

Should Texas expand its DNA arrestee database?

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As a growing number of states adopt or expand laws to collect DNA samples from those arrested for crimes, Texas lawmakers may consider proposals to do the same. Some of the laws adopted or considered in other states require or propose the collection of DNA from all those arrested for felonies, while others include those arrested for misdemeanors.

Law enforcement agencies in Texas currently are required to obtain DNA samples from anyone convicted of a felony but from only a few categories of people who have been arrested but not convicted, mostly repeat offenders. Information taken from the samples is entered into a statewide database and used to investigate and prosecute crimes.

Several states have enacted laws to expand their DNA collection efforts since the U.S. Supreme Court in June 2013 upheld a Maryland law that requires police to take DNA samples from arrestees suspected of serious crimes. The court ruled in *Maryland v. King* (133 S. Ct. 1958 (2013)) that when law enforcement officers take a suspect into custody after an arrest for a serious offense supported by probable cause, it is constitutional to take and analyze a cheek swab of the suspect's DNA. The court compared the procedure to fingerprinting and photographing suspects.

Texas is one of 30 states, along with the federal government, that authorizes collection of DNA samples from at least some arrestees, according to the National Conference of State Legislatures (NCSL). All 50 states and the federal government allow or require DNA collection from convicted offenders. Debate in Texas centers on how proposals to expand DNA collection might affect public safety, privacy, and resource allocation.

Debate in Texas focuses on how various proposals to expand DNA collection might affect public safety, privacy, and resource allocation.

Current Texas law

The Department of Public Safety (DPS) is authorized, under Government Code, Title 4, subch. G, to maintain the state's computerized DNA database. It is the central repository for the state's DNA records, and its principal purpose is to help criminal justice agencies investigate and prosecute crimes. For criminal cases, the database may be used only to investigate offenses, to exclude or identify suspects or offenders, or to prosecute or defend the case in court.

The database also may be used for certain non-criminal justice purposes, such as to identify human remains or missing persons, living or dead. If identifying information is removed, the data may be used to establish a population statistics database and for certain other types of research.

When it was enacted in 1995, the Texas database law was designed to obtain DNA samples from sex offenders. A court also could order certain offenders to submit samples to the database. Samples were required from adults and juveniles convicted of:

- certain sex crimes;
- certain other crimes committed with the intent to commit a sex crime; and
- felonies, if offenders had prior convictions for specified sex crimes.

The law has been amended several times to include more offenders and arrestees among those who are required to submit DNA samples. Current law requires authorities to collect DNA from convicted felons, those charged with certain felonies, those convicted of certain misdemeanors, those required by the state to register as sex offenders, and repeat offenders who are arrested for specific crimes.

The database also may contain specimens from deceased crime victims, unidentified missing persons, and unidentified skeletal remains.

The Texas database law has been amended several times to include more offenders and arrestees among those who are required to submit DNA.

Convicted felons. A convicted felon confined to a state penal institution is required, under Government Code, sec. 411.148, to submit a DNA sample to the database. This applies to adults in Texas Department of Criminal Justice (TDCJ) facilities and to juveniles in Texas Juvenile Justice Department (TJJD) facilities. Both agencies take samples when offenders enter their facilities.

Code of Criminal Procedure, Art. 42.12, sec. 11(j) requires a judge granting probation to an adult felon to require the offender to submit a sample to the database as a condition of probation. Samples also are required from juveniles placed on probation for certain serious and violent felonies, including felonies involving the use of a deadly weapon, according to Government Code, sec. 411.148(2)(B).

Those charged with certain serious felonies.

A person who is formally charged with but not convicted of certain serious and violent felonies is required to submit a sample to the DNA database. Under Government Code, sec. 411.1471, this applies to a person charged with:

- indecency with a child;
- sexual assault;
- aggravated sexual assault;
- prohibited sexual conduct (incest);
- compelling prostitution;
- sexual performance by a child;
- possession or promotion of child pornography;
- continuous sexual abuse of a young child;
- continuous trafficking of persons;
- aggravated kidnapping involving intent to violate, to inflict bodily injury, or to abuse sexually; or
- committing a felony other than theft in the process of a home burglary, or intending or attempting to commit such a felony during a home burglary.

Those arrested for certain serious felonies.

Government Code, sec. 411.1471(2) requires the collection of DNA samples from those arrested for the felonies listed above who have a previous conviction or

have been placed on deferred adjudication for one of the same felonies or for second-degree felony burglary of a habitation.

In processing such an arrest, the law enforcement agency must take the DNA sample immediately after the fingerprints are collected and in the same location.

Misdemeanor convictions. Offenders convicted of two misdemeanors — public lewdness and indecent exposure — are required under Government Code, sec. 411.1471(3) to submit DNA samples.

Sex offenders. The database also includes DNA records of registered sex offenders. Government Code, sec. 411.1473 requires law enforcement agencies to submit either specimens or analysis of DNA from any sex offender required to register with the state who has not already given a sample.

Database operations

Once the DNA sample from an arrestee or offender has been collected and analyzed, the resulting information is used to create a DNA record in the state's database. Samples may be analyzed by a laboratory run or approved by DPS.

The Texas DNA database contained about 716,000 profiles as of February 2014. DPS processed 4,665 samples that month and had 438 hits matching DNA profiles in the database, according to the agency. At the end of February 2014, about 20,000 samples were backlogged, awaiting analysis. On average, according to DPS, it takes about three months for the agency to analyze a sample once it has been received.

The Texas database is part of the FBI's Combined DNA Index System, or CODIS. Records entered into the state system are uploaded to the national system.

Samples are collected either by drawing blood or by means of a cheek swab. Government Code, sec. 411.148(h) allows criminal justice agencies to obtain samples by force, if necessary. DPS provides free collection kits to criminal justice agencies and does not charge for the analysis of database samples sent to agency labs.

Restrictions, confidentiality. Under Government Code, sec. 411.143(e), DPS is prohibited from storing a name or other personal identifying information in CODIS, although the CODIS system may contain a reference number to identifying information in another information system. DPS retains DNA samples for quality control and identity confirmation if a criminal suspect is identified through the database.

Government Code, sec. 411.147 restricts the release of DNA records, analysis, and samples. DPS may release them only:

- to criminal justice agencies for criminal justice or law enforcement identification purposes;
- for judicial proceedings;
- for criminal defense purposes to a defendant;
- as required by federal law; or
- for another purpose listed in Government Code, ch. 411.143, such as recovering or identifying human remains after a disaster or identifying missing persons.

Database information cannot be collected, analyzed, or stored to gain information about human physical traits or predisposition for disease unless it is related to another purpose in Government Code, ch. 411.

Under sec. 411.1471(e), a court must order DPS to destroy DNA specimens collected from a person indicted or arrested if the person is subsequently acquitted or the case dismissed.

Records in the DNA database are confidential and not subject to disclosure under laws governing public information. Government Code, sec. 411.153 makes it a state-jail felony to knowingly disclose information in a DNA record to an unauthorized recipient and states that disclosing confidential DNA records in the database constitutes official misconduct.

Expunging DNA records. DPS is required to expunge an individual's DNA record if a court orders it to do so under standard procedures for the expunction of criminal records or if a court orders that a juvenile record of a case be sealed.

U.S. Supreme Court ruling on Maryland law

The U.S. Supreme Court's *Maryland v. King* decision stemmed from a case that challenged Maryland's DNA Collection Act. That law, which took effect in January 2009, requires the collection of a DNA sample from anyone charged with a crime of violence, burglary, or attempted burglary. The 24 offenses considered crimes of violence under Maryland law include murder, rape, kidnapping, various sex offenses, first-degree assault, assault with the intent to commit certain other crimes, and other serious offenses. Under Maryland law, the DNA database may contain only the suspect's identity information, and no sample may be added to a database before the suspect is arraigned. The Maryland law also requires destruction of a suspect's sample if the person is not convicted.

In *Maryland v. King*, a suspect arrested for first- and second-degree assault had DNA collected by cheek swab during the booking process. The sample was matched to an unsolved rape case, and the suspect was later convicted of the rape. The defendant challenged the law's requirement that a DNA sample be taken, arguing that it violates the Fourth Amendment to the U.S. Constitution (see *Constitutional provisions on searches and seizures*, below).

While a lower court upheld the constitutionality of the law, the conviction was set aside when the Maryland Court of Appeals found portions of the law unconstitutional. However, in a five-to-four decision written by Justice Anthony Kennedy, the Supreme Court held that when law enforcement officers make an arrest supported by probable cause for a serious offense, it is constitutional to collect and analyze a cheek swab of DNA from the suspect in custody.

The Supreme Court ruled that taking a sample of DNA under these circumstances is a legitimate booking procedure, like fingerprinting and photographing, and is reasonable under the Fourth Amendment to the U.S. Constitution. The court said that the permissibility of the search should be analyzed based on "reasonableness, not individualized suspicion."

The government has a significant interest in correctly identifying arrestees, and DNA has unmatched potential to serve that interest, the court said. Like fingerprinting, DNA is a metric of identification, with the only difference between the two techniques being the unparalleled accuracy of DNA analysis, according to the opinion. Any privacy invasion from DNA identification beyond that involved with fingerprinting is insignificant, according to the court.

Constitutional provisions on searches and seizures

The Fourth Amendment to the U.S. Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Texas Constitution contains a similar provision in Art. 1, sec. 9:

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

In the Maryland case, the court said that the interests of the government were not outweighed by the arrestee’s privacy interests. Taking the sample itself was minimally intrusive, according to the court, and the way the DNA was processed did not intrude unconstitutionally on the arrestee’s right to privacy. The testing in the case reveals identity, the sample is not tested for genetic traits or medical information, and the law includes statutory protections against invasions of privacy, according to the court.

The 83rd Legislature in 2013 considered two proposals to expand Texas’ DNA collection requirements, but neither was enacted. HB 1038 by Eiland would have expanded DNA collections to include those arrested for all crimes other than class C misdemeanors, which are fine-only offenses that do not carry jail time. The arresting agency would have been responsible for collecting the sample during the fingerprinting and booking process. A court would have been required to impose a fee on the arrestee to pay the cost of the evidence collection kit. HB 1038 was approved by the Homeland Security and Public Safety Committee but died in House Calendars.

Proposed legislation in Texas

Recent proposals to expand DNA collection efforts in Texas vary in the categories of people to which the requirement would apply. Some would require taking samples from all those arrested for felonies, while others would limit collection to a subset of those arrested for felonies. Other proposals would include those arrested for class B and class A misdemeanors as well.

Another proposal, HB 1063 by Hernandez/SB 767 by Patrick, would have required the collection of DNA samples from those convicted of class B and class A misdemeanors and those placed on deferred adjudication for public lewdness or indecent exposure. HB 1063 was left pending in the House Criminal Jurisprudence Committee, while SB 767 was placed on the intent calendar but not considered by the Senate.

Arrestee DNA collection laws by state



Oklahoma collects DNA upon arrest only from individuals present illegally in the United States under federal law.

Source: National Conference of State Legislatures

Debate on expanding DNA database

The arguments about expanding the number of people from whom DNA is collected in the criminal justice system tend to center on privacy, public safety, and the availability of resources.

Supporters of expanding the database:

Supporters say collecting and analyzing DNA data from more arrestees would improve public safety, respect privacy rights, and constitute a good use of state resources.

Public safety. Supporters say Texas should expand its DNA database by collecting samples from more arrestees to help law enforcement agencies investigate, solve, and prevent crime. They say a larger DNA database would help accurately and quickly identify suspects so that the guilty could be convicted and the innocent exonerated.

Supporters say many cold cases have been solved nationwide after the analysis of DNA data collected from arrestees. In 2012, for example, a man was convicted in Chambers County, Texas for the 1996

capital murder of a 13-year-old girl. The break in the case occurred after evidence from the crime was reanalyzed and placed in a national database, where it matched DNA collected from the killer after he was arrested many years later in Louisiana.

Expanding the database to include arrestees would be a logical extension of current law, supporters say, and would mirror action taken in other states in the wake of the *Maryland* ruling. In 2013, Nevada and Wisconsin passed laws requiring the collection of DNA from all felony arrestees, and 10 more states have discussed such policies, according to the NCSL.

Privacy. Supporters of expanding the database say collecting DNA has become the standard method for compiling identity information about people who pass through the criminal justice system, including arrestees. It is used not unconstitutionally to obtain private information but to identify people in custody and to reveal their criminal histories so that their risk to others can be assessed.

Expanding the state's DNA database to meet the needs of law enforcement would not infringe upon arrestees' rights to privacy or to be free from

Debate on collecting DNA from misdemeanor arrestees

Among those who support expanding DNA collection, debate is ongoing about whether DNA should be obtained from those arrested for misdemeanors, other than class C, or whether collection should be limited to certain groups of arrestees who have committed more serious crimes.

Supporters of expanding collection efforts to include all those arrested for misdemeanors and felonies say Texas should obtain DNA from the broadest group possible to protect the public. For example, a person arrested for criminal mischief might have a history of burglary or assault that came to light only after the person's DNA was collected at arrest and linked with previous incidents of these crimes. Such a match might indicate that the person arrested for a misdemeanor actually had more serious crimes in mind. Although Maryland's law – and the Supreme Court's decision upholding it – applied to the collection of DNA from people arrested for serious crimes, the same reasoning would apply to a law requiring DNA collection from other arrestees.

Opponents of expanding DNA collection in this manner argue that any expansion of Texas' collection efforts should be limited to those arrested for more serious crimes — which may include felonies, violent felonies, or violent misdemeanors and felonies. They say targeting collections to those arrested for the most dangerous crimes would keep the collection and analysis system from being overwhelmed, constituting the best use of state resources.

unreasonable searches, supporters say. The Supreme Court addressed these issues when it upheld the constitutionality of Maryland's DNA collection law. The court compared collecting an arrestee's DNA to taking fingerprints, calling both legitimate police booking procedures. In the *Maryland* case, DNA collection did not violate privacy expectations that accompany a valid arrest supported by probable cause, and the collection of arrestee DNA constitutes a reasonable search under the Fourth Amendment, according to the court.

Current law in Texas contains numerous privacy safeguards that regulate the collection, analysis, storage, and exchange of information related to DNA samples, and these would apply to samples taken from arrestees. For example, supporters say, information in the DNA database cannot be analyzed to reveal information about physical traits or predisposition to diseases unless such an activity is related to another purpose in the law. DNA data recorded in the database do not include information that would compromise the privacy of the arrestee or someone related to the arrestee. Database records are confidential and not subject to public information disclosure. Knowingly disclosing information about a DNA sample to an unauthorized recipient is a crime.

Supporters say some concerns about privacy could be addressed by changing policies governing the expunction of DNA records. For example, Texas could require automatic or expedited expunction for those who are not charged with a crime, found not guilty, acquitted, or otherwise not convicted.

Resources. Any increase in costs related to the collection of DNA would be a proper use of state resources, supporters say, because this activity protects the public by identifying dangerous criminals and repeat offenders. Initial costs involved with expanding the database by collecting samples from more arrestees would be a long-term investment in public safety. Some proposals to expand testing would require fees from those arrested to offset costs to the state for expanded collection of DNA.

Opponents of expanding the database:

Opponents say the database should not be expanded to include information from additional arrestees because current requirements for taking DNA strike the right balance among public safety, privacy, and resource allocation.

Public safety. Opponents of expanding DNA collection say current law protects the public by requiring samples from all convicted felons, those formally charged with certain serious felonies, and arrestees with certain previous convictions. This ensures that DNA is taken from those posing the greatest threat to the public. Texas should continue to focus on taking DNA samples from this group of dangerous offenders, opponents say, rather than expanding collection to additional arrestees.

Many misdemeanors and felonies involve nonviolent or property offenses that do not justify taking DNA at the arrest stage.

Opponents of expanding the database say current law establishes a workable option for obtaining DNA when an arrestee is not required to give a sample but one may be needed to investigate a case. In these cases, law enforcement officers may obtain a search warrant to collect DNA, which limits collections to cases in which it is warranted, rather than allowing an overly broad, intrusive collection scheme.

Expanding DNA collection would add to the backlog of samples that have not been analyzed, opponents say. A better approach to solving and preventing crimes would be to focus on analyzing the existing backlog in an effort to solve cold cases in which DNA may play a part. At the end of February 2014, the backlog was 19,653, according to DPS. Taking DNA samples from those arrested for class B misdemeanors and higher could add as many as 460,000 samples to the current workload, an increase of 670 percent, according to the fiscal note on HB 1038. This could delay the analysis of existing samples, opponents say, allowing dangerous crime suspects to remain unidentified.

Arguments about expanding the number of people from whom DNA is collected center on privacy, public safety, and the availability of resources.

Privacy. Opponents say the government should not expand the store of private information it holds about individuals by increasing DNA collections. DNA holds vastly more information than fingerprints, and collecting it can raise questions about the invasion of an individual's privacy and the violation of Fourth Amendment rights by the government.

DNA information is highly personal, opponents say, and the state should not require samples from people who have not been convicted of a crime and are presumed innocent. Current Texas law appropriately requires DNA from those found guilty, those who have been formally charged with certain offenses, and those arrestees convicted of certain previous offenses. Privacy expectations for these groups are different from the privacy expectations of those who simply have been arrested for a crime.

Opponents say the DNA database could be misused by those outside of law enforcement. The security of electronic database information can be compromised and the information misused by insurance companies, employers, and others.

Opponents say the pool of arrestees who must give DNA samples should not be expanded until changes are made to the state's criminal record expunction process. They say the current expunction process places unfair burdens on those who were never charged with a crime, found not guilty, had their case dismissed, or otherwise were not convicted.

Resources. To require the collection of DNA from more arrestees, state and local law enforcement agencies would need a substantial increase in resources that would be better spent in other areas, opponents say. For example, expanding DNA collection to all those arrested for a class B misdemeanor or above would have cost \$22.7 million in fiscal 2014-15, according to the fiscal note for HB 1038. DPS would have needed 79.9 additional FTEs, supplies for testing, and more equipment. The annual supplies alone would have cost \$8.5 million in fiscal 2015 and \$11.8 million the following year, according to the fiscal note.

— by Kellie Dworaczyk

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