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FTCoE Contact:

Jeri Roper-Miller, PhD, F-ABFT
Senior Director, FTCoE
JeriMiller@rti.org

NIJ Contact:

Jennifer C. Love, PhD, D-ABFA
Physical Scientist
Office of Investigative and Forensic Sciences
Jennifer.love@usdoj.gov

**A Review of
Legislation
Associated With
Lawfully Owed DNA
Samples**

Technical Contacts

Patricia Melton, PhD

pmelton@rti.org

Shannon Krauss, PhD

skrauss@rti.org

Jonathan Kurland, JD

jkurland@aequitasresource.org

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Report Overview

The National Institute of Justice's (NIJ's) Forensic Technology Center of Excellence (FTCoE), led by RTI International, supports the criminal justice system by providing valuable resources that promote the use of technologies in the forensic science community and the application of adopting potential solutions into practice. The Federal Bureau of Investigation's Combined DNA Index System (CODIS) also supports the criminal justice system by generating investigative leads, aiding in the identification of perpetrators, and making connections between cases to identify serial criminal activity. DNA profiles obtained from convicted offenders and arrestees are entered into the appropriate index (i.e., Convicted Offender Index or Arrestee Index) and uploaded into the State DNA Index System and the National DNA Index System of CODIS. However, recent research and practitioner experiences have confirmed that the CODIS database is not consistently populated with DNA profiles obtained from convicted offenders' DNA samples and, in relevant states, arrestees' DNA samples. These samples—often referred to as “lawfully owed DNA” samples—are critical to CODIS, which is founded on the need for a comprehensive national DNA database. Recently published research,^{1, 2} including the FTCoE report, [Perspectives on Addressing the Collection, Tracking and Processing of Lawfully Owed DNA Samples](#),³ indicates that the gap caused by failing to upload lawfully owed DNA samples to CODIS is a result of complex factors, such as (1) the identification of individuals convicted of a qualifying offense that mandates submission of a DNA sample; (2) the variability regarding which agency is responsible for sample collection and when that collection should take place; and (3) the creation of a process to effectively track sample submission, processing, testing, and upload into CODIS.

Because state statutes are the primary authority by which criminal justice professionals carry out the expectations associated with CODIS entry, this report examines legislation associated with convicted offenders' samples to identify possible gaps and root causes associated with the systemic failure to collect, track, and test lawfully owed DNA samples effectively. To better understand the potential root causes of failures associated with lawfully owed DNA, the FTCoE, in partnership with [AEquitas](#),⁴ has examined current state legislation with the potential to create unintended issues related to entering convicted offender DNA samples in CODIS. These examples were compared against state legislation that provides additional clarity and support within its structure that may prevent such failures. This report is intended for policymakers, legislative decision-makers, and allied criminal justice professionals to use as a guide to effectively review their internal practices and legislation to improve processes associated with collecting, tracking, and testing convicted offender lawfully owed DNA samples for CODIS entry. The considerations, statutes, and processes for collecting lawfully owed DNA samples from arrestees differ from the processes associated with collecting lawfully owed DNA samples from convicted offenders. As such, ***this report focuses strictly on legislation associated with obtaining DNA samples from offenders convicted of qualifying offenses and does not focus on legislation associated with obtaining DNA samples from arrestees.***

Objectives

This report provides policymakers, legislative decision-makers, and allied criminal justice professionals with the following:

- An informational overview of the current issues associated with collecting, tracking, and testing lawfully owed DNA samples from convicted offenders.
- A review of legislation associated with collecting lawfully owed DNA samples from convicted offenders.

- A list of state legislation that could result in failure to effectively collect, track, and test of lawfully owed convicted offender DNA samples, compared with examples of possible legislative solutions that provide guidance and clarity to resolve these issues.

Methodology

To conduct this legislative review, the FTCoe, in partnership with AEquitas, used a two-step process that included (1) reviewing current state legislation associated with collecting, tracking, and testing convicted offender lawfully owed DNA samples for entry into CODIS and (2) reviewing the available literature that addresses the current issues associated with lawfully owed DNA samples from convicted offenders.

Introduction

The Federal Bureau of Investigation's (FBI's) Combined DNA Index System (CODIS) is a powerful tool that supports the criminal justice system by generating investigative leads, aiding in the identification of perpetrators, and making connections between cases to identify serial criminal activity. CODIS is often used generally to represent both the FBI's operations program for databases that support the criminal justice system and software for the system.⁵ DNA profiles obtained from forensic evidence, convicted offenders, and arrestees are entered into the appropriate index (i.e., Forensic Index, Convicted Offender Index, or Arrestee Index) and uploaded into the State DNA Index System and the National DNA Index System, which are both a component of CODIS. Through the search process, CODIS may identify an association between the DNA profile obtained from a forensic sample and the DNA profile obtained from a convicted offender or arrestee. This results in an *offender hit*, which is a valuable investigative lead that establishes a connection between the case and the potential perpetrator. The National DNA Index System has grown to over 14,800,000 convicted offender profiles and has produced over half a million CODIS hits.^{a 6}

Tremendous focus has been placed on policies and practices that improve the effectiveness of collecting evidentiary DNA samples associated with violent crimes such as aggravated assault, sexual assault, sexually motivated homicide, and homicide. For example, many states have passed legislation requiring that sexual assault kits (SAKs) are tracked and submitted for DNA testing in a timely manner.^{7; 8} This effort has been partly motivated by research associated with previously unsubmitted SAKs that illuminated the frequency of serial sexual assault offenders and the propensity of those serial offenders to cross-offend.^{1; 9-12} These national efforts have successfully increased the volume of sexual assault evidentiary DNA profiles submitted into CODIS. As sexual assault cases were linked together through CODIS *forensic hits*, investigators noticed that corresponding *offender hits* did not occur. Recent research has confirmed that the CODIS database is not consistently populated with DNA profiles

For this document, the FTCoe has defined the following terms:

- ▶ Carceral: Of, relating to, or suggesting a jail or prison.
- ▶ Expungement: The removal, destruction, or sealing of records.
- ▶ Interstate Compact: A pact or agreement between two or more states that may involve agreements for states to assume parole or probation supervision of offenders convicted and sentenced in the other state.
- ▶ Lawfully Owed DNA: A DNA sample obligated to be provided by an offender upon a statutorily designated point of arrest, conviction, sentencing, or other circumstance for an enumerated criminal violation.
- ▶ Legislative Intent: The goals of a legislature in passing a law or set of laws. If the text of a law is not clear, courts can sometimes use legislative intent in deciding whether the law should be applied.
- ▶ Litigants: A person or persons involved in a legal case.
- ▶ Plea Agreement: An agreement whereby a prosecutor agrees to a concession in charges or sentencing in exchange for a defendant pleading guilty or no contest. A plea agreement must be accepted or rejected by the court and, on occasion, can involve agreements to other terms.
- ▶ Serial Offender: An offender who commits multiple offenses, against different victims or the same victim, over time.
- ▶ Statutory Construction: The process of reading, understanding, and applying the text of a statute or statutes to a factual circumstance or episode.

^a CODIS hits in this context include both forensic hits (i.e., an association made between a forensic sample and a DNA profile obtained from a separate crime scene) and offender hits (i.e., an association made between an uploaded convicted offender or arrestee profile and a forensic sample).

obtained from convicted offenders' DNA samples and, in relevant states, arrestees. These "lawfully owed DNA" samples are critical for ensuring CODIS is a comprehensive national system that supports the criminal justice community. The CODIS database is an integral component of the criminal justice system for generating investigative leads, and the FBI, law enforcement agencies, and crime laboratories all strongly emphasize and support entering DNA profiles from evidentiary, convicted offender, and arrestee samples using standard operating procedures and protocols.

DNA profiles are provided to CODIS through state statutes requiring offenders to provide a biological sample either post-arrest or post-conviction for certain qualifying offenses. Although the language may vary, each state, the District of Columbia, and several territories (i.e., Guam, Puerto Rico, and the Virgin Islands) have laws requiring convicted offenders of qualifying offenses, which may also vary, to provide a biological sample that can be processed, uploaded, and made available for comparison in CODIS. All states have statutes pertaining to the collection of DNA samples from offenders convicted of certain offenses, but not every state permits the collection of DNA samples from arrestees of qualifying offenses. The considerations, statutes, and processes for collecting lawfully owed DNA samples from arrestees differ from the processes associated with collecting lawfully owed DNA samples from convicted offenders. As such, ***this report strictly focuses on legislation associated with obtaining DNA samples from convicted offenders of qualifying offenses and does not focus on legislation associated with obtaining DNA samples from arrestees.***

The FTCoe released a previous report entitled [*Perspectives on Addressing the Collection, Tracking and Processing of Lawfully Owed DNA Samples*](#),³ which provided an overview of the challenges and potential barriers leading to failures in practices associated with collecting, tracking, and testing lawfully owed DNA samples. That report noted that several jurisdictions were experiencing challenges in addressing lawfully owed DNA samples from convicted offenders because of the lack of clarity as to (1) which agency is responsible for the collection of such samples and (2) at what point in the incarceration processes DNA sample collection should take place.

Convicted offender DNA sample collection laws vary in each state in terms of what type of offense obligates an offender to provide a sample, whether a conviction should be the trigger for sample collection, and which agency is responsible for collecting the sample. Because of this interstate variability, the effectiveness of DNA sample collection laws may vary, and in some cases this can result in missed opportunities to identify and collect lawfully owed DNA samples. In those situations, modifying current legislative language could provide the needed clarification to improve policies and practices associated with collecting DNA samples from convicted offenders.

For an overview of qualifying offenses; collection, management, and expungement information; and state statutes pertaining to lawfully owed DNA for all U.S. states, the District of Columbia, and U.S. territories, please visit the [RAINN Lawfully Owed Search](#).¹³

To provide examples of legislation that may offer an improved approach to addressing lawfully owed DNA samples, the FTCoe and AEquitas conducted a legislative review and analysis of statutes associated with the collection, tracking, and testing of DNA samples from convicted offenders. This report does not aim to recommend a specific legislative preference regarding DNA collection laws but rather to identify areas where questions and conflicts may arise and subsequently highlight jurisdictions that have drafted statutes that address and minimize those issues.

Legislative Analysis of Lawfully Owed DNA Statutes in the United States

This legislative analysis examined the collection of DNA samples from offenders pursuant to federal law and the statutes from all 50 states, the District of Columbia, and several territories (i.e., Guam, Puerto Rico, and the Virgin Islands). The FTCoE and AEquitas conducted this analysis through a textual examination of the laws from each aforementioned jurisdiction to highlight both innovative and general approaches. This analysis is presented in the context of challenges and issues that have been made apparent in various jurisdictions while making efforts to execute these laws. Although there was a purposeful effort to avoid any specific policy recommendations, this report highlights contrasting approaches and identifies statutory remedies to problems articulated by practitioners when possible. Ideally, this report will provide policymakers, legislative decision-makers, and allied criminal justice professionals with a resource to guide further optimization of the effectiveness of their DNA collection, tracking, and processing laws by showing promising approaches from several jurisdictions.

Statutes Related to Collecting, Tracking, and Testing Lawfully Owed DNA Samples

This legislative analysis identified 10 categories that can greatly impact a jurisdiction's ability to collect, track, and test lawfully owed DNA samples. These categories are described below to contextualize how the legislation affects the collection process, examples of developed legislation, and considerations for aligning the legislation with a more optimal solution to prevent or address issues associated with the collection of lawfully owed DNA samples.

1. Statement of Legislative Intent

This review identified that not all jurisdictions include a statement of legislative intent in their DNA collection laws. Including such declarations is advantageous because it helps the court apply principles of statutory construction to decide the limits to or extent of a law when applied to a particular case. For example, the meaning of statutory text can often be supplemented with an articulated statement of legislative intent and can thereby make a statute clearer to potential litigants and the courts. A statement of legislative intent can also help courts understand how the legislature intended the law to be applied and clarify the text of the law when it is difficult to understand and apply. In the absence of a statement of legislative intent, a court can have difficulty objectively deciding how to

Navigating Legislative Code Formats

For readers who are unfamiliar with reviewing statutes, it is helpful to note that statutory citations are structured to reference the title (or volume number) of a code, the abbreviation used for the code, the chapter in the title containing the statute, and the section number of the code. The precise combination can vary from jurisdiction to jurisdiction, but the U.S. Code and Georgia Code within this table can provide examples of the general format used for national and state codes, respectively.

| United States Code | Core Elements | State Code |
|-----------------------------|-----------------------------------|----------------------------|
| 34 USC § 12592(b)(3) | | Ga. Code § 35-3-161 |
| 34 | Code (Type of Legislation) | |
| USC (United States Code) | Jurisdiction | Ga. (Georgia) |
| 12593 | Section | 35 |
| (b) | Subparagraph or Chapter | 3 |
| (3) | Sub-Section | 161 |

apply statutory text that may be ambiguous and thus cannot appropriately interpret and apply it. Ultimately, a clear statement of legislative intent can help to prevent or resolve adversarial litigation. Although the appropriate purpose of a DNA collection law is a policy preference that is beyond the scope of this report, Florida provides a succinct example:

“ (1) *Legislative intent.*—

- (a) *The Legislature finds that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of criminal investigations or prosecutions and in detecting recidivist acts. It is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interests of the citizens of this state to establish a statewide DNA database containing DNA samples submitted by persons convicted of or arrested for felony offenses and convicted of certain misdemeanor offenses. Additionally, the statewide DNA database shall include DNA records and samples necessary for the identification of missing persons and unidentified human remains, including DNA samples voluntarily contributed by relatives of missing persons.*
- (b) *The Legislature also finds that upon establishment of the Florida DNA database, a match between casework evidence DNA samples from a criminal investigation and DNA samples from a state or federal DNA database of certain offenders may be used to find probable cause for the issuance of a warrant for arrest or to obtain the DNA sample from an offender.* ”

[F.S. § 943.325 – DNA Database](#)¹⁴

Particularly of note is the correlation of F.S. § 943.325(1) with the purpose of CODIS set forth in [34 USC § 12592\(a\)](#)¹⁵ and the limitations on contributions to CODIS established in [34 USC § 12592\(b\)\(3\)](#).¹⁵

In this example, if a conflict arises as to how Florida’s collection laws can be applied, this statement of legislative intent allows the conflict to be resolved in a manner consistent with the goal of the state database’s eligibility for inclusion in CODIS.

Key Takeaway 1: A statement of legislative intent provides clarity and further defines the intended application of the statute. As applied to lawfully owed DNA, legislative intent provides clarification that improves collection processes by defining the individual who legally owes a DNA sample and the purpose of this collection in regard to how it will support the DNA database. ***Without a defined statement of legislative intent, any ambiguity about the law’s applicability to unusual circumstances may be resolved in a manner that was not intended by the legislature.***

2. Collection Procedures for Obtaining Lawfully Owed DNA Samples

2a. Defining When and How Lawfully Owed DNA Samples Should Be Collected

States have adopted statutes that delineate the timing and procedure for collecting DNA samples from convicted offenders. This review found that the clarity in states’ strategies regarding sample collection timing and process

varies. A lack of detail or clarity can lead to erroneous assumptions regarding (1) which agency or allied criminal justice professional is responsible for sample collection and (2) when collection should be conducted.³ Having legislation that provides detailed procedures helps better define roles, responsibilities, and expectations for agencies involved with collecting DNA from convicted offenders.

Georgia is one jurisdiction that presents a statute with an equal balance of clarity and specificity pertaining to when and how lawfully owed DNA samples should be collected:



(a) Each [DNA] sample required pursuant to [Code Section 35-3-160](#) from persons who are to be incarcerated shall be withdrawn within the first 30 days of incarceration at the receiving unit of the detention facility or at such other place as is designated by the department. Each sample required pursuant to [Code Section 35-3-160](#) from persons who are to be released from a detention facility shall be withdrawn within the 12 months preceding such person's release at a place designated by the department. The required samples from persons who are not sentenced to a term of confinement shall be withdrawn as a condition of probation. The division shall publish in its quality manuals the procedures for the collection and transfer of samples to such division pursuant to [Code Section 35-3-154](#). Personnel at a detention facility shall implement the provisions of this Code section as part of the regular processing of offenders.

(b) Samples collected by oral swab or by a noninvasive procedure may be collected by any individual who has been trained in the procedure. Only a correctional health nurse technician, physician, registered professional nurse, licensed practical nurse, graduate laboratory technician, or phlebotomist shall withdraw any sample of blood to be submitted for analysis. No civil liability shall attach to any person authorized to take a sample as provided in this article as a result of the act of taking a sample from any person submitting thereto, provided the sample was taken according to recognized medically accepted procedures. However, no person shall be relieved from liability for negligence in the withdrawing of any blood sample.

(c) Chemically clean sterile disposable needles shall be used for the withdrawal of all samples of blood. The containers for blood samples, oral swabs, and the samples obtained by noninvasive procedures shall be sealed and labeled with the subject's name, social security number, date of birth, race, and gender plus the name of the person collecting the sample and the date and place of collection. The containers shall be secured to prevent tampering with the contents. The steps set forth in this subsection relating to the taking, handling, identification, and disposition of samples are procedural and not substantive. Substantial compliance therewith shall be deemed to be sufficient. The samples shall be transported to the division not more than 15 days following withdrawal and shall be analyzed and stored in the DNA data bank in accordance with [Code Section 35-3-162](#) and [Code Section 35-3-163](#).



[Ga. Code § 35-3-161 – Time and Procedure for Withdrawal of Blood Samples](#)¹⁶

The following are notable features about the Georgia law:

- Specific and individualized timelines for collection to be completed for individuals who are incarcerated, released from a detention facility, or supervised on probation.
- Designated individuals who are authorized to collect buccal swabs and those who can collect blood samples pursuant to previously established procedures.
- Delineated procedural requirements to help track collected samples.
- Deadlines to transfer samples for analysis and storage in the state's DNA data bank.

2b. Specifying Who Is Authorized to Collect Lawfully Owed DNA Samples

Another question that arises in the collection of lawfully owed DNA samples is which agency or allied criminal justice professional is responsible for collecting the sample. Some jurisdictions are open-ended in their approach to this question. For example, Maine's statute indicates the following:

“ 1. **Conviction subsequent to effective date.** *A person convicted, on or after January 1, 1996 and before October 1, 2001, of a crime listed in subsection 4 or a person convicted on or after October 1, 2001, of a crime listed in subsection 5 shall submit to having a DNA sample taken and at the time of sentencing the court shall enter an order directing that the DNA sample be taken. If the convicted person's sentence includes a straight term of imprisonment or a split term of imprisonment, the DNA sample may be taken at any time following the commencement of the straight term or initial unsuspended portion of the term of imprisonment. If the convicted person's sentence includes a period of probation but no immediate imprisonment, the DNA sample may be taken at any time following commencement of the probation period as directed by the probation officer. If the convicted person's sentence includes a period of probation, the court may attach the duty to submit to having a DNA sample taken as a condition of probation.* ”

[25 MRS § 1574\(1\) – Biological Sample Required for DNA Analysis Upon Conviction or Adjudication](#)¹⁷

Although this statutory language provides flexibility, it does not provide clear guidance on the party responsible for sample collection, and there is no urgency in when the sample must be collected. In comparison, the Connecticut law states the following:

“ **Procedure for collection of blood or other biological sample for DNA analysis.** (a) (1) *The collection of a blood or other biological sample from persons required to submit to the taking of such sample pursuant to [post-arrest collection triggers] shall be the responsibility of the law enforcement agency that arrested such person and shall be taken at a time and place specified by that agency prior to such person's release from custody.*

(2) *The collection of a blood or other biological sample from persons required to submit to the taking of such sample pursuant to [post-conviction triggers for incarcerated offenders] shall be the responsibility of the Department of Correction and shall be taken at a time and place specified by the Department of Correction.*

(3) *The collection of a blood or other biological sample from persons required to submit to the taking of such sample pursuant to [post-conviction triggers for sexual offenses against*

children] shall be the responsibility of the Judicial Department and shall be taken at a time and place specified by the Court Support Services Division.

(4) The collection of a blood or other biological sample from persons required to submit to the taking of such sample pursuant to [offenders acquitted of certain offenses for reasons of mental disease or defect] shall be the responsibility of the Commissioner of Mental Health and Addiction Services or the Commissioner of Developmental Services, as the case may be, and shall be taken at a time and place specified by said commissioner.

(5) The collection of a blood or other biological sample from persons required to submit to the taking of such [post-conviction triggers for offenders on probation/parole] shall be the responsibility of the Judicial Department if such person is serving a period of probation and of the Department of Correction if such person is serving a period of parole and shall be taken at a time and place specified by the Court Support Services Division or the Department of Correction, as the case may be.

(6) The collection of a blood or other biological sample from persons required to submit to the taking of such sample pursuant to [offenders acquitted of certain out of state offenses for reasons of mental disease or defect] shall be the responsibility of the agency in whose custody or under whose supervision such person has been placed, and shall be taken at a time and place specified by such agency.

(b) Only a person licensed to practice medicine and surgery in this state, a qualified laboratory technician, a registered nurse or a phlebotomist shall take any blood sample to be submitted to analysis.



[CGS § 54-102h – Trial and Proceedings After Conviction](#)¹⁸

The Connecticut legislation clearly designates the agencies responsible for specific types of offenders in circumstances accompanied by a statutory command of “shall” rather than the discretionary “may.”

Although an open-ended statute may have been intended to provide flexibility, it could create a lack of direction and does not specify the party responsible for collection, which may result in failure to collect the sample. In addition, it is important that the legislation also consider resources and training to ensure the agencies or allied criminal justice professionals responsible for the collection have the knowledge, resources, and staff to collect these samples and meet the requirements of the statute.

Key Takeaway 2: Providing wording in the statute that clearly defines the agency or allied criminal justice professional responsible for collection, when collection should take place, and how the collection should be conducted is likely a significant factor in reducing the confusion surrounding the collection process. **A clear and mandatory designation of DNA sample collection may clarify and potentially avoid missing opportunities to collect lawfully owed DNA samples.**

3. Tracking Collected DNA Samples From Convicted Offenders

A methodology for tracking DNA samples from when they are collected to when they are tested and entered into the database is essential for reliability and efficiency. The statutory approaches of many jurisdictions do not identify

a process for effectively tracking and documenting (i.e., initiating a chain of custody) of a lawfully owed DNA sample at the time of collection. Georgia is a jurisdiction that provides guidance on this issue. Reference to [Ga. Code § 35-3-161](#)¹⁶ was previously made in the context of delineating the timeline requirements for collecting samples, but a complement to [Ga. Code § 35-3-161](#)¹⁶ is [Ga. Code § 35-3-162](#),¹⁹ which reads as follows:



Whether or not the results of an analysis are to be included in the data bank, the bureau shall conduct the DNA analysis in accordance with procedures adopted by the bureau to determine identification characteristics specific to the individual whose sample is being analyzed. The director or his or her designated representative shall complete and maintain on file a form indicating the name of the person whose sample is to be analyzed, the date and by whom the sample was received and examined, and a statement that the seal on the container containing the sample had not been broken or otherwise tampered with. The remainder of a sample submitted for analysis and inclusion in the data bank pursuant to [Code Section 35-3-160](#) may be divided, if possible, labeled as provided for the original sample, and securely stored by the bureau in accordance with specific procedures of the bureau to ensure the integrity and confidentiality of the samples. All or part of the remainder of that sample may be used only to create a statistical data base provided no identifying information on the individual whose sample is being analyzed is included or for retesting by the bureau to validate or update the original analysis. A report of the results of a DNA analysis conducted by the bureau as authorized, including the identifying information, shall be made and maintained at the bureau. Except as specifically provided in this Code section and [Code Section 35-3-163](#), the results of the analysis shall be securely stored and shall remain confidential.



[Ga. Code § 35-3-162 – Procedure for Analysis and Storage of Blood Sample; Use of Remainder of Sample Not Subjected to Analysis; Confidentiality of Results](#)¹⁹

Together, [Ga. Code § 35-3-161](#)¹⁶ and [Ga. Code § 35-3-162](#)¹⁹ create a statutory protocol that ensures the sample collected is the same sample that is analyzed and entered into the database. Georgia law states that if a sample has previously been collected, a duplicate sample is not needed.²⁰ However, the law fails to present measures requiring the collecting agency to verify that a sample has already been collected for the database. The absence of such an obligation on the collector creates the risk of multiple samples being submitted for analysis, thereby creating inefficiency.

The following Colorado statute provides an example of a statute that mitigates the potential for such redundancy:



(4) An agency collecting a biological substance sample pursuant to this section shall make reasonable efforts to determine if the Colorado bureau of investigation already holds a biological substance sample from the adult. If, but only if, the agency determines that the Colorado bureau of investigation already holds a sample from the adult, then the agency need not collect a sample.



[CRS § 16-23-103 – Collection of Biological Samples from Persons Arrested for or Charged with Felonies](#)²¹

Provisions for documenting and tracking collected samples, in addition to the chain of custody, are more than a legalistic tangent. Rather, clarifying and prioritizing procedures ensures that a sample collected from the offender is the same sample transmitted for analysis and ultimately included in a database.

In general, this analysis found that most legislation does not address the tracking of DNA samples at the collection phase, creating a gap in the overall process of identifying lawfully owed DNA samples and thereby reducing efficiency. Although the collection processes typically defined in the legislation trigger the creation of any required documentation and chain of custody at the time of sample collection, tracking is often not initiated until the sample is submitted to the laboratory for processing. This lack of tracking, combined with the lack of communication between collection agencies and laboratory systems, creates opportunities for missed collections. Furthermore, unspecified tracking procedures can increase the likelihood of samples not being collected at statutorily designated times or resources being unnecessarily expended because multiple samples are collected from offenders. These problems are particularly concerning with respect to offenders who owe DNA samples in one state but reside in a different state.

Key Takeaway 3: Legislation that clarifies the processes for effectively tracking collected lawfully owed DNA samples from identified convicted offenders will improve efficiency, enhance resource allocation, prevent unnecessary resource depletion due to redundant collection efforts, reduce inefficiencies associated with testing duplicate samples, and decrease the probability of missed opportunities to collect lawfully owed DNA samples. ***Proper sample tracking and accessibility of associated records by collecting parties may prevent the collection of redundant samples and unwarranted assumptions about whether a sample was already collected from the individual.***

4. Ability to Collect Lawfully Owed, Previously Uncollected Samples

Clear statutory construction can offer an avenue for collecting a DNA sample that is legally owed but not yet collected. Failures to collect may occur because of a lack of tracking processes, a lack of clarity addressing **who** is responsible for collecting or **when** the sample should be collected, or a general absence of policy and practice associated with collecting DNA samples from convicted offenders. When a lawfully owed sample is not collected for any of the aforementioned reasons, the next question is **whether** a sample may be legally collected. If the statute only allows for collection at a certain moment in the incarceration process (e.g., at the time of arrest, at the time of booking, at the time of sentencing, before release), the critical question becomes, “Can a sample be legally collected outside of that time frame?” In other words, if an individual who owes a sample is not under supervision, either carceral or post-carceral, do the collection statutes offer any explicit or implicit authority to obtain a sample? One possible solution could be to specify a deadline by which a sample must be collected or to establish procedures to obtain a lawfully owed DNA sample at any point with no established deadline. Unfortunately, the statutes in many jurisdictions are ambiguous as to when and whether a previously uncollected lawfully owed DNA sample can be collected.

Minnesota offers a clear example of a statute that permits collection of a lawfully owed DNA sample at any time after the sentence or supervision of the individual expires with no defined deadline for collection:

“ **After supervision expires.** (a) Upon motion of a prosecuting authority, a court shall issue an order to show cause why an offender who should have been ordered or required to provide a biological specimen under this section but did not, should not now be ordered to provide

one for the purposes of DNA analysis. This subdivision applies if the offender’s sentence or supervision has expired. The prosecuting authority shall provide the court with an affidavit that:

- 1. identifies the offender by name and date of birth;*
- 2. identifies the offender’s last known address;*
- 3. identifies the offender’s charged offense, offense of conviction, and date of conviction; and*
- 4. indicates that the Bureau of Criminal Apprehension database of biological specimens has been searched and the offender has not previously provided a biological specimen for DNA analysis under this chapter.*

(b) The order to show cause shall direct the offender to appear before the court within 30 days after the order is served. The prosecutor shall serve the order to show cause upon the offender in the same manner as a civil summons. The offender may avoid appearing before the court by appearing at a place and time designated in the order and voluntarily providing the specimen.

(c) Upon the offender’s appearance before the court, and after an opportunity to be heard, the court may issue an order directing the offender to provide the specimen.

(d) If the offender has failed to provide the specimen or appear before the court and the prosecuting authority makes a sufficient showing that the offender was properly served with the order to show cause, the court may issue an order:

- 1. requiring the offender to submit the specimen within 30 days from the date of the order at a designated location;*
- 2. including the designated location’s address, telephone number, and regular hours of operation; and*
- 3. authorizing, if the offender fails or refuses to comply with the order to provide a specimen, a peace officer to detain and bring the offender before the court as soon as practicable to show cause why the specimen should not be obtained.*



[M.S. § 609.117, subd. 4 – DNA Analysis of Certain Offenders Requires](#)²²

Subparagraph (a) explicitly states that the authority to collect is independent of the expiration of the offender’s sentence or supervision.

Policymakers can add language that specifies a lawfully owed sample may only be collected while an offender is under a sentence or supervision. Although no jurisdiction has explicitly declared that policy preference, New Mexico appears to adopt a similar approach given statutory language that samples must be provided upon “request” so long as the request is made before release from incarceration, the end of probation, or supervisory release.²³ [N.M.S. § 29-16-9](#)²³ provides prosecutors with an avenue to petition for a court order if an individual does not provide a sample; however, that approach can only be pursued if the individual is “required” to provide a sample. This stipulation would not be applicable if an individual is not incarcerated, on probation, or under supervisory release.

In short, one unresolved question in many jurisdictions is, “What is the extent of authority to obtain DNA samples from offenders who lawfully owe them if samples were not collected at a statutorily designated point in time?” The open-ended nature of this question can be compounded if the offender’s sentence has expired or if the offender is no longer living within the jurisdiction in which the offense was committed.

Another facet of this issue—that of lawfully owed, previously uncollected samples—is whether a sample can be collected from a deceased offender. **No collection laws specifically provide for this circumstance by authorizing exhuming a body or other methods.** However, if there is sufficient evidence to suspect a deceased offender was involved in a specific crime, there may be sufficient reasoning to obtain a search warrant authorizing the collection of a sample. The rationale for obtaining a sample from an offender who is deceased is that the addition of this collected sample to a DNA database can help resolve previously unresolved crimes, thereby bringing justice for victims, minimizing investigative attention on individuals who are not culpable, and improving public safety more broadly, especially in instances of serial offenders. For states that do not address how to collect lawfully owed, previously uncollected samples, the issue will likely be resolved through litigation that may result in outcomes not anticipated by policymakers. A more ideal method would be to address the question in the manner done by jurisdictions such as Minnesota and New Mexico (presented above) in an effort to be proactive rather than reactive when this issue arises.

Key Takeaway 4: Legislation that defines collection procedures to avoid missing an opportunity to collect a lawfully owed DNA sample should be in place. Even if proactive measures and improved legislation associated with collecting and tracking lawfully owed DNA samples are implemented, having guidance for missed lawfully owed DNA samples would further support an overall effective collection process. Such legislative guidance could extend to the consideration for collecting a lawfully owed DNA sample from an offender who is deceased.

5. Collecting Lawfully Owed DNA Samples From Interstate Individuals

A state can use multiple criteria to decide what kind of offender should be obligated to provide a DNA sample. Many jurisdictions may have an unintentional gap in their legislature related to offenders with qualifying offenses who are obligated to supply a DNA sample—but from whom a sample was not collected—who transfer within the justice system to a new state. Having decided which qualifying offenses obligate a DNA sample for a state’s DNA database, it seems incongruent that an individual with an equivalent qualifying offense from another state would be deliberately excluded from that database. **In other words, out-of-state offenders convicted of equivalent qualifying offenses can in theory be obligated to provide a sample under the law of their new state, even if the underlying conviction did not occur under the laws of the new state.**

Nevertheless, many jurisdictions’ statutes do not provide guidance on how to handle collecting lawfully owed DNA samples from interjurisdictional convicted offenders. South Dakota’s statute is offered here as an example of authorizing the collection of a sample from an out-of-state offender:

“ If the state accepts a person from another state under any interstate compact, or under any other reciprocal agreement with any county, state, or federal agency, or any other provision of law, whether or not the person is confined or released, the acceptance is conditional on the person providing a DNA sample if the person was convicted of an offense in any other jurisdiction which would be considered a qualifying offense as defined in [§ 23-5A-1](#) if committed in this state, or if the person was convicted of an equivalent offense in any other

jurisdiction. The person shall provide the DNA sample in accordance with the rules of the custodial institution or supervising agency.



[S.D.C.L. § 23-5A-7 – Interjurisdictional Provisions to Provide DNA Sample](#)²⁴

A seemingly unavoidable gap for collection laws is if an offender moves to a new state before the original state collects a sample. In combination with jurisdictional limitations, this gap is especially challenging if that offender's sentence or supervision has expired. However, one method to ensure that the DNA profile of such offenders is included in a national database is to ensure that states have provisions for collecting samples from out-of-state offenders with equivalent qualifying offenses.

Key Takeaway 5: States should consider implementing legislation that clarifies how to collect DNA samples from individuals who either relocate within their state system or depart their state system before their lawfully owed DNA sample has been collected.

6. Collecting Samples as a Condition of Negotiated Plea Agreements

As previously discussed, states have made thoughtful decisions about which types of offenses qualify an offender to be obligated to provide a DNA sample for the state database. Sexual assault cases settled by plea agreements with reduced charges resulting in the conversion from a qualifying offense to a non-qualifying offense can be concerning because of the propensity of recidivism rates and serial and crossover offending of sex offenders. Not having a DNA sample in CODIS may result in a failure to identify other cases associated with that offender and may, in turn, have negative implications for public safety.^{1; 9-12} Statutorily providing an option that a DNA sample can be required and subsequently submitted to the state database as a term of a negotiated plea agreement could provide some flexibility. California's statute offers an example:

“(5) Nothing in this chapter shall be construed as prohibiting collection and analysis of specimens, samples, or print impressions as a condition of a plea for a non-qualifying offense.”



[Cal. Penal Code § 296\(a\)\(5\) – Offenders Subject to Sample Collection](#)²⁵

Permitting samples to be included in a database pursuant to a negotiated plea agreement builds the database regardless of whether a plea agreement that would reduce a non-qualifying offense is accepted. DNA samples obtained pursuant to plea agreements can help identify unknown forensic samples in the database and resolve additional previously unresolved cases.

Key Takeaway 6: Legislation that provides guidance for collecting a DNA sample when the associated plea agreement reduces the offense from a qualifying offense to a non-qualifying offense maintains the ability to build the database to resolve cases.

7. Addressing Resistance to Providing Lawfully Owed DNA Samples

DNA collection laws do not always specify what can be done if the offender refuses to cooperate in providing the lawfully owed DNA sample. Two aspects of this challenge can be addressed in a statute:

1. What can the collector of the sample do or not do?
2. What can happen to the offender?

Many jurisdictions provide statutory authorization for the collector to use reasonable force and immunity from civil liability. Although these provisions are similar, this Arkansas statute provides an example:

“ (k)(1) An authorized law enforcement agency or an authorized correctional agency may employ reasonable force if an individual refuses to submit to a taking of a DNA sample authorized under this subchapter.

(2) An employee of an authorized law enforcement agency or an authorized correctional agency is not criminally or civilly liable for the use of reasonable force described in subdivision (k)(1) of this section.

[A.C. § 12-12-1006\(k\) – Fingerprinting, DNA Sample Collection, and Photographing](#)²⁶

When the offender refuses to provide a lawfully owed DNA sample, available remedies range from making the refusal a criminal offense or subjecting the refuser to contempt-of-court proceedings. These alternatives may be especially attractive when the use of force is discouraged, even when authorized and immune from litigation. An example of criminalizing a refusal is provided in this Connecticut statute:

“ (i) Any person who refuses to submit to the taking of a blood or other biological sample pursuant to this section or willfully fails to appear at the time and place specified pursuant to subsection (b) of this section for the taking of a blood or other biological sample shall be guilty of a class D felony. Any person required to submit to the taking of a blood or other biological sample pursuant to subsection (c) of this section who willfully fails to appear to submit to the taking of such sample within five business days of the time specified by the Court Support Services Division may be arrested pursuant to a warrant issued under section 54-2a.

[C.G.S. § 54-102g\(i\) – Blood or Other Biological Sample Required from Certain Arrested or Convicted Persons for DNA Analysis](#)²⁷

In comparison, Iowa subjects the refuser to contempt proceedings:

“ 3. A person required to submit a DNA sample who refuses to submit a DNA sample may be subject to contempt proceedings pursuant to chapter 665 until the DNA sample is submitted.

[I.C. § 81.4\(3\) – Collecting, Submitting, Analyzing, Identifying, and Storing DNA Samples and DNA Records](#)²⁸

A contempt finding or minimal additional criminal violation may not have much impact on offenders who are already serving long terms of incarceration. However, if contempt sanctions or new criminal violations can be combined with administrative remedies imposed by correctional institutions, there may be additional compliance with efforts to obtain samples.

Key Takeaway 7: Legislation that provides remedies beyond the applicable use-of-force legislation may be appealing and can provide acceptable alternatives that result in the collection of the lawfully owed DNA sample.

8. Limits to and Extent of Using Data From DNA Databases

For a state to have DNA records compatible with the national level of CODIS, federal law requires states to agree to limits on the disclosure of information in its database. Those limits are as follows:

“ [CODIS] shall include only information on DNA identification records and DNA analyses that are—

...

(3) maintained by Federal, State, and local criminal justice agencies (or the Secretary of Defense in accordance with section [1565 of Title 10](#)) pursuant to rules that allow disclosure of stored DNA samples and DNA analyses only--

(A) to criminal justice agencies for law enforcement identification purposes;

(B) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules;

(C) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or

(D) if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.

”

[34 U.S.C.A. § 12592\(b\) – Index to Facilitate Law Enforcement Exchange of DNA Identification Information](#)²⁹

Under the terms of the statutory language, a state could limit disclosure more restrictively, but not more expansively, than provided by section [12592\(b\)](#).¹⁵ Alaska is an example of a jurisdiction with a statute that allows for wide use of data from its DNA database (**emphasis added**):

“ (f) The DNA identification registration system is confidential, is not a public record under [AS 40.25.110 - 40.25.140](#), and may be used only for

(1) providing DNA or other blood grouping tests for identification analysis;

(2) criminal investigations, prosecutions, and identification of human remains;

(3) statistical blind analysis;

(4) improving the operation of the system; or

(5) **exoneration of the innocent**

”

[A.S. § 44.41.035 – DNA Identification System](#)³⁰

Despite the legal authority to do so, specifying that DNA records can be used for an exoneration is unusual, especially because it suggests that requests to compare DNA profiles with those contained in the state DNA database can be initiated by someone other than state actors.

*In contrast to the extent to which Alaska law permits disclosure, Vermont law contains a narrower window (**emphasis added**):*

- “ (a) A DNA sample and a DNA record obtained pursuant to this subchapter shall be used only for the purposes authorized in this subchapter and may be provided to law enforcement agencies for lawful law enforcement purposes.
- (b) The tissue, fluid, or other substance from which the DNA is extracted shall be used only for DNA sample analysis authorized in this subchapter and may be provided to law enforcement agencies only for DNA sample analysis for use in any investigation and prosecution.
- (c) Only DNA samples shall be stored in the state DNA data bank.
- (d) Only DNA records derived from DNA samples shall be stored in the state DNA database.
- (e) Except as provided in section 1939 of this chapter, no DNA records derived from DNA samples shall be aggregated or stored in any database, other than CODIS and the state DNA database, that is accessible by any person other than by the department for the purpose for which the samples were collected.
- (f)(1) Except for forensic unknown samples, no samples of tissue, fluid or other biological substance voluntarily submitted or obtained by the execution of a nontestimonial identification order^(a) shall be entered into the state DNA data bank. However, such samples may be used for any other purpose authorized in section 1937 of this subchapter.
- (2) Notwithstanding the prohibition of subdivision (1) of this subsection, any sample which may lead to an exculpatory result shall be used only for the purpose of the criminal investigation and related criminal prosecution for which the samples were obtained. Upon the conclusion of the criminal investigation and finalization of any related criminal prosecution, such samples shall be placed under seal, and shall not be used for any purpose whatsoever, except pursuant to a judicial order for good cause shown.
- (3) Notwithstanding the prohibition of subdivision (1) of this subsection, any sample which may lead to an exculpatory result shall be used only for the purpose of the criminal investigation and related criminal prosecution for which the samples were obtained. Upon the conclusion of the criminal investigation and finalization of any related criminal prosecution, the genetic records shall be placed under seal, and shall not be used for any purpose whatsoever, except pursuant to a judicial order for good cause shown.
- (g) Except for records obtained from forensic unknown samples, **no DNA records of samples of tissue, fluid or other biological substance which were obtained as the result of either consensual submission of biological evidence or the execution of a nontestimonial identification order shall be entered into the State DNA database.** ”

Section 1938(g)³¹ would preclude a DNA sample that a victim consensually provides during a sexual assault forensic medical examination from being entered into Vermont's DNA database. Vermont's specificity helps prevent a victim's DNA sample from being compared with the records stored in CODIS. If a victim's DNA sample were compared with the information contained in the national level of CODIS or in a state database, it would likely be beyond the scope of that victim's consent, thereby making it unlawful and impinging on victims' rights laws.

Key Takeaway 8: Ultimately, federal law provides guidance on the extent of record disclosures stored in CODIS. Targeting a state's law to coincide, as closely as possible, with that guidance can be conducive to maximizing the impact of the database. However, caution should be taken to ensure that the privacy expectations and rights of victims are always upheld.

9. Good-Faith Exception for Using DNA Records Inadvertently Remaining in the Database

One of the purposes of a DNA database is to use the DNA profile information it contains to assist with open investigations with the intent of resolving cases and improving public safety. If DNA profiles that should have been expunged remain in a DNA database, it can raise issues of whether any arrests or charges derived from matches associated with those DNA profiles are valid. **One example is when an offender's conviction is overturned and the DNA profile should be expunged from the database. The expungement process may not be completed immediately, and another CODIS hit could take place in the interim.** Therefore, an investigation that moves forward based on the CODIS hit that took place during the interim period is likely to be addressed under a good-faith exception statute because the investigator is not acting under bias but rather on the known information at the given time.

Although not necessarily a single-faceted or clear issue, many jurisdictions incorporate an explicit statutory provision recognizing a good-faith exception to the use of DNA records that remained in the database after an expungement should have occurred, which can help mitigate litigation. Illinois has such a statutory provision:

“ (c) Mistake does not invalidate a database match. The detention, arrest, or conviction of a person based upon a database match or database information is not invalidated if it is determined that the specimen was obtained or placed in the database by mistake. ”

[730 I.L.C.S. 5/5-4-3\(o\) – Specimens; Genetic Marker Groups](#)³²

Lack of a good-faith exception may result in investigators and prosecutors feeling uncomfortable using the database based on concerns that its use may jeopardize cases if samples are not efficiently expunged from the database, regardless of the reason. Additionally, without a good-faith exception, law enforcement agencies may become responsible for ensuring the validity of every sample before submitting an inquiry. Both situations negatively impact the investigation and prosecution of cases.

Key Takeaway 9: Legislation that clarifies and defines a good-faith expectation for samples inadvertently not expunged and remaining in the database and helps mitigate litigation processes for associated cases.

10. Expungement of DNA Samples From DNA Records

Although the previous section pertains to establishing a good-faith exception statute for the use of DNA records in a DNA database, guidance must also be provided for effectively and efficiently expunging DNA records from the database. As a condition of CODIS access, states must provide an outlet for expunging any DNA record that is inappropriately included in a database.¹⁵ To fulfill this [federal requirement](#),¹⁵ most states have established a process through which an offender can petition for their DNA record to be removed from the database when certain enumerated preconditions are met. A succinct sample of a statute requiring proactive efforts to expunge DNA records can be seen in Arizona's legislature:

“ M. A person who is [required to provide a DNA sample] may petition the superior court in the county in which the arrest occurred or the criminal charge was filed to order that the person's deoxyribonucleic acid profile and sample be expunged from the Arizona deoxyribonucleic acid identification system, unless the person has been arrested, charged with or convicted of or adjudicated delinquent of another offense that would require the person to submit to deoxyribonucleic acid testing pursuant to this section, if any of the following applies:

1. The criminal charges are not filed within the applicable period prescribed by [section 13-107](#).
2. The criminal charges are dismissed.
3. The person is acquitted at trial.

”

[A.R.S. § 13-610\(M\) – DNA Testing](#)³³

A less common approach adopted by states to address the expungement obligation is to require automatic expungement for DNA records that are not qualified to be included in the database. Maryland offers an example of a law requiring automatic expungement:

“ (a)(1) Except as provided in paragraph (2) of this subsection, any DNA samples and records generated as part of a criminal investigation or prosecution shall be destroyed or expunged automatically from the State DNA data base if:

- (i) a criminal action begun against the individual relating to the crime does not result in a conviction of the individual;
- (ii) the conviction is finally reversed or vacated and no new trial is permitted; or
- (iii) the individual is granted an unconditional pardon.

(2) A DNA sample or DNA record may not be destroyed or expunged automatically from the State DNA data base if the criminal action is put on the stet docket^[a] or the individual receives probation before judgment.

(b) If the DNA sample or DNA record was obtained or generated only in connection with a case in which eligibility for expungement has been established, the DNA sample shall be destroyed and the DNA record shall be expunged.

(c) Any DNA record expunged in accordance with this section shall be expunged from every data base into which it has been entered, including local, State, and federal data bases.

- (d) An expungement or destruction of sample under this section shall occur within 60 days of an event listed in subsection (a) of this section.*
- (e) A letter documenting expungement of the DNA record and destruction of the DNA sample shall be sent by the Director to the defendant and the defendant's attorney at the address specified by the court in the order of expungement.*
- (f) A record or sample that qualifies for expungement or destruction under this section and is matched concurrent with or subsequent to the date of qualification for expungement:
 - (1) may not be utilized for a determination of probable cause regardless of whether it is expunged or destroyed timely; and*
 - (2) is not admissible in any proceeding for any purpose.**
- (g) The Director shall adopt procedures to comply with this section.*



[MD Code, Public Safety, § 2-511 – Expungement of DNA Information](#)³⁴

An expungement process initiated by the individual whose sample was collected may fail if the individual does not have access to resources and support. If the state legislation delineates the expungement process in this manner, it should also consider clarifying the accessibility of resources for completing the process. Alternatively, a system that automatically initiates the expungement process may require an investment of agency resources, but this approach reduces the burden on the individual and may enhance credibility and confidence between the agency and the community.

Key Takeaway 10: Although states include legislation pertaining to the expungement of DNA records, such legislation may need to be reviewed to ensure the processes are effective and do not overly burden individuals from whom samples were collected.

Conclusion

Lawfully owed DNA collection laws build a foundation that supports the collection of DNA samples from convicted offenders and helps develop DNA databases, thereby making these databases more effective. The strength of CODIS to assist with the investigation process relies on the input of DNA profiles from convicted offenders to search against DNA profiles obtained from forensic evidence. As more DNA profiles populate the database, the database becomes more effective. As a result, a more populated database may lead to more hits. Therefore, collecting, tracking, and testing an offender's lawfully owed DNA sample is critical.

Although lawfully owed DNA collection laws offer a tremendous opportunity to facilitate the investigation of unresolved crimes, these laws may not be applied effectively because of a lack of clarity associated with the collecting, tracking, and testing of these samples. For example, issues can arise when there is lack of specificity on who is responsible for collecting lawfully owed DNA samples or when these samples should be collected during the incarceration process.

To address these issues, consider the following:

- Allied criminal justice professionals should comprehensively review their legislation to identify and address issues that lead to a lack of effective collection processes for lawfully owed DNA samples.
- Modifications made to existing legislation should offer clarifications on collecting, tracking, and testing lawfully owed DNA samples to uphold the relevant statute.
- Modifications made to existing legislation should address sample collection and processing strategies for when the defined time frame to collect has passed, the individual is deceased, or the individual has left the jurisdiction.
- Legislative changes should also secure an investment in resources and training to address the identified challenges in lawfully owed DNA collection laws, policies, and practices.

This legislative analysis was completed to empower policymakers, legislative decision-makers, and allied criminal justice professionals with statutory strategies that can help maximize their ability to effectively collect, track, and test lawfully owed DNA samples from convicted offenders and to mitigate the degree to which a jurisdiction’s collection laws may unintentionally inhibit the overarching goal of CODIS. The key takeaways for each of the different legislative categories discussed in this report are summarized below in **Exhibit 1**. This summary is designed to provide a quick overview that may be helpful to agencies as they review and prioritize addressing changes to their legislation.

Exhibit 1. Categories and key takeaways for legislation associated with collecting, tracking, and testing lawfully owed DNA samples.

| Legislative Category | Synopsis | Key Takeaway |
|--|--|--|
| <u>Statement of Legislative Intent</u> | Clarifies and defines the intended application of the statute, thereby improving collection processes. | A statement of legislative intent provides clarity and further defines the intended application of the statute. As applied to lawfully owed DNA, legislative intent provides clarification that improves collection processes by defining the individual who legally owes a DNA sample and the purpose of this collection in regard to how it will support the DNA database. <i>Without a defined statement of legislative intent, any ambiguity about the law’s applicability to unusual circumstances may be resolved in a manner that was not intended by the legislature.</i> |

Exhibit 1. Categories and key takeaways for legislation associated with collecting, tracking, and testing lawfully owed DNA samples. (continued)

| Legislative Category | Synopsis | Key Takeaway |
|--|---|--|
| <u>Collection Procedures for Obtaining Lawfully Owed DNA Samples</u> | Aids in the specification of the timing and responsible party for collection of lawfully owed DNA samples. | Providing wording in the statute that clearly defines the agency or allied criminal justice professional responsible for collection, when collection should take place, and how the collection should be conducted is likely a significant factor in reducing the confusion surrounding the collection process. |
| <u>Defining When and How Lawfully Owed DNA Samples Should Be Collected</u> | Provides clarification for when and how collection should occur to reduce confusion surrounding collection processes. | <i>A clear and mandatory designation of DNA sample collection may clarify and potentially avoid missing opportunities to collect lawfully owed DNA samples.</i> |
| <u>Specifying Who Is Authorized to Collect Lawfully Owed DNA Samples</u> | Provides clarification on who is responsible for collecting samples. | |
| <u>Tracking Collected DNA Samples From Convicted Offenders</u> | Delineates a process for the effective tracking of identified and collected samples, thereby improving efficiency and reducing the chances of missing opportunities to collect lawfully owed DNA samples. | Legislation that clarifies the processes for effectively tracking collected lawfully owed DNA samples from identified convicted offenders will improve efficiency, enhance resource allocation, prevent unnecessary resource depletion due to redundant collection efforts, reduce inefficiencies associated with testing duplicate samples, and decrease the probability of missed opportunities to collect lawfully owed DNA samples. <i>Proper sample tracking and accessibility of associated records by collecting parties may prevent the collection of redundant samples and unwarranted assumptions about whether a sample was already collected from the individual.</i> |

Exhibit 1. Categories and key takeaways for legislation associated with collecting, tracking, and testing lawfully owed DNA samples. (continued)

| Legislative Category | Synopsis | Key Takeaway |
|---|---|--|
| <u>Ability to Collect Lawfully Owed, Previously Uncollected Samples</u> | <p>Clarifies and defines collection procedures to avoid missing an opportunity to collect a lawfully owed DNA sample.</p> | <p>Legislation that defines collection procedures to avoid missing an opportunity to collect a lawfully owed DNA sample should be in place. Even if proactive measures and improved legislation associated with collecting and tracking lawfully owed DNA samples are implemented, having guidance for missed lawfully owed DNA samples would further support an overall effective collection process. Such legislative guidance could extend to the consideration for collecting a lawfully owed DNA sample from an offender who is deceased.</p> |
| <u>Collecting Lawfully Owed DNA Samples From Interstate Individuals</u> | <p>Specifies how to collect DNA from individuals who relocate within the prison system to another state before their sample was collected in their state of origin.</p> | <p>States should consider implementing legislation that clarifies how to collect DNA samples from individuals who either relocate within their state system or depart their state system before their lawfully owed DNA sample has been collected.</p> |
| <u>Collecting Samples as a Condition of Negotiated Plea Agreements</u> | <p>Grants some flexibility associated with plea agreements and the collection of DNA samples that may support the resolution of additional cases.</p> | <p>Legislation that provides guidance for collecting a DNA sample when the associated plea agreement reduces the offense from a qualifying offense to a non-qualifying offense maintains the ability to build the database to resolve cases.</p> |
| <u>Addressing Resistance to Providing Lawfully Owed DNA Samples</u> | <p>Presents remedies beyond the applicable use-of-force legislation that result in the collection of a lawfully owed DNA sample.</p> | <p>Legislation that provides remedies beyond the applicable use-of-force legislation may be appealing and can provide acceptable alternatives that result in the collection of the lawfully owed DNA sample.</p> |

Exhibit 1. Categories and key takeaways for legislation associated with collecting, tracking, and testing lawfully owed DNA samples. (continued)

| Legislative Category | Synopsis | Key Takeaway |
|---|--|--|
| <u>Limits to and Extent of Using Data From DNA Databases</u> | <p>Ensures a state’s law coincides with federal law to maximize the impact of the database while ensuring individual privacy expectations and victim rights.</p> | <p>Ultimately, federal law provides guidance on the extent of record disclosures stored in CODIS. Targeting a state’s law to coincide, as closely as possible, with that guidance can be conducive to maximizing the impact of the database. However, caution should be taken to ensure that the privacy expectations and rights of victims are always upheld.</p> |
| <u>Good-Faith Exception for Using DNA Records Inadvertently Remaining in the Database</u> | <p>Clarifies and defines a good-faith exception for samples inadvertently remaining in the database after an expungement notification.</p> | <p>Legislation that clarifies and defines a good-faith expectation for samples inadvertently not expunged and remaining in the database and helps mitigate litigation processes for associated cases.</p> |
| <u>Expungement of DNA Samples From DNA Records</u> | <p>Ensures processes for effectively expunging DNA records.</p> | <p>Although states include legislation pertaining to the expungement of DNA records, such legislation may need to be reviewed to ensure the processes are effective and do not overly burden individuals from whom samples were collected.</p> |

References

1. Lovell, R., Butcher, F., & Flannery, D. (2016). *Cuyahoga County Sexual Assault Kit (SAK) Pilot Project: Report on serial and one-time sexual offenders*. Case Western Reserve University Begun Center for Violence Prevention Research and Education. <https://digital.case.edu/islandora/object/ksl:2006061450>
2. Lovell, R., & Klingenstein, J. (2019). *Outcomes from Efforts to Swab Offenders Who Lawfully “Owe” DNA in Cuyahoga County*. Case Western Reserve University Begun Center for Violence Prevention Research and Education. https://case.edu/socialwork/begun/sites/case.edu.begun/files/2019-02/Swabbing_Outcomes_CWRU_FINAL.pdf
3. Forensic Technology Center of Excellence. (2021). *Perspectives on Addressing the Collection, Tracking, and Processing of Lawfully Owed DNA Samples*. U.S. Department of Justice, National Institute of Justice, Office of Investigative and Forensic Sciences. <https://forensiccoe.org/private/60808ef9c1930>
4. AEquitas. (n.d.). *AEquitas home page*. AEquitas. Retrieved from <https://aequitasresource.org/>
5. Federal Bureau of Investigation. (n.d.). *Frequently asked questions on CODIS and NDIS*. FBI Laboratory Services. Retrieved from <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>
6. Federal Bureau of Investigation. (n.d.). *CODIS-NDIS Statistics*. FBI Laboratory Services. Retrieved from <https://le.fbi.gov/science-and-lab-resources/biometrics-and-fingerprints/codis/codis-ndis-statistics>
7. Statewide sexual assault evidence collection kit tracking system, North Carolina General Statutes (2021). <https://law.justia.com/codes/north-carolina/2021/chapter-114/article-9/section-114-65/>
8. Testing and retention of sexual assault evidence kits, (2016). <https://legislature.idaho.gov/statutesrules/idstat/Title67/T67CH29/SECT67-2919/>
9. Lovell, R., Luminais, M., Flannery, D. J., Overman, L., Huang, D., Walker, T., & Clark, D. R. (2017). Offending patterns for serial sex offenders identified via the DNA testing of previously unsubmitted sexual assault kits. *Journal of Criminal Justice*, 52, 68-78. <https://www.sciencedirect.com/science/article/pii/S0047235217302283>
10. Campbell, R., Feeney, H., Pierce, S. J., Sharma, D. B., & Fehler-Cabral, G. (2018). Tested at last: How DNA Evidence in Untested Rape Kits Can Identify Offenders and Serial Sexual Assaults. *Journal of Interpersonal Violence*, 33(24), 3792-3814. <https://doi.org/10.1177/0886260516639585>
11. Lovell, R., Butcher, F., Flannery, D., Overman, L., & Walker, T. (2016). *Cuyahoga County Sexual Assault Kit Pilot Research Project: Patterns of Sexual Offending* Case Western Reserve University. https://case.edu/socialwork/begun/sites/case.edu.begun/files/2018-09/Patterns-Brief_0.pdf
12. Campbell, R., Pierce, S. J., Ma, W., Feeney, H., Goodman-Williams, R., & Sharma, D. B. (2019). Will history repeat itself? Growth mixture modeling of suspected serial sexual offending using forensic DNA evidence. *Journal of Criminal Justice*, 61, 1-12. <https://www.sciencedirect.com/science/article/pii/S0047235218304586>
13. RAINN. (n.d., March 2020). *Lawfully owed DNA*. RAINN. Retrieved from <https://www.rainn.org/search/node/lawfully%20owed%20dna>

14. DNA database, F.S. § 943.325 Florida Legislature (2013).
<https://www.flsenate.gov/Laws/Statutes/2013/0943.325>
15. Index to facilitate law enforcement exchange of DNA identification information, (2018).
<https://law.justia.com/codes/us/2018/title-34/subtitle-i/chapter-121/subchapter-viii/part-a/sec-12592/>
16. Time and procedure for withdrawal of blood samples, Ga. 35-3-161 (2018).
<https://law.justia.com/codes/georgia/2018/title-35/chapter-3/article-6a/section-35-3-161/#:~:text=Only%20a%20correctional%20health%20nurse,to%20be%20submitted%20for%20analysis.>
17. Biological sample required for DNA analysis upon conviction or adjudication, 25 MRS § 1574(1) (2011).
<https://www.legislature.maine.gov/statutes/25/title25sec1574.html#:~:text=%C2%A71574.%20Biological%20sample%20required%20for%20DNA%20analysis%20upon,or%20adjudication%201.%20Conviction%20subsequent%20to%20effective%20date.>
18. Trial and Proceedings After Conviction, CGS § 54-102h (2011).
https://www.cga.ct.gov/current/pub/chap_961.htm#sec_54-102h
19. Procedure for Analysis and Storage of Blood Sample; Use of Remainder of Sample Not Subjected to Analysis; Confidentiality of Results, Ga. Code § 35-3-162 (2013).
<https://law.justia.com/codes/georgia/2017/title-35/chapter-3/article-6a/section-35-3-162/>
20. DNA analysis upon conviction of certain sex offenses, GA Code § 35-3-160 State of Georgia (2014).
<https://law.justia.com/codes/georgia/2014/title-35/chapter-3/article-6a/section-35-3-160>
21. Collection of biological samples from persons arrested for or charged with felonies, (2013).
<https://cbi.colorado.gov/sections/forensic-services/dna-database/crs-16-23-101-katies-law>
22. DNA analysis of certain offenders required, 609.117 State of Minnesota (2021).
<https://www.revisor.mn.gov/statutes/cite/609.117>
23. Collection of samples, State of New Mexico (2022). https://www.lawserver.com/law/state/new-mexico/nm-statutes/new_mexico_statutes_29-16-6#:~:text=A%20covered%20offender%20shall%20provide%20one%20or%20more,penalty%20of%20more%20than%20a%20year%20in%20prison.
24. Interjurisdictional provisions to provide DNA sample, 23-5A-7 Legislature of South Dakota (2003).
https://sdlegislature.gov/Statutes/Codified_Laws/2047959
25. California Penal Code Section 296, § 296(a)(5) (1998).
https://california.public.law/codes/ca_penal_code_section_296
26. Fingerprinting, DNA Sample Collection, and Photographing, § 12-12-1006(k) (2010).
<https://law.justia.com/codes/arkansas/2010/title-12/subtitle-2/chapter-12/subchapter-10/12-12-1006/>
27. Blood or Other Biological Sample Required from Certain Arrested or Convicted Persons for DNA Analysis, C.G.S. § 54-102g(i) (2019). https://www.cga.ct.gov/current/pub/chap_961.htm#sec_54-102g
28. Collecting, Submitting, Analyzing, Identifying, and Storing DNA Samples and DNA Records, I.C. § 81.4(3) (2020). <https://www.legis.iowa.gov/law/iowaCode/sections?codeChapter=81&year=2020>

29. Index to Facilitate Law Enforcement Exchange of DNA Identification Information, 34 U.S.C.A. § 12592(b) (1999). <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title34-section12592&num=0&edition=prelim>
30. DNA Identification System, A.S. § 44.41.035 (2014). <https://law.justia.com/codes/alaska/2014/title-44/chapter-44.41/section-44.41.035/>
31. Storage and Use of Samples and Records, 20 V.S. § 1938 (1998). <https://legislature.vermont.gov/statutes/section/20/113/01938>
32. Specimens; Genetic Marker Groups, 730 I.L.C.S. 5/5-4-3(o). <https://www.ilga.gov/legislation/ilcs/documents/073000050K5-4-3.htm>
33. DNA Testing, A.R.S. § 13-610(M). <https://azleg.gov/ars/13/00610.htm>
34. Expungement of DNA Information, MD Code, Public Safety, § 2-511. <https://mgaleg.maryland.gov/mgawebsite/Laws/StatuteText?article=gps§ion=2-511&ext=html&%20sesi%C3%B3n=2020RS>

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