
POLICE DNA "SWEEPS" :
A PROPOSED MODEL POLICY
ON POLICE REQUESTS FOR DNA SAMPLES

Samuel Walker

Michael Harrington

Police Professionalism Initiative

University of Nebraska at Omaha

July 2005

TABLE OF CONTENTS

I. Introduction

II. The Model Policy

III. Discussion

 Overview of recent cases and controversies

 Elements of the Model Policy illustrated with reference to specific cases

IV. Recommendations for Action

I. INTRODUCTION

A. DNA “Sweeps”

When should police officers ask a citizen for a voluntary DNA sample related to a criminal investigation?

Several recent cases around the country generated controversy when the police asked large numbers of people for voluntary DNA samples.¹ In some cases more than 1,000 people were asked for sample. Critics argued that the police violated the 4th Amendment rights of those asked for samples because there was no individualized suspicion associating them with the case under investigation. The media labeled the police requests for samples as “DNA sweeps.”

At present there is no model policy or controlling court decision regarding the circumstances under which the police can request voluntary DNA samples without a warrant from multiple individuals. In response to a controversy in Omaha, Nebraska, in the summer of 2004, the Nebraska Legislature enacted a state law restricting the collection of DNA samples from criminal suspects.² The law is discussed in detail later in this report.

¹ Samuel Walker, Police DNA “Sweeps” Extremely Unproductive: A National Survey of Police DNA “Sweeps” (Omaha: University of Nebraska at Omaha, 2004). Available at www.policeaccountability.org.

² Nebraska Unicameral, LB 361. Available at www.state.unicam.ne.us.

DNA evidence is a powerful scientific tool that can provide enormous assistance to officials in all components of the criminal justice system.³ It has been used to exonerate over 150 people convicted of crimes they did not commit.⁴ No one doubts that the police have the right to obtain evidence from a criminal suspect under the proper circumstances. The police have a legal right to ask a citizen for permission to conduct a search, as is the case with consent searches in traffic stops. But as the racial profiling controversy has indicated, the process of requesting permission to search involves potential abuses of citizens rights.⁵

Police departments should not be left to their own devices with regard to voluntary DNA samples. Guidance from national experts, based on thoughtful consideration of legal and practical considerations is needed, as is the case with all uses of police powers.⁶ This Model Policy is designed to define the parameters of DNA sample requests that are both constitutional and effective from an investigative stand point.

The proposed Model Policy offered in this report is designed to initiate discussion and debate leading to a policy that would be adopted by law enforcement professional associations and law enforcement agencies.

³ National Institute of Justice, The Future of Forensic DNA Testing (Washington, DC: Department of Justice, 2000).

⁴ For current data and further information see the Innocence Project web site: www.innocenceproject.org.

⁵ See the important discussion of this in David Harris, Profiles in Injustice: Why Racial Profiling Doesn't Work (New York: The New Press, 2002), pp. 33-37, 156-158.

⁶ The basic principle, with examples and a history of its application, is discussed in Samuel Walker, The New World of Police Accountability (Thousand Oaks: Sage, 2005).

B. The Issues

The question of police requests for voluntary DNA samples involves three distinct sets of issues: the legality of such requests; the effectiveness of requesting voluntary DNA samples in solving crimes; the practical impact of DNA sample requests on both law enforcement agencies and communities.

1. The Legal Issues

The taking of a DNA sample is a search under the meaning of the Fourth Amendment.⁷ Consequently, such searches must be guided by constitutional principles. A DNA sample taken under a valid court order raises a distinct and narrow set of issues and is not discussed in this report. At issue here is the question of a request by a law enforcement officer for a voluntary DNA sample.

Law enforcement officers have a legal right to ask for a voluntary DNA sample. Such requests are analogous to “consent searches” in the context of motor vehicle stops.⁸ In both situations, a citizen has a legal right to refuse to grant consent. But as the racial profiling controversy has revealed, there are potential problems in making such requests. In addition

⁷ This report will not attempt to address the large body of case law on searches, generally, or consent searches, specifically.

⁸ This point was discussed at length at a session on DNA sweeps at the PERF Annual Meeting, April, 2005, New York City. See also the Alert published by the Americans for Effective Law Enforcement (AELE): www.aele.org.

to questions of voluntariness and whether it is a knowing waiver of one's rights, there is the question of whether the police are making such requests in an evenhanded and non-discriminatory fashion.

2. *The Effectiveness Issues*

Voluntary DNA samples also raise important questions with regard to their effectiveness in identifying perpetrators and solving crimes. A 2004 report by the Police Professionalism Initiative (PPI) found them to be highly ineffective.⁹ Out of a total of 18 cases from across the country and reaching back into the 1970s, DNA samples were successful in identifying the perpetrator in only one case. That one successful case, moreover, involved the most clearly focused search. The crime was a sexual assault in a nursing home, and the requests for DNA samples was limited to employees known to have access to the victim. Thus, it was not a "sweep" in the same sense as the other cases. (The distinction between these kinds of sweeps is explained in detail in the Model Policy and accompanying discussion, below.)¹⁰

⁹ Walker, Police DNA "Sweeps" Extremely Unproductive.

¹⁰ Since publication of the report, the highly publicized case in Truro, Massachusetts (often referred to as the Cape Code case) added a 19th case. An arrest was made without the benefit of the controversial "sweep" searches. Additionally, an arrest was made in the previously reported Topeka, Kansas "BTK" case, also without benefit of the controversial "sweep" searches.

3. The Practical Effects Issues

Requests for voluntary DNA samples have two important practical effects. The first involve criminal justice agencies. Given the strong evidence about their ineffectiveness as an investigative tool, they represent a serious waste of resources. The most serious waste involves the inefficient use of police officer time. The collection of large numbers of DNA samples also overloads forensic laboratories. Reports from several states indicate serious backlogs in the processing of DNA samples. It is a serious mistake, therefore, to further burden laboratories with additional samples arising from sweeps that are highly unproductive. Tests are also expensive, and consequently impose a dollar cost on already financially strapped agencies.

DNA sweeps also impose costs on communities affected and on police-community relations. Particularly in African American and Hispanic communities, they reinforce the impression that the police are stereotyping people of color, and as a consequence aggravate long-standing tensions that community policing and other efforts are designed to overcome.

II. PROPOSED MODEL POLICY ON POLICE REQUESTS FOR DNA SAMPLES

Guiding Principles

Obtaining a DNA sample from an individual is a search within the meaning of the Fourth Amendment. Whether seeking a DNA sample through the voluntary cooperation of the individual or through a court order, police officers must conform to the requirements of the law. While it is true that the police have a legal right to ask for a voluntary DNA sample, such requests should not be made indiscriminantly. The following policy is designed to provide guidance for law enforcement officers and agencies on the circumstances that permit a request for a voluntary DNA sample.

I. Requests for Voluntary DNA Samples

Police requests for voluntary DNA samples are permissible only when police officers have specific credible evidence linking a person or very small number of people with a crime.

Commentary

The language and the basic principle in this Model Policy is adapted from the model policy on traffic stops proposed by the Police Executive Research Forum report, Racially Biased Policing. The policy states states that officer may take into account the race or ethnicity of a driver only where there is “trustworthy, locally

relevant information that links a person or persons of a specific race/ethnicity to a particular unlawful incident(s)."¹¹

The following section illustrates the policy by outlining four categories of requests for voluntary DNA samples. In the first three categories, a request for a voluntary DNA sample is not permissible. In the fourth scenario a request is permissible.

A. Broad Requests

Broad requests for DNA samples from individuals about whom there is no specific credible evidence are not permissible.

A broad request involves asking for DNA samples of between dozens and hundreds or even thousands of individuals. In such cases there is no credible evidence linking the subjects to the crime.

Generally, broad requests identify subjects on the basis of two categories: gender and race. Typically, the description of the suspect is limited to a "white male" or "African American male."

B. Limited Requests

¹¹ Lorie Fridell, et al., Racially Biased Policing: A Principled Response (Washington, DC: Police Executive Research Forum, 2001), Chapter 4.

Limited requests for DNA samples involving 10 to 25 individuals are not permissible.

Limited requests typically involve either more identifiers or simply fewer individuals than broad requests. In addition to gender and race, the description of the suspect might involve area of residence or place of employment. Nonetheless, despite this additional information and the smaller number of individuals involved, limited requests do not meet the standard of specific credible evidence linking a person with the crime being investigated.

C. Narrowly Focused Requests

Narrowly focused requests for DNA samples are not recommended. A narrowly focused requests involves specific credible information linking more than one suspect to a crime.

Narrowly focused requests involve several identifiers linking a small number of individual suspect to a crime. For example, the description of the suspect might include gender, race, place of employment, and perhaps other information that greatly narrows the list of possible suspects. Even if this resulted in as few as three suspects it would still not meet the standard of individualized suspicion.

D. Individualized Suspicion Requests

Requests for voluntary DNA samples based on individualized suspicion are permissible.

Because of DNA sample is a highly intrusive search, requests for samples should meet the same standard as other searches. That standard should be individualized suspicion that the person in question was the perpetrator.

COMMENTARY

This Model Policy follows the new 2005 Nebraska statute which reads, "No DNA sample shall be obtained from any person for any law enforcement purpose in connection with an investigation of a crime without probably cause, a court order, or voluntary consent as described in subdivision (2) of this section;"¹²

Section (2) requires that a sample "is knowingly and voluntarily given;" that the person be "informed by a written advisory that the request may be refused and that refusal does not provide probable cause or reasonable suspicion to believe that the person has committed a crime," and that "the person signs the advisory;". Section (2) also states that "No threat, pressure, duress, or coercion" of any kind be employed. Section (2) includes other procedural safeguards.

The individualized suspicion standard is a high one and does impose limits on

¹² Nebraska Unicameral, LB 361. www.state.unicam.ne.us

the ability of the police to investigate a crime. Two factors justify this high standard with respect to requests for voluntary DNA samples. First, a DNA sample is a highly intrusive form of investigation. Second, a lower standard, including narrowly focused requests, opens the door for possible abuse and encourages lazy police work. This point is illustrated by several themes that emerge from the reports of the DNA sweep cases reported to date.

The first is that in many cases DNA samples were requested of people about whom there was clearly nothing even approaching individualized suspicion. In several of these cases there is strong evidence that the DNA sweeps were a desperation measure. There was a vicious crime and understandable community fear; the police had exhausted traditional investigative steps and found no suspect; the police appeared to be under pressure to appear to be doing something to solve the crime.

The second is that some searches were highly embarrassing to the individuals and their families. In the Omaha case, for example, police officers arrived at people's homes and made their requests in the presence of the person's children.

The third is that in some cases the persons who were asked for samples fell outside the parameters of the reported profile of the suspect. In the Omaha case, for example, DNA samples were requested of people who did not match the height or weight of the suspect as described by victims.

All three of these examples represent lazy and unprofessional police work. One of the lessons of the experience with the Miranda warning and the exclusionary rule is that rules protecting the rights of citizens have the effect of forcing the police to engage

in more professional police work. Limitations on voluntary DNA samples would have the same effect: requiring detectives to engage in more thorough investigations and to seek evidence against a suspect only where other possible suspects have been eliminated and there is sufficient evidence against the suspect of whom the requests is being made.

II. Notification of Outcomes

When a person who has given a voluntary DNA sample is found to be not implicated in the crime(s) for which the DNA sample was obtained, that person shall be immediately notified in writing of that fact.

III. The Retention and Disposal of DNA Samples

No DNA sample shall be retained by any criminal justice agency in cases where the person has been found to be not implicated in the crime(s) for which the sample was obtained. All such samples shall be delivered to the person within ten days after the notification required in Section II, above.

III. DISCUSSION

To better illustrate the three categories of DNA searches in the policy, what follows are descriptions of some of the more recent DNA searches conducted in the United States. [cite earlier report] These descriptions are not comprehensive, but never-the-less can promote further discussion of the topic for development of the model policy.

A. Broad Requests

Baton Rouge, Louisiana

Of the more recent cases involving police use of DNA searches, the Baton Rouge, Louisiana search has drawn considerable criticism. In the search for a serial rapist, based on a forensic profile, in 2002 Baton Rouge Police began gathering DNA samples from white males. Additional information directed police to individuals who may have driven a white pick up truck. Men who refused were fearful of public exposure as a suspect and complied with police requests. Critics of the Baton Rouge search claim that many were coerced into giving samples. The use of DNA was criticized due to lack of other investigative activity that would have cleared individuals. In all, over 1200 men were sampled. A suspect was later arrested, convicted and sentenced to death in the case. Derrick Todd Lee is an African American and did not drive a white pick-up truck. His arrest and conviction came through the investigation of an unrelated incident.

The DNA samples gathered were not returned or destroyed after suspects were eliminated. Some of those who were sampled have filed suit to have their DNA returned or destroyed.

Charlottesville, VA

From 1997 to 2003, Charlottesville, Virginia had experienced 6 sexual assaults that were linked through DNA evidence. Using a composite sketch, the police began requesting DNA from African American males in November of 2002. In 2003, the sixth victim provided a more detailed description of the suspect. Following the sixth incident police increased the intensity of the DNA search process. The decision to request a DNA search was based on three factors. First, police receiving a phone tip identifying a possible suspect, those with a history of sex crimes and burglaries, and 911 calls which alert authorities of a man who resembles the composite sketch. Approximately 200 men were searched with a cheek swab. Following considerable criticism from community leaders, the Charlottesville Police conducted a more detailed investigation of individuals prior to requesting a DNA sample. In addition, all samples which excluded individuals as suspects were destroyed.

Truro, MA

When the investigation of the January 2002 murder stalled, Truro, MA Police announced in early 2005 their intention to gather DNA samples of all males who were year

round residents of the small community (approximately 790). A limited DNA search of those who were close to the victim or had a prior relationship had already been excluded. The new search did not have any other parameters to exclude potential suspects. In April 2005, a suspect was arrested based on the initial DNA search of those who had access to the victim. The accused was the trash collector at the time and his DNA was not processed for over a year.

B. Limited Requests

Muncie, IN

Following the break in and rape of a 7 year old girl, police in Muncie, Indiana gathered DNA from 23 men who lived in the neighborhood. The decision to sample a suspect was based on their residence being in the neighborhood of the victim. A suspect was later arrested when his DNA from an unrelated case was matched to DNA from the crime scene.

Omaha, NE

Following the rape of four African American women in two years, Omaha police conducted a DNA search in an attempt to identify a suspect. Based on a broad physical description police sought samples from African American males, 5'3" to 5'9", stocky, a large

stomach and weighed 175 to 250 pounds. Additional information had police focused on employees of the local power company. It was reported that 36 samples were gathered, some of which did not meet the broad composite description of the suspect. No suspect has been identified in the case.

C. Narrowly Focused Requests

Lawrence, MA

In 1998, a comatose female resident of a Lawrence, MA nursing home gave birth to a premature baby girl. The patient had been a resident of the facility for 5 years in a drug induced coma. The DNA search focused on male employees of the nursing home who would have had access to the victim. The DNA search identified a certified nursing assistant of the facility who was subsequently charged in the case.

Notification and Disposal Issues

Section II of the policy regarding notification to people found not to be implicated in the crime(s) under investigation is adapted from the 2005 Nebraska statute.¹³ For a person not to be informed that he or she is definitely not a suspect in a crime is a source of great

¹³ Nebraska Unicameral, LB 361. www.state.unicam.ne.us.

personal stress. Basic standards of decency require that people who have been cleared of suspicion be promptly notified. A written record of such notifications ensures that law enforcement agencies can be held accountable for complying with this requirement.

Section III of the policy requiring the return of voluntarily given DNA samples is also adopted from the 2005 Nebraska statute. Basic standards of fairness require that law enforcement agencies not retain personal information about a person who is not a criminal suspect. Failure to return any such evidence only creates distrust of the police and damages police-community relations.

IV. RECOMMENDATIONS FOR ACTION

The Need for a Model Policy

Local law enforcement agencies should not be left to their own devices on the subject of voluntary DNA searches. A model policy, based on thoughtful consideration of all the relevant issues, is needed. The principle of guiding law enforcement actions on the use of police powers is a fundamental principle of sound management.¹⁴ Formal policies based on

¹⁴ James J. Fyfe, et al., Police Administration, 5th ed. (New York: McGraw-Hill, 1997), Chapter 15.

all the relevant considerations exist in the areas of deadly force, less lethal force, vehicle pursuits, domestic violence incidents, and other critical incidents involving the use of police powers.¹⁵

The Role of Law Enforcement Professional Associations

Law enforcement professional associations have a high responsibility to develop a model policy regarding voluntary DNA sweeps. They already have a long history of developing such model policies in other areas, and need to address this issue as well. The International Association of Chiefs of Police (IACP) maintains a Policy Center which has developed model policies on a large number of issues. The Police Executive Research Forum (PERF) has also developed model policies on issues.

State professional associations have an important responsibility to act where there is no national model or where existing national policy is deemed inadequate. State associations may be able to act more quickly than national associations in areas where new technologies or other circumstances have introduced new issues. State policies can also contribute to the development of national policies. The Wisconsin Department of Justice Law Enforcement Standards Bureau, for example, is developing a state policy on the use of "tasers."

The Role of Community Groups

¹⁵ Walker, [The New World of Police Accountability](#).

Community groups have an important role in the development of a model policy on voluntary DNA searches. Community groups, after all, represent citizens who are the ultimate consumers of police services. Such community groups may include national professional associations and/or local geographically-based communities affected by DNA searches. The role of community groups is twofold. First, they can take the lead in demanding that the law enforcement profession address this issue. Second, they should be represented on the task forces or committees that develop a model policy on DNA searches.

The Role of the U.S. Department of Justice

The U.S. Department of Justice (DOJ) also has an important role to play. The Justice Department can convene a national conference to discuss the issue and speed the development of a national consensus of opinion. Various branches of DOJ can provide funding to facilitate discussions and the development of policy. The National Institute of Justice can fund research on such questions as the prevalence of DNA testing and its effectiveness in the criminal justice system. The Special Litigation Section of the Civil Rights Division has incorporated various controls over use of force in consent decrees and memoranda of understanding settling pattern or practice suits against law enforcement agencies. Such provisions establish a de facto model policy on the issue in question.

The Role of State Legislatures

In 2005 the Nebraska Unicameral enacted a statute governing the collection of DNA samples from persons suspected of involvement in a crime or crimes. Important sections of this Model Policy are adapted from that law. Legislatures in the other 49 states may also choose to enact similar legislation.

Contact Information:

Samuel Walker

Department of Criminal Justice

University of Nebraska at Omaha

402-554-3590

samwalker@mail.unomaha.edu