the return. NEB. REV. STAT. § 29-3306.

56. The right-to-counsel provisions appear in the statutes of Idaho, IDAHO CODE ANN. § 19-625(2)(H), Iowa, IOWA CODE tit. XVI, subtit. 2, § 810.8(8), and North Carolina, N.C. GEN. STAT. § 15A-278(5).

57. ARIZ. REV. STAT. ANN. § 13-3905(A)(3); IDAHO CODE ANN. § 19-625(1)(D); IOWA CODE tit. XVI, subtit. 2, § 810.6(4).

58. U.S. v. Holland, 552 F.2d 667, 674 (5th Cir. 1977).

59. As Professor Stern points out, in addition to the Conference's constitutional and other concerns with the rule, it also believed that the rule would have little applicability in the federal courts. Stern, *supra* note 31, at 1441 n.113 (citing *Holland*, 552 F.2d at 674).

60. 470 U.S. 811, 817 (1985).

1. Broad Challenges to Constitutionality

The earliest constitutional challenge to one of the statutes arose in Arizona in *State v. Grijalva*.[61] In *Grijalva*, the defendant was convicted of armed burglary, rape, and attempted rape, with his conviction based on fingerprints, photographs, and head hair procured under the state's nontestimonial identification evidence procedure.[62] Frank Grijalva argued on appeal that the statute violated the Fourth Amendment both on its face and as applied in his case.[63] In holding the statute constitutional, the Arizona court focused on its similarity to elements of the *Davis* dictum.[64] In doing so, however, it limited its analysis of a crucial element of the statute—the types of evidence that permissibly may be procured under it—to Grijalva's as-applied challenge, rather than addressing his facial challenge.[65]

Having declared that a Fourth Amendment standard of reasonableness requires that the statute balance society's interest in the investigation of felonies with the individual's interest in privacy, the *Grijalva* court moved to an analysis of the nontestimonial identification procedure's intrusion upon that privacy.[66] The court noted that

> [t]he degree of intrusion into the person's privacy is relatively slight. Photographs, more so than fingerprints, involve none of the probing that the *Davis* court found to mark a search of an unreasonable nature. Similarly, clipping several head hairs is only the slightest intrusion upon

61. 533 P.2d 533 (Ariz. 1975).

62. *Id.* at 534.

63. *Id.*

64. *Id.* at 535–37. The "key to the statute and its great strength," according to the opinion, lies in the *Davis*-implied requirement for a judicial order. *Id.* at 536.

65. *Id.* at 534–36. Failing to account for more than three-quarters of the procedures allowed under the statute, the court described that statute as allowing "temporary pre-arrest detention of an individual for the purpose of obtaining evidence of physical characteristics such as photographs, fingerprints and hair samples." *Id.* at 534. Photographs, fingerprints, and hair samples comprised the nontestimonial identification evidence Grijalva sought to suppress through his as-applied challenge. *Id.*

66. *Id.* at 535–36.

> the body, if any at all, and does not constitute anything unreasonable.[67]

Relying on the *Davis* dictum's pronouncements that detention for fingerprinting "may constitute a much less serious intrusion upon personal security than other types of police searches and detentions," and that such detention "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search," the court reasoned that taking photographs and head hairs comprised similarly non-intrusive—and so constitutionally permissible—procedures.[68]

What the *Grijalva* court's analysis omitted, however, was a discussion of the other procedures permitted by the Arizona statute, including (and "not limited to") blood samples, urine samples, saliva samples, and pubic hair samples, all of which reasonably could be characterized as intrusive.[69] The Arizona Supreme Court had a second chance to address this omission two decades later, when it heard a renewed facial challenge to the statute in *State v. Rodriguez*. In that case, the defendant had been detained for nontestimonial identification procedures to procure fingerprints, palm prints, hair samples, and a blood sample. [70] In response to Toribio Rodriguez's facial challenge to the statute,[71] the court again confined its analysis to the statute as applied: "Because the State used a palm print but no blood or hair samples at trial, we confine our discussion to prints."[72] Based on that analysis, the court again held the statute constitutional under the standard of "reasonable cause, which is something less than probable cause."[73]

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67. *Id.* at 536 (citation omitted).

68. *Id.*

69. *See* ARIZ. REV. STAT. ANN. § 13-3905(G) (West, Westlaw through first 2007 Sess.). The Arizona statute was originally numbered § 13-1424 when it was adopted in 1971. Before it was amended in 1999, current subsection (G), which defines "identifying physical characteristics," was lettered subsection (D). The subsection's contents, however, were unchanged by the 1999 amendment.

70. State v. Rodriguez, 921 P.2d 643, 646 (Ariz. 1996). All of the samples listed in the court order were obtained except for the hair samples. *Id.* Only the palm print was offered as evidence at trial. *Id.* at 650.

71. Rodriguez argued that the court should "find that full blown probable cause is required for the issuance of a warrant for the taking of physical characteristics." *Id.*

72. *Id.*

73. *Id.* at 651.

Thus, despite several facial challenges, the Arizona Supreme Court has relied on as-applied analysis to find the state's statute constitutional. Other state supreme courts, by contrast, have squarely considered facial challenges to nontestimonial identification evidence rules and statutes, with mixed results.

In *State v. Madson*, decided in 1981, the Colorado Supreme Court relied on an analysis of the U.S. Supreme Court's Fourth Amendment jurisprudence to establish the constitutionality of Rule 41.1.[74] In *Madson*, the defendant was convicted of murder in the first degree after deliberation, based on evidence that included a handwriting exemplar obtained pursuant to a Rule 41.1 order.[75] While the Colorado court reversed Madson's conviction because of the admission of prejudicial hearsay,[76] it elected to address his constitutional challenge to Rule 41.1 in order to provide guidance to the lower court on retrial.[77] Observing that Rule 41.1 was "an outgrowth" of the *Davis* dictum, the Colorado court looked to five U.S. Supreme Court cases (four decided after *Davis* and one before) for an interpretation of how the dictum might translate into constitutionally permissible state action.[78] From those five cases, the Colorado court crafted a set of standards for constitutionally permissible "limited intrusions into privacy on less than probable cause":

> First, there must be an articulable and specific basis in fact for suspecting criminal activity at the outset. Second, the intrusion must be limited in scope, purpose, and duration. Third, the intrusion must be justified by substantial law enforcement interests. Last, there must be an opportunity at some point to subject the intrusion to the neutral and detached scrutiny of a judicial officer . . . .[79]

74. 638 P.2d 18, 31–33 (Colo. 1981).
75. *Id.* at 21, 22 & n.7.
76. *Id.* at 21.
77. *Id.* at 31.
78. The court cited *Michigan v. Summers*, 452 U.S. 692 (1981), *United States v. Cortez*, 449 U.S. 411 (1981), *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), *Adams v. Williams*, 407 U.S. 143 (1972), and *Terry v. Ohio*, 392 U.S. 1 (1968). *Madson*, 638 P.2d at 31.
79. *Id.* at 31–32.

Based on this set of standards, the unanimous court held that Colorado's nontestimonial identification evidence rule was facially constitutional.[80]

Just two years after *Madson* was decided, the Nebraska Supreme Court took up the facial constitutionality of that state's identifying physical characteristics statute in *State v. Evans*.[81] In *Evans*, the defendant was convicted of burglary based in part upon his palm print exemplar, taken in accordance with an order issued under the statute.[82] The Nebraska court rejected Jerry Evans's claim that the statute was constitutionally infirm because it did not require a nexus between the alleged crime and the individual detained.[83] However, it went on to address a claim he did not make: that "on a showing of less than probable cause to believe the person to be seized and compelled to submit to identification procedures committed the crime under investigation," the statute would be unconstitutional under both the Fourth Amendment and Article I, Section 7 of the Nebraska Constitution.[84]

Speaking unanimously on this point, the Nebraska court held that U.S. Supreme Court decisions in *Dunaway v. New*

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80. *Id.* at 32–33. While the *Madson* court explicitly addressed itself to a facial analysis of Colorado's Rule 41.1, notably absent from its set of standards for constitutionality is any mention of the type of evidence that might permissibly be collected without probable cause. *See id.* In addition, in testing the state's rule against that set of standards, the court quoted in full but did not comment on Rule 41.1's non-exclusive list of acceptable nontestimonial identification evidence. *Id.* at 32 (quoting COLO. R. CRIM. P. 41.1(h)(2)).

The constitutionality of Colorado Rule 41.1 has also been challenged before the Tenth Circuit, which was able to avoid the constitutional question because the defendant had acknowledged his consent to the Rule 41.1 order at issue in his appeal. Moreno v. Cooper, No. 94-1029, 1994 U.S. App. LEXIS 11773, at *2 (10th Cir. May 20, 1994).

81. 338 N.W.2d 788 (Neb. 1983). The Nebraska statute is codified at NEB. REV. STAT. § 29-3301 to -3307 (West, Westlaw through second 2006 Sess.).

82. 338 N.W.2d at 790–92.

83. *Id.* at 793. Looking to *State v. Grijalva*, 533 P.2d 533 (Ariz. 1975), for guidance, the Nebraska court held that at least one construction of section 29-3303 does require such a nexus, and that when a statute is susceptible of multiple interpretations, courts should adopt the interpretation that renders the statute constitutionally valid. *Evans*, 338 N.W.2d at 793.

84. *Id.* Article I, section 7 of the Nebraska Constitution declares,

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

NEB. CONST. art. I, § 7.

York[85] and *Florida v. Royer*[86] had "effectively dispel[led] any speculation created by the . . . [*Davis*] dictum" that seizures of nontestimonial identification evidence on less than probable cause might be constitutionally permissible.[87] Thus, compelling a suspect to accompany police to the police station, hospital, or other location,

> and the [suspect's] forced submission to nontestimonial identification procedures, is a seizure of such a magnitude that more than mere suspicion is required. . . . It would be anomalous and indeed bizarre to require such probable cause prior to the seizure of papers, books, and other objects, but not for the seizure of persons.[88]

The Nebraska court determined that the state's identifying physical characteristics statute could be interpreted to require probable cause; thus, the court held the statute constitutional.[89]

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85. 442 U.S. 200, 216 (1979) (holding that police must have probable cause rather than merely reasonable suspicion to pick up and detain a suspect for questioning, even if the detention is not characterized as an arrest).

86. 460 U.S. 491, 493, 501 (1983) (holding that police must have probable cause rather than merely reasonable suspicion to search the luggage of a suspect detained at an airport because he "fit the profile of a drug courier").

87. *Evans*, 338 N.W.2d at 793. In reaching this holding, the Nebraska court explicitly distinguished itself from the Arizona Supreme Court, whose lead in *Grijalva* Nebraska now declined to follow. *Id.*

88. *Id.* at 794.

89. *Id.* The statute was revised in light of *Evans* and now explicitly requires "probable cause to believe that the person subject to the [nontestimonial identification evidence] order has committed the offense." NEB. REV. STAT. § 29-3303(2) (West, Westlaw through second 2006 Sess.). In concluding its discussion of the constitutionality of the statute and the requirement of probable cause, the Nebraska court cited a New York case, *In Re Abe A.*, 437 N.E.2d 265 (N.Y. 1982), for its similar holding. *Evans*, 338 N.W.2d at 794. In *Abe A.*, a homicide suspect was held in contempt of court when he refused to comply with a court order for a blood sample. 437 N.E.2d at 267–68. New York has neither a nontestimonial identification statute nor any authorization for appellate review of a court order to produce such evidence; however, the court found authority for such an order implied in the state's rules of criminal procedure. *Id.* While the court acknowledged that jurisdictions such as Arizona "have authorized such seizures on a standard below that of probable cause to arrest," it concluded that "it is hard to regard such holdings as constitutionally firm." *Id.* at 269 (citing *Grijalva*, 533 P.2d 533 (Ariz. 1975)). Like the Nebraska court, the New York court relied on *Dunaway*, "which squarely held that the seizure of a person can never be undertaken for less than probable cause." *Id.* (internal citation omitted).

2. The Definition and Application of the Reasonable Suspicion Standard

In states such as Arizona and Colorado, whose supreme courts have held that nontestimonial identification evidence orders constitutionally may issue upon a standard of reasonable suspicion rather than probable cause, the definition and application of "reasonable suspicion" provides another live issue for appeal.

In *Grijalva*, the Arizona Supreme Court held that the state's nontestimonial identification evidence statute implicitly requires "reasonable cause to believe" that a "nexus" exists between the crime under investigation and the suspect to be detained.[90] In that case, the Tucson Police Department submitted a "Petition to Obtain Evidence of Physical Characteristics," stating that Frank Grijalva was connected to the crimes under investigation (two armed burglaries, a rape, and an attempted rape) because "he fitted the general description" of the victims' assailant(s)—"mexican [sic] male, 20–25 years, 5'6" tall, 120 pounds"; because there was a "similarity of modus operandi" between the two crimes; and because latent fingerprints from one of the crime scenes "had been tentatively matched to a 'very poor specimen of Grijalva's known fingerprints.'"[91] The Arizona court held that while the order could not have issued based on the victims' overly "broad" physical description of their assailant or on the unelaborated assertion of similar modus operandi, the order could issue based on the tentative fingerprint match, which comprised an adequate nexus between Grijalva and the crimes.[92]

Grijalva thus stands for at least two propositions: (1) that a broad match between a suspect's appearance or racial categorization and physical descriptions provided by witnesses or victims should not, on its own, provide reasonable suspicion;[93] and (2) that the necessary "nexus" between suspect and crime will be established by a tentative fingerprint match without

90. State v. Grijalva, 533 P.2d 533, 536 (Ariz. 1975).
91. *Id.* at 537.
92. *Id.*
93. With this holding, the *Grijalva* court seems to be trying to head off potential claims of racially biased use of the nontestimonial identification evidence statute.

more, even if that match depends upon a "poor specimen" of the suspect's prints.[94]

In affirming the *Grijalva* holding two decades later, in *State v. Rodriguez*,[95] the Arizona Supreme Court considered another live issue within the context of reasonable suspicion: whether an anonymous tip can provide the requisite "nexus" for that reasonable suspicion, and thus for a nontestimonial identification evidence order.[96] Toribio Rodriguez was convicted of first-degree murder, sexual assault, and burglary after Tucson police received an anonymous call naming him as the killer.[97] The caller said that Rodriguez had come home on the night of the crime with bloody clothing and with items belonging to the victim, and that Rodriguez was connected with the death of a prostitute in an unrelated case.[98] On appeal, Rodriguez argued that under U.S. Supreme Court decisions in *Illinois v. Gates*[99] and *Alabama v. White*,[100] the state could not rely on anonymous tips to establish reasonable cause.[101]

The Arizona Supreme Court dismissed this argument as "without merit," on the grounds that *Gates* rested on a determination of probable (rather than reasonable) cause, and that *White*, while resting on a reasonable suspicion standard attaching to a *Terry* stop, "did not involve an order obtained from a neutral and detached magistrate" and so was inapplicable.[102]

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94. 533 P.2d at 537.

95. 921 P.2d 643, 652 (Ariz. 1996). The *Rodriguez* court did not mention the *Grijalva* court's insistence that the fingerprint evidence—not the suspect's broad match to the victims' physical description nor the claim of similarity of modus operandi—provided the requisite reasonable suspicion to issue an identification evidence order. *Id.*

96. *Id.* at 651.

97. *Id.* at 645–46. Police received the anonymous phone tip five years after the crime had taken place. *Id.* at 646.

98. *Id.* at 645–46.

99. 462 U.S. 213, 226–31, 241–46 (1983) (holding that in making determinations of probable cause on the basis of an informant's tip, the state should apply a "totality-of-the circumstances analysis" rather than the rigid two-part test established by *Spinelli v. United States*, 393 U.S. 410 (1969); and that an informant's tip may provide probable cause where the tip is corroborated by "independent police work").

100. 496 U.S. 325, 328–29, 331–32 (1990) (relying on precedent in *Adams v. Williams*, 407 U.S. 143 (1972), and *Illinois v. Gates*, 462 U.S. 213 (1983), in holding that an anonymous tip may carry "sufficient 'indicia of reliability'" to create the reasonable suspicion necessary for a *Terry* stop, where there is "independent corroboration by the police of significant aspects of the informer's predictions").

101. *Rodriguez*, 921 P.2d. at 651.

102. *Id.*

While declining to overturn state precedent that had held anonymous tips reliable,[103] the *Rodriguez* court did emphasize that the petition for a nontestimonial identification evidence order in this case "contained more than unverifiable information from an anonymous tip."[104] The court stressed that the petition also contained inconclusive fingerprint evidence and a statement that the suspect had previously been arrested near the crime scene for indecent exposure.[105] For the Arizona Supreme Court, then, there appears to be at least some doubt as to whether an unverifiable anonymous tip may, without more, establish reasonable suspicion.

For the Colorado Supreme Court, there is no such doubt. In *State v. Davis*,[106] one victim of kidnapping and attempted robbery and a second victim of attempted robbery appeared to have been victimized by the same perpetrators on the same evening.[107] The first victim described her assailants as "a black male, 5' 10", stocky build, in his late 20s or 30s, and wearing a red ski mask, [and] a white male, 5' 7", thin build, in his 20's, having a deep voice with a southern drawl, and wearing light colored hiking boots, a plain flannel shirt, and gloves."[108] The second victim identified the man who attempted to rob him as a white male, "5' 9" to 5' 10", medium build, blond hair, brown eyes, about 26 to 28 years old, with a deep New York accent, wearing tennis shoes, blue jeans, a red and white flannel shirt, a red ski cap, and a red scarf."[109] He also reported that he saw, in the parking lot of his bank, a car driven by a black man.[110]

Roughly thirteen hours after the first victim escaped from her kidnappers, the Boulder police received an anonymous telephone call urging them to "check out John Davis" in connection with the abduction and attempted robbery.[111] The caller informed police of the address at which Davis's mother lived with "that colored guy he's been running around with";

103. *Id.* The Arizona court had so held in *State v. Summerlin*, 675 P.2d 686 (1983).
104. *Rodriguez*, 921 P.2d at 651–52.
105. *Id.*
106. 669 P.2d 130 (Colo. 1983).
107. *Id.* at 132–33.
108. *Id.* at 132.
109. *Id.*
110. *Id.*
111. *Id.* at n.1.

when asked if he had any other information that might be useful, the caller said, "No. I just kind of overheard him talking about pulling some robberies."[112] After listening to the tape of this call and remembering that he had once spoken with Davis, who lived with his mother at the address given by the anonymous caller, a Boulder police officer checked department records and discovered that Davis "was a white male, 5' 6", 155 pounds, [with] green eyes [and] brown hair, 28 years of age."[113]

With an affidavit containing the information from both the anonymous tip and the Boulder police records, the officer applied for and received a nontestimonial identification order from a Boulder County judge.[114] The order was executed for voice samples, a photograph, and fingerprints.[115] After the first victim identified Davis's voice in a voice lineup, a warrant was issued for his arrest.[116] Before trial, on Davis's motion, the court suppressed the nontestimonial identification evidence, holding that the anonymous tip did not establish the reasonable suspicion necessary for an identification evidence order.[117] The Colorado Supreme Court reversed, on the grounds that the police officer's affidavit, containing facts from both the anonymous tip and the department's records, did establish reasonable suspicion:

> These facts included the report of the crimes which had been committed, and the [first] victim's identification of her assailants, the telephone tipster's reference to the specific crimes under investigation, naming the defendant by name, the home address of the defendant's mother, and overhearing the defendant "talking about pulling some robberies." In addition, the police records showed that the defendant's physical characteristics were comparable to those described by the victims.[118]

In Colorado, then, reasonable suspicion attaches to an anonymous telephone tip that simply names a crime and an alleged perpetrator, gives the alleged perpetrator's address, and claims that the alleged perpetrator has been talking about

112. State v. Davis, 669 P.2d at n.1.
113. *Id.* at 132–33.
114. *Id.* at 133.
115. *Id.*
116. *Id.*
117. *Id.*
118. State v. Davis, 669 P.2d at 134.

committing robberies, when that alleged perpetrator's physical appearance is only vaguely comparable to conflicting descriptions given by the victims.[119]

3. The Consequences of Statutory Violations

A third live issue arising from nontestimonial identification evidence rules and statutes derives from application of the exclusionary rule to evidence obtained in violation of those rules or statutes. In *State v. Pearson*,[120] for instance, the defendant pled guilty to second-degree rape charges after the trial court denied his motion to suppress evidence taken under a nontestimonial identification order.[121] He then appealed his conviction on the ground that the evidence—obtained more than twelve years prior to his arrest—should have been suppressed because of two violations of the North Carolina statute.[122]

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119. Contrast the varying descriptions of the "white male" in notes 108–113, *supra*, and accompanying text. The first victim described two assailants, a white man and black man; the second victim described one assailant, a white man, with a black man sitting in a nearby car. State v. Davis, 669 P.2d at 132. The first victim described her white assailant as being 5'7" with a "thin build"; the second victim described his assailant as being "5'9" to 5'10", [with a] medium build." *Id.* The first victim described her white assailant as "having a deep voice with a southern drawl"; the second victim described his assailant as speaking with "a deep New York accent." *Id.* The first victim described her white assailant as wearing "light colored hiking boots, a plain flannel shirt, and gloves"; the second victim described his assailant as wearing "tennis shoes, blue jeans, a red and white flannel shirt, a red ski cap, and a red scarf." *Id.*

The Colorado court did not say what role the race of Davis's alleged coperpetrator—the black man described by the first victim—may have played in establishing reasonable suspicion in predominantly white Boulder, where Davis's mother lived with "the colored guy [Davis had] been running around with." *See id.* at n.1. The extent to which the police may use racial or ethnic characteristics to establish reasonable suspicion is a point on which the states particularly need guidance from the Supreme Court. In the absence of such guidance, nontestimonial identification evidence rules and statutes have the potential to lead to the sort of dragnet in which two dozen young black men were detained for fingerprinting in *Davis v. Mississippi*. *See supra* notes 6–8 and accompanying text.

120. 551 S.E.2d 471 (N.C. App. 2001), *aff'd*, 566 S.E.2d 50 (N.C. 2002), *cert. denied*, 537 U.S. 1121 (2003). The North Carolina Supreme Court has not ruled on the constitutionality of the state's nontestimonial identification evidence statute, but the Court of Appeals held in *Pearson* that the statute did not violate the Constitution of the United States nor that of North Carolina. *See id.* at 477–79 (citing Davis v. Mississippi, 394 U.S. 721 (1969)).

121. *Pearson*, 551 S.E.2d at 473.

122. *Id.*

Marion Pearson's first ground for appeal arose from a violation of the statute's right-to-counsel provision. The statute stipulates that when a nontestimonial identification order is implemented, the suspect not only is entitled to have counsel present, but also must be advised of that right before being subjected to any procedures.[123] In *Pearson*, the defendant repeatedly asked for counsel—first when the order was served upon him, and again when he gave samples of blood, pubic hair, and saliva—and was denied.[124] The *Pearson* majority, relying on North Carolina appeals court precedent, determined that the "plain language" of the nontestimonial identification evidence statute "protects the defendant from having statements made during the nontestimonial identification procedure used against her at trial where counsel was not present at the procedure."[125] The majority thus concluded that because Pearson was not seeking to suppress a statement, but rather the identification evidence itself, failure to provide him counsel at his request did not amount to a "substantial violation" requiring suppression.[126]

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123. *Id.* at 475–77 (citing N.C. GEN. STAT. § 15A-279(d) (1999)). Suspects must also be informed of their right to have counsel appointed if they are indigent. *Id.*

124. *Id.* at 474. *But see id.* at 482–83 (Biggs, J., dissenting) ("The right to counsel is so fundamental that the failure to provide counsel when required by law should be treated seriously.").

125. *Id.* at 476 (quoting State v. Coplen, 530 S.E.2d 313 (N.C. App. 2000)). The statutory language reads as follows:

> Any such person [subject to an order] is entitled to have counsel present and must be advised prior to being subjected to any nontestimonial identification procedures of his right to have counsel present during any nontestimonial identification procedure and to the appointment of counsel if he cannot afford to retain counsel . . . . No statement made during nontestimonial identification procedures by the subject of the procedures shall be admissible in any criminal proceeding against him, unless his counsel was present at the time the statement was made.

N.C. GEN. STAT. § 15A-279(d) (LexisNexis through 2006 Sess.).

126. *Pearson*, 551 S.E.2d at 476. As Judge Biggs's vigorous dissent makes clear, if Pearson had been granted counsel, as required under the statute,

> the advice of counsel would likely not be restricted to issues connected with custodial statements . . . , but would reasonably encompass information on the legal implications of the identification procedures, the legal consequences of making a statement, the defendant's right to a copy of the results, and—most significantly—the defendant's right under N.C.G.S. § 15A-280 to seek the destruction of the products and reports of the nontestimonial procedures.

Id. at 482 (Biggs, J., dissenting). In the dissent's view, the state's failure to destroy the products of Pearson's identification evidence procedure comprised the heart of the appeal. *Id.* at 482–83.

Pearson's second ground for appeal arose from a violation of the statute's return provision.[127] The statute stipulates that within ninety days of the procedure, an inventory of the evidence obtained from the procedure must be returned to the judge who issued the order or who is designated in the order.[128] At that time, if there is no probable cause to believe that the suspect has committed *any* offense (that named in the affidavit or otherwise), the suspect may move for destruction of all products of and reports on the procedure.[129] Except for good cause shown, that motion must be granted.[130] In addition, the statute requires that as soon as reports of procedure results are available—in other words, no later than ninety days after the procedure—the suspect must be given a copy.[131]

In *Pearson*, the suspect (later the defendant) was not given a copy of his results until more than twelve years after the procedure, when he was arrested and charged.[132] The North Carolina appeals court concluded that this, too, was a "minimal" violation of state law, in part because Pearson did not move, as he was statutorily entitled, to have the products of and reports from the procedure destroyed.[133] The court surmised that, for two reasons, the judge who issued the order would have had good cause to deny any motion to destroy the products of that order.[134] First, Pearson had been arrested for a separate offense by the end of the ninety-day return period.[135] Second, the disputed identification evidence had not ruled him out as a suspect in the rapes that were being investigated when the identification order was issued.[136] While not condoning statutory violations, the court concluded that "unyielding exclusionary penalties" were not appropriate for the violations in the

127. N.C. GEN. STAT. § 15A-280.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* § 15A-282.
132. 551 S.E.2d at 477. Pearson's arrest was for the same series of rapes and robberies for which the police had obtained the nontestimonial identification evidence order against him twelve years earlier. *Id.*
133. *Id.* at 476–77. As the *Pearson* dissent points out, a defendant who has been unlawfully deprived of counsel would be unlikely to be aware of his statutory entitlement to make such a motion. *Id.* at 482.
134. *Id.* at 477.
135. *Id.*
136. *Id.*

case, as the majority did not construe those violations as prejudicial to the defendant.[137]

A year after *Pearson* was decided, Colorado's highest court considered the consequences of police misconduct under that state's nontestimonial identification evidence rule.[138] In *People v. Diaz*, the Pueblo police contacted Joseph Diaz after his ex-girlfriend reported that he had twice sexually assaulted her.[139] Diaz agreed to speak with officers at the police department, where he was advised of but did not waive his *Miranda* rights.[140] When asked to provide blood and hair samples voluntarily, he refused.[141] Nevertheless, without obtaining a judicial order to do so, the Pueblo police transported Diaz to the hospital, where a nurse took samples of his blood, head hair, and pubic hair.[142] After Diaz was charged with sexual assault and violation of a restraining order, he filed a motion to suppress the blood and hair evidence, and the trial court granted that motion.[143] Then, "as a sanction against police misconduct," the trial court ruled that it would deny any prosecution requests for a nontestimonial identification evidence order under Colorado Rules of Criminal Procedure 41.1 and 16(II)(a).[144]

The Colorado Supreme Court affirmed in part and reversed in part, holding that while the trial court was correct in excluding the illegally obtained evidence, it abused its discretion in refusing to issue nontestimonial identification evidence orders to the prosecution as a sanction for police misconduct.[145] Because the prosecution did not violate the rule, it "could not be sanctioned for the police conduct in which it did not participate."[146] In seeking its own nontestimonial identification evidence order under Rule 16(II)(a), the court held, the prosecution did not rely on information obtained by the police's illegal search.[147] As a result, the court reversed the trial court's order

137. *Id.* at 477–78.
138. People v. Diaz, 53 P.3d 1171 (Colo. 2002).
139. *Id.* at 1173.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 1174.
144. *Id.* at 1174. Rule 41.1 applies to suspects before arrest, or after arrest and before trial; Rule 16(II)(a) applies to defendants after judicial proceedings have been initiated. *Id.* at 1177 n.6.
145. *Id.* at 1177–78.
146. *Id.* at 1177.
147. *Id.*

disallowing the prosecutor from seeking identification evidence under Rule 16(II)(a).[148]

4. Kinds of Evidence Permissibly Sought Under Identification Procedures

As was evident in the Arizona cases *Grijalva* and *Rodriguez*,[149] state supreme courts have been somewhat reluctant to address facial challenges to their nontestimonial identification evidence statutes and rules, declining to analyze *all* of the types of evidence that police are authorized to collect under those statutes and rules. Instead, courts have tended to follow the model adopted by the Colorado Supreme Court in *People v. Harris*.[150] Relying heavily on a recitation of the *Davis* dictum and references to *Hayes v. Florida*'s affirmation of that dictum, the *Harris* court concluded that the permissible procedures in Rule 41.1's long list comprise "limited intrusions into privacy" comparable to the fingerprinting in *Davis*.[151] As it had done in its 1981 *Madson* decision, the Colorado court in *Harris* quoted that list in full, again making no comment about how each entry in the list met a "limited intrusion" standard.[152]

That lapse is particularly interesting in light of Colorado precedent. In *People v. Williams*,[153] decided in 1976, the Colorado Supreme Court had recognized that in *Schmerber v. California*, the U.S. Supreme Court "established a higher, more protective standard [than probable cause for arrest] for . . . attempts to find evidence within the body," including the extraction of blood or bodily fluids or the seeking of evidence in body apertures.[154] As the *Williams* court acknowledged, the consti-

148. *Id.* at 1178.

149. *See supra* notes 61–73 and accompanying text.

150. 762 P.2d 651 (Colo. 1988), *cert. denied*, 488 U.S. 985 (1988).

151. *See id.* at 653–56. The *Harris* court acknowledged that Colorado's long list of permissible procedures is not exhaustive. *Id.* at 656.

152. *Id.* The *Harris* court quoted the list in large part to point out that it does not include interrogation, which was at issue in the case. Under Colorado Rule 41.1(h)(2), "'Nontestimonial identification' includes, but is not limited to, identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, specimens of material under fingernails, or other reasonable physical or medical examination, handwriting exemplars, voice samples, photographs, appearing in lineups, and trying on articles of clothing." *Id.* (quoting COLO. R. CRIM. P. 41.1(h)(2)).

153. 557 P.2d 399 (Colo. 1976).

154. *Id.* at 406 (citing Schmerber v. California, 384 U.S. 757, 769–70 (1966)).

tutionality of obtaining such evidence depends on the state's meeting *Schmerber* requirements *even after* the state has established clear probable cause for arrest.[155] Because Colorado's list of permissible identification procedures includes the extraction of blood and bodily fluids, decisions such as *Madson* and *Harris* seemingly contravene both state supreme court and U.S. Supreme Court precedent.

In following proposed (but never adopted) Federal Rule of Criminal Procedure 41.1, the states have gone well beyond the *Davis* dictum's conception of fingerprinting as a unique process involving "none of the probing into an individual's private life" that characterizes a search.[156] Blood and saliva samples are fair game under all of the rules or statutes that permit orders to be issued under a standard of reasonable cause, and urine samples are explicitly permissible under four of the five.[157] Pubic hair samples are also permitted under each of the five rules or statutes,[158] while semen samples, buccal swabs for DNA testing, and full-body examinations for scars or other identifying marks seem to be likely incarnations of the "other

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155. *See id.*

156. Davis v. Mississippi, 394 U.S. 721, 727 (1969).

157. *See* ARIZ. REV. STAT. ANN. § 13-3905(G) (West, Westlaw through first 2007 Sess.); COLO. R. CRIM. P. 41.1(h)(2); IDAHO CODE ANN. § 19-625(4) (LexisNexis through 2007 Sess.); IOWA CODE tit. XVI, subtit. 2, § 810.1 (LexisNexis through 2006 legislation); N.C. GEN. STAT. § 15A-271 (LexisNexis through 2006 Sess.). While Iowa's statute does not explicitly include urine samples, its list is nonexclusive. IOWA CODE tit. XVI, subtit. 2, § 810.1. Because Nebraska's statute requires probable cause for an order to issue, NEB. REV. STAT. § 29-3303 (West, Westlaw through second 2006 Sess.), its nontestimonial identification procedures do not produce live issues under the Fourth Amendment.

158. *See* ARIZ. REV. STAT. ANN. § 13-3905(G); COLO. R. CRIM. P. 41.1(h)(2); IDAHO CODE ANN. § 19-625(4); IOWA CODE tit. XVI, subtit. 2, § 810.1; N.C. GEN. STAT. § 15A-271 (not limiting hair samples to head hair). *See also* State v. Rodriguez, 921 P.2d 643 (Ariz. 1996). The *Rodriquez* court quoted from the transcript of the conversation between police and Rodriguez immediately after he was arrested:

> [Detective KW]: We're going to need samples of head hair—and we'll let you pull your head hair. . . . And we're gonna need a bunch. . . . Why don't you just yank it out. . . .
>
> . . . .
>
> I'm going to step out and Ed's going to have you do the same thing but it's going to be pubic hair. . . .
>
> [Detective ES]: And we want about thirty-seven or thirty-eight of these?
>
> . . . .
>
> Okay. . . . Just reach down there and start pulling some pubic hairs. . . . A couple more clumps should do it.

Id. at 646–47.

reasonable physical or medical examination" permitted under the Colorado rule and the North Carolina statute.[159] Indeed, state courts seem inclined to interpret the statutory lists expansively. For instance, although North Carolina's statute neither indicates that its list of evidentiary procedures is nonexclusive nor includes gunshot residue tests on that list, the state's Court of Appeals repeatedly has held that such tests are "nontestimonial identification procedure[s] 'comparable to handwriting exemplars, voice samples, photographs, and lineups.'"[160]

The states' rules and statutes thus have significant potential to cross the Fourth Amendment line for searches and seizures. As Part III points out, that line remains somewhat blurry as it applies to nontestimonial identification evidence. However, there are certain steps the states might take to reform and strengthen their rules and statutes, thus ensuring that those rules and statutes are both constitutional and fundamentally fair. Those steps are laid out in the Model Rule proposed in Part IV.

III. NONTESTIMONIAL IDENTIFICATION EVIDENCE AND THE FOURTH AMENDMENT

After its flurry of activity in the late 1960s and early 1970s, the U.S. Supreme Court has not been especially active in Fourth Amendment jurisprudence in recent decades. This section begins by outlining, in broad terms, Supreme Court decisions that presumably control the states' nontestimonial identification evidence rules and statutes, and by summarizing the distinct standards the Court has established, in those cases, for the gathering of intrusive and non-intrusive evidence. The section then turns to Supreme Court decisions addressing specific constitutional issues raised by nontestimonial identification evidence cases in the state appeals courts.

159. *See* COLO. R. CRIM. P. 41.1(h)(2); N.C. GEN. STAT. § 15A-271.

160. State v. Page, 609 S.E.2d 432, 436 (N.C. Ct. App. 2005) (quoting State v. Coplen, 530 S.E.2d 313, 318 (N.C. Ct. App. 2000)). Iowa's statute explicitly allows for paraffin tests, presumably for detecting gunpowder residue. *See supra* note 54.

A. Broad U.S. Supreme Court Holdings

Because the Supreme Court has never granted certiorari on a case turning on the constitutionality of one of the state rules or statutes,[161] there is no single or simple controlling doctrine against which they can be tested. Instead, those rules and statutes must be evaluated within the broader context of standards the Court has established for evidence-gathering procedures of varying levels of intrusiveness.

Before 1967, the Court had followed a "per se rule" requiring probable cause for all searches.[162] However, its decisions in *Camara v. Municipal Court*[163] and *Terry v. Ohio*[164] created a balancing test that the Court has followed ever since in cases involving non-intrusive searches and seizures, which may be constitutionally "reasonable" with less than probable cause.[165] Because the Court has declared itself "careful to maintain [the narrow] scope" of this balancing test,[166] probable cause has remained the default constitutional standard for searches and seizures. Therefore, an evaluation of state rules and statutes permitting police to gather nontestimonial identification evidence with mere reasonable suspicion requires an analysis of the sorts of searches and seizures the Court has determined to be especially "intrusive" or "non-intrusive" under the Fourth Amendment.

Most notably, in *Schmerber v. California*, the Court held that even *after* a suspect has been arrested with probable

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161. In *Hayes v. Florida*, 470 U.S. 811 (1985), the Court observed that certain states had enacted nontestimonial identification procedures in reliance on the *Davis* dictum, and that the state courts "are not in accord on the validity of these efforts to insulate investigative seizures from Fourth Amendment invalidation." *Id.* at 817. That observation, however, indicated the Court's lack of familiarity with the state rules and statutes, which the *Hayes* opinion characterized as implemented "for the purpose of fingerprinting." *Id.* *See also* Crane, *supra* note 5, at 829 (emphasizing that the Court has never ruled on the constitutionality of the state procedures). The *Hayes* Court did declare itself "not inclined to forswear" the *Davis* holding, 470 U.S. at 815, or the *Davis* dictum, *id.* at 817.

162. *See* Asselta, *supra* note 3, at 504, 514.

163. 387 U.S. 523, 537 (1967) (establishing a test "balancing the need to search against the invasion which the search entails," and upholding a San Francisco ordinance permitting warrantless safety inspections of apartment buildings).

164. 392 U.S. 1, 24–25, 30 (1968) (upholding "carefully limited" stop-and-frisk searches on less than probable cause, with limitations based on "the nature and quality of the intrusion on individual rights").

165. *See* Asselta, *supra* note 3, at 504–06; Crane, *supra* note 5, at 817–19.

166. Dunaway v. New York, 442 U.S. 200, 210 (1979), *quoted in* Crane, *supra* note 5, at 819.

cause, the government may not forcibly take a blood sample from that suspect without first meeting a Fourth Amendment reasonableness test.[167] In *Schmerber*, a drunk-driving suspect was arrested at the hospital where he was being treated after an automobile accident.[168] Following the arrest, which was made without a warrant but with "plain[] probable cause," a police officer directed that a physician take a sample of the suspect's blood; the sample was taken over the suspect's objection.[169] On appeal of his conviction for driving under the influence, Armando Schmerber argued that, among other violations, the state had violated his rights under the Fourth Amendment by taking the blood sample without a warrant and without his consent.[170]

Writing for the majority, Justice Brennan emphasized that "the mere fact of lawful arrest does not end" the Fourth Amendment inquiry regarding "searches involving intrusions beyond the body's surface."[171] Thus, although "the facts which established probable cause to arrest" likewise suggested that a blood test would be relevant and useful in showing the suspect's blood alcohol level,

> the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. . . . The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.[172]

Because of the evanescent nature of the evidence sought in a blood alcohol test, and because the test itself was reasonable in both substance and procedure, the Court held that Schmerber's Fourth Amendment rights were not violated.[173] The *Schmerber* majority made clear, however, that its holding—

167. 384 U.S. 757, 768–70 (1966).
168. *Id.* at 758.
169. *Id.* at 758–59, 768–69.
170. *Id.* at 759.
171. *Id.* at 769.
172. *Id.* at 770.
173. *Schmerber*, 384 U.S. at 770–72.

that a blood test to establish evanescent blood alcohol level, performed *after* a lawful arrest based on probable cause, may be constitutionally reasonable even without a warrant for the test—was narrow. Justice Brennan declared, "That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."[174]

Because *Schmerber* imposed "stringently limited conditions" for blood tests that follow arrests based on probable cause, nontestimonial identification evidence statutes that permit such tests with only reasonable suspicion would seem to be constitutionally suspect. Indeed, the case provokes a question as to what other "minor intrusions" into an individual's body would be governed by the *Schmerber* rule. *United States v. Dionisio*,[175] decided in 1973, offers an answer to that question.

In *Dionisio*, a grand jury subpoena for voice exemplars was challenged as offending Fourth Amendment standards of reasonableness.[176] Writing for the majority, Justice Stewart cited the Court's precedent in distinguishing "what 'a person knowingly exposes to the public, even in his own home or office,'" from what is kept private: "The physical characteristics of a person's voice, its tone and manner, . . . are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear."[177] Because of this constant exposure to the public, handwriting is "immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in *Schmerber*."[178] Most interestingly in terms of nontestimonial identification evidence rules and statutes, the *Dionisio* majority concluded that publicly exposed personal characteristics such as handwriting, voice, and facial appearance are not only "immeasurably . . . removed" from blood tests,

174. *Id.* at 772.

175. 410 U.S. 1, 14–15 (1973). *See also* United States v. Mara, 410 U.S. 19, 21–22 (1973). *Mara* was a companion case to *Dionisio*. *Id.* at 21.

176. *Dionisio*, 410 U.S. at 2–3, 13–14.

177. *Id.* at 14 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

178. *Id.*

they are also "like the fingerprinting in *Davis*."[179] In other words, while not explicitly expanding the *Davis* dictum, *Dionisio* suggested an acceptable model on which such an expansion might proceed.[180]

B. U.S. Supreme Court Holdings Applicable to Specific Issues in the State Courts

In *Adams v. Williams*,[181] the Court addressed the specific issue of whether an informant's tip can provide a police officer with the requisite reasonable suspicion to perform a *Terry* stop-and-frisk. In *Adams*, a police officer on late-night car patrol in a high-crime area was approached by an informant with whom the officer had previously worked.[182] The informant told the officer that a man sitting in a nearby car "had a gun at his waist" in addition to carrying narcotics.[183] The officer approached the vehicle, tapped on its window, and asked the occupant, Robert Williams, to open the door.[184] Williams rolled down the window, instead, and the officer reached into the car and removed a gun—which had not been visible to the officer from outside the car—from Williams's waistband.[185] Williams was placed under arrest for a weapons offense and searched incident to that arrest.[186] During the search, officers discovered large quantities of heroin on his person and in the vehicle, as well as a machete and a second gun in the vehicle.[187] After his conviction in Connecticut state court for possession of weapons and narcotics, Williams petitioned for habeas corpus relief on

179. *Id.* at 15 (quoting the *Davis* dictum's observation that fingerprinting "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search," Davis v. Mississippi, 394 U.S. 721, 727 (1969)).

180. *Mara* iterated *Dionisio*'s holding that grand jury subpoenas "compelling production of 'physical characteristics' that are 'constantly exposed to the public'" do not violate the Fourth Amendment. *Mara*, 410 U.S. at 21 (quoting *Dionisio*, 410 U.S. at 9–10, 14). In his *Davis* dissent, Justice Stewart had offered a similar formulation for identification evidence that might permissibly be obtained with less than probable cause: "Like the color of a man's eyes, his height, or his very physiognomy, the tips of his fingers are an inherent and unchanging characteristic of the man." 394 U.S. at 730 (Stewart, J., dissenting).

181. 407 U.S. 143, 145 (1972).

182. *Id.* at 144–45.

183. *Id.*

184. *Id.* at 145.

185. *Id.*

186. *Id.*

187. *Adams*, 407 U.S. at 145.

the ground that the initial seizure of the gun in his waistband did not meet *Terry* standards for reasonable suspicion, because of the inherent unreliability of a tip from an informant.[188] The Supreme Court reversed the Second Circuit's grant of habeas corpus relief, in the process laying down standards for establishing reasonable suspicion through an informant's tip.[189]

Performing a *Terry* analysis, the *Adams* majority concluded that the police officer acted reasonably in his response to the informant's tip, in part because the officer knew the informant personally and had received information from him previously.[190] The indicia of reliability in this case, Justice Rehnquist reasoned, distinguished this informant's tip from an anonymous telephone tip.[191]

> This is a stronger case than obtains in the case of an anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene. Indeed, under Connecticut law, the informant might have been subject to immediate arrest for making a false complaint had the [officer's] investigation proved the tip incorrect. Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.[192]

Adams thus stands for the proposition that an informant's tip *may* establish reasonable suspicion in the context of a *Terry* stop, but only if the tip has sufficient indicia of reliability. Those indicia might include the recipient's familiarity with the informant and with the information he or she has provided in the past, as well as specific legal consequences the informant might face for providing false information.

Significantly for state interpretations of reasonable suspicion standards attaching to nontestimonial identification evidence orders,[193] *Adams* specifically distinguishes such sufficiently reliable information from that provided by anonymous telephone tips. While the reasonable suspicion standard for a

188. *See id.*
189. *Id.* at 146–49.
190. *Id.* at 146.
191. *Id.*
192. *Id.* at 146–47 (footnote and citations omitted).
193. *See supra* Part II.B.2.

Terry stop may not be simply equivalent to the reasonable suspicion standard required for a nontestimonial identification evidence procedure,[194] *Adams* strongly indicates that anonymous telephone tips do not provide the indicia of reliability necessary to achieve Fourth Amendment reasonableness with less than probable cause.

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194. An interpretation of "reasonable suspicion" that would satisfy Fourth Amendment requirements is one of the crucial areas in which states with nontestimonial identification evidence rules and statutes need guidance from the Supreme Court. The *Davis* dictum, after all, suggested only that "[d]etentions for the sole purpose of obtaining fingerprints . . . might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." Davis v. Mississippi, 394 U.S. 721, 727 (1969).

Dissenting from the majority dictum in *Hayes v. Florida*, Justice Brennan observed that police detention of a suspect for onsite fingerprinting (without probable cause *or* a judicial order) "would have to be measured by the standards of *Terry v. Ohio*" and the Court's other Fourth Amendment cases. 470 U.S. 811, 818–19 (1985) (Brennan, J., dissenting). The *Terry* Court articulated those standards as follows:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (footnote and citations omitted). The *Terry* Court went on to warn, in closing, that a stop-and-frisk ("a protective seizure and search for weapons") "is not justified by any need to prevent the disappearance or destruction of evidence of crime." *Id.* at 29 (citing Preston v. United States, 376 U.S. 364, 367 (1964)). Instead, such a warrantless search, in the absence of probable cause to arrest, may be justified only by the "protection of the police officer and others nearby." *Id.*

Because the reasonable suspicion necessary for a *Terry* stop thus is anchored, at least in part, in situations of immediacy, and because such immediacy is likely to play a limited role in applications for judicial orders for nontestimonial identification procedures, it is not clear how the *Terry* standard should bear on the reasonable suspicion standard in the state rules and statutes.

IV. A MODEL RULE

The *Davis* dictum's legacy has provided states with a powerful investigative tool, but one that is vulnerable to challenge because of its occasionally troubling Fourth Amendment implications. This section proposes a model nontestimonial identification evidence rule that would both serve the interests of the criminal justice system and eliminate those troubling constitutional implications. The Model Rule, included in full in Part IV.A, brings together positive elements of the state rules and statutes discussed in this Comment, while addressing issues that those rules and statutes have provoked in the state appeals courts.

A. Model Rule of Criminal Procedure 41.1: Court Order for Nontestimonial Identification[195]

(a) **Authority to Issue Order.** A nontestimonial identification order authorized by this Rule may be issued by any judge of the Supreme, District, Superior, or County Court, or Court of Appeals.

(b) **Time of Application.** A request for a nontestimonial identification order may be made prior to the arrest of a suspect, after arrest and prior to trial, or, when special circumstances of the case make it appropriate, during trial.

(c) **Basis for Order.** An order shall issue only on an affidavit or affidavits sworn to or affirmed before the judge and establishing the following grounds for the order:

(1) That there is probable cause to believe that an offense has been committed;

(2) For the non-intrusive identification procedures described in § (o)(2), that there are reasonable grounds, not amounting to probable cause to arrest, to suspect that the

195. The proposed model rule brings together elements of the state rules and statutes discussed in this Comment. *See* COLO. R. CRIM. P. 41.1; ARIZ. REV. STAT. ANN. § 13-3905 (West, Westlaw through first 2007 Sess.); IDAHO CODE ANN. § 19-625 (LexisNexis through 2007 Sess.); IOWA CODE tit. XVI, subtit. 2, § 810 (LexisNexis through 2006 legislation); NEB. REV. STAT. § 29-3301 to -3307 (West, Westlaw through second 2006 Sess.); N.C. GEN. STAT. § 15A-271 to -282 (LexisNexis through 2006 Sess.).

person named or described in the affidavit committed the offense;

(3) For the intrusive identification procedures described in § (o)(3), that there is probable cause to suspect that the person named or described in the affidavit committed the offense;

(4) That the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named or described in the affidavit committed the offense; and

(5) That such evidence cannot practicably be obtained from other sources.

(d) **Issuance of Order**. Upon a showing that the grounds specified in § (c) exist, the court shall issue an order directing the person named or described in the application to appear at a designated time and place for nontestimonial identification procedures. The order shall direct that the designated nontestimonial identification procedures be conducted expeditiously.

(e) **Contents of Order**. The order shall be directed to the person named or described in the application and shall inform the person of all of the following:

(1) That the presence of the person is required for the purpose of conducting or permitting nontestimonial identification procedures in order to aid in the investigation of the criminal offense specified in the order;

(2) The time and place of the required appearance;

(3) The nontestimonial identification procedures to be conducted, the methods to be used, and the approximate length of time the procedures will require;

(4) The grounds to suspect that the person named in the order committed the criminal offense specified therein;

(5) That the person will be under no legal obligation to submit to any interrogation or to make any statement during the period of the person's appearance except for that required for voice identification;

(6) That the person may request the court to make a reasonable modification of the order with respect to time and place of appearance;

(7) That if the person fails to appear for the specified nontestimonial identification procedures, the person may be held in contempt of court;

(8) That if, at the time of the disposition of the evidence, there is not probable cause to arrest the person for the criminal offense specified in the order, and the court directs that the evidence be preserved, the right to counsel, including the right of indigent persons to appointed counsel, shall apply for the petitioning process described in § (k)(4);

(9) That the person may request that the court modify or vacate the order as provided in §§ (l) and (m);

(10) The names of any persons making affidavits for issuance of the order;

(11) The name of the person issuing the order; and

(12) Any other conditions which the issuing court believes necessary to properly protect the rights of the individual named or described in the order.

(f) **Service of Order.**

(1) The order issued pursuant to this rule shall be served by a peace officer by delivery of a copy of the order to the person named or described in the order.

(2) The peace officer shall make every reasonable effort to ensure that service of the order does not give the appearance of an arrest.

(3) The officer serving the order shall give a copy of the order to the person upon whom it is served.

(4) If the issuing court finds reasonable cause to believe that the person named or described in the order may flee, or may alter or destroy the nontestimonial identification evidence sought, the court may direct a law enforcement officer to bring the person before the court. Upon presentation of the person, the court shall read the order to the person and afford a reasonable opportunity for the person to consult

with a lawyer and to seek modification or vacation of the order. The court may then direct the person to participate immediately in the designated identification procedures. After the procedures have been completed, the person shall be released or charged with the offense specified in the order.

(g) **Time of Service**. A peace officer shall serve the order upon the person named or described therein within five days after its issuance, excluding Saturdays, Sundays, and legal holidays, between the hours of 8:00 a.m. and 12:00 midnight. The order shall be served not later than twelve hours prior to the time of the person's required appearance.

(h) **Implementation of Order**.

(1) Nontestimonial identification procedures may be conducted by any peace officer or other person designated by the court. Blood tests shall be conducted under medical supervision, and the court may require medical supervision for any other test ordered pursuant to this section when such supervision is deemed necessary. No person who appears under an order of appearance issued pursuant to this rule shall be detained longer than is reasonably necessary to conduct the specified nontestimonial identification procedures, unless the person is arrested for an offense.

(2) The order may be implemented only within ten days of its date of issuance. If the order is not implemented within ten days, a new order may be issued, pursuant to the provisions of this rule.

(3) No search may be made of the person who is to give nontestimonial identification evidence, except a protective search for weapons, unless a separate search warrant has been issued.

(4) No person may be detained for more than three hours for the purpose of implementing an order issued pursuant to this rule.

(5) The person implementing the order shall make every reasonable effort to ensure that such implementation does not give the appearance of an arrest.

(i) **Failure to Comply**. Any person who fails to comply with a nontestimonial identification order issued and served

pursuant to this rule may be held in contempt of the court that issued the order.

(j) **Return.** Within ten days of the implementation of the order by completion of the nontestimonial identification procedure(s), the order shall be returned to the issuing court. The court, the prosecuting attorney, and the person who was the subject of the order shall be furnished with a written report of the results of any tests or comparisons utilizing the evidence obtained in the authorized procedures. This report shall be disclosed promptly after it becomes available unless the court directs that disclosure be delayed.

(k) **Disposition of Evidence.**

(1) If, at the time of the return, the nontestimonial identification evidence demonstrates definitively that the person named in the order could not have committed the criminal offense specified therein, the court shall direct that the products of the nontestimonial identification procedures and all copies thereof be promptly destroyed.

(2) If, at the time of the return, the nontestimonial identification evidence does not demonstrate definitively that the person named in the order could not have committed the criminal offense specified therein, but there exists no probable cause to believe that the person named in the order committed the criminal offense specified therein, the court may, in its discretion, either

(i) direct that the products of the nontestimonial identification procedures and all copies thereof be preserved for the remainder of the investigation of the criminal offense specified in the order; or

(ii) direct that the products of the nontestimonial identification procedures and all copies thereof be promptly destroyed.

(3) The products of the nontestimonial identification procedures and all copies thereof may be used as evidence against the person named in the order only in a trial of that person for the criminal offense specified in the order.

(4) If the court directs, under § (k)(2)(i), that the products of the nontestimonial identification procedures and all copies thereof be preserved for the remainder of the investigation

of the criminal offense specified in the order, the person named in the order may, upon the conviction or guilty plea of someone other than that person for the criminal offense specified in the order, or upon other clear cessation of the investigation of the criminal offense specified in the order, petition the court for the destruction of all products of the nontestimonial identification procedures and all copies thereof. Except for good cause shown, the court shall grant the petition.

(i) If the court directs, under § (k)(2)(i), that the products of the nontestimonial identification procedures and all copies thereof be preserved for the remainder of the investigation of the criminal offense specified in the order, the right to counsel, including the right of indigent persons to appointed counsel, shall apply for the petitioning process under § (k)(4). The person named in the order shall be informed by the court of this right at the time that the court directs that the products of the nontestimonial identification procedures be preserved.

(ii) Deprivation of counsel under this section shall be construed as a structural error requiring that a conviction be overturned on appeal.

(l) **Modification of Order**. At the request of the person named or described in a nontestimonial identification order, the issuing court may modify the order with respect to time, place, or manner of conducting the identification procedures if it appears reasonable under the circumstances to do so.

(m) **Vacation of Order**. On motion of the person named or described in a nontestimonial identification order, the issuing court shall vacate the order if the court finds that the order was improperly issued or that there are no longer sufficient grounds for issuance of the order.

(n) **Nontestimonial Identification Order at Request of Defendant**. A person arrested for or charged with an offense may request a court to order a nontestimonial identification procedure. If it appears that the results of specific such procedures will be of material aid in determining whether the defendant committed the offense, the court shall order the state to conduct those procedures under such terms and conditions as the court shall prescribe.

(o) **Definition of Terms**. As used in this Rule, the following terms have the following designated meanings:

(1) "Offense" means any felony, class 1 misdemeanor, or other crime which is punishable by imprisonment for more than one year.

(2) "Non-intrusive nontestimonial identification" means identification by fingerprints, palm prints, footprints, measurement or examination of physical characteristics typically exposed to public view, head hair samples, handwriting exemplars, voice samples, photographs, appearance in lineups, and trying on articles of clothing.

(3) "Intrusive nontestimonial identification" means identification by blood specimens, urine specimens, saliva samples, buccal swabs, specimens of material under fingernails, pubic hair samples, semen samples, vaginal swabs, and measurement or examination of physical characteristics typically not exposed to public view.

(p) **Anonymous tips.** In order to constitute reasonable grounds to suspect under § (c)(2), an anonymous tip must have sufficient indicia of reliability. A tip providing a name and address, without more, will not amount to the reasonable suspicion necessary to issue an order for non-intrusive nontestimonial identification procedures.

(q) **Suppression of Evidence.**

(1) A person aggrieved by an order issued under this Rule may file a motion to suppress nontestimonial identification evidence seized pursuant to such order. The motion shall be granted if there were insufficient grounds for the issuance; the order was improperly issued, served, or implemented; or return and disposition of evidence were not carried out in accordance with this Rule. The motion to suppress the use of such evidence shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court, in its discretion, may entertain the motion at trial.

(2) If evidence is suppressed under § (q)(1), the court may not grant a new order for nontestimonial identification procedures unless the prosecutor has demonstrated by clear and convincing proof that the grounds for the new order are independent from both the grounds for the original order and the products of that original order.

(3) If nontestimonial identification evidence is suppressed and was not gathered pursuant to an order issued under

> this Rule, the court may not grant an order for nontestimonial identification procedures unless the prosecutor has demonstrated by clear and convincing proof that the grounds for the order are independent from the suppressed evidence or products of that suppressed evidence.

B. Fourth Amendment Concerns

Most crucially, the proposed Model Rule addresses Fourth Amendment concerns by distinguishing between non-intrusive and intrusive nontestimonial identification procedures.[196] Drawing on the language and logic of the *Davis* dictum as well as that of Supreme Court holdings in cases involving nontestimonial identification evidence,[197] the Model Rule allows judicial orders to issue under a reasonable suspicion standard for non-intrusive identification procedures but requires such orders to issue under a probable cause standard for intrusive identification procedures.[198] The Model Rule specifies the procedures that fall into each category.[199]

The Model Rule also addresses Fourth Amendment concerns about the use of anonymous telephone tips under the reasonable suspicion standard.[200] While providing the states with ample room to determine whether an anonymous tip contains sufficient indicia of reliability to comprise reasonable suspicion, the rule stipulates that a tip containing nothing more than a suspect's name and address will not meet that standard.[201] Still of great concern in this context is the potential for the rule to be pressed into the service of the sort of ra-

196. *See supra* Part IV.A, Model Rule 41.1(c)(2)–(3), (o)(2)–(3) [hereinafter Proposed Model Rule].

197. *See* United States v. Dionisio, 410 U.S. 1, 14 (1973) (distinguishing between the identifying characteristics that "a person knowingly exposes to the public, even in his own home or office," and those characteristics that the person keeps private (quoting Katz v. United States, 389 U.S. 347, 351 (1967)); Davis v. Mississippi, 394 U.S. 721, 727 (1969) (observing that fingerprinting "may constitute a much less serious intrusion upon personal security than other types of police searches and detentions," because fingerprinting "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search"); Schmerber v. California, 384 U.S. 757, 770 (1966) (emphasizing the "importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt").

198. Proposed Model Rule, *supra* note 196, §§ (c)(2)–(3).

199. Proposed Model Rule, *supra* note 196, §§ (o)(2)–(3).

200. Proposed Model Rule, *supra* note 196, § (p).

201. *Id.*

cial dragnet conducted in *Davis v. Mississippi*.[202] The Model Rule's probable cause requirement for many identification procedures will alleviate this concern to some degree, but the Court should still provide the states with guidance on the use of racial and/or ethnic characteristics, without more, to establish reasonable suspicion.

C. Procedural Safeguards

The Model Rule addresses, in three ways, procedural concerns that have arisen in the state courts. First, the Model Rule provides explicit safeguards for the disposition of evidence. Second, the Model Rule provides a standard by which courts should determine whether to authorize an order for the production of nontestimonial identification evidence after such evidence has been suppressed under the exclusionary rule. Third, the Model Rule provides for a right to counsel under specified circumstances.

1. Disposition of Evidence

The Model Rule mandates that if, at the time the results of the identification procedure are returned to the court that issued the order, there is definitive proof that the person named in the order could not have committed the named offense, the results of the procedure will be destroyed.[203] The Model Rule permits the temporary preservation of the evidence if, at the time of the return, that evidence neither definitively exculpates the suspect nor provides probable cause for the suspect's arrest.[204] In order to address the troubling potential for the products of nontestimonial identification evidence orders to be preserved in state databases, the Model Rule provides that such products may not be used as evidence except in the trial of the person named in the order for the offense specified in the order.[205] Finally, the Model Rule provides for the destruction

202. *See supra* Part I.

203. Proposed Model Rule, *supra* note 196, § (k)(1).

204. Proposed Model Rule, *supra* note 196, § (k)(2).

205. The DNA Identification Act of 1994 permitted states to create databases of the DNA of convicted offenders of specified crimes. *See* 42 U.S.C. § 14132 (1994), *cited in* Dodson, *supra* note 5, at 243 & n.109. The statute's constitutionality has been upheld in various circuit courts of appeals, federal district courts, and state courts. *See* Dodson, *supra* note 5, at 243–44 & n.113. The difference be-

of all such products at the conclusion of the investigation of the specified offense.[206]

2. New Orders After Application of the Exclusionary Rule

When police misconduct or other state misconduct causes nontestimonial identification evidence to be suppressed, the Model Rule requires the state to meet a strict burden before the court will issue a new order to obtain the same or similar evidence.[207] To ensure that the state does not benefit from such misconduct, the prosecuting attorney must provide clear and convincing proof not only that the requisite grounds for the new order are independent from the grounds for the original order, but also that they do not derive from the products of the original order.[208] This provision is fair to the state because it does not punish the prosecuting attorney for police misconduct;[209] it is likewise fair to the defendant because it does not deprive the exclusionary rule of its force (both at trial and in future deterrence).

3. Assistance of Counsel

While required presence of counsel during the identification evidence procedure itself would impose more of a burden on the state than would be justified by the benefit to the person named in the order, the assistance of counsel may have an enormous impact on the petitioning process following disposition.[210] Thus, the proposed Model Rule provides for the right to counsel if the court directs that the results of the identification procedures be preserved, where those results have not created probable cause to arrest. The court may so direct in the interest of facilitating the state's continuing investigation or

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tween the database permitted by the 1994 Act and the sort of database at issue in this Comment is that the former comprises identification evidence taken from those convicted of specified crimes, while the latter would comprise evidence taken from those only under reasonable suspicion of committing crimes.

206. Proposed Model Rule, *supra* note 196, § (k)(4).

207. Proposed Model Rule, *supra* note 196, § (q)(2).

208. *Id.*

209. *See* People v. Diaz, 53 P.3d 1171 (Colo. 2002); *supra* notes 138–48 and accompanying text.

210. *See, e.g.*, State v. Pearson, 551 S.E.2d 471 (N.C. Ct. App. 2001).

prosecution of the offense named in the order.[211] The rule also provides that, in such a situation, the person named in the order must receive explicit notice of the right to counsel, both in the order itself and from the court when it directs that the evidence be preserved.[212] Finally, to ensure that states recognize the petitioning process following disposition as a "critical stage" of proceedings against the suspect,[213] the Model Rule requires appellate courts to treat the deprivation of counsel after disposition as a structural error requiring that a conviction be overturned.[214]

CONCLUSION

The Supreme Court has left the *Davis* dictum hanging for almost forty years. Given the state nontestimonial identification procedures that go well beyond the dictum, the state courts' disagreements on the constitutionality of such procedures, and the changes in technology (most notably DNA testing) since 1969, the Court should grant certiorari on a case challenging one of the state rules or statutes. Until the Court grants certiorari and produces a definitive holding, however, states should revisit their rules and statutes with an eye to addressing the concerns that those rules and statutes have provoked in the state courts of appeals, and thus with an eye to preserving and strengthening a powerful tool of criminal investigation. This Comment's Model Rule offers one path the states might follow in doing so.

211. Proposed Model Rule, *supra* note 196, § (k)(2).

212. Proposed Model Rule, *supra* note 196, § (e)(8).

213. *See* Coleman v. Alabama, 399 U.S. 1, 9–10 (1970) (holding that the preliminary hearing is "a 'critical stage' of the . . . criminal process at which the accused is 'as much entitled to such aid [of counsel] . . . as at the trial itself'" (alteration in original) (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932))).

214. Proposed Model Rule, *supra* note 194, § (k)(4)(ii).