



# The Florida Senate

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Committee on Criminal Justice

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## AN EXAMINATION OF THE NATIONAL MOVEMENT TOWARD COLLECTING DNA SAMPLES FROM ARRESTEES

### Statement of the Issue

More than a dozen states and the federal government have adopted laws that provide for taking DNA samples from arrestees. A number of states have considered or are currently considering similar legislation.

During the 2008 Legislative Session, one Florida Senator filed a bill that would have required any person arrested for a felony or attempted felony to provide a biological specimen for the Florida Department of Law Enforcement DNA database. There was no companion bill in the House so the bill died in committee. It is anticipated that similar legislation will be proposed in the future, given the national trend.

### Discussion

Every state in the country collects DNA (deoxyribonucleic acid) samples from criminal offenders. These "known samples" are analyzed and the analysis, or DNA profile, is loaded into a state indexing system and then passed on to the National Indexing System known as CODIS. Likewise, "forensic DNA" gathered from physical evidence in criminal cases is loaded into the databases. When these databases are run against one another, the result is a national network that has the potential to help solve crimes based on evidence and known samples from all over the country.

The collection of DNA samples from persons who come into contact with the criminal justice system has expanded over recent years. Currently, all fifty states require that convicted sex offenders provide DNA samples; 46 states require samples from all or a certain group of convicted felons; and 11 states, including Florida, require that certain misdemeanants provide DNA samples at the time of conviction.

The most recent trend is the movement towards obtaining DNA samples from felony arrestees. It could provide an entire new pool of known samples which may be run against forensic evidence collected in cold or current criminal cases and therefore potentially resolve additional cases.

### What Have Other States Done?

To date, thirteen states - Maryland's bill having recently been signed into law - have passed and implemented legislation authorizing the collection of DNA samples from felony arrestees. There are variations among the states because of their unique systems of criminal justice, but there are some recurring themes. Six of the thirteen states require DNA in all felony arrests and four of those six states are implementing the program in a phased-in manner or upon specific funding. The seven remaining states are only taking arrestee samples in limited felony arrests. The states are also fairly evenly split on the issue of whether expungement of the sample and record is automatic under certain circumstances or if the arrestee has to initiate the process of expungement. Below is a list of the states that require arrestee DNA samples and a brief description of their particular law.

*Alaska:* Requires collection of a DNA sample from persons arrested for violent felonies or laws or ordinances with similar elements. Provides for destruction of the sample and removal from the database, upon order of the court, if the person was released without being charged or the case was dismissed. Alaska Stat. §44.41.035.

*Arizona:* Requires samples be obtained from persons arrested for delineated serious felony offenses. Provides for collection from persons released on their own recognizance or on bail prior to transport to the jail or agency that collects the DNA sample, by court order. A person may petition the court for expungement of the sample and DNA profile if charges are not filed within a specified time, the case is dismissed, or the person is acquitted at trial. Ariz.Rev.Stat. Ann. §13-610.

*California:* Specifically likens the collection of DNA samples to the collection of fingerprints, as “an administrative requirement to assist in the accurate identification of criminal offenders.” Phased-in sample collection from all adult felony arrestees is to be complete in January 2009. Allows for DNA sample collection as a condition of a plea. Extensive language regarding the privacy, confidentiality, and security of samples and records, including remedies for statutory violations. Cal. Penal Code §296.

*Kansas:* Phased-in sample collection from all adult felony arrestees and juvenile detainees. Person may petition the Kansas Bureau of Investigation for expungement of sample and profile upon acquittal or dismissal of the charges, or if the court finds that there was no probable cause for the arrest, or even if the conviction is subsequently expunged from the person’s record. Kan.Stat. Ann. §21-2511.

*Louisiana:* Adults and juveniles arrested on felony offenses must provide DNA specimens as part of the booking procedure. La.Rev.Stat. Ann. §609.

*Maryland:* The law passed and signed by the Governor in May, 2008, requires DNA sample collection at the time a person is charged with crimes of violence or burglary. The sample may not be tested or placed in the database until after arraignment on the charge, and must be automatically destroyed and expunged from the database if there is no conviction, if a conviction is overturned on appeal and not re-tried, or if a pardon is granted. 2008 Md. Laws Ch. 337.

*Minnesota:* Adults and juveniles who have appeared in court and had a judicial probable cause determination on an arrest for an enumerated crime of violence or burglary must provide DNA samples. Samples must be automatically destroyed and records returned to the person or juvenile who is subsequently found to be not guilty of a felony, or upon the request of the person if the charge was later dismissed. Minn.Stat. §299C.105.

*New Mexico:* Persons who are arrested for specified violent felonies must provide DNA samples. The sample and records may be expunged upon request if felony charges are not filed within one year or if the felony is dismissed by the court or dropped by the prosecutor, or if the defendant completes a diversion program or is acquitted. N.M.Stat. Ann. §29-3-10.

*North Dakota:* Effective after July 31, 2009, North Dakota will take DNA samples from arrestees in felony cases, but the samples “may be preserved...for subsequent analysis upon the receipt of sufficient funding.” If the arrest does not result in a felony charge within a year, if the case is dismissed, or if there is an acquittal or misdemeanor conviction, the defendant may seek a court order for destruction of the sample and sealing of the record. N.D. Cent. Code §§31-13-02, 31-13-07.

*South Dakota:* Adults arrested on felony offenses must supply a DNA sample or they can be charged with a felony for refusing to do so. The South Dakota law contains provisions for confidentiality of records. Expungement of the DNA records may be requested if felony charges are not filed within one year, or if the charges are dismissed, result in an acquittal or in a misdemeanor conviction. S.D.Comp.Laws Ann. §§23-5A-5.2, 23-5A-14, 23-5A-28.

*Tennessee:* After a judge or grand jury finds probable cause for the felony arrest on suspicion of committing one of the enumerated serious crimes, a person must provide a DNA sample prior to being released from custody. The clerk of the court notifies the Bureau of Investigation of the final disposition of the case, and if the charge is dismissed or the defendant is acquitted, the bureau destroys the sample and all records of it. Tenn. Code Ann. §40-35-321.

*Texas:* Texas law prohibits the information contained in the database from being analyzed to “obtain information about human physical traits or predisposition for disease” unless that information falls within one of the specified purposes of the database. Once a defendant is indicted or waives indictment on one of the listed felony offenses, a DNA sample must be provided. The court orders destruction of the sample and “record of its receipt” if the defendant is acquitted or the case is dismissed. The records stored in the DNA database are specifically exempt from the Public Records law. Tex. Gov’t Code §§411.143, 411.153, 411.1471.

*Virginia:* Requires a sample be taken after a probable cause determination as to the validity of the arrest and before release from custody on one of the enumerated violent felonies. The clerk of the court is required to notify the Department of Forensic Science of the final disposition, and if the case is dismissed or an acquittal occurs, the department must destroy the sample and all records thereof. Va. Code § 19.2-310.2.

The federal government is set to implement taking DNA samples from anyone charged with a federal crime and from non-U.S. citizens who face deportation. Congress enacted the measure in late 2005 and the federal rule which will implement the measure is forthcoming.<sup>1</sup> It is estimated that the new requirements will add approximately 1.2 million samples a year to the federal DNA database.<sup>2</sup>

### **Solving Cases, Search and Seizure, and Privacy Rights**

The Maryland arrestee DNA bill that was passed and signed into law this year was lobbied for by a rape victim from that state, Laura Neuman. She was victimized when she was 18 years old – it took 20 years to find her attacker. Alphonso Hill had been arrested six times before and six times after his attack on Neuman. He pled guilty in the Neuman case in 1992, DNA was collected and tested, and he was then charged in 6 other rapes. Hill is a suspect in 10 other rape cases in the Baltimore area. Neuman believes he could have been stopped sooner if DNA had been collected in conjunction with his prior arrests.<sup>3</sup>

Katie’s Law, the name given the South Dakota DNA database expansion legislation, was pushed by the mother of murder victim, Katie Sepich. In a press release, soon after the law passed, Katie’s mother stated: “Katie’s killer could have been caught shortly after her death. Three months later he broke into the home of two women. He was holding a knife. He was arrested, but his DNA sample was not collected....He escaped and remained at large for three years. When he was finally caught, his DNA sample was taken and it solved Katie’s murder.”<sup>4</sup>

It seems clear from the national movement to expand DNA databases that lawmakers are more and more interested in using that crime-solving tool to its greatest advantage in the interest of public safety. They must weigh the interests of privacy rights and search and seizure limitations in the process, however.

Although fingerprints are taken in the course of the booking procedure in all arrests, critics assert that the taking of a DNA sample – even by mouth swab – is a violation of the Fourth Amendment right against unreasonable search and seizure. Because this is a new area of the law (arrestee DNA), the courts are just beginning to rule on the various legal issues that are being raised for the first time. It could be many years before we have a clear message from the courts as to how the Constitution applies when the State seeks a DNA sample from a person who has been arrested.

The Virginia arrestee DNA law, explained above, was challenged on search and seizure violation grounds and was upheld by the Supreme Court of Virginia. The case, *Anderson v. Virginia*, cites the reasoning of four different federal courts (predominantly *Jones v. Murray*<sup>5</sup>, a convicted felon DNA sample case) and three state appellate courts in concluding that the taking of a DNA sample from an arrestee, even by a blood draw, is “no different in character than acquiring fingerprints upon arrest.”<sup>6</sup> The Virginia Supreme Court, in making its ruling, reasoned that the State’s interest in ascertaining and keeping a record of the arrestees’ identification for purposes of solving

<sup>1</sup> Pub.L. 109-162, §1002, Jan. 5, 2006; 28 CFR Part 28; 73 Federal Register 76, April 18, 2008.

<sup>2</sup> [www.abajournal.com/news](http://www.abajournal.com/news) posted April 17, 2008.

<sup>3</sup> [www.cnn.com/2008/CRIME/05/12/dna.database/index.html](http://www.cnn.com/2008/CRIME/05/12/dna.database/index.html).

<sup>4</sup> [www.reuters.com/article/pressRelease/idUS158411+21-Jan-2008+PRN20080121](http://www.reuters.com/article/pressRelease/idUS158411+21-Jan-2008+PRN20080121).

<sup>5</sup> 962 F.2d 302 (4<sup>th</sup> Cir.), cert. denied, 506 U.S. 977, 113 S.Ct. 472, 121 L.Ed.2d 378 (1992).

<sup>6</sup> *Anderson v. Virginia*, 650 S.E.2d 702 (Va. 2007).

crimes outweighs the arrestees' right to privacy and protection from government intrusion. The Virginia court, therefore, found no violation of the constitutional protection against unreasonable search and seizure.

A Minnesota court reached a different conclusion on the search and seizure issue in a 2006 case, *In the Matter of the Welfare of: C.T.L., Juvenile*.<sup>7</sup> This court determined that the State (law enforcement) should obtain a search warrant in order to take the DNA sample, except under the limited exceptions to the warrant requirement. Because no exception to the 4th Amendment warrant requirement existed, and because no search warrant was obtained, law enforcement intrusion into the human body to gather DNA was a violation of the right not to be subjected to unreasonable search and seizure.

Although the State argued that a judicial determination of probable cause for the arrest had been made, pursuant to the statutory requirement, the court found that probable cause for an arrest did not meet the same constitutional criteria as an impartial magistrate's decision to issue a search warrant for the sample, nor was it a sufficient reason to allow the DNA to be taken.

The State also urged the court to consider the issue by applying a "general balancing test" to the individual's rights and the State's interests. This was the analysis used by the federal court in the *Jones* case, relied upon by the Virginia court in *Anderson*. In its application of this balancing test, the Minnesota court opined that the person who is merely charged with a criminal offense has a greater expectation of privacy than one who has actually been convicted, which therefore weighs more heavily in the balance than the State's interest in gathering the DNA.

The court mentions that the Minnesota Legislature appears to have acknowledged that a greater right to privacy exists for one who is not yet convicted, because the DNA statute requires that the DNA sample be destroyed (and the information in the database be removed) if the person is later acquitted or the charge dismissed. It is interesting to note that the federal law that will soon be implemented also allows an arrested person to have his or her DNA purged from the State and National DNA Index, upon a showing that his or her arrest did not culminate in a charge being filed, if the case was dismissed, or if he or she was acquitted. In fact, in order for a state to participate in the National Indexing System, the state must comply with this requirement.<sup>8</sup>

It should be remembered that the courts at the federal level and the other states' courts can be relied upon in Florida merely as "persuasive," not "legal precedent." Precedent that holds sway in Florida would come from the rulings of Florida appellate courts, and ultimately the Supreme Court of Florida and the U.S. Supreme Court, should these questions be addressed by those courts, as they relate to any arrestee DNA statute the Florida Legislature may pass.

The Florida First District Court of Appeal was the first state court to look at the constitutionality of s. 943.325, F.S., which at the time of the opinion required a DNA sample from adults and juveniles convicted of certain enumerated felonies. The court rejected defense arguments made in the lower court based on equal protection and privacy grounds. With regard to the 4th Amendment search and seizure issue, the court applied the analysis used in *Jones*, the federal convicted felon DNA case heavily relied upon by the Virginia court (cited above) in deciding Virginia's arrestee DNA case.

The Florida court found "most compelling the traditional 'minimally intrusive search' approach used in *Jones v. Murray*." After applying that analysis, the Florida court upheld the constitutionality of the convicted person's DNA sample statute, stating:

We find that a "convicted" person, as defined in section 943.325, has no reasonable expectation of privacy with respect to the taking of a blood sample for DNA testing that outweighs the state's interests in identifying convicted felons in a manner that cannot be circumvented, *in*

<sup>7</sup> *In the Matter of the Welfare of C.T.L., Juvenile*, (A06-874, Court of Appeals 2006) found at [www.lawlibrary.state.mn.us](http://www.lawlibrary.state.mn.us).

<sup>8</sup> Pub.L. 109-162, §1002, Jan. 5, 2006.

*apprehending criminals, in preventing recidivism, and in absolving innocent persons charged with crimes.*<sup>9</sup>

Note the similarity in the federal court's reference to an *arrestee* in the *Jones* (convicted person's) case:

With the person's loss of liberty *upon arrest* comes the loss of at least some, if not all, rights to personal privacy otherwise protected by the Fourth Amendment. ... [H]is identification becomes a matter of legitimate state interest and he can hardly claim privacy in it. We accept this proposition because the identification of *suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes.* *Id.* at 306 (emphasis added).

Although it is not possible to accurately predict what Florida courts would do if presented with an arrestee DNA challenge, it is nonetheless tempting to draw conclusions from the First District Court's reliance on the *Jones* reasoning in its *L.S.* opinion. Although both *Jones* and *L.S.* are convicted persons' DNA cases, the *Jones* court finds, in *dicta*, that taking *DNA at the time of arrest* would be akin to fingerprinting during the booking procedure. Further the *Jones* court weighs among the state's interests in obtaining DNA samples, *at the time of arrest*, such interests as *solving past and future crimes.*

The Florida *L.S.* court lists among the state's interests: *apprehending criminals, preventing recidivism, and absolving the innocent.* Do these interests not weigh heavily in arrestee DNA cases as well, as they did in the Virginia *Anderson* court's analysis? The argument certainly exists, and furthermore, it should be remembered that the Virginia (arrestee) court relied heavily on the *Jones* (convicted person) case, a case with which the Florida courts also appear to be comfortable.

Of course the opposite may just as well be true. The Florida appellate courts may find merit in the arguments set forth in the Minnesota *C.T.L.* arrestee DNA sample case, that law enforcement must obtain a search warrant to take an arrestee's DNA, despite a court's finding that probable cause exists for the arrest. After all, an arrestee DNA sample case would be a case of first impression in Florida, and without guidance from the U.S. Supreme Court, the courts would have no true precedent in this area of the law.

If the Florida Legislature considers passing arrestee DNA sample legislation, the courts' findings with regard to its constitutionality is certainly not a foregone conclusion. Such a law's fiscal impact is at least somewhat more predictable, although there are variables to understand and consider. The predicted fiscal impact along with systemic efficiency issues are presented below.

### **The Science of the Numbers**

Since the inception of the Florida convicted offender database, the number of known DNA samples gathered and entered into the system could be safely characterized as staggering. As of the end of August 2008, slightly over half a million samples from Florida have been analyzed and loaded into the system and a total of 9,052 investigations have been aided because of those samples. The Florida Department of Law Enforcement (FDLE) Forensic Services Unit runs an average of 10,000 known samples per month. Each week state and national "match reports" come through the system, when known samples are run against forensic unknown samples from crime scenes and other sources. Florida has an approximate 50 percent match rate – that is, about half the time a known sample is linked to a forensic (unknown) sample.

The known DNA samples arrive at FDLE from the agencies that take them from convicted offenders. At present there are approximately 500 "collection agencies." The collection kits are provided by FDLE. They are tracked by barcode with the identifying information provided by the agency taking the sample. According to information obtained during the research for this Issue Brief, this particular part of the process tends to create a bottleneck.

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<sup>9</sup> *L.S. v. State*, 805 So.2d 1004 (Fla. 1st DCA 2001) at 1007; *rev. denied*, 821 So.2d 297 (Fla. 2002). (emphasis added) Both the Second and the Fifth District Courts of Appeal have agreed with the reasoning and holding of the *L.S.* court.

Oftentimes samples cannot be analyzed and loaded into the system because agencies forward the samples with incomplete data which leads to a system slow-down while the FDLE staff verifies and completes the data.

One example of the cost of inefficiency that sometimes occurs due to incomplete data and record-checking at the collection site is found in the number of duplicate samples received by the lab. This happens when a known sample is submitted for the same individual more than once – likely in an abundance of caution, but for reasons only known by the collection agency. It is estimated that the duplication rate is currently running at a full 20 percent of the samples received. The estimated cost associated with the duplicate samples is \$4 per duplicate. Using the average number of samples run per month of 10,000, and assuming the 20 percent duplication rate and cost of \$4 is correct, this amounts to an annual cost of \$96,000 that could be avoided if efficiency measures were created or put in place at the collection sites.

It should be mentioned that there is a state-wide integrated criminal history program being developed under the leadership of FDLE (“FALCON”) that should have a positive effect on the bottleneck in the DNA database system. The FALCON project features a live-scan fingerprint component and could eliminate the incomplete record submission, duplicate samples, and the manual data entry that is so time-consuming. However, until FALCON comes on line, or another solution is found, the bottleneck at the part of the Forensic Services Unit responsible for known samples is likely to continue to exist.

Based upon arrest figures from 2007, it is estimated that the recurring annual cost for FDLE to be able to process, upload, and store DNA samples from all felony arrestees (527,027) would run around \$17.8 million. Non-recurring costs are estimated at \$2 million. The number of all arrestees, felony and misdemeanor suspects combined, was 970,739 in 2007. Based upon that number of arrestees, the costs involved in processing, uploading, and storing those samples would nearly double. Because equipment will need to be purchased and facility renovations as well as training for the agencies that would begin submitting samples would be needed, a law adding arrestees to the DNA database would ideally provide adequate time and funding for proper implementation.

It has been suggested that, from a fiscal standpoint, the approach taken by the Legislature in implementing s. 943.325, F.S., wherein the most violent felons were required to provide the first wave of sample submissions followed by other felonies incrementally, would be advisable should arrestees be added to the database. This is suggested because data from Great Britain, where all arrestees have provided DNA samples for 10 years, as well as from the State of Virginia, do not seem to indicate a greater match rate than the *current* Florida system (approximately 50%). Therefore, it may be advantageous to study the effect of the increased known sample availability in terms of increased crime “solvability” as the phase-in approach is slowly implemented. If the Legislature chose to phase-in the collection of arrestee DNA samples then the immediate costs to the State would be considerably less and perhaps more feasible given the economic situation at this time.

## Conclusion

From a policy perspective, expanding the collection of DNA samples to include at least arrestees in the most violent felony crimes makes good public safety sense, especially if such an expansion of the database increases crime solvability. It will, however, come with both a financial cost and a cost to citizen privacy. Further, if the Legislature makes this policy shift, as other states have done, the state can most likely expect the Florida courts to analyze the new law to determine the constitutionality of the database expansion.