



## Quarterly Forensic DNAResource Report July 2012

### Special Interest Feature

#### ***Down But Not Out - State Progress on DNA Database Expansion Slows***

##### ***Case Study: Washington State 2012***

US States looking to expand DNA database laws are running into questions on constitutional and individual privacy rights that are preventing progress forward. Where Fourth Amendment concerns are not raised, funding becomes a hurdle to be tackled – but there are solutions for funding, whereas objections based on privacy rights represent a fundamental objection to the basic premise of the bill. The 2012 legislative effort in Washington State provides a good case study on the obstacles to enactment facing these bills in the remaining 25 states.

A third iteration of an arrestee DNA database bill was halted again this year in Washington State. Despite the bill's defeat, HB 2588 progressed further in the legislative process than any of its predecessors. Its successful movement forward can be attributed to the careful process of crafting the bill; tailored to withstand concerns of Washington's strongly Democratic legislature as well as likely review by State and federal courts. The bill also had significant support from a victim of a preventable rape who came forward to publicly support and testify on the bill.

Washington's State Constitution may have more stringent protections on individual privacy and liberties than even the U.S. constitution. Throughout the legislative session, many opponents to the bill legislators referred to "Article 1, Sec. 7" as the location within the state's constitution that would prohibit the legislature from passing arrestee DNA legislation.

One unique provision in the bill would have required probable cause to be found by a judge (not a prosecutor, or a law enforcement officer) before the collected sample could be analyzed for inclusion in the database. This compromise was made to address the logistical concerns of police who need DNA collection regimens to coincide with the existing booking procedures, versus the concerns of privacy advocates who raise issues of bad arrests and racial profiling. However, sometimes compromising with opposition forces does not ultimately guarantee their support of the final bill, and ultimately HB 2588 was pulled from the floor calendar for consideration in the final moments of 2012 legislative session.

Opponents continued to point to other state and federal courts that have weighed in on the policy. With court decisions on this matter becoming increasingly bifurcated, these days you can just as easily find a ruling supporting arresting testing as you can one that calls it a violation of basic Fourth Amendment rights. Like Washington, many states are finding that such a division is not enough to hang their hats on. What is needed is a final decision made by the most influential court in the land – the Supreme Court of the United States.

It appears increasingly likely that the US Supreme Court will be forced to consider this matter, given the split in court decisions. In the meantime, law enforcement and victims are frustrated in attempts to pass this important public safety law that could solve and prevent crime.

## International Developments

### **After 5 Years, Brazil a Safer Place**

A five-year effort to make Brazil a safer place to live was finally realized in May. As a country with one of the highest crime rates in the world, the final passage of legislation establishing what could be South America's largest DNA database is an important milestone.

On May 28, 2012, Brazil's President Dilma Rousseff signed a law to require DNA from convicted criminals to be included in the newly established Brazilian DNA database. The DNA profiles from convicted offenders will be searched against crime scene evidence in unsolved cases. Brazil crime laboratories will utilize the FBI's CODIS software to search for matches (but not connected to the US CODIS system).

The legislative sponsor, Senator Ciro Nogueiro, became passionate about this policy years ago when he met the surviving family members of serial murderer Marco Trigueiro. Trigueiro – a previously convicted violent felon -- paralyzed the entire city of Belo Horizonte with fear when he brutally raped and murdered five women in 2009. "Most of the Belo Horizonte murders could have been prevented if this law had been in place. I am proud of these families for their courage to come to Brasilia to tell their story, and I am proud of my fellow members of Congress who voted to pass this law and make Brazil a safer place," said Nogueiro.

Brazil became the 56<sup>th</sup> country to pass a DNA database law, and only the third in South America following Chile in 2007 and Uruguay in 2011. With a strong DNA crime lab infrastructure and large population, Brazil could potentially become the largest DNA database in Latin America and one of the largest in the world. With the passage of this law, experts believe that other countries in the region could be spurred into action - following suit by passing their own DNA database laws.

### **Arabian Peninsula Continues To Push For Establishment of DNA Database Programs**

Dubai, Abu Dhabi, Qatar and Kuwait have officially begun offender DNA database programs. Over the last few months, others on the Peninsula have also been making progress towards establishing similar programs.

Bahrain is rumored to be close to moving forward, while Oman recently opened a world class crime laboratory with a DNA section built for significant growth. Oman is currently collecting DNA samples from its prison population and hopes to begin testing and expanding its program through a legislative mandate in the near future.

Saudi Arabia is also moving forward with DNA databasing discussions. The second largest country in the Arab world is carefully developing a DNA database policy that will be a model for the region. The country is also

working diligently to build the necessary lab infrastructure. Saudi Arabia hopes to begin their program within the next one to two years.

## **Asian Forensic Sciences Network 4<sup>th</sup> Annual Meeting & Symposium**

The Asian Forensic Sciences Network (AFSN) will hold its 4<sup>th</sup> annual Meeting & Symposium in Bangkok, Thailand November 26-28. AFSN's is the region's largest forensic science conference.

This year, AFSN leadership has invited international leaders in law enforcement to be key note speakers, including United States Congressman Dave Reichert and Dr. Chris Hassell, FBI Laboratory Director.

As many Asian countries look to either establish or expand existing DNA database programs, the annual AFSN conferences become increasingly influential. This year's meeting will be no exception, as attendance from a dozen Asian nations is expected.

## **United States Developments**

### **Legislative Update**

#### Addressing Backlogs

The US Senate Judiciary Committee has passed a bill which would reauthorize the Debbie Smith DNA Backlog Elimination Act through fiscal year 2017. This legislation (S. 250, The Justice For All Act Reauthorization) also makes several changes to the Debbie Smith DNA backlog grants – namely that the grants could be used for counting (and analyzing) those cases with DNA evidence that are buried in local law enforcement property rooms, and not currently counted as “backlog” by laboratories. In order to access this funding, the law enforcement agencies would have to develop a comprehensive plan for “the expeditious collection and processing of DNA evidence.” This plan would be required to incorporate protocols and practices which the US Attorney General is directed to develop in regards to DNA evidence collection and submission, including the following considerations:

- 1) What to collect and forward for testing.
- 2) Order in which evidence from the case should be tested.
- 3) Order in which evidence from different cases should be tested.
- 4) Time period in which evidence should be submitted for testing.
- 5) Time period in which “each state of analytical laboratory testing” should be completed.
- 6) Systems to encourage communication in the status of DNA testing and results among all players in the criminal justice system; from investigators and prosecutors, to the defense counsel, to individual victims.

This bill is now ready for a vote in the full Senate, but with matters regarding jobs and annual appropriations taking precedence, not to mention election year politics, it is not clear how, when or if the bill will be considered this year. After Senate approval, the bill would travel to the House for consideration where its fate is even more uncertain at this time.

## Federal Katie's Law

Also included in S. 250 (the Justice for All Act Reauthorization), is a provision to assist states that have chosen to expand their DNA databases to include arrests for certain crimes. The provision is named in honor of murder victim Katie Sepich and the efforts of her family in advocating for expanded DNA database systems. The grant program would be authorized under the Debbie Smith grant, and would ensure that states which have chosen to expand their programs to include arrestees have access to sufficient funding in the first year of the program to assist with significant start-up costs. A similar proposal passed the House of Representatives in 2010 but was mired in the Senate. This year, the Senate appears to have taken the lead in moving the bill, while its fate in the House is uncertain.

## **Legal Update**

The first six months of 2012 have brought a considerable amount of uncertainty for states that have expanded their databases to include felony arrests. In the first significant legal action impacting arrestee DNA databases of 2012, the 9<sup>th</sup> Circuit Court of Appeals upheld a challenge to the California DNA database statute in *Harris v. Haskell*, a challenge to the California statute for felony arrestee collection.

Shortly after this decision in *Haskell*, in March the US Supreme Court denied cert in the case of *US v. Mitchell* – a challenge to the federal law on arrestee DNA collection. In *Mitchell*, the 3<sup>rd</sup> Circuit Court of Appeals had previously ruled that the federal statute for collection of DNA from persons arrested under federal authority is *not* a violation of 4<sup>th</sup> Amendment rights. Thus, the US Supreme Court's decision against reviewing that case resulted in leaving the 3<sup>rd</sup> Circuit's ruling as precedential – thereby solidifying the constitutionality of the federal law for arrestee DNA collection, for the time-being. Although *Haskell* is under appeal for an en banc review in the 9<sup>th</sup> Circuit, the body of legal opinion on arrestee DNA database laws certainly seemed to be leaning heavily in favor of their constitutionality in early 2012.

In *King v. Maryland*, the Maryland state supreme court ruled against the state's arrestee DNA law. Interestingly, the *King* case highlights proponent arguments for the need for such laws – Mr. King was arrested for a felony and later pled down to a misdemeanor. However, his DNA sample was taken under the Maryland law for the initial felony arrest and was subsequently matched to an unsolved rape. King was tried for that rape, at which time he finally objected to having had his DNA collected, and was ultimately sentenced to life without parole. Because the Maryland law was declared unconstitutional, King now stands to walk free from this conviction unless the US Supreme Court accepts and reverses this ruling.

Meanwhile, in June the Arizona Court of Appeals also came out with a negative decision in *Mario v. Kaipio*. This ruling was limited to only the juvenile DNA collection provisions in state law, but will obviously have an impact on any future challenges to the portions of that statute addressing arrestee DNA collection from adults. This ruling may also be appealed to the US Supreme Court. Meanwhile, in Vermont a series of challenges have been mounted to that state's law and this under appeal to the State Supreme Court.

Given the significant division amongst courts regarding this matter, the US Supreme Court will almost necessarily be forced to settle the matter...eventually. At this time, *King v. Maryland* seems to be a likely case

for the Court to consider. The appeal in *King* is underway, and barring major delays, a decision on acceptance is expected this fall, with oral arguments in early 2013 and a decision out next summer.

## **Backlog / Funding**

The FY 2013 federal spending proposals for the US Department of Justice include levels on par with FY 2012 for forensic DNA programs. Though not yet formally approved by either chamber, the new spending plan includes \$117 million for DNA-related programs, plus another \$4 million for post conviction DNA grants, and \$4 million for SANE/SART training. Given the continuing, significant pressures to further reduce federal spending, the fact that the DNA programs remain uncut from FY 2012 represents a great amount of congressional support for this program. Unfortunately, potential “sequestration” process looms ahead...

In November 2011, a bipartisan, congressional “Super Committee” failed to negotiate an agreement on over \$1 trillion in spending cuts needed to stabilize the national debt. Unless a new agreement is reached soon (and this is not likely to happen), a nine-year “sequestration” process will begin on January 2, 2013 during which \$1.2 trillion in deficit reduction will be achieved through cuts to all defense and non-defense discretionary spending. For FY 2013, we anticipate a roughly 8% across-the-board cut to all non-defense discretionary spending -- or a cut of approximately \$10 million for the DNA program funding, bringing the final amount available for forensic DNA-related programs down to \$107 million in FY 2013.

In future years, Congress will regain its ability to pick and choose where sequester mandated cuts occur (rather than visit across-the-board cuts on all programs). This will mean a significant effort by interest groups in every sector of the economy, as they fight to protect their programs from further cuts and potential elimination.