

DNA Database Legislation and Legal Issues¹

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INTRODUCTION

Over the past few years, the number of proposals addressing DNA in the criminal arena has been substantially increasing. Across the country, hundreds of bills were introduced on a variety of issues, ranging from expansion of the offenses requiring a DNA sample to extending the statutes of limitations in cases involving DNA and providing post-conviction DNA testing in certain cases. There is a national trend to expand coverage of state DNA databases to include all felony offenders and a growing recognition of the impact of forensic DNA analysis in resolving "cold" cases and on applications for post-conviction relief.

QUALIFYING OFFENSES

Since passage of the first state DNA database law in 1988 (2), all fifty states, the District of Columbia, and the Federal government have enacted laws authorizing the collection of DNA samples from certain categories of convicted offenders. While all of these laws cover offenders convicted of sexual offenses, the overwhelming majority of state laws now include other violent felonies, such as murder, manslaughter, kidnapping, arson and robbery. Early successes with these CODIS databases and the activation of the National DNA Index System may have served as the catalyst for states to broaden the coverage of these databases beyond sex offenses. Currently, only a few states do not cover additional violent felonies (3). Two-thirds of the country include burglary within their qualifying offenses (4). About half of the states also collect DNA samples from juveniles who are either convicted or adjudicated delinquent for a qualifying offense (5). As a result of successful legislative proposals introduced this year, thirteen states now have the authority to collect DNA samples from all felony offenders (6).

At this time, only two states are authorized to collect DNA samples from persons arrested or indicted for a criminal offense. South Dakota had a law allowing the collection of a DNA sample from persons arrested for certain sex offenses, but that authority was repealed in 1997 (7). Also in 1997, a DNA database law was enacted in Louisiana that authorized the collection of a DNA sample from persons arrested or convicted for certain violent felony offenses, including murder, sexual assault, kidnapping, assault/battery, etc., (8). Because of funding issues, Louisiana has not yet begun to collect from the qualifying arrestees. This year, the Texas Legislature passed a law that authorized the collection of DNA samples from persons indicted for sex offenses, kidnapping and burglary (9). This law applies to persons indicted for the specified offenses on or after February 1, 2002.

FEDERAL AUTHORITY

While the DNA Identification Act of 1994 authorized the Director of the Federal Bureau of Investigation to establish a national DNA identification index, it did not contain the corresponding authorization for the collection of DNA samples from Federal offenders. It was not until December 2000 that Congress passed the DNA Analysis Backlog Elimination Act authorizing the collection of DNA samples from persons convicted of specified Federal felony offenses (10). This Act also authorized the collection of DNA samples from certain District of Columbia convicted offenders and military offenders (11). As the collection of DNA samples from Federal offenders was just beginning, Congress expanded the Federal program to include all "crimes of violence" as well as terrorism-related offenses (12).

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LEGAL ISSUES

CATEGORIES OF DNA DATA THAT MAY BE STORED IN FORENSIC DNA DATABASES

One of the many legal issues surrounding DNA databases is the DNA data that may be stored at the local, state and national level. Federal law clearly addresses the national DNA index and permits the storage and maintenance of DNA data of: 1) persons convicted of a crime; 2) crime scene specimens; 3) unidentified human remains; and 4) relatives of missing persons (13). Many state laws also specify the types of DNA data that may be stored and searched at the state level. An issue may arise when a local or state level database maintains DNA data that cannot be forwarded to the state or national index. For example, a local laboratory has analyzed a DNA sample obtained from a suspect pursuant to a lawful court order and wishes to have that DNA profile searched at the state and national levels. The DNA profile cannot be searched at the national level pursuant to the DNA Identification Act, but in some cases it is not clear if the DNA profile may be searched and/or maintained at the state level. A handful of states expressly prohibit the storage of suspect samples in their state databases, while the vast majority are silent on this issue (14).

This issue has been the subject of litigation in states such as Florida, Georgia, Indiana, Maryland and New York. The courts in these cases held that suspect samples obtained either by consent or pursuant to a court order may be searched against unrelated cases, that is, in cases other than those for which the sample was originally obtained (15). Generally, the courts found that DNA profiles are similar to fingerprints and reasoned as such that they could be maintained by law enforcement authorities for use in other criminal investigations.

Another category of data that was included in many of the original state DNA database laws relates to missing persons (i.e., unidentified human remains and relatives of missing persons). The FBI's CODIS program includes missing persons and related DNA data. Recently, however, two states have enacted new provisions requiring that their missing persons' DNA databases be separate from their convicted offender DNA databases (16). Because the confidentiality provisions of Federal and state convicted offender laws extend to the missing persons data, segregation of this DNA data should not be necessary, especially when there may be legitimate circumstances to search unidentified human remains against the

convicted offender index. Privacy protection for the relatives of missing persons will continue to permit only searching of their DNA profiles against DNA profiles obtained from unidentified human remains.

PRESERVING PROSECUTIONS BY TOLLING THE STATUTE OF LIMITATIONS

More frequently we hear of forensic laboratories going back to review old unsolved or "cold" cases for DNA evidence. One of the issues encountered in analyzing evidence from these "cold" cases may be that the statute of limitations for prosecution of the case has expired or is at hand. There may be several different approaches for addressing this issue: 1) authorize the issuance of a warrant describing an unknown suspect through his/her DNA profile (17); 2) extend the statute of limitations for cases involving DNA analysis of the evidence; and/or 3) repeal or eliminate the statute of limitations in serious violent felony offenses such as sexual assault and kidnapping. Four states passed legislation extending their statute of limitations in sexual assault cases where identity was established through DNA analysis of the evidence (18), and legislation was enacted in a fifth state permitting an indictment to identify a person by listing the genetic information (19).

POST-CONVICTION DNA RELIEF

Perhaps in response to the Sense of Congress included in both the DNA Analysis Backlog Elimination Act of 2000 and the Paul Coverdell National Forensic Sciences Improvement Act of 2000, which encouraged the linking of eligibility for Federal funds to a state's providing for post-conviction DNA procedures, proposals were introduced in many State Legislatures to establish post-conviction DNA procedures for incarcerated persons. To date, nineteen states have procedures to obtain post-conviction DNA testing of evidence (20). Two states amended existing laws that applied to persons sentenced to death or life imprisonment to expand them to persons convicted of a felony offense and serving a term of imprisonment (21). A number of these laws also require the preservation of biological evidence for specified periods to ensure the availability of the post-conviction relief.

REFERENCES

1. Excerpted from a presentation given by M. Dawn Herkenham at the CODIS 7th Annual Users' Conference in Arlington, VA. Ms. Herkenham is employed by Science Applications International Corporation on the CODIS Project.

Ms. Herkenham's article is not intended to reflect the views of the Federal Bureau of Investigation or the United States Department of Justice.

2. Colorado Revised Statutes Annotated §17-2-201(5)(g)(I), (II).
3. Five states do not currently collect DNA samples from persons convicted of either murder or assault: Connecticut, Delaware, Kentucky, Mississippi and New Hampshire.
4. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin and Wyoming.
5. Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Kansas, Louisiana, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington and Wisconsin.
6. Alabama, Colorado, Florida, Georgia, Michigan, Montana, New Mexico, Oregon, Tennessee, Texas, Virginia, Wisconsin and Wyoming. Please note that several of these state laws have future effective dates, such as Colorado, Florida and Texas.
7. South Dakota Codified Laws §23-5-14 et seq.
8. Louisiana Revised Statutes §15:601 et seq.
9. Texas Statutes and Codes §411.141 et seq.
10. P.L. 106-546, 42 U.S.C. §14135a.
11. 42 U.S.C. §14135b, 10 U.S.C. §1565.
12. P.L. 107-56.
13. 42 U.S.C. §14132(a).
14. Alaska, Michigan, Vermont and Wisconsin.
15. See generally, *State v. Washington*, 653 So.2d 362 (1994); *Bickley v. State*, 489 S.E.2d 167 (1997); *Smith v. State*, 734 N.E.2d 706 (2000); *Wilson v. State*, 752 A.2d 1250 (2000); *People v. King*, 232 A.D.2d 111 (1997).
16. California and Texas.
17. Please see John Doe, D1S7, D2S44, D5S110, D10S28, D17S79, Charged with Rape, An Interview with Norman Gahn, *Profiles in DNA*, February 2000.
18. Delaware, Indiana, Kansas and Michigan.
19. Arkansas.
20. Arizona, Arkansas, California, Delaware, Florida, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Michigan, Nebraska, New York, North Carolina, Oklahoma, Oregon, Tennessee and Washington.
21. Tennessee and Washington.