

# DRAFTER'S CHECKLIST FOR ARRESTEE DNA LEGISLATION

## SEPTEMBER 2011

### o TYPES OF FELONY ARRESTS

*ISSUE: Should DNA samples be collected for all felony arrests? Or only for certain felony arrests, such as violent felonies or burglary?*

13 states have enacted laws to require DNA from all felony arrestees. 10 states have limited their collections to only felony arrests for violent crimes and burglary, and 3 states collect from violent felony arrests only. A smaller group of arrestees will mean fewer logistical difficulties in implementing the new policy and will also reduce the fiscal note. However, failing to collect from all felony arrestees – and especially burglary – will necessarily result in missed opportunities to solve more crimes. If a database limited to only violent felony convictions reduces a DNA database hit rate by 80% (as Virginia studies have proven), then a limitation to only violent felony arrests would have a corresponding reduction in hit rates. Another possible consideration is a phased-in expansion – California, Kansas and Florida added arrests for violent and sex offenses immediately, with provisions for an automatic phase-in to all felony arrests in over a number of years.

### o COLLECTION POINT

*ISSUE: At what point will DNA samples be collected? Shortly after arrest while fingerprints are being taken? Or at some later point where formal charges are laid?*

Collection of DNA at the point where fingerprints are taken (booking stations) will make the most logistical sense for law enforcement and will likely result in the most streamlined approach, using the least amount of resources. A buccal (cheek) swab kit for DNA can be collected at the same time as fingerprints, mugshots, names, etc. A few states have delayed collection until after a finding of probable cause, and a few others require a legal indictment. Requiring a judicial finding provides better certainty to those who may fear false arrests, but also creates a significant amount of logistical problems with collection along with potential loopholes. By creating a separate process for DNA collection, this delay becomes a more significant burden for both the collector (jails) and the collectee (arrestee). As a compromise, a few states (Maryland, Colorado, Utah) have enacted laws to require DNA collection at booking, but delay the data upload to the database until the probable cause finding.

### o SAMPLE DESTRUCTION

*ISSUE: Should DNA samples from felony arrestees be maintained at the state laboratory for quality purposes? Or should the laboratories be required to destroy the sample once a profile has been generated?*

Arguments may arise that by destroying the DNA sample after a profile is generated, the ability to retest it for other, unlawful, purposes is also eliminated. However, destroying the sample will also destroy routine quality assurance measures for DNA – a cornerstone of this forensic science. Once a match is made on the database, the first step a lab will undertake is to retest the original sample to ensure that no mistakes were made – *before* the match information is provided to law enforcement for further investigation. Not only does this provide quality assurance, but it also proves additional privacy protections for those individuals who could be falsely named due to an unidentified lab error (to date, this has never happened with database matches, due to quality assurance checks). Additionally, if a mistake is ever discovered on the database, the laboratory needs to have the original samples in order to determine exactly where the mistake was made and how large that mistake was. Without those original samples laboratories may be forced to conclude that the entire database is potentially corrupted. It should also be noted that advocating sample destruction will almost necessarily put legislators in a position of attempting to legislate best science practices that run counter to those advocated by the state's leading forensic laboratories and experts.

o **PROFILE EXPUNGEMENT**

*ISSUE: Should an arrestee's DNA profile be expunged from the database if the arrest does not result in a conviction? If so, should expungement be automatic or at the request of the arrestee?*

**Federal law requires that a state establish some sort of expungement process for individuals to request that their information be removed in the event that they are not convicted of the crimes for which they were arrested.** This is a necessary provision of any arrestee DNA bill (although arguable the expungement process could be governed through agency rule instead of state law). The question then becomes whether to make the expungement something that occurs automatically, or whether the onus is on the individual to initiate the expungement procedure. One drawback to expunging arrestee samples is that many criminals have extremely lengthy arrest records. Constant expungement will mean fewer hits, but will also mean that DNA tests must be completed over and over again for the same offender who comes in and out of the system. Moreover, the DNA database is not used for any purpose other than criminal investigations. Unlike the fingerprint database, this DNA database cannot be searched for general employment purposes. More importantly, automatic expungement presupposes that crime laboratories have access to information regarding disposition of criminal cases. This simply is not true, and creating such a system typically would require a costly information technology initiative (adding significantly to the fiscal note). For these reasons, many states have opted to provide opportunities for expungement to those who request it. The request process does not need to be burdensome or require additional legal support.

o **PRIVACY & USE RESTRICTIONS**

*ISSUE: Are current provisions sufficient regarding the privacy of collected DNA samples and restrictions on their use?*

Current federal and state statutes specifically limit DNA samples that are collected for the DNA database to law enforcement purposes, only. Any additional provisions clarifying that third parties, such as insurance and employers, may not have access to these DNA samples would always serve to make legislation more palatable.

o **PENALTIES**

*ISSUE: Are penalties for the intentional misuse of DNA samples collected for the database stringent enough to deter mischief?*

Federal law imposes a fine of \$250,000 or imprisonment of one year for each instance of unauthorized disclosure, obtaining or use of DNA data collected for the database. Most states also have penalties, but the fines and/or incarceration sentences vary significantly. Any additional provisions strengthening penalties for the intentional misuse of forensic DNA samples would always serve to make legislation more palatable.

o **FUNDING**

*ISSUE: How will state and local governments pay for the additional collection and analysis costs of requiring DNA from felony arrestees?*

There is federal funding available, which requires no state match, that state and local laboratories can use to increase the capacity of their DNA laboratories. Thoughtful use of this funding would assist a state in building the capacity to adequately handle the increased workload of requiring DNA from felony arrestees. Federal funding is also available to labs to directly off-set the cost of offender DNA sample analysis – also with no match requirement. Moreover, many states are also creating long-term funding sources for their DNA programs by increasing criminal fines for all matter of violations, including parking tickets in some instances. The California law, which was passed overwhelmingly as a voters initiative, pays for arrestee testing by adding a \$2 fee for every \$10 in fines. Several states have already followed this example, on the basis that the DNA database serves a general public safety benefit to the entire population.