

## Collecting DNA From Arrestees: Implementation Lessons

by Julie Samuels, Elizabeth Davies, Dwight Pope and Ashleigh Holand

Interim data from an [Urban Institute study](#) provide a detailed look at state arrestee DNA collection laws.

In the summer of 2011, a man was arrested for the abduction of a 15-year-old girl in the small Dayton, Ohio, suburb of Englewood.<sup>1</sup> A new state law, which expanded the pool of individuals eligible to have their DNA collected to include those arrested for a felony offense, allowed sheriff's deputies to collect a DNA sample from the arrested man. The sample was analyzed, and the resulting profile was entered into the Combined DNA Index System (CODIS), where it matched (or "hit") against a profile from forensic evidence collected in a rape committed a decade earlier. The man has been charged in both cases.

Similar stories of investigations aided by hits to arrestee DNA profiles<sup>2</sup> — along with cautionary tales of what

can happen when a state fails to collect DNA in time<sup>3</sup> — have bolstered the arguments for collecting DNA samples not just from convicted offenders, but also from individuals arrested or charged with certain qualifying offenses. Twenty-eight states and the federal government have enacted laws that authorize such collection. Yet despite their widespread adoption, little is known about the investigative utility of collecting DNA from arrestees or how expanded DNA collection laws affect the collecting agencies and state crime laboratories responsible for their implementation.

This article explores the latter issue — how key provisions in arrestee DNA legislation influence the activities associated



with DNA collection and analysis. Information in this article was derived from a review of state and federal laws and from interviews with state crime laboratory representatives in 26 of the 28 states that passed legislation authorizing collection of DNA from some subset of arrestees.<sup>4</sup> This data collection is part of an NIJ-funded Urban Institute project examining the collection of DNA from arrestees.

### A Growing Trend

The first state to pass legislation authorizing the collection of DNA samples from arrestees was Louisiana in 1997. The legislation authorized DNA sample collection from “a person arrested for a felony sex offense or other specified offense on or after September 1, 1999.”<sup>5</sup> In the eight years that followed, four additional states passed arrestee DNA laws. The pace of expansion increased dramatically after Congress passed the DNA Fingerprint Act of 2005,<sup>6</sup> which, among other things, enabled states to upload arrestee DNA profiles to the National DNA Index System (NDIS). Between 2006 and 2011, 23 states passed arrestee DNA collection legislation. Today, 28 states and the federal government have passed legislation authorizing the collection of DNA following arrest or charging (see Figure 1). (To learn more about DNA databases, see sidebar, “CODIS: The National DNA Database” on page 6, in “Solving Sexual Assaults: Finding Answers Through Research.”)

Supporters of these laws maintain that expanding DNA databases to include DNA profiles from arrestees will provide law enforcement with an additional tool to identify suspects, particularly those in unsolved cases, and potentially prevent future crimes. They note that even if a profile will

## Studying the Implications of Expanding DNA Databases

In 2010, the Urban Institute began an NIJ-funded study to examine the policies, practices and implications of expanding state and federal DNA databases to include arrestees. Key research questions for the project include:

- How do the laws and policies regarding arrestee DNA collection differ by state?
- How have the laws been implemented in each state?
- What have been the challenges of requiring DNA collection from arrestees across the criminal justice system?
- What evidence is available regarding the effects of collecting DNA from arrestees on public safety or other justice outcomes?

To answer these questions, researchers have been reviewing and cataloging state laws, interviewing laboratory and criminal justice representatives in jurisdictions with arrestee DNA laws, and collecting descriptive statistics from states on the volume of arrestee profiles entered into the Combined DNA Index System and resulting hits. The final report, expected in late 2012, will explore issues identified in this article in greater detail, address broader issues concerning the rationale and benefits of arrestee DNA collection, and present findings from data collection and analysis.

ultimately be expunged (see “Who is responsible for initiating expungement?” on page 23), investigations may still benefit from the period of time prior to disposition when the arrestee DNA profile can be linked to DNA evidence collected from an unsolved criminal investigation and lead to the identification of a suspect in the “hit case.”<sup>7</sup> Proponents argue that were it not for such laws, some individuals who are arrested but never convicted could “slip through the fingers of law enforcement”<sup>8</sup> and never have their DNA linked to additional crimes that they may have committed.

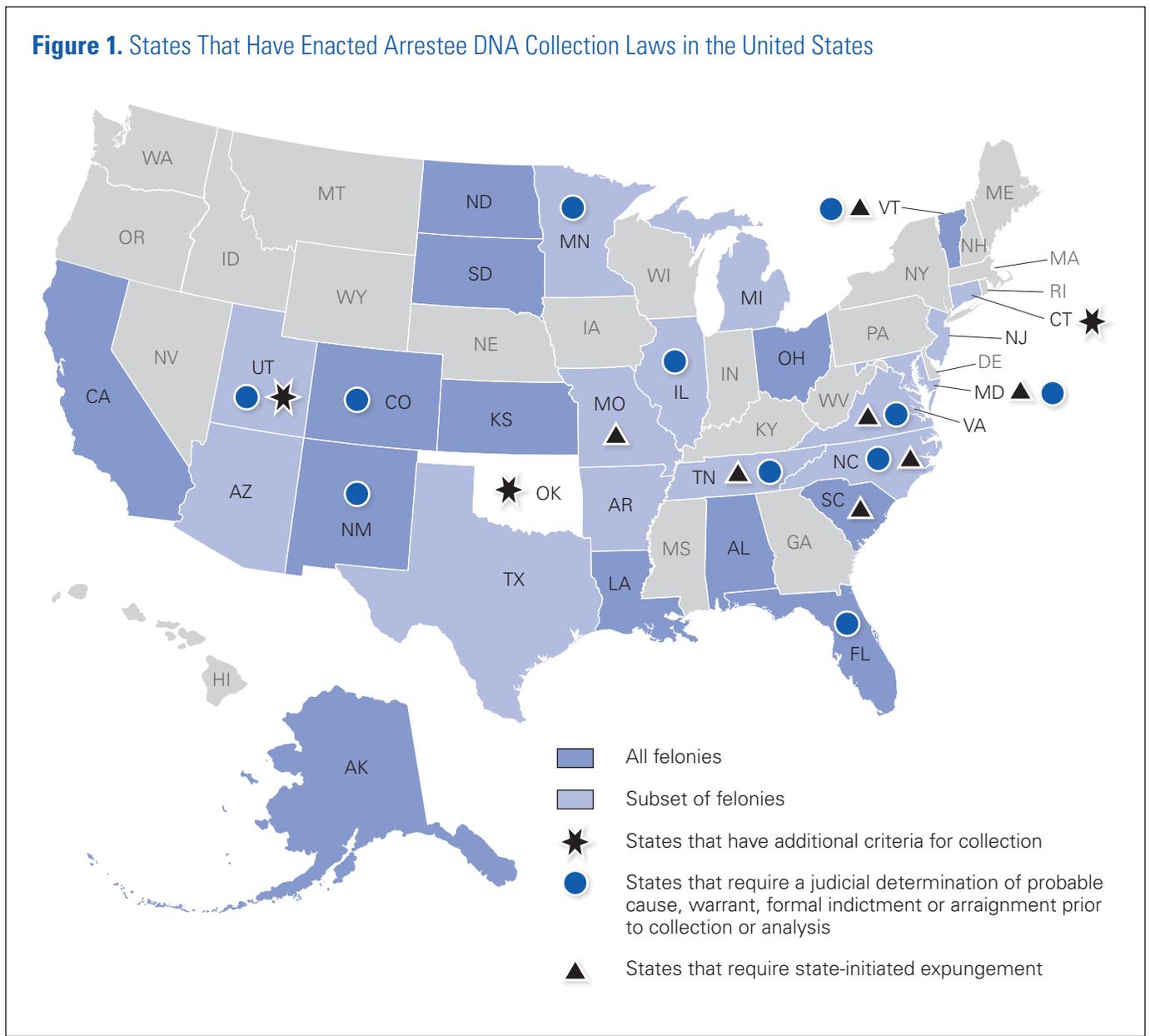
Others argue that the anticipated benefits do not justify the collection of DNA samples from citizens

who have not been convicted of the charges for which they were arrested. The constitutionality of collecting DNA from arrestees has been challenged as a violation of the Fourth Amendment’s protection against unreasonable search and seizure in state and federal courts across the country. At this time, courts are split, with some upholding the expanded laws and others ruling them unconstitutional. Ultimately, the U.S. Supreme Court may be called upon to resolve the issue.<sup>9</sup>

### Key Logistical Questions About Arrestee DNA Collection

State legislators have drafted their laws against this backdrop of competing perspectives on the benefits

**Figure 1. States That Have Enacted Arrestee DNA Collection Laws in the United States**



of arrestee DNA collection and the potential for legal challenges. Among the questions that legislators have addressed are:

- Which offenses are eligible for collection?
- At what point in criminal case processing can a sample be collected or analyzed?
- Who is responsible for collection?
- What policies govern the collection and analysis of duplicate samples?
- Who is responsible for initiating expungement?

The answers to these questions vary by state and have the potential to increase the workload and implementation burdens placed on

collecting agencies and the state crime laboratories responsible for analysis. In some instances, increased workloads will require additional staffing, technology, training and funding.

**Which offenses are eligible for collection?**

Our review of laws in the 28 states that passed legislation authorizing

the collection of DNA samples prior to conviction reveals that about half of states (13) collect from all persons arrested for any felony crime, while the other half of states limit collection to a subset of felonies that typically involve violence or sexual assault.<sup>10</sup> Seven states also collect from individuals arrested or charged with select misdemeanor crimes.<sup>11</sup> Oklahoma, Connecticut and Utah have additional criteria for collection based on the arrestee's status, criminal history and health (respectively).

How does the decision to limit or expand the number of offenses that trigger collection affect the workload of collecting agencies and state crime laboratories? State laws that adopt broader eligibility criteria increase the number and variety of known profiles that may result in a match; hence, it makes sense to assume that as qualifying offenses increase, so too will the number of people sampled and the number of DNA samples processed. The total number of samples received is likely to decrease *eventually* as DNA samples collected at arrest supplant those that would have been collected following conviction;<sup>12</sup> however, our research suggests that limited laboratory staff, resources and space can restrict laboratories' ability to respond to the initial increase in sample volume, often resulting in the need for new staff, technological upgrades and larger facilities.

Some states have been able to mitigate the effect of new samples on laboratory staff workload by phasing in implementation over the course of several months or even years. For example, Florida passed legislation whereby the scope of qualifying offenses becomes more inclusive every two years until all felony

arrests are eligible for DNA collection; each phase is contingent upon the availability of state funds to support expanding laboratory activities.

Ironically, limiting the scope of collection to a subset of felony arrests may actually increase the administrative burden. Although there are fewer individuals for whom DNA must be collected and analyzed than in all-felon states, laboratory staff often must expend additional resources

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verifying offense eligibility, which can be particularly time-consuming. Collecting agencies may also find it difficult to quickly determine an arrestee's eligibility for collection in the field, particularly if their state's list of qualifying offenses is extensive and complex.

Linked criminal justice information systems, along with routine training, can help collecting agencies determine when they need to collect a sample and increase the likelihood that laboratories will receive all eligible samples. These systems also can alert laboratory staff responsible

for verifying sample eligibility. Of course, if agencies are to rely on data systems to provide them with information regarding sample eligibility, these systems must be kept up to date.

### **At what point in criminal case processing can a sample be collected or analyzed?**

Nearly two-thirds of states in our review authorize DNA collection immediately after arrest, typically at a local booking or detention facility. Although collection at arrest is the norm, 11 states require an arraignment or judicial determination of probable cause to occur before a sample can be collected or analyzed.<sup>13</sup>

Provisions that require a judicial probable cause determination or arraignment ensure the involvement of a judicial officer before a profile is generated for uploading to CODIS.<sup>14</sup> These added protections are not without costs, such as delays in collection and analysis and more work for state agencies. For example, in states that require a judicial probable cause determination before analysis, collecting agencies must gather the sample but wait to send it to the laboratory, or the laboratory must wait to analyze it. In interviews, laboratory administrators in these states described an ongoing need to verify the status of the associated case through either a case processing database or direct communication with the courts. These added steps can lead to bottlenecks in the system and delay sample processing.

Although linked criminal justice information systems could allow agencies to monitor case status regularly and consistently, not all laboratories and collecting agencies have direct access to case

processing information. And for those that do have access, laboratory and court data systems may not be designed to exchange information easily. Regular communication about cases among collecting agencies, courts and laboratories may also be challenging for agencies with already limited time and resources.

### Who is responsible for collection?

Responsibility for collection is often set in statute. Of the 17 states that designate a specific type of agency in their arrestee DNA legislation, the vast majority designate the arresting agency, booking agent, detention center, sheriff or jail as the primary collector.

The number and variety of unique collecting agencies — which in some states total into the hundreds — can complicate implementation of arrestee DNA laws.<sup>15</sup> Our interviews with laboratory administrators suggest that the sheer number of agencies collecting and submitting DNA samples can present an administrative challenge for laboratories, which are often primarily responsible for administration and training. The need for training varies depending on several factors, including whether:

- Agencies are new to DNA collection.
- Technology or data systems have changed or contain new information.
- Procedures have changed (such as a switch from blood to buccal swab collection or a change in the scope of collection).

Training is likely to be time-intensive for laboratories when an arrestee law is enacted. Moreover, several state laboratories noted that high turnover in collecting agencies has resulted in an ongoing need to train new staff.

Most state laws do not address responsibility for overseeing collection activities in their DNA laws. As a result, oversight functions like training and coordination often fall to laboratory staff. In addition, laboratories are responsible for compliance tasks such as verifying sample eligibility and ensuring that materials are submitted correctly. This administrative role may pose challenges

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for state laboratories that are largely staffed by skilled analysts — individuals who may not have experience with oversight, training and inter-agency coordination.

Our research reveals that the time and staff needed to complete administrative duties depend on a variety of factors associated with collection. One such factor is the completeness of collection kits when they arrive at the laboratory — laboratories may encounter kits that are not completed correctly, not completed in a timely manner or missing information that laboratories need to process the sample. Laboratories also report instances where collecting agencies erroneously collect samples from individuals who have not been arrested for a qualifying offense — and others that do not collect arrestee samples at all. Some state laboratories have attempted to gain compliance by monitoring cases that should have resulted in collection and

notifying collecting agencies if the laboratory did not receive a sample. However, it is important to note that although laboratories almost always assume responsibility for oversight of arrestee DNA policies and the costs associated with devoting staff time to administrative tasks, they rarely have the legal authority to compel an agency to comply with rules.

### What policies govern the collection and analysis of duplicate samples?

Not all arrestees are new to the criminal justice system.<sup>16</sup> Arrestees who were previously arrested may already have a DNA profile in CODIS. Despite the likelihood that collecting agencies will arrest repeat offenders, only about half of arrestee DNA laws address whether agencies can or should collect samples from people who have a profile in CODIS. Even when such provisions are present, the laws rarely consider the logistical issues that laboratories and collecting agencies may encounter when checking for duplicates.

The collection of duplicate samples can provide some degree of built-in quality control — such as when a duplicate profile matches to the same forensic profile and confirms the original analysis — but it also means that states are expending limited resources to collect samples and create DNA profiles that do not add power to the database. Our interviews indicate that duplicates can represent a significant cost to states, depending on the number of duplicates received (with rough estimates ranging from 5 to 50 percent of total samples) and the costs associated with collection (estimated at \$4 to \$6 per kit) and analysis (ranging from \$20 to \$40 per sample). Some states actively seek to minimize duplicates, others choose to include them and still others are unable to identify duplicates.

Minimizing the number of duplicates can be time- and resource-intensive. State crime laboratory administrators note that the number of duplicates that their laboratories receive is influenced by the availability of automated, linked data systems that can quickly inform collecting agencies when a sample needs to be collected. For example, in some states, the computerized criminal history records include a flag that indicates that DNA has already been collected. If an unnecessary sample is collected and submitted for analysis, laboratory staff with access to linked systems can also check to determine whether the incoming sample already has an associated profile in CODIS. Indeed, many of the laboratories that experience high volumes of duplicates do not have the capacity to check for duplicates and may only identify them when two profiles hit against each other in CODIS. Of course, these data systems must contain up-to-date information if they are to be helpful in the field.

### Who is responsible for initiating expungement?

In order for an arrestee profile to be uploaded to NDIS, states must have FBI-approved expungement provisions that describe the process for expunging a profile if a qualifying charge is dismissed or results in acquittal. Most states place the responsibility for initiating expungement on the individual from whom a sample was collected. States that bear the responsibility for initiating expungement include Maryland, Missouri, North Carolina, South Carolina, Tennessee, Vermont and Virginia.<sup>17</sup>

These additional provisions, which are intended to protect the rights of arrestees who are not ultimately convicted, often carry increased collection, analysis and monitoring

activities (and, therefore, increased costs). Interviews with laboratory administrators suggest that these increased activities have deterred many states from compelling government agencies to bear the responsibility for initiating expungement. State-initiated expungement processes require a great deal of coordination between the laboratory

## The sheer volume of samples received may be difficult for laboratories to manage with existing resources.

and the agency responsible for initiating the expungement process. In some states, the burden of checking for expungement eligibility falls to the laboratory, which requires staff to regularly check case processing information to determine case disposition and may require them to build infrastructure to track case processing events.

Regardless of which criminal justice agency bears the burden of expungement, automatic expungement provisions ensure that only individuals convicted of the offense for which DNA was collected have profiles retained in CODIS. In fact, our interviews with state crime laboratories suggest that when individuals bear the burden of initiating the expungement process, very few expungements actually occur and profiles are retained of individuals who were never formally charged with a qualifying offense or whose case resulted in acquittal

or dismissal. Some states have been proactive about providing information on expungement policies to arrestees to encourage the initiation of expungement procedures. For example, California's Department of Justice works with county jails to ensure that arrestees are advised of their right to request an expungement. Some states, including Kansas and California, offer expungement request forms on their public websites.

### Considerations for Legislators

More than half of the states in this country currently authorize the collection of DNA from individuals following arrest or charging; several other states have recently considered similar legislation.

States may face a number of challenges if they implement arrestee DNA legislation. Verifying that a sample is eligible to be collected and analyzed and determining whether the individual has previously provided a sample can be time-consuming for all involved agencies, especially those that are using older data systems. Laboratories in states that require a judicial determination of probable cause or a state-initiated expungement process may also need to expend significant resources monitoring case processing information to determine if an individual has been charged with or convicted of a qualifying offense. And the sheer volume of samples received may be difficult for laboratories to manage with existing resources.

Our research to date, based on the experiences of states that have already instituted arrestee DNA collection laws, strongly suggests that lawmakers who may be contemplating the expansion of DNA collection in their states should

consider the system changes that may be required to implement the new policy. Clearly, collecting and analyzing DNA samples from arrestees requires planning, resources and time to support state crime laboratories and collecting agencies. Existing data systems may require integration and automation, and laboratories will likely need additional resources to hire and train staff, develop collecting agency training materials, and design and distribute new collection kits. This need for training will likely be ongoing, in large part due to turnover in collecting agencies. Our findings indicate that developing new systems and materials, training staff, and preparing for new responsibilities will require a period of time to implement — from a few months to a year — depending on the scope of additional responsibilities.

By considering these resource needs in advance, states have the opportunity to alleviate some of the burdens of new arrestee DNA laws on laboratories and collecting agencies and improve the chances for compliance.

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**About the authors:** Julie Samuels is a senior fellow at the Urban Institute's Justice Policy Center and serves as the principal investigator of a project to examine the policies, practices and implications of arrestee DNA collection. Elizabeth Davies, research associate, and Dwight Pope, research assistant, also work on this project in the Justice Policy Center. Ashleigh Holand was a research associate with the Urban Institute at the time of the article's writing.

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Learn more about DNA backlogs: <https://www.ncjrs.gov/pdffiles1/nij/232197.pdf>.

Read about DNA databases: <http://www.dna.gov/solving-crimes/cold-cases/howdatabasesaid>.

## Notes

1. See Page, Doug, "New State Law on DNA Leads to Arrest in 10-Year-Old Rape," *Dayton Daily News Online*, November 14, 2011, [www.daytondailynews.com/news/crime/new-state-law-on-dna-leads-to-arrest-in-10-year-old-rape-1284425.html](http://www.daytondailynews.com/news/crime/new-state-law-on-dna-leads-to-arrest-in-10-year-old-rape-1284425.html); and Heffner, Jessica, "DNA Samples Lead to Arrest of Criminal Suspects," *Dayton Daily News Online*, February 15, 2012, <http://www.daytondailynews.com/news/dayton-news/dna-samples-lead-to-arrest-of-criminal-suspects-1329261.html>.
2. We use the word "arrestee" to refer to a person whose DNA is eligible for collection following arrest and prior to conviction. It includes individuals whose DNA is collected following arrest, arraignment, indictment or judicial determination of probable cause.
3. Studies of preventable crimes have been conducted in Chicago, Denver, Washington State and Maryland; see [http://www.denverda.org/dna/DNA\\_Arrestee\\_Database\\_Cases.htm](http://www.denverda.org/dna/DNA_Arrestee_Database_Cases.htm) for more information.
4. Illinois has not been interviewed because it only recently authorized collection at the time of writing this article. South Carolina could not be reached for an interview.
5. LA Rev Stat § 15:609; Acts 1997, No. 737, § 1.
6. Pub.L. 109-162 amended 42 U.S.C. § 14132 and § 14135a, permitting states to upload arrestee profiles to NDIS and authorizing federal agencies to collect DNA from arrestees (2006).
7. The median period of time between arrest and adjudication is 92 days (see Cohen, Thomas H., and Tracey Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006*, Washington, D.C.: Bureau of Justice Statistics, U.S. Department of Justice, 2010, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf>). Some states, such as California, also have the authority to retain DNA profiles for a certain period of time following an acquittal or dismissal.
8. Siegel, Jay, and Susan D. Narveson, *Why Arrestee DNA Legislation Can Save Indiana Taxpayers Over \$60 Million Per Year*, [dnasaves.org](http://dnasaves.org), 2009, available at [http://dnasaves.org/files/IN\\_DNA\\_Cost\\_Savings\\_Study.pdf](http://dnasaves.org/files/IN_DNA_Cost_Savings_Study.pdf).
9. The Supreme Court of Virginia upheld the arrestee law (*Anderson v. Commonwealth of Virginia*, 650 S.E. 2d 702 (Va.2007)). The Minnesota Court of Appeals found that the Minnesota DNA arrestee statute violates the Fourth Amendment (*In re Welfare of C.T.L.*, 722 N.W.2d (Minn. Ct. App. 2006)). The California arrestee DNA collection law was found unconstitutional by a state appellate court, and the case will be heard before the state's highest court (*People v. Buza*, 129 Cal.Rptr.3d (Cal. Ct. App. 2011) cert. granted, 262 P.3d 854 (Cal. 2011)). In April 2012, the Maryland Supreme Court found the state's arrestee law unconstitutional in *King v. State* (No. 68, 2012 WL 1392636 (Md. Apr. 24, 2012)). Readers interested in learning more about these issues should consult Sarah B. Berson's article, "Debating DNA Collection," *NIJ Journal* 264 (2009): 9-16, available at <http://www.nij.gov/journals/264/debating-DNA.htm>.
10. Alabama, Alaska, California, Colorado, Florida (by 2019), Kansas, Louisiana, New Mexico (2011), North Dakota, Ohio, South Carolina, South Dakota and Vermont authorize DNA collection from any individual charged with a felony offense. Arizona, Arkansas, Connecticut, Illinois, Maryland, Michigan, Minnesota, Missouri,

- New Jersey, North Carolina, Tennessee, Texas, Utah and Virginia authorize collection for a subset of felonies. According to its statute, Oklahoma authorizes collection at arrest from “any alien unlawfully present under federal immigration law.” Connecticut authorizes collection from “any person arrested for the commission of a serious felony and, prior to such arrest, [who] has been convicted of a felony but has not submitted to the taking of a blood or other biological sample for DNA (deoxyribonucleic acid) analysis pursuant to this section.” In Utah, “a DNA specimen is not required to be obtained if the court determines that obtaining a DNA specimen would create a substantial and unreasonable risk to the health of the person.”
11. Alabama, Arizona, Kansas, Louisiana, Minnesota, South Carolina and South Dakota.
  12. Provided that the laboratory does not collect duplicate samples from arrested individuals who have already submitted their DNA under existing convicted offender laws.
  13. For example, arraignment or a judicial probable cause determination is needed for *collection* in Florida, Illinois, Minnesota, North Carolina, Tennessee, Vermont and Virginia; Texas requires an indictment or waiver of indictment if the arrestee has not been previously convicted of or placed on deferred adjudication for a qualifying offense. Probable cause is needed for *analysis* in Colorado, Maryland, New Mexico (2011) and Utah.
  14. In a 1987 study, 23 percent of felony arrests brought by law enforcement for prosecution were never filed in the courts. See Boland, Barbara, Catherine H. Conly, Paul Mahanna, Lynn Warner, and Ronald Sones, *The Prosecution of Felony Arrests, 1987*, Washington, D.C.: Bureau of Justice Statistics, U.S. Department of Justice, 1990, available at <https://www.ncjrs.gov/pdffiles1/ Digitization/124140NCJRS.pdf>.
  15. For example, there are more than 500 collecting agencies in Michigan and Ohio.
  16. We did not find any national estimates of the proportion of felony arrestees with prior felony convictions. The Bureau of Justice Statistics has reported that 43 percent of felony defendants (i.e., individuals for whom the court has filed formal charges) had been convicted previously of a felony. See Cohen & Kyckelhahn, 2010.
  17. Minnesota was a “split state,” such that cases resulting in acquittal would be automatically expunged, while cases resulting in dismissal would require the individual to initiate expungement. Given the volume of cases that resulted in dismissal (compared to acquittals), the individual would be responsible for initiating expungement in the majority of cases.