

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]~~

WHY??? Proponents continue to tell us “it’s just a swab.” If they are telling the truth, WHY this change?

Examples of other “biological samples”: shaking hands, sneezing, worn clothing, furniture.

“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:

“How could the State know if an arrestee has already had his DNA sample collected, if the point of the sample is to identify who he is?” *Maryland v. King*, 569 U.S. ____ (2013) (Scalia, J., dissenting)

Proponents say DNA will be the new identifier like fingerprints. If so, why do we not need to identify anyone after their first offense/arrest? This is not identification on the scene, this is searching for evidence in unsolved (uncharged) cases. See *Maryland v. King*, 569 U.S. ____ (2013) (Scalia, J., dissenting)

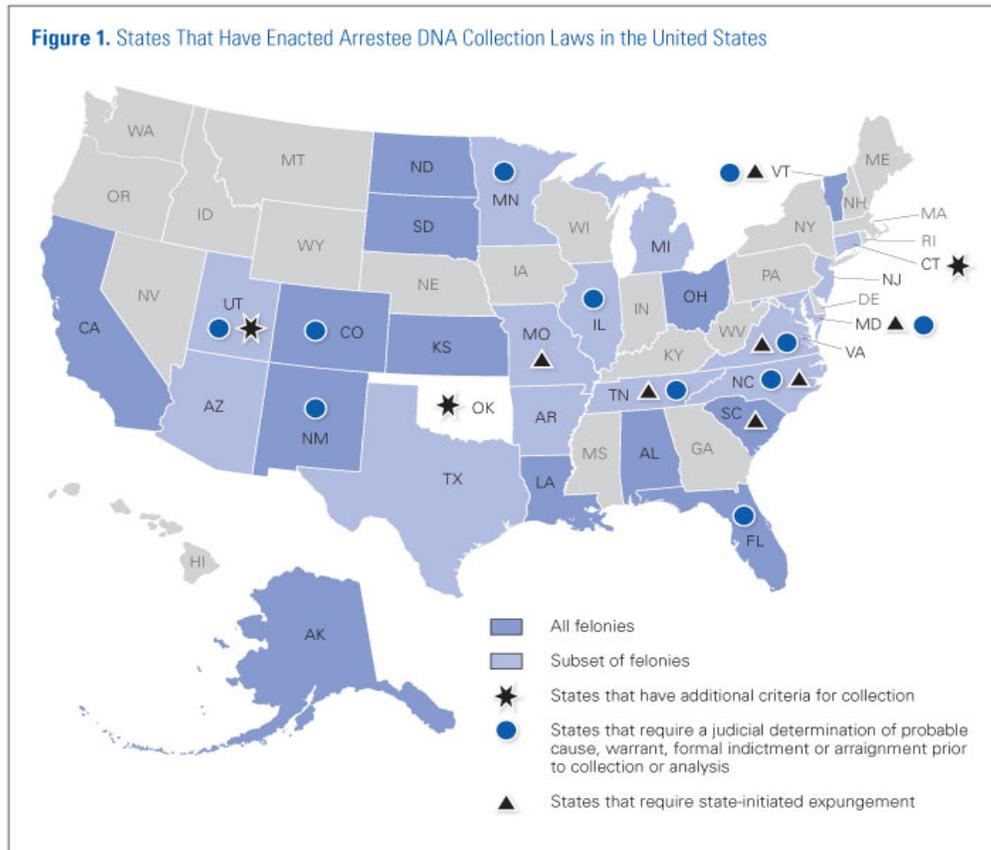
- (a) Any person convicted on or after March 27, 2009, of a felony offense under the Kentucky Revised Statutes;~~[or]~~

(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.

In Maryland v. King, the Supreme Court continually noted it was deciding a case of DNA collection for “serious offenses.” Maryland collected on much less than Kentucky proposes. Compare the states below:



This is as strict as California. It is pushed by Obama. <http://www.politico.com/news/stories/0310/34097.html>
Mary Lou Marzian first introduced it in Kentucky in 2012 (HB 314) and carried it again in 2013 (HB 89).

The federal language uses “may” collect DNA upon arrest, and “shall” collect upon conviction, whereas the Kentucky language says “shall” collect all.
 42 USC § 14135a(a)(1)

- (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.

Another classic example that DNA is not being used for identification of the person booking. It takes weeks, months, or years to get the DNA tested. This means the person is being subjected to a search without probable cause that they will provide a match in the database.

- (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.

Studies show that too little physical evidence is being gathered from crime scenes, and even less is being used. 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). "A major finding of the study was that most evidence goes unexamined." p.9

	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.

- (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.

We have no business gathering evidence from lawful citizens able to appear on summons responsibly when we can't get a handle on actual serious cases.

(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.

A large number of “success” stories with arrestee DNA have been previously-convicted people whose DNA would be in the database already. Amici Curiae Brief of 14 Scholars of Forensic Evidence in Maryland v. King, U.S. Supreme Court, No. 12-207, p 12.

Because DNA can already be taken on conviction, the only people affected by this change are those who will be acquitted. The innocent. WHY??? They are the first we should be protecting, not harming.

(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.

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

(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.

According to Justice Alito and others who voted in favor of DNA search and seizure in June, “DNA testing—even when performed with modern STR technology, and even when performed in perfect accordance with protocols—often fails to provide ‘absolute proof’ of anything.” District Atty’s Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 80-81 (2009) (Alito, J., concurring).

A recent study was conducted using a Georgia criminal who was convicted based partly on DNA evidence. Itiel Dror & Greg Hampikian, *Subjectivity and bias in forensic DNA mixture interpretation*, 51 SCI. & JUST. 204 (2011). ***“The original examiners determined that the suspect could not be excluded as a potential source of the sample,” but of the 17 new examiners in the study, “twelve excluded the suspect, four found the test inconclusive, and only one concurred in the inclusion.”***

In Conclusion, the study said, ***“DNA mixture interpretation has subjective elements and may be susceptible to bias and other contextual influences.”***

(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.

“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

➔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.**

- (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.

“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

(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 error.....5.00

“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>

(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.

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.

“[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.” *Mincey v. Arizona*, 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)

“Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail.”
Maryland v. King, 569 U.S. ____ (2013) (Scalia, J., dissenting)

What Does the Supreme Court Say?

*“It can be agreed that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a **search**.”* Maryland v. King, 569 U.S. ___ (2013)

The Court explained at length FOUR reasons we should use DNA:

- 1) *“A suspect's criminal history is a critical part of his identity that officers should know when processing him for detention.”*
- 2) *“Law enforcement officers bear a responsibility for ensuring that the custody of an arrestee does not create inordinate risks for facility staff, for the existing detainee population, and for a new detainee.”*
- 3) *“The Government has a substantial interest in ensuring that persons accused of crimes are available for trials.”*
- 4) *“An arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail.”* Maryland v. King, 569 U.S. ___ (2013)

NONE of these reasons explain why a DNA “search” is allowed by the Fourth Amendment.

What the court relies on is that it seems “reasonable.”

*“Once an individual has been arrested on probable cause for a **dangerous offense** that may require detention before trial, his or her expectations of privacy and freedom from police scrutiny are reduced.”* Maryland v. King, 569 U.S. ___ (2013)

Notice the Supreme Court is not blessing Kentucky’s proposal of “any felony.”

*“Searches conducted outside the judicial process, without prior approval by judge or magistrate, are **per se unreasonable under the Fourth Amendment**—subject only to a few specifically established and well-delineated exceptions. Among the exceptions to the warrant requirement is a search incident to a lawful arrest. The exception derives from **interests in officer safety** and **evidence preservation** that are typically implicated in arrest situations.”* Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 1716 173 L.Ed.2d 485 (2009).

“The objects of a search incident to arrest must be either (1) weapons or evidence that might easily be destroyed, or (2) evidence relevant to the crime of arrest.” Maryland v. King, 569 U.S. ___ (2013) (Scalia, J., dissenting)

In short, if DNA is not related to the reason for arrest, it should not be taken.

To allow DNA for “any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis.”
Arizona v. Gant at 1721.

How will the Supreme Court decision affect Kentucky?

It does not affect us right now, as our current law does not allow DNA on arrest.

It could affect us all if we pass this new bill. Here is the path we are headed down:

*“The Court repeatedly says that DNA testing, and entry into a national DNA registry, will not befall thee and me, dear reader, but only those arrested for “serious offense[s].” I cannot imagine what principle could possibly justify this limitation, and the Court does not attempt to suggest any. **If one believes that DNA will “identify” someone arrested for assault, he must believe that it will “identify” someone arrested for a traffic offense.***

*Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the “identity” of the flying public), applies for a driver's license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. **But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.**”*

- Justice Antonin Scalia, dissenting opinion in *Maryland v. King*, 569 U.S. ____ (2013)

The right vote is NO for DNA on arrest.