

# DRAFTER'S CHECKLIST FOR ARRESTEE DNA LEGISLATION

## ❑ 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?*

Virginia, Minnesota, New Mexico and Texas have limited their laws to require DNA from only certain felony arrestees, while California, Kansas and Louisiana laws require DNA from all felony arrests. 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 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 – both California and Kansas added arrests for violent and sex offenses immediately, with provisions for an automatic expansion to all felony arrests in a few years.

## ❑ 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 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 and by the same person responsible for collecting fingerprint images. However, Texas law was structured to require DNA upon indictment instead of actual arrest, which requires the sample to be collected at a later point in the system. Legislators felt collecting DNA upon indictment would ensure persons were not arrested under false pretenses simply in order to get a DNA sample for the database. As a compromise, Virginia requires DNA samples to be taken with fingerprints, but requires that an arrest warrant accompany the DNA samples submitted for profiling.

## ❑ SAMPLE DESTRUCTION

*ISSUE: Should DNA samples from felony arrestees be maintained at the state laboratory for an indeterminate time? Or should the law enforcement be required to destroy the sample once a profile has been generated?*

Most crime laboratories would prefer to be allowed to retain the DNA sample of arrestees in storage in order to be able to adapt to new technologies and to have ability for retests if quality control checks are needed. However, DNA techniques for testing databased samples is not likely to change significantly (with almost four million DNA samples on the national database, it would be impossible to retest all of the samples). Quality control checks can easily be completed by obtaining another sample from the suspect after a hit is made. Moreover, the assurances given to the general public by sample destruction (ie, no additional genetic testing can be completed if the sample is destroyed), may outweigh crime laboratory desires to retain the samples. Having said this, 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.

## ❑ 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?*

Expungement of DNA samples if an arrest does not result in a conviction has been a common theme in most legislation on the matter. 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. Therefore, arguments for expungement of this record fall short – a DNA sample on the database will only come back to haunt a person if that person's DNA is found at a crime scene. Having said this, in order to share the arrestee profiles on the national DNA index system, **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**

## ❑ 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.

## ❑ 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.

## ❑ 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 \$1 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.