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ACLU says California DNA law violates privacy

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Challenging a California law that requires police to collect the DNA of all suspected felons, an American Civil Liberties Union lawyer told a federal appeals court Tuesday that the government should not be allowed to take the "genetic blueprint" of someone who hasn't been convicted of a crime.

One-third of the 300,000 Californians arrested on felony charges each year are never convicted, but the state now can "seize, search and analyze the DNA of everyone," attorney Michael Risher told the Ninth U.S. Circuit Court of Appeals in San Francisco.

He said the voter-approved law allowing DNA testing after all felony arrests sacrifices privacy in exchange for questionable gains in identifying criminals.

The three-judge panel questioned whether DNA sampling is a major invasion of privacy, but indicated that the California law may be vulnerable because of a year-old ruling in another case.

Judge Milan Smith said DNA testing, taken with a swab from the inner cheek, is no more intrusive than fingerprinting and is "a really good way of identifying people." He said Risher was asking government officials to be "Luddites (who) can't use modern technology."

But Smith said the court is bound by the precedent of its June 2009 ruling in a case from Las Vegas. That 2-1 decision said police violated the constitutional ban on unreasonable searches when they extracted DNA from a man who was under arrest - but was not suspected of any other crimes - so they could enter it into a criminal database.

'Hands are tied'

If the California case is similar, "our hands are tied" and the court must overturn the law, Smith told Deputy Attorney General Daniel Powell, the state's lawyer. Smith said the state would have to ask the full 27-judge court to order a new hearing before a larger panel, which would have the authority to overturn the Nevada ruling.

Powell argued that the current case is different because California has a law that authorizes post-arrest DNA testing and Nevada does not. He also said the California law protects privacy by making it a crime to release DNA information to anyone but a law enforcement officer.

California voters approved Proposition 69 in November 2004 to expand a previous law allowing police to collect DNA samples only from suspects who had been convicted previously of a sex crime or a violent felony. The new law, implemented in two stages, extended the requirement to anyone who had been convicted of a felony or arrested on a felony sex charge and, starting in January 2009, to anyone arrested on any felony charge.

The lead plaintiff in the case, Elizabeth Haskell of Oakland, was arrested in March 2009 at an anti-war rally in San Francisco on suspicion of forcibly trying to free another demonstrator, but was eventually released without charges, the ACLU said. She said she agreed to provide a DNA sample after police told her she would be charged with another crime and held in jail if she refused.

Under the law, she must wait at least three years from the time of her arrest before seeking to remove her genetic information from the database, a request that either a judge or a prosecutor can veto.

Asked by Judge William Fletcher why the state keeps the DNA of people who were not convicted, Powell said those who know their samples are in the database are "less likely to commit future crimes."

In a news conference before Tuesday's hearing, Attorney General Jerry Brown proclaimed the benefits of DNA evidence as "the fingerprint of the 21st century" and a powerful crime-fighting weapon. "This is no more a violation of privacy than you have when you give up your fingerprints," he said.

Multiple-murder suspect

Brown said the suspect in the Los Angeles "Grim Sleeper" murders, Lonnie Franklin Jr., could have been caught much earlier if police had been allowed to take DNA samples after his numerous felony arrests.

Franklin was arrested last week on suspicion of 10 murders dating back to 1985 after his son was jailed on an unrelated charge and yielded a DNA sample that police said led them to Franklin.

The appeals court pressed Risher about the Franklin case, asking whether the enhanced ability of police to solve "cold cases" might be worth a minor intrusion, which Smith described as "just a better form of fingerprinting."

The ACLU lawyer replied that police could have taken a DNA sample from Franklin after Prop. 69 passed in 2004, when Franklin was on probation for receiving stolen property. Risher also said fingerprinting is "infinitely less invasive" than a bodily intrusion like DNA sampling.

"I shake hands when I meet people," Risher said. "I don't let them put things in my mouth."

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