California Being Sued Over DNA Retention Policies

January 7, 2019 - It has been legal in California since 2009 for law enforcement to take DNA samples from suspects at the time of any felony arrests. The state then has the right to use that DNA immediately, even if the suspect has never been convicted of a crime. Those who are acquitted, or who never have their cases go to trial, have a right to have their DNA expunged from the system, but the process is cumbersome and it isn't automatic. In fact, if an arrestee doesn't ask to have their DNA taken out of the state's database, the state will keep in in perpetuity. Last month, a lawsuit was filed against California in an attempt to get the state to change its ways. The goal of the suit is to get California to automatically delete DNA samples from anyone not convicted of a crime.

Since 2009, law enforcement retention of suspect DNA samples has been controversial. But the law allowing it has been upheld in both state and federal courts. Last year, Congress passed a law known as the Rapid DNA Act which makes California's policy of perpetual DNA retention more troublesome. That new federal law allows law enforcement agencies across the country to collect and analyze DNA information from felony suspects at the time of their arrest.

As we mentioned last month, Rapid DNA (RDNA) is a technology that allows police and first responders to analyze DNA samples in a matter of hours, instead of weeks or months. It can only be used to compare a new sample against a known sample, but it brings up a number of troubling privacy issues. These are exacerbated when DNA for people who are never convicted of a crime is added to the database.

The FBI is now in the process of building an RDNA network around the country. It's likely that this network will eventually include access to all of the state databases in the country as well as the FBI's own CODIS database. This will make is significantly more difficult for felons to commit crimes in multiple jurisdictions and go undetected. But it could also make life very difficult for anyone who mistakenly gets caught up in the database.

There has already been one case in California where DNA resulted in someone being charged with murder when he never actually met the person who was killed. As it turns out, the DNA was transferred to the victim by a third party.

Touch transfer DNA has become an issue for law enforcement. As it turns out, every time we touch something we leave our DNA behind. That wasn't an issue when using DNA for identification required a sample of bodily fluids. But the technology is now advanced so much that DNA extraction is possible from the fingerprints we leave behind. Now think about this scenario. You go to visit a friend and when you are leaving his house, you grab the knob on his front door.

Later that day, your friend leaves his house, also using the doorknob. When he does that, your DNA is transferred to his hand. Your friend then decides to hold up a liquor store than youâ€™ve never been too. He puts his hand on the counter and once again your DNA is transferred.

If you think that's far-fetched, it isn't. A paper published in the Journal of Forensic Science in 2016 titled Could Secondary DNA Transfer Falsely Place Someone at the Scene of a Crime? states very clearly that touch transfer could easily lead to the wrong conclusion about a suspect.

Given this, the privacy implications of the case against California really can't be overstated. Without some intervention by the courts to uphold the 4th Amendment rights of people never convicted of a crime, it's almost inevitable that the innocent will get swept up in law enforcement activities for crimes they have no association with. And it's equally inevitable that some innocent people will be convicted of those crimes.
byJim Malmberg
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