

Survey of State DNA Database Statutes

[Revised following passage of the federal “Justice for All Act” and California “Proposition 69”]

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All 50 states and the Federal Bureau of Investigation now collect DNA samples from convicted offenders, retain the profiles generated from those samples in databases, and compare the database entries against DNA profiles of biological evidence. This project presents and summarizes the major features of the state DNA database statutes in the form of four charts with explanatory text. The charts are based on the state statutes present in the Westlaw database as of July 1, 2004, and have been revised to incorporate California Proposition 69, “The DNA Fingerprint, Unsolved Crime, and Innocence Protection Act.”

When reading the charts and the explanatory text, the reader should consider the following: Statutes provide an informative yet limited picture of each state’s DNA database system. Administrative rules and regulations, as well as the policies and procedures of individual forensic laboratories, play a large role in defining the real-world operation of these databases. Furthermore, statutes are subject to various interpretations, and the impact of any DNA database statute depends in large part on the interpretations and actions of law enforcement agencies and courts. References are provided for all the information presented in the chart if the reader wishes further detail on a particular statutory provision. This information is provided as a service by the American Society of Law, Medicine and Ethics, and does not constitute legal advice.

Inclusion Criteria

This chart introduces the inclusion criteria for each state’s DNA database. Subdivided into three sections, the chart addresses the extent to which various types of offenders—adult convicts, delinquent juveniles, and other non-convicts (arrestees and suspects)—are included in the database. Within each of the three subdivisions, different questions are asked in order to detail the commonalities and differences in the statutes across all 50 states. Taken as a whole, the information in the chart provides a picture of the relative scopes of the various DNA database statutes. As further discussed below, most states now require DNA samples from all convicted felons and juveniles adjudicated delinquent for certain offenses. Only a limited number of states require samples from other populations.

Adult Convicts

Cataloging the adult qualifying offenses remains the most straightforward way of illustrating the relative scopes of the various DNA database statutes. State DNA database statutes are universally directed at certain sex and violent offenders. States have gradually expanded the boundaries in which their DNA database statutes operate, balancing the database’s practical advantages with the financial costs, privacy concerns, and fairness concerns associated with DNA profiling. Thirty-four states have adopted “all felony” provisions, requiring all felons to submit DNA for purposes of DNA profiling. Other states extend farther. New Jersey, for example, makes any “crime” the criterion for inclusion; the definition of “crime”—an offense punishable by more than 6 months imprisonment—is more expansive than the common law

definition of felony.¹ At least 38 states also include some misdemeanors as qualifying offenses. (The Minnesota statute is unclear and has not been included in this tally). The specific qualifying misdemeanors, indicated on the chart, generally consist of sexual and/or violent offenses.

Please note, the information provided in the Inclusion Criteria chart is not an exhaustive list of every offense that warrants inclusion of one's DNA into the state database. To list each qualifying offense for the purpose of comparing them across states would be extremely time consuming, and would be of limited value given that each state criminalizes different conduct and differentially defines the offenses. Additionally, the information listed in the Inclusion Criteria chart refers only to choate crimes. Some state statutes not only include completed crimes as qualifying offenses, but also inchoate crimes such as attempt, conspiracy and solicitation. For example, Nebraska includes DNA from those convicted of a felony sex offense, which is defined as either a felony offense or an attempt, conspiracy or solicitation to commit a felony offense.² The exclusion of inchoate crimes from the chart avoids the problem of determining how the states define, grade, and punish these offenses. Citations for the adult qualifying offenses are provided so that interested readers can easily refer back to the statutes for more detailed information.

Juveniles Adjudicated Delinquent

The scope of DNA databases is defined not only by the range of included offenses, but also by the range of included offenders. The second section of the Inclusion Criteria chart deals with the inclusion of juveniles adjudicated delinquent. Every state statute provides for DNA samples to be taken from certain convicts; ostensibly, the term "convicts" includes juveniles tried as adults for a qualified offense. Twenty-eight states also include juveniles adjudicated delinquent (or its equivalent)—*i.e.*, juveniles adjudicated by the state juvenile justice system for what would be a qualifying offense if committed by an adult.³ The chart identifies the state statutes that include juveniles adjudicated delinquent into the DNA database, and declares whether the juvenile qualifying offenses are the same as or more restricted than the adult qualifying offenses. Of the 28 states that include DNA from delinquent juveniles into the database, 12 states restrict the scope of qualifying offenses with regards to juvenile offenders.⁴ Of these 12, New Mexico and California are noteworthy. New Mexico does not include delinquent juveniles in the database, but rather only juveniles convicted as adults; however, the qualifying offenses for convicted juveniles are less broad than those for convicted adults.⁵ For California, the qualifying offenses are the same for adult convicts and juvenile delinquents, but juvenile arrestees—unlike adults—are excluded from the database.⁶

Arrestees and Suspects

¹ See N.J. Stat. Ann. §§ 53:1-20.20 and 2C-1:4.

² See Neb. Rev. Stat. § 29-4103.

³ Alabama has not been included in this tally, because the statute is unclear.

⁴ Ohio has not been included in this tally, because the one qualifying offense differing between adults and juveniles—corruption of a minor—does not apply to juveniles.

⁵ See N.M. Stat. Ann. § 29-16-3.

⁶ See Cal. Penal Code § 296.

The third section of the Inclusion Criteria chart deals with DNA samples involuntarily taken from arrestees and suspects. Only 4 states—California, Louisiana, Texas, and Virginia—allow for the collection of DNA from arrestees. Even though all 4 states are “all felony” states, only Louisiana collects DNA from an arrestee charged with any felony.⁷ California will expand to permit collection of DNA for any adult arrested for or charged with a felony in 2009.⁸ Both Texas and Virginia collect DNA from individuals arrested for specified felonies (although in certain situations, Texas will take DNA from any felony arrestee).⁹

Only California has an explicit provision authorizing the inclusion into the database of DNA obtained from a suspect indicted for a qualifying offense.¹⁰ The New York statute does not explicitly authorize taking DNA from suspects, but states that an individual who submitted DNA pursuant to a warrant or court order can petition for expungement of his DNA sample and records when no criminal action is taken against him.¹¹ Thus, it appears that under certain circumstances, New York law enforcement officials can collect and profile a suspect’s DNA without his consent, and enter the results into the state database. Because no other state statute authorizes or suggests the involuntary collection of suspects’ DNA for inclusion into the database, this chart does not contain any further entries.¹² However, various states accept DNA submitted voluntarily by suspects. Additional information on these voluntary submissions is presented in the chart on Retention of Information and Samples.

Collecting DNA from arrestees and suspects widens the inclusion criteria beyond the guilty, as the DNA profiles are entered into the database prior to any conviction. Ultimately, however, retention of the DNA sample and profile is predicated upon guilt. Louisiana, Texas, Virginia, and New York all require that arrestees’ and suspects’ DNA information be expunged upon acquittal or dismissal of the charges (see below).¹³ In California, the expungement mechanism is not automatic, but is initiated only by the filing of a written request by the individual seeking to expunge his or her DNA. In Virginia, “[b]etween January 1, 2003, and August 31, 2003, 5,416 individuals were arrested and had their DNA samples collected and sent for analysis. DNA samples and records for 1,645 of these arrestees were then expunged.”¹⁴ Additional information on the expungement of arrestees’ and suspects’ DNA is presented in the chart on Retention of Information and Samples.

⁷ See La. Rev. Stat. Ann. § 15:609.

⁸ See Cal. Penal Code § 296.

⁹ See Tex. Gov’t Code Ann. § 411.1471 and Va. Code Ann. § 19.2-310.2:1.

¹⁰ See Cal. Penal Code § 297.

¹¹ See N.Y. Exec. Law § 995-c.

¹² Vermont provides for the collection of DNA pursuant to a nontestimonial identification order, but prohibits the DNA sample or record from being entered into the database. See Vt. Stat. Ann. 20 § 1938. Michigan and Nebraska provide for profiling of suspects’ DNA, but there is no indication that these statutes refer to anything but samples given voluntarily. See Mich. Comp. Laws Ann. § 28.176 and Neb. Rev. Stat. § 29-4105.

¹³ The United Kingdom’s DNA database reaches farther than any in the US, and retains DNA samples and profiles from suspects, regardless of the ultimate disposition of the case. See 2004 UKHL 39.

¹⁴ See Va. Regs. Reg. 20:12 (Feb. 23, 2004) (proposing regulations, which were later adopted as 6 Va. Admin. Code §§ 20-210-10 to 110).

Retention of Information and Samples

This chart documents the state statutory provisions dealing with the retention of DNA samples and information in the DNA database.¹⁵ The chart contains three interrelated parts: (1) a section detailing the general expungement provisions; (2) a section detailing any provisions regarding the retention of DNA samples; and (3) a section detailing special provisions regarding the retention and expungement of DNA samples and records from suspects, arrestees, and voluntary donors.

Expungement

Expungement is the term given to the removal of certain information from an individual's criminal history record. The provisions catalogued in this section concern the removal of DNA samples and/or records from the database. The information is presented in a manner that clarifies the grounds for expungement, what is actually expunged, the process for expungement, and other miscellaneous provisions. The language used in the charts reflects the language used in the statute, so as to accurately present the information and highlight the differences between state statutes.

Thirty-eight states contain statutes that detail the expungement criteria and procedure. DNA samples and records are expunged upon a change in the disposition of the case in the convict's favor, provided that the offender has not been convicted for a separate qualifying offense. The state statutes differ, however, in the extent to which the disposition of the case must change before expungement proceedings can begin. Some states only require that the defendant's conviction be reversed,¹⁶ whereas others require that the conviction be reversed and the case dismissed.¹⁷ Illinois, for example, requires that the conviction be reversed (or that the pardon be granted) based on the defendant's actual innocence.¹⁸ The chart illustrates the variety in the phrasing and requirements of the statutes. Similarly, the statutes vary in terms of what is actually expunged once the criteria are met. In general, states require expungement of any combination of DNA records, DNA samples, or other identifiable information. The expungement process may be initiated by the offender or a government actor. Of the 38 statutes that detail the expungement procedure, 33 require that the offender initiate the process. Of these 32, only Texas contains a statutory provision requiring the defendant to be advised after his acquittal of his right to expungement.¹⁹

Sample Retention and Destruction

The section of the chart on sample retention and destruction identifies any statutory provision that addresses the question of whether DNA samples collected from convicts for purposes of

¹⁵ Some states have established a separate databank and database for the retention of DNA samples and profiles, respectively. This distinction is made in the chart, but for the sake of brevity in the explanatory text, only the term database is used.

¹⁶ See, e.g., Ala. Code § 36-18-26 and Or. Rev. Stat. § 181.085.

¹⁷ See, e.g., Pa. Stat. Ann. 42 § 4721 and W. Va. Code Ann. § 15-2B-11.

¹⁸ See 730 Ill. Comp. Stat. Ann. § 5/5-4-3.

¹⁹ See Tex. Gov't Code Ann. § 411.151 and Tex. Code Crim. Proc. Ann. Art. 55.02.

DNA analysis are retained or destroyed after analysis. Twenty-eight state DNA database statutes either are completely silent on the issue (indicated by asterisks in the chart) or empower an authority to promulgate rules and regulations regarding the storage and/or destruction of samples. These states are labeled as having “no provision” because their statutes do not address the question of whether samples are ultimately retained or destroyed.

Only Wisconsin contains a provision that requires the destruction of all offender samples after DNA analysis has been performed.²⁰ California and Idaho provide that unused samples can be disposed if certain privacy precautions are taken, but do not require disposal.²¹ In contrast, Nebraska requires that samples from qualified offenders be permanently retained,²² and Arizona requires that biological samples be maintained for at least 35 years.²³ Connecticut, Georgia, and Virginia similarly require unused samples to be maintained, while additionally limiting the authorized uses of the unused portions.²⁴ South Dakota’s statute, although lacking an explicit mandate to retain unused DNA samples, most likely has the same effect as the Connecticut, Georgia and Virginia statutes.²⁵

For the remaining 13 states, the DNA database statutes do not explicitly state whether DNA samples are retained indefinitely once a profile has been generated and entered into the database. However, it is likely that the statutes do, in fact, provide for sample retention. Ten of the states have statutes establishing a databank as a repository for DNA samples and providing for expungement of DNA samples upon a reversal of the disposition of the convict’s case.²⁶ This combination suggests that samples are retained in the state databank as long as the conviction for the qualifying offense stands. Of the remaining 3 states, Kansas and Maine also establish state repositories for samples,²⁷ and Washington explicitly provides that samples may be retained.²⁸

Voluntary Donors / Suspects / Arrestees

The final section of this chart deals with special provisions regarding the retention and expungement of DNA samples and records taken from voluntary donors, suspects, and arrestees. As noted in the discussion of the Inclusion Criteria chart, 4 states (California, Louisiana, Texas, and Virginia) explicitly provide for the collection of arrestees’ DNA, and one state (California) explicitly provides for the collection of suspects’ DNA. All 4 of these state statutes contain provisions distinguishing the use and/or retention of the DNA samples and records from those of convicted offenders; broadly speaking, the provisions require or allow for the expungement of the DNA samples and records, should the criminal investigation or prosecution not result in a conviction.

²⁰ See Wis. Stat. Ann. § 165.77.

²¹ See Cal. Penal Code § 299.7 and Idaho Code § 19-5516.

²² See Neb. Rev. Stat. § 29-4105.

²³ See Ariz. Rev. Stat. § 13-610.

²⁴ See Conn. Gen. Stat. Ann. § 54-102i, Ga. Code Ann. § 24-4-62, and Va. Code Ann. § 19.2-310.4.

²⁵ See S.D. Codified Laws § 23-5A-18.

²⁶ See, e.g., the chart entries for Arkansas.

²⁷ See Kan. Stat. Ann. § 21-2511 and Me. Rev. Stat. Ann. 25 § 1572.

²⁸ See Wash. Rev. Code Ann. § 43.43.754.

Besides the 4 states already mentioned, this chart contains entries for 9 other states. The statutory provisions detailed in these entries pertain to DNA samples given voluntarily or pursuant to a court order for purposes of a specific criminal or missing persons investigation. Generally, these provisions safeguard the use of the DNA samples by limiting the use and retention of the samples for the specific investigation. For example, 24 state statutes authorize the collection of DNA samples for purposes of identifying missing, deceased or unidentified persons (see chart on the Authorized Uses of the Database). Only New Mexico and Ohio, however, have statutes that describe the limited uses and/or retention of DNA samples collected from close relatives for the purpose of aiding a missing persons investigation.²⁹ Similarly, some states collect voluntary DNA samples from suspects so that they may exonerate themselves from suspicion. Vermont, for example, prohibits inclusion of such samples into the DNA database.³⁰

Authorized Uses of the Database

The clear intent behind the establishment of state DNA databases was to aid and enhance law enforcement. For example, Alabama's statute declares that "the creation and establishment of a statewide DNA database is the most reasonable and certain method or means to rapidly identify repeat or habitually dangerous criminals."³¹ In general, the DNA database statutes authorize use of DNA and the database for law enforcement purposes, and for purposes of maintaining and improving the database. This chart probes the additional uses of the database beyond these traditional areas.

State legislatures have passed genetic privacy laws that prohibit employers, insurance companies, and others from genetic testing, retaining or disclosing the results without informed consent, and discriminating against an individual based on his test results.³² The DNA database provisions, however, are usually exempted from the genetic privacy laws.³³ Rather, the database provisions typically authorize certain uses of offender's genetic information and prohibit unauthorized uses. The chart identifies commonly authorized uses of the DNA databases. Specifically, it identifies which states contain provisions allowing the database to be used for: (1) identification of missing, deceased, or unidentified persons (24 states);³⁴ (2) identification of human remains following a mass disaster (25 states);³⁵ or (3) "other humanitarian purposes" (13 states). The chart also identifies which states have authorized the creation of population statistical databases, tools which allow for the statistical analysis and interpretation of anonymous DNA profiles collected from convicted offenders. Thirty-four statutes expressly authorize the creation of a population statistical database; an additional 4 states do not, but authorize use of the DNA database for statistical purposes.

Thus, the authorized uses of DNA databases extend beyond criminal identification purposes into the realm of humanitarian and statistical research purposes. The chart also addresses whether

²⁹ See N.M. Stat. Ann. §§ 29-16-6, 29-16-8.1, and 29-16-10.1; see also Ohio Rev. Code Ann. § 109.573.

³⁰ See Vt. Stat. Ann. 20 §§ 1938 and 1940.

³¹ See Ala. Code § 36-18-20(g).

³² See, e.g., N.J. Stat. Ann. §§ 10:5-43 et seq. and Del. Code Ann. 16 §§ 1220 to 1227.

³³ See *Id.*

³⁴ New Hampshire is not included in the tally because the statute is unclear.

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information from the DNA databases can be used for medical or genetic research. Alabama is the only state that explicitly authorizes the use of population statistical data for medical research.³⁶ In contrast, 8 states prohibit the use of the database to obtain information on human physical traits, predisposition to disease, or medical or genetic disorders; the 8 statutes vary in terms of the specific use or uses that are prohibited. Forty states contain no provision addressing the use of their DNA database for genetic research.³⁷

Because the terms used in the statutes are often vague or undefined, one cannot predict with certainty the scope of the databases' authorized uses; examples include "law enforcement purposes" and "other humanitarian purposes." The construction of each statute may provide clues as to whether these terms will be interpreted broadly or narrowly. Some statutes may explicitly enumerate and limit the authorized uses of the database, whereas others may not use such restrictive language. Thus, when browsing this chart for information on a specific state statute, the reader is advised to review the text of the statute(s) to provide additional context to the chart.

Sanctions for Misuse of the Database

This chart catalogues the various criminal and civil liabilities associated with the misuse of the DNA database. The first section of the chart identifies criminal penalties imposed for: (1) tampering with DNA samples or records; (2) improper entry of DNA samples and records into the database; (3) improper access to and use of DNA samples and records; and (4) improper disclosure of DNA samples and records. The information in the chart consists of the grade of the punishment, the prohibited conduct, and the requisite mental state with which one must have acted (if specified). For example, the following is an entry under the state of Delaware: "Class A misdemeanor [grade of the punishment]: Improper dissemination of database information [prohibited conduct], knowing such dissemination is for a purpose unauthorized by law [mental state]."³⁸ The language used in the chart reflects the language used in the statute. However, please note that the entries refer only to the choate crime; some statutes prosecute attempts as well as completed crimes.³⁹

(1) Fourteen states impose a penalty for tampering with DNA samples or records. Of the 14, 12 punish this offense as a felony. (2) With regards to improper entry of DNA samples or records, only Alabama criminalizes this behavior, punishes those who make false entries into the database.⁴⁰ In contrast, New Hampshire exempts its officials from liability for mistaken collection and entry of DNA into the database provided they acted in good faith reliance that the DNA originated from a qualifying offender.⁴¹ Five other states contain provisions safeguarding the future use of DNA records mistakenly entered into the database, making no mention of the consequences to the individual who mistakenly entered such data. (3) Thirty states criminalize improper access to and use of DNA samples and records, the majority of which grade this

³⁶ See Ala. Code §§ 36-18-20 and 36-18-31.

³⁷ Michigan is not included in the tally because the statute is unclear.

³⁸ See Del. Code Ann. 29 § 4713.

³⁹ See, e.g., La. Rev. Stat. Ann. § 15:618 (punishing attempts to tamper with samples).

⁴⁰ See Ala. Code § 36-18-29.

⁴¹ See N.H. Rev. Stat. Ann. § 651:C-4.

offense as a misdemeanor;⁴² and (4) thirty-seven states criminalize improper disclosure of DNA samples and records, the majority of which classify the crime as a misdemeanor.⁴³ Montana, on the other hand, sanctions malfeasant officials by withholding their salary.⁴⁴

The next section of the chart identifies whether the statute or a related statute establishes a private cause of action for individuals aggrieved by misuse of the database. The majority of states have no such provision (35 states). Seven states provide aggrieved individuals with monetary damages (including costs and attorneys' fees) and/or injunctive relief. Eight other states do not have provisions for a private cause of action within their DNA database statutes, but do provide a private cause of action for violations of their genetic privacy statutes. Because the applicability of the genetic privacy statutes to matters concerning the DNA databases is questionable, these chart entries have been bracketed. Four states, on the other hand, provide immunity from civil liability and/or criminal prosecution for misuse of the database, as shown in the next row of the chart.⁴⁵ Finally, the last row in the chart contains additional penalties or other miscellaneous notes regarding misuse of the database.

Coordination of State and Federal Databank Laws

State forensic DNA identification practices may be limited by the requirements of the federal DNA Identification Act (DNA Act). For example, the DNA Act permits the inclusion in CODIS of profiles from "persons who have been charged in an indictment or information with a crime," and "other persons whose DNA samples are collected under applicable legal authorities." The statute makes clear, however, that arrestees who have not been indicted or charged in an information with a crime, and those individuals who voluntarily submitted a DNA sample for elimination purposes cannot be included in CODIS. This amendment works to permit, with the limitations noted, the uploading of DNA profiles collected by those states that currently authorize the inclusion of arrestees in their state DNA databases (Calif., La., Va., Texas,), as well as other DNA profiles if "collected under applicable legal authority." Also, the DNA Act expressly conditions access to CODIS on compliance with the quality control and privacy requirements,⁴⁶ and with expungement of the DNA profile from CODIS in the event that a conviction is overturned, or, in the case of an arrestee, if there is no conviction and the charges have been dismissed or an acquittal entered.⁴⁷

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⁴² Mississippi, Oregon and Wisconsin were not included in this tally, because it is questionable whether their statutory provisions are applicable to improper access/use of the DNA database.

⁴³ Oregon was not included in this tally, because it is questionable whether the statutory provision cited in the chart is applicable to improper disclosure of database sample and records.

⁴⁴ See Mont. Code Ann. §§ 44-6-108, 44-5-111, 44-5-112, and 44-2-205.

⁴⁵ Mississippi has not been included in the tally, because the applicability of the cited provision is doubtful.

⁴⁶ 42 U.S.C. § 14132 (c)

⁴⁷ 42 U.S.C. § 14132 (d)

The American Society of Law, Medicine and Ethics welcomes any comments, questions or suggestions regarding our survey of state DNA database statutes.