

AN ACT relating to DNA.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

→Section 1. KRS 17.169 is amended to read as follows:

As used in this section and KRS 17.170 and 17.175, the following definitions shall apply:

- (1) "DNA sample" or "deoxyribonucleic acid sample" means a biological sample~~[blood or swab specimen]~~

The importance of this change opens up a vast world of invasion without knowledge. Examples: shaking hands, sneezing, worn clothing, furniture. “In addition, DNA can inadvertently transfer. Studies show that if A shakes hands with B, and then B shakes hands with C, it is possible for A’s cells to transfer to C, leaving the false impression that A and C came into direct contact.” Amici Curiae Brief of 14 Scholars of Forensic Evidence in Maryland v. King, U.S. Supreme Court, No. 12-207, p 30.

from a person, as prescribed by administrative regulation, that is required to provide a DNA sample pursuant to KRS 17.170 or 17.510, that shall be submitted to the Department of Kentucky State Police forensic laboratory for law enforcement identification purposes and inclusion in law enforcement identification databases; and

- (2) "Authorized personnel" means an agent of state or local government who is properly trained in DNA sample collection pursuant to administrative regulation.

→Section 2. KRS 17.170 is amended to read as follows:

- (1) Any DNA sample collected pursuant to the law in effect prior to March 27, 2009, shall be maintained and used pursuant to this section and KRS 17.175 and 17.510.
- (2) The following persons shall have a DNA sample collected by authorized personnel if they do not have a DNA sample on file in the DNA database established in Section 3 of this Act:

The federal language uses “may” collect DNA upon arrest, and “shall” collect upon conviction, whereas the Kentucky language says “shall” collect all.

42 USC § 14132 (a) The Director of the Federal Bureau of Investigation may establish an index of—
(1) DNA identification records of— (A) persons convicted of crimes; (B) persons who have been charged in an indictment or information with a crime; and (C) other persons whose DNA samples are collected under applicable legal authorities, provided that DNA samples that are voluntarily submitted solely for elimination purposes shall not be included in the National DNA Index System;

(2) analyses of DNA samples recovered from crime scenes;

(3) analyses of DNA samples recovered from unidentified human remains; and

(4) analyses of DNA samples voluntarily contributed from relatives of missing persons.

42 USC § 14135a(a)(1)

(A) The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted...

(B) The Director of the Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of a qualifying Federal offense... (2) The probation office responsible for the supervision under Federal law of an individual on probation, parole, or supervised release shall collect a DNA sample from each such individual who is, or has been, convicted of a qualifying Federal offense...

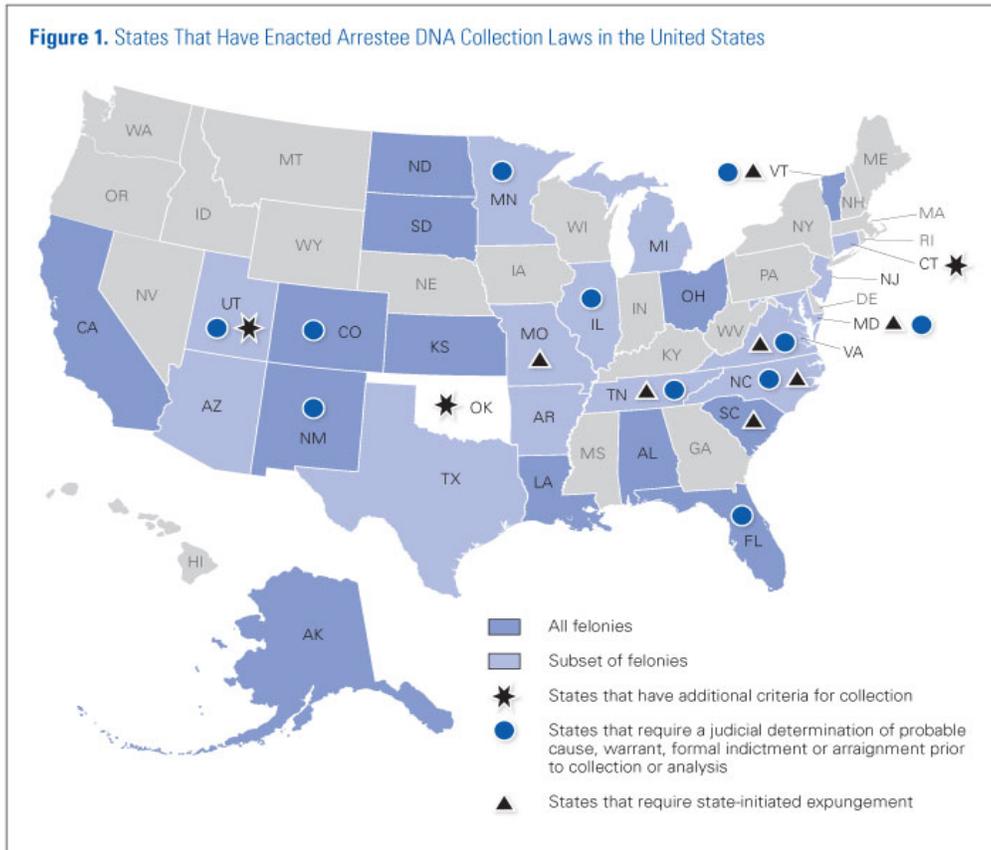
(3) For each individual described in paragraph (1) or (2), if the Combined DNA Index System (“CODIS”) of the Federal Bureau of Investigation contains a DNA analysis with respect to that individual...the Director of the Bureau of Prisons, or the probation office responsible (as applicable) **may (but need not)** collect a DNA sample...

- (a) Any person convicted on or after March 27, 2009, of a felony offense under the Kentucky Revised Statutes;~~or~~
- (b) Any juvenile who was at least fourteen (14) years of age at the time of the commission of the offense and who stands adjudicated delinquent of being a public offender by a court of competent jurisdiction, of:
 - 1. Any felony offense in KRS Chapter 510;
 - 2. Incest as defined in KRS 530.020;
 - 3. Criminal attempt or criminal conspiracy to commit an offense identified in subparagraph 1. or 2. of this paragraph; or
 - 4. Being a juvenile sexual offender under KRS 635.510; or
- (c) Any adult arrested, indicted, or otherwise charged after the effective date of this Act with a felony offense.

This is as strict as California. It is pushed by Obama.

<http://www.politico.com/news/stories/0310/34097.html>

Does this seem like a match for Kentucky? The Supreme Court is deciding on Maryland now, and they do not even require as much as Kentucky proposes. Compare states below:



- (3) (a) It shall be the duty of the jailer or other local correctional official into whose custody a person arrested for a felony offense is committed to have a DNA sample collected by authorized personnel as part of the person's booking process and to submit that sample to the Department of Kentucky State Police forensic laboratory.

Studies show that physical evidence is often not collected from crime scenes, even for serious offenses. Below is a table outlining the findings in Joseph Peterson et al., Final Report: The Role and Impact of Forensic Evidence in the Criminal Justice Process, NAT'L INST. OF JUST., (2010). Too little evidence is being gathered from crime scenes, and even less is being used:

	Burglaries	Robberies	Aggravated assaults	Rapes	Homicides
Evidence collected	20%	25%	30%	66%	81%
Submitted for testing*	11-13%	11-13%	11-13%	32%	89%
Actually tested	9-10%	9-10%	9-10%	18%	81%

* DNA tests constituted a negligible amount of analyses requested—less than 5% even for homicide and rape cases.

- (b) It shall be the duty of an arresting peace officer who takes a person arrested for a felony offense directly before a judge without booking the person into a jail to have a DNA sample collected by authorized personnel and to submit that sample to the Department of Kentucky State Police forensic laboratory.
- (c) If a person making his or her initial appearance before a judge pursuant to an arrest, indictment, summons, or other process for committing a felony offense has not previously had a sample of his or her DNA collected under this subsection, it shall be the duty of the sheriff to have a DNA sample collected by authorized personnel as part of that person's initial appearance and to submit that sample to the Department of Kentucky State Police forensic laboratory. The judge before whom the person is appearing shall issue any orders necessary to effectuate this subsection.

Cutting DNA-on-arrest in half, and keeping crime scene collection the same, the matches for unsolved crimes actually increased.

<i>Average monthly...</i>	2010	2011	Jan-July 2012
offender profiles uploaded	20,931	15,749	11,915
crime scene samples uploaded	608	592	602
hits	361	377	397

http://www.law.virginia.edu/pdf/news/md_v_king.pdf

Moral of this story: more miscellaneous samples to test will clog the system and important samples can get set aside. As a general statistic, most people's first crime is something small. After conviction when DNA is taken, it is then available for all future serious ones.

A large number of "success" studies have used previously-convicted people whose DNA would be in the database already. This simply proves that we can guard the presumption of innocence very well while still handling DNA evidence solutions. Amici Curiae Brief of 14 Scholars of Forensic Evidence in Maryland v. King, U.S. Supreme Court, No. 12-207, p 12.

(d) It shall not be necessary to collect a DNA sample from a person under this section if the person charged with collecting the sample verifies through a mechanism approved by the Department of Kentucky State Police forensic laboratory both the identity of the charged person and that the person has previously submitted a DNA sample that remains on file.

(e) A DNA sample may be collected by authorized personnel at any point during the pendency of a felony charge made after the effective date of this Act if a DNA sample was not previously collected under this section or if a previous taken DNA sample was lost, damaged, destroyed, contaminated, or was otherwise unusable.

(4) Any person who is required to register as a sex offender under KRS 17.510 who is not otherwise required to submit to a DNA sample collection under this section or KRS 17.510, including those persons convicted of a felony or adjudicated as a public offender on offenses in other jurisdictions as identified in KRS 17.510(6) and (7), shall have a DNA sample collected by authorized personnel.

~~(5)~~~~(4)~~ Any person who is required to provide a DNA sample pursuant to subsection (2) of this section and who is released from custody upon sentencing or adjudication shall immediately report to the local probation and parole office and shall have a DNA sample collected by authorized personnel.

~~(6)~~~~(5)~~ A DNA sample shall be obtained in an approved manner by authorized personnel~~[-a physician, registered nurse, phlebotomist, medical technician, or medical technologist,]~~ and packaged with supplies and containers provided by the Department of Kentucky State Police forensic laboratory in accordance with administrative regulations promulgated by the cabinet. No civil liability shall attach to any person authorized to obtain the DNA sample as provided by this section as a result of the act of obtaining the DNA sample from any person, provided the procedure was done according to administrative regulations by the cabinet.

~~(7)~~~~(6)~~ Authorized personnel collecting DNA samples under this section or KRS 17.510 are not engaging in the practice of medicine pursuant to KRS 311.550.

~~(8)~~~~(7)~~ Any person required to provide a DNA sample under this section or KRS 17.510 who, after receiving notice of the requirement to provide a DNA sample, knowingly refuses to provide such DNA sample, shall be guilty of a Class A misdemeanor for each separate violation of the offense.

~~(9)~~~~(8)~~ Any person who tampers or attempts to tamper with any DNA sample collected under this section or its container without lawful authority shall be guilty of a Class D felony.

(10) (a) A DNA sample obtained in good faith shall be deemed to have been obtained in accordance with the requirements of this chapter and the legitimate use of the information in the furtherance of a criminal investigation is authorized until an expungement is obtained.

“False database matches may arise from cross-contamination of samples. Such cases have been reported in Washington, California, New Jersey, and Florida, as well as in Australia, New Zealand, and Scotland. In one case, a database match identified a man who would have been a toddler at the time of the offense; the laboratory had conducted a training exercise using his DNA that accidentally contaminated the crime samples. In another famous case, police hunted across Europe for a suspect that surfaced in a wide assortment of crimes ranging from murder to larceny, only to realize that the DNA belonged to an employee of the firm that manufactured swabs used to collect evidence. Given the sensitivity of DNA testing, contamination can be as simple as ‘someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches the area that may contain the DNA to be tested.’” Amici Curiae Brief of 14 Scholars of Forensic Evidence in Maryland v. King, U.S. Supreme Court, No. 12-207, p 28 (citations omitted).

“Although the FBI does not release match rates, the British Home Office has reported that over a quarter of its database searches result in hits to more than one person.” Id. p 33

(b) An inadvertent error or omission by a public servant otherwise acting in good faith in attempting to comply with this section shall not be considered as malfeasance, misfeasance, or nonfeasance.

→Section 3. KRS 17.175 is amended to read as follows:

- (1) A centralized database of DNA (deoxyribonucleic acid) identification records for convicted or adjudicated offenders, [arrestee samples collected under Section 2 of this Act,] {Floor Am. 1} crime scene specimens, unidentified human remains, missing persons, and close biological relatives of missing persons shall be established in the Department of Kentucky State Police under the direction, control, and supervision of the Department of Kentucky State Police forensic laboratory. The established system shall be compatible with the procedures set forth in a national DNA identification index to ensure data exchange on a national level.
- (2) The purpose of the centralized DNA database is to assist federal, state, and local criminal justice and law enforcement agencies within and outside the Commonwealth in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of sex-related crimes, violent crimes, or other crimes and the identification and location of missing and unidentified persons. Analysis of DNA samples obtained pursuant to this chapter is not authorized for identification of any medical or genetic disorder.

“As our nation’s experience with fingerprints and Social Security Numbers demonstrates, government identification databases tend to expand far beyond the uses that were initially used to justify them and authorized by the legislature. In less than 25 years CODIS has expanded from including samples only from persons convicted of serious felonies, to the now-routine collection of DNA from persons convicted of any felony, to samples from persons who have not been convicted of anything but have merely been arrested for minor offenses. There is little reason to think that this rapid expansion will stop here. The brightest, most fundamental line in our criminal-justice system is the one that separates those who have been convicted of a crime from those who are presumed innocent. If the government’s authority to take DNA without a warrant or even individualized suspicion is allowed to cross that line, ‘then it’s hard to see how we can keep the database from expanding to include everybody.’ Kincade, 379 F.3d at 872 (Kozinski, J., dissenting)” Amici Curiae Brief of the ACLU in Maryland v. King, U.S. Supreme Court, No. 12-207, p 20-21.

“Already, state governments have authorized law enforcement DNA samples to be used for non-law enforcement purposes.” <https://epic.org/amicus/dna-act/>

Example: familial search. “Analysts look, not for an exact match between the crime scene sample and a known offender, but rather for a partial match that may indicate the perpetrator is a relative of the known offender. Investigators can pursue those relatives – often by surreptitiously taking a DNA sample – to determine whether any match the crime scene sample...”

“It is impossible to know exactly how many jurisdictions engage in familial matching because almost all do so informally rather than through legislative or executive order. One survey found at least fifteen states engage in the practice. Maryland is one of two jurisdictions to forbid familial searches...Familial searching blossomed as a result of an FBI rule change, and the decision whether to engage the practice is often made on a lab-by-lab basis.

“The FBI is poised to introduce new CODIS loci without seeking judicial pre-authorization.” Amici Curiae Brief of 14 Scholars of Forensic Evidence in Maryland v. King, U.S. Supreme Court, No. 12-207, p 37, 40-41

- (3) The Department of Kentucky State Police forensic laboratory shall receive, analyze, and classify DNA samples received from the Department of Corrections, the Department of Juvenile Justice, and other sources, and shall file the DNA results in the centralized databases for law enforcement identification and statistical purposes.
- (4) DNA identification records produced from the samples are not public records but shall be confidential and used only for law enforcement purposes. DNA identification records shall be exempt from the provisions of KRS 61.870 to 61.884.
- (5) A person whose DNA profile has been included in the data bank pursuant to this chapter may apply to the Department of Kentucky State Police for removal and destruction of the DNA record and DNA sample if the arrest or conviction that led to the taking of the DNA sample or inclusion of the DNA record resulted in an acquittal, a dismissal, a nolle prosequi, a conviction for only non-felony offenses,~~request expungement on the grounds that the conviction or adjudication on which the authority for including the DNA profile was based has been reversed and the case dismissed,~~ or if~~that~~ the person successfully completed the pretrial diversion program under KRS 533.258 and the charges were dismissed-diverted. The Department of Kentucky State Police shall expunge all identifiable information in the data bank pertaining to the person and destroy all samples from the person upon receipt of:
 - (a) A written request for expungement pursuant to this section; and
 - (b) Either:
 1. A certified copy of the court order reversing and dismissing the conviction or adjudication;~~or~~
 2. A certified copy of the court order deeming the charges dismissed-diverted; or

3. Any other verifying documentation as the department may authorize by administrative regulation.

(6) The cabinet shall promulgate administrative regulations necessary to carry out the provisions of the DNA database identification system to include procedures for collection of DNA samples and the database system usage and integrity, as well as to:

(a) Provide written notification of expungement provisions and instructions for requesting expungement to all persons from whom a DNA sample is taken;

(b) Provide for the operation of a public Web site providing information and forums relative to requests for expungement; and

(c) Require the processing of all expungement requests within ninety (90) days of their receipt, with a written response of the department's disposition of the request being sent to the requesting party.

(7) The Department of Kentucky State Police shall destroy all DNA samples that are not entered into the DNA database identification system.

(8) Any person who disseminates, receives, or otherwise uses or attempts to use information in the DNA database identification system, knowing that such dissemination, receipt, or use is for a purpose other than authorized by this section, shall be guilty of a Class D felony.

➔Section 4. KRS 64.060 is amended to read as follows:

(1) Sheriffs, jailers, constables, coroners, marshals, and policemen shall be paid out of the State Treasury for the following services the following fees:

(a) Apprehending a person on charge of felony, or a fugitive
from justice charged with a felony in this state\$10.00

(b) Executing a process of contempt in a criminal
case when the court excuses the contempt 1.60

(c) Executing a summons upon a witness in behalf
of the Commonwealth in a felony case3.00

(d) Summoning a jury, on order of a court, in a county other than that in which the action
is pending, a reasonable allowance to be fixed by the court.

(e) Summoning and attending a jury in a case of felony2.50

(f) For each DNA sample collected and transmitted to the Department of Kentucky State Police in accordance with Section 2 of this Act that results in a usable DNA profile, that is not received in duplicate, and is not deemed unacceptable due to a collection error5.00

“Collection is estimated at \$4 to \$6 per kit, and analysis is estimated at \$20 to \$40 per sample.” <http://nij.gov/topics/forensics/evidence/dna/collection-from-arrestees.htm#overviewof>

Costs of all this testing are covered by federal grant for only 1 year. While it sounds nice that local law enforcement doesn't incur a bunch of expenses, what about KSP? How many people are arrested every year vs. convicted? California numbers were to the tune of 100,000, but even Kentucky would be a lot.

(2) No claim for services incidental to examining courts shall be allowed to any sheriff, deputy sheriff, constable, marshal, policeman, or other officer authorized to execute process in felony cases until the grand jury has returned an indictment for a felony.

→Section 5. The expanded collection of DNA samples under the provisions of Sections 2 and 3 of this Act as amended by this Act shall be required as of July 1, 2014. Collection in a county may begin earlier upon the agreement of the Secretary of the Justice and Public Safety Cabinet and the jailer responsible for incarcerating prisoners from the county. Expanded DNA collection may be delayed if the secretary determines that sufficient funds are unavailable to support the collection and processing, or if necessary to comply with the decisions of any court of competent jurisdiction.

The obvious question is what issues will the Supreme Court address? The question on appeal in Maryland v. King is whether the Fourth Amendment permits DNA samples from being taken on arrest for a criminal offense for use in investigating other offenses with no individualized suspicion. The problem we will encounter most likely, however, is that Maryland allows DNA for only certain crimes. King had been convicted of prior offenses, so his DNA could have been taken before. The charges which rose to the level of taking DNA on arrest were later dropped. A whole host of factual issues will likely direct the court away from painting with a broad brush, and instead deciding the case at hand as is their job to do. See Amici Curiae Brief of the ACLU in Maryland v. King, U.S. Supreme Court, No. 12-207, p 31-33.

The effect in Kentucky will be that we will still be left to make our own decision about how much we want to be involved in this pre-conviction question. The best thing we can do is make that decision ourselves, and not just conform to what other states with different circumstances have decided. Keep in mind also that if a law is unconstitutional, it doesn't require a court to say so. It is null and void from the start. How embarrassing it would be for Kentucky to pass this, then deal with a bunch of arrestees arguing with law enforcement about the constitutionality of taking their DNA.

CONCLUSION

The highest road to take on this issue is to simply bolster our crime scene evidence investigations, make progress on cases from that angle, and thus avoid all the pitfalls while reaping all the benefits. Next year we may have better information to make a different decision. But California has already done our research for us. *Until we have exhausted our safely constitutional means, we have no business encroaching into the very questionable territory of our God-given rights enumerated in the Constitution.*

The right vote is NO on SB 47 in 2013.