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## **Federal court struggles with California DNA collection case**

State hopes DNA break in Grim Sleeper case will persuade judges to allow its program of collecting genetic profiles during felony arrests. The ACLU argues it shouldn't be done until after conviction.

By Maura Dolan, Los Angeles Times

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As state forensic scientists savor their success in using DNA to nab the alleged Grim Sleeper, a federal court is considering shutting down a DNA collection program the state says has helped solve several violent crimes.

During a court hearing last week, a panel of the U.S. 9th Circuit Court of Appeals showed extraordinary interest in an ACLU lawsuit challenging the state's collection of DNA from people arrested, but not necessarily convicted, in felony cases. One judge said the court was struggling.

"All of us on this panel have wrestled with this," said Judge Milan Smith, a George W. Bush appointee. "It is a very hard case." The hearing had been scheduled for 15 minutes. It lasted more than an hour.

Nearly half the states and the federal government now take DNA samples during arrests. Rulings nationwide on the constitutionality of the practice have been divided, and the issue is expected to eventually reach the U.S. Supreme Court.

Among those named as victims in the ACLU's class-action lawsuit was a woman arrested during an antiwar protest but never charged. The state continues to hold her DNA, and her genetic profile is in a criminal database.

Atty. Gen. Jerry Brown strongly defends DNA collection during felony arrests, which the state began last January. He contends that nearly 1,000 DNA samples from unsolved crimes have been matched to DNA taken during arrests, many of them for nonviolent crimes.

Lawyers defending the state program have cited numerous cases like that of Sophia McAllister, an elderly woman murdered in Sacramento in 1989. Police linked the 20-year-old murder to Donald Carter, 56, after his DNA was taken last year during a drug arrest. The drug charge was dismissed, but Carter now faces murder charges, Brown's office said.

DNA from Joshua Graham Parker, 20, arrested this year on suspicion of robbery in Santa Barbara, matched evidence in a 2009 triple murder. Parker now faces murder charges.

Anthony Vega was arrested in Los Angeles County last year on federal drug charges that were later reduced to misdemeanors. But DNA taken during the arrest linked him two Orange County burglaries.

But ACLU lawyer Michael Risher said the state would have solved many of those crimes anyway because two-thirds of felony arrests result in convictions. Some of the matches pointed to convicted felons whose crimes — if committed more recently — would have put them in the database, he said.

"It is simply not useful to put DNA from innocent people in a criminal database," said Risher, a staff attorney with the American Civil Liberties Union of Northern California. "They are not going to be committing crimes in the future."

The ACLU has cited studies showing that a similar expansion of the criminal DNA database in the United Kingdom has not led to a proportional increase in the number of crimes solved.

State officials hope the capture of alleged serial killer Lonnie Franklin Jr., who faces 10 murder charges as a result of a DNA search, will persuade the courts to approve expansion of DNA collection. Indeed, the court mentioned the Grim Sleeper case more than once during the argument.

Franklin, whose DNA was never taken by the state, was caught after evidence from a crime scene partially matched the DNA of his son, a felon whose genetic profile was in a database of convicted offenders.

DNA profiles taken at arrest are kept in a separate database, and remain there even if the individuals are later convicted, state officials say. They cite technical problems for the gap.

The state prohibits familial searches in the arrestee database because of legal concerns. So if DNA from Franklin's son had been taken before his conviction, the state would not have been able to conduct the search that led them to his father.

California arrests about 300,000 individuals each year on suspicion of felonies. About a third are never convicted or even charged. State law permits an innocent person to have his DNA profile removed from the database, but the process can be lengthy and cumbersome and removal is not guaranteed.

The state's defense is complicated by a 2009 9th Circuit precedent that said police in Las Vegas violated the rights of a man whose DNA was taken when he was arrested.

Deputy Atty. Gen. Daniel J. Powell, who is representing the state against the ACLU, has argued that the ruling in the Las Vegas case was based on an entirely different set of facts.

California, unlike Nevada, has a law that authorizes DNA collection for felony arrests and limits the use of the genetic information to identification, Powell said.

California officials won the first legal round in federal district court in San Francisco. In December, U.S. District Judge Charles R. Breyer refused to stop the state from taking DNA

during arrests, and the ACLU appealed.

Noting the disagreement among courts across the country, Risher said they have been far more troubled by the constitutional implications of taking DNA from people who are simply arrested than they have been about DNA collection from the convicted.

"The distinction between someone who has been convicted and someone who has been merely arrested is one of the most fundamental distinctions in our criminal justice system," Risher said.

The federal appeals court could rule at any time.