

Garden State CLE presents:

DNA Samples in New Jersey following Maryland v. King



Lesson Plan

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Part 1 – Underlying Maryland Statutes

[Note: Twenty-eight States and the Federal Government have adopted laws similar to the Maryland Act authorizing the collection of DNA from some or all arrestees.]

a.) The Maryland DNA Collection Act

§ 2-504. Collection of DNA samples

(3)(i) In accordance with regulations adopted under this subtitle, a DNA sample shall be collected from an individual who is charged with:

1. a crime of violence or an attempt to commit a crime of violence; [these include murder, rape, first-degree assault, kidnapping, arson, sexual assault, and a variety of other serious crimes. Md. Crim. Law [Code Ann. § 14–101](#)]

or

2. Burglary or an attempt to commit burglary.

(ii) At the time of collection of the DNA sample under this paragraph, the individual from whom a sample is collected shall be given notice that the DNA record may be expunged and the DNA sample destroyed in accordance with [§ 2-511](#) of this subtitle.

(d)(1) A DNA sample collected from an individual charged with a crime under subsection (a)(3) of this section may not be tested or placed in the statewide DNA data base system prior to the first scheduled arraignment date unless requested or consented to by the individual as provided in paragraph (3) of this subsection.

[Note: This is done to assure that there be an independent determination of probable cause by a neutral magistrate.]

(2) If all qualifying criminal charges are determined to be unsupported by probable cause:

(i) the DNA sample shall be immediately destroyed; and

(ii) notice shall be sent to the defendant and counsel of record for the defendant that the sample was destroyed.

(3) An individual may request or consent to have the individual's DNA sample processed prior to arraignment for the sole purpose of having the sample checked against a sample that:

**(i) has been processed from the crime scene or the hospital;
and**

(ii) is related to the charges against the individual.

b.) Destruction of sample:

If “all qualifying criminal charges are determined to be unsupported by probable cause ... the DNA sample shall be immediately destroyed.” [§ 2-504\(d\)\(2\)\(i\)](#). DNA samples are also destroyed if “a criminal action begun against the individual ... does not result in a conviction,” “the conviction is finally reversed or vacated and no new trial is permitted,” or “the individual is granted an unconditional pardon.” [§ 2-511\(a\)\(1\)](#).

c.) Limitation on use

The Act also limits the information added to a DNA database and how it may be used. Specifically, “[o]nly DNA records that directly relate to the identification of individuals shall be collected and stored.” [§ 2-505\(b\)\(1\)](#). No purpose other than identification is permissible: “A person may not willfully test a DNA sample for information that does not relate to the identification of individuals as specified in this subtitle.” [§ 2-512\(c\)](#).

Part II – DNA Collection – In General

a.) Collection Technique

Buccal Swab - Buccal cell collection involves wiping a small piece of filter paper or a cotton swab similar to a Q-tip against the inside cheek of an individual's mouth to collect some skin cells. The procedure is quick and painless. The swab touches inside an arrestee's mouth, but it requires no surgical intrusion beneath the skin,” and it poses no threat to the health or safety of arrestees.

[The buccal swab procedure constitutes a search within the meaning of the 4th Amendment thus requiring reasonable conduct on behalf of state officials. The fact that the intrusion is negligible is of central relevance to determining reasonableness.]

b.) CODIS

Respondent's identification as the rapist resulted in part through the operation of a national project to standardize collection and storage of DNA profiles. Authorized by Congress and supervised by the Federal Bureau of Investigation, the Combined DNA Index System (CODIS) connects DNA laboratories at the local, state, and national level. Since its authorization in 1994, the CODIS system has grown to include all 50 States and a number of federal agencies. CODIS collects DNA profiles provided by local laboratories taken from arrestees, convicted offenders, and forensic evidence found at crime scenes. To participate in CODIS, a local laboratory must sign a memorandum of understanding agreeing to adhere to quality standards and submit to audits to evaluate compliance with the federal standards for scientifically rigorous DNA testing.

One of the most significant aspects of CODIS is the standardization of the points of comparison in DNA analysis. The CODIS database is based on 13 loci at which the (short tandem repeats) STR alleles are noted and compared. These loci make possible extreme accuracy in matching individual samples, with a “random match probability of approximately 1 in 100 trillion (assuming unrelated individuals).” [T]he information in the database is only useful for human identity testing.” STR information is recorded only as a “string of numbers”; and the DNA identification is accompanied only by information denoting the laboratory and the analyst responsible for the submission. In short, CODIS sets uniform national standards for DNA matching and then facilitates connections between local law enforcement agencies who can share more specific information about matched STR profiles.

Part III – Case Analysis

a.) Fouth Amendment Issues

The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody. It is beyond dispute that “probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Also uncontested is the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested. The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged. Even in that context, the Court has been clear that individual suspicion is not necessary, because the constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search.

The routine administrative procedure[s] at a police station house incident to booking and jailing the suspect derive from different origins and have different constitutional justifications than, say, the search of a place, for the search of a place not incident to an arrest depends on the “fair probability that contraband or evidence of a crime will be found in a particular place. The interests are further different when an individual is formally processed into police custody. Then the law is in the act of subjecting the body of the accused to its physical dominion. When probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests.

b) Justifications for Gathering DNA Evidence

1.) Identity -

[I]n every criminal case, it is known and must be known who has been arrested and who is being tried. An individual's identity is more than just his name or Social Security number, and the government's interest in identification goes beyond ensuring that the proper name is typed on the indictment. Identity has never been considered limited to the name on the arrestee's birth certificate. In fact, a name is of little value compared to the real interest in identification at stake when an individual is brought into custody. "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. Disguises used while committing a crime may be supplemented or replaced by changed names, and even changed physical features. An "arrestee may be carrying a false ID or lie about his identity," and "criminal history records ... can be inaccurate or incomplete

2.) Revealing Criminal Case History

A suspect's criminal history is a critical part of his identity that officers should know when processing him for detention. It is a common occurrence that “[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals. Hours after the Oklahoma City bombing, Timothy McVeigh was stopped by a state trooper who noticed he was driving without a license plate. Police stopped serial killer Joel Rifkin for the same reason. One of the terrorists involved in the September 11 attacks was stopped and ticketed for speeding just two days before hijacking Flight 93. Police already seek this crucial identifying information. They use routine and accepted means as varied as comparing the suspect's booking photograph to sketch artists' depictions of persons of interest, showing his mug-shot to potential witnesses, and of course making a computerized comparison of the arrestee's fingerprints against electronic databases of known criminals and unsolved crimes. In this respect the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.

3.) Accurate Searching Law Enforcement Records

The task of identification necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him. The DNA collected from arrestees is an irrefutable identification of the person from whom it was taken. Like a fingerprint, the 13 CODIS loci are not themselves evidence of any particular crime, in the way that a drug test can by itself be evidence of illegal narcotics use. A DNA profile is useful to the police because it gives them a form of identification to search the records already in their valid possession. In this respect the use of DNA for identification is no different than matching an arrestee's face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee's fingerprints to those recovered from a crime scene. See Tr. of Oral Arg. 19. DNA is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police. Those records may be linked to the arrestee by a variety of relevant forms of identification, including name, alias, date and time of previous convictions and the name then used, photograph, Social Security number, or CODIS profile. These data, found in official records, are checked as a routine matter to produce a more comprehensive record of the suspect's complete identity. Finding occurrences of the arrestee's CODIS profile in outstanding cases is consistent with this common practice. It uses a different form of identification than a name or fingerprint, but its function is the same.

4.) Risks for Detention Center Personnel

Law enforcement officers bear a responsibility for ensuring that the custody of an arrestee does not create inordinate risks for facility staff, for the existing detainee population, and for a new detainee. DNA identification can provide untainted information to those charged with detaining suspects and detaining the property of any felon. For these purposes officers must know the type of person whom they are detaining, and DNA allows them to make critical choices about how to proceed.

Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in [certain cases, such as] where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.”

Recognizing that a name alone cannot address this interest in identity, the Court has approved, for example, “a visual inspection for certain tattoos and other signs of gang affiliation as part of the intake process,” because [the identification and isolation of gang members before they are admitted protects everyone

5.) Flight and Availability for Trial

Looking forward to future stages of criminal prosecution, “the Government has a substantial interest in ensuring that persons accused of crimes are available for trials. A person who is arrested for one offense but knows that he has yet to answer for some past crime may be more inclined to flee the instant charges, lest continued contact with the criminal justice system expose one or more other serious offenses. For example, a defendant who had committed a prior sexual assault might be inclined to flee on a burglary charge, knowing that in every State a DNA sample would be taken from him after his conviction on the burglary charge that would tie him to the more serious charge of rape. In addition to subverting the administration of justice with respect to the crime of arrest, this ties back to the interest in safety; for a detainee who absconds from custody presents a risk to law enforcement officers, other detainees, victims of previous crimes, witnesses, and society at large.

6.) Bail Considerations

Fourth, an arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail. The government's interest in preventing crime by arrestees is both legitimate and compelling. DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness. Knowing that the defendant is wanted for a previous violent crime based on DNA identification is especially probative of the court's consideration of the danger of the defendant to the alleged victim, another person, or the community.

[Bail – time issues]

Present capabilities make it possible to complete a DNA identification that provides information essential to determining whether a detained suspect can be released pending trial. See, *e.g.*, States Brief 18, n. 10 (“DNA identification database samples have been processed in as few as two days in California, although around 30 days has been average”). Regardless of when the initial bail decision is made, release is not appropriate until a further determination is made as to the person's identity in the sense not only of what his birth certificate states but also what other records and data disclose to give that identity more meaning in the whole context of who the person really is. And even when release is permitted, the background identity of the suspect is necessary for determining what conditions must be met before release is allowed.

7.) Protect the innocent

Finally, in the interests of justice, the identification of an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense. Prompt DNA testing ... would speed up apprehension of criminals before they commit additional crimes, and prevent the grotesque detention of ... innocent people.

8.) Historical Use of Identifiers in Law Enforcement (mug-shots, fingerprints)

DNA identification represents an important advance in the techniques used by law enforcement to serve legitimate police concerns for as long as there have been arrests, concerns the courts have acknowledged and approved for more than a century. Law enforcement agencies routinely have used scientific advancements in their standard procedures for the identification of arrestees. Police had been using photography to capture the faces of criminals almost since its invention. Courts did not dispute that practice, concluding that a sheriff in making an arrest for a felony on a warrant has the right to exercise a discretion, [if] he should deem it necessary to the safe-keeping of a prisoner, and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph. By the time that it had become “the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals,” the courts likewise had come to the conclusion that “it would be [a] matter of regret to have its use unduly restricted upon any fanciful theory or constitutional privilege

9.) State-of-the-Art Superiority over other Techniques

DNA identification is an advanced technique superior to fingerprinting in many ways, so much so that to insist on fingerprints as the norm would make little sense to either the forensic expert or a layperson. The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant, see Part V, *infra*, and DNA is a markedly more accurate form of identifying arrestees. A suspect who has changed his facial features to evade photographic identification or even one who has undertaken the more arduous task of altering his fingerprints cannot escape the revealing power of his DNA.

10.) Conclusion

In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

Part IV - Current New Jersey Law

a.) Statutory Law

New Jersey DNA Database and Databank Act of 1994, [N.J.S.A. 53:1-20.17-20.28](#), as amended. Construed in *State v. O'Hagen*, 189 NJ 140 (2007) and *AA v. Attorney General*, 189 NJ 128 (2007) (Special Needs Exception to the Warrant Requirement)

By way of Amendments in 2003:

[Adults] NJSA 53:1-20.20(g) g. Every person convicted or found not guilty by reason of insanity of a crime shall have a blood sample drawn or other biological sample collected for purposes of DNA testing.

[Juvies] NJSA 53:1-20.20(h) h. Every juvenile adjudicated delinquent, or adjudicated not delinquent by reason of insanity, for an act which, if committed by an adult, would constitute a crime shall have a blood sample drawn or other biological sample collected for purposes of DNA testing.

b. Post-Arrest Identification Procedures **(Rule 7:2-2(e))**

53:1-15. Fingerprinting; forwarding copies

The sheriffs, chiefs of police, members of the State Police and any other law enforcement agencies and officers shall, immediately upon the arrest of any person for an indictable offense, or for any of the grounds specified in paragraph (1), (2), (3) or (4) of subsection a. of section 5 of [P.L.1991, c. 261 \(C.2C:25-21\)](#) or of any person believed to be wanted for an indictable offense, or believed to be an habitual criminal, or within a reasonable time after the filing of a complaint by a law enforcement officer charging any person with an indictable offense, or upon the arrest of any person for shoplifting, pursuant to [N.J.S.2C:20-11](#), or upon the arrest of any person for prostitution, pursuant to [N.J.S.2C:34-1](#), or the conviction of any other person charged with a nonindictable offense, where the identity of the person charged is in question, take the fingerprints of such person, according to the fingerprint system of identification established by the Superintendent of State Police and on the forms prescribed, and forward without delay two copies or more of the same, together with photographs and such other descriptions as may be required and with a history of the offense committed, to the State Bureau of Identification.

Such sheriffs, chiefs of police, members of the State Police and any other law enforcement agencies and officers shall also take the fingerprints, descriptions and such other information as may be required of unknown dead persons and as required by section 2 of P.L.1982, c. 79 ([C.2A:4A-61](#)) of juveniles adjudicated delinquent and shall forward same to the State Bureau of Identification.

Any person charged in a complaint filed by a law enforcement officer with an indictable offense, who has not been arrested, or any person charged in an indictment, who has not been arrested, or any person convicted of assault or harassment constituting domestic violence as defined in section 3 of [P.L.1991, c. 261 \(C.2C:25-19\)](#), or any person against whom a final order has been entered in any domestic violence matter pursuant to the provisions of section 13 of [P.L.1991, c. 261 \(C.2C:25-29\)](#) shall submit himself to the identification procedures provided herein either on the date of any court appearance or upon written request of the appropriate law enforcement agency within a reasonable time after the filing of the complaint. Any person who refuses to submit to such identification procedures shall be a disorderly person.

Part V – Expansion of DNA Sampling in New Jersey

a.) Current law strictly limits DNA samples based upon an arrest. See generally NJSA 53:20.20

53:1-20.20. Persons convicted of sexual offenses to provide blood specimen for DNA testing

a. On or after January 1, 1995 every person convicted of aggravated sexual assault and sexual assault under [N.J.S.2C:14-2](#) or aggravated criminal sexual contact and criminal sexual contact under [N.J.S.2C:14-3](#) or any attempt to commit any of these crimes and who is sentenced to a term of imprisonment shall have a blood sample drawn or other biological sample collected for purposes of DNA testing upon commencement of the period of confinement.

In addition, every person convicted on or after January 1, 1995 of these offenses, but who is not sentenced to a term of confinement, shall provide a DNA sample for purposes of DNA testing as a condition of the sentence imposed. A person who has been convicted and incarcerated as a result of a conviction of one or more of these offenses prior to January 1, 1995 shall provide a DNA sample before parole or release from incarceration.

Every person arrested for an offense enumerated in this subsection shall provide a DNA sample for purposes of DNA testing prior to the person's release from custody.

b. On or after January 1, 1998 every juvenile adjudicated delinquent for an act which, if committed by an adult, would constitute aggravated sexual assault or sexual assault under [N.J.S.2C:14-2](#) or aggravated criminal sexual contact or criminal sexual contact under [N.J.S.2C:14-3](#), or any attempt to commit any of these crimes, shall have a blood sample drawn or other biological sample collected for purposes of DNA testing.

Every juvenile arrested for an act which, if committed by an adult, would constitute an offense enumerated in this subsection shall provide a DNA sample for purposes of DNA testing prior to the juvenile's release from custody.

c. On or after January 1, 1998 every person found not guilty by reason of insanity of aggravated sexual assault or sexual assault under [N.J.S.2C:14-2](#) or aggravated criminal sexual contact or criminal sexual contact under [N.J.S. 2C:14-3](#), or any attempt to commit any of these crimes, or adjudicated not delinquent by reason of insanity for an act which, if committed by an adult, would constitute one of these crimes, shall have a blood sample drawn or other biological sample collected for purposes of DNA testing.

d. On or after January 1, 2000 every person convicted of murder pursuant to [N.J.S.2C:11-3](#), manslaughter pursuant to [N.J.S.2C:11-4](#), aggravated assault of the second degree pursuant to paragraph (1) or (6) of subsection b. of [N.J.S.2C:12-1](#), kidnapping pursuant to [N.J.S.2C:13-1](#), luring or enticing a child in violation of [P.L.1993, c. 291 \(C.2C:13-6\)](#), engaging in sexual conduct which would impair or debauch the morals of a child pursuant to [N.J.S.2C:24-4](#), or any attempt to commit any of these crimes and who is sentenced to a term of imprisonment shall have a blood sample drawn or other biological sample collected for purposes of DNA testing upon commencement of the period of confinement.

In addition, every person convicted on or after January 1, 2000 of these offenses, but who is not sentenced to a term of confinement, shall provide a DNA sample as a condition of the sentence imposed. A person who has been convicted and incarcerated as a result of a conviction of one or more of these offenses prior to January 1, 2000 shall provide a DNA sample before parole or release from incarceration.

Every person arrested for an offense enumerated in this subsection shall provide a DNA sample for purposes of DNA testing prior to the person's release from custody.

b. What offenses will be covered under the revised law?

- 1.) Specific Offenses as noted in the current law**
- 2.) All 1st and 2nd degree crimes**
- 3.) All Crimes**
- 4.) All offenses (D/P & P/D/P)**
- 5.) Criminal offenses and Drunk Driving**
- 6.) Criminal Offenses and Specified D/P offenses (Domestic violence, Shoplifting and Prostitution) See Rule 7:2-2(e)**

c.) Expungement of Criminal Records

1.) 2C:52-1. Definition of expungement

a. Except as otherwise provided in this chapter, expungement shall mean the extraction and isolation of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system.

b. Expunged records shall include complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, "rap sheets" and judicial docket records.

2.) DNA Expungements currently limited to dismissals and reversals. See NJSA 53:1-20.25

