

**COLLECTING DNA AT ARREST:  
POLICIES, PRACTICES, AND IMPLICATIONS**

*FINAL TECHNICAL REPORT*

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## Abstract

Collecting DNA specimens from arrestees has become fairly commonplace across the country. More than half the states and the federal government have laws authorizing the collection of DNA prior to conviction, and about one million resulting profiles are now included in the National DNA Index System (NDIS), which matches offender DNA profiles to forensic profiles generated from crime scene evidence. Recognizing that many arrests do not lead to conviction, proponents of collecting DNA from arrestees contend that this practice can help law enforcement identify new suspects in unsolved crimes, resolving cases sooner and preventing additional crimes.

Notwithstanding its potential as an investigative tool, collecting DNA from arrestees raises legal and logistical issues that warrant special study. In fact, courts in several states have overturned their arrestee DNA laws, and the US Supreme Court will address the constitutionality of arrestee DNA laws. To assess the effects and implications of expanding DNA collection to include arrestees, Urban Institute (UI) researchers examined what arrestee DNA laws require, how the courts have interpreted them, and how they have been implemented by state laboratories and collecting agencies. The study also explored how the practice has affected the growth of databases, the number of hits to forensic profiles, and the frequency with which DNA aids investigations. UI researchers employed complementary data collection methods, including: (1) reviewing relevant statutes and case law; (2) interviewing state and federal CODIS (Combined DNA Index System) laboratory staff, key stakeholders, and other forensic experts; and (3) collecting descriptive data from state laboratories.

The study reveals that key provisions of arrestee laws vary across states, particularly with respect to qualifying offenses, point of collection and analysis, and expungement procedures. About half the states with arrestee DNA laws collect for all felonies, with the rest authorizing collection from a subset of felonies. Some states also collect from a subset of misdemeanors. The federal government authorizes collection from all arrestees and detainees. Although most states and the federal government collect these samples after arrest as part of the booking process, ten states require an arraignment, indictment, or judicial determination of probable cause before collection or analysis can occur. For most states, the process for removal—or expungement—of DNA profiles from CODIS upon acquittal or case dismissal requires the arrestee to initiate the process; a minority of states must automatically carry out expungements for eligible individuals. Few expungements occur in states that require individuals to initiate the process.

The study's analysis of state-provided data indicates that arrestee DNA laws have contributed additional profiles in CODIS and additional hits. The study could not estimate the total number of hits for which arrestee laws were solely responsible, i.e., *those hits that would not have occurred without arrestee laws and those that occurred sooner because of arrestee laws*, although this could be determined from publicly available data from two states. A separate analysis of NDIS data also suggests that additional forensic profiles may generate more hits and aid more investigations than offender profiles.

Researchers also find that the implementation of arrestee laws has imposed significant administrative and analytic burdens on many state laboratories and collecting agencies. Even if they were not formally designated with the responsibility, lab personnel often assumed responsibility for implementing the laws. 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. Once the laboratory began to receive arrestee samples, laboratory staff also spent time on various administrative functions, such as verifying sample eligibility, identifying duplicate submissions, training new collecting agents, and monitoring compliance.

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## Introduction

Collecting DNA specimens from individuals who are arrested, but not convicted, has become fairly commonplace across the country. More than half (28) of states and the federal government have passed legislation authorizing the collection of DNA prior to conviction, and more than one million of the resulting profiles are now included in the National DNA Index System (NDIS), which matches arrestee and convicted offender profiles to forensic profiles generated from crime scene evidence. The inclusion of arrestees (see textbox, *What do we mean by “arrestee DNA”?*) in DNA databases can be viewed as a logical next step in the evolution of laws designed to populate CODIS (Combined DNA Index System) with the DNA profiles of individuals who have had some contact with the criminal justice system. This trend also reflects the increasing use of DNA evidence as an investigative tool.

### What do we mean by “arrestee DNA”?

This project uses the term “arrestee DNA” to refer to biological specimens collected from individuals *following an arrest or charging decision but prior to case disposition*. Although collection immediately after arrest – whether or not a warrant has been issued – is the norm, laws in several states require an arraignment, indictment, or judicial determination of probable cause before a sample can be collected or analyzed.

Despite the growing prevalence of this practice across the country, the public safety effects of collecting DNA at arrest have only been addressed theoretically and through limited case studies. To date, no study has systematically examined the effect of arrestee DNA collection on the growth of databases, on the number of hits generated through matches to arrestee profiles, or on other measures of public safety.

Collecting DNA from arrestees also presents a number of distinct legal issues that warrant special study. In fact, the constitutionality of collecting DNA from arrestees has been challenged as a violation of the Fourth Amendment in state and federal courts across the country. The courts at this time are split, and the US Supreme Court has been called upon to resolve the issue.

Finally, an examination of implementation issues, including the activities needed to prepare for and administer arrestee DNA laws, is important to provide information and guidance to states considering expanding DNA collection to arrestees.

This study, conducted by the Urban Institute (UI) for the National Institute of Justice (NIJ), sought to fill these research gaps by considering the following research questions:

1. What states have passed legislation authorizing the collection of DNA from arrestees?
2. How do the laws and policies regarding collecting DNA from arrestees differ by state?
3. How have the courts ruled on these new laws?
4. How have arrestee DNA laws been implemented in each state?
5. What has been the impact of requiring DNA collection from arrestees on state crime laboratories and other involved agencies?
6. What evidence is available to determine the effects of collecting DNA from arrestees on public safety or other criminal justice outcomes?

To address these questions, UI researchers employed several complementary data collection methods, including: (1) reviewing relevant statutes and case law; (2) interviewing state and federal CODIS laboratory staff, key stakeholders, and other forensic experts; and (3) collecting descriptive data from state laboratories.

This report begins by introducing the relevant theory, literature, and case law concerning the collection of DNA from offenders in general and arrestees in particular (section 1). After describing the study's methodology and research methods (section 2), the report then details the key provisions of arrestee DNA legislation, including the scope and timing of collection and analysis, expungement procedures, and oversight and administration (section 3), and then discusses how these laws have been implemented by state crime laboratories, collecting agencies, and other actors in the criminal justice system (section 4). Section 5 explores the effect of these laws on public safety and other criminal justice outcomes. Profiles of five states and the federal government follow (section 6), highlighting the varied experiences states have had implementing their laws. The final section (section 7) summarizes key findings from this report and discusses the study's policy implications.

## 1. Background: Review of the Relevant Literature and Case Law

By authorizing the collection of DNA at the time of arrest or charging, states anticipate more offender profiles in CODIS that can match to forensic profiles and lead to the identification of previously unknown suspects. These matches—or “hits”—should mean more cases solved and more crimes prevented. States also expect to reduce crime by identifying suspects *earlier* in the process, hastening apprehension and detention. In this instance, the anticipated benefit is the prevention of criminal activity from individuals who *would have* committed crimes between the time of arrest and case conviction (incapacitation) and from individuals who know their DNA is on file (deterrence). According to proponents, the ultimate outcome is enhanced public safety as well as greater cost-efficiency in criminal investigations.

While conventional wisdom suggests that more offender profiles will lead to more hits, and thus more investigations aided, such wisdom falls short of conveying the specific value of arrestee profiles. Moreover, there are other issues to consider including the constitutionality of collecting DNA from individuals not yet convicted of crimes. Given these uncertainties, to assess the effects of arrestee DNA laws on government efficiency and public safety, it is important first to examine the theories and assumptions relied upon by those who support—and oppose—arrestee DNA legislation.

This section summarizes the relevant literature, statistics, and case law to explore both the theory and empirical evidence regarding the practice of arrestee DNA collection. It begins by examining how the growth of CODIS has affected public safety, first by reviewing the effectiveness of increasing the number of offender profiles and then by considering the relative investigative value of additional forensic profiles. It then considers the specific effect of expanding CODIS to include arrestee profiles.

### CODIS Overview

The Combined DNA Index System (CODIS) is a software platform that supports the national (NDIS), state (SDIS), and local (LDIS) DNA databases. The term CODIS also refers more generally to the set of databases themselves and to the program that supports them, run by the Federal Bureau of Investigation (FBI). NDIS is managed by the FBI and houses profiles contributed by states and the federal government. Each state maintains its own SDIS, which includes profiles submitted by state and local agencies. Some cities and counties maintain an LDIS, which includes profiles submitted by agencies within the city or county. LDIS profiles may be submitted to the state SDIS in accordance with state requirements. To submit to NDIS, a state must comply with the federal DNA Identification Act, including its quality control and privacy requirements.<sup>1</sup>

Each tier of CODIS is divided into several indices based on the origin of the DNA specimen used to generate the profile, such as convicted offender, arrestee, missing person, and crime scene (forensic) indices. Searches conducted in a state’s SDIS can yield matches from profiles submitted from within the state, while searches conducted in NDIS can match to profiles submitted from multiple states and federal agencies. Matches *within* indices (such as between two profiles in the forensic index) and *between* indices (such as between a profile in the forensic index and one in the arrestee index) can help investigators link crime scenes and identify new suspects.

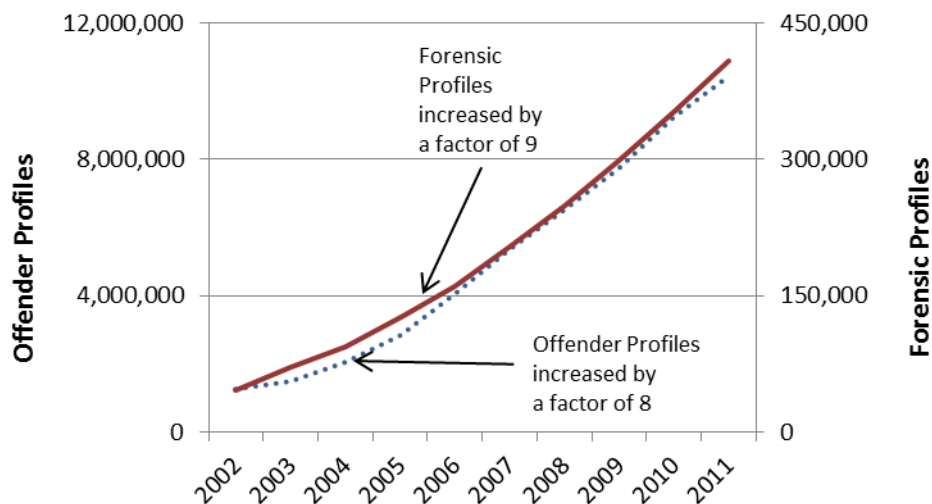
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<sup>1</sup> The Quality Assurance Standards for DNA Databasing Laboratories require laboratories analyzing DNA samples for the purpose of uploading resulting profiles to a DNA database to comport with standards regarding organization, personnel, equipment, analytical procedures, maintenance, validation, outsourcing, safety, and auditing, inter alia (see FBI 2012a).

## Growth of CODIS

Since its implementation in 1998, there has been a dramatic expansion in the number of offender (associated with arrestees or convicted offenders) and forensic profiles available in CODIS. As seen in figure 1 below, the total number of offender profiles in NDIS has grown substantially over the last decade, from 1.2 million profiles in 2002, to nearly 10.4 million profiles as of 2011. Arrestee profiles account for approximately eleven percent (1.2 million) of the total offender profiles in NDIS. During the same time period, the number of forensic profiles also grew (from 46,000 in 2002 to 400,000 by 2011).<sup>2</sup>

**Figure 1. Offender and Forensic Profiles in NDIS: 2002–11**



Source: Federal Bureau of Investigation, Annual CODIS/NDIS Data (appendix H)

The growth in offender profiles has not only been fueled by the federal government’s financial support to eliminate the DNA analysis backlog,<sup>3</sup> but also by a number of changes in federal and state laws that specify the kinds of offender profiles that may be stored in CODIS. Upon its establishment in 1998, all 50 states had laws authorizing DNA collection from at least a subset of convicted offenders. While only 9 states participated in CODIS at its inception, 6 years later (2004), all 50 states participated in CODIS. Today, all states authorize DNA collection from any convicted felon. While states also began collecting DNA from arrestees in the late 1990s and early 2000s—and uploaded resultant profiles into SDIS—the upload of these profiles to NDIS was not authorized until the enactment of the federal DNA Fingerprinting Act of 2005, in January, 2006. After this federal authorization, 22 states passed arrestee DNA legislation.

A substantial body of research supports the value of forensic evidence (Peterson, Sommers, Baskin, and Johnson 2010)—that is, evidence collected from crime scenes—and more specifically, DNA evidence collected from crime scenes (Briody, 2004; Roman, Reid, Reid, Chalfin, Adams, and Knight 2008), in investigations and prosecutions. Although the number of forensic profiles has grown steadily in the last decade, the availability of forensic evidence from crime scenes varies by crime type and is subject to

<sup>2</sup> As of 2009 (the last year for which data are available), 75 percent of all forensic biological requests received by state-funded crime laboratories were to analyze offender samples (Burch, Durose, and Walsh 2012).

<sup>3</sup> *DNA Analysis Backlog Elimination Act of 2000*, 42 U.S.C. §§ 14135-14135e. NIJ began to support the analysis of arrestee samples in late 2006/early 2007.

attrition at each stage of the process. While forensic evidence is a broad term encompassing items recovered from crime scenes (including DNA) research addressing forensic evidence may have implications for DNA found at crime scenes. Peterson and colleagues (2010) found that physical evidence was collected for the vast majority (97 percent) of homicide cases, but at progressively lower rates for rape (64 percent), aggravated assaults (30 percent), robberies (25 percent), and burglaries (20 percent). Similarly, not all collected items were submitted to laboratories for analysis, and of the items submitted, not all were analyzed. Less than 20 percent of rape cases and less than 10 percent of assault, burglary, and robbery incidents had lab-examined evidence. These findings suggested that except for homicide, very few criminal incidents resulted in DNA profiles.

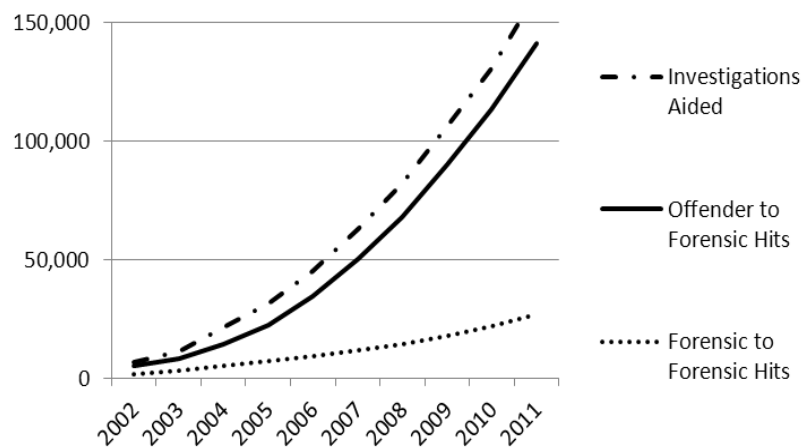
Similar research in the UK supports Peterson and colleagues' (2010) findings. Crime-scene DNA profiles were entered into the UK's DNA database for less than one percent of all recorded crime, and in 2004/2005, only 0.35 percent of crimes were detected using DNA, the same percentage as detected in the two years prior despite the rapid expansion of the United Kingdom (UK) National Database (GeneWatch UK 2006). Further, from a laboratory perspective, because samples collected from crime scenes may (1) be collected improperly, (2) not contain DNA, (3) be composed of multiple substances or degraded, or (4) exist in a variety of formats (e.g., semen, blood), they are not as amenable to automation as single-source samples collected from individuals (Butler 2009). As a result, forensic samples require more laboratory resources to process. As a frame of reference, the Department of Justice's FY 2012 Federal DNA Backlog Reduction Program reimburses participating state and local crime laboratories up to \$40 on average for the analysis and upload of an offender sample, while reimbursing up to \$1,000 on average for the analysis and upload of a forensic sample (National Institute of Justice 2012).

### Measuring the Value of Expansion

One of the chief benefits of the CODIS expansion can be conceptualized as the extent to which it helps solve more crimes by linking individuals to crime scenes. Links (or matches) between offender profiles and forensic profiles—or between multiple forensic profiles—are referred to as hits. Theoretically, increasing the number of profiles in CODIS will increase the number of opportunities for a hit to occur between an offender and forensic profile. Some of these hits will be of probative value to criminal investigations, culminating in a conviction, the incapacitation, or rehabilitation of repeat criminals, and the prevention of new crimes, while other hits will not provide new information to law enforcement.

Indeed, the growth in offender and forensic profiles has been accompanied by a staggering increase in hits; according to FBI CODIS data (see appendix H), the total offender hits occurring at both the national and state levels at the end of 2011 totaled upwards of 141,000, compared

**Figure 2. Hits and Investigations Aided in CODIS: 2002–11**



Source: Federal Bureau of Investigation, CODIS/NDIS Data (Appendix H)

to approximately 5,000 in 2002 (see figure 2). The number of investigations aided, including all *investigations* associated with hits between forensic profiles and offender profiles in CODIS, increased from 6,700 to 162,000 between 2002 and 2011.

Hits between offender and forensic profiles may establish new links between individuals and crime scenes and thus potentially aid investigations. Alternatively, hits may also: (1) confirm a suspect that investigators identified through traditional investigative means and whose DNA would be tested against forensic evidence following the issuance of a search warrant; (2) link a convicted offender to the crime for which he was already convicted; or (3) implicate a known third party not associated with the crime (for example, the boyfriend of an individual raped by an unknown assailant) (Gabriel, Boland and Holt 2010). The FBI considers hits to aid an investigation when they provide “investigative leads for law enforcement in cases where no suspect has yet been identified” (FBI 2012b). However, the definition of “investigations aided” may not be used universally by state crime laboratories—while some track this metric, they are not required to monitor the outcome of criminal cases to which a profile is linked. Instead, laboratories may consider an investigation aided if a hit is reported to the investigating law enforcement agency. As such, cross-agency communication, notably follow-up with law enforcement, is necessary to determine whether a hit added value to an investigation (Gabriel, Boland, and Holt 2010).

A growing body of research has examined how hits contribute to criminal investigations and resulting criminal cases. In the United Kingdom, which currently collects, analyzes, and retains DNA from all arrestees, the Home Office (2006 *c.f.* Wallace 2006) found that the DNA match represented the first link to the offender in 58 percent of all detected cases in 2002–03. Further, Gabriel and colleagues (2010) examined the results of approximately 200 database hits for homicide, sexual assault, and burglary crimes investigated by the San Francisco Police Department. The researchers found that across all cases, the vast majority of hits (90 percent) were probative—that is, they provided investigators with substantive leads. Notably, probative hits did not always lead to a conviction. While a sizable proportion of cases (40 percent) were resolved through conviction, guilty plea, or parole revocation,<sup>4</sup> potentially probative hits were not used in cases that were closed or in cases where prosecutors or victims declined to move forward with the case; for example, nearly half of all sexual assault cases that had a corresponding hit did not move forward as a result of victim or prosecutor declination.<sup>5</sup> These studies suggest that while hits have remarkable *potential* to aid investigations and prosecutions, measuring their ultimate effect requires knowledge of case outcomes, which only about a third of laboratories can access electronically.<sup>6</sup>

Limited research has examined the value of increasing the number of forensic and offender profiles *independent* of each other. Goulka and colleagues (2010) found that hits are more strongly linked to the number of forensic profiles in CODIS than to the number of offender profiles. The researchers postulated that this is because a crime scene profile is always linked to an offender, whereas an offender profile may not be linked to a crime scene (i.e., because the individual has either not engaged in additional criminal activity or because that activity did not result in forensic evidence and a corresponding profile). Similarly, a study of the United Kingdom’s DNA database found that the inclusion

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<sup>4</sup> This finding was preliminary as nearly one third of cases in the study were ongoing investigations or pending judicial resolution.

<sup>5</sup> For example, Spohn (2001) found that prosecutors were more likely to reject charges when victims failed to appear for a pre-file interview, refused to cooperate in the prosecution, or admitted to fabricating charges.

<sup>6</sup> The 2009 Census of Publicly Funded Forensic Crime Laboratories shows that 31 percent of labs have a LIMS with this capability. See Durose, Walsh, and Burch, 2012.

of additional offender profiles (from two million in 2002–03 to three million in 2004–05) did not result in more crimes solved through DNA. One observer noted that, “Given that the detection rate has not noticeably increased and a [higher] DNA-detection rate might be difficult to reach, there seems to be a rapidly diminishing return from adding more individuals to the NDNAD” (Wallace 2006). While the collection of one type of sample does not preclude collection of the other, the relative utility of each is important, and needs to be considered in conjunction with the relative costs of collecting and processing each type of sample.

Proponents of offender database expansion also suggest that increasing the number of offender profiles in CODIS can improve public safety by deterring future criminal activity. This theory assumes that individuals have access to complete information about the potential benefits and consequences of criminal activity and make rational, premeditated choices to engage in that activity. Given that DNA databases have the ability to link an individual’s DNA profile to biological samples left behind at a crime scene with a high degree of certainty, collecting DNA samples from offenders could theoretically deter future criminal activity. Bhati (2010) tested this hypothesis, examining whether the presence of an offender’s DNA profile in a database influenced future criminal activity. The study had mixed results—the inclusion of a DNA profile in a database had a statistically significant deterrent effect on burglary and robbery, albeit small, but was associated with an increase in other crime types, including violent crimes.

The existing body of literature shows that more research is needed to understand the value of expanding the database. While the growth of both the offender and forensic indices will presumably lead to more hits, it is uncertain how jurisdictions can most cost-effectively maximize the utility of CODIS. The Urban Institute has been exploring this research gap in a project focused specifically on cold hits.

#### High Profile Arrestee DNA Cases

A number of high profile cases have galvanized support for collecting DNA at arrest. Proponents have argued that the horrific crimes – typically involving the rape and/or murder of a young woman – could have either been prevented or solved more quickly had an arrestee law been in place. Often cited was Katie Sepich, whose August 2003 rape and murder in New Mexico went unsolved until 2006, when Gabriel Adrian Avila, who was not a suspect in the case, was linked to skin and blood found under Sepich’s fingernails. At the time of the match, Avila, who had been arrested in November 2003 for aggravated burglary, was serving time in the New Mexico Corrections System, where he had been since November 2004. If the state had analyzed Avila’s DNA sample following his late 2003 felony arrest, investigators might also have identified him three years earlier. It is unclear why Avila’s DNA sample, reportedly taken upon his conviction in 2004, was not tested and uploaded until 2006, which might also have helped solve the case earlier.

### Specific Value of Additional Arrestee Profiles

Research demonstrates that a considerable number of individuals will commit multiple crimes (Langan and Levin 2002; Pew 2011), suggesting that collecting DNA from repeat offenders could assist law enforcement in solving crimes. Proponents of arrestee DNA laws recognize that certain individuals who are arrested but not convicted for a qualifying offense<sup>7</sup> have committed crimes (or will commit future crimes) for which there might be forensic evidence. Even those who are ultimately convicted may

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<sup>7</sup> Data on felony defendants’ criminal history reveal that although 64 percent of felony defendants have been *arrested* previously for a felony, only 43 percent of felony defendants have ever been convicted of a felony. Approximately 21 percent of felony defendants have been previously arrested for a felony but never convicted (Cohen and Kyckelhahn 2010).



remain in the community between their arrest and conviction, which could provide an opportunity for additional criminal offending before DNA can be collected, analyzed, and used to establish guilt.

The expansion of offender databases to include arrestees seeks to remedy this gap by identifying new suspects in a criminal investigation and resolving cases faster.<sup>8</sup> Proponents of arrestee DNA frequently cite averted crime as a short- and long-term outcome. Based on findings from their cost-benefit analysis of proposed arrestee DNA legislation in Indiana, Siegel and Narveson (2009) concluded, “with an arrestee law in place, the first time [a criminal] is arrested he will be linked to his long record of anonymous violent crimes, and can be removed from the population and the opportunity to do further harm—saving the government’s cost to investigate, prosecute, and adjudicate those prevented crimes.” In their retrospective case studies exploring the criminal trajectories of known criminals, several jurisdictions have arrived at the same conclusion as Siegel and Narveson, arguing that if DNA had been collected earlier in the individuals’ criminal careers, crimes may have been prevented.<sup>9</sup> These retrospective studies, however, are generally limited to a small group of individuals and they assume that the collection, analysis, and upload of the DNA sample, as well as the resulting criminal justice processing, will proceed seamlessly and without delay.

The arguments these state studies put forth regarding the potential benefits of arrestee DNA collection rest on a number of facts and assumptions, including:

- **Convicted offender laws do not collect DNA from all individuals with justice involvement.** An estimated one in two felony arrests will not result in a felony conviction (see figure 3).<sup>10</sup> Arrestee DNA laws are designed to at least temporarily populate CODIS with the DNA profiles of individuals whose DNA would not be collected under existing convicted offender laws. These individuals include:
  - Those who are arrested for a qualifying offense *but who are not formally charged* (i.e., the case was not filed because the prosecutor declined to prosecute or the courts did not find probable cause to proceed); approximately 18 percent of felony arrests do not result in a criminal case (Prosecution of Felony Arrests 1987; Boland et al. 1989).

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<sup>8</sup> Some advocates also note that arrestee DNA collection can help reduce wrongful convictions by supplying a new suspect on which officers can build a case. Following a conviction, however, an increase in the size of the database offers less probative value because a determination has already been made. Further, as noted by GeneWatch UK (2006), “although DNA can undoubtedly be useful to exonerate the innocent, a database of individual DNA profiles (as opposed to crime scene profiles) is never necessary to exonerate an innocent person, since this can always be done by comparing the DNA profile of the innocent suspect directly with the crime scene DNA profile.”

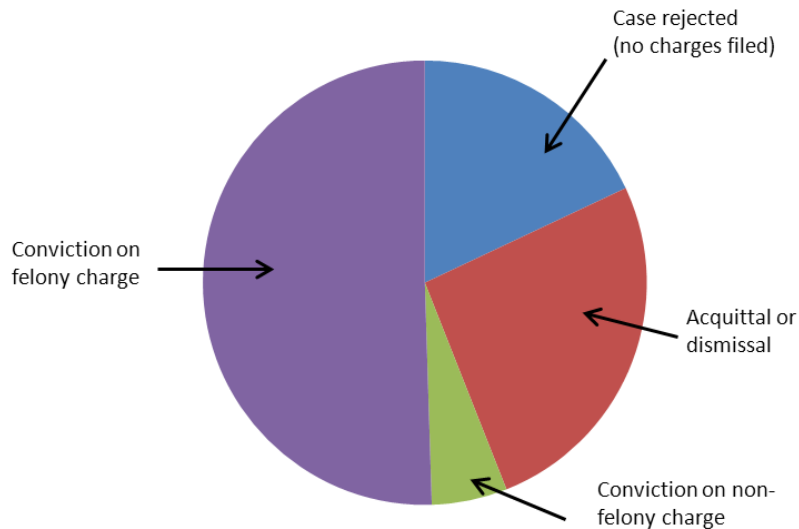
<sup>9</sup> Studies of preventable crimes have been conducted by Chicago (<http://www.dnaresource.com/documents/ChicagoPreventableCrimes-Final.pdf>), Denver ([http://www.denverda.org/DNA\\_Documents/Denver's%20Preventable%20Crimes%20Study.pdf](http://www.denverda.org/DNA_Documents/Denver's%20Preventable%20Crimes%20Study.pdf)), Maryland ([http://www.denverda.org/DNA\\_Documents/MarylandDNAarresteeestudy.pdf](http://www.denverda.org/DNA_Documents/MarylandDNAarresteeestudy.pdf)), and Washington ([http://www.dnasaves.org/files/WASHINGTON\\_STATE\\_PREVENTABLE\\_CRIME.pdf](http://www.dnasaves.org/files/WASHINGTON_STATE_PREVENTABLE_CRIME.pdf)).

<sup>10</sup> Assuming a felony case rejection rate of 18 percent (Boland et al. 1990) and a conviction rate of 68 percent (of which 90 percent are for a felony offense; Cohen and Kyckelhahn 2010), analysts estimate that approximately 50.6 percent of felony arrests result in conviction. Note that disposition rates varied within two percentage points between 1987 and 2006. This estimate includes data from only the largest jurisdictions in the country and considers cases that result in diversion as “dismissals,” although they may result in conviction under certain circumstances.



- Those who are arrested for a qualifying offense *but who are not convicted*; an estimated one in three felony cases results in acquittal or dismissal (Cohen and Reaves 2006; Kyckelhahn and Cohen 2008; Cohen and Kyckelhahn 2010).
- Those who are arrested for a qualifying offense *but who are convicted of a non-qualifying offense*, typically following negotiations between the prosecutor and defense counsel. An estimated ten percent of felony defendants are convicted of a misdemeanor offense, which does not qualify for collection in most states (Cohen and Kyckelhahn 2010).

**Figure 3. Estimates of Felony Arrest Outcomes**



Source: Authors' analysis of data from *Prosecution of Felony Arrests*, 1987; Boland et al. 1989; Cohen and Kyckelhahn 2010. Note that actual rates will vary considerably by state.

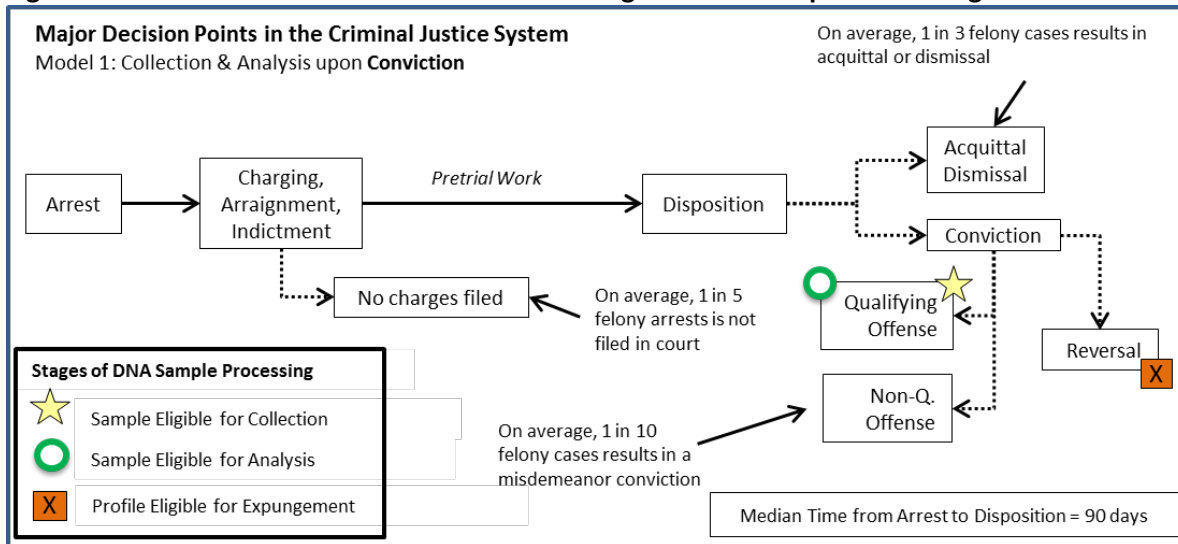
- **DNA can be collected and analyzed before the disposition of a case.**  
Proponents also argue that if samples can be collected, analyzed and uploaded earlier in the process, then hits to forensic profiles will also happen earlier. In theory, a hit that occurs earlier can reduce the amount of time devoted to investigation and case processing. This argument has validity: national data from the 75 largest jurisdictions suggests that felony cases take a median of just over three months from arrest to case disposition, and may take much longer for convictions (Cohen and Kyckelhahn 2010); arrests that are not filed in the courts may be resolved within a matter of days. Hence, the window of opportunity for generating a hit will depend on the speed of laboratory sample processing (see section 4), the speed of court case processing, the frequency of database searching, and the degree to which profiles that qualify for expungement are actually removed from the system. The extent to which these hits could prevent the commission of new crimes (by providing support for pretrial detention) is untested. The extent to which a hit to another case would affect the likelihood of an individual's pretrial detention is unknown.
- **Individuals who have not been convicted of a crime have committed other crimes that can be solved with DNA evidence.**  
Arrestee DNA laws rest on the assumption that some number of arrestees who are not convicted are guilty of additional crimes that could be solved if their DNA profiles were in CODIS.

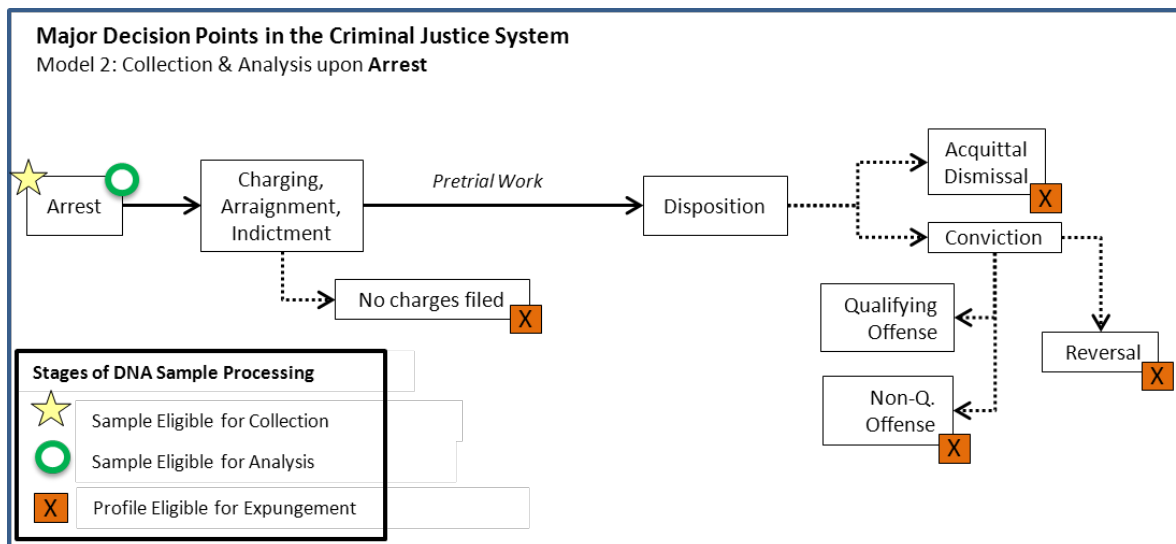
Studies that have tested the effect of theoretical arrestee DNA profiles on hits, investigations aided, and overall public safety have focused almost exclusively on retrospective case studies, as referenced earlier, making it difficult to quantify the magnitude of these laws' effect on public safety. Another study (Siegel and Narveson 2009) estimated the potential cost savings that Indiana could realize by expanding DNA collection to include arrest. The authors estimated the number of additional convictions that would occur if DNA was collected from all arrestees in Indiana based on data from Virginia and the United Kingdom—two jurisdictions that collect DNA at arrest. Using the conviction estimates, the average cost of processing a criminal case in Indiana, and estimates of the number of crimes prevented as a result of successful conviction (based on findings from Roman et al. (2008) and Chicago's Study on Preventable Crimes), the authors projected a broad range of savings from about \$6.4 million to nearly \$59.4 million.

Apart from this limited research, no study to date has examined whether the inclusion of arrestee profiles in CODIS increases hits to forensic profiles and aids investigations that had previously gone unsolved.

In figure 4 below, the first model displays the point at which DNA is collected under post-conviction laws—and highlights the samples that are not included due to natural case attrition. The second model depicts the flow of traditional arrestee DNA collection laws. Individuals who have their DNA collected earlier in the process and individuals who would not have qualified for DNA collection are included in the database. Although some arrests will be warrant-driven and occur after a judicial determination of probable cause, judicial review is not required for collection in this model. Customized models for five states are included in the state profiles section (section 6).

**Figure 4. Models of Criminal Justice Case Processing and DNA Sample Processing**





## Considerations of Fairness and Legality

While arrestee DNA collection can be examined with respect to its impact on public safety through crime solving, the practice has also raised questions of its fairness and legality. Opponents suggest that these laws may not be fair or just, primarily because of the presumption that an arrestee is innocent until proven guilty. Further, opponents have noted the broader societal inequities the laws may create or deepen. Because racial and ethnic minorities are represented throughout the criminal justice system at disproportionate rates in the United States,<sup>11</sup> they may also be disproportionately represented in CODIS. Looking to Britain, an estimated 75 percent of Britain's young black men are currently represented in the UK database as a result of the country's 2001 decision to include all arrestees in its databank (Human Genetics Commission 2009).

Based on the UK experience, the disproportionate impact on minorities due to systemic inequities may be a valid concern, as is the potential for abuse that furthers those inequities, especially if police were to "pre-textually arrest a person from whom [they wanted] a DNA sample" (*People v. Buza* 2011). These concerns were examined in 2009 by the Human Genetics Commission, an independent government advisory body in Britain, which found that police routinely arrest people simply to record their DNA profiles for the national database. The panel recommended that the database be regulated on a "clear statutory basis" and supervised by an independent authority, noting that "function creep" over the years had transformed a database of offenders into one of suspects (Stanglin 2009). As of March 2008, 857,000 people in the UK's DNA database (about 20 percent of all profiles) had no current criminal record. The European Court of Human Rights ruled that Britain violated international law by collecting DNA profiles from innocent people (Moore 2009), and the country has since introduced the Protection of Freedoms Bill, which sets out proposals to adopt the Scottish model of DNA retention, to restrict the scope of the DNA database and to give added protection to innocent people whose DNA profiles have been retained.

## Views of the Courts

For the first time, the US Supreme Court is considering the constitutionality of DNA collection laws with its review of *Maryland v. King* (2012), a case that has called into question the constitutionality of

<sup>11</sup> See, for example, Pew Center on the States (2008).

Maryland's arrestee DNA law. A decision is expected mid-2013. While federal and state appellate courts have generally upheld laws authorizing DNA collection from individuals who are *convicted* of specified offenses,<sup>12</sup> courts have offered conflicting opinions about arrestee DNA laws. The central question posed by numerous cases challenging arrestee laws is whether the laws violate the Fourth Amendment's proscription against unreasonable searches. In considering these challenges, courts have weighed the potential law enforcement or governmental interest in arrestee DNA collection against the intrusion of an individual's privacy. In their opinions, the courts explored many of the same questions regarding the purpose and effectiveness of the laws addressed by social scientists.

As of July 2012, the federal arrestee law had been challenged in a number of federal district and circuit courts across the country; numerous state arrestee DNA laws had been challenged in state and federal courts. While federal circuit courts have so far upheld the *federal* collection laws, courts that have considered *state* arrestee DNA laws have both upheld and overturned them. State appellate courts in Maryland, California, and Minnesota have found their arrestee laws unconstitutional, while the Virginia law has been upheld. The Arizona law has been found unconstitutional with respect to juvenile collection. The California law is unique as it is the only state law to have been challenged in state and federal court as of July 2012. Summaries for each case presented in table A are provided in appendix B.<sup>13</sup>

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<sup>12</sup> Prior to the Maryland case, the US Supreme Court had not reviewed cases challenging the constitutionality of either post-conviction or arrestee DNA laws. Further, the Court has not reviewed cases regarding the constitutionality of the routine collection of fingerprints at booking, a practice to which DNA collection is often analogized (see Henning [2010] and Barbour [2011]). However, Henning (2010) cites a number of cases where federal courts have upheld the constitutionality of federal laws permitting the collection of DNA from individuals who are *convicted* of specified offenses, including the First Circuit in *United States v. Weikert* (2007), the Ninth Circuit in *United States v. Kriesel* (2007), and the Tenth Circuit in *United States v. Banks* (2007). Henning (2010) also cites cases where federal courts have upheld various state laws: the Seventh Circuit upheld the Wisconsin Statute (*Green v. Berge* [2004]), while the Eleventh Circuit upheld Georgia's statute (*Padgett v. Donald* [2005]).

<sup>13</sup> There have been several challenges to arrestee DNA collection in Vermont. These cases originated in Vermont county courts, and have been appealed to the Vermont Supreme Court. As of March 2013, the court had heard arguments for these cases as part of a consolidated review.

Table A. Case Law at-a-Glance as of July 2012					
Case	Jurisdiction	Court	Point of Collection	Decision	Year
<i>Mario W. v. Kaipio</i>	Arizona	State, Highest	Probable Cause	Unconstitutional	2012
<i>King v. Maryland</i>	Maryland	State, Highest	Probable Cause	Unconstitutional	2012
<i>U.S. v. Fricosu</i>	Federal	D. Colo.	Arrest	Upheld	2012
<i>Haskell v. Harris</i> <sup>14</sup>	California	9th Cir.	Arrest	Upheld	2012
<i>U.S. v. Shavlovsky</i>	Federal	E.D. Cal.	Indictment	Unconstitutional	2011
<i>People v. Buza</i> <sup>15</sup>	California	State, Appellate	Arrest	Unconstitutional	2011
<i>U.S. v. Mitchell</i>	Federal	3d Cir.	Indictment	Upheld	2011
<i>U.S. v. Thomas</i>	Federal	W.D.N.Y.	Indictment	Upheld	2011
<i>U.S. v. Frank</i>	Federal	E.D. Wash.	Indictment	Unconstitutional	2010
<i>U.S. v. Pool</i> <sup>16</sup>	Federal	9th Cir.	Pretrial Release	Upheld	2010
<i>Anderson v. Commonwealth</i>	Virginia	State, Highest	Arrest	Upheld	2007
<i>CTL, Juvenile</i> <sup>17</sup>	Minnesota	State, Appellate	Probable Cause	Unconstitutional	2006

This section reviews the case law (based on the cases shown in table A) and describes key considerations that courts have relied upon in their legal analyses. For purposes of this discussion, decisions regarding state and federal laws are examined together.

### Standard of Review

The courts generally acknowledge that the collection and subsequent analysis of a DNA sample is a “search” under the Fourth Amendment.<sup>18</sup> In *Haskell v. Harris* (2012), the court asserted, “it is undisputed that a compelled DNA extraction is a ‘search’ for Fourth Amendment purposes.” At issue is whether this search is reasonable in accordance with the Fourth Amendment. To assess the reasonableness of the search, courts have employed two standards of review: the *special needs exception* and the *totality of the circumstances* test (see textbox, *Standards of Review*).

<sup>14</sup> In February 2012, a Ninth Circuit panel upheld California’s arrestee DNA law in *Haskell*. The case was reheard by the court *en banc*—following a petition to rehear the case—the following September. The court has postponed its ruling pending the US Supreme Court’s decision in *King*.

<sup>15</sup> A temporary injunction of the state’s law was issued in August 2011 as a result of the court’s decision. The injunction was lifted when California Supreme Court granted review of the case in October 2011. In January 2013, the court postponed further action pending the US Supreme Court’s decision in *King*.

<sup>16</sup> Since Pool entered a guilty plea, the case became moot and the Ninth Circuit vacated its panel opinion. Following his indictment, Pool was required to submit a sample as a condition of pretrial release.

<sup>17</sup> The decision reached by the Minnesota Court of Appeals was not appealed to the Minnesota Supreme Court.

<sup>18</sup> In a few cases, there were other grounds for the challenge, including violations of the Fourteenth Amendment (see *Buza*), the Due Process Clause (see *Pool*), and the Commerce Clause (see *Thomas*). The courts, however, focus their analyses on the Fourth Amendment.

## Standards of Review

1. The *special needs exception* requires that suspicionless searches: (1) be justified by a special need for an activity that falls outside of typical law enforcement functions, and (2) involve circumstances that render the warrant and probable cause requirement of the Fourth Amendment “impracticable.” The state’s interest in the special need must also outweigh the individual’s interest in his or her privacy upon which the search impinges (see *New Jersey v. T.L.O.*, 1985).
2. The *totality of the circumstances* test evaluates the reasonableness of a search by “assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy, and on the other, the degree to which it is needed for the promotion of legitimate governmental interests” (see *Wyoming v. Houghton*, 1999).

One court in this review applied the special needs exception to assess the reasonableness of the search. In *United States v. Thomas* (2011), the court relied on the legal precedent set by the Second Circuit in *U.S. v. Amerson* (2007), which employed the special needs test to evaluate the constitutionality of collecting DNA specimens from individuals on probation. The Second Circuit in *Amerson* reasoned that because the purpose of the law was to create an “identification index” to assist with investigations, this aim was distinct from ordinary law enforcement activities. Most courts in this review, however, employed the totality of the circumstances test, reasoning that DNA collection is *within* the scope of law enforcement, thereby not requiring the special needs test.<sup>19</sup>

### Privacy Interest

Courts that have upheld arrestee DNA laws and those that have overturned them have fundamentally disagreed over the privacy concerns at stake. Their assessments of the privacy concerns have depended largely on the perceived purpose of the search, the degree of intrusion, and the expectation of privacy.

### Purpose of the Search

Courts that upheld arrestee DNA laws have generally argued that the central aim of the search is to establish the identity of the individual. While fingerprinting may achieve the same end, these courts reason that DNA is a more reliable and accurate means of identification, especially since there is no knowledge suggesting that one’s DNA can be altered. In *United States v. Mitchell* (2011), for instance, the Third Circuit cited its earlier explanation of the superiority of DNA to fingerprinting for the purpose of identification:

It is a well-recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity... Traditional methods of identification by photographs, historical records, and fingerprints often prove inadequate. The DNA, however, is claimed to be unique to each individual and cannot, within current scientific knowledge, be altered (*United States v. Sczubelek* (2005), as quoted in *Mitchell*).

Further, courts upholding the laws have defined identity as not only *who* a person is, but also *what* a person has done, potentially leading to faster case disposal, clearance of suspects, and even crime avoidance through pretrial detention (*Mitchell*). These courts have typically reasoned that a person who is arrested or charged has a diminished expectation of privacy in his identity. In *Mitchell*, for instance, the court argued that “[w]hen an individual is arrested upon probable cause, his identification becomes

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<sup>19</sup> While most courts expressly applied the totality of the circumstances test, the courts in *CTL* and *Anderson* did not characterize their analyses as such, using instead general balancing tests that weigh the state’s interest against that of the individual—the central method of the totality of circumstances test.

a matter of legitimate state interest and he can hardly claim privacy in it.” In *Thomas*, the court maintained that the government has a legitimate interest in the identity of an indicted individual.

Conversely, in *People v. Buza* (2011), the court was critical of the two-pronged definition of identity. The court, citing *Haskell* in particular, maintained that courts have “conflated” the concepts of identity and investigation. The court reasoned that the second prong of the definition of identity is “too contrived” and that the actual purpose of collecting and analyzing DNA samples is its investigative value. Further, the court challenged the notion that DNA is critical to establishing identity, since “identity must be verified by other means before a DNA sample is collected.” Similarly, in *United States v. Shavlovsky* (2011), the court indicated that since the government had already identified the plaintiff’s identity through fingerprinting, “the actual reason for extracting the DNA sample” was for investigative purposes. The courts in *Buza* and *Shavlovsky* similarly concluded that since a warrantless search is conducted absent individualized suspicion that an additional crime has been committed, the search does not comport with the Fourth Amendment.

### Degree of Intrusion

Privacy concerns extend beyond identification to the use of samples and profiles. Similar to fingerprinting, courts tend to agree that the intrusion occasioned by the *physical collection* of DNA is minimal. Disagreement arises over the *analysis* of the DNA sample, which some courts explicitly view as a second search, and the *upload* of the resulting profile to a database. Courts overturning the laws have expressed concern that the analysis of the sample could reveal private, sensitive information about individuals. The court in *Shavlovsky* argued that the comparison of DNA collection to fingerprinting is “misplaced” because of the amount of personal information DNA reveals that fingerprints do not.

While courts that have upheld the laws acknowledge the sensitive information contained in a DNA sample (e.g., the court in *Mitchell* highlighted that DNA contains a “vast amount of information”), they cite statutory provisions and policies that are designed to protect samples and resulting profiles from misuse. In *Mitchell*, the court pointed to the limited set of government agencies that have access to DNA test results and the limited amount of uses of DNA test results (e.g., for population statistics if the identifying information is redacted), as specified by federal statute. In addition, they referenced the penalties for unauthorized disclosure regarding a collected DNA sample. The courts in *Buza* and *United States v. Frank* (2010) maintained that these safeguards do not justify an unconstitutional search.

Courts that have upheld the law also distinguish between a DNA *sample* and a DNA *profile*. The court in *Haskell* argued that because a profile, which only establishes identity, is used in a database “search,” the search does not utilize sensitive information. Further, the court in *Thomas*, citing *Amerson*, observed that there is no evidence of scientific advances that could generate information from profiles beyond identity. However, in *Buza*, the court cast doubt on the limited use of profiles, noting that recent studies have suggested that such profiles may contain revealing material; further, the court argued that in the future, scientific advances may enable sensitive information to be extracted from such profiles. The courts in *Haskell* and *Mitchell* did not factor this speculation into their analyses and indicated that they may revisit this question if these concerns actualize in the future.

### Expectation of Privacy and Relevance of the Point of Collection

Courts generally agree that individuals who are *convicted* have a diminished expectation of privacy that justifies DNA collection. However, courts disagree as to whether individuals who are *arrested or charged*, but not convicted, have a sufficiently diminished expectation of privacy to justify the search. In *Thomas*, the court did not view the plaintiff’s interest in the privacy of her identity as different from a



probationer's. Similarly, in *Anderson v. Commonwealth* (2006), the court did not distinguish between convicted offenders and defendants. In both of these cases, the courts upheld the laws.

Other courts overturning the laws have argued that individuals who are arrested or charged do not have a sufficiently diminished expectation of privacy to permit the search. In *CTL, Juvenile* (2006), the court maintained that individuals who are not convicted do not have the same reduced expectation of privacy as those who have been convicted. Further, the court reasoned that the law's requirement that the state destroy the DNA sample and pertinent information upon case acquittal or dismissal suggests that an individual's privacy interest outweighs the state's interest. The court did not view the privacy interest of individuals who are awaiting disposition as different from individuals whose cases do not result in conviction. Similarly, in *Mario W. v. Kaipio* (2012), the court reasoned that since the state grants the opportunity for expungement upon case acquittal or dismissal, these profiles should not be used prior to adjudication.

In several cases, the point of collection in the case continuum is a decisive factor in assessing the extent to which an individual's expectation of privacy is diminished. Courts considering cases in which sample collection occurred *after* a judicial determination of probable cause have been divided. Courts that found the laws unconstitutional, including those in *CTL, Frank, and King v. Maryland* (2012), argued that even judicially determined probable cause is not sufficient grounds for collection. In contrast, the federal courts in *Thomas, Mitchell, and United States v. Pool* (2010) asserted that the judicial determination of probable cause diminishes the individual's expectation of privacy. In *Pool*, the court considered the judicial determination of probable cause to be a "'watershed event' that results in a diminished expectation of privacy." The courts did not weigh in on the broader language of the federal statute that authorizes collection upon arrest, which may precede judicial determination of probable cause.

Several courts have ruled on the constitutionality of collecting DNA after arrest absent a judicial determination of probable cause. In *Anderson*, the court reviewed a case in which a DNA specimen was collected and analyzed prior to a judicial determination of probable cause. In its ruling, the court analogized DNA collection to fingerprinting—a routine booking practice—and thus deemed it constitutional. In *Buza* and *Haskell*, cases in which the California law was challenged, samples were ordered to be collected after arrest but *prior to judicial determination of probable cause*. Although the state court in *Buza* found that probable cause for arrest is not equivalent to probable cause for DNA collection and ruled the California law unconstitutional, the federal court in *Haskell* disagreed, arguing that probable cause, whether it is determined by law enforcement or a judge, sufficiently reduces an individual's privacy interest and that police officer-determined probable cause warrants sample collection.

### State Interest

The courts have considered the government's interest in the laws to evaluate whether the purported benefits justify the suspicionless search. Courts upholding the laws have generally argued that such benefits justify the search. In *Mitchell*, the court observed that linking an individual to past crimes may not only help in solving crimes, resulting in faster case disposal and clearance of suspects, but it also may assist in the decision to detain an individual during the pretrial period. Similarly, in *United States v. Pool* (2010), the court reported that DNA is more likely to be left behind at a crime scene than fingerprints, and can therefore link an individual to crimes s/he has committed. Consequently, more crimes can be solved (investigation), crimes can be solved faster (efficiency), crimes can be prevented (public safety), and suspects can be cleared. Although the court in *Kaipio* ruled that the *analysis* of a sample and *upload*



of the resulting profile violated the Fourth Amendment, it ruled that the *collection* of a sample is permissible. Such collection, the court reasoned, could benefit the state if a juvenile is released and fails to appear at trial. In this instance, the opportunity to collect a DNA sample is lost and presents a challenge to the state if it wishes to link an individual to the crime in the future.

Courts overturning the laws, however, have tended to be critical of the purported benefits of collecting DNA prior to conviction. In *Kaipio*, the court argued that since the time between an advisory hearing (the point at which samples are requested from juveniles) and adjudication is relatively short (an average of 60 days in Arizona) and sample processing may take weeks, the interest in analyzing a sample prior to adjudication does not seem strong. While the court recognized that earlier analysis could link individuals to other crimes sooner, this benefit seemed “speculative.” Similarly, in *Shavlovsky*, the court argued that because the search is not guided by the suspicion that an individual is linked to another crime, and not “anchored” by the arresting offense, it is not reasonable to collect an individual’s DNA on the “off chance” that he might have committed a crime. Other courts argued that despite the potential benefits of the search, the privacy interests outweighed the governmental interest. In *Buza*, the court concluded that even if such collection proved valuable to investigations, “the effectiveness of a crime fighting technology does not render it constitutional.”

The method of analysis that the courts employ—weighing the government’s interest against the extent to which individual privacy is infringed—to examine the constitutionality of arrestee DNA laws largely reflects the arguments proponents and opponents of these laws put forth. On the one hand, proponents theorize that arrestee DNA laws will not only identify more new suspects, but identify them sooner, thus averting future crimes—these theories serve the government’s interest. On the other hand, opponents are typically concerned with an individual’s right to privacy prior to conviction, as well as the concerns about the potential misuse of DNA samples.

The legal uncertainty surrounding the arrestee DNA laws has influenced the development and implementation of the laws. As the next section will discuss, legislatures have sometimes added provisions in their laws to address privacy concerns. Several states, for instance, wait to collect or analyze samples until a judicial determination of probable cause has been made. In addition, some states have state-initiated expungement procedures to ensure that an individual’s profile will be removed from CODIS if he or she is not convicted of the crime for which the sample was collected.

## Section Highlights

- The number of forensic and offender profiles (both convicted offender and arrestee profiles) in NDIS has increased by an order of magnitude in the last decade; this growth has been accompanied by an increase in the number of hits and investigations aided. Arrestee profiles account for about one-tenth of offender profiles in NDIS.
- Conventional wisdom suggests that including arrestee profiles will increase the number of profiles in CODIS, and thus increase the opportunities for forensic profiles to hit to offender profiles. However, it is unknown the extent to which this theory is true in practice, as the specific value of including profiles from arrestees has not been studied in states that have arrestee laws in place.
- There is uncertainty about the constitutionality of collecting DNA pre-adjudication. As of July 2012, the federal law has been upheld by federal appellate courts, while several state laws have been struck down. The adverse court decisions have generally argued that a person’s privacy interest outweighs any investigative value the profiles may yield. In 2013, the US Supreme Court will issue its opinion on the constitutionality of the Maryland arrestee law.

## 2. Research Design and Methods

The Urban Institute employed several complementary data collection methods to answer the research questions posed by the study. UI researchers (1) compiled and reviewed relevant statutes, (2) reviewed relevant case law, (3) interviewed state and federal CODIS laboratory staff, key stakeholders, and other forensics experts, (4) collected and analyzed descriptive data from the state laboratories, and (5) developed federal and state profiles to serve as case studies. Data collection and analysis occurred from late-2010 to mid-2012.

### Legislative Review

To understand the breadth of DNA collection laws, UI assembled the complete set of state and federal laws. Using a broad definition of “arrestee DNA,” the team found that as of July 2012, the federal government and 28 states had enacted statutes permitting the collection of DNA from individuals pre-adjudication. This number represented a marked increase from the estimate that UI researchers submitted in their original proposal to NIJ and reflected the increased prevalence of these laws. This compilation includes all states that have enacted such laws *even if they have since been overturned by the courts or withdrawn by state legislatures*. Similarly, researchers included states that have laws on the books even if they were not actively collecting arrestee DNA samples at the time of this report, either because they have not yet implemented the law or because they suspended collection due to budget constraints or legal challenges.

The research team identified the set of states by reviewing earlier compilations of DNA laws available on DNA Resource, the National Conference of State Legislators (NCSL) website, the American Society of Law, Medicine, and Ethics (ASLME) website, and DNA Saves, and through Westlaw and other internet searches.<sup>20</sup>

Having identified the states that currently or previously permitted the collection of arrestee DNA, researchers found current versions of arrestee DNA statutes for each state and uploaded those documents into NVivo (a software tool to assist in analyzing the information) for review and coding. The team did not consider administrative rules in its review. After members of the research team had scanned the laws from each state, they developed a coding scheme based on common themes noted in the review, on the Urban Institute’s previous work completed when researching the collection of DNA from juveniles (Samuels et al. 2011), and on earlier compilations by ASLME (2006).

The final list of key questions for review included:

#### **Scope and Timing of Collection and Analysis**

1. When in case processing can DNA be collected and analyzed?
2. For what offenses can DNA be collected?
3. From whom can DNA be collected?

#### **Expungement Procedures**

4. How is the expungement process initiated?
5. Under what circumstances is a sample eligible for expungement?
6. What rules govern expungement procedures?

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<sup>20</sup> For more information about these organizations, see DNA Resource’s website (<http://www.dnaresource.com/>), NCSL’s website (<http://www.ncsl.org/>), DNA Saves website (<http://www.dnasaves.org/>), and ASLME’s website (<http://www.aslme.org/>).

### **Oversight and Administration**

7. Who is authorized to collect? Who is responsible for ensuring compliance with the law?
8. What policies govern arrestee refusals and collecting agency mistakes?
9. Do the laws include reporting requirements?

Individual researchers coded the laws, which other members of the team reviewed to ensure comparability across states. UI research classifications were also compared against information about state laws compiled by DNA Resource, NCSL, and the Federal Bureau of Investigation,<sup>21</sup> and from discussions with federal officials and other forensic experts. A Legal Matrix was developed from this review and classification of the laws. The Legal Matrix includes a quick summary table that provides information aggregated across states, which is included in appendix C.

### **Case Law Review**

Because of legal challenges to arrestee laws both at the federal and state levels, researchers conducted a systematic case law review to understand the character of the challenges and courts' reasoning in either upholding the laws or ruling them unconstitutional.

To identify cases, researchers conducted a keyword search in Westlaw, using inclusive search strings such as "arrest, DNA" and "DNA, Fourth Amendment," and utilized Westlaw's alert function that notified the team to any case law activity for codified arrestee laws. In addition to Westlaw, researchers used daily Google Alerts to learn of any news articles, weblogs, and other Internet sources that referenced phrases used in the Westlaw search. This allowed researchers to keep abreast of any additional challenges to arrestee laws through July 2012.

Once researchers retrieved all relevant cases from this search process, they reviewed each opinion, identifying the following factors consistently for all cases: the law in question, the point of collection, the court reviewing the case, the date of review, the standard of review (the method of analysis that courts employ to arrive at their conclusion), legal reasoning (including *individual privacy interests* and *government interests*), and the decision reached. Summaries of each case are included in appendix B.

As of early May 2013, the case law regarding arrestee DNA laws remains unsettled. The US Supreme Court heard an appeal of *Maryland v. King* (2012) in February 2013, with a decision expected by the end of June. Given this uncertainty, and the expectation of additional court rulings, readers should view the case law section as a discussion of the issues being considered in the courts, and not as a definitive legal analysis.

### **Interviews with Federal and State Laboratory Representatives**

To learn about the states' experience in implementing the laws, researchers conducted 29 semi-structured phone interviews with state laboratory leadership in 26 of the 28 states that have authorized collection of DNA at arrest; Illinois and South Carolina could not be reached. While these respondents were primarily state CODIS administrators, we interviewed laboratory directors and database supervisors, among others, in some states. All respondents, regardless of role, were well-positioned to address how their state's arrestee DNA laws have been implemented and their impact on laboratory

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<sup>21</sup> Note that because of this report's broad definition of "arrestee DNA," Connecticut, which the FBI did not consider an arrestee DNA state, is included.

operations and CODIS. The team also spoke with the Federal DNA Database Unit. Researchers used information from a related Urban Institute project focused on collecting DNA from juveniles<sup>22</sup> to develop a preliminary list of respondents and a draft interview protocol, which researchers piloted prior to implementation and revised accordingly (see appendix D). Respondents were recruited via email and phone, and received a one-page summary of UI researchers' interpretation of their state law and a list of sample interview questions (upon request) before the interview. States that had recently passed laws authorizing arrestee DNA collection were interviewed pre- and post-implementation to learn more about the process of preparing for implementation.

Similar to the analysis process for state laws, the team uploaded interview notes to NVivo for review and coding. After reviewing each interview for key themes, researchers developed a coding scheme for the interviews (see appendix E). Three members of the research team coded one interview to test for inter-rater reliability and made changes and clarified the code book as needed. Individual team members coded their portion of the remaining interviews. This exercise allowed the research team to identify themes across states.

## Data Analysis

To understand how arrestee DNA laws impact DNA databases, researchers requested NDIS/SDIS data from states that are currently collecting DNA at arrest as well as from the FBI CODIS Unit. The data collection effort focused on four categories: convicted offender and arrestee samples received and corresponding profiles uploaded to CODIS, duplicate sample submissions, hits occurring between offender and forensic profiles, and profile expungements. The data request to CODIS administrators (see appendix F) sought information about both cumulative data as of year-end 2011, as well as annual data two years prior to the year in which the arrestee law went into effect until year-end 2011. If a state implemented its arrestee law in 2007, for instance, researchers asked the state to provide data from 2005 through 2011. By collecting data before and after arrestee implementation, trends could be observed over time, particularly on profile uploads and hit rates. Ideally, this analysis could provide evidence of an impact of collecting DNA at arrest.

Researchers requested data from the 23 states that were collecting DNA from arrestees at the time of the data collection period.<sup>23</sup> Twelve states provided data to UI.<sup>24 25</sup> In addition to the state data request,

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<sup>22</sup> See Samuels et al. 2011.

<sup>23</sup> Connecticut, Illinois, Minnesota, New Jersey, and South Carolina were excluded. Four of these states—Connecticut, Illinois, New Jersey, and South Carolina—had recently implemented their arrestee DNA law or had not yet implemented it at the time of data collection and were thereby not well-positioned to provide sufficient data for analysis. In Minnesota, arrestee DNA collection was ruled unconstitutional by a state court the year following implementation.

<sup>24</sup> In general, states that responded to the data request were able to provide data for most metrics. Some states, however, were unable to provide data for some metrics. Where a state did not provide data for a given metric, it was excluded from analysis for that metric. All data analyses presented in this report indicate the states that had sufficient data for inclusion in the analyses.

<sup>25</sup> Eleven states did not respond to the data request. Five states reported that their laboratories' workload prevented them from fulfilling the request. Three states acknowledged the request, but did not specify why they could not complete the request. The remaining states did not acknowledge receipt of the data request. While one state did not complete the data request form because the data was not readily accessible, it provided an internal annual summary report that included much of the requested data. Therefore, this state is included among the twelve states that responded to the data request.

the research team requested additional information from the FBI CODIS Unit, which supplied historical information about CODIS/NDIS.

Researchers analyzed the data submitted to produce descriptive summaries by state. To the extent possible, researchers compared statistics across states to explore differences in offender profiles and hit rates based on variations in state practices. In a few instances, the research team supplemented the data with publicly available information from laboratory websites.<sup>26</sup>

In addition, using data collected from annual NDIS statistics published by the FBI from 2008 to 2012, the researchers analyzed the extent to which an increase in offender profiles (convicted offender profiles and arrestee profiles) in NDIS impacts the number of investigations aided.<sup>27</sup> All data referenced throughout the report includes source notes.

## State Profiles

To gain a deeper understanding of the varied challenges and successes of arrestee DNA implementation, researchers selected the federal government and five states to profile for this report. States were selected based on a range of criteria:

- **Submission of Data.** Only states that responded to the Urban Institute’s data request and that had completed an interview were eligible to be profiled (N=12).
- **Maturity.** At least one state would need to be in each category: (1) started arrestee DNA collection prior to 2006 (pre-federal authorization state) and (2) started arrestee DNA collection during or after 2010 (recent state).
- **Scope of Qualifying Offenses.** At least one state would need to be in each category: (1) collect DNA from all felonies; (2) collect DNA from a subset of felonies; (3) collect DNA from misdemeanors; and (4) phased-in collection to expand from select to all felonies.
- **Role of Probable Cause in Collection and Analysis.** At least one state would need to be in each category: (1) collect and analyze DNA after arrest; (2) collect DNA after arrest but wait for an additional next step in case processing before analysis; and (3) collect and analyze DNA after an additional step in case processing.
- **Expungement Policy.** At least one state would need to be in each category: (1) automatically initiate expungement and (2) leave expungement requests to the individual.

Federal and state summaries used information from laboratory interviews, the legislative review, and online news and article searches. The team supplemented these findings with interviews with a limited number of stakeholders (11), including law enforcement, legislators, advocates, and opponents. These stakeholders were generally contacted to gain a deeper understanding into unique state provisions, practices, or legislative histories that were addressed in the state laboratory interview. Interview protocols are presented in appendix G. The research team also customized a diagram of the collection

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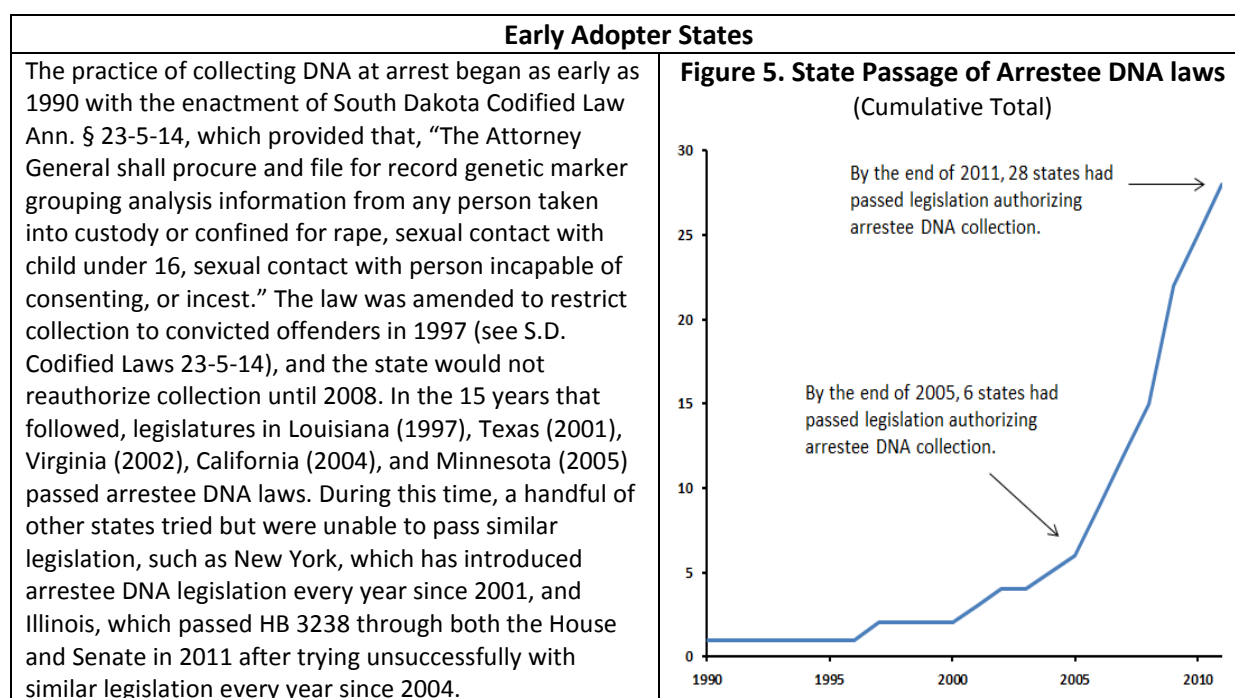
<sup>26</sup> Virginia’s Department of Forensic Science provides information about its DNA database at <https://www.dfs.virginia.gov/statistics/index.cfm>. In addition, the Maryland State Police provides information about its DNA database in the Forensic Sciences Division’s Annual Report (2012).

<sup>27</sup> Annual NDIS data for each state was collected from the FBI’s NDIS Statistics website (FBI 2012c). While the website only includes the most recent NDIS data (at the time of the review, data from July 2012 were available), researchers collected data from additional years from a web cache.

and analysis process for each state. All profiles included in this report were reviewed by their respective laboratory representatives.

### 3. Arrestee DNA Laws and Their Provisions

As of July 2012, more than half the states and the federal government had enacted laws to collect DNA from individuals arrested or charged, but not convicted, of qualifying offenses. Although the collection of DNA from arrestees is not new (see textbox, *Early Adopter States*), the practice expanded dramatically following the passage of the federal DNA Fingerprint Act of 2005, which enabled states to upload DNA profiles generated from arrestees into the National DNA Index System (NDIS). Additional funding from the National Institute of Justice for analyzing arrestee samples may have also contributed to the growth in this legislation. Moreover, as noted earlier, a number of high profile cases have galvanized support for collecting DNA at arrest, and organizations such as DNA Saves (started by the family of Katie Sepich) have promoted the adoption of DNA arrestee laws across the country.<sup>28</sup> From 2006 to 2011, 22 states passed legislation authorizing the collection and analysis of DNA from individuals arrested or charged with specific offenses—a notable increase from the 6 states that had passed arrestee DNA legislation in the previous 15 years.



The expansion of state DNA database laws to include arrestees occurred with minimal debate in some states, and after protracted discussion and compromise in others. Strong support from state and local leaders, including governors, district attorneys, sheriffs and police chiefs, and victims’ groups, has run counter to opposition that typically has arisen from the American Civil Liberties Union (ACLU), criminal defense attorneys, and advocates concerned with the fairness of collecting DNA prior to conviction, minority over-representation in the criminal justice system, and police interactions with persons of color. These opponents have occasionally been able to stop movement on legislation; at other times, their voices have helped shape key provisions focused on protecting arrestee rights. The experience of some early adopter states and emerging “best practices” or lessons learned have also influenced the

<sup>28</sup> In January 2013, the president signed the *Katie Sepich Enhanced DNA Collection Act of 2012 (Public Law 112-253)*, which authorizes the attorney general to award grants to states to assist with the cost of implementing a “DNA Arrestee Collection Process,” a term defined by the Act.



### Current Arrestee DNA Collection Practices

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 (*CTL, Juvenile*), Minnesota no longer collects DNA from individuals prior to conviction. Although South Carolina is authorized to collect DNA samples from arrestees, budgetary constraints have halted implementation. New Jersey's recent law authorizing collection of DNA from arrestees takes effect in 2013. Other states, such as California, Vermont, and Maryland, have active litigation that has disrupted the collection of samples. For the purposes of analyzing provisions included in arrestee DNA laws, however, researchers considered laws in all 28 states that have passed arrestee DNA legislation.

development of these laws. For example, upon request, the FBI circulated sample legislative language that guided a number of states in drafting their arrestee DNA bills.

State crime laboratories' involvement in legislative development varied considerably by state. While some laboratory directors/CODIS administrators and staff had substantive roles in the process—such as drafting legislation, providing counsel (including formal testimony), and/or supplying legislators with estimates of the

resources needed for implementation—other laboratories reported that provisions were enacted quickly or without laboratory participation in the legislative process.

The views of advocates and opponents, as well as input from state crime laboratories, undoubtedly influenced states' decisions to pursue arrestee DNA legislation and affected its ultimate success in the legislature. The points raised by these groups also influenced the specific provisions enacted. This section of the report examines variation in state and, to a more limited extent, federal arrestee DNA laws by focusing on: (1) scope and timing of collection and analysis; (2) expungement procedures; and (3) oversight and accountability.

Where relevant, information from interviews is used to contextualize findings and explain the rationale for certain provisions. The tables that precede each discussion display a snapshot of the enacted state laws and some of their key provisions. More detailed information about state laws that authorize the collection of DNA from arrestees can be found in the Legal Matrix included in appendix C. Note that some states may address topics not specified in the law in administrative rules and regulations.

### Scope and Timing of Collection and Analysis

All state arrestee DNA laws specify the point in case processing at which law enforcement can obtain DNA samples from individuals and the offenses that qualify individuals for DNA sample collection. In addition, some state arrestee laws specify offender characteristics that can limit which individuals can supply DNA.



Table B: Scope and Timing of Collection and Analysis			States	Percent of Arrestee DNA States
Case Status	Collection occurs ...	After arrest	21	75%
		After charging / judicial probable cause	7	25%
	Analysis occurs ...	After arrest	18	64%
		After charging / judicial probable cause	10	36%
Qualifying Offenses	Felonies	All	13	46%
		Subset	14	50%
	Misdemeanors		7	25%
	Other (status offense)		1	4%
Offender Characteristics	Criminal History		2	7%
	Age	Under 18 explicitly permitted	8	29%
		Under 18 explicitly prohibited	8	29%
	Health		1	4%

### Case Status

“Arrestee” DNA is a bit of a misnomer. Although collection immediately after arrest is the norm, seven arrestee DNA laws require that an arraignment, indictment, or judicial determination of probable cause occur prior to sample collection.<sup>29</sup> An additional three arrestee DNA states authorize DNA sample collection following arrest but require an arraignment, indictment, or judicial determination of probable cause before a sample can be *analyzed*; these laboratories are expected to receive samples after arrest and hold them for analysis until the individual goes before a judge. See section 6: *State and Federal Profiles* for various models of DNA collection.

Arrestee DNA laws that include a judicial determination of probable cause provide additional protections to arrestees and may help the states defend their laws if there are challenges in court. In fact, the latter reason appears to have prompted lawmakers in at least two states to introduce legislation that would amend existing laws to include a judicial determination of probable cause. These added protections also respond to concerns raised by some opponents that law enforcement could arrest individuals on spurious charges simply to collect DNA and see if the individual has committed other crimes. At times, legislators have had to weigh this desire for added protections against concerns about the resources needed to verify probable cause (for a more detailed discussion of these resource concerns, see section 4 of this report). As seen in this report’s review of case law, opinions differ on whether arrest alone (absent an arrest warrant, charging, or arraignment) provides a sufficient legal basis for collecting DNA.

### Qualifying Offenses

All 50 states now authorize DNA collection from any individual who has been convicted of a felony offense (SWGDM [Scientific Working Group on DNA Analysis Methods] 2012). Of the 28 states that have passed legislation authorizing the collection of DNA samples prior to conviction, about half align their collection practices with convicted offender laws and authorize collection from persons arrested for any felony crime. The other half of states limits collection to a subset of felonies, typically involving violence, sexual assault, or serious property crimes. Seven arrestee DNA states also collect from individuals arrested or charged with select misdemeanor crimes. Broader than any of the state laws,

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<sup>29</sup> Texas has a similar provision, but it only applies to individuals who have not been previously convicted of or placed on deferred adjudication for a qualifying offense.

federal law authorizes collection from all arrestees and non-US citizens detained by the US government. The regulation implementing the law clarified the scope of collection by allowing agencies to focus collection on individuals from whom federal agencies collect fingerprints.

Arrestee DNA laws with a narrower scope of collection generally limit new samples to those individuals arrested and/or charged with more serious crimes, or with crimes believed to more likely result in a CODIS hit. Interviews with state laboratory representatives suggest that choosing a narrower scope of collection was influenced heavily by concerns about the financial burden of arrestee DNA legislation, particularly following laboratory estimates of the expected resource (and budgetary) impact of the legislation. One stakeholder reported that limiting the scope of qualifying offenses to only serious violent offenses was also the only way to gain support from opponents and ensure the passage of the legislation.

Four states that authorize collection for all felony offenses have phased in collection by collecting first from a subset of felonies. For example, Florida passed legislation whereby the scope of qualifying offenses expands every two years until all felony arrests are eligible for DNA collection; each phase is contingent upon the availability of state funds to support expanded laboratory activities. States may also choose to expand collection criteria through new legislation; in 2011, New Mexico expanded its 2006 arrestee DNA law, which had authorized collection for only serious violent and property crimes, to include all felony arrests.

Arguably the most unusual of all arrestee DNA collection laws, Oklahoma authorizes DNA collection at arrest from “any alien unlawfully present under federal immigration law.” The study team is uncertain about how the law has been implemented, for example, whether an individual must be charged with a federal immigration offense in addition to the arresting offense in order for the profile to be legally on file. Federal law also authorizes DNA collection from “non-United States persons who are detained under the authority of the United States.”

### Offender Characteristics

Although not common, some arrestee DNA states restrict collection to individuals who meet additional criteria for collection.

*Criminal History and Status:* In two states, an individual’s criminal history affects when (or whether) DNA is collected.

- Texas authorizes collection immediately after arrest only if the individual has been previously convicted of (or placed on deferred adjudication for) a qualifying offense in Texas. If this condition is not met, law enforcement must wait for an indictment or waiver of indictment before they can collect a sample.
- Connecticut authorizes collection at arrest only if the individual has been previously convicted of a felony offense in the United States. If this condition is not met, law enforcement cannot collect a sample. Although the resulting profiles are not labeled “arrestees” in NDIS (in part because many consider this law to be merely an extension of Connecticut’s convicted offender laws), the study team has included the state in this study because of the law’s expungement provision, which requires profile removal if the *current case* is dismissed or results in acquittal. The research team reasons that if the intent of the law were to provide an additional means for law

enforcement to collect DNA from convicted offenders, the disposition of the current case would not matter.

*Age:* Eight states explicitly authorize DNA collection from juveniles pre-adjudication, while an additional eight expressly prohibit such collection. The remaining twelve arrestee DNA states—which typically authorize collection of DNA from “any person”—implicitly allow collection from juveniles in their laws.

*Health:* In Utah, the law stipulates that, “a DNA specimen is not required to be obtained if the court determines that obtaining a DNA specimen would create a substantial and unreasonable risk to the health of the person.” The study team does not know whether this provision has been invoked.

## Expungement Procedures

Expungement provisions codify a process for removing (or “expunging”) an arrestee profile from CODIS—or in some instances, removing the identifying information that links an individual to his or her profile in CODIS—in the event of case dismissal or acquittal. Before a state can upload arrestee profiles to NDIS, the FBI must approve state expungement provisions. 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” (FBI 2012b). States that include FBI-approved expungement policies also address: (1) which entity bears the burden of initiating the process; (2) additional conditions for expungement; and (3) guidelines for proper notification, processing times, and uses of profiles.

Table C: Expungement			States	Percent of Arrestee DNA States
Responsibility	Process started	By Request	18	64%
		Both	2	7%
		Automatic	7	25%
Additional Conditions	Convicted of non-qualifying crime		10	36%
	No other qualifying offenses		16	57%
Notification and Timeline	Notification of expungement policy required	Upon collection of sample	4	14%
		Upon successful expungement	2	7%
	Expungement period specified (days)		5	18%
	Use of hits associated with profiles ordered for expungement	Allowed	7	25%
Prohibited		4	14%	

## Responsibility for Expungement

As of July 2012, the majority of arrestee DNA states (18 of 28) place the responsibility for *initiating* expungement on the arrestee.<sup>30</sup> The state—typically the courts—bears the responsibility for initiating

<sup>30</sup> Alaska is an individual-initiated expungement state, but the availability of two versions of 44.41.035 led some to believe that the state expunges automatically. One version directs the Department of Public Safety (DPS) to, “upon receipt of a court order, destroy the material in the system relating to a person;” some interpreted the ambiguous wording to mean that Alaska expunges profiles automatically. The correct version directs DPS to “destroy the

expungement in Connecticut, Maryland, North Carolina,<sup>31</sup> South Carolina, Tennessee, Vermont, and Virginia; these states are also referred to as “automatic” expungement states because the state is *required* to initiate expungement proceedings.<sup>32</sup> Intended to protect the rights of those who are not ultimately convicted, these added protections often carry a well-documented increase in collection, analysis, and monitoring activities that have deterred many states from compelling government agencies to bear responsibility for initiating expungement.

Arrestee DNA laws in Minnesota and Missouri split the burden of expungement between the individual and state.

- **Minnesota.** When the law was active, Minnesota expunged automatically upon acquittal but required individuals to initiate the process if their charges were dismissed.
- **Missouri.** Missouri places the burden of expungement on the arresting agency and the Missouri state highway patrol crime laboratory in the event of *warrant\_refusal*. However, the law places the responsibility on the individual if his or her case results in *reversal or dismissal*.

Interviews with lab representatives indicated that expungements are rare in states where the individual bears the burden of requesting the expungement. This conclusion was verified by the data provided by the states and reported in section 5.

### Additional Conditions

As noted earlier, for states to upload DNA profiles to NDIS, they must codify a process for expunging a profile if the case for which the individual had DNA collected is dismissed or results in acquittal. While it follows that all states would also consider a profile eligible for expungement when formal charges are not filed, only a handful of arrestee DNA states specify a timeframe in which filing must occur, an important point given that investigations can remain open and pending prosecution for months. Colorado and Utah qualify that if charges are not filed within 90 days, the sample and any results become eligible for destruction. Colorado will automatically destroy samples associated with cases that have not been filed in one year. States that require a judicial determination of probable cause before collection avoid the need to specify a timeframe for case filing (because cases must be filed in order for DNA to be collected) and may make it easier for an individual requesting expungement to document that his or her arrest did not result in conviction.

Ten states’ arrestee DNA laws specify that a profile is eligible for expungement if a qualifying offense is dismissed but the case leads to a conviction for a non-qualifying offense. For example, North Carolina’s law states specifically that a profile shall be removed if the “defendant is convicted of a lesser-included misdemeanor offense that is not an offense included” in the statute. These provisions relate, in part, to a desire expressed by some advocates that samples be collected and analyzed based on the charge at arrest and not the “negotiated” charge at conviction. Sixteen states also include a provision that individuals may not have their profiles expunged if they are being prosecuted for another case that would have prompted DNA collection.

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material in the system relating to a person or minor *on the written request of the person or minor*, if the request is accompanied by a certified copy of a court order” (emphasis added).

<sup>31</sup> By statute, North Carolina switched from individual-initiated to state-initiated expungement in June 2012.

<sup>32</sup> 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 DNA state, suggesting that its expungement policy has been approved.

## Guidelines for Proper Notification, Processing Times, and Use of Profiles

Although the burden rests consistently on the individual in 18 of the 28 states that authorize arrestee DNA collection, only two of these states require that arrestees be notified of the expungement policy (an additional two “automatic” states have expungement notification requirements). The role of the defense attorney in notifying clients of expungement policies is not addressed in statute. Two states are legislatively required to notify individuals when their profiles have been expunged successfully, although interviews suggest that additional states may impose this requirement through regulation or policy.

Five states require expungement to occur within a certain period of time; the remaining 23 states’ laws do not set specific timeframes. Hence, even though a valid request might be made for an expungement, the state is not legally required to carry out that request in a timely manner. This review found that at least eleven arrestee DNA laws address whether a profile hit can be used in an investigation despite a failure of the state to expunge or a delay in expunging records—four states prohibit the use of these profiles and seven states allow their use. Five of the seven states that allow profiles to be used in a criminal investigation despite a failure of the state to expunge or a delay in expunging records place the burden of expungement on the individual.

State	Response	Text
AL	No	“Use [of DNA sample is] authorized until ... the circuit court where the individual was arrested orders that the DNA sample should be expunged.”
CA	Yes	“Any identification, warrant, probable cause to arrest, or arrest based upon a data bank or database match is not invalidated due to a failure to expunge or a delay in expunging records.”
CO	No	“A data bank or database match shall not be admitted as evidence against a person in a criminal prosecution and shall not be used as a basis to identify a person if the match is ... obtained after the required date of destruction or expungement.”
MD	No	“A record or sample that qualifies for expungement or destruction under this section and is matched concurrent with or subsequent to the date of qualification for expungement may not be utilized for a determination of probable cause regardless of whether it is expunged or destroyed timely; and is not admissible in any proceeding for any purpose.”
MI	Yes	“An identification, warrant, detention, probable cause to arrest, arrest, or conviction based upon a DNA match or DNA information is not invalidated if it is later determined that ... a DNA sample [or DNA identification] profile was not disposed of or there was a delay in disposing of the sample.”
MO	Yes	“Any identification, warrant, arrest, or evidentiary use of a DNA match derived from the database shall not be excluded or suppressed from evidence, nor shall any conviction be invalidated or reversed or plea set aside due to the failure to expunge or a delay in expunging DNA records.”
NC	No	“Any identification, warrant, probable cause to arrest, or arrest based upon a database match of the defendant’s DNA sample which occurs after the expiration of the statutory periods prescribed for expunction of the defendant’s DNA sample shall be invalid and inadmissible in the prosecution of the defendant for any criminal offense.”
ND	Yes	“The detention, arrest, or conviction of an individual based upon database information is not invalidated if it is later determined that the specimens or samples were obtained or placed in the database by mistake or if the specimens or samples should have been expunged.”
SD	Yes	“Any identification, warrant, probable cause to arrest, or arrest based upon a database match is not invalidated due to a failure to expunge or a delay in expunging records.”
TX	Yes	“The department’s failure to expunge a DNA record ... may not serve as the sole grounds for a court in a criminal proceeding to exclude evidence based on or derived from the contents of that record.”
VT	Yes	“If a DNA sample from the state DNA database, CODIS, or the state DNA data bank is matched to another DNA sample during the course of a criminal investigation, the record of the match shall not be expunged even if the sample itself is expunged in accordance with the provisions of this section. If a match has been made, the department may confirm the match prior to expunging the sample.”

## Oversight and Accountability

Arrestee DNA laws address key oversight and administration responsibilities, including: (1) designating certain agencies to collect samples and specifying an entity responsible for ensuring compliance with the law; (2) directing states on how to respond to refusals, samples collected in error, and improper use of samples and respective profiles; and (3) establishing tracking requirements.

Table E: Oversight and Administration			#	Percent of Arrestee DNA States
Collection Specifics	Authorized Agencies (multiple agencies possible)	<i>Specified</i>	17	61%
		Law Enforcement	13	46%
		Sheriffs   Jails	7	25%
		Other	1	4%
		<i>Ambiguous/not specified</i>	11	39%
	Processing Speed Requirements	7	25%	
Arrestee Refusals and Collection Mistakes	Reasonable Force Allowed		11	39%
	Criminal Offense		9	32%
	Mistakes in Collection	Does not invalidate	12	43%
		Re-collection authorized	14	50%
	Penalties for Misuse of Samples/Profiles		23	82%
Tracking Requirements			6	21%

### Collection Specifics

Under convicted offender laws, the courts, the prison, and parole and probation officers were most likely to collect samples from eligible individuals. Under arrestee laws, the most common agency designated to collect is the “arresting authority,” which is usually local police agencies or sheriffs’ departments; some states designate the booking agent, detention center, sheriff, or jail as the primary collector, and four states designate both arresting agencies and sheriffs/jails. Eleven state arrestee laws do not designate a specific agency for collection.<sup>33</sup>

Although not common, some arrestee DNA states specify a timeframe under which samples must be collected, sent to the state crime laboratory, and uploaded to CODIS. For example, three states require that *individuals submit* a sample within a set period of time, and an additional three states require that *collecting agencies transmit* the sample to the laboratory within a certain number of days. Alaska requires that the *laboratory analyze* the sample within a certain period of time following receipt. These provisions could become important in determining responsibility in the event that collection does not occur. Theoretically, if collection and subsequent analysis of a sample did not occur, or did not occur within the required timeframe, and it was later shown that the sample would have resulted in a hit, the entity that failed to collect or submit a sample could be blamed for the lapse.

<sup>33</sup> Although the types of agencies authorized to collect DNA samples vary across states, most states designate a local jail or detention facility as the primary collection location. Four states veer from this model: Illinois requires collection at a site designated by the Illinois Department of State Police; Maryland at “the time of charging, by a facility designated by the Secretary;” North Dakota at the time of arrest, appearance, or booking; and Vermont “at a time and date determined at arraignment.” Five states do not specify a location.

## Arrestee Refusals and Collection Mistakes

Arrestee DNA laws provide collecting agencies in several states with tools to ensure that collection occurs. At least one third of arrestee DNA states authorize the use of *reasonable force* to obtain samples from arrestees who have refused to submit. If an individual refuses to submit a DNA sample, he can be charged with a felony offense in three states; six states levy less severe penalties, including misdemeanors or a violation if the person is under supervision. One notable exception is in Alabama, which states that, “notwithstanding the other provisions of this section, any person arrested for a felony offense or a sexual offense, including a juvenile ... shall consent in writing freely and voluntarily to provide a DNA sample and shall be informed that they are providing written permission without any threats or promises. The person shall have the right to refuse to provide a sample ... without penalty. The refusal may not be used as evidence against the person in any proceeding” (AL 36-18-25).

Collecting agencies are often absolved of responsibility for mistakes in the collection process: 12 states stipulate that an honest mistake in collecting DNA at arrest does not invalidate a sample (i.e., profiles derived from samples that should not have been collected can be used in a criminal investigation), and 13 states allow for re-collection if the original sample was not collected correctly. States often do not have policies concerning the destruction or expungement of ineligible samples.

To participate in NDIS, states must comply with federal disclosure requirements (42 § U.S.C. 14132 (b)(3)); failure to comply may lead to cancellation of participation in NDIS. As a result, most states include a list of acceptable uses. In 23 states, misuse of samples carries a criminal or civil penalty.

## Tracking Requirements

Tracking or reporting requirements exist in a handful of states. Maryland, for example, prepares an annual report that is posted on its website with information on samples received, profiles uploaded, expungements, hits, investigations aided, and successful convictions. New Jersey’s Division of Criminal Justice will be tracking the effect of this legislation and has generated internal reports to estimate the expected hits resulting from the new law.

## Section Highlights

### *Scope of Collection and Analysis*

- Although the majority of arrestee DNA states authorize collection after arrest, ten states require an arraignment, indictment, or judicial determination of probable cause before analysis can occur. Seven states also require that this higher burden of proof be met before collection occurs.
- About half of arrestee DNA states authorize collection from all felony offenders; the rest authorize collection from a subset of felonies, typically involving a crime of violence and/or sexual abuse. By no means the norm, some states also authorize collection from select misdemeanors.
- Certain characteristics of the arrestee—including criminal history, prior submission of DNA samples, age, and health—affect collection practices in a number of states.

### *Expungement*

- An individual who is arrested but subsequently not convicted must initiate the expungement process in 18 states; seven states “automatically” expunge a profile if certain conditions are met. Although all states will expunge a profile upon dismissal or acquittal, not all state laws address what happens when an individual is convicted of a non-qualifying offense. Few expungements occur in states where the individual is responsible for requesting the expungement.



- Most arrestee DNA laws 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 profiles for which a valid expungement request has been made can be used in a criminal investigation. Seven states allow hits to profiles ordered for expungement to be used in criminal investigations.

#### *Oversight and Administration*

- The most common agency designated to collect is the “arresting authority,” which is usually local police agencies or sheriffs’ departments; some states designate a jail representative. The timeline for collection is rarely specified.
- Many states allow collecting agencies to use reasonable force or initiate criminal proceedings if an individual refuses to submit a sample. At the same time, honest mistakes in collection—including incomplete samples or ones that should not have been collected in the first place—are allowed to remain in the database in about half the states. Misuse of samples or profiles carries a criminal or civil penalty in 23 states.
- Tracking or reporting requirements exist in at least four states.



## 4. Implementation of Arrestee DNA Laws

State arrestee DNA laws, which are intended to expand the scope of collection, increase opportunities to verify identity at booking, and identify new suspects, also place new collection, analysis, and administrative burdens on the agencies that must prepare for and implement them. As will be discussed in section 5, laboratories that responded to the Urban Institute’s data request<sup>34</sup> typically received a greater number of samples following the implementation of their state’s arrestee DNA law.

As a result, state crime laboratory workload (particularly for the CODIS or databasing unit) was affected, and although DNA sample collection represents a nominal part of a collecting agency’s job, some agencies faced challenges to comply with these laws.

### Funding the New Laws

In many states, demands on staff time and resources necessitated additional resources to operate effectively. Funding—typically from the state general fund, through additional fines and fees, or from federal grants—was made available to support implementation in 16 of the 28 arrestee DNA states. Twelve of these states received this funding on an ongoing basis. Note that the funding authorized to states through legislation did not always materialize. For example, Arizona created a built-in funding source through fee surcharges, however money from the fund was diverted to other purposes during the economic downturn. South Carolina has not implemented its arrestee DNA law due to funding issues.

Eight laboratories reported not receiving additional funding. States occasionally have provisions whereby the laboratory or collecting agencies are not obligated to collect if there is no funding. For example, Florida’s implementation is contingent upon the availability of state funding; however, the laboratory was able to begin implementation by relying on internal resources.

## Preparation Activities

At a minimum, the expansion of DNA collection to arrestees necessitated updates to laboratory protocols (such as expungement procedures specific to arrestees) and changes to collection procedures (including the development and distribution of new collection kits). Some states needed to change the chemistry used to analyze samples, particularly if the specimen type changed from blood to buccal (cheek swab) (see section 6: *Louisiana*), and to plan for the receipt of a large number of samples (e.g., by considering prioritization or outsourcing). Almost all laboratories became responsible for training collecting agencies. New staff and equipment were necessary in several states.

Interviews with laboratory staff suggest that collection began immediately after the effective date in some states, but typically did not begin for a few months. As discussed earlier, some states phased in collection over time by authorizing collection for a subset of felony offenses before authorizing collection for all felony offenses (see section 6: *Louisiana* and *Kansas*). This phased approach was designed to regulate the number of new samples received by the laboratory so that staff were equipped to handle the influx. Other states provided laboratories with a preparation period through delayed effective dates. For example, five states had an effective or implementation date within one month of the date of passage, and an additional nine had an implementation date within six months of passage. Six states provided laboratories with seven months to a year to prepare for implementation (see section 6: *Maryland*). The remaining eight states had a year or more to prepare for implementation (ranging from just under 18 months to upwards of four years).

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<sup>34</sup> See section 2: *Research Design and Methods* for a description of the data request sent to state laboratories.

Even in states where a “ramp up period” was not built into the statute, state crime laboratory representatives were often aware of arrestee DNA legislation for months as the state legislature deliberated, and some were able to institute administrative delays, either to wait for funding or to make changes to infrastructure, such as preparing to receive additional samples, hiring and training staff, and clearing existing backlogs (see section 6: *Kansas*).

### Changing laboratory processes, facilities, equipment, and technology

Every state that collects DNA from arrestees uses buccal swabs; most states also expanded this practice to convicted offenders following the passage of arrestee DNA legislation (convicted offender DNA was traditionally collected from blood samples). As a result, laboratories preparing to receive arrestee samples had to change the chemistry used for analyzing samples and train laboratory staff in new procedures (see section 6: *Federal*). For the sake of simplicity, six arrestee DNA states either switched their convicted offender collection procedures from blood to buccal or began to collect blood and buccal swab specimens from convicted offenders. Three states reported that agents still used blood samples for convicted offenders; according to one respondent, blood collection from sentenced prisoners was more cost-efficient because the state needed to collect blood samples from this population anyway (see section 6: *Louisiana*).

The inclusion of samples from arrestees also prompted the need for new collection kits and cards that

#### Live Scan and Arrestee DNA in North Carolina

In preparation for arrestee DNA collection, the North Carolina State Crime Lab and the Department of Justice Information Technologies Division worked with local law enforcement to install modifications to existing Live Scan terminals in each of the state’s 100 counties. The new machines facilitate the screening and collection of arrestee DNA through the following process:

1. When an individual is arrested, the arresting officer brings him or her to a booking station and uses the Live Scan terminal to select charge information from a pick list of options.
2. If the machine indicates that the charge qualifies for DNA collection, the officer completes additional fields and submits the arrestee’s fingerprints to the state repository to see if a DNA profile is already on file.
3. Following identity verification and confirmation that a DNA profile is not already in the system, collecting officers print a DNA collection card and mail the sample to the State Crime Lab.
4. Upon receipt, the laboratory checks **three** bar codes associated with the collection card, the collection kit, and the mailing pouch before processing. It will also verify that the correct offense was recorded. The laboratory rejects samples that were incorrectly obtained and sends them back to the collecting agency for destruction.

reflected information about the arrest/case.

Laboratories were typically responsible for designing, ordering, and distributing the kits, and some also collected old kits from collecting agencies. These activities often required sufficient time for preparation; for example, one state described a delay in implementation due in part to the time needed to identify, design, purchase, and print new kits. Responsibility for paying for kits influenced collecting agency compliance in one state, where a laboratory representative reported that shifting this burden from the laboratory to collecting agencies resulted in a marked decrease in the number of samples received.

Laboratories also made changes to their instrumentation, processes, procedures, and infrastructure that helped streamline the analysis process. Seven states reported securing new equipment (such as computers and Live Scan / AFIS terminals) and/or moving their laboratory to a new location that was better able to handle the new samples. For example, Colorado designated a nearby laboratory to serve as the central repository for arrestee samples that were subsequently analyzed at the main laboratory (see section 6: *Colorado*).

Nine states reported making changes to existing criminal justice data systems and laboratory systems to improve communications between the laboratories and criminal justice agencies. Changes included adding a flag to the criminal history database; enabling Live Scan technology; developing a CJIS accessible to laboratory staff, courts, and prosecutors; adding new modules to LIMS; and developing systems/procedures that alert lab staff to changes in case status.

Some states, such as Colorado, are experimenting with Rapid DNA systems that can collect and analyze DNA within 90 minutes to verify identity. Although this technology is still in its infancy, one stakeholder felt that the speed and accuracy of these systems will provide law enforcement with an invaluable tool to identify persons at booking, detect other criminal activity (e.g., through a hit to forensic evidence associated with another crime), and indemnify the agency against law suits (e.g., by reducing wrongful detentions).<sup>35</sup>

### Hiring and training new staff

As expected, arrestee DNA laws increased laboratories' need for technical and analytical staff.<sup>36</sup> Twelve state crime laboratories and the Federal DNA Database Unit reported increasing staffing in direct response to arrestee DNA legislation (see section 6: *Colorado*). Staff were hired to: (1) process new samples; (2) clear existing backlogs of convicted offender samples; (3) verify sample identity and eligibility (particularly to ensure that juveniles were not collected in one state); (4) enter data; (5) help with expungements; and (6) provide general administrative support. One state funded a half-time position responsible solely for tracking who was arrested, who qualified for collection, and whether their profile was in the system. Laboratory personnel need a certain amount of training and experience (typically six months) before they can begin work in the laboratory, which also delayed implementation in some states. Laboratories that were not provided with additional staff support varied in the extent to which they struggled with implementation.

Many states received supplemental grant funding from the Department of Justice (through NIJ) to hire staff and clear existing backlogs. This funding, combined with sufficient preparation time—whether due to phased-in collection, legislative effective dates, or laboratory administrative delays—and the structural changes that accompanied arrestee DNA legislation appear to have helped some states process samples faster and clear up existing offender backlogs. In interviews, most laboratory staff described being able to process arrestee samples in a matter of weeks.<sup>37</sup> This turnaround time is consistent with findings from the 2009 Census of Publicly Funded Crime Laboratories, which reported that, “among the 217 laboratories that reported backlog data for forensic biology requests, the total backlog between yearend 2008 and 2009 decreased for offender and arrestee samples” (Burch, Durose, and Walsh 2012). However, the offender backlog still was reported to be over one million requests.

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<sup>35</sup> The FBI has a Rapid DNA initiative, whose goal “is to develop commercial instruments capable of producing a CODIS-compatible DNA profile within two hours and to integrate those instruments effectively within the existing CODIS structure to search unsolved crimes while an arrestee is in police custody during the booking process” (see FBI 2012b). If the goal is achieved, this initiative could have far-reaching effects on implementing arrestee DNA laws.

<sup>36</sup> Note that because forensic casework analysis functions were generally assigned to other staff than to those who processed offender samples, laboratory representatives did not report an impact on forensic case analysis.

<sup>37</sup> The typical range reported was from 7 to 30 days, with only 1 state reporting a processing speed of 4 months.

## Training new collecting agents

Interviews with stakeholders suggest that regardless of the law, collection is typically carried out by the arresting agency, law enforcement, or by sheriffs/jails. The number of collecting agencies, which in some states exceeds 500 unique agencies, complicated implementation of arrestee DNA laws. Table F below displays the number of law enforcement agencies in states with arrestee DNA laws to illustrate the number of agencies that could *potentially* collect from each state; note that in some states, collection is only performed by jail staff or by sheriff's deputies, which means a smaller number of agencies in practice than listed below.

**Table F: Law Enforcement Agencies (Police and Sheriffs) by State**

AL	346	FL	361	MO	564	SC	274
AK	40	IL	778	NJ	545	SD	142
AZ	106	KS	337	NM	109	TN	453
AR	280	LA	147	NC	510	TX	1,011
CA	460	MD	132	ND	107	UT	135
CO	234	MI	629	OH	607	VT	69
CT	103	MN	322	OK	330	VA	279

Source: 2010 UCR

The sheer number of agencies collecting and submitting DNA samples is a burden for laboratories, often bearing the primary responsibility for administration and training but rarely had the ability to enforce compliance. One state that allows many agencies to collect DNA reported challenges with high staff turnover in collecting agencies and a lack of statewide standardization of collection.

Significant changes to collection procedures typically accompanied the implementation of arrestee DNA laws, and most agents needed training in these new procedures. State crime laboratory staff were typically responsible for conducting this training, often by conducting in-person visits to collecting agencies or holding regional sessions that can be attended by multiple agencies.<sup>38</sup> About half of the laboratories that provided training supplemented these visits with additional materials, including packets, videos, and websites. The California DOJ funded a statewide outreach program to organize and conduct trainings with new agencies in 2004–05 and 2008–09.

### Ohio's Online Training

In preparation for implementation, the Ohio Bureau of Criminal Identification and Investigation (BCI) developed an online training course for law enforcement to learn how to collect DNA samples; this course was accompanied by a webinar. The attorney general's office continued to offer a schedule of webinars and links to download the training module. At the time of the interviews, the BCI was working with the Police Officer Academy to incorporate collection procedures into future trainings.

The need for training varied depending on several factors, including whether agencies were new to DNA collection (such as policing agencies), whether technology or data systems had changed or contained new information, whether procedures changed (such as a switch from blood to buccal swab collection), and the scope of collection. States that experienced a sizable increase in the *number* of agencies or the

<sup>38</sup> For example, Louisiana (see section 6: *Louisiana*) had collecting agencies come to regional locations for training, but is exploring the development of an online training/demonstration tool.

*type* of agencies collecting samples had a greater need for training sessions. Certain provisions also required statewide standardization of historically local-level policies, such as booking procedures and the use of summons in lieu of custody, that require coordination and education. Some laboratories also remarked on the challenge of ensuring that the right people, i.e., either those who will be collecting DNA or those with the ability to train others in their jurisdiction, attend training sessions, especially in light of agency attrition. The need for ongoing communication and training is addressed in the next section.

## Ongoing Activities

In addition to the start-up activities needed to implement arrestee DNA laws, state crime laboratories and collecting agencies needed to expand some of their ongoing activities and adopt new processes.

### Collecting and analyzing additional samples

The number of additional arrestee samples received by state laboratories depended heavily on the scope and point of collection. From a logistics standpoint, provisions that require judicial probable cause prior to collection or analysis reduced the number of samples received and arrestee profiles entered into the state database and eased the *analysis* burdens on laboratory staff. A narrower scope of qualifying offenses also reduced the number of total samples collected and analyzed.

Many of the states that authorize collection from all felony arrestees saw substantial increases in the number of samples received, particularly in the first few years of implementation (see section 5 for more detail on this finding). State crime laboratories with limited capacity to respond to the initial increase in sample volume associated with arrestee DNA laws often adopted various strategies to ensure that arrestee samples were processed in a timely manner:

- **Staggering Implementation.** As previously discussed, some states were able to mitigate the impact of new samples on laboratory staff workload by phasing in implementation over the course of several months or years.
- **Prioritizing Samples.** Eight state laboratories reported prioritizing arrestees for analysis, while 18 reported analyzing them alongside convicted offender samples. Prioritizing samples is important considering that: (1) an arrestee profile may only be searchable in CODIS for a limited amount of time if it is expunged and (2) one of the central reasons for collecting at arrest is to prevent future crimes and solve cases faster through earlier crime detection. Setting priorities was not relevant for states able to process all samples within the standard 30 days.
- **Outsourcing.** According to the 2009 census, about one third of laboratories (at any level of government) outsourced DNA casework requests. Of the 26 laboratories interviewed for this report, 7 reported outsourcing arrestee samples for analysis. In one state, the laboratory decided to process arrestee samples in-house (in lieu of outsourcing them as is done with convicted offender samples) because the state's probable cause provision required laboratory staff to wait for an arraignment before analysis could occur.
- **Determining sample eligibility.** Verifying that a sample is eligible for analysis is more complicated for arrestees than for convicted offenders, and the same provisions that reduce the number of samples received by state crime laboratories may affect workload by necessitating a more time-intensive verification process. As explained in the previous section, there are at least three criteria that qualify an individual for DNA collection—case status, charge at arrest/indictment, and personal characteristics—and that must be considered before a laboratory can accept a sample for processing.

- **Case Status.** Laboratory administrators in states that require a judicial determination of probable cause prior to collection or analysis described the ongoing need to verify the status of the associated case, by either using a case processing database or communicating directly with the courts, which led to system bottlenecks and delayed sample processing in some states.
- **Charge at Arrest/Indictment.** Although states that limited collection to a subset of felony arrests had fewer individuals eligible for DNA collection and analysis, laboratory staff often expended additional resources verifying offense eligibility using criminal records, arrest reports, and case processing information. This process was particularly time-consuming for laboratory staff that needed to review each individual’s criminal records to find the official list of charges at arrest. Some collecting agencies also found it difficult to quickly determine an arrestee’s eligibility for collection in the field, particularly if their state’s list of qualifying offenses was extensive and complicated. In contrast, “all felony” states produced more samples, but it was often easier for agencies to determine if an arrestee qualified for collection.
- **Individual Characteristics.** States that restricted collection based on age, criminal history, immigration status, or any other personal characteristic also required an extra step for collecting agencies and laboratories to ensure that the individual not only was charged with a qualifying offense, but also had the requisite characteristics to prompt DNA collection. This process was especially challenging when an arrestee was new to the system and did not have demographic and criminal history information that could be used to verify eligibility. A recent report that addressed the collection of DNA from juveniles (arrestees and adjudicated delinquents) highlighted the coordination challenges between laboratories and the juvenile justice system (Samuels et al. 2011).

One laboratory representative in a state that has been processing arrestee samples for years noted that staff can spend up to an hour on each sample determining why the laboratory received it. Another state laboratory representative remarked on the challenges associated with monitoring individual cases, particularly when detailed information is restricted to certain law enforcement agencies. Some state crime laboratories whose limited access to data made verification nearly impossible opted to check that a sample qualified for collection only after a hit occurred. In these instances, a state’s policy around the use of profiles collected in error will determine if the hit information can be used in a criminal investigation (for more on “honest mistake” policies, see section 3).

Criminal history flags and automated systems, along with routine training, helped collecting agencies identify the correct cases and persons from whom to collect a sample and reduced the number of invalid samples submitted to laboratories; these systems also alerted laboratory staff responsible for verifying sample eligibility. In Kansas, collection cards were integrated into the state’s criminal history software, to indicate whether a DNA sample was on file for the individual (see section 6: *Kansas*). The ability to batch files also expedited the verification process in some states. It is important to add that if agencies are to rely on data systems to provide them with information regarding sample eligibility, these systems must contain up-to-date information.

### Checking for duplicates

Not all arrestees are new to the criminal justice system; in fact, an estimated 43 percent of felony defendants have been previously convicted of a felony (Cohen and Kyckelhahn 2010) and may have an existing DNA profile in CODIS. Duplicate sample submissions generally do not add power to CODIS and may represent a costly burden to laboratories; according to interviews, the cost associated with collecting ranges from \$2 to \$6 per kit, and the cost of processing ranges from \$20 to \$40 per sample,



depending on whether staff time is included in the estimate. The analysis of duplicate samples may extend overall laboratory processing time, thereby delaying the generation and upload of unique profiles to CODIS. Four arrestee DNA laws expressly prohibit the collection of DNA from individuals with a profile in CODIS. An additional eleven arrestee DNA states relieve the individual or state from having to submit/collect DNA (i.e., collection is optional but still allowed). Thirteen state laws do not address duplicates.

Interviews suggest that the vast majority of collecting agencies had access to systems that allowed them to check if a sample had already been collected. At least 12 states had flags in their criminal history database that indicated when a profile was on file; a handful of other states provided agencies with access to more advanced systems for checking collection information, such as Live Scan and AFIS. Despite access to these systems, duplicates represented a challenge for laboratories, depending in large part on the length of time that the state had been implementing arrestee DNA laws (many states experienced a temporary spike in duplicates when arrestee DNA laws were first implemented).

The rate of duplicates was influenced by the availability of data systems that could quickly and easily inform collecting agencies and laboratories about sample eligibility. Indeed, the states that experienced high volumes of duplicates lacked LIMS with the capacity to check for duplicates. A handful of states collected samples at every arrest because they did not have the ability to check if a person's DNA had already been collected. Although most laboratories have a process for checking for duplicate samples and will remove them from the stream of analysis once identified, a handful of states actively collected DNA samples from all individuals arrested or charged with a qualifying offense, regardless of whether that person had a profile in CODIS. In Maryland, if an individual does not have a DNA profile in the Convicted Offender Index, the state will collect a DNA sample at charging and again upon successful qualifying conviction. This practice could be useful in the event that the arrestee law is overturned.

Again, it is critical that criminal history databases or other systems provide *current* information to officers in the field about previous DNA collection to avoid the unnecessary and costly collection and analysis of duplicate samples. Efforts by laboratory staff to notify collecting agencies when a duplicate sample was submitted and to provide additional training on checking for duplicates also helped states control the number of repeat submissions.

### **Monitoring case status**

States where the current status of the criminal case influenced DNA sample processing (such as an arraignment prompting analysis or an acquittal prompting expungement) needed procedures to facilitate *regular* communication between collecting agencies, courts, and laboratories or to provide laboratories and collecting agencies with regular and automated updates from a case processing database. In some states, the burden of checking for expungement eligibility fell to the laboratory, which required staff to regularly check case processing information to determine case disposition. Although the use of an automated alert system is preferable to relying on communication with the courts, not all laboratories had direct access to case processing information, and rarely was such information integrated with laboratory data. Coordination issues may be compounded when laboratories need to check on the status of a juvenile delinquency proceeding, because the laboratories often do not have ongoing relationships with the staff in the juvenile justice system or access to juvenile records (Samuels et al. 2011).

Some states developed ways to streamline communication between collecting agencies, the courts, and the laboratory, such as developing forms or notifications that the agency responsible for initiating

expungement completes and submits to the laboratory. In Virginia, the first state to legislate an automatic expungement process, the laboratory had to build a new system to track case status and now receives weekly notifications from the Virginia State Police that details the case status of all individuals from whom DNA was collected.

Access to integrated systems may not be sufficient for states that deal with a large number of samples and profiles that must be checked. Automated systems will also prove insufficient if county or city level variation in record keeping/coding makes it difficult to interpret when an arrest results in a formal case. For example, one state crime laboratory used a certain identifier to determine cases that had been formally charged and were ready for analysis, only to discover that one jurisdiction used this identifier both for cases formally filed in the courts and cases pending review (i.e., arrestees).

Other states were working to develop integrated databases that allowed laboratories to track cases directly. For example, after meeting with the prosecutors and court officials to determine the best way to organize the expungement notification process, the Missouri state crime laboratory developed an interface between the state's CJIS (which prosecutors and courts can access to update dispositions) and the laboratory's database that allowed the laboratory to extract information and create reports to see if an arrested individual qualifies for expungement. Vermont developed an access database that will keep information on arraignee samples and eventually connect with the courts' data system to alert lab technicians when a case's disposition prompts expungement.

### **Ensuring proper collection and submission of materials**

Most state laws do not assign responsibility for oversight over arrestee DNA collection. As a result, oversight functions often fell informally to laboratory staff who became responsible for quality control tasks such as ensuring that materials were submitted correctly and that all eligible samples were collected and analyzed.

Staff in some crime laboratories report spending a substantial amount of time resolving problems rather than conducting analysis; one state estimated that about five percent of samples received cannot be processed because kits contained inadequate DNA or insufficient identifying information. In addition to challenges with ineligible samples, laboratories confronted collection kits that were not completed correctly or in a timely manner, or that were missing information that laboratories needed to process the sample. Some collecting agencies listed an incorrect name for the arrestee or multiple, confused identifiers on the collection card, while others simply used the wrong collection kit (e.g., for a convicted offender and not an arrestee, which slowed processing at the laboratory) or did not complete all of the fields listed on the sample collection card. In one state, a lab technician had spent a significant amount of time ensuring that all required information was noted on the collection card. Although not common, errors were also found in expungement forms or forms were sent to the wrong agency.

#### **The Role of New Mexico's CODIS Administrator in Oversight**

The New Mexico legislature formalized the role of its CODIS administrator in overseeing implementation of SB 216, the law that authorizes DNA collection from individuals following a judicial determination of probable cause. The state CODIS administrator chairs a nine-member DNA Identification Oversight Committee, which meets quarterly to "adopt rules and procedures regarding the administration and operation of the DNA identification system." It is composed of representatives from several key criminal justice system stakeholders, including crime laboratories, the attorney general's office, district attorneys, and public defenders.



A number of interviewees described problems with agencies that collected for non-qualifying offenses, with one laboratory representative noting that “they mean well, but are also wasting resources.” Another state crime laboratory reported that in the first few months of implementation, some collecting agencies appeared to be collecting from whomever they wanted.

According to interviews, the majority of laboratories and collecting agencies did not check whether samples were collected from all qualified individuals. However, some state laboratories attempted to gain compliance by monitoring cases that should have resulted in collection and notifying agencies if they were missing a sample (see textbox, *Monitoring the Collection of Qualifying Samples/Ensuring Full Compliance with the Law*). Other states monitored the number of samples received by jurisdiction and notified agencies if there was a major change in trends. For example, although the Arkansas laboratory does not have a formal system for ensuring collection from all eligible individuals, it routinely monitors the number of submissions by provinces and sends blast notification emails through the Arkansas Crime Information Center, a list that includes most law enforcement agencies, to notify agencies of apparent discrepancies.

<b>Monitoring the Collection of Qualifying Samples/Ensuring Full Compliance with the Law</b>
<ul style="list-style-type: none"><li>• In coordination with its Statistical Analysis Center, <b>Florida</b> monitors the number of submissions it should have received from convicted offenders based on crime data obtained through DOC, NCIC, and juvenile justice databases.</li><li>• <b>Kansas</b> has a system for verifying that all convicted offenders have submitted samples. At the end of every quarter, the laboratory receives a list of individuals eligible for DNA submission from the sentencing commission, which it checks against LIMS, and will notify any county that has not submitted an eligible sample. A comparable system has yet to be developed for arrestees.</li><li>• <b>North Dakota</b> laboratory staff query arrest information and manually compare it to information collected from the laboratory’s database; a list of qualifying individuals is then sent to collecting agencies. In the future, the state plans to implement a system whereby if an individual is pulled over (traffic stop), the officer will be alerted to collect.</li><li>• For the past several years, the <b>South Dakota</b> State Division of Criminal Investigation has funded a part-time position to track who was arrested, who qualified for collection, and whether their profile is in the system. If the profile is not in the system when it should be, the sheriff’s office receives a message from the laboratory notifying the office that a sample was not collected as expected.</li></ul>

Because of these issues, training activities were time-intensive for some laboratories on an ongoing basis; several state laboratories noted that high turnover in law enforcement agencies has resulted in a constant need to train new collection staff. One solution was to train officers with the expectation that they would go on to train others within the agency and alleviate the need for laboratory-run training.

In addition to the ongoing training of new staff, laboratories typically needed a way to communicate regularly and easily with collecting agents. Some agencies sent out notices when there were minor changes to the law, such as a new offense becoming eligible for collection; others (such as Connecticut) reached out to statewide law enforcement associations to ensure that top administrators knew about the collection policy. In Michigan, the laboratory required collecting agencies to place orders for new kits through the laboratory (not the vendor) to encourage the two agencies to develop a relationship and to provide an opportunity for the laboratory to answer any questions.

Laboratories noted that while they can notify and “hound” collecting agencies, their role is ultimately one of an administrator, not an enforcer. Indeed, 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.<sup>39</sup>

## *Section Highlights*

### *Preparation Activities*

- Laboratories in arrestee DNA states typically needed time to prepare for implementation, provided through delayed effective dates or administrative action.
- To prepare for the receipt of arrestee DNA samples, some states made significant changes to infrastructure, including updating collection kits, renovating/building physical laboratories, purchasing equipment, and updating existing criminal justice data systems and laboratory systems.
- About half the laboratories in arrestee DNA states hired and trained new laboratory analysts in direct response to arrestee DNA laws.
- The majority of arrestee DNA states was able to process arrestee samples in a timely manner and reduced the backlog of requests to analyze offender samples.
- As states prepared for implementation, training represented a substantial time investment for both laboratory staff and collecting agencies, particularly if most agencies were new to collection and procedures had changed significantly.

### *Ongoing Activities*

- States responded to an increase in samples received by staggering implementation, prioritizing arrestee samples for analysis, and outsourcing part of their work.
- A substantial amount of laboratory staff time was spent on verifying sample eligibility, particularly if the criteria for qualifying case status, charge at arrest/indictment, and personal characteristics were complicated.
- Despite collecting agency access to systems that could establish whether a DNA profile exists in CODIS, state laboratories still received duplicate samples. Although common practice was to remove a sample from the stream of analysis upon identifying it as a duplicate, some states did not have the systems in place to detect duplicates until after a hit had occurred.
- States where the current status of the criminal case influences DNA sample processing required *regular* communication between collecting agencies, courts, and laboratories, or a system that provided laboratories and collecting agencies with regular and automated updates from a case processing database. Even when these systems were in place, monitoring the case associated with a sample was time-intensive for laboratory staff.
- State crime laboratories expended a substantial amount of staff time resolving collection issues and providing ongoing training to agencies.

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<sup>39</sup> Ensuring compliance with DNA collection laws is not a problem confined to arrestee DNA laws. For example, a 2009 report found that 10,000 felons were released from the Illinois DOC without having their DNA collected as allowed by law—an additional 40,000 did not have their DNA collected from probation departments (see Twohey 2009).

## 5. The Effect of Arrestee DNA Laws on Public Safety

Analyzing the specific impact of offender profiles categorized as arrestees means testing the theory that the collection of DNA at arrest or charging contributes to public safety not only by increasing the number of crimes solved, but also by reducing the amount of time it takes to solve them. This theory is based on the following assumptions:

1. **Arrestee laws increase the number of unique offender profiles in CODIS.** Because of case attrition, arrestee DNA laws presumably draw upon a broader population of individuals for a given set of qualifying offenses than convicted offender laws.
2. **Arrestee laws increase the likelihood of CODIS hits.** If more profiles are included as a result of these laws, there are more opportunities for forensic profiles (unknown profiles) to match offender profiles (convicted offender and arrestee profiles). These hits could aid investigations by identifying or confirming a suspect.
3. **Arrestee laws solve cases faster.** Because it could take months to resolve a case, laws that authorize collection at arrest provide the opportunity to upload offender profiles to CODIS sooner than if samples were only collected at conviction.

To test each of these assumptions and the public safety theory, researchers analyzed annual data on the number of samples received, profiles uploaded to CODIS, hits, investigations aided, and expungements provided by twelve states<sup>40</sup> that authorize DNA collection at arrest or charging (see table G). By observing trends in these data in the context of the laws' provisions and implementation, we can begin to understand how arrestee DNA laws contribute to DNA database expansion and investigations aided. In addition, using the FBI's NDIS data for 50 states from 2008–12,<sup>41</sup> the research team examined the relationship between the number of offender and forensic profiles in NDIS and the number of investigations aided.

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<sup>40</sup> The team sent data requests to 23 states and twelve states submitted data in response. The team did not request data from Connecticut or Illinois because these states had only recently implemented their laws at the time of the request (early 2012). The team did not request data from South Carolina or New Jersey because these states had not yet implemented their laws at the time of the data request. Although the team conducted an interview with a state lab representative in Minnesota, data was not requested since its law was overturned in 2006.

<sup>41</sup> Annual NDIS data for each state was collected from the FBI's NDIS Statistics website (FBI 2012c). While the website only includes the most recent NDIS data (e.g., at the time of the review, data from July 2012 were available), researchers collected data from additional years from a web cache.

Table G. States that Completed Urban Institute Data Request						
State	Year (signed)	Felonies	Misdems	Collection <sup>42</sup>	Analysis	Expungement Resp.
Arizona	2007	Select	x	After arrest	After arrest	Individual
Colorado	2009	All		After arrest	After charging	Individual
Florida	2009	All, phased		After arrest	After arrest	Individual
Kansas	2006	All, phased	x	After arrest	After arrest	Individual
Louisiana	1997	All	x	After arrest	After arrest	Individual
Maryland	2008	Select		After charging	After charging	State/Auto
Michigan	2008	Select		After arrest	After arrest	Individual
Missouri	2009	Select		After arrest	After arrest	State/Auto
New Mexico	2006	All, phased		After arrest	After charging	Individual
North Carolina	2010	Select		After charging	After charging	Individual → State/Auto
Tennessee	2007	Select		After charging	After charging	State/Auto
South Dakota	2008	All	x	After arrest	After arrest	Individual

### Assumption 1: Arrestee Laws Increase the Number of Unique Offender Profiles in CODIS

As previously noted, NDIS has seen spectacular growth in the volume of offender profiles it supports, increasing by an order of magnitude from 1.2 million profiles in 2002 to upwards of 11 million profiles in July 2012. Between 2006 and 2012, approximately 1.2 million arrestee profiles were added to NDIS, and they now account for about one-tenth of the total offender profile population.<sup>43</sup> Figure 6 displays the number of arrestee profiles that 23<sup>44</sup> states and the federal government have contributed to NDIS. As observed in figure 6, California, which has an all-felon arrestee law, has contributed upwards of 40 percent of arrestee profiles in NDIS as of July 2012. Louisiana has contributed more than one-fifth of the arrestee profiles. The federal government, Colorado, and Tennessee are also included among the top contributing jurisdictions to NDIS's Arrestee Index. The sum of profiles contributed by the remaining 19 states as of July 2012 accounted for less than the total amount of profiles uploaded by Louisiana alone.<sup>45</sup>

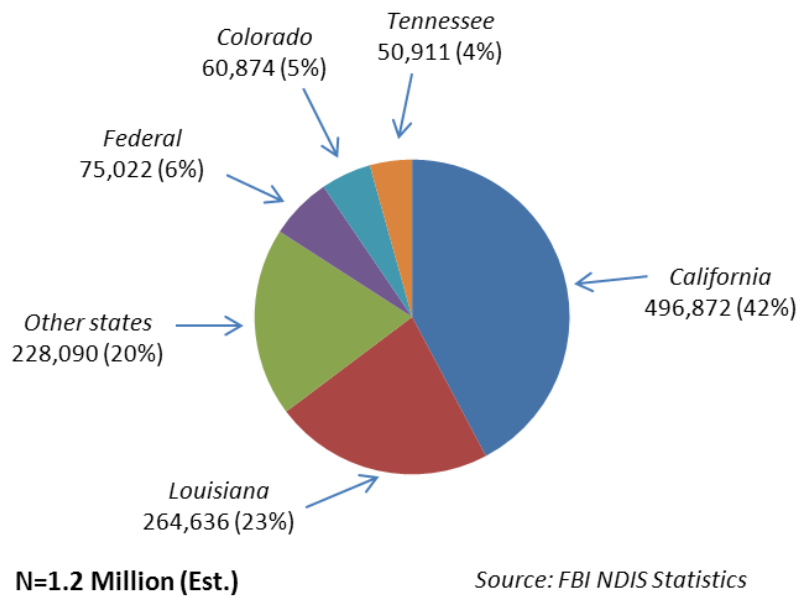
<sup>42</sup> "After charging" generally refers to collection and/or analysis that occurs after charging, arraignment, indictment, or judicial determination of probable cause.

<sup>43</sup> July 2012 NDIS data was collected from the FBI's NDIS Statistics website (FBI 2012c). The FBI reports metrics by jurisdiction and in aggregate. Historical NDIS data for all jurisdictions in aggregate (2002–11) was provided by the FBI's CODIS Unit. See <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics> for more information.

<sup>44</sup> While 28 states have arrestee DNA laws, only 23 states uploaded arrestee profiles to NDIS as of July 2012. As noted earlier, South Carolina and New Jersey have not yet implemented their arrestee DNA laws. Texas is not uploading arrestee profiles to NDIS. Minnesota is no longer uploading arrestee profiles since its law was overturned in 2006. While Connecticut authorizes collection from individuals who are arrested, these profiles are entered into NDIS as convicted offender profiles since the law only applies to arrestees who have been previously convicted.

<sup>45</sup> See appendix B (Legal Matrix) for each state's scope of qualifying offenses and point of collection. Table G only describes the scope of offenses and point of collection of states that responded to the project team's data request.

**Figure 6. Number of Arrestee Profiles in NDIS by Jurisdiction (as of July 2012)**



Regardless of the growth in the number of offender profiles in NDIS, what remains unclear is the net benefit of arrestee profiles to NDIS—how many of these arrestee profiles would not have been submitted without the arrestee laws? Based on the interviews, most states do not transfer an individual’s profile from the Arrestee Index to the Convicted Offender Index upon conviction, as this task would require the laboratory to track the cases from arrest to conviction and then shift categories. As a result, a profile stored in the Arrestee Index may forever be designated as an “arrestee,” despite a subsequent qualifying conviction, and any subsequent hit to the profile may be reported as an “arrestee” hit. Over time, it is expected that the overall proportions of arrestee and convicted offender profiles in NDIS will change as samples are collected earlier in the case process (i.e., front end collection versus back end collection). Louisiana’s arrestee DNA law, for instance, was implemented in 2003; as of July 2012, arrestee profiles represent 69 percent of Louisiana’s offender profiles in NDIS (FBI 2012c).

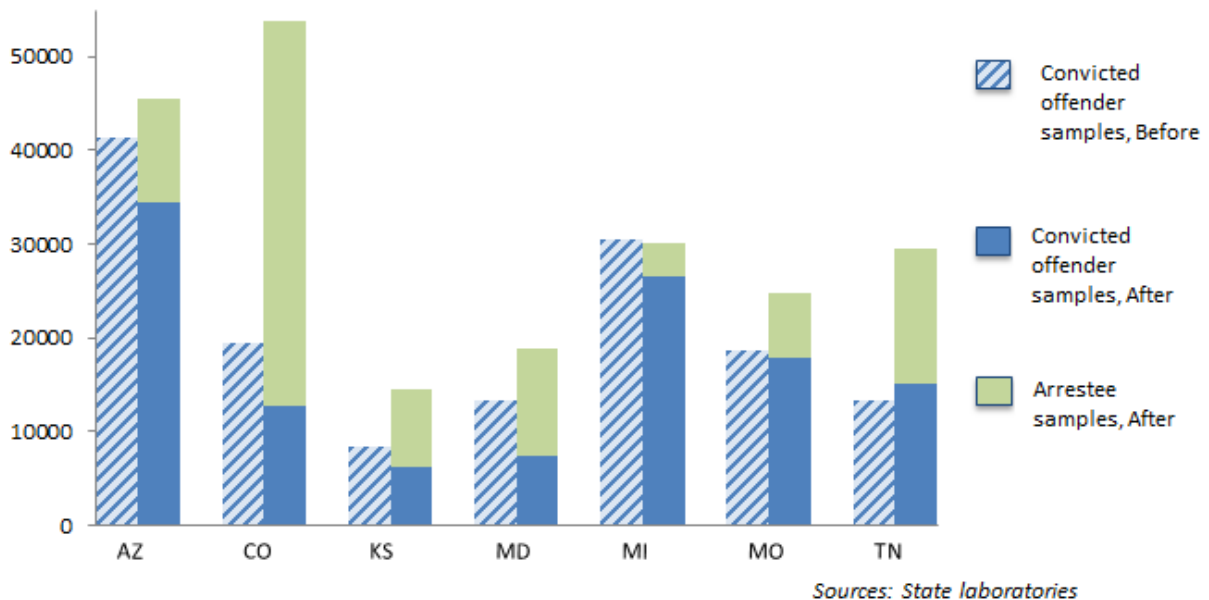
Despite these limitations in determining the extent to which arrestee laws have contributed to the overall growth in NDIS, trends in the volume of convicted offender and arrestee samples received by laboratories may provide some insight as to the impact of arrestee laws.

### Change in Sample Volume

To estimate the extent to which arrestee DNA laws contribute to more unique profiles in CODIS, researchers examined the change in samples received pre- and post-implementation in arrestee DNA states. Figure 7 displays the change in the number of samples that laboratories received between the year prior to the arrestee law’s implementation and the year after<sup>46</sup> implementation.<sup>47</sup>

<sup>46</sup> The year following the arrestee law’s implementation was selected as a comparison for two reasons. First, states have implemented their laws and varying points in a calendar year. Some, for instance, have implemented their laws in January, while others have implemented in October. Selecting the year following implementation allows researchers to observe changes for an entire year of implementation, as opposed to partial year of implementation. Second, as the interviews revealed, the year in which an arrestee law is implemented may be

**Figure 7. Number of Samples Received Before and After Implementation**



As figure 7<sup>48</sup> indicates, several states experienced dramatic growth in the number of samples received: Colorado and Tennessee increased by 177 percent and 122 percent the year following implementation, respectively, while Kansas experienced an increase of 74 percent. Other states experienced smaller but still substantial increases: Maryland (42 percent), Missouri (32 percent), and Arizona (10 percent). Notably, Michigan’s sample yield was relatively stable prior to and after implementation. While convicted offender samples largely decreased in most of these states post-implementation, the volume of arrestee samples counterbalanced this trend.

The differences between states in terms of the magnitude of change may be affected by a variety of factors, including the scope of qualifying offenses, the point at which a sample may be collected and/or analyzed, the prevalence of duplicate samples, and trends in the volume of arrests. Colorado and Kansas’s arrestee laws are the broadest in scope compared to the states featured in this analysis, authorizing collection from individuals arrested for any felony offense. While both states actively discourage duplicate sample collection, the growth in Colorado might be larger as law enforcement officers collect at each arrest because they cannot easily check if the collection is duplicative. On the other hand, collecting officers in Kansas are able to check the state’s criminal history index to see if an individual has already had a sample collected. While Tennessee’s law limits collection to individuals

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characterized by preparation activities, including training, infrastructure and systems development. All of these factors may dramatically affect the number of samples received in the first year.

<sup>47</sup> Louisiana and New Mexico are not included in this figure because they did not provide data on samples received. Florida and North Carolina implemented their laws too recently for inclusion. South Dakota is not included in this metric because the data it provided was not comparable to data provided by other states.

<sup>48</sup> While California—the single largest contributor of profiles to CODIS—did not respond to the data request, summary data provided on the California Bureau of Forensic Science website indicate that the number of samples increased in the first year of implementation. In 2009, an average of 26,500 samples were submitted each month, compared to a monthly average of 12,000 samples in 2008. See <http://oag.ca.gov/bfs/prop69/faqs> for more information.

arrested for a subset of felony offenses, the state does not actively discourage duplicate sample collection. Therefore, if samples are collected from the same individuals at both arrest *and* conviction, it is expected that the number of samples collected would experience this growth.

In Maryland, by contrast, the growth in samples received was more modest in the first year of the arrestee law's implementation. Here, collection is limited to individuals who have been charged for crimes of violence, select burglaries, and attempts to commit these crimes. Further, law enforcement agencies are advised to collect from individuals who are charged of a qualifying offense if an individual does not already have a sample on file from a prior conviction.

Trends in the number of samples received may also be informed by arrest trends over time. While arrest data is easy to obtain through 2009 (e.g., see Puzanchera, Adams, and Kang 2012), data consistent with the timeframe of the analysis was not readily available for each state the project team examined. Arrest data for each crime type over time could potentially be used to forecast the number of samples a state can expect to receive (see textbox: *Predicting the Number of Additional Unique Offender Samples*).

<b>Predicting the Number of Additional Unique Offender Samples</b>
<p>To evaluate the potential workload impact of collecting DNA at arrest on collecting agencies and laboratories, the following thought exercise may be useful for states that are considering extending their DNA laws to arrestees. While researchers did not have the data to test this formula for a particular state, the expected number of DNA samples from individuals who are arrested or charged with qualifying offenses could be estimated by using annual state arrest data in tandem with statistics on attrition between arrest and case filing and between case filing and conviction. The formula for each state will depend on (1) the state's scope of collection for convicted offenders and arrestees, (2) the point at which the state collects DNA from arrestees, (3) the state's policy for collecting duplicate samples, and (4) criminal history information for those arrested of qualifying offenses.</p> <p>The following formula considers each of these factors: <math>T = \theta a</math>, where <math>T</math> is the total number of expected arrestee samples, and <math>a</math> is the total number of arrests in a given year for qualifying offenses. Theoretically, the coefficient, <math>\theta</math>, could be developed using statistics on the proportion of unique individuals arrested for a qualifying offense in a single year, the proportion of individuals arrested for a felony who have not had a prior felony conviction, the proportion of arrests/bookings for juveniles, and if applicable, the proportion of individuals arrested who are charged. The product of these proportions works to exclude (1) individuals who may have already had a sample collected in the past (reflecting that many states actively discourage the collection of duplicates), (2) individuals who do not qualify for collection if probable cause determination or charging is required, and (3) individuals with characteristics that prompt inclusion or exclusion.</p> <p>To put this equation to work, assume that 100 felony adult arrests occurred within a particular jurisdiction (<math>a=100</math>) in a given year. The jurisdiction collects and analyzes DNA for all felony offenses upon arrest and wants to avoid duplicate submissions. Seventy-five of these arrests are unique individuals (0.75) and 60 of the arrests are associated with individuals who have not had a prior felony conviction (0.60). The coefficient, <math>\theta</math>, is the product of these proportions (i.e., <math>(0.75) \times (0.60) = 0.45</math>). Therefore, <math>T = (0.45)(100) = 45</math>. The jurisdiction can expect to collect 45 unique samples within the year.</p>

### **Sample-Profile Attrition**

Despite the increase in total samples received for most states as evidenced in figure 7, it is important to underscore that not all samples received result in profiles stored in CODIS. While this may be a result of the quality of a submitted sample, collecting agencies may submit duplicate samples that many laboratories screen for and do not upload, resulting in attrition between sample receipt and upload, or a share of arrestee profiles may be uploaded to CODIS temporarily if states are charged with the responsibility of expunging profiles upon eligibility. These factors are explored below.



## Duplicates

As discussed in sections 3 and 4, duplicate collection policies vary across states, with most states employing strategies to curtail such submissions by flagging criminal history databases to inform law enforcement that a sample has already been collected. These states typically screen samples prior to analysis to ensure that they are unique, not analyzing samples that are duplicates. Data provided by states in response to the data request shed some light on duplicate rates. In Michigan, of the 7,018 samples submitted to the state laboratory between 2009 and 2011, 508 were duplicate submissions, about 7 percent of the total submissions. Further, of the 19,232 arrestee samples submitted to Arizona's state laboratory between 2008 and 2011, an estimated 5,149 (27 percent) were duplicate samples. Other states reported duplicate rates of 13 percent (Florida), 15 percent (North Carolina), and 16 percent (Missouri); note that these rates may be higher when a state is first implementing its arrestee DNA law.

## Expungement Policy

Individuals who are arrested or charged, but not subsequently convicted, are generally eligible to have their profiles expunged from CODIS. States that have automatic expungement policies from which the research team collected data typically have a high expungement rate. In Maryland, for instance, 33,649 samples were received between 2009 and 2011; in this same time period, 10,258 arrestee profiles were expunged.<sup>49</sup> In Missouri, profiles were expunged to a lesser degree; between 2009 and 2011 13,746 arrestee samples were received, and 1,146 arrestee profiles were expunged during this time period.<sup>50</sup> To the extent that there is little variation in the volume of qualifying arrests over the years, states that automatically expunge arrestee profiles and transfer profiles to the offender index upon conviction may expect to have a fairly constant number of arrestee profiles in their database at any given point in time. As of July 2012, the FBI's NDIS Statistics (FBI 2012c) indicates that Virginia has uploaded 5,570 arrestee profiles, or about 1.5 percent of the state's total offender profiles. A laboratory representative reports that this figure has stayed fairly consistent across years since arrestee profiles are either expunged if individuals are not convicted or transferred to the offender index if the individual is convicted.

However, states that are only statutorily required to expunge individuals' profiles upon request from the respective individual may expect to perform significantly fewer expungements. Kansas, for instance, reported that they did not receive any valid expungement requests. Although the percentage of filed cases resulting in conviction is not readily available, data obtained from the Kansas Judicial Branch and Kansas Sentencing Commission shows that in FY 2011, the state filed 19,600 felony cases and reported 14,000 felony sentences. Recognizing the limitations of associating these figures (namely, that the reported sentences may correspond to cases filed in previous fiscal years), it is estimated that approximately 30 percent of felony defendants are not convicted (a figure consistent with national statistics reported earlier in this report) and may have profiles eligible for expungement. It is important to note that some portion of these individuals did not submit a DNA sample because their profile had already been uploaded following a previous conviction or arrest.

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<sup>49</sup> Although Virginia did not submit data for this study, in the year after it implemented its arrestee law, Virginia expunged 38 percent of its arrestee profiles (Ferrara and Li, 2004).

<sup>50</sup> Missouri has both a state-initiated and individual-initiated expungement policy. If an individual's warrant is refused, the state must automatically expunge the individual's profile. If an individual is acquitted or his case is dismissed, then the individual must initiate the process. This division of responsibility based on case outcome might explain why Missouri's expungement rate is relatively small compared to other states that have automatic expungement policies.



The large number of profiles that likely will qualify for expungement raises questions about the potential costs and benefits of collecting and analyzing DNA from arrestees only to remove the profiles months later. One laboratory representative in an automatic expungement state pointed out that because more than half of qualifying offenses received by the laboratory could be dismissed or pled down, staff could potentially expend time and money on thousands of samples that would ultimately be expunged. However, as discussed below, proponents of arrestee DNA legislation note that even if a profile will later be expunged, investigations may still benefit from the period of time prior to disposition when the arrestee DNA profile can be linked to DNA evidence collected from an unsolved criminal investigation and lead to the identification of a suspect in the hit case.

The extent to which arrestee DNA laws contribute unique offender profiles is unclear. However, based on case attrition statistics, the growth in the number of samples laboratories received after implementation, and expungement policies that facilitate the retention of otherwise expungeable profiles in CODIS, it is likely that arrestee DNA laws contribute more profiles to CODIS, translating to more opportunities for forensic profiles to match offender profiles. The extent to which more offender profiles translate into more hits is explored below.

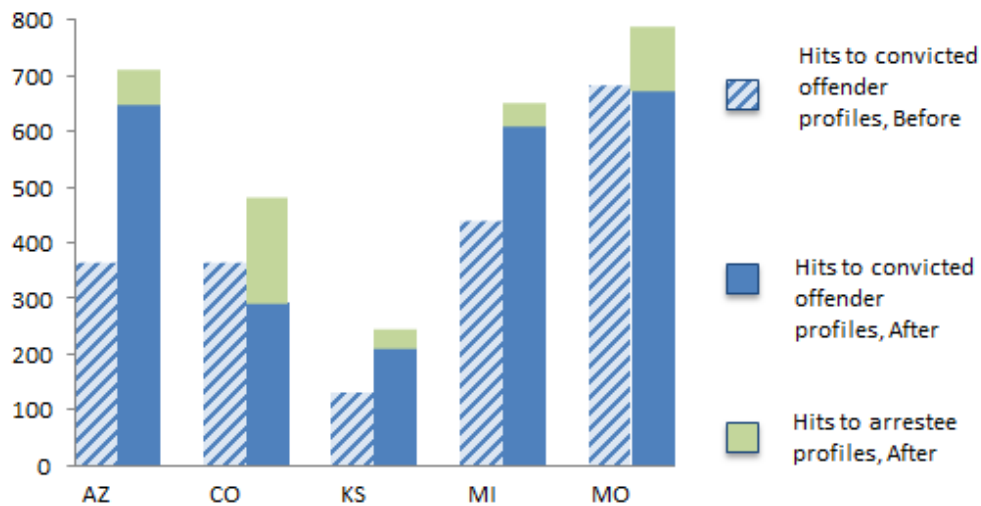
### **Assumption 2: Arrestee Laws Increase the Number of Hits and Investigations Aided**

The value of CODIS is not measured by its size, but by the number of hits that may potentially aid investigations. If arrestee DNA laws increase the number of profiles in NDIS, then the likelihood of a hit and subsequent investigation aided increases. The extent of this increase has important implications for considering the investment in expanding the number of offender profiles in CODIS. Consistent with the increase in the number of samples observed in several states that collect DNA at arrest, the number of overall hits has also increased. Figure 8<sup>51</sup> displays this trend. The first bar for each state corresponds to the number of hits that occurred the year prior to the state's implementation of its arrestee DNA law. The second bar corresponds to the number of hits that occurred the year after the state implemented its law. Overall, the hits increased the year after implementation. In Colorado and Missouri, for instance, while the total number of hits to convicted offender profiles decreased after implementation, hits to arrestee profiles more than made up for this difference.

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<sup>51</sup> Consistent with the trends in other states presented in figure 8, summary data from the California Bureau of Forensic Science (<http://oag.ca.gov/bfs/prop69/faqs>) indicate that the number of hits increased following implementation of the state's arrestee law. In 2008, there were 183 hits on average per month. In 2009—the year of implementation—this monthly average increased to 280. This trend continued in 2010, in which an average of 360 hits occurred each month, about the twice the average in 2008. After a state appellate court ruled California's arrestee DNA law unconstitutional in *People v. Buza* (2011), which resulted in a temporary injunction of the state's law, the number of arrestee sample submissions decreased from 17,047 in August 2011, to 7,398 in October 2011. The decrease in submissions was accompanied by a decrease in the number of hits—in December 2011, 215 hits were reported, which was lower than the monthly average in 2009 (280) and the number of hits reported in December 2010 (625). After the California Supreme Court granted review of *Buza* in October 2011, which effectively lifted the injunction, the number of submissions increased to upwards of 17,000 in March 2012, closely matching the number of samples submitted prior to the injunction. The increase in submissions was paralleled by an increase in hits between April and December 2012, with a monthly average of 430 hits.

**Figure 8. Hits Before and After Implementation**



Sources: State laboratories

It is difficult, however, to determine the extent to which arrestee DNA collection contributed to this growth in these states. First, in several states the number of hits to convicted offender profiles also increased after the arrestee DNA law was implemented. Further, because arrestee profiles are generally not reclassified as convicted offender profiles upon successful conviction—another event that triggers DNA collection in these states—the extent to which arrestee profiles contributed to additional hits is unknown. As discussed later in this section, Maryland and Virginia are uniquely positioned to measure the impact of their arrestee DNA laws on the number of hits.

While it is difficult to assess the unique contribution of arrestee profiles on the number of hits, we can investigate whether adding more profiles to CODIS increases the number of investigations aided. Because arrestee DNA laws draw DNA from a larger population, it is a useful exercise to understand the extent to which an increase in the population of profiles results in more investigations aided. Using data collected from annual NDIS statistics published by the FBI, researchers analyzed the extent to which an increase in offender profiles (convicted offender profiles and arrestee profiles) in NDIS affected the number of investigations aided. To examine the relationship, the project team constructed a dataset containing the following data by state (50) for each year from 2009 to 2012:<sup>52</sup>

- the number of *additional* offender profiles uploaded to NDIS (arrestee and convicted offender profiles combined);<sup>53</sup>
- the number of *additional* forensic profiles uploaded to NDIS; and
- the number of *additional* reported investigations aided.

<sup>52</sup> While the FBI publishes cumulative NDIS data by state, the number of additional profiles or investigations aided can be inferred for a given year (Time 1) by subtracting the total number of profiles or investigations aided of the previous year (Time 0) from Time 1. To calculate the total of offender profiles *added* to NDIS between 2008 and 2009, researchers subtracted the total number of offender profiles reported in 2008 from the total number of offender profiles reported in 2009. Thus, the use of 2009 NDIS data required 2008 NDIS data for this analysis.

<sup>53</sup> While the FBI reports the number of convicted offender profiles and arrestee profiles in NDIS separately as of July 2012, in previous years, only the total number of “offender” profiles was available. Therefore, the analyses include the total number of “offender” profiles. To have consistent data for each year, researchers combined the arrestee profiles and convicted offender profiles reported for 2012.

The dataset contained four observations per state (N=200). Researchers conducted ordinary least squares regression, with investigations aided as the dependent variable, and offender profiles and forensic profiles as the independent variables of interest. They included forensic profiles as an independent variable to provide an understanding of its how it relates to investigations aided compared with offender profiles.

**Table H. Regression Results**

Model		Unstandardized		Standardized		
		Coefficients		Coefficients		
		B	Std. Error	Beta	t	Sig.
1	(Constant)	-56.209	40.089		-1.402	.162
	Offender Profiles	.008*	.001	.385	8.358	.000
	Forensic Profiles	.407*	.033	.570	12.375	.000

a. Dependent Variable: Investigations Aided

b. \*p<.000

c.  $R^2 = .754$ .

The results of the analysis indicate that for every offender profile uploaded to NDIS, the number of investigations aided increased by .008. Practically speaking, for every 1,000 offender profiles uploaded to NDIS, 8 investigations were aided. This finding is statistically significant at p<.000. The results also indicate that for every forensic sample that is uploaded to NDIS, the number of investigations aided increased by .407. In other words, for every 1,000 forensic profiles uploaded to NDIS, 407 investigations were aided. This finding is also statistically significant at p<.000.

The results suggest that additional forensic profiles will likely generate more hits and aid more investigations than offender profiles. Thus, the findings indicate that increasing the number of forensic profiles may be of greater benefit than increasing offender profiles. Notably, these findings are consistent with findings from Goulka and colleagues (2010). Although processing forensic profiles is about 25 times more expensive than processing an offender profile (\$1,000 versus \$40, using NIJ reimbursement rates as a proxy), the analysis suggests that the relative benefit of a forensic profile (407 investigations aided for every 1,000 forensic profiles), in terms of aiding an investigation, is 50 times that of an offender profile (8 investigations aided for every 1,000 offender profiles).

There are two primary limitations for the independent variable of interest (offender profiles) and dependent variable of interest (investigations aided). Ideally, an analysis would attempt to isolate the effect of arrestee profiles on the number of hits. However, the FBI has only provided disaggregated arrestee and convicted offender profile data for 2012. Further, as discussed earlier, the extent to which arrestee profiles in NDIS might have otherwise been collected under convicted offender laws is unclear.

Researchers used “investigations aided” because the FBI does not provide state-level hit data, which may be a more consistent and objective measure of investigative benefit. As discussed earlier, determining how hits aid investigations is challenging since such an effort requires input from the investigating agency (see Gabriel et al. 2010). Data provided by states to the project team suggest that the proportion of hits that result in investigations aided, according to laboratories, ranges from 83 percent (Florida) to 100 percent (Colorado, South Dakota).

Data on investigations aided provided by the FBI includes both case-to-case hits (i.e., two forensic profiles matching each other) and case-to-offender hits (i.e., an offender hit matching a forensic profile),

which may explain in part why more investigations were aided by forensic profiles. On the one hand, when a case-to-case hit occurs, two investigations may be aided (since each forensic profile is contributed from a different case). Data provided by New Mexico show that as of January 2012, 308 case-to-case hits occurred locally for the Albuquerque Police Department and Department of Public Safety. These 308 hits resulted in 481 investigations aided. On the other hand, when a case-to-offender hit occurs, only one investigation may be aided (the case associated with the forensic profile), which may explain why investigations aided from case-to-offender hits are either equal to or less than the number of case-to-offender hits. Data provided by the FBI CODIS Unit on the total number of CODIS hits demonstrate that the total number of case-to-offender hits outnumber case-to-case hits from 2002–11 by a ratio of 5 to 1 (see appendix H).

### **Assumption 3: Arrestee Laws May Solve Cases Faster**

Ideally, to examine the assumption that arrestee laws help solve cases faster, one would compare the timeline between a sample's collection and its upload to CODIS to the arrestee's case processing timeline. If a sample is collected, analyzed, and uploaded to CODIS prior to an individual's conviction, then including arrestee profiles creates the opportunity for hits that would have otherwise not occurred until the individual's profile was uploaded to CODIS post-conviction.

To understand states' timeframe for processing samples, the data instrument asked laboratories to report the average number of days between sample receipt and profile storage in CODIS (turnaround time). Most states' LIMS were not capable of calculating this average. However, three states provided such data and reported average turnaround times for arrestee samples of 6, 15, and 16 days. Interviews with state laboratory representatives indicated that the range of sample processing time was 7 to 30 days. Given that the majority of states the team interviewed reported being able to process arrestee DNA samples in 30 days or less, and that the median time between arrest to case disposition is 92 days for cases filed in the courts (Cohen and Kyckelhahn 2010), most samples are likely to be processed prior to case disposition.

States that are statutorily required to expunge individuals' profiles automatically—that is, without request by the respective individual—may view this time period between arrest and case disposition as critical, affording the state the opportunity to include the profile in CODIS and compare it against forensic profiles collected from unsolved crimes. This opportunity is contingent on the period of time between a laboratory's receipt of a sample and its corresponding profile's storage in CODIS. Virginia and Maryland—two states that automatically expunge arrestee profiles—are discussed below.

#### **Virginia**

The arrestee database in Virginia, established in 2003, includes profiles associated with individuals who have been arrested for a subset of felonies but who have yet to be convicted. According to data provided by a state laboratory representative, arrestee profiles account for approximately 5,500 of more than 350,000 total offender profiles in the state's database as of August 2012. This proportion (1.5 percent) has seen little fluctuation since the state's law was implemented in 2003. The state has expunged about 57 percent of the 56,000 arrestee profiles received since 2003.

The state tracks the number of hits that occurred to arrestee profiles that would either (1) not have occurred unless the arrestee law was in place, or (2) would have occurred, but at a later time. It is worth noting that Virginia is poised to track this data since it automatically expunges arrestee profiles or reclassifies them as convicted offender profiles upon successful conviction. According to the Virginia Department of Forensic Science's DNA Databank Statistics (2012), as of August 2012, Virginia reported a

total of 770 hits between arrestee and forensic profiles. One hundred and fifteen hits (15 percent) were associated with sexual assault cases. These arrestee hits represent close to 11 percent of the total offender hits between 2003 and August 2012.<sup>54</sup>

## **Maryland**

Similar to Virginia, Maryland is well-positioned to isolate the effect of the arrestee law since it only collects samples from individuals who do not already have a profile on file in the Convicted Offender Index. If an individual is not convicted, the arrestee sample is destroyed and the corresponding profile is expunged. If an individual is convicted, an additional sample is collected and stored in the Convicted Offender Index. Therefore, it is possible for an individual to have a profile in the Arrestee Index and Convicted Offender Index. In the event that an individual has a profile in each index, the hit is reported as a convicted offender hit.

The Maryland State Police Forensic Sciences Division Statewide DNA Database Report (2012) provides information on how arrestee profiles in Maryland's database have contributed to investigations and prosecutions. Arrestee profiles accounted for about 30 percent of hits sent to law enforcement in 2011 (78 hits of 263 total). At the time of the report, of the 78 arrestee hits, 56 resulted in the investigation of the newly identified suspect. While 17 investigations were still ongoing, 19 resulted in formal charges, of which 9 resulted in convictions (6 individuals who were convicted were not already incarcerated), and 6 cases were still pending trial. No individuals were exonerated by DNA hits.

Outcomes of hits to convicted offender profiles show similar proportions. At the time of the report, of the 185 hits to convicted offender profiles in 2011, 143 resulted in the investigation of the newly identified suspect. While 43 investigations were still ongoing, 65 hits resulted in formal charges, of which 17 resulted in convictions (14 individuals who were convicted were not already incarcerated), and 32 cases were still pending trial. No individuals were exonerated by DNA hits.

## **Section Highlights**

- In general, states providing data to UI had received more DNA samples following implementation of their arrestee laws.
- Because most states discourage agencies from collecting or processing duplicate samples, samples are likely collected at the front-end of the criminal justice process (at arrest) in increasing numbers, as opposed to the back-end (post-conviction).
- Although processing a forensic profile is about 25 times more expensive than processing an offender profile (\$1,000 versus \$40, using NIJ reimbursement rates as a proxy), the analysis suggests that the relative benefit of a forensic profile, in terms of aiding an investigation, is 50 times that of an offender profile (for every 1,000 forensic profiles, 407 investigations are aided, whereas for every 1,000 offender profiles, 8 investigations are aided).
- Determining the unique contribution of arrestee profiles is difficult since profiles uploaded as "arrestees" often remain categorized as arrestee after an individual is convicted of a qualifying offense. Therefore, in most states, a hit to an individual associated with an arrestee profile might have occurred without the arrestee law.

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<sup>54</sup> Between 2003 and August 31, 2012, there were 7,215 hits between offender/arrestee profiles and forensic profiles in Virginia. See <http://www.dfs.virginia.gov/statistics/index.cfm>.

- Virginia, however, is well-positioned to estimate the unique contribution of arrestee profiles. Since profiles are expunged or transferred, any hits to arrestee profiles indicate that (1) the hit may not have occurred under convicted offender laws, or (2) the hit occurred sooner if the individual was going to be convicted and have his profile uploaded to CODIS.
- Similarly, Maryland collects a DNA sample if an individual is charged of a qualifying offense under its arrestee DNA law and a sample if an individual is convicted of a qualifying offense under its convicted offender DNA law. If a forensic profile is linked to a person who has both an arrestee profile and a convicted offender profile in the database, the hit is counted as a convicted offender hit. Forensic profiles that are linked to individuals who only have an arrestee profile in the database are hits that (1) may not have occurred if the individual was not subsequently convicted of a qualifying offense, or (2) occurred sooner if the individual was going to be convicted of a qualifying offense and therefore have his sample collected.

## 6. State and Federal Profiles

This section profiles the federal government and five states that collect DNA from arrestees, illustrating variations in how arrestee laws are written and implemented. Each profile uses information gleaned from UI’s review of state and federal statutes, interviews with laboratory representatives and other stakeholders, completed data requests, and a scan of additional articles and literature specific to the jurisdictions profiled.

States were selected to reflect variations in key provisions of arrestee laws, including the scope of offenses for which DNA is collected, the point of collection and/or analysis, and the expungement policy. The year of implementation was also taken into consideration to examine trends over time. States were selected from those that submitted annual data on samples received, profiles uploaded to CODIS, hits, investigations aided, and expungements in response to the data request. Such data allow researchers to examine trends over time for each state and explore relationships between these trends, the provisions of the laws, and how the laws were implemented. Table I displays the five selected states.

**Table I. State Characteristics**

State	Data submitted	Year (signed)	Scope of Collection		Collection <sup>55</sup>	Analysis	Expungement Responsibility
			Felonies	Misdemeanors			
CO	x	2009	All		After arrest	After charging	Individual
KS	x	2006	All, phased	x	After arrest	After arrest	Individual
LA	x	1997	All	x	After arrest	After arrest	Individual
MD	x	2008	Select		After charging	After charging	State/Automatic
NC	x	2010	Select		After charging	After charging	Individual → State/Automatic

Each state profile provides an overview of the state’s statute, outlines how collecting agencies and laboratories have implemented the law, and presents a customized model of criminal justice case processing and DNA sample processing. The profiles describe the impact of implementation on agency operations and infrastructure. Finally, using data provided by each of the states in the data request, the profiles explore trends in the number of known samples received and resulting CODIS hits both before and after the state implemented its arrestee law.

### Colorado

#### Statute

In 2009, the Colorado Legislature passed SB 241, requiring law enforcement agencies to collect DNA at booking from any adult arrested for a felony offense. For a sample to be analyzed, the individual must be formally charged with the felony offense. If charging does not occur within 90 days, samples become eligible for destruction, which may be requested by the individual to whom the sample belongs; if there are no formal charges against the individual within one year of arrest, the laboratory must destroy the associated sample.

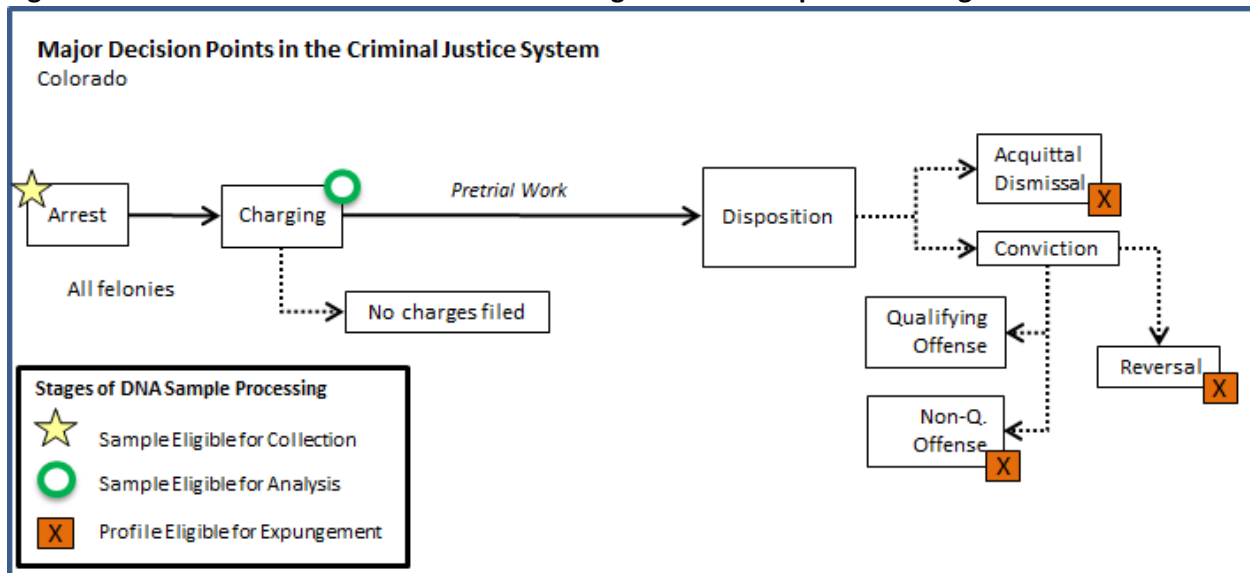
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<sup>55</sup> “After charging” generally refers to collection and/or analysis that occurs after charging, arraignment, indictment, or judicial determination of probable cause.

Uploaded profiles become eligible for expungement if qualifying charges are dismissed, result in acquittal, or result in a conviction for a non-felony offense, unless the person has been charged with a felony on another case. Although individuals are ultimately responsible for initiating the expungement process, the law contains several protections to ensure that expungements occur, including:

- At the person's first court appearance, the court is required to inform the individual about the expungement process.
- If a case event qualifies the person for expungement, the court or District Attorney (DA) is required to advise the person that he may request expungement.
- Once an individual requests an expungement, the Colorado Bureau of Investigation (CBI) is required to promptly submit a written inquiry to the DA in the county for which the sample was collected concerning the outcome of the case to confirm that the individual is eligible for expungement. Unless the CBI receives written notification from the DA's office that the person does not qualify for expungement, it is required to destroy the sample and expunge the resulting profiles from NDIS and SDIS.
- If a profile is required to be expunged, it cannot be used in a criminal investigation. In other words, if a hit occurs to such profiles before the expungement occurs, the evidence provided by the hit cannot be used in the investigation.

**Figure 9. Model of Criminal Justice Case Processing and DNA Sample Processing in Colorado**



Many of these provisions were the outcome of a debate within the legislature and among advocates about the expungement process. The testimony of individuals speaking on behalf of the ACLU and Colorado Criminal Defense Bar advocated for additional protections, including a probable cause requirement for analysis and more accountability in the expungement process to ensure that individuals were informed of their rights and that agencies followed through on requests.<sup>56</sup> The debate also focused on how the state would pay for the new law, a subject that divided conservative groups typically

<sup>56</sup> Some provisions were not included in the final legislation. For example, if law enforcement did not notify the laboratory within 90 days of an expungement request, they would be assessed a fine of \$25,000. Amendment L.027 was removed after the County Sheriffs of Colorado spoke against this provision, noting the difference between “intentional transgressions and good faith mistakes.”



supportive of arrestee DNA legislation. Ultimately, lawmakers opted to increase traffic fees to pay for the law. Because fees were kept low, the state had to delay implementation to raise sufficient seed money.

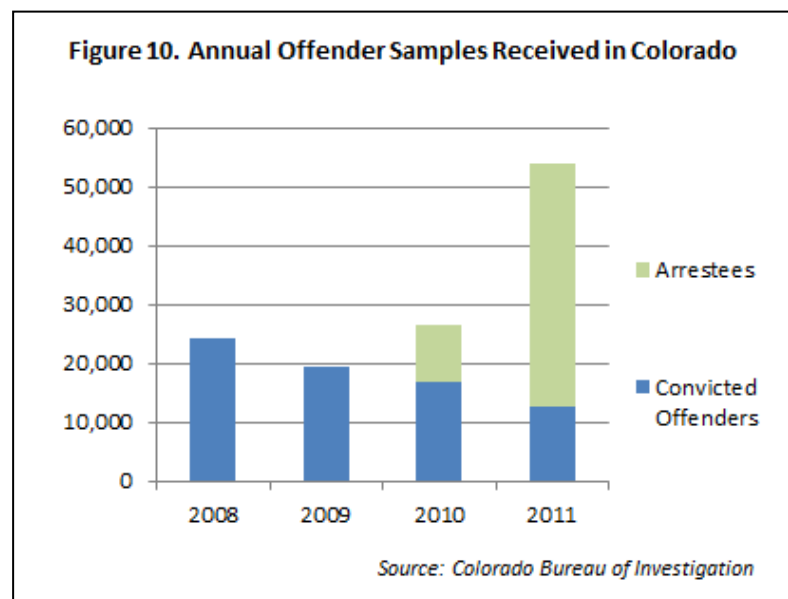
## Implementation

### *Collecting agencies*

State laboratory staff were tasked with coordinating training of new collecting agents. Sheriffs' offices, which represent the majority of the agencies now responsible for collection, had some experience with DNA collection from convicted offenders, but police departments were completely new and required additional training. Laboratory personnel visited booking stations to develop training materials for new collecting agencies; those materials were subsequently posted online. Upon collection of a sample, collecting agencies send it to a satellite state laboratory in Grand Junction for eligibility confirmation, accessioning, and storage.

### *Laboratory Workload and Infrastructure*

Interviews revealed that once samples have been collected and submitted, laboratories must follow a complex process for storing and analyzing them, in large part due to the requirement that the laboratory await formal charging before processing samples. Once submitted to the Grand Junction lab, a laboratory technician verifies sample identity, checks that the information on the buccal collection kit and the identity associated with the fingerprint match each other, and verifies that the individual is not



a juvenile. Instead of being automatically added to a queue for processing, arrestee samples are “held” in LIMS as the laboratory waits for a formal charge. This extra step requires the laboratory to add modules to its LIMS that allowed staff to place arrestee samples into a holding area until the charges are filed. The laboratory has implemented a web service that links the LIMS and the state criminal history database, so the LIMS is automatically updated when charges are filed. Prior to the implementation of this integrated data system, laboratory staff had to constantly monitor submissions to

determine when they were eligible for analysis. To facilitate this, laboratory personnel had access to court and district attorney data systems. Laboratory staff had to understand court and District Attorney data systems so that codes would be interpreted correctly. For example, one stakeholder reported that the laboratory accidentally included arrestee samples (versus those who had been formally charged) from a county that used a code for both cases pending review and cases filed.

In an interview, the laboratory representative estimated that of the 35,000 arrestee samples received last year, about 6,500 (19 percent) were not charged and thus eligible to be destroyed. Samples associated with cases that *are* formally charged are sent to the state’s flagship laboratory in Denver for processing and upload. In addition to receiving thousands of samples that it cannot process because of

probable cause restrictions, the laboratory also receives a considerable number of duplicates. Interviews suggest that although Colorado’s law discourages the collection of duplicate samples, law enforcement cannot easily check if samples represent duplicate submissions and now collects samples at every arrest. However, the laboratory is in the process of flagging criminal history profiles for individuals who have profiles in CODIS. This will not only inform collecting agencies that a sample is not required, but also alert the Denver laboratory if a duplicate arrives. Such samples can then be removed from the processing queue. In total, the data provided by the laboratory indicates that the volume of combined arrestee and convicted offender samples increased by 177 percent in the two years since implementation. As figure 10 displays, this growth is largely a result of the influx of arrestee samples the laboratory received in 2011.

In addition, the data submitted by the state suggest that the added requirements that facilitate an individual-initiated expungement process may have had an effect on the number of expungement requests, adding to the laboratory’s workload. To date, there have been a total of 82 expungements in Colorado since the state implemented this law in 2009—a much higher number than reported in interviews by states with by-request expungements.

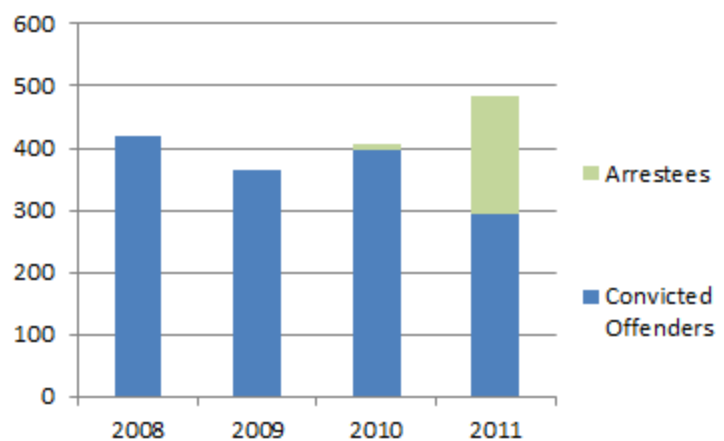
To accommodate this increase in workload, the laboratory hired new staff, including a technician, two crime data specialists, and a DNA analyst responsible for verifying that samples qualify for analysis and are associated with the correct person. The laboratory also updated its LIMS and expanded its lab facilities to handle the new samples. Additional computers were purchased for new staff in the Grand Junction lab. Further, the statute required that adequate funding be collected prior to the commencement of collection and analysis. Fees were collected starting July 1, 2009 to provide adequate funds for implementation of the program on September 30, 2010, as required by statute. Despite this preparation time and influx of resources, the laboratory described being “busier than ever.” In addition, as noted earlier, laboratory staff have been tasked with providing training to collecting agencies.

*Public Safety Impact*

Overall, data provided by the state indicate that arrestee profiles account for 27 percent of all offender profiles in SDIS as of year-end 2011. One stakeholder also noted that 95 to 97 percent of felony cases result in a conviction, suggesting that about 3 to 5 percent of total samples received by the laboratory would not have been collected absent an arrestee law. According to data provided by the laboratory, arrestee profiles account for 11.3 percent of all hits. It bears

noting that following the inclusion of arrestees, the overall number of hits began to increase as observed in figure 11. However, analysis of the unique contribution of arrestee profiles to hits is difficult to determine since arrestee profiles are not transferred to the Convicted Offender Index upon conviction.

**Figure 11. Annual Hits to Offender Profiles in Colorado**



Source: Colorado Bureau of Investigation

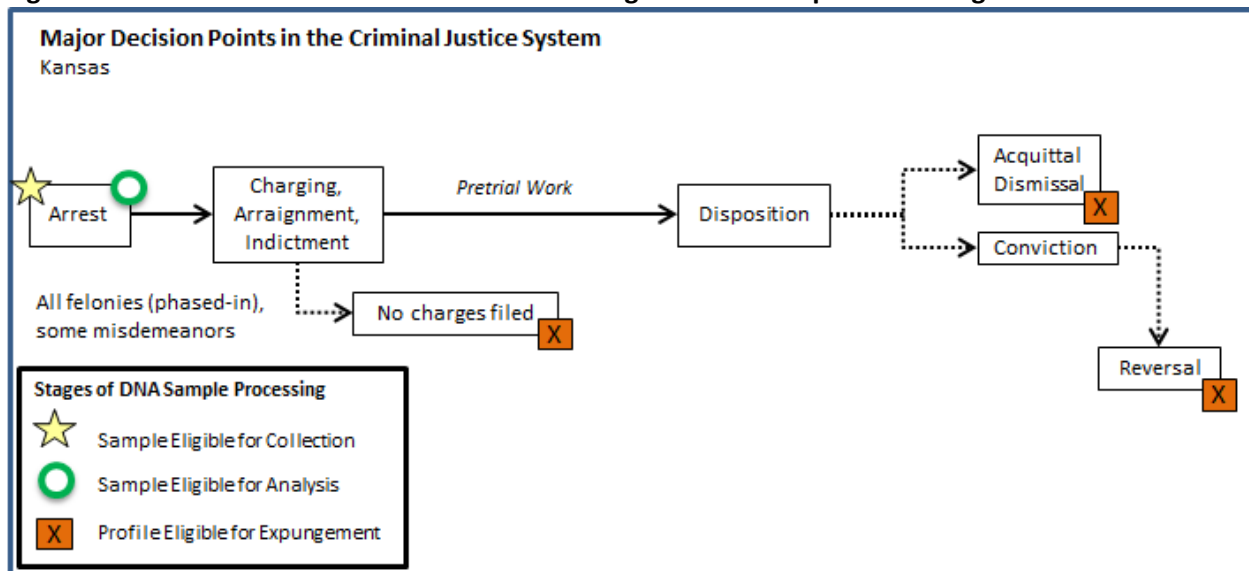
## Kansas

### Statute

In 2006, the Kansas governor signed HB 2554 into law, authorizing the state to collect and analyze DNA samples from individuals—including those less than 18 years of age<sup>57</sup>—arrested for felony offenses and a subset of misdemeanors. Kansas’s statute addresses several details of implementation. The law requires that sample collection occur during the booking process when an individual’s fingerprints are taken. The Kansas Bureau of Investigation (KBI), which houses the state laboratory and maintains the DNA database, is responsible for furnishing booking agencies with supplies and instructions needed for collection. Prior to collection, law enforcement personnel are required to check an individual’s criminal history file to determine if KBI already has the individual’s sample on file; in this case, the collection of an additional (duplicate) sample is not required. Refusal to provide a sample is a misdemeanor offense. Once collected, the samples are forwarded to and maintained by KBI.

An individual may request that his DNA profile and sample record be destroyed if a court determines there was not probable cause for the arrest, charge, or detention, the charges are dismissed, or upon acquittal, provided that the case is not pending appeal. The law provides for a two-stage implementation process. Beginning in 2007, the law authorized collection of DNA samples from individuals arrested for person felonies and certain drug felonies. This effective date left about eight months between the law’s enactment and its expected implementation. Then, in mid-2008, the law extended collection to individuals arrested for *any* felony offense (and some misdemeanor charges, too).

**Figure 12. Model of Criminal Justice Case Processing and DNA Sample Processing in Kansas**



<sup>57</sup> While the state authorizes DNA collection from juveniles upon arrest for felony offenses and additional violations, juveniles are often not housed in state agencies, but private contractors’ facilities, which do not book individuals or collect DNA samples. Further, the state laboratory representative suggested that booking agencies are hesitant to collect from juveniles. Ongoing training has been successful in increasing the compliance of juvenile collection; however this population presents a unique challenge.

## **Implementation**

### *Collecting Agencies*

When DNA collection was restricted to individuals *convicted* of a felony offense in Kansas, the primary agencies responsible for collection were the Department of Corrections and Court Services. When the law was expanded to include individuals who were *arrested* for felony offenses, agencies in which booking occurs (upwards of 200) became responsible for DNA collection, including sheriffs' and local police departments and regional booking centers. The state laboratory has sought to establish a relationship with each booking agency, providing training on collection procedures and tools for collection. Together, the governing statute, policies set by KBI, and interagency collaboration between the laboratory and booking agencies have sought to curtail the number of ineligible and duplicate sample submissions, reduce laboratory workload, and increase data quality.

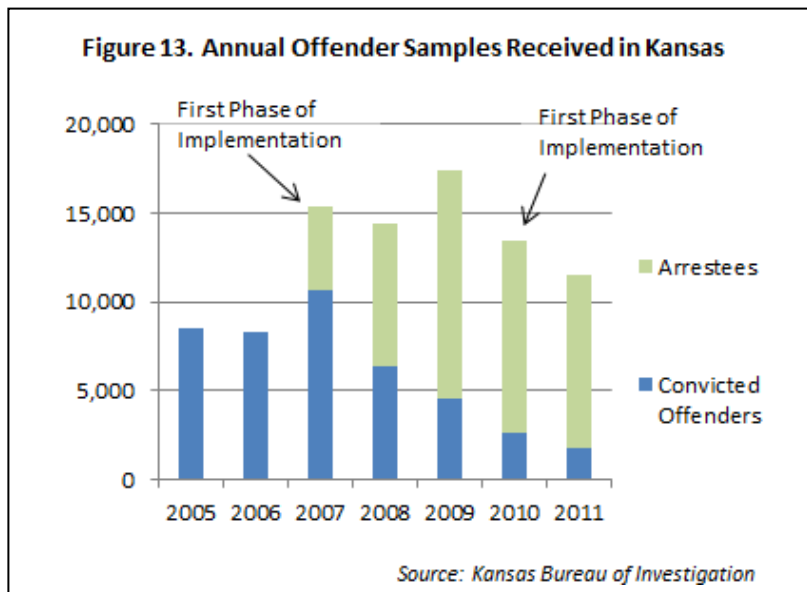
Prior to collection, booking agencies are required to check individuals' criminal history files to determine if the state has a DNA sample on file—this statutory provision is largely to control for duplicate sample collection. To this end, agencies have access to computerized criminal history files that have a flag to indicate if an individual has a sample on file. In addition, an electronic collection card is integrated into the criminal history software platform, allowing booking agents to check the criminal history file and complete the collection card in tandem. The collection card includes identifying administrative information as well as the qualifying offense. Importantly, the inclusion of qualifying offense information allows the laboratory to verify that the sample is submitted for a qualifying offense upon receipt of the sample. Information on the collection card is represented by a barcode that is printed and attached to each collection kit. Once the laboratory receives the kit, a lab analyst scans the barcode, auto-populating the laboratory's database and thus reducing the likelihood of data entry errors.

Historically, access to the criminal history and collection card software has been limited to individuals who have met security clearance requirements or have an access token, which cost about \$50. In a review, the laboratory had found that few local criminal justice personnel had access tokens—in one jurisdiction, for instance, only one court employee had an access token. As such, booking personnel who do not have access tokens will typically collect a sample and then check the following day when they have access to the system. If they find that a person does already have a sample on file, they generally discard the collected sample to avoid a duplicate submission. If the laboratory receives duplicate samples from booking agencies, laboratory personnel will contact the booking agency to discourage such collection. However, the implementation of the integrated criminal history and collection card has been accompanied by an increase in token request and usage. A state laboratory representative indicates that feedback about the integration of the criminal history platform and collection card has been positive.

### *Laboratory Workload and Infrastructure*

Data provided by the Kansas state laboratory reflect an increase in sample collection associated with both phases of implementation. Between 2006 and 2007 (the first phase of implementation), for instance, the number of samples submitted to the state laboratory increased by 85 percent. The number of samples received from convicted offenders decreased significantly between 2007 (10,698) and 2010 (2,543). While it is expected that collection upon arrest minimizes the need to collect upon conviction (i.e., samples are collected earlier in the case process), it is notable that the samples received in 2011 significantly outnumber the samples received prior to arrestee collection as shown in figure 13.

Prior to the arrestee law’s implementation, the state laboratory was faced with a significant backlog of



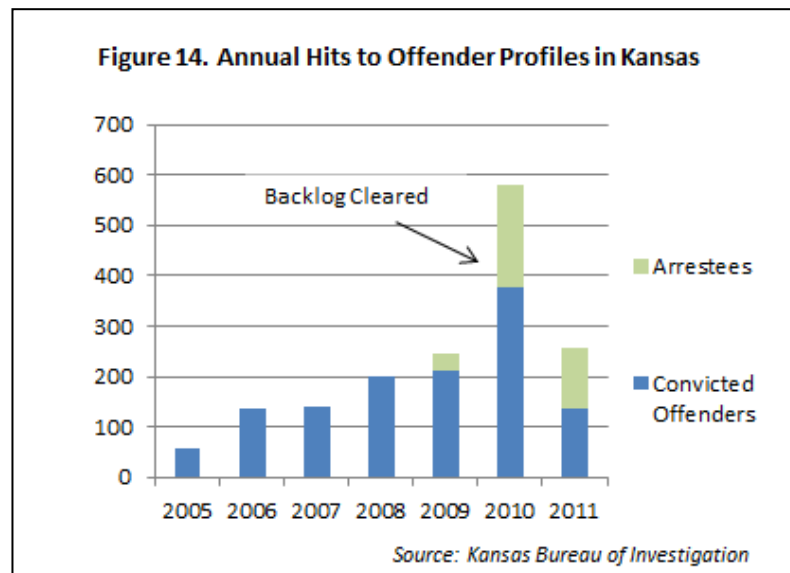
samples to analyze. Data provided by the state laboratory show that in 2005, of 8,534 samples received, 741 profiles (9 percent) were generated and uploaded to SDIS. Because of the expected increase in the volume of samples the state laboratory would receive as a result of collecting upon booking and the increase in cheek cell specimens,<sup>58</sup> the laboratory ceased normal operation for three months to modify and build upon existing infrastructure. While the laboratory accepted arrestee samples submitted from

collecting agencies, it did not analyze these immediately. Instead, during this time, the laboratory worked to clear its convicted offender backlog, increased personnel (three forensic scientists), and made several technological changes to increase throughput and processing time, including the implementation of automation, robotics, and LIMS. By 2010, the lab cleared its convicted offender and arrestee sample backlog, and analyzed and uploaded close to 50,000 samples, outnumbering the total number of samples (13,468) submitted that year.

The state laboratory has received few expungement requests. While the request form is available online through KBI’s website, a state laboratory representative estimates that there have been fewer than 20 expunged profiles since the DNA database was established in Kansas in 1992. As of 2011, only one individual has requested expungement of his arrestee profile.

#### Public Safety Impact

The upload of these profiles resulted in a commensurate increase in the number of hits between offender and forensic profiles, as observed in figure 14. The laboratory’s clearance of its backlogged samples and their upload to SDIS appears to



<sup>58</sup> Booking agents only collect and submit buccal swab specimens using an instrument developed by a vendor that also produces the laboratory’s processing equipment. One stakeholder interviewed for this report commented that a generic collection instrument would have increased the laboratory’s ability to select from a range of equipment and vendor options.

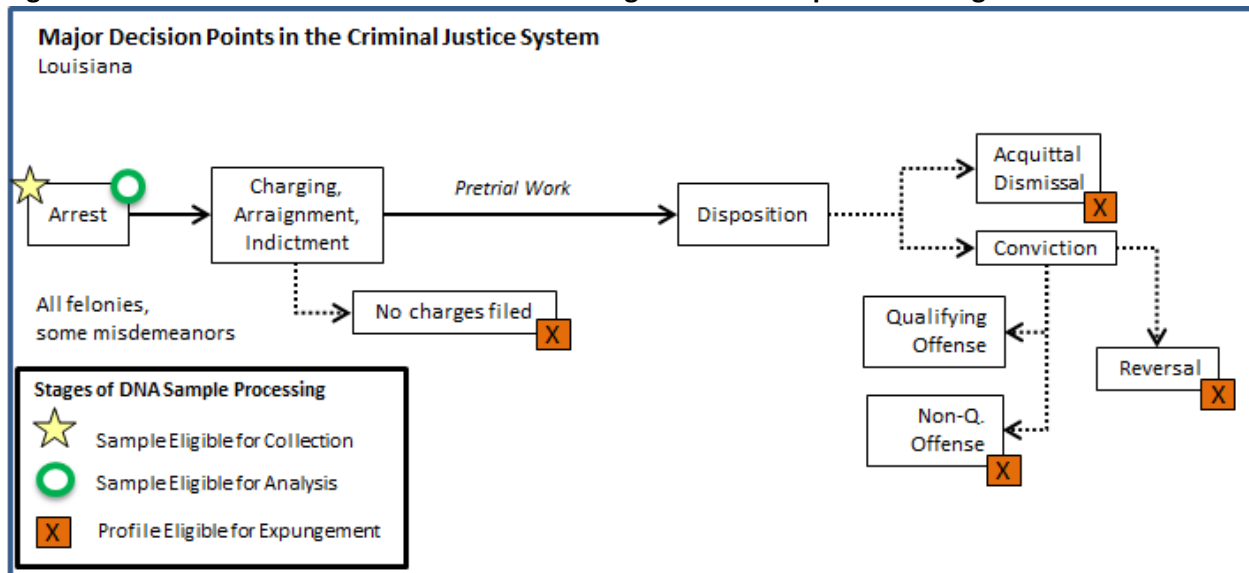
have contributed to the increase in hits. Because arrestee profiles are not transferred to the Convicted Offender Index if an individual is convicted, it is difficult to determine the unique contribution of arrestee profiles to hits.

## Louisiana

### Statute

The 1997 passage of Louisiana’s HB 1377 permitted DNA collection from “a person who is arrested for a felony sex offense or other specified offense on or after September 1, 1999.” In 1999, the same year that collection was slated to begin, additional legislation was passed recognizing that to “properly equip and operate the crime laboratory of the Louisiana State Police to implement the provisions of Act 737, additional funding is necessary and a two-year start-up phase is required.” Additional legislation in 2003 (SB 346) expanded collection to any felony or other specified misdemeanor offense committed on or after September 1, 1999. Today, the state can collect a DNA sample from any adult or juvenile arrested for a felony or select misdemeanors. The state is responsible for collection and can use reasonable force to obtain a sample. Collecting agents cannot be held civilly liable for use of such reasonable force. Additionally a database match or database information is not invalidated if it is determined that the sample was obtained or placed in the database by mistake. Profiles received and uploaded to CODIS become eligible for expungement if charges are not filed, are dismissed, or result in an acquittal. Responsibility for initiating the process rests with the individual.

**Figure 15. Model of Criminal Justice Case Processing and DNA Sample Processing in Louisiana**



### Implementation

#### Collecting Agencies

Arrestee sample collection did not begin in Louisiana until the early 2000s, and the laboratory did not start uploading profiles to SDIS until 2003. Individuals interviewed for this report describe three checks in the collection process that are necessary for determining sample eligibility:

**1. Collecting agencies must confirm an individual's identity through fingerprints.**

If the individual is booked through the AFIS terminal, then their information (demographics, etc.) is automatically uploaded to the LIMS system. When manual collections are performed, the AFIS terminal is still used by the collecting agency to positively identify the individual.

**2. Collecting agencies verify qualifying offenses either via the AFIS terminal notification or through a manual check.**

The laboratory's legal department reviews the revised statute (RS) code table to determine which offenses are eligible for collection. This RS code table is integrated into the AFIS terminal to provide qualifying offense notifications during the arrest/charging process. The main challenge in determining offense eligibility is that some offenses qualify for collection if they meet a specified condition (e.g., some crimes are elevated to a felony only if committed against certain individuals or if the damage is over a certain value). Further, offenses are often coupled with qualifiers. A robbery, for instance, might be in the RS table as an attempt of robbery, accessory to robbery, or the actual commission of a robbery. One strategy that the laboratory has employed to minimize uncertainty at the point of collection is to collect for all offenses related to the principal offense. In other words, the laboratory does not distinguish between a commission of, attempt to, or accessory to a qualifying crime. This thorough review of the RS table and AFIS integration ensures collection of the proper qualifying offenses.

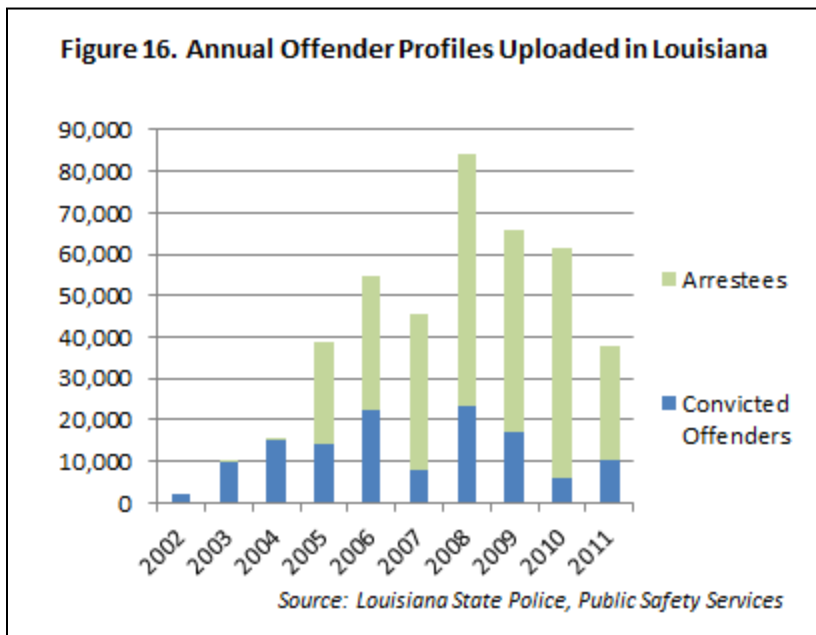
**3. Collecting agencies must determine if a person's DNA is already on file to avoid collecting duplicate DNA samples.**

A historically high duplication rate (at around 25 percent of samples submitted) has been related in part to the difficulties determining if an individual already has a profile on file. Although current arrestee law authorizes re-collection if the first sample was poorly collected or incomplete, there is no process in place for destroying duplicate samples. The laboratory accessioned and stores any duplicate samples it receives; the samples are not analyzed. Because duplicates represent a waste of resources, the laboratory is working to create technology-based solutions to provide the collecting agent with information to only collect samples from individuals who do not have DNA on file. Today, AFIS prompts agents to collect DNA only from arrestees whose criminal records indicate no DNA on file. However, because the laboratory developed this flagging system with samples already in the system, the conversion process to mark those previously-submitted samples has resulted in challenges in the interfacing of the various databases. Further, when a DNA sample is collected outside the AFIS system, the feedback mechanism is not able to notify the collector that DNA is on file; therefore, a fair amount of duplicates are still being submitted. Until the technology provides the necessary assurances to the agencies, the relatively high duplicate rate will continue to be an issue. The laboratory is seeking technology solutions to reconcile the various system databases to provide more accurate flagging to collecting agencies and reduce the unnecessary collections that occur when there is no flag. Laboratory studies do not indicate issues with improperly flagged samples, which would lead to missed collections.

*Laboratory Workload and Infrastructure*

Louisiana faced a large increase in workload after Louisiana arrestee legislation was passed primarily due to the required collection of all convicted offenders currently incarcerated, as well as the addition of arrestee samples without mechanisms in place to detect duplicate collections. It took time, but eventually staffing was added to match workload.

Data provided by the state indicate that the increase in total profiles uploaded to NDIS<sup>59</sup> occurred after the DNA Fingerprint Act of 2005 was passed, allowing states to upload arrestee DNA profiles to NDIS, as observed in figure 16.



In an effort to (1) further automate processing internally, (2) enable in-house robotic analysis, and (3) move away from blood collections for safety and to reduce costs, the laboratory moved to a different sample collector. The blood card collection kit used for Convicted Offenders (CO) were replaced with a filter paper collection device that (1) had barcoded kit elements that replaced many of the stickers and handwritten labels, (2) could be automated, (3) could be stored more efficiently, and (4) could render multiple retests if needed. The cost of the new kit was much

lower than the CO blood kit. While the kit cost makes the reduction in duplicates a more urgent issue, it made collections in the field by the agencies simpler, universal, safer, and collectable by any staff. In some institutions, CO samples could previously only be collected by medical staff due to the handling of a blood specimen. The new kits are less prone to clerical errors and are usually collected in a more timely fashion. In addition, the analysis is conducted internally and has eliminated the need for outsourcing, which reduces the turnaround time dramatically. The lab is currently transitioning the arrestee collection to the same collection device as used for CO.

Louisiana has faced challenges in providing a consistently well-trained collection force throughout the 200+ agencies that collect DNA samples. Turnover in the collecting agencies has made consistent and timely training a challenge for laboratory staff. As a solution, the laboratory is exploring the development of an online training demonstration tool. This will provide standardized, on-time training to the field as needed. While there are still some differences between the arrestee and convicted offender clerical tasks, the DNA collection procedure should be uniform once implementation of the new arrestee kits is completed. This should minimize costs in creating and producing a video that can be provided either on disc or online.

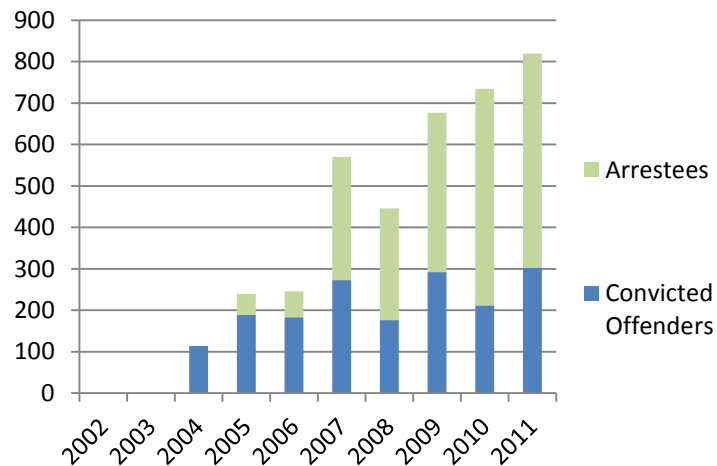
<sup>59</sup> Louisiana was unable to provide data on the annual number of samples the laboratory received.



### Public Safety Impact

Overall, as of year-end 2011, arrestee profiles account for 69 percent of all offender profiles in NDIS. Once profiles are entered into the Arrestee Index, they remain in the Arrestee Index unless expunged, even if there is a subsequent conviction. Hits to arrestee profiles account for 55 percent of all reported CODIS hits to offender profiles. Approximately 0.7 percent of arrestee profiles were hit against as compared to 1.4 percent of convicted offender profiles. Hits have increased steadily since 2002,

**Figure 17. Annual Hits to Offender Profiles in Louisiana**



Source: Louisiana State Police, Public Safety Services

culminating in 3,848 at year-end 2011, as observed in figure 17. However, like many states, the unique contribution of arrestee profiles to hits is difficult to isolate since arrestee profiles are not transferred to the Convicted Offender Index upon conviction. Even with a feedback mechanism in place and reduction in duplicates samples, it would be difficult to track which arrestee profiles are now associated with convicted offenders. The state does not have the capacity to monitor court proceedings to move the sample to a new index.

## Maryland

### Statute

In 2008, the governor of Maryland signed SB 211 into law, authorizing the state to collect DNA samples from individuals charged with crimes of violence, select burglaries, or attempts to commit these crimes. The law grants the Maryland Department of State Police (MDSP)—which operates the state forensics laboratory—the authority to implement the law. The law was not effective until January 1, 2009, leaving eight months between the law’s enactment and implementation. Although the law requires the state to collect samples upon charging for qualifying offenses, it prohibits the *analysis* of these samples prior to the individual’s first scheduled arraignment date. If the *qualifying charge* is unsupported by probable cause, the sample is automatically destroyed. Further, if the criminal action against the individual does not result in a conviction, the conviction is reversed or vacated and no new trial is permitted, or the

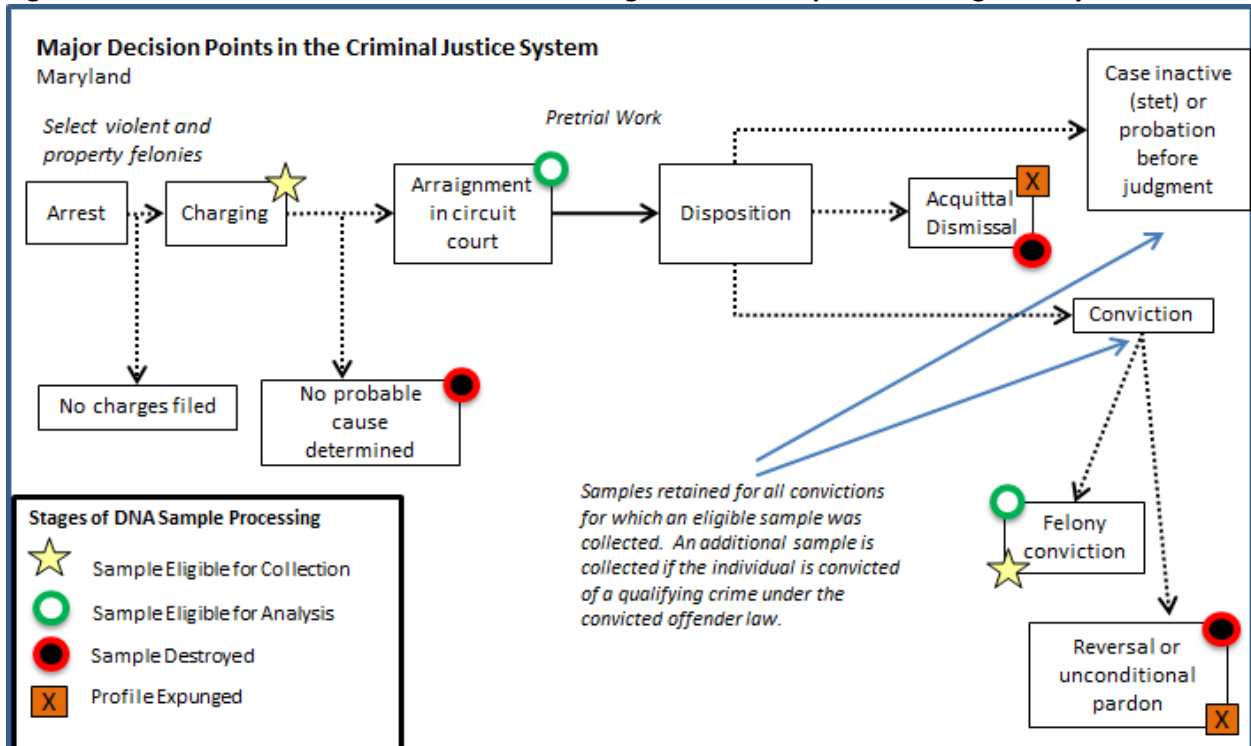
### Constitutionality of Arrestee DNA Collection in Maryland

In April 2012, the Maryland Court of Appeals—the highest state court in Maryland—found the law to be unconstitutional—concluding that the law’s provision requiring collection from individuals charged with crimes of violence does not comport with the Fourth Amendment. In that case, Alonzo King was required to submit a DNA sample after being charged with a qualifying crime of violence. The profile generated from King’s DNA sample matched DNA collected from an unsolved sexual assault case, providing probable cause for King’s indictment and serving as evidence for his ultimate conviction. The Maryland Court of Appeals overturned the conviction citing a violation of King’s Fourth Amendment rights. The State of Maryland appealed the case to the Supreme Court of the United States and a temporary stay was granted allowing Maryland to reinstate collection and analysis of arrestee samples. The court granted certiorari, hearing oral arguments for the case in early 2013. A final decision is expected mid-2013.

individual is granted an unconditional pardon, the state must automatically expunge the profile and destroy the sample. Notice is provided to the defendant and counsel. Once a sample qualifies for expungement, the sample must be expunged within 60 days.

Notably, the law includes a sunset provision indicating that the law is only effective until year-end 2013, unless further legislative action is taken to extend the law. To this end, the law requires MDSP to provide an annual report to the governor, documenting how the state DNA database contributes to criminal investigations and its associated costs.

**Figure 18. Model of Criminal Justice Case Processing and DNA Sample Processing in Maryland**



## Implementation

### Collecting Agencies

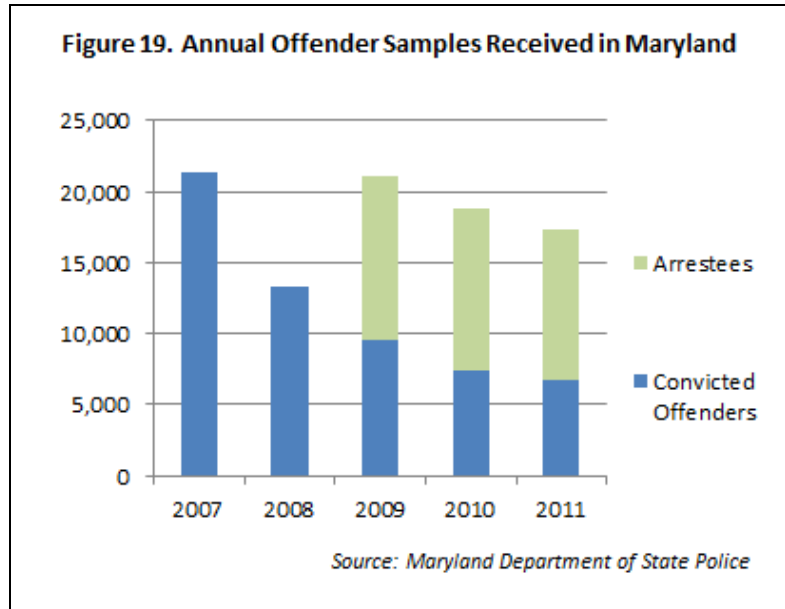
Typically, samples are collected at the time of booking by sheriffs' offices and central booking agencies. Prior to implementation, MDSP, in collaboration with the governor's office, held summits across the state to educate and train key stakeholders involved in the collection process. Further, a web-based training module and video were developed to educate the wider pool of collectors needed after the new law was enacted. Individuals are required to take the web-based DNA collection training to be approved as DNA collectors permitted by law to collect samples. This web-based training enables the laboratory to maintain and audit participation records.

Agencies that collect samples from convicted offenders and arrestees are encouraged to check the external module of an internal database sample tracking program to determine if individuals already have a profile on file from a previous conviction. If such a sample exists, then collection is not required. If, however, such a sample does not exist, then agencies are required to collect a sample from a person if he is charged with a qualifying crime, and then again if the person is also subsequently convicted of a

qualifying crime under the convicted offender collection provisions of the law. This added precaution results from the various expungement provisions in the law. This allows the state to distinctively separate the samples that were collected based on a qualifying arrest offense and those collected based on a conviction. This could be useful in the event that the arrestee law is litigated and overturned (see textbox).

#### *Laboratory Workload and Infrastructure*

In early 2007, prior to the law's implementation, the state laboratory faced a backlog of approximately 24,000 unanalyzed convicted offender samples. With support from the governor's office, MDSP increased the lab's analysis capacity and efficiency by expanding staff, allowing for the use of overtime, and adding new technologies in an effort to achieve backlog clearance. By January 2008, the laboratory was able to clear its backlog, poising the laboratory to handle the expected increase in samples once the state began collecting samples from arrestees.



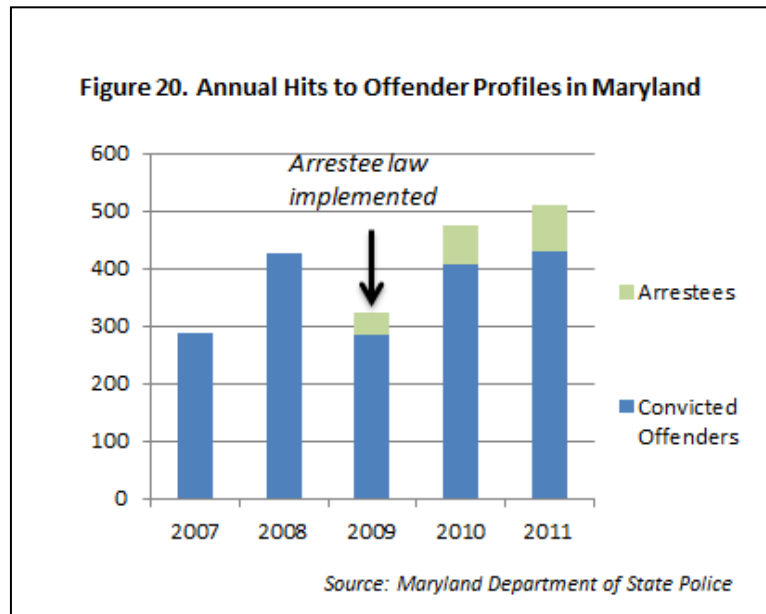
As expected, the volume of samples the laboratory received increased after the law was implemented in 2009. Data provided by the state laboratory exhibit the growth in the number of samples received, which increased by 56 percent between 2008 and 2009 (figure 19). Part of this growth is attributed to multiple collections of the same individuals under different arresting events. This duplicate collection is necessary as each of these collections will be evaluated separately through the legal system and could qualify for either expungement or retention under the new law's provisions.

Because the law requires a delay between the collection and testing of the sample and the state must automatically expunge samples if the criminal action does not result in a conviction or if the qualifying charge is not substantiated by probable cause, a significant share of the samples received are destroyed prior to analysis. Some of the samples that are tested and entered into CODIS are expunged. Once arrestee samples are entered into CODIS they are searched immediately and then routinely searched a minimum of once a week. Between 2009 and 2011, the state laboratory reported that 33,649 arrestee samples were submitted. During the same time period, 10,258 arrestee profiles were expunged from CODIS.

The Laboratory uses web-based tools to integrate laboratory and court data regarding arraignment dates and qualifying expungement events. Courts across the state have different methods of storing their electronic data and counties are not consistent in the language used to indicate that an arraignment took place. The laboratory has faced challenges in extracting the needed electronic information from the courts in an efficient manner to make the final determination of retention or expungement of a sample. If a sample has been received and there is no movement on a case after 90 days, the laboratory will check an individual's case status to see if the profile needs to be tested, expunged or at the very least evaluate the reason for the lack of movement of these samples.

### Public Safety Impact

While data gathered from the state laboratory show an upward trend in the number of hits since the first year the arrestee law was implemented (figure 20), this data is limited in that it does not measure the value of including arrestee profiles in terms of solving crimes and successful prosecutions. However, because of the statutory requirement to measure the cost and success of collecting DNA upon arrest in Maryland, as well as the automatic expungement provision, MDSP has the capability of isolating the effect of collecting at arrest rather than waiting until conviction. Maryland's Statistical Analysis Center, housed in the Office of the Governor, is also tracking the impact of including arrestee profiles in CODIS.



Between 2009 and 2011, the state reports that arrestee profiles resulted in 175 hits. At the time of the report, 145 of these hits resulted in an investigation, 30 of which resulted in a conviction (Maryland State Police, Forensic Sciences Division 2011). In comparison, between 2009 and 2011, the state reports that convicted offender profiles resulted in 573 hits. At the time of the report, 481 of these hits resulted in an investigation, 112 of which resulted in a conviction (2011).<sup>60</sup>

## North Carolina

### Statute

North Carolina authorized collection for a select group of felonies and misdemeanors in 2010 with the passage of Session Law: 2010-94.<sup>61</sup> The list of qualifying offenses is specific and extensive, and includes:

- Select violent person crimes, such as murder/manslaughter, rape and other sex offenses, armed robbery, and assault; most of these offenses are listed by degree and aggravating factors;
- Select property crimes, such as burglary and arson; and
- Other person crimes, such as human trafficking, kidnapping/abduction, and stalking.

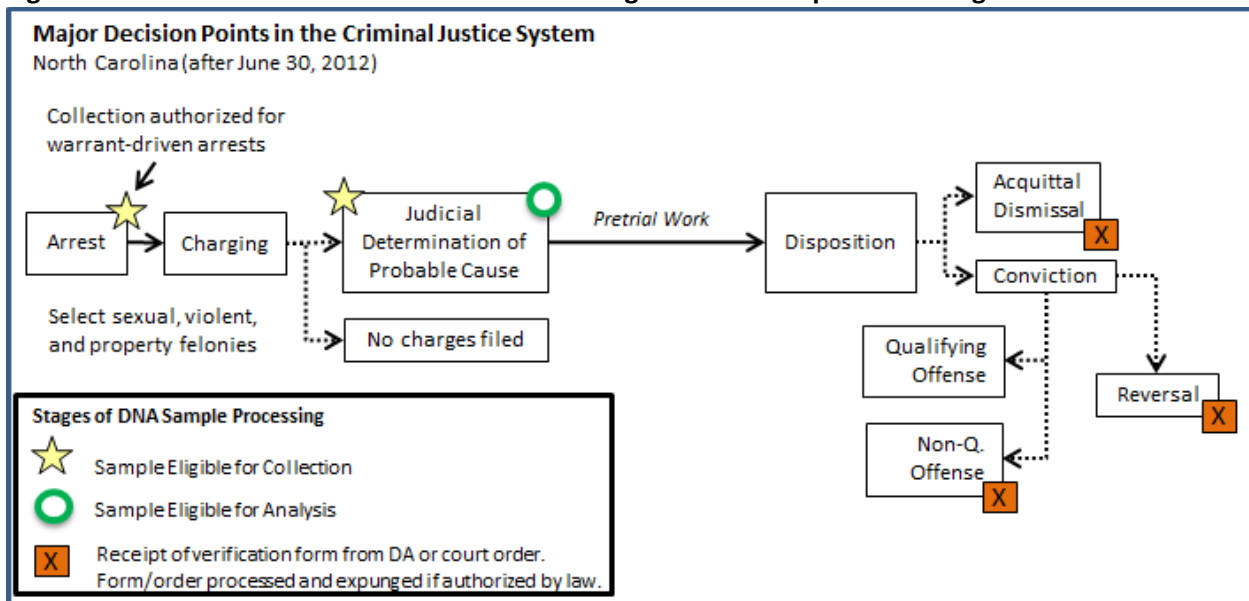
<sup>60</sup> It is important to note that some of the investigations and cases resulting from these hits to arrestee and convicted offender profiles were still ongoing and pending trial at the time Maryland's annual report was published (April 2012).

<sup>61</sup> According to newspaper accounts and other sources (see Friedman, 2010, and Crook, 2012), this legislation was a source of intense debate and was contested by the ACLU and by members of the House Black Caucus, who argued that taking DNA at arrest undermined the presumption of innocence and would disproportionately affect black citizens (Friedman, 2010). The bill received support from the state's attorney general, the NC Conference of District Attorneys, and the NC Metropolitan Police Chiefs.

To collect a sample, law enforcement agencies must either have an arrest warrant or wait until a probable cause determination has been made pursuant to N.C.G.S § 15A-511.

North Carolina amended its law in June 2012 when it switched from individual-initiated to state-initiated (automatic) expungements. Under the new system, the District Attorney must file an expungement request form within 30 days of determining expungement eligibility. The laboratory then has 30 days to check that no other eligible offenses support retention of the profile. If the expungement request is approved and the profile is in CODIS, the profile is deleted from CODIS by laboratory staff, the sample and collection card are destroyed, all electronic data pertaining to the analysis of the sample is redacted or deleted as applicable, and the database manager contacts the outsourcing vendor to ensure that the sample and profile are removed from their system. If the expungement is denied, the sample, collection card, and profile remain within the laboratory/CODIS. The laboratory then sends a letter notifying the individual of the expungement request outcome.

**Figure 21. Model of Criminal Justice Case Processing and DNA Sample Processing in North Carolina**



## Implementation

### Collecting Agencies

The implementation of arrestee DNA collection necessitated a considerable investment in training and infrastructure. Prior to implementation, North Carolina had a huge training push, in which the laboratory sent out advance notices (describing the statute, training lesson plans, training dates, and information on sample collection), scheduled trainings, and mailed collection kits to local law enforcement agencies. The laboratory held 17 initial training sessions for local law enforcement agencies, which were each requested to send a minimum of two officers. Following the training sessions, the laboratory created and distributed training DVDs to each collecting agency in the state, including those that had not sent representatives to a session. The laboratory provided a second round of 15 additional training sessions in winter 2012 following an upgrade of its Live Scan terminals and the June 1, 2012 change in the state’s expungement policy. To facilitate regular contact with agencies between these sessions, the laboratory also designated a staff member to serve as a liaison with collecting agencies.

In addition to training, the laboratory and the Department of Justice Information Technologies Division worked with local law enforcement to install modifications to pre-existing Live Scan terminals—which facilitate the screening and collection of samples—in each of the state’s 100 counties.<sup>62</sup> When an individual is arrested, the arresting officer brings that individual to a booking station and uses the Live Scan terminal to select charge information from a tick list of options; agencies with a records or jail management system may auto-populate this information into the terminal before the officer arrives. The machine then indicates whether the charge qualifies for DNA collection, at which point the officer completes additional fields and submits the arrestee’s fingerprints to the state repository to see if a DNA profile is already on file. Because fingerprint verification may take a number of hours, the collecting officer often must proceed with collection before verifying identity or checking that a DNA profile is already in the system.

Collecting officers then print a DNA collection card, which has a bar code corresponding to the electronic fingerprint number used to link the DNA collection record with arrest and court records. The collection kit also contains a bar code that corresponds to the label on the buccal swab collector. Finally, the pouch in which the sample is mailed includes a bar code. These three bar codes must match when the laboratory receives the sample. If the laboratory has questions about the sample or the packaging of the sample, the staff will attempt to make contact with the submitting agency for clarification, but will ultimately reject and return the sample if any question arises about the integrity of the collection or condition of the sample.

Although there is a push to process samples quickly, if the collecting agency does not record the right offense, the laboratory must obtain documentation to ensure that the sample was collected properly. In the event that the sample was incorrectly obtained, the lab rejects and sends the sample back to the collecting agency, which is responsible for destroying the sample. Some issues with incorrectly obtained samples might be prevented through changes to the Live Scan system. For example, although the system alerts collecting officers to sample eligibility, it cannot prevent officers from printing collection cards for individuals who do not qualify for collection. The Live Scan terminal also does not interface with court data systems and does not indicate whether an individual has been formally charged with a qualifying offense, a requirement that must be met before samples can be collected or analyzed. Although the arresting officer should screen out arrests that are not warrant-driven (i.e., probable cause has not been determined), some officers may proceed with collection, preferring to have the laboratory determine sample eligibility.

#### *Laboratory Workload and Infrastructure*

In the year after the arrestee legislation was passed, the state crime laboratory began to receive substantially more samples (see figure 22). However, only a portion of these samples were uploaded to NDIS, in part because a large portion (about 30 percent) represented duplicate submissions.<sup>63</sup> As found in other states, the difference between samples received and profiles uploaded was influenced by several factors, including the removal of duplicate submissions, a time lag between analysis and profile development/upload, delayed implementation (referenced above), and expungement requests.

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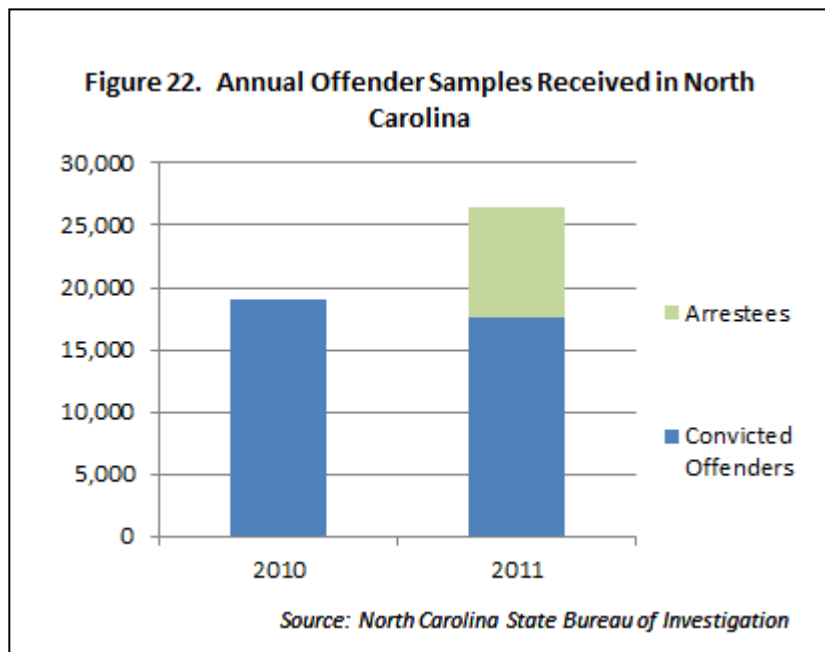
<sup>62</sup> Although changes to the fingerprinting system to support DNA collection were fully installed in May 2011, delays due to training pushed back full implementation of the Live Scan modifications until February 2012.

<sup>63</sup> Some individuals had their DNA collected at arrest by law enforcement agencies and then again upon conviction by the Department of Corrections.

According to one laboratory representative, an estimated 25 percent of samples submitted will receive an expungement request (assuming no duplicates; this number will be higher with duplicate submissions) under the new expungement law. This provision is expected to add to laboratory staff workload, particularly as laboratory technicians are currently responsible for entering case processing information because court data is not integrated with laboratory data. These factors, combined with the lengthy eligibility verification and secondary verification process, have contributed to a growing backlog.

North Carolina outsources its database (offender) samples to a private laboratory for analysis. Typically, arrestee samples are prioritized through weekly batches; convicted offender samples go out monthly. Because of the difference in turnaround times, the lab pays more for arrestee samples than convicted offender samples (\$27, versus \$20). The lab opted to retain the status at which the sample was collected (at arrest, at conviction) because of concerns about challenges to arrestee legislation from other states.

The bill authorized the laboratory to hire seven additional staff (of which five had been hired at the time of the interview). This hiring increase prompted an initial delay because new staff needed to be in a forensic setting for a period of six months, during which they assisted the unit in a more administrative function while completing their analytical training. Designated staff were trained to access administrative court records along with DOC records to verify offense eligibility. To meet a legislative requirement for annual statistical updates, the laboratory also had to redesign its in-house data system, including its specimen manager program.

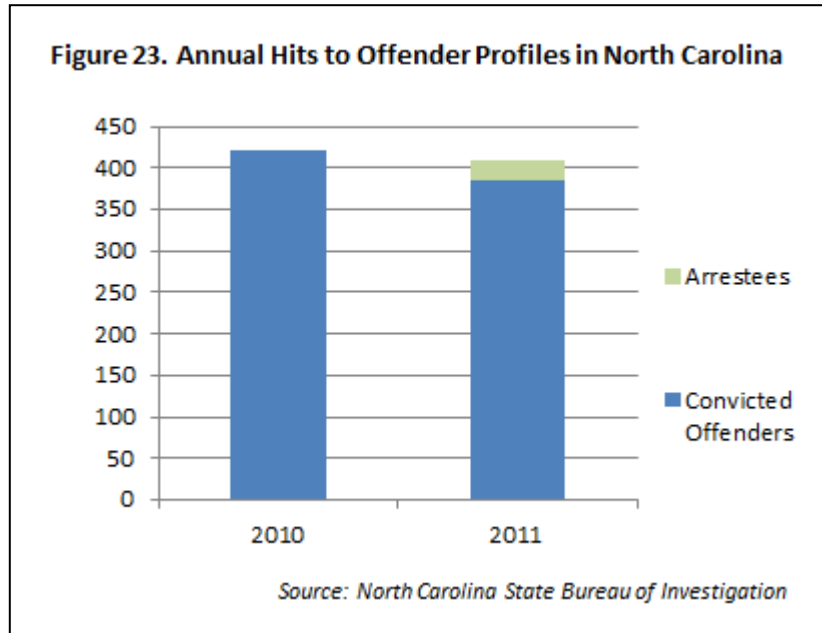


#### *Public Safety Impact*

When a database profile hits to a forensic profile, the laboratory performs a confirmation analysis process, which includes reanalyzing the sample for its profile and subsequent comparison of the secondary profile to the profile in CODIS for the individual. Additionally, designated individuals will also perform a check on the person’s criminal history to see if they were incarcerated on the date of the offense of the crime to which the hit occurred. A latent verification of the fingerprints on file for the individual is also included as a secondary measure of identifying the individual. The information concerning the CODIS hit is ultimately relayed by a laboratory analyst to the investigating agency that submitted the case to which the hit occurred along with a request to submit a standard from the individual in question. If received, this standard is then analyzed and a report issued to the investigating agency.

As seen in other states, limiting arrestee DNA collection to a subset of felonies, in contrast to more inclusive convicted offender laws, tends to reduce the number of samples received—and the likely number of hits to database profiles. One North Carolina interviewee notes that the inclusion of property crimes would have likely resulted in more hits to forensic profiles.

The newness of arrestee DNA collection in North Carolina makes it very difficult to examine trends in hit rates (figure 23). In 2011, the first year in which profiles were uploaded to the database, there were 409 hits to offender profiles, of which 24 were to arrestee profiles.



Additional hits are expected as the state begins to upload more profiles from arrestees, a desirable outcome given the considerable investment by laboratory staff in training collecting agencies, developing infrastructure, determining eligibility, and handling incomplete samples.



## Federal Government

### Statute

Broader than any of the state laws, current federal law authorizes DNA collection from individuals who are “arrested, facing charges, or convicted, or from non-United States persons who are detained under the authority of the United States.” (42 § USC 14135a). The law extending DNA collection to federal arrestees and detainees was included in the DNA Fingerprint Act of 2005<sup>64</sup> and was further amended by the Adam Walsh Child Protection and Safety Act of 2006. Implementing regulations, effective in January 2009 (42 CFR 28.12, as amended), clarified the scope of collection by allowing agencies to focus collection on individuals from whom federal agencies collect fingerprints. The regulations describe DNA collection as expanding the types of identifying information that may be collected during the booking of federal arrestees or non-US person detainees.

Federal law places the burden for requesting a DNA profile expungement on the individual. The individual must include “a certified copy of a final court order establishing that such charge has been dismissed, has resulted in an acquittal, or that no charge was filed within the applicable time period.” These requirements are posted on the FBI’s website. There have been very few expungement requests thus far. The federal law also includes a criminal penalty of up to one year in prison or a fine up to \$250,000 for an unauthorized disclosure of a DNA sample or DNA profile stored in NDIS (42 USC § 14135e).

In 2010, the attorney general provided guidance to prosecutors and investigators at the Justice Department about collecting DNA samples from federal arrestees and defendants following the Federal District Court ruling in *United States v. Mitchell* (2011). Among other things, the memorandum discussed how adverse judicial decisions might affect implementation and directed investigative agencies to suspend DNA sample collection in districts where an adverse district court opinion had not been overturned on appeal (unless the court provided a court order for an individual case). The guidance concluded that collection should continue outside the district in which the adverse district court decision occurred (Holder 2010).

### Implementation

#### *Collecting agencies*

DNA is collected by federal investigative agencies that collect fingerprints as part of the routine booking process. Full implementation of arrestee collection has not yet been achieved by all federal investigative agencies as of late 2012; for example, the Department of Homeland Security is phasing in implementation.

#### *Laboratory Processes and Workload*

The Federal DNA Database Unit (FDDU, formerly the Federal Convicted Offender Program) within the FBI is responsible for processing DNA submissions resulting from authorized Federal DNA collections. Analogous to a state CODIS lab, the FDDU analyzes samples and enters the resulting profiles into NDIS, where they are searched and compared to forensic profiles.

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<sup>64</sup> At the same time, the Act enacted a complementary change making cooperation in DNA collection a mandatory condition of pretrial release (18 U.S.C. §3142(b), (c)(1)(A)).

At the Department of Justice's direction, arrestee samples are collected via buccal (cheek) swab, a change from the earlier reliance on blood (finger stick) collections. This shift in collection method required major changes within the FBI laboratory, which was organized around analyzing blood samples. FDDU provides buccal collection kits, free of charge, to all federal investigative agencies responsible for collecting DNA from federal arrestees or detainees. Detailed information about using the collection kit is on the FDDU's website, and the unit also provided some agency training.

The first arrestee sample was received by the FDDU in April 2009. During 2009, the FBI Laboratory received about 8,000 new arrestee samples. In 2010, there were more than 35,000 new samples and in 2011, about 40,000 more samples. The laboratory expects to receive more than 50,000 samples in 2012. Arrestee samples represent an increasing share of all offender profiles received.

The Justice for All Act (2004) expanded the scope of DNA collection from violent offenses to virtually all federal convictions. The change resulted in an influx of submissions that initially exceeded the FDDU's processing capabilities, producing a substantial backlog that was only cleared after an infusion of resources that funded new positions and infrastructure (including significant technology advancements, such as robotics, automation, expert system software).

The FDDU seeks to process and upload samples within 30 days from the date the lab accepts a sample for analysis; the average turnaround time for October 2012 was 13 days. The FDDU also aims to minimize the number of duplicate samples it receives, citing concerns about the expense and time associated with processing duplicate samples, and most especially the unnecessary risk presented to personnel from collecting agencies. The laboratory is working with collecting agencies to add a flag to the criminal history records system that would indicate whether a DNA profile had already been established within NDIS for a particular convicted offender, arrestee, or detainee. Until the flag can be implemented, the unit is developing an interim measure that would allow collecting agencies to check for previous DNA collection.

#### *Public Safety Impact*

The unit did not provide information specifically related to arrestees. Through October 2012, the unit had issued a total of 4311 letters to investigative agencies notifying them of a hit, which is represented by investigations aided through database hits. There has been a progressive increase in the level of DNA hits. The FDDU believes it is important to understand what happens after the hit and has instituted a practice to follow up with the investigative agencies to determine the final disposition resulting from a DNA hit.

## 7. Findings and Policy Implications

Recognizing that many individuals who commit one crime will commit multiple crimes, every state and the federal government authorize DNA collection from all *convicted* felons—and some from misdemeanants as well.<sup>65</sup> These laws are intended to solve crimes by linking convicted offenders to forensic evidence from crime scenes and prevent future crimes by deterring offenders who are in the DNA database from committing crimes again.

Congress and lawmakers in 28 states have expanded DNA collection to include individuals who have been arrested or charged, but not convicted, of a qualifying offense. These laws reflect concerns about the past and future criminal activity of individuals who fall through the cracks of the criminal justice system. The laws also respond to the belief that some defendants may commit crimes in the community between arrest and conviction and these crimes could be prevented (or solved faster) if DNA was collected earlier.

To assess the effects of expanding DNA collection to include arrestees, this study examined what the arrestee DNA laws require, how they have been interpreted by the courts, and how they have been translated into action by state laboratories and collecting agencies. It explored 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 public safety.

Overall, the analysis suggested that arrestee DNA laws led to more profiles in CODIS, contributed to additional hits, imposed significant administrative and analytic burdens on many state crime laboratories and collecting agencies, and raised important legal and policy issues. The study presented data obtained and analyzed from about half the states currently collecting DNA at arrest, supplemented by data from the FBI CODIS unit and publicly available information from two states. This study was not able to estimate the total number of hits that resulted from arrestee laws, i.e., those hits that would not have occurred without arrestee laws and those that occurred sooner because of arrestee laws.

The findings and their policy implications, summarized below, may be of interest to policymakers and legislators considering adoption of arrestee DNA laws, funders investing in the collection and analysis of DNA samples, practitioners embarking on implementation of arrestee DNA laws, and researchers examining DNA databases/collection laws.

The US Supreme Court's decision about the constitutionality of Maryland's arrestee DNA law (anticipated by the end of 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 a worthwhile or cost-effective practice and how it could be implemented more effectively.

### More than half the states and the federal government have passed laws authorizing arrestee DNA collection

**The pre-adjudication collection of DNA expanded rapidly following the DNA Fingerprint Act of 2005.** The practice of collecting DNA from arrested or charged individuals has been around since the early 1990s and expanded dramatically following the passage of the federal DNA Fingerprint Act of 2005,

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<sup>65</sup> New York State collects from all misdemeanants.

which enabled states to upload arrestee DNA profiles into the NDIS. One year later (late 2006 and early 2007), NIJ expanded federal funding for offender backlog reduction to include arrestees. From 2006 to 2011, encouraged by organizations promoting nationwide adoption of DNA arrestee laws, 22 states passed legislation authorizing the collection and analysis of DNA from individuals arrested or charged with specific offenses—a notable increase from the 6 states that had previously passed arrestee DNA legislation. Most recently, the legal uncertainty surrounding arrestee laws has slowed the pace of adoption.

**Arrestee DNA laws are designed to expand collection to the sizable percentage of individuals who are arrested or charged for a criminal offense but will not be convicted.** This population includes those who are never formally charged, those who are not convicted, and those who are convicted of a non-qualifying offense. The actual size of this population relative to convicted offenders will vary by state, but this study estimates that approximately one in two felony arrests will not lead to a conviction for a felony offense. All told, an estimated one in five felony defendants has an arrest record—but has never been convicted.

**“Arrestee” DNA collection is a bit of a misnomer.** Although the majority of states authorize collection after arrest as part of the booking process, ten states require an arraignment, indictment, or judicial determination of probable cause before analysis can occur. Seven states also require that this higher burden of proof be met before collection occurs. Note that an arrest may occur pursuant to an arrest warrant.

**The scope of qualifying offenses varies across the states and the federal government.** About half the states with arrestee DNA laws authorize collection for all felony offenses, with the rest authorizing collection for a subset of felony offenses. Some states also authorize collection for select misdemeanor offenses, typically involving a crime of violence and/or sexual abuse. Several states collect from only certain sub-populations, such as adults or arrestees with certain qualifying prior felonies. The federal government authorizes collection from all arrestees and detainees.

**Most states place the burden of initiating expungement on the arrestee and have few requirements for how the process is carried out.** An individual who is arrested but not convicted must initiate the expungement process in 18 states and the federal government; 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 state laws do not require that arrestees be informed of expungement procedures, specify a timeline under which a valid expungement request must be processed, or address whether hits to profiles after an expungement has been ordered can be used in a criminal investigation. Expungements occur infrequently in states that require individuals to initiate the process.

**Arrestee DNA laws include provisions to enforce collection and protect against misuse of profiles.** Many states allow agents authorized to collect samples, typically the arresting officer or jail booking staff, to use reasonable force or initiate criminal proceedings if an individual refuses to submit a sample. At the same time, honest mistakes in collection—including incomplete samples or ones that should not have been collected in the first place—are allowed in about half the states. In addition to the federal restrictions on unauthorized disclosure of DNA data in NDIS, 23 state laws and the federal law specify legal consequences for misuse of profiles. Courts that have upheld arrestee laws cite a number of safeguards in state and federal law designed to protect DNA samples and profiles from misuse, including limiting the type of agencies that can access DNA test results and limiting the uses of DNA test results.

**Arrestee laws are being challenged in state and federal courts across the country.** Courts have 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. The issue is pending before the US Supreme Court as of mid-May 2013.

**Ramifications of unsettled law can be seen in the way the laws are drafted and implemented.** The uncertainty about the constitutionality of the laws has led to additional legislative safeguards. For example, some state laws require judicial determination of probable cause prior to collection or analysis as a moderating factor to intrusiveness. Lawmakers in at least two states introduced legislation to *amend* existing laws to include a judicial determination of probable cause.

**Litigation and budgetary constraints have halted or limited collection of DNA from arrestees in some states.** 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. In other states, such as California and Vermont, active litigation has disrupted collection efforts.

## Laboratories assumed responsibility for implementing arrestee laws and often responded in creative and innovative ways

**Implementing arrestee laws can be challenging and resource intensive.** State crime laboratories, which generally coordinate arrestee laws, typically need some lead time to prepare for implementation. Lab personnel, even if they are not formally designated with the responsibility, often coordinate training for collecting agencies, verify sample eligibility, and oversee overall compliance with the law. Technical/forensic staff may assume responsibility for administrative tasks. Ramp-up time, provided through delayed effective dates or administrative action, is often needed to prepare new collection kits, improve infrastructure, increase staffing, and train collecting agencies. Some states made significant changes to infrastructure, including renovating/building physical laboratories, purchasing equipment, and updating existing criminal justice data systems and laboratory systems. Most states received some form of state funding to support implementation.

**Arrestee laws increase laboratory workload.** States have responded to the addition of arrestee samples by staggering implementation, prioritizing samples for analysis, and outsourcing part of their work. About half the states reported an increase in staffing in direct response to arrestee DNA laws, and most states were able to process arrestee samples in a timely manner and reduced the backlog of requests to analyze offender samples. Interviews with state laboratories suggested that choosing a narrower scope of collection was heavily influenced by concerns about the financial burden of arrestee DNA legislation, particularly following laboratory estimates of the expected resource impact of the legislation.

**Laboratories are generally responsible for training collecting agencies about new arrestee laws.** As a state prepares for implementation, training can represent a substantial time investment for both laboratory staff and collecting agencies, particularly if most agencies are new to collection or procedures

have changed significantly. Many states have scores of collecting agencies that need training from the laboratories on an ongoing basis.

**As part of their oversight responsibilities, laboratories monitor the eligibility of samples received.** A substantial amount of laboratory staff time may be spent verifying that a sample is eligible for analysis, particularly if the criteria for qualifying case status, charge at arrest/indictment, and personal characteristics are complicated.

**Statutory provisions designed to enhance individual protections often require coordination among labs, collecting agencies, and the courts.** States where the current status of the criminal case influences DNA sample processing (such as an arraignment prompting analysis or an acquittal prompting expungement) need a process in place that facilitates regular communication between collecting agencies, courts, and laboratories or a process that provides laboratories and collecting agencies with regular and automated updates from a case processing database. Although the use of an automated alert system is preferable to relying on communication with the courts, not all laboratories have direct access to case processing information, and rarely is such information integrated with laboratory data. Even when these systems are in place, monitoring a sample's case status can be time-intensive for laboratory staff.

**Collecting and processing duplicate samples can require significant staff time.** Duplicate sample submissions generally do not add power to CODIS and may represent a costly burden to laboratories, especially if they are not detected until after they enter the stream of analysis. These analyses may lengthen overall laboratory processing time, thereby delaying the generation and upload of unique profiles to CODIS. Most agencies have access to systems that allow them to check if a sample has already been collected, including flags in their criminal history database that indicate when a profile is on file and access to more advanced systems for checking collection information, such as Live Scan and AFIS. Despite access to these systems, duplicates represent a problem for many states. Although states typically remove a sample from the stream of analysis upon identifying it as a duplicate, some do not have the systems in place to detect duplicates until after a hit has occurred.

**The ability of laboratories to ensure compliance is limited by position and resources.** According to interviews, the majority of laboratories and collecting agencies do not check whether samples are collected from all qualified individuals. Some state laboratories have attempted to gain compliance by notifying agencies if they are missing a sample, have received a sample in error, or are missing vital information for analysis. Although laboratories almost always assume responsibility for administration and oversight of arrestee DNA policies, they do not have the legal authority to compel an agency to comply with rules. In general, laboratory representatives reported the need for clarity about roles and responsibilities for implementation, guidelines for ensuring compliance, and a statewide policy that sets standards for collection.

## **Collecting DNA at arrest increases the number of profiles in DNA databases**

### **Collecting DNA from individuals pre-adjudication has increased the number of profiles in NDIS.**

Between 2006 and 2012, approximately 1 million arrestee profiles were uploaded to NDIS; as of July 2012, arrestee profiles account for one-tenth of the total offender profile population (which itself has seen spectacular growth in the volume of offender profiles it supports, increasing by an order of magnitude from 1.2 million profiles in 2002 to upwards of 10.4 million profiles in 2011). During the same time period, the number of forensic profiles also grew, from 46,000 in 2002, to 409,000 by 2011. Data

from individual states also reflect a substantial increase in the total number of arrestee samples/profiles received. For example, in Missouri, the number of samples the laboratory received in the first year of implementation represented an 18 percent increase over the previous year; arrestee samples accounted for 61 percent of this increase. Similar trends were observed in North Carolina, Arizona, and Kansas.

**Collecting DNA from individuals prior to case disposition has likely resulted in *earlier* uploads to NDIS.**

BJS data from the 75 largest counties suggest that felony cases take a median of just over 90 days from arrest to case disposition, and often much longer for convictions (Cohen and Kyckelhahn 2010). On the other hand, arrests that do not lead to formal charges may be disposed within a matter of days. Interviews with state laboratories suggested that the majority of arrestee samples are processed in under 30 days, and some in just over a week. Thus, most samples can be collected, analyzed, and uploaded to NDIS before case disposition, providing months for profiles to hit against forensic profiles before they may become eligible for expungement.

**Variation in state laws and practices affect the number of samples received.** The number of additional samples received by the state crime laboratory will depend heavily on the scope and point of collection. Provisions that require judicial probable cause prior to collection or analysis, include a narrower scope of collection, or restrict collection based on offender characteristics—such as criminal history, presence of a DNA profile on file, or age—reduce the number of samples received and profiles entered into the state database and may ease the analysis burden on laboratory staff; however, these additional protections may also impose additional administrative burdens on the laboratory.

**Fewer samples are analyzed, uploaded, and retained than received by the laboratories.** The attrition between sample receipt and profile upload /retention is a function of the laboratory’s backlog (which slows processing time), duplicate submissions (which are generally not analyzed or uploaded once identified), unusable samples (such as those that were collected incorrectly or from ineligible individuals), and destroyed or expunged samples and profiles. States that remove arrestee samples after the prosecutor declines to prosecute, for example, may never have a chance to analyze samples and upload profiles to NDIS. The net number of arrestee profiles available in CODIS at any one time will also be influenced by the number of profiles that have been expunged from the system.

## Arrestee DNA laws increase hits to forensic profiles, but to an unknown degree

**Most states do not collect the data necessary to calculate the discrete impact of arrestee profiles on public safety.** It is difficult to obtain data on the number of hits resulting from arrestee profiles, in large part because most states do not reclassify an arrestee profile as a convicted offender profile once the individual is convicted. Hence, a hit to an “arrestee” profile may occur after the individual is convicted. At the NDIS level, the FBI does not yet report data regarding hits associated with arrestee profiles (although it has begun reporting by state the number of arrestee and convicted offender profiles separately). 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 and how many occurred between arrest and conviction. Although some states publish or post information about the implementation of their arrestee laws, the follow-up from hits is generally left to local law enforcement and the results are not routinely monitored.



**At least two states have data to isolate the discrete effect of arrestee profiles on public safety.** Upon case disposition, some states will either (1) reclassify arrestee profiles as convicted offenders if the case resulted in conviction or (2) expunge profiles from the system following case dismissal or acquittal. This system of sorting profiles allowed the examination of hits for which arrestee laws are responsible. For example, a review of DNA data from Maryland, which automatically expunges arrestee profiles that do not result in conviction, reveals that they accounted for about 25 percent of hits sent to law enforcement between 2009 and 2011. Arrestee profiles also accounted for about 25 percent of investigations initiated from information provided by hits and about 20 percent of convictions from those investigations (Maryland State Police, Forensic Sciences Division 2011). The Arrestee Database in Virginia, which also automatically expunges and updates arrestee profiles to convicted offenders upon successful conviction, only includes profiles associated with individuals who have been arrested but whose have not yet convicted. As of August 2012, 770 hits occurred between arrestee and forensic profiles, of which about 15 percent were associated with sexual assault cases. These arrestee hits represent nearly 11 percent of all offender hits between 2003 and August 2012 (Virginia Department of Forensic Science 2012).

**Forensic profiles have a larger effect on hits than offender profiles, but are also more expensive to collect and process.** While the analysis of NDIS data indicates that including more offender profiles has a significant, positive effect on investigations aided (for every 1,000 *offender* profiles, 8 investigations are aided), increasing the number of forensic profiles in CODIS has a much larger, significant, positive effect on investigations aided (for every 1,000 *forensic* profiles, 407 investigations are aided). While one might conclude that 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 FY 2012 solicitation, the Department of Justice’s DNA Backlog Reduction Programs’ reimbursement rate for analyzing forensic evidence is, on average, \$1,000 per case, and \$40, on average, for each offender profile analyzed and uploaded to CODIS.

## Safeguards and compliance monitoring represent important aspects of implementation

**While legally important, the practical benefits of expungement are unclear.** The ability to expunge is cited as an important safeguard for those arrested, but not convicted. Expungements are rare in most states where the individual must initiate the process. States that adopt automatic expungement provisions can invest substantial resources in tracking case progress and expunging profiles. Yet the risks associated with a profile remaining in the system are hypothetical—non-criminal justice uses are not permitted and there are penalties for unauthorized disclosure (familial searching or changing rules may be the concern). The larger potential danger is in the misuse of the sample itself, but there, too, the risks appear to be more hypothetical than real, and penalties are in place. Although some courts have expressed concern that the analysis of the sample could reveal private, sensitive information about individuals (since the samples collected include the entire human genome), the quality and quantity of statutory and policy safeguards that protect samples and profiles have satisfied other courts.

**The potential for agencies to collect from ineligible individuals suggests the importance of training law enforcement and monitoring collection carefully.** Many laboratories already invest heavily in training and in assessing the eligibility of samples. States—particularly those that do not collect from all felonies, those that allow for samples collected in error to be used in an investigation, or those that receive large numbers of ineligible samples—may want to ensure that their training emphasizes the need for accurate collection practices and the close monitoring of submissions. In the United Kingdom, an independent



government advisory body found that police routinely arrested people simply to record their DNA profiles and that "function creep" over the years had transformed a database of offenders into one of suspects.<sup>66</sup>

## Looking ahead to the future of arrestee DNA laws

**States should carefully consider new arrestee 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 US Supreme Court ultimately upholds arrestee laws, 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 DNA analysis of crime scene evidence or even further expanding convicted offender laws to all misdemeanants. Assessing the value of the added hits, indictments, or convictions against the additional costs ultimately depends on how one measures the benefits of each additional crime solved or prevented.

**The design of new laws should recognize the tradeoffs that may occur during implementation.** This report identified several tradeoffs that legislators should consider when deciding whether to expand DNA collection laws to include arrestees.

- *Protection of arrestee rights versus simplicity of implementing the law.* Provisions that limit the scope of collection, require probable cause, or require automatic expungement reduce the number of samples received/ profiles retained, may help (or be perceived to help) protect the rights of arrestees, and may also increase the administrative burden on laboratories and collecting agencies. Laws that collect samples from all felony arrestees with individual-initiated expungement are the easiest to implement.
- *Administrative versus analytic functions of laboratory staff.* Unless funding for administrative staff is provided, the scientific/forensic staff will need to spend more time on administrative functions—including training, checking eligibility, coordination, and compliance—and less time on analytic functions.
- *Collecting agency versus laboratory responsibilities.* Laboratories often oversee implementation, but they are not empowered to enforce compliance by collecting agencies.
- *Collection of arrestee profiles versus other investigative practices.* The time spent collecting DNA from arrestees could be used for other law enforcement purposes, e.g., collecting forensic evidence, investing resources in law enforcement, or engaging in crime prevention efforts.

**Determining the specific benefit of collecting from arrestees is possible, but may not be worth the effort for laboratories.** As the study has described, 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), and (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

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<sup>66</sup> Based on the UK experience, the disproportionate impact on minorities due to systemic inequities may be a valid concern, as is the potential for abuse that furthers those inequities, such as if police were to “pre-textually arrest a person from whom [they wanted] a DNA sample.” (*People v. Buza* [2011]).

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 ascertain that the hit only occurred as a result of the arrestee law. These changes could also require considerable coordination between laboratories, collecting agencies, the courts, and potentially the DA's office.

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. It is unclear if the *Katie Sepich Enhanced DNA Collection Act of 2012* could provide needed support for such activities in the future.

**Even if the hits resulting from arrestee DNA collection could be determined, limitations remain in consistently determining whether the hits have resulted in investigations aided.** Given the resources invested in collecting and analyzing DNA, federal policymakers and state officials should work to improve the capabilities of the labs to collect and track information about how DNA hits contribute to criminal investigations and resulting criminal cases. An important objective would be to establish a uniformly applied definition of "investigations aided."

**Changing technology could lessen the challenges of implementing arrestee DNA laws.** Improved methods of collecting and analyzing DNA samples, checking for duplicates, and/or monitoring case eligibility and status could ease the administrative burdens on laboratories described in this report. The FBI's Rapid DNA initiative,<sup>67</sup> for example, could have far-reaching effects on implementing arrestee DNA laws and increase their likelihood of solving more crimes quickly and efficiently.

**NIJ, which funds the analysis of offender and forensic profiles, should continue to encourage the development and adoption of best practices to track case outcomes and isolate the impact of adding profiles to CODIS.** Researcher/practitioner partnerships would be one way to assist laboratories in refining their methods for tracking case outcomes and assessing the impact of adding profiles.

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<sup>67</sup> The goal of the initiative "is to develop commercial instruments capable of producing a CODIS-compatible DNA profile within two hours and to integrate those instruments effectively within the existing CODIS structure to search unsolved crimes while an arrestee is in police custody during the booking process" (FBI 2012b).

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## Appendix B. Case Summaries

### Challenges to State Laws

#### *Mario W. v. Kaipio*, 281 P.3d 476 (Ariz. 2012)

**Court:** Supreme Court of Arizona

**Decision Issued:** June 27, 2012

**Background:** Seven juveniles (Mario, Bradley, Alexis, Eric, Noble, Bailey, and Devon) were charged with unrelated offenses, including sexual conduct with a minor, child molestation, and burglary. A judicial finding of probable cause substantiated the charges for five of the juveniles. For two juveniles (Bailey and Devon), there was no record of a judicial finding of probable cause. The superior court ordered that each juvenile submit a DNA specimen after an advisory hearing pursuant to A.R.S. § 8-238(A). The seven juveniles jointly challenged the law on the grounds that it did not comport with the Fourth Amendment's proscription of unreasonable searches and seizures.

**Analysis:** The Supreme Court of Arizona employed the totality of the circumstances test. The court considered the collection and analysis of DNA as two separate searches and likened the first search – the collection of buccal cells – to fingerprinting, viewing it as a minor physical intrusion. Such collection, the court reasoned, could benefit the state if a juvenile is released and fails to appear at trial. In this instance, the opportunity to collect a DNA sample is lost if the individual fails to appear, and presents a challenge to the state if it wishes to link the individual to the crime. For this reason, the court concluded that the state's interest in collecting a sample outweighed an individual's privacy interest, regardless of whether a judicial determination of probable cause has been issued.

Conversely, the court did not find a compelling state interest to justify the intrusion occasioned by the second search – the analysis of the DNA sample and the upload of the resulting profile to a database. First, the court maintained that the privacy interest at stake in this search was higher since the analysis of a sample can reveal personal information, unlike fingerprinting. Second, the court reasoned that since the state grants the opportunity for expungement if an individual is not convicted, these profiles should not be used prior to adjudication. Third, the court argued that since the time between an advisory hearing (the point at which samples are requested from juveniles) and adjudication is relatively short (an average of 60 days in Arizona) and sample processing may take weeks, the interest in analyzing a sample prior to adjudication does not seem strong. While the court recognized that earlier analysis could link individuals to other crimes sooner, this benefit seemed "speculative."

**Decision:** The court ruled that the analysis of samples prior to adjudication is unconstitutional. It did ensure, however, that analysis could occur if a juvenile had absconded.

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#### *King v. State*, 42 A.3d 549 (Md. 2012)<sup>1</sup>

**Court:** Court of Appeals of Maryland (Highest state court in Maryland)

**Decision Issued:** April 24, 2012

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<sup>1</sup> The State of Maryland appealed the case to the Supreme Court of the United States and a temporary stay was granted allowing Maryland to reinstate collection and analysis of arrestee samples. The court granted certiorari, hearing oral arguments for the case in early 2013. A final decision is expected mid-2013.

**Background:** In 2009, Alonzo King was arrested on assault charges. In accordance with § 2-504(3), a DNA specimen was collected from King at booking (the day he was arrested) and its corresponding profile was entered into CODIS. While awaiting trial, King’s profile matched a forensic profile pertaining to an unsolved rape case that occurred in 2003. The match was verified, and King was ultimately convicted of the rape and sentenced to life in prison. King challenged the statute (both facially and as-applied) that authorized the collection of his DNA on the grounds that it did not comport with the Fourth Amendment’s proscription of unreasonable searches and seizures.

**Analysis:** The court employed the totality of the circumstances test. The court first considered King’s expectation of privacy and the degree of intrusion occasioned by sample collection and analysis. The court argued that individuals who are only arrested or charged have a higher expectation of privacy than individuals who are convicted, citing the state’s responsibility to automatically expunge a sample if an individual is not convicted. Further, the court observed that DNA contains more sensitive information than fingerprints; while the law includes provisions to protect samples from misuse, the court reasoned that such protections do not justify the search. The court also maintained that probable cause for arrest does not serve as probable cause for DNA collection and analysis.

Second, the court considered the state’s interest in King’s DNA. The court disagreed with the state’s contention that the law’s purpose is to establish identity, arguing that the purpose of the law is to solve crimes. The court argued that warrantless searches could not be justified by an interest in solving crimes. While other courts have defined identity as who a person is and the crimes a person has committed, the court found this definition of identity to be too expansive. The court reasoned that the state’s purported interest in establishing identity had already been accomplished through other means, including fingerprints. The court concluded that King’s privacy interest outweighed the state’s interest in collecting and analyzing his DNA. The court ordered that evidence presented at trial should be suppressed.

**Decision:** Unconstitutional

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### ***Haskell v. Harris*, 669 F.3d 1049 (9th Cir. 2012)<sup>2</sup>**

**Court:** United States Court of Appeals for the Ninth Circuit

**Decision Issued:** February 23, 2012

**Background:** Elizabeth Haskell, Reginald Lyons, Jeffrey Lyons, and Aakash Desai were arrested for unrelated felony offenses in California and required to submit a DNA sample pursuant to California Penal Code § 296(a)(2)(C). In a joint action, the arrestees challenged the California statute on the grounds that it did not comport with the Fourth Amendment’s proscription of unreasonable searches and seizures.

**Analysis:** The court employed the totality of the circumstances test. On the one hand, the court considered the plaintiffs’ expectation of privacy and the degree of intrusion occasioned by sample collection and analysis. The court argued that arrestees have a diminished expectation of privacy upon arrest, marked by intrusive physical searches upon booking and detention. The court reasoned that in light of these searches, DNA collection by buccal swab is a minor intrusion. Further, the court

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<sup>2</sup> The case was reheard by the 9th Cir. *en banc* – following a petition to rehear the case – the following September. The court has postponed its ruling pending the U.S. Supreme Court’s decision in *King* (2012).



maintained that like fingerprinting, the purpose of DNA collection is to ascertain the individual's identity, which includes an individual's criminal history. The court acknowledged that DNA samples contain more information than fingerprints and that DNA profiles could be used to glean more information than identity. However, the court argued that these concerns are silenced by statutory provisions that penalize individuals for misusing samples or profiles. The court also noted that there is no evidence of current misuse of DNA profiles.

On the other hand, the court cited four government interests accomplished by the law: the identification of arrestees (including who the arrestee is and his or her criminal history), the resolution of past crimes (citing an increase in hits after the law's implementation), the prevention of future crimes (deterrent effect), and the exoneration of innocent suspects. The court concluded that these interests justified the search.

**Decision:** Constitutional

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### ***People v. Buza*, 129 Cal. Rptr. 3d 753 (Cal. App. 2011)<sup>3</sup>**

**Court:** Court of Appeal of California, First Appellate District, Division Two

**Decision Issued:** August 4, 2011

**Background:** In 2009, Mark Buza was arrested for arson, vandalism, and possession of combustible material. After his arrest, but prior to his court appearance, law enforcement requested that Buza provide a DNA specimen pursuant to California Penal Code § 296(a)(2)(C). Buza refused to provide a sample, which constituted a misdemeanor offense. Buza was subsequently charged and convicted of the offenses for which he was arrested and for not providing a DNA sample. Buza challenged the California statute on the grounds that it did not comport with the Fourth Amendment proscription of unreasonable searches and seizures.

**Decision:** The court employed the totality of the circumstances test. The court reasoned that because Buza was only arrested and not yet convicted at the time a DNA sample was requested, he had a greater expectation of privacy than individuals who are convicted and those whose arrests are paired with a judicial determination of probable cause. Further, the court argued that the analogy of DNA collection to fingerprinting is misplaced because DNA contains sensitive information. The court maintained that fingerprinting, while accepted as routine practice, has not been subjected to Fourth Amendment analysis. Further, the court argued that since the search occasioned by DNA collection and analysis is not based on individualized suspicion and without warrant, it is not constitutional.

The court also assessed the government's interests at stake. The court argued that other courts have conflated identity and investigation by offering a two-pronged definition of identity as who a person is and what he has done. The court reasoned that the purpose of such collection is not to identify an individual, but to investigate him. The court considered that the state had already accomplished its goal of identifying an individual through fingerprinting. Further, the court argued that even if investigating individuals who are arrested could benefit the state, the effectiveness of such technology did not justify the unconstitutional search.

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<sup>3</sup> A temporary injunction of the state's law was issued in August 2011 as a result of the court's decision. The injunction was lifted when California Supreme Court granted review of the case in October 2011. In January 2013, the court has postponed further action pending the U.S. Supreme Court's decision in *King* (2012).



**Decision:** Unconstitutional

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### ***Anderson v. Commonwealth, 650 S.E.2d 702 (Va. 2007)***

**Court:** Supreme Court of Virginia

**Decision Issued:** September 14, 2007

**Background:** In 2003, Angel Anderson was arrested for rape and sodomy charges in Virginia. A DNA sample was collected from Anderson upon arrest in accordance with VA Code § 19.2–310.2:1. The sample was subsequently analyzed and its corresponding profile was uploaded to Virginia’s DNA Database. Upon upload, Anderson’s DNA profile matched a forensic DNA profile developed from a sexual assault kit from an unrelated rape case. After the match between Anderson’s DNA and the DNA from the sexual assault kit was confirmed, Anderson was indicted and found guilty by a jury. Anderson challenged Code § 19.2–310.2:1 on the grounds that collection of DNA from individuals who are arrested does not comport with the Fourth Amendment’s proscription of unreasonable searches and seizures.

**Analysis:** The court likened the collection of DNA upon arrest to taking fingerprints upon arrest – a procedure that has “been accepted as part of the routine booking process.” While the court acknowledged that DNA is more “revealing” than fingerprints, the purpose of both is to identify individuals and solve past and future crimes. Further, the court did not distinguish between individuals who are convicted and individuals who have not been convicted. Following similar logic as the Fourth Circuit in *Jones v. Murray*, a case that challenged collection from individuals convicted of felonies, the court reasoned that the search is justified by the state’s interest in identifying an individual with certainty and “knowing whether he is wanted elsewhere.”

**Decision:** Constitutional

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### ***In re Welfare of C.T.L, 722 N.W.2d 484 (Minn. App. 2006)***

**Court:** Court of Appeals of Minnesota (this case was not appealed to the Minnesota Supreme Court)

**Decision Issued:** October 10, 2006

**Background:** A juvenile was charged with assault and with aiding and encouraging aggravated robbery. The juvenile was ordered to provide a DNA sample in accordance with Minn. Stat. § 299C.105 after his initial appearance. The juvenile challenged the statute on the grounds that it violated the Fourth Amendment and Minnesota’s analogous proscription of unreasonable searches and seizures (Article I, Section 10, of the Minnesota Constitution).

**Analysis:** The court arrived at its decision through two distinct arguments. First, the court reasoned that probable cause supporting a criminal charge is not sufficient to obtain a DNA sample. Instead, probable cause supporting the issuance of a search warrant is necessary to collect a DNA sample. Second, the court employed a balancing test to assess the individual’s privacy interest in light of the state’s interest in collecting the DNA sample. The court maintained that those who have not been convicted have a greater expectation of privacy than individuals who have been convicted. Further, the court reasoned that the law’s requirement to automatically expunge a sample and profile if a case does not result in conviction reflects this distinction. The court did not view the privacy interest of individuals who are

awaiting disposition as different from individuals whose cases do not result in conviction since, the court asserted, individuals are innocent until proven guilty. The court concluded that the government interest supported by the law did not justify the search.

**Decision:** Unconstitutional

## Challenges to Federal Laws

### *United States v. Shavlovsky*, 2012 WL 652672 (E.D. Cal. 2012)

**Court:** U.S. District Court for the Eastern District of California

**Decision Issued:** February 24, 2012

**Background:** In 2011, a warrant was issued for Vitaly Tuzman’s arrest for mortgage fraud. Tuzman surrendered himself to the U.S. Marshals Service. In accordance with 42 U.S.C. § 14135a, U.S. Marshals staff collected a DNA sample from Tuzman. Tuzman subsequently challenged the law on the grounds that it does not comport with the Fourth Amendment’s proscription of unreasonable searches and seizures.

**Analysis:** The court employed the totality of the circumstances test. The court first evaluated the interests presented by the government, including verifying Tuzman’s identity and solving more crimes. The court indicated that because the government had already identified Tuzman, the question was “whether it ha[d] a compelling interest in taking the DNA to further identify him.” The court considered the usefulness of having a DNA sample on file in the event that Tuzman absconded and altered physical characteristics, including his fingerprints. However, the court reasoned that because these may be rare events, a warrant should still be required to collect and analyze DNA. Further, the court considered the government’s argument that DNA collection helps solve crimes. The court argued that because the search is not guided by the suspicion that an individual is linked to another crime, and not “anchored” by the arresting offense, it is not reasonable to collect an individual’s DNA on the “off chance” that he might have committed a crime.

Secondly, the court assessed Tuzman’s expectation of privacy and the degree of the intrusion occasioned by DNA collection and analysis. The court argued that Tuzman has a greater expectation of privacy than individuals who are convicted. While the government claimed that collection of DNA is a minor intrusion, the court countered that the invasive nature of the search is “an affront to physical security.” Further, while the government claimed that it has an interest in Tuzman’s identity, the court concluded that the DNA reveals more information than identity. The court found that these privacy concerns outweighed the government interests supported by the law.

**Decision:** Unconstitutional

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### *United States v. Fricosu*, 844 F. Supp. 2d 1201 (D. Colo. 2012)

**Court:** United States District Court for the District of Colorado

**Decision Issued:** February 22, 2012

**Background:** In 2011, Ramona Fricosu was charged with real estate fraud. Upon intake by the U.S. Marshals Service, a DNA sample was collected pursuant to 42 U.S.C. § 14135a. Fricosu challenged the search on the grounds that it did not comport with the Fourth Amendment’s proscription of unreasonable searches and seizures.

**Analysis:** The court employed the totality of the circumstances test. The court assessed the degree of intrusion and Fricosu’s expectation of privacy and argued the intrusion occasioned by the sample’s collection was minor. While the court acknowledged that DNA contains sensitive information, it reasoned that these privacy concerns are minimized by the limited authorized uses of the sample that

the statute provides to protect against misuse. Further, the court observed that the DNA profile, which is entered and searched in the DNA, only reveals the identity of an individual. The court stated that individuals who are arrested do not have an expectation of privacy regarding their identity.

The court found that the government has an interest in ascertaining identity, which is accurately achieved through DNA, and knowing whether an individual has been involved in other crimes. The court concluded that the government's interest supported by the law justified the search.

**Decision:** Constitutional

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### ***United States v. Mitchell, 652 F.3d 387 (3d Cir. 2011)***

**Decision Issued:** July 25, 2011

**Background:** Ruben Mitchell was indicted on a drug charge. Mitchell was ordered to submit a DNA sample pursuant to 42 U.S.C. § 14135a. Mitchell challenged the statute on the grounds that it did not comport with the Fourth Amendment's proscription of unreasonable searches and seizures.

**Analysis:** The court employed the totality of the circumstances test. The court assessed Mitchell's expectation of privacy and established that the purpose of the statute is to identify an individual, likening DNA collection to fingerprinting. The court reasoned that when an individual is arrested upon probable cause, he has a diminished expectation of privacy regarding his identity. This diminished expectation of privacy has "traditionally justified taking...fingerprints and photographs." While the court acknowledged that the misuse of DNA presents concerns, the safeguards in place to limit such misuse mitigate concerns about DNA's use beyond establishing identity.

The court also considered the government's interest in collecting DNA. The court observed that DNA provides more accurate identifying information than fingerprints and photographs. While an individual may alter his appearance or fingerprints, he cannot (according to current knowledge) alter his genome. Second, the court maintained that since identity consists of who a person is and what he or she has done, collecting DNA may help solve present and past crimes, resulting in faster case disposal and clearance of suspects. Further, linking individuals to other crimes and the current crime has "important pretrial ramifications." Ultimately, the court concluded that the government's interests supported by the law justified the search.

**Decision:** Constitutional

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### ***United States v. Thomas, 2011 WL 1599641 (W.D.N.Y. 2011)***<sup>4</sup>

**Court:** United States District Court for the Western District of New York

**Decision Issued:** February 14, 2011

**Background:** On August 31, 2010, Audrey Thomas was indicted with theft of federal government property. At her arraignment hearing, the court ordered Thomas to submit a DNA specimen as a condition of her pretrial release in accordance with 42 U.S.C. § 14135a. Thomas challenged the statute on the grounds that the law did not comport with the Fourth Amendment's proscription of unreasonable searches and seizures.

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<sup>4</sup> Appeal to the Second Circuit was dismissed by the plaintiff.

**Analysis:** Following the same reasoning as the Second Circuit in *United States v. Amerson* (2007),<sup>5</sup> the court employed the special needs exception to assess the constitutionality of the law as it applied to Thomas. In *Amerson*, the Second Circuit considered the law as it applied to probationers and reasoned that the law’s purpose of creating an identification index to help solve crimes was distinct from ordinary law enforcement activities and could not be achieved through normal law enforcement activities. The Second Circuit concluded that the law “qualified as a special need.” In *Thomas*, the court could not distinguish the purpose of the law as it applied to arrestees from probationers, thereby concluding that the law’s purpose qualified as a special need in Thomas’s case.

Once the court established the law’s purpose as a special need, it balanced Thomas’s privacy interest against the government’s interest in the search. The court applied the same reasoning as the Second Circuit in *Amerson* to Thomas’s case. First, the Second Circuit argued that the privacy interest at stake is the individual’s identity. The court maintained that while sensitive information could be derived from DNA samples, adequate measures were in place to limit misuse, including the narrow purpose for which they may be used and criminal penalties for misuse. Further, the court reasoned that while only numerical representations of DNA were stored in CODIS, there was no evidence of scientific advances that could generate information from these profiles beyond identity. The court maintained that the government has a legitimate interest in the identity of an individual who has been indicted.

Second, the Second Circuit considered the government’s interest in collecting DNA from probationers. The court argued that DNA identification provides the government with the opportunity to quickly and accurately solve crimes. The court concluded that these interests supported by the law justified the search. Since the Western District of New York could not distinguish between individuals on probation and individuals who have been indicted, it applied the same reasoning in *Amerson* to *Thomas*.

**Decision:** Constitutional

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### ***United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010)<sup>6</sup>**

**Court:** United States Court of Appeals for the Ninth Circuit

**Decision Issued:** September 14, 2010

**Background:** In 2009, Jerry Pool was indicted for the possession and receipt of child pornography. As a condition of his pretrial release, Pool was required to submit a DNA specimen pursuant to 18 U.S.C. § 3142(b) and (c)(1)(A). Pool challenged the condition on the grounds that it did not comport with the Fourth Amendment’s proscription of unreasonable searches and seizures.

**Analysis:** The court employed the totality of the circumstances test. The court first considered Pool’s expectation of privacy and the degree of intrusion occasioned by the law. The court established that the goal of the law is to establish identity. The court argued that the identity of arrestees is a matter of public interest. Further, the court reasoned that the physical collection of the sample is minimally

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<sup>5</sup> *United States v. Amerson*, 483 F.3d 73 (2d Cir. 2007).

<sup>6</sup> An appeal was filed for an en banc hearing, which the Ninth Circuit granted. Because Pool pleaded guilty, the appeal was moot and the panel decision (summarized here) was vacated.

intrusive. While the court recognized that DNA contains sensitive information, the narrow purpose of the law (to establish identity) and statutory provisions proscribing misuse mitigated these concerns.

Second, the court considered the government's interests in the law. The court argued that DNA is superior to fingerprinting in terms of establishing identity and is more likely to be left behind at crime scenes. The court also concluded that DNA collection has implications for pretrial release and discourages violations of pretrial release. The court concluded that these interests outweighed the privacy concerns associated with the search.

**Decision:** Constitutional

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### ***United States v. Frank, No. CR-09-2075-EFS-1 (E.D. Wash. 2010)***<sup>7</sup>

**Court:** United States District Court for the Eastern District of Washington

**Decision Issued:** March 10, 2010

**Background:** In 2009, Lance and Johnathon Frank were arrested and indicted on federal murder charges, rendering them eligible for DNA collection pursuant to 42 U.S.C. § 14135a. The defendants challenged the condition on the grounds that it did not comport with the Fourth Amendment's proscription of unreasonable searches and seizures.

**Analysis:** The court employed the totality of the circumstances test. On the one hand, the court considered the defendants' expectation of privacy and the degree of intrusion occasioned by sample collection and analysis. The court argued that because the defendants are presumed innocent during the pretrial phase, they are entitled to a greater expectation of privacy than individuals who have been convicted. While the court recognized that the collection of DNA is a minimal intrusion, its concern was with the amount of information that DNA provides and its storage in a database.

The court considered the government's interests and observed that the government's goal of identifying the defendants had already been accomplished. The court maintained that there was not an urgent need to collect DNA, citing evidence that nearly all of the Eastern District of Washington's cases resulted in conviction, and thus a DNA sample would be collected regardless. Further, the court reasoned that since the average time between filing and disposition was nine months in the Eastern District of Washington, the government could wait this period of time to collect a sample. The court concluded that government's interest did not outweigh the privacy concerns associated with the search.

**Decision:** Unconstitutional

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<sup>7</sup> This case was not reviewed by a higher court. Since the plaintiffs entered guilty pleas, it is likely that an appeal was moot.

### Appendix C: State Arrestee DNA Laws (1 of 3)

STATE	Year Signed into Law	Scope of Collection & Analysis											
		Case Status				Qualifying Offenses				Offender Characteristics			
		Collection occurs ...		Analysis occurs ...		Felonies		Misdems	Other (Status)	Criminal History	Age		Health
		After Arrest	After Charging*	After Arrest	After Charging*	All	Subset				Under 18 permitted	Under 18 prohibited	
21	7	18	10	13	14	7	1	2	8	8	1		
AL	2009	x		x		x		x			x		
AK	2007	x		x		x							
AZ	2007	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						
KS	2006	x		x		x		x			x		
LA	1997	x		x		x		x			x		
MD	2008		x		x		x						
MI	2008	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						
ND	2007	x		x		x						x	
OH	2010	x		x		x						x	
OK	2009	x		x					x				
SC	2008	x		x		x		x				x	
SD	2008	x		x		x		x				x	
TN	2007		x		x		x						
TX	2001	x		x			x			x			
UT	2010	x			x		x				x		x
VT	2009		x		x	x							
VA	2002		x		x		x						

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

### Appendix C: State Arrestee DNA Laws (2 of 3)

STATE	Year Signed into Law	Expungement									
		Responsibility			Additional Conditions		Notification & Timeline				
		Process Started ...			Convicted of non-qualifying crime	No other qualifying offenses	Notification of Expungement Policy required ...		Expungement Period Specified (days)	Investigative uses for profiles that will be expunged	
		By Request	Both	Automatic			Upon collection of sample	Upon successful expungement		Allowed	Prohibited
	18	2	7	10	16	4	2	5	7	4	
AL	2009	x									x
AK	2007	x									
AZ	2007	x				x					
AR	2009	x			x						
CA	2004	x				x			x		
CO	2009	x			x	x	x	x			x
CT	2011			x							
FL	2009	x				x					
IL	2011	x			x	x					
KS	2006	x									
LA	1997	x									
MD	2008			x			x	x	x		x
MI	2008	x				x				x	
MN	2005		x								
MO	2009		x			x			x	x	
NJ	2011	x			x	x					
NM	2006	x			x	x					
NC	2010			x	x	x			x		x
ND	2007	x			x					x	
OH	2010	x				x					
OK	2009	<i>We did not locate expungement provisions for Oklahoma.</i>									
SC	2008			x	x	x	x	x	x		
SD	2008	x			x	x				x	
TN	2007			x		x					
TX	2001	x								x	
UT	2010	x				x	x				
VT	2009			x	x					x	
VA	2002			x		x					



### Appendix C: State Arrestee DNA Laws (3 of 3)

STATE	Year Signed into Law	Oversight & Administration												
		Authorization & Responsibility for Collection				Arrestee Refusals & Collection Mistakes					Other			
		Authorized Agencies				Processing Speed Requirements	Reasonable force allowed	Criminal Offense to Refuse	Mistakes in Collection		Penalties for Misuse of Samples/Profiles	Tracking Requ.	Duplicate Submissions	
		Law Enforcement	Sheriffs   Jails	Other	Unspec.				Does not invalidate	Recollection authorized			Optional	Prohibited
		13	7	1	11	7	11	9	12	14	23	6	11	4
AL	2009				x			No	x		Criminal		x	
AK	2007				x	x	x		x	x				
AZ	2007	x				x				x				x
AR	2009	x					x	Misdem.	x		Criminal		x	
CA	2004	x	x			x		Misdem.	x	x	Criminal	x		
CO	2009	x					x						x	
CT	2011	x						Felony		x	Criminal			
FL	2009				x		x	Misdem.	x	x	Criminal	x		
IL	2011				x	x	x	Felony	x	x	Criminal			
KS	2006				x			Misdem.		x			x	
LA	1997				x		x		x	x	Criminal			
MD	2008				x					x	Criminal	x	x	
MI	2008	x	x					Misdem.	x	x	Criminal	x	x	
MN	2005	x	x			x					Civil Only			
MO	2009				x		x	Revoc.		x	Criminal			
NJ	2011	x									Criminal	x		x
NM	2006		x								Criminal		x	
NC	2010	x									Criminal	x	x	
ND	2007	x							x	x	Criminal		x	
OH	2010	x	x			x					Criminal			
OK	2009		x						x		Criminal			
SC	2008				x					x	Criminal			x
SD	2008				x		x	Felony	x		Criminal		x	
TN	2007	x												
TX	2001	x					x				Criminal			
UT	2010		x				x		x	x	Criminal		x	
VT	2009				x		x				Criminal			
VA	2002			x		x					Criminal			x

## Appendix D. Laboratory Interview Protocol

Arrestee DNA Protocol for Interviewing Lab Staff  
The Urban Institute

State

Respondent

Date

Key Points

Thank you for taking the time to speak with us today. As we mentioned before, we are working on a project for the National Institute of Justice that examines the issues surrounding the policies and practices governing DNA collection from arrestees.

- We are conducting interviews with representatives of CODIS labs in all states that collect DNA from arrestees and a broader group of stakeholders in a handful of states.
- Interviews will be used to produce a report from criminal justice practitioners and policymakers that describes the various ways that arrestee DNA is collected and used across the country.
- Interview is voluntary, and your name and position will not be used; if we want to quote you at some point, we will seek your permission
- Questions about the general process of how arrestee DNA is collected, processed, and stored, and how profiles are created, uploaded into CODIS, and expunged if necessary.
- In addition, we want to learn what summary data is retrievable from your data systems/databases, because we hope to obtain information on the number and characteristics of those arrestees whose DNA profiles are currently within SDIS.

We want to start by going over our understanding of your state laws to ensure we understand correctly, and then we have a number of questions we'd like to ask you about your experience translating this law into action.

[If asked: *I expect the questions will take about 45 minutes.*]

### I. Respondent Background Information

1. Can you start by telling us about your role in the lab and your involvement with SDIS/CODIS?

### II. Review of the arrestee law summary.

2. Are laws cited correctly?
  - Authorization
  - Expungement
  - a. Is there anything incorrect?
  - b. Is there anything missing?

II. Overview of State Law/Implementation

3. What prompted the passage of this law?

- Prompt: A specific case?
- Prompt: If a case, would the use arrestee DNA have prevented the crime?

4. Were there any particular legal challenges, resistance, or logistical issues raised in reference to the law at the time?

- Probe: Was the laboratory involved in the decision-making process?

5. We understand that the policy was signed into law in \_\_\_\_\_. Is this accurate?

- Yes
- No

6. When did collection of DNA from arrestees actually begin (i.e., when did you lab receive its first arrestee sample)?

7. How did your laboratory prepare to begin handling the new population of samples?

- How long did your lab have to prepare before receiving these new samples?
  - i. Probe: Was this time period legislatively authorized? Or was it informal (i.e., the time between when the legislation was signed into law and when the law went into effect)?

- Were trainings conducted for lab staff, collection agencies?

- Was additional equipment/staff brought in?

- Were any systems changed?
  - i. Prompt: buccal versus blood, chemistry, process changes, data sharing agreements, tracking systems

8. Was additional funding provided to your lab when it began processing arrestee samples?

- Yes
- No

- What was the source of the funding? Is this funding recurring?

- Are fees collected for arrestee DNA collection? If so, does your lab receive any portion of the fees that the collecting agency collects to mitigate the costs of processing arrestee samples?

III. Sample Collection

9. In what form(s) is the arrestee sample collected?

- Buccal Swab
- Blood
- Other

- How does this compare to how convicted offender samples are collected?

Did this change when arrestees came online?

How much do the collection kits cost?

10. When is a DNA sample collected from an arrestee?

- prompt: immediately upon arrest; booking; first appearance; etc.

11. What agency or agencies collect arrestee DNA samples? (Who sends in collection kits?) (e.g., local police, law enforcement agency, jails, etc.)

- Are these different agencies than those involved in collecting convicted offender samples?

12. When an arrestee DNA sample is submitted, what information is included on the sample collection card?

Check all that apply:

- |   |   |
|---|---|
| <input type="checkbox"/> Name                       | <input type="checkbox"/> Collecting Agency    |
| <input type="checkbox"/> Social Security Number     | <input type="checkbox"/> Collecting Officer   |
| <input type="checkbox"/> State ID Number            | <input type="checkbox"/> Signature (officer): |
| <input type="checkbox"/> Jail/Prison ID Number      | <input type="checkbox"/> Arrest Status        |
| <input type="checkbox"/> Sex or Gender              | <input type="checkbox"/> Qualifying offense   |
| <input type="checkbox"/> Race                       | <input type="checkbox"/> Other information?   |
| <input type="checkbox"/> Date of Birth              |   |
| <input type="checkbox"/> Fingerprints (all)         |   |
| <input type="checkbox"/> Fingerprints (thumbs only) |   |
| <input type="checkbox"/> Signature (offender):      |   |

13. Is there a way for the officials who are collecting a DNA sample to know if an arrestee's DNA has already been collected (e.g., a flag in the criminal history database)?

14. How large of an issue are duplicates for your lab?

15. At what point are duplicates typically identified, and what happens if a sample has already been collected?

16. Does your lab have a process for making sure that samples are collected from all eligible arrestees?

- Who is responsible for this process?
- Was this policy promulgated by another agency or is the lab responsible for determining the specifics of implementation?

**IV. DNA Processing/Analysis**

17. How many samples does your lab receive in an average month?

- Estimate of percentage of arrestees and percentage of convicted offenders
- Are you able to analyze and upload all of these samples in the same month?
- How long does it take to process and upload a sample?
- Has including arrestee samples impacted processing speed or procedures at your lab (i.e., the percent of samples your lab analyzes and uploads into CODIS on average per month)?

18. Are arrestee samples processed (analyzed and uploaded into CODIS) differently from offender samples in any way?

- e.g. prioritization, staff, location

19. Do you categorize a profile as belonging to an arrestee in CODIS or your lab's LIMS? (*We understand that there is a sample category in CODIS that permits states to identify arrestees.*)

- a. Is this category ever updated (e.g. If the arrestee is eventually convicted, is the sample then re-categorized)?

20. Are forensic and offender samples processed by the same staff or are they separate?

21. How much does it cost to analyze and upload an offender sample?

- Does this include cost of kits, staff time, equipment, chemistry, etc.?

22. Where are offender samples analyzed?

- e.g. state lab, other public lab(s), outsourced

23. If outsourced: Please describe the collection and analysis process for the outsourced offender DNA sample.

- a. Does the outsourcing lab receive the sample directly from the collecting agency, or does the state lab forward it?

b. How and when is the state lab notified that an offender DNA sample has been taken?

c. What information is provided to the state lab by the outsourcing lab? (profile, arrestee information)

**V. Databases**

24. Are there offender profiles in SDIS that by State law or policy are not submitted to NDIS although they would be eligible?

- probe: If so, what type?

25. What offender profile information does your lab maintain in its LIMS? How is this information connected to CODIS?

- probe: Is there a separate database that contains the offender profile ID # as well as information on the identity of the offender?
- probe: Who has access to this database?

26. Roughly how many “hits” does your lab receive?<sup>1</sup>

27. Of those hits, roughly how many are arrestees?

28. When you get a “hit,” what is the verification/confirmation process for arrestees?

- probe: Is the verification process for arrestees different from offenders in any way?

**VI. Expungement**

29. How does the expungement<sup>2</sup> request process work for arrestees?

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<sup>1</sup>If asked: A “hit” is when an offender profile matches a forensic profile in CODIS. The FBI then sends a “hit letter” to the lab that submitted the offender/sample in order to confirm the match and obtain any additional information about the DNA in question.

<sup>2</sup> If asked: An “expungement” is when a DNA profile is removed from CODIS. Alternatively, an expungement is when the link between CODIS and the identifying database managed the lab (e.g., LIMS) is broken by the removal of the profile identification number.

- a. Is the procedure or documentation required for arrestee expungement different than for convicted offenders?

- b. On what grounds are arrestees eligible to have their DNA expunged? *[if not already addressed in pre-interview review]*

- c. How are you informed that a profile needs to be expunged?

- probe: Are there specific documentation requirements that your lab needs in order to proceed with an expungement (e.g., judicial order)?
- Probe: Are you aware of instructions regarding how to request expungement? Especially for those who have not been charged?

- d. Who is responsible for initiating the expungement process?

- probe: Is a state agency responsible for initiating the process?
- probe: Does responsibility for pursuing expungement rest with the offender?

- e. [If Automatic Expungement] Is your lab notified of the outcome of a charge for an individual whose profile is in your database? *For example, if an arrested person was ultimately convicted, does your lab receive notification of this outcome?*

- Yes  
 No

- If yes: Does your lab document the outcome of a charge for an individual in your database?

- If no: Does your lab have another way to track charge outcomes for individuals whose profile is in your database?

30. What is the actual method of expungement?

- a. Is the profile removed from CODIS at all levels (SDIS, NDIS, and LDIS)?
- b. Are any electronic or paper records destroyed, or is the identifier linking them to SDIS removed?
- c. Under what circumstances would the DNA sample itself be expunged or destroyed?

31. Are there any costs associated with expunging records?

- Yes  
 No

- If yes: what agency bears the burden of these costs?

32. Have any expungements occurred?

- Yes

No

- Estimate how many?

## VII. Challenges/Lessons Learned

33. How do you plan on tracking/evaluating the impact of including arrestees?

- Does your state require that you track or report on the effects of this policy?

34. What impact does processing arrestee DNA have on your lab?

35. What do you see as the biggest challenges in collecting and analyzing arrestee DNA?

36. Is there anything that has worked particularly well?

37. Are there any lessons learned from these first few years of arrestee DNA collection that can help policymakers or practitioners as collection mandates expand or move to new states?

- Any additional pre-implementation preparation suggested?

- Anything would change about law or approach?

Well, thank you very much, **X**. Those are all the questions I had for you. Is there anything else you think we should know about arrestee DNA practices in your state? Did you have any questions for me? I greatly appreciate your taking the time to speak with me today. Let me give you my contact information if you need to reach me with any additional questions or anything you want to add. **(Give email & phone)**. Feel free to contact me. Thank you very much, again.



## Appendix E: Interview Coding Scheme

<b>Legislation</b>	<ul style="list-style-type: none"> <li>• Background &amp; context on state culture, politics, beliefs, values</li> <li>• Discussion of the bill's origins</li> <li>• Discussion of how legislature determined which qualifying offenses to include in statute</li> <li>• Lab involvement in legislation</li> </ul>
<b>Ongoing Implementation</b>	<ul style="list-style-type: none"> <li>• Delayed or phased-in implementation (legislatively mandated or administrative policy)</li> <li>• Changes to existing infrastructure / technology / data systems</li> <li>• Need for training or education</li> <li>• Funding, fees, &amp; resources (or discussion of need for such)</li> </ul>
<b>Collection Procedures</b>	<ul style="list-style-type: none"> <li>• Legal threshold beyond arrest</li> <li>• Checking sample eligibility</li> <li>• Issues or solutions with collecting or submitting samples</li> <li>• Collection agencies</li> <li>• Authority or oversight over the collection process</li> </ul>
<b>Analysis Procedures</b>	<ul style="list-style-type: none"> <li>• Legal threshold beyond arrest</li> <li>• Arrestee and Convicted Offender differences</li> <li>• Duplicates</li> <li>• Outsourcing</li> <li>• Turn-around time / Backlog</li> </ul>
<b>Data</b>	<ul style="list-style-type: none"> <li>• Cost and revenue estimates</li> <li>• Samples, hits, measures of effectiveness</li> <li>• Tracking / reporting</li> </ul>
<b>Expungement</b>	<ul style="list-style-type: none"> <li>• State-initiated</li> <li>• Offender-initiated</li> </ul>
<b>General</b>	<ul style="list-style-type: none"> <li>• Advice</li> <li>• Major Issues</li> <li>• Major Successes</li> <li>• Follow-up required</li> </ul>

**Appendix F. Sample Data Request**

**Urban Institute Arrestee DNA Data Request to State CODIS Laboratories**

**Arrestee DNA Collection Law enacted in 2009**

State:

Effective Year:

**Respondent Contact Information**

Name   
 Phone   
 Email   
 Date completed

**Current Snapshot: Cumulative as of December 31, 2011**

Date that lab received its first arrestee sample:   
 If cumulative data is only available for a different date, enter the end date here:

	#
<b>Total Offender Profiles in SDIS</b>	
Convicted Offender Profiles in SDIS	<input type="text"/>
Arrestee Profiles in SDIS	<input type="text"/>
<b>Total Offender Profiles Submitted to NDIS</b>	
Convicted Offender Profiles Submitted to NDIS	<input type="text"/>
Arrestee Profiles Submitted to NDIS	<input type="text"/>
<b>Total Forensic Profiles in SDIS</b>	<input type="text"/>
<b>Total Forensic Profiles Submitted to NDIS</b>	<input type="text"/>

<b>Total Hits (to Convicted Offender and Arrestee Profiles)</b>	<input type="text"/>
<i>Total Hits to Arrestee Profiles only</i>	<input type="text"/>
<b>Total Investigations Aided* (by hits to Convicted Offender and Arrestee Profiles)</b>	<input type="text"/>
In-State Investigations Aided	<input type="text"/>
<b>Total Investigations Aided by Hits to Arrestee Profiles</b>	<input type="text"/>
In-State Investigations Aided	<input type="text"/>

Please use the yellow box below to indicate how your laboratory defines "investigations aided" if different from the definition provided below.

**NOTE**

The Urban Institute's Justice Policy Center, with funding from the National Institute of Justice, is conducting a study to examine the policies, practices, and implications of expanding state DNA databases to include arrestees. We are requesting data that will help us understand the impact on key public safety outcomes.

Please complete the yellow boxes in this spreadsheet to the best of your ability. Your participation is vital to the success of our project and is very much appreciated.

Questions?  
 Contact Elizabeth Davies at  
 202-261-5630  
 edavies@urban.org

\* Investigations Aided (FBI definition): The number of criminal investigations where CODIS has added value to the investigative process.

Data Requested	Time (prior to and after effective date of statute) For 2011, please report data through the calendar year				
	2007	2008	2009	2010	2011
<b>Total Offender Samples submitted to/received by state CODIS lab</b>					
Convicted Offender Samples	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<i>Number of the convicted offender samples received that were duplicate submissions</i>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Arrestee Samples	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<i>Number of the arrestee samples received that were duplicate submissions</i>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<b>Total Offender Profiles uploaded to SDIS by year end</b>					
Convicted Offender Profiles	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Arrestee Profiles	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<b>Total Offender Profiles uploaded to NDIS by year end</b>					
Convicted Offender Profiles	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Arrestee Profiles	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<b>Total CODIS hits to Offender Profiles</b>					
CODIS hits to Convicted Offender Profiles	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
CODIS hits to Arrestee Profiles	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<b>Total Investigations Aided</b>					
<i>Investigations aided from hits to Convicted Offender Profiles</i>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
In-State Investigations Aided	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<i>Investigations aided from hits to Arrestee Profiles</i>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
In-State Investigations Aided	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<b>Number of Profile Expungements</b>					
Convicted Offender Profiles	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Arrestee Profiles	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<b>Total Forensic Profiles uploaded to SDIS by year end</b>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<b>Total Forensic Profiles uploaded to NDIS by year end</b>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

**Laboratory Data Capacity Questions (Yes or No)**

Please indicate your response by selecting from the drop-down menu

Are **dates** for the following stages recorded in any Lab LIMS or other electronic records system?

- Date the Arrestee DNA sample was collected
- Date the Arrestee DNA sample was received
- Date the Arrestee DNA profile was uploaded
- Date of hit to Arrestee profile
- Date investigating agency was notified of hit


Can your LIMS calculate the time from receipt of Convicted Offender DNA sample to CODIS upload?

If yes, what is the average time from receipt of Convicted Offender DNA sample to CODIS upload in the last year?


days

Can your LIMS calculate the time from receipt of Arrestee DNA sample to CODIS upload?

If yes, what is the average time from receipt of Arrestee DNA sample to CODIS upload in the last year?


days

Can your LIMS break out the number of arrestee profiles in NDIS by offense type ?

If yes, indicate the cumulative number of arrestee profiles in NDIS that fall under the following instant offense.

- Violent / Person
- Property
- Drug
- Other

--


Can your LIMS break out the number of hits to arrestee profiles in NDIS by qualifying offense\*\* type ?

If yes, indicate the cumulative number of hits to arrestee profiles in NDIS that fall under the instant offense types.

- Violent / Person
- Property
- Drug
- Other


Can your LIMS break out the number of hits to arrestee profiles in NDIS by hit offense type ?

If yes, indicate the cumulative number of hits to arrestee profiles in NDIS that fall under the following hit offense types.

- Violent / Person
- Property
- Drug
- Other


\* Investigations Aided (FBI definition): The number of criminal investigations where CODIS has added value to the investigative process.

\*\* Qualifying offense: Offense for which the sample was collected at arrest.

## Appendix G. Stakeholder Interview Protocols

State:

Interview Date:

### ADNA Stakeholder Interview Protocol: Collecting Agencies

Name

Position

Agency

Thank you for taking the time to speak with us today. As we mentioned before, we are working on a project for the National Institute of Justice that examines the issues surrounding the policies and practices governing DNA collection from arrestees. As part of this project, we are conducting interviews with stakeholders from across the criminal justice system, including policymakers, court administrators, and corrections officials, as well as with representatives from your state's DNA lab. The issues surrounding arrestee DNA collection have not been explored thoroughly in the past, and the information gathered from these interviews will be used to produce a report for criminal justice practitioners and policymakers that describes the various ways that arrestee DNA is collected and used across the country. Information you share with us today may be used in our final report, but we will seek your approval before identifying you by name or position.

Before we begin, let me go over what we will be talking about today. The questions we will ask will cover your experience collecting DNA from arrestees, and your views on the effects of this collection. Some of these questions may be outside of your general scope of work, but please give us the best information you can. We expect the interview will take about 45 minutes.

#### Background Information

1. Can you tell us briefly about your position with the [Agency Name]?
2. What has been your personal involvement in making sure that DNA is collected from arrestees?

#### DNA Collection Policy and Procedure

We'd like you to walk us through the process of collecting DNA samples from arrestees.

1. Can you start by telling me **what triggers** DNA collection?  
Probe: How do officers know that an **offense is eligible** for collection?  
How do officers know that an arrestee **hasn't already submitted a sample**?  
Do you have **formal, written procedures** that we could look at?

2. So your agency [has / does not have] the ability to **check if an arrestee already has a DNA sample** in the system?

**If agency has the ability to check if arrestee already has a DNA sample:**

- i. Are collectors **trained** to check for duplicate samples?
- ii. Are collectors **required** to check for duplicate samples? Who monitors? Are there performance standards?
- iii. Do you **maintain records in your own agency** on which individuals have DNA samples in the state database?

**If agency does not have the ability to check if arrestee already has a DNA sample:**

- i. Does your agency have other ways to check if someone is in the system?  
Example: if criminal history shows felony arrest in last three years, assume there is a DNA sample on file

3. Where and how is **DNA collected**?

Probe: Does collection occur at multiple points in the justice system?

4. Are there situations in which your agency **would not collect** DNA from an eligible arrestee? Could you tell me about these situations?
5. Does your agency have internal procedures for **ensuring that all arrestees eligible** for DNA sample collection have had samples collected?
6. What happens if an individual **refuses**? Is this part of the written procedure?
7. How and when is DNA **sent to the lab**? Who monitors? Are there performance standards?

**Interactions with other agencies**

8. What **other agencies collect** arrestee DNA in your state?

- a) Has the collection process been **standardized**?
- b) How often do you **coordinate or communicate** with these agencies about DNA collection policies?

9. Does collection require coordination, communication or notification with any **other agencies**?

Probe: Labs, other collection agencies, courts

10. Did you / do you collect convicted offenders? Is the process different?

**Preparation for DNA Collection**

Now we have a few questions about how your agency prepared for the collection of DNA from arrestees.

**11.** When did your agency **first start collecting** DNA from arrestees?

**12.** Did legislation **require** your agency to collect sample from all eligible arrestees? If so, how is this enforced? Who monitors?

**13.** How did your agency **prepare to begin collecting** DNA samples from arrestees?

- a) How much **time** did you have to prepare for implementation?
- b) What kind of **training** was involved? Who provided the training?
- c) How were changes to internal policies and procedures **decided**?
- d) How were these changes **communicated to staff**?

**14.** Did this law require any **other changes** to internal policies and procedures?

**15.** Did this law require **additional staff or resources**? Did you receive funding?

**Lessons Learned**

**16.** Has your agency encountered any collection **challenges** specific to collecting DNA from arrestees?  
Has the inclusion of this new group added **additional work** or staff burdens to your agency?  
How, if at all, has the inclusion of arrestees **changed the existing systems** at your agency?

**17.** Are there any **lessons learned** from your experience with arrestees DNA collection that can help **policymakers and practitioners** make decisions?

**18.** Are there any **lessons learned** from your experience with arrestees DNA collection that can help **[similar agencies]** that must collect DNA from arrestees?

**19.** What **advice** would you give a state that is **considering expanding DNA collection to arrestees**?

**20.** Can you think of anyone else in [State] who is involved with DNA collection or who may be able to provide additional insight into the issues surrounding arrestee DNA collection and use?

- Names, Numbers, Emails

State: \_\_\_\_\_

Interview Date: \_\_\_\_\_

## A-DNA Stakeholder Interview Protocol: Legislators

Name / Title: \_\_\_\_\_, \_\_\_\_\_

Agency: \_\_\_\_\_

Interviewer(s): \_\_\_\_\_

Thank you for taking the time to speak with us today. As we mentioned before, we are working on a project for the National Institute of Justice that examines the issues surrounding the policies and practices governing DNA collection from arrestees. As part of this project, we are conducting interviews with stakeholders from across the criminal justice system, including policymakers, court administrators, and corrections officials, as well as with representatives from each state's DNA lab and local law enforcement agencies. The issues surrounding arrestee DNA collection have not been explored thoroughly in the past, and the information gathered from these interviews will be used to produce a report for criminal justice practitioners and policymakers that describes the various ways that arrestee DNA is collected and used across the country. Information you share with us today may be used in our final report, but we will seek your approval before identifying you by name or position.

Before we begin, let me go over what we will be talking about today. The questions we will ask will cover your experience with the legislation allowing DNA collection from arrestees and your views on the impact of this collection. We expect the interview will take no more than 30 minutes.

### Background Information

Summarize information we have gathered about the legislator and ask if it's correct (years served in legislature, any CJ-related committees served on, and sponsorship of any DNA or CJ bills) and if anything is missing.

1. How did the arrestee DNA bill originate in your state and how did you become involved?
  - Prompt: sponsor, co-sponsor, in committee, opponent, etc.
  - Had there been similar legislation proposed/attempted before this bill was successful?
    - If yes, why was it not successful?
  - a) If respondent was a sponsor / co-sponsor / supporter of the bill
    - What caused you to sponsor/co-sponsor/support the bill?
      - Was there a specific event or issue that inspired you to take action?
      - Have the activities of other states influenced your sponsorship?
  - b) If respondent opposed bill:
    - Why did you oppose this bill?
    - Has your opinion about the law changed since implementation?
2. What was the original purpose/goal of including arrestee DNA in the state database?

- Prompt: including arrestees, getting more people in the database, getting people in sooner, expanding qualifying offenses, increasing hit rate, etc.
3. During deliberations on this bill, what was your sense of the public will on this particular piece of legislation?
  4. Interest groups or agencies:
    - a) Were any interest groups or agencies particularly vocal in support of the legislation?
    - b) Were any interest groups or agencies particularly vocal in opposition to the legislation?

*Prompt: Attorney General, Law Enforcement Agencies, Prosecutors, Defense Attorneys, Judges, Victims' Advocates*
  5. In generating bill language concerning logistics, were the labs or collecting agencies consulted or invited to testify on the impact of the bill?
    - How involved was the lab agency's legislative affairs staff?

### **Bill Specifics**

6. How did the legislature determine which offenses would be eligible for collection?
7. Expungement in this state is initiated by the [court/offender/lab/LEA]. Can you tell us why/how this decision was made?
8. [Generate list of specifics that the bill requires and ask about each one]
  - Authority for collecting
  - Point of collection
  - Monitoring collection (reporting requirements)
  - Funding mechanism for collection and analysis
  - Time to implement (phased-in or specified lag time)
  - Monitoring analysis (reporting requirements)
  - Prioritization of arrestee samples (as funding allows or otherwise)
  - Sunset provisions
  - How assess impact
9. [Generate list of specifics that the bill does not mention and ask about whether it was considered]
  - Authority for collecting
  - Point of collection
  - Monitoring collection (reporting requirements)
  - Funding mechanism for collection and analysis
  - Time to implement (phased-in or specified lag time)
  - Monitoring analysis (reporting requirements)
  - Prioritization of arrestee samples (as funding allows or otherwise)
  - Sunset provisions
  - How assess impact



## **Implementation and Assessment**

10. What is your sense of whether the law has been implemented as originally designed? (and where does that come from)
11. What impact, if any, have you seen in your state from the collection of arrestee DNA?
12. Considering the original goals of the law, how will you determine whether this policy has been successful in your state?

## **Lessons Learned**

13. Now that the law has been in effect for [Number of years], what do you see as the benefits of collecting arrestee DNA?
  - What do you see as the drawbacks of collecting arrestee DNA?
14. Looking back on the original law, is there anything you would change about the language used or any of the specifications?
  - Any plans to propose new legislation in the future?
15. From your experience with drafting and supporting this legislation, what advice would you give to a group of legislators in another state that are considering expanding their DNA collection to arrestees?
  - Specific advice on bill language, who to involve in the process, things to consider?

**State:**

**Interview Date:**

**ADNA Stakeholder Interview Protocol: Proponents / Opponents**

**Name / Title:**

**Agency:**

**Interviewer(s):**

Thank you for taking the time to speak with us today. As we mentioned before, we are working on a project for the National Institute of Justice that examines the issues surrounding the policies and practices governing DNA collection from arrestees. As part of this project, we are conducting interviews with stakeholders from across the criminal justice system, including policymakers, court administrators, and corrections officials, as well as with representatives from your state's DNA lab and local law enforcement. The issues surrounding arrestee DNA collection have not been explored thoroughly in the past, and the information gathered from these interviews will be used to produce a report for criminal justice practitioners and policymakers that describes the various ways that arrestee DNA is collected and used across the country. Information you share with us today may be used in our final report, but we will seek your approval before identifying you by name or position.

Before we begin, let me go over what we will be talking about today. The questions we will ask will cover your experience collecting DNA from arrestees, and your views on the effects of this collection. Some of these questions may be outside of your general scope of work, but please give us the best information you can. We expect the interview will take about 45 minutes.

**Background Information**

3. Can you provide a brief description of your position and how you became involved in this topic?

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4. Why you do support / oppose the collection of DNA from arrestees?

- a) Was there a specific event or issue that inspired you to take action?
- b) Have the activities of other states influenced your support / opposition?

5. Has your opinion on the collection of DNA from arrestees changed at all over the past few years?

**Law Creation (2006 ,2011)**

*Support & Opposition*

16. Did you have any involvement at the time [Arrestee DNA bill] was being reviewed?

- Prompt: sponsor, co-sponsor, in committee, opponent, etc.
- Probe: What advice did you give to legislatures? Did they accept it?

17. Were there provisions of the bill that you felt particularly strongly about?

- Did you support or oppose the bill as developed? What would you have changed?

- How did the legislature determine which offenses would be eligible for collection? Was there disagreement over that?

18. How would you describe the original purpose/goal of including arrestee DNA in the state DNA database?

- Prompt: including arrestees, getting more people in the database, getting people in sooner, expanding qualifying offenses, increasing hit rate, etc.
- What about the purpose of the legislation passed in 2011?
- Do you think the laws have accomplished that/these goal(s)? Why or why not?

19. How did the public feel about this legislation? Were there strong opinions either way?

- c) What individuals/interest groups supported the legislation?
- d) What individuals/interest groups opposed the legislation?
- e) How do they feel now?

20. How did other agencies feel about this legislation?

- Attorney General
- Law Enforcement Agencies
- Prosecutors
- Defense Attorneys
- Judges
- Victims Advocates

21. Has similar legislation been attempted before? If yes, why was it not successful? If no, why not?

### **Implementation**

22. Has the law been implemented as originally designed / written?

23. Have there been any challenges, unanticipated problems, or implementation issues surrounding collection of DNA from arrestees?

### **Lessons Learned**

1. What do you see as the benefits, if any, of collecting arrestee DNA?

2. What do you see as the drawbacks, if any, of collecting arrestee DNA?

3. What impact have you seen in your state from the collection of arrestee DNA? How do you know if this program has been successful or unsuccessful?

4. Are there any lessons learned from your experience with arrestees DNA collection that can help policymakers and practitioners make decisions? Is the field moving in any particular direction when it comes to arrestee DNA?

a. What advice would you give a state that is considering expanding DNA collection to arrestees?

## Appendix H. Annual CODIS/NDIS Data

**CODIS Unit**  
 Calendar Year Summary\*  
 (Cumulative Totals by Calendar Year)

Category	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
<b>COMBINED DNA INDEX SYSTEM (CODIS)</b>											
Investigations Aided <sup>1</sup>	3,635	6,670	11,220	21,266	31,485	45,364	62,725	81,955	106,116	130,317	162,246
Forensic Hits <sup>2</sup>	1,031	1,832	3,004	5,056	7,000	9,493	11,890	14,364	17,991	21,983	27,170
Offender Hits Within State <sup>3</sup>	2,204	4,394	7,118	12,482	19,620	30,138	43,688	59,184	78,727	97,772	122,560
Offender Hits Inter State <sup>3</sup>	167	638	1,151	1,834	2,875	4,397	6,556	8,561	11,305	15,724	18,826
Total Offender Hits <sup>4</sup>	2,371	5,032	8,269	14,316	22,495	34,535	50,244	67,745	90,032	113,496	141,386
<b>NATIONAL DNA INDEX SYSTEM (NDIS)</b>											
Convicted Offender Profiles	750,929	1,247,163	1,493,536	2,038,514	2,826,505	3,977,433	5,287,505	6,398,874	7,389,917	8,559,841	9,422,152
Arrestee Profiles	-	-	-	-	-	54,313	85,072	140,719	351,926	668,849	990,740
Legal Index Profiles	-	-	-	-	-	2	196	326	1,486	3,829	6,644
Detainee Profiles	-	-	-	-	-	-	-	-	-	1,035	3,851
Total Offender Profiles <sup>4</sup>	750,929	1,247,163	1,493,536	2,038,514	2,826,505	4,031,748	5,372,773	6,539,919	7,743,329	9,233,554	10,423,387
Forensic Profiles	27,897	46,177	70,931	93,956	126,315	160,582	203,401	248,943	298,369	351,951	408,951

\*Data is current as of December 2011 and is subject to change based upon laboratory submissions and/or retroactive updates.

- 1 The "Investigations Aided" is defined as the number of criminal investigations where CODIS has added value to the investigative process (CODIS can only aide an investigation one time).
- 2 A Forensic Hit occurs when two or more forensic samples are linked at the Local DNA Index System (LDIS), State DNA Index System (SDIS), or National DNA Index System (NDIS).  
Forensic Hits are sometimes called case-to-case hits.
- 3 An Offender Hit occurs when one or more forensic samples are linked to a convicted offender sample at SDIS or NDIS. Offender Hits are sometimes called case-to-offender hits.
- 4 Total Offender profiles include Convicted Offender, Arrestee, Legal and Detainee indexes. Total number of offender profiles was revised in 2010 to reflect breakdown of Convicted Offender, Arrestee, Legal and Detainee indexes.

Source: CODIS Unit, Federal Bureau of Investigation