

# COLLECTING DNA AT ARREST:

Policies, Practices, and Implications

## *EXECUTIVE SUMMARY*

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Over the past ten years, the number of individuals with DNA profiles in the National DNA Index System (NDIS) has risen dramatically. Although most of these profiles belong to convicted offenders whose DNA was collected following case disposition, a growing portion of these are associated with individuals whose DNA was collected at arrest or charging. This emerging practice, authorized through legislation passed by Congress and 28 states throughout the country,<sup>1</sup> is designed to add value to criminal investigations by increasing the number of profiles associated with individuals whose arrests do *not* result in conviction, either because no charges are filed, charges are dismissed, or the individuals are found not guilty or are convicted of a non-qualifying offense. In theory, some of these profiles will match with profiles generated from crime scene evidence in NDIS and solve more cases, faster.

Despite their prevalence, very little is known about arrestee DNA laws, their implementation in the field, and their subsequent effects on agency operations and public safety. To address this research gap, the National Institute of Justice provided funding for the Urban Institute (UI) to conduct a study that examined (1) key provisions in arrestee DNA laws, (2) how those laws are being implemented across the country, and (3) the effects of arrestee DNA collection on the growth of databases, the number of hits generated through matches to arrestee profiles, and other measures of effectiveness. UI researchers used complementary data collection methods, including a review of relevant literature, case law, and statutes; interviews with state and federal CODIS laboratory staff, key public safety stakeholders, and other forensic experts; and an analysis of data collected from laboratories and other data sources.

The US Supreme Court's decision about the constitutionality of Maryland's arrestee DNA law (anticipated in June 2013) will determine the future relevance of these findings and implications, including whether attention can move from the threshold question of the practice's constitutionality to the broader questions of whether it is worthwhile or cost-effective and how it could be implemented more effectively.

## KEY FINDINGS AND POLICY IMPLICATIONS

### 1. Provisions governing arrestee DNA collection and analysis vary considerably by state.

Of the 28 arrestee DNA states, 13 align collection practices with convicted offender laws and authorize DNA collection from persons arrested or charged for any felony crime. Fourteen states limit collection to a subset of felonies, typically involving violence, sexual assault, or property crimes. Seven arrestee DNA states also collect from individuals arrested or charged with select *misdemeanor* crimes. One state, Oklahoma, authorizes DNA collection at arrest from "any alien unlawfully present under federal immigration law." Federal law authorizes collection from all arrestees and non-US citizens detained by the US government. In part because of financial concerns, four states that authorize collection for all felony offenses phased-in collection by collecting first from a subset of felonies. Other states limit collection to sub-populations of arrestees, such as adults or those with a criminal history (i.e., repeat offenders).

Collection occurs immediately after arrest as part of the booking process in 21 arrestee DNA states. Although most would agree that individuals who have been arrested for a crime yield certain rights, opinions differ on whether arrest alone (absent a warrant, charging decision, or arraignment)

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<sup>1</sup> A handful of the 28 states that have passed legislation authorizing collection of DNA from those arrested or charged with a qualifying offense were not actively collecting as of July 2012. As a result of the adverse court decision in 2006, Minnesota no longer collects DNA from individuals prior to conviction. Although South Carolina is authorized to collect DNA samples from arrestees, budgetary constraints have prevented implementation. New Jersey's recent law authorizing collection of DNA from arrestees takes effect in 2013.

provides a sufficient legal basis for collecting DNA to outweigh privacy rights. In response to this legal uncertainty, seven arrestee DNA laws require an arraignment, indictment, or judicial determination of probable cause to occur prior to sample collection. An additional three arrestee DNA states authorize sample collection following arrest but require this higher standard of judicial probable cause before a sample can be analyzed.

To ensure that all eligible samples are collected, many states allow collecting agencies to use reasonable force or initiate criminal proceedings if an individual refuses to submit a sample. These agencies are often absolved of responsibility for mistakes in the collection process; 12 states stipulate that profiles derived from samples collected by accident can still be used in a criminal investigation.

2. **Most arrestee DNA laws place the responsibility for expungement on the arrestee but do not specify notification procedures, processing times, or use of profiles.**

Expungement provisions codify a process for removing (or “expunging”) an arrestee profile from CODIS (Combined DNA Index System)—or in some instances, removing the identifying information that links an individual to their profile in CODIS—in the event of case dismissal or acquittal. According to the FBI, “Laboratories participating in the National DNA Index are required to expunge qualifying profiles from the National Index under the following circumstances ... for arrestees, if the participating laboratory receives a certified copy of a final court order documenting the charge has been dismissed, resulted in an acquittal or no charges have been brought within the applicable time period.” Although state arrestee laws comply with these requirements, there is still great variation.

An individual who is arrested but not convicted must initiate this expungement process in 18 states; seven states “automatically” expunge a profile if certain conditions are met; two states place responsibility for expungement on both the state and the individual; and the study team is uncertain about one state. Most states do not require that arrestees be informed of expungement procedures, do not specify a timeline under which a valid expungement request must be processed, and do not address whether hits to profiles after an expungement has been ordered can be used in a criminal investigation. Few expungements occur in states that require the individual to initiate expungement; they occur much more frequently in automatic expungement states.

States’ arrestee DNA laws are summarized in the following table, which indicates the timing of collection and analysis, the scope of collection, and the expungement mechanism. Appendix B provides a more comprehensive overview of each state’s law.

### Snapshot of Key Arrestee Law Provisions by State

State	Year Signed Into Law	Timing of Collection and Analysis				Qualifying Offenses			Expungement Process		
		Collection after		Analysis after		Felonies		Other	By Request	Both	Automatic
		Arrest	Charging*	Arrest	Charging*	All	Some				
		21	7	18	10	13	14	8	18	2	7
AL	2009	x		x		x		x	x		
AK	2007	x		x		x			x		
AZ	2007	x		x			x	x	x		
AR	2009	x		x			x		x		
CA	2004	x		x		x			x		
CO	2009	x			x	x			x		
CT	2011	x		x			x				x
FL**	2009	x		x		x			x		
IL	2011		x		x		x		x		
KS	2006	x		x		x		x	x		
LA	1997	x		x		x		x	x		
MD	2008		x		x		x				x
MI	2008	x		x			x		x		
MN	2005		x		x		x	x		x	
MO	2009	x		x			x			x	
NJ	2011	x		x			x		x		
NM	2006	x			x	x			x		
NC	2010		x		x		x				x
ND	2007	x		x		x			x		
OH	2010	x		x		x			x		
OK***	2009	x		x				x			
SC	2008	x		x		x		x			
SD	2008	x		x		x		x	x		
TN	2007		x		x		x				x
TX	2001	x		x			x		x		
UT	2010	x			x		x		x		
VT	2009		x		x	x					x
VA	2002		x		x		x				x

\* Refers to collection and/or analysis that occurs after charging, arraignment, indictment, or judicial determination of probable cause.

\*\*Florida is currently phasing in its arrestee law, adding additional felony offenses each year. Full implementation, which will authorize collection for all felony offenses, is expected by 2019.

\*\*\*Researchers did not find an expungement provision in Oklahoma law at the time of this review, but the FBI has included it as an arrestee state, suggesting that its expungement policy has been approved.

### 3. The constitutionality of arrestee DNA laws is unsettled.

As of July 2012, courts were split on whether arrestee laws violate the Fourth Amendment's proscription against unreasonable searches and seizures. Courts agree that privacy is diminished upon arrest and charging, but opinions vary on the extent of the reduction and how it is weighed against law enforcement's interest in the DNA collection. Active litigation has disrupted DNA

collection in at least three states. The issue will be resolved in the US Supreme Court based on its review of *Maryland v. King* (2012), in which the Maryland high court overturned the state's arrestee DNA law.

**4. Preparing for arrestee DNA laws can be time and resource intensive.**

Laboratories assumed responsibility for implementing arrestee DNA laws and often responded in creative and innovative ways. Interviews with representatives of state laboratories revealed that laboratories needed time to prepare for implementation. Lab personnel, even if they were not formally designated with the responsibility, often coordinated trainings, ensured sample quality, and oversaw overall compliance. Ramp-up time, provided through delayed effective dates or administrative action, was often needed to (1) change laboratory processes, facilities, equipment, and technology; (2) hire and train new staff; and (3) train collecting agencies.

- *Changing processes.* Many laboratories preparing to receive arrestee samples had to change the chemistry used for analyzing samples and train laboratory staff in new procedures. Some states also made significant infrastructure changes, including renovating/building physical laboratories, purchasing equipment, and updating criminal justice data and laboratory systems.
- *Hiring and training new staff.* About half the states reported an increase in staffing in direct response to arrestee DNA laws. Most states were able to process arrestee samples in a timely manner and reduce the backlog of requests to analyze offender samples.
- *Training collecting agencies.* Laboratories are generally responsible for training collection agencies about new arrestee laws. As states prepared for implementation, training represented a substantial time investment for both laboratory staff and collecting agencies, particularly when most agencies were new to collection and procedures had changed significantly. Many states had collecting agencies that required training on an ongoing basis.

As a result of these changes, the majority of states received some form of state funding to support implementation.

**5. In addition to analyzing more samples, state laboratories take on more administrative work.**

Once laboratories began to receive arrestee samples, laboratory staff spent time on various administrative functions, such as verifying sample eligibility, identifying duplicate submissions, training new collecting agents, and monitoring compliance.

- *Verifying sample eligibility.* States with complex criteria for collection, analysis, and expungement eligibility, such as case status (e.g., an arraignment prompting analysis or an acquittal prompting expungement) and personal characteristics (e.g., age), required a process in place that facilitated regular communication between collecting agencies, courts, and laboratories or that provided laboratories and collecting agencies with regular and automated updates from a case processing database. Even when these systems were in place, monitoring a sample's case status could be time intensive for laboratory staff.
- *Identifying duplicate submissions.* In the field, most collecting agencies had access to systems that allowed them to check if a sample had already been collected, including flags in their criminal history database that indicated when a profile is on file and access to more advanced systems for checking collection information. Despite access to these systems, duplicates remained a problem for many laboratories, which typically removed a sample from the stream

of analysis upon identifying a duplicate. However, some laboratories could only detect a duplicate submission *after* a hit had occurred. These samples incurred collection and laboratory costs, and added little value to the database.

- *Monitoring compliance.* Some state laboratories attempted to gain compliance by notifying collecting agencies if a sample was missing, was received in error, or was missing vital information for analysis on its kit. Although laboratories almost always assumed responsibility for administration and oversight of arrestee DNA policies, they rarely had the legal authority to compel an agency to comply with rules. In general, laboratory representatives identified a need for (1) clarity about roles and responsibilities for implementation, (2) guidelines for ensuring compliance, and (3) a statewide policy that sets collection standards.

**6. Arrestee DNA laws increased the number of samples received by laboratories and profiles in NDIS.**

Between 2006 and 2012, approximately one million arrestee profiles were uploaded to NDIS. This growth in arrestee profiles was accompanied by an overall increase in the number of known profiles and forensic profiles contributed to NDIS. By July 2012, arrestee profiles accounted for one-tenth of total known profiles in NDIS. Data from individual states also reflect a substantial increase in the total number of arrestee samples received.

The number of arrestee samples received by the state laboratory depended heavily on the scope and point of collection. Provisions that required judicial probable cause prior to collection or analysis, that included a narrower scope of collection, or that restricted collection based on offender characteristics—such as criminal history, presence of a DNA profile on file, or age—reduced the number of samples received and profiles entered into the state database and eased the analysis burden on laboratory staff in some states.

Various provisions within the arrestee DNA law, subsequent administrative policies, and collection errors also affected how many samples were analyzed and uploaded as profiles to CODIS. For example, a state's expungement policy influences the number of profiles that are retained in the database. A laboratory's backlog slows processing time, whereas sample prioritization speeds up the process for select samples. The number of samples collected in error (such as duplicate submissions or samples collected from individuals who had not been charged with a qualifying offense), and the laboratory's ability to detect and remove these samples from the stream of analysis, also affects the number of profiles uploaded.

**7. Arrestee profiles lead to more hits, but the extent of this increase is unclear.**

It is difficult to determine the number of hits resulting from arrestee profiles, in large part because most states do not reclassify arrestee profiles as convicted offender profiles upon conviction. As a result, a hit to an arrestee profile may occur after the individual has been convicted and would have submitted a sample anyway. At the NDIS level, the FBI does not yet report data regarding hits associated with arrestee profiles (although it has begun reporting the number of arrestee and convicted offender profiles by state). Most states that provided data for this study indicated the number of hits associated with arrestee profiles, but did not disaggregate further to identify how many were associated with profiles from arrestees who were not subsequently convicted, or how many occurred between arrest and conviction.

Researchers were able to examine hits to arrestee profiles that would not have occurred under convicted offender laws in two states. In both states, arrestee profiles are expunged following case dismissal or acquittal. One state reclassifies arrestee profiles as convicted offender profiles

(following case conviction). The other state collects a profile upon a qualifying conviction, even if the individual already has an arrestee profile on file. If a hit occurs to both an arrestee and convicted offender profile, the hit is counted as a convicted offender hit. Thus, both states are able to isolate the hits that occurred because of their respective arrestee DNA laws. In these states, arrestee profiles did increase the number of resulting hits, investigations aided, and successful prosecutions, though the rate of attrition was considerable.

Analysis of national CODIS data also revealed that increasing the number of forensic profiles in CODIS has a much larger, significant, positive effect on investigations aided than increasing the number of offender (arrestee and/or convicted offender) profiles. While one might conclude that focusing on adding profiles to the forensic index might be more beneficial than adding more profiles to the offender index, it is also important to consider the relative costs— in its FY2012 solicitation, the Department of Justice’s DNA Backlog Reduction Programs’ reimbursement rate for analyzing forensic evidence is, on average, \$1000 per case, and \$40, on average, for each offender profile analyzed and uploaded to CODIS.

**8. Safeguards and compliance monitoring represent important aspects of implementation.**

States that adopt judicial probable cause and automatic expungement provisions have invested substantial resources in tracking case progress (and in the latter provision, expunging profiles). Are these additional safeguards warranted? The risks associated with a profile remaining in the system are hypothetical—non-criminal justice uses are not permitted and there are penalties associated with unauthorized disclosure of profiles or samples (which include the entire human genome). Many laboratories have also invested heavily in training law enforcement agencies to ensure compliance and adherence to proper collection practices.

**9. Looking ahead to the future of arrestee DNA laws.**

States that do not currently have arrestee DNA laws may wish to consider the potential benefits of expanded collection (in terms of a real but limited number of additional hits and subsequent cases resolved), in light of the administrative burdens and costs imposed by collecting from offenders pre-conviction and the legal uncertainty surrounding the arrestee DNA laws themselves. Even if the arrestee laws are ultimately upheld by the US Supreme Court, questions will remain about their effectiveness—particularly from a cost perspective. In a time of scarce resources, there may be sufficient questions to pause and more carefully assess the cost effectiveness of investing in arrestee collection, particularly compared to investing in more analysis of crime scene evidence or even expanding convicted offender laws to all misdemeanants.

In general, determining the added value of arrestee profiles on hits requires isolating those hits that (1) resulted from arrests that *never led to convictions* (whether the profile was eventually expunged or not), plus (2) occurred in the *interval between the arrest and conviction* (which assumes there is a benefit of learning about the hit sooner). To improve their ability to measure this specific impact, states could: (1) change the status of arrestee profiles upon conviction for any qualifying offense (not just the one for which a sample was collected), (2) check the status of a case for which an arrestee sample was collected when a hit occurs, or (3) collect samples at arrest and then again upon conviction; if a hit occurs and an individual has only an arrestee profile in the database, one may conclude that the hit only occurred as a result of the arrestee law. Taking the steps necessary to accurately assess the impact of arrestee laws would cost money that laboratories may not have to spend, particularly if the state expands the scope of DNA collection without additional funding. These changes would also require considerable coordination between laboratories, collecting agencies, the courts, and potentially the district attorney’s office.