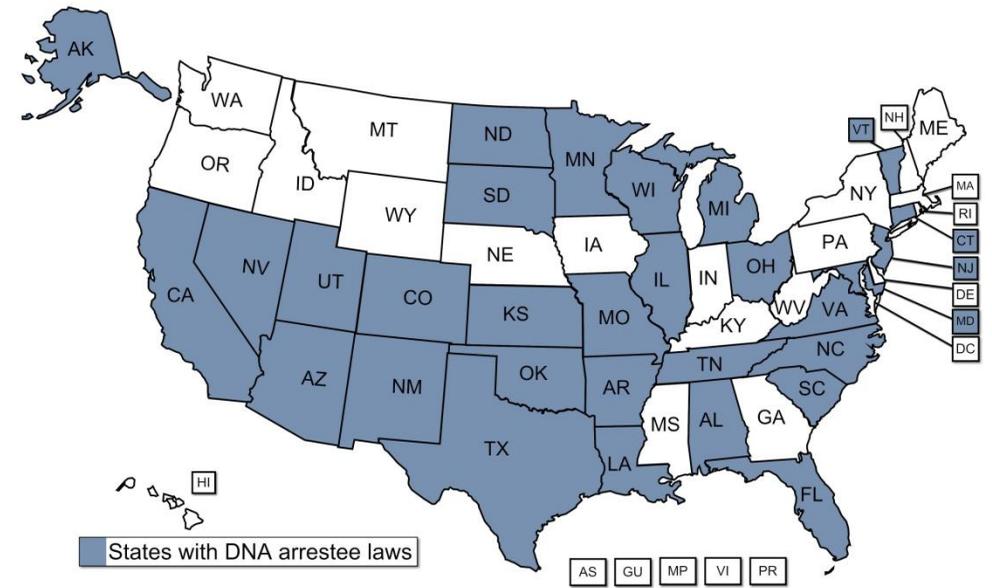


# National Conference of State Legislatures

## ~ DNA Arrestee Laws ~

**State DNA Collection from Arrestees** —DNA arrestee laws authorize the analysis of DNA samples collected from individuals arrested or charged, but not convicted, of certain crimes. Currently 30 states and the federal government have such laws.

Arrestee law provisions include: which crimes qualify for sample collection, whether probable cause hearings are required prior to testing, whether the sample can be analyzed upon charge or arrest, expungement procedures and whether or not juveniles are subject to testing.



### **Points of View on Arrestee Laws**

Proponents of taking DNA samples from arrestees assert that the practice has many benefits for solving and preventing crimes, exonerating the innocent and objectively identifying suspects. They also contend that the principal method of DNA sample collection, a buccal cell swab—wiping the inside of the mouth with a cotton swab—is no more intrusive than taking an arrestees' fingerprints or other standard booking procedures.

Those opposed to arrestee laws are concerned that they infringe on the civil liberties and privacy of those who give their DNA. They also believe the samples contain too much genetic information to be surrendered without a criminal conviction.

Cost is a consideration for both sides of the DNA arrestee debate. Expanding the classifications of arrests that qualify for DNA collection can exceed capacity at forensic laboratories, creating a backlog of unanalyzed samples. Communicating with state crimes labs can reveal how many samples they are currently processing, whether or not they have a present backlog and how expansions, based on crime statistics, would impact their ability to process future samples in a time-effective manner. Combining these statistics with the number of resulting database hits and court convictions can also reveal the cost-effectiveness of different measures.

### **Supreme Court - *Maryland v. King***

The United States Supreme Court considered DNA arrestee issues when it made its ruling in [Maryland v. King \(June 2013\)](#). In its decision, the Court weighed the government's interest in public safety against an individual's privacy interest in their DNA. The Court found that DNA sample collection for violent crime arrests supported by probable cause is a legitimate police booking procedure - like fingerprinting or photographing - and does not violate the Fourth Amendment.

A DNA Profile identifies the position of DNA sequences at 13 specific locations. Each person (except identical twins) has a unique DNA profile.

Maryland’s statute, at issue in *King*, requires that DNA samples be collected from individuals charged with burglary or a crime of violence and provides that the sample cannot be uploaded into a DNA database until a judicial officer determines that there was probable cause for the arrest. For expungement, the law provides for the automatic destruction of the sample if the charges brought do not ultimately lead to a conviction. The Court also took notice of additional protections offered by Maryland’s code, specifically their prohibition against accessing information from the arrestee’s DNA for a purpose other than identification.

Additional issues that may be addressed by the judiciary include: statutes that collect arrestee DNA for misdemeanor and non-violent crimes, statutes that have no hearing to ensure probable cause for the arrest, and states that place more responsibility on the arrestee to initiate expungement.

**State Law**

**Qualifying Arrests** - Each state DNA arrestee law specifies certain crimes for collection. Twenty-nine states collect DNA for at least some state felonies, while eight states have laws that collect DNA from arrestees for certain misdemeanors. Oklahoma only collects DNA from arrestees who are unauthorized immigrants under federal immigration law. Eight states apply their arrestee laws to juveniles.

**Probable Cause Hearing Required Prior to: Analysis**

| Sample Collection |                |
|-------------------|----------------|
| Colorado          | Illinois       |
| Missouri          | Maryland       |
| Nevada            | Minnesota      |
| New Mexico        | North Carolina |
| Utah              | Tennessee      |
| Wisconsin         | Vermont        |
|                   | Virginia       |

**Probable Cause Hearings** - Thirteen states require a hearing to determine whether probable cause existed for an arrest that qualifies for DNA sample collection and analysis. The hearings required by these laws are intended to be a safeguard against law enforcement targeting an individual for DNA collection without proper justification. Four of the states that require probable cause hearings—Nevada, New Mexico, North Carolina and Wisconsin— provide an exception if the arrestee was arrested pursuant to a warrant which required probable cause to obtain.

**Expungement** - When an arrestee is not charged, has his or her charges reduced to a crime that does not qualify for DNA collection, is found not guilty or otherwise acquitted of criminal activity, the DNA profile and sample can be expunged.

Expungement is the process of removing their profile from a database and destroying their sample. Sixteen states provide for the

expungement of a DNA record upon the request of the individual. Thirteen states provide for automatic expungement, with no action required by the individual. Proponents of expungement upon request say that automatic expungement puts an increased burden on the justice system. Those who favor automatic expungement argue that an individual should not be compelled to remove their profile when they have done nothing wrong. They also contend that fewer expungements occur in states that require the individual to initiate the process.

| All Felony Arrests | Enumerated Misdemeanors | Some Felony Arrests | DNA Collection Laws Apply to Juveniles |
|--------------------|-------------------------|---------------------|--|
| Alabama            | Alabama                 | Arizona             | Alabama                                |
| Alaska             | Arizona                 | Arkansas            | Arizona                                |
| California         | Kansas                  | Connecticut         | Florida                                |
| Colorado           | Louisiana               | Florida             | Kansas                                 |
| Kansas             | Minnesota               | Illinois            | Louisiana                              |
| Louisiana          | North Carolina          | Maryland            | Minnesota                              |
| Nevada             | South Carolina          | Mississippi         | New Jersey                             |
| New Mexico         | South Dakota            | Minnesota           | Wisconsin                              |
| North Dakota       |                         | Missouri            |  |
| Ohio               |                         | New Jersey          |  |
| South Carolina     |                         | North Carolina      |  |
| South Dakota       |                         | Tennessee           |  |
| Vermont            |                         | Texas               |  |
| Wisconsin          |                         | Utah                |  |
|                    |                         | Virginia            |  |

\*Oklahoma only collects DNA upon arrest for individuals unlawfully present under federal immigration law.

### **State and Local Government Studies on Collecting DNA from Arrestees**

Several state and local governments have produced research to support the effectiveness of DNA sample collection from arrestees. For example, [Maryland's study on preventable crimes](#) details how 20 crimes committed by three offenders would have been prevented if arrestee collection had been in place. [Indiana](#), [Denver](#) and [Chicago](#) created similar reports.

### **2013 Legislative Action**

**Federal** - In January, Congress passed the Katie Sepich Enhanced DNA Collection Act of 2012 (HR 6014). The new law authorizes the Attorney General to award grants to states in order to implement DNA arrestee collection processes. States are eligible to receive a grant for up to 100 percent of the first year costs of implementation, not to exceed \$10 million per fiscal year through 2015. To qualify, states must demonstrate that they statutorily authorize DNA arrestee collection and that the funds would be used to supplement, not supplant, their process.

**State** - In 2013, Nevada (SB 243) and Wisconsin (AB 40) became the most recent states to enact DNA arrestee laws. The new laws require DNA testing for all felony arrestees and hearings to determine probable cause for the arrest. Both laws also provide for automatic expungement if no probable cause existed for the arrest. Also this year, Utah (HB 170) expanded DNA arrestee collection for certain felonies including the sale of a child, human trafficking and the sale or use of body parts.

| State And Statute <sup>i</sup>                  | Legislation                      | Qualifying Offenses (All Felonies, Some Felonies, Misdemeanors)  | Is a Probable Cause Hearing Required? | When is the Sample Collected?                   | When can sample Analysis or Database Upload be Done? | Is Expungement Automatic or Upon Request? | Are Juveniles Included?        | Notable Administrative  |
|---|----------------------------------|--|---------------------------------------|---|--|---|--------------------------------|---|
| Alabama<br>§ 36-18-25                           | HB146 (2009)                     | All felonies<br>Sexual offenses  |                                       | At booking.<br>Offender must consent in writing |  | Upon circuit court order                  | Yes                            |   |
| Alaska<br>§ 44.41.035                           | HB 152 (2009)<br>HB 90 (2007)    | All felonies<br>Crimes against a person  |                                       | At booking                                      |  | Upon request                              |                                | Dept. of Public Safety shall adopt procedures for collection, analysis, storage, expungement, and use of DNA identification registration system |
| Arizona<br>§ 13-610                             | SB 1367 (2011)<br>HB 2207 (2008) | Enumerated dangerous, violent and serious offenses (murder, sex crimes, burglary)                      |                                       | At booking                                      |  | Upon request                              | Yes, upon charging             |   |
| Arkansas<br>§§ 12-12-1006, 1019, 1105           | HB 1563 (2011)<br>HB 1473 (2009) | Capital murder,<br>First Degree Murder<br>Kidnapping<br>Rape<br>First and Second Degree Sexual Assault |                                       | At booking                                      |  | Upon request                              | No, unless charged as an adult |   |
| California<br><br>Penal Code §§ 296, 296.1, 299 |                                  | All felonies   |                                       | At booking                                      |  | Upon request                              |                                |   |
| Colorado<br><br>§§ 16-23-103, 104, 105          | SB241 (2009)                     | All felonies   | Yes – Prior to sample Analysis        | At booking                                      | When offender is charged with felony                 | Upon request                              |                                |   |
| Connecticut<br><br>§§ 54-102g, 102h, 102i       | HB 6489 (2011)                   | Serious felonies and has been arrested for a felony before   |                                       | Prior to release from custody                   |  | Automatic                                 |                                |   |

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|---|---|---|--|------------------------------------|--|--|-------------------------|---|
| Florida<br>§ 943.325                              | SB 2276 (2009)  | Progressively more felony offenses until all felonies by Jan. 1, 2019   |  | At booking                         |  | Upon request   | Yes                     | Dept. of Law Enforcement shall adopt rules specifying procedure |
| Illinois<br>730 § 5/5-4-3                         | HB 3238 (2011)  | First degree murder, home invasion, predatory criminal sexual assault of a child, aggravated criminal sexual assault or criminal sexual assault | Yes  | After probable cause hearing       |  | Automatic  |                         |   |
| Kansas<br>§ 21-2511                               | SB 262 (2009)   | All felonies  | No, but if court later finds lack of probable cause for arrest, individual may request expungement | At booking                         |  | Upon request   | Yes                     |   |
| Louisiana<br>§§ 15:609, 614                       | SB 678 (2010)<br>HB 346 (2009)<br>SB 346 (2003)<br>HB 1377 (1997) | All felonies  |  | At booking                         |  | Upon request   | Yes                     |   |
| Maryland<br>Public Safety Code Ann. §§ 2-504, 511 | HB 292 (2013)<br>SB 211 (2008)                                    | A crime of violence or an attempt to commit a crime of violence or burglary or an attempt to commit burglary                                    | Yes  | Upon charging                      | Not prior to first scheduled arraignment date        | Automatically  |                         |   |
| Michigan<br>§ 750.520m                            | HB 4092 (2008)  | Enumerated violent felonies (murder, sex crimes)  |  | At booking                         |  | Upon request   |                         |   |
| Minnesota<br>§ 299C. 105                          | H.F. No. 1 (2005)   | Enumerated offenses including murder, manslaughter, assault, sex crimes, etc.   | Yes  | After probable cause determination |  | Upon request the biological specimen is destroyed and records are returned to the individual | Yes                     |   |

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|------------------------------------|--------------------------------|---|---|---|---|--|-------------------------|------------------------|
| Missouri<br>§ 650.055              | SB 789 (2012)                  | Enumerated offenses including murder, burglary, sexually violent acts, etc.     | Yes, but sample can be taken before hearing | At booking  |   | Upon request   | No                      |                        |
| Nevada<br>§ 176.0913               | SB 243 (2013)                  | All felonies  | Yes   | At booking  | When collected if arrested with a warrant or following a probable cause hearing if arrested without | Automatically if the court determines there was no probable cause and upon request |                         |                        |
| New Jersey<br>§§ 53:1-20.20, .25   | SB 737 (2011)                  | Enumerated offenses including murder, manslaughter, sexual offenses, etc.       |   | Prior to release from custody   |   | Upon request   | Yes                     |                        |
| New Mexico<br>§§ 29-3-10, 29-16-10 | SB 365 (2011)<br>SB 216 (2006) | All felonies  | Yes   | At booking  | When collected if arrested with a warrant or following a probable cause hearing if arrested without | Upon request   | No                      |                        |
| North Carolina<br>§ 15A-266.3A     | HB 1403 (2010)                 | Enumerated offenses including murder, manslaughter, sex offenses, assault, etc. | Yes   | At booking, or after probable cause determination if arrested without a warrant |   | Automatically after June 1, 2012   |                         |                        |
| North Dakota<br>§ 31-13-03, 07     | HB 1389 (2011)                 | All felonies  |   | At booking  |   | Upon request   | No                      |                        |
| Ohio<br>§ 2901.07                  | SB 268 (2011)<br>SB 77 (2010)  | All felonies  |   | During intake process   | No later than 15 days after collecting the DNA  | Upon request   | No                      |                        |

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|--|--|--|---|---|--|--|-------------------------|--|
| Oklahoma<br>74 § 150.27a                         | SB 1102 (2009)   | Only aliens unlawfully present under federal immigration law                             |   |   |  |  |                         | Oklahoma State Bureau of Investigation to make rules concerning collection, storing and expungement                              |
| South Carolina<br>§ 23-3-620                     |  | All felonies, eavesdropping, peeping, and stalking                                       |   | At booking  |  |  | No                      |  |
| South Dakota<br>§§ 23-5A-5.2, 5A-1, 5A-28, 5A-16 | SB 133 (2008)  | All felonies/crimes of violence and sex offenses   |   | At booking  |  | Upon request   | No                      | Attorney General's office to make rules for collection, submission, identification, analysis, storage and disposition of samples |
| Tennessee<br>§ 40-35-321                         | SB 2667 (2011)<br>SB 1196 (2007)                                 | Enumerated violent felonies, including murder, aggravated assault, sexual offenses, etc. | Yes   | After probable cause determination                          |  | Automatic after court clerk notifies Tennessee bureau of investigation of disposition of charges |                         |  |
| Texas<br>Govt. Code Ann. § 411.1471              | HB 3000 (2011)<br>HB 3295 (2007)<br>HB 8 (2007)<br>SB 638 (2001) | Varies based on prior convictions  | Indictment required if collection is not based on prior convictions | At arraignment or at booking depending on prior convictions |  | Automatic  |                         |  |
| Utah<br>§§ 53-10-403, 404.5, 406                 | SB 277 (2010)  | Violent felonies and other enumerated felonies   | Yes, but sample can be taken before hearing                         | At booking  | Following probable cause determination or indictment | Automatic if criminal charged are not filed within 90 days after booking                         | No                      | Bureau of Forensic Sciences shall make rules for obtaining, transmitting, analyzing, storing and destroying DNA samples          |
| Vermont<br>20 §§ 1932, 1933, 1940                |  | All felonies   | Yes   | Time and date set by court at arraignment                   |  | Automatic  |                         |  |

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|--------------------------------|--|---|---------------------------------------|--|---|---|-------------------------|--|
| Virginia<br>§ 19.2-310.2:1     | SB 579 (2006)<br>HB 776 (2004)<br>HB 2661 (2003)<br>SB 535 (2002)<br>HB 892 (2002) | Violent felonies  | Yes                                   | After probable cause determination but prior to release from custody |   | Automatic                                 |                         |  |
| Wisconsin<br>§§ 165.76, 165.84 | WI AB 40 (2013)  | All felonies  | Yes                                   | At booking   | When collected if arrested with a warrant or following a probable cause hearing if arrested without | Automatic                                 | Yes                     | Department of Justice may make rules to implement DNA collection |

Source: National Conference of State Legislature, 2013.

<sup>i</sup> States that are not included have no such provisions.