LEGAL BULLETIN
9.4
DNA Collection and Testing

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Introduction

DNA, or deoxyribonucleic acid, is located within a person's cells. It designates an individual's personal genetic blueprint and is one of the most reliable bases of forensic identification. Federal and state statutes now require certain offenders to provide a DNA sample (usually a blood sample) upon conviction or as a condition of release. This bulletin will present an overview of these statutes, as well as the constitutional issues surrounding them. In addition, this bulletin will discuss how post-conviction DNA testing can be used for exculpatory purposes.

Collection of DNA

Federal Law

Under the DNA Analysis Backlog Elimination Act of 2000 (DNA Act), 42 USCS § 14135-14135e, individuals convicted of certain offenses are required to submit a DNA sample to be included in CODIS. CODIS is a DNA identification index system that allows for the storage and exchange of DNA records submitted by state and local forensic laboratories. Section 14135a allows DNA samples to be taken from individuals in custody who have been convicted of a qualifying federal offense and from individuals on release, parole or probation who have been convicted of a qualifying federal offense. Individuals on release, parole or probation must cooperate with the statute as a condition of their supervised release under section 14135c. If the individual's DNA sample is already in CODIS, another sample may be taken, but does not have to be.

The Director of the Bureau of Prisons or the probation office in charge of the individual may use or authorize reasonably necessary means in order to detain, restrain, and collect a DNA sample if the individual refuses to cooperate. If an individual refuses to provide a sample, he or she is guilty of a class A misdemeanor and is subject to the appropriate punishment.

42 USCS § 14135 applies to individuals convicted of the following federal offenses:

1) Any felony.
2) Any offense under chapter 109A of title 18 of the United States Code (aggravated sexual abuse)
3) Any crime of violence as identified by section 16 of title 18 of the United States Code, which defines a crime of violence as:
    a. an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
    b. any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
4) Any attempt or conspiracy to commit any of the offenses in 1) through 3).

A complete list of all qualifying offenses can be found at 28 C.F.R. § 28.2.

Pennsylvania Law

In Pennsylvania, the requirements and procedures of DNA collection from certain offenders are outlined in 44 Pa. C.S. § 2316. Under this statute, any person convicted of a felony sex offense or another specified offense must submit a DNA sample. If the person is sentenced to a term of confinement, the sample is to be taken upon intake to the prison, jail or juvenile detention facility. If the person is already confined at the time of sentencing, the DNA sample should be drawn immediately after sentencing. If the sample is not taken upon intake to the facility, it may be done at any time thereafter. Individuals who are not sentenced to a term of confinement, but are still convicted of an offense triggering application of this statute, must provide a DNA sample prior to any form of release as a condition of that release.

"Felony sex offense" as used in the statute is defined as a felony offense or an attempt, conspiracy or solicitation to commit a felony offense under any of the following:

18 Pa. C.S. chapter 31 (relating to sexual offenses)
18 Pa. C.S. § 4302 (relating to incest)
18 Pa. C.S. § 5902 (c) (1) (III) and (IV) (relating to prostitution and related offenses)
18 Pa. C.S. § 5903 (a) (relating to obscene and other sexual materials and performances) where the offense constitutes a felony
18 Pa. C.S. § 6312 (relating to sexual abuse of children)
18 Pa. C.S. § 6318 (relating to unlawful contact with a minor) where the most serious underlying offense for which the defendant contacted the minor is graded as a felony
18 Pa. C.S. § 6320 (relating to sexual exploitation of children)

Other "specified offenses" included in the statute are *any felony offense* and an offense under 18 Pa. C.S. § 2910 (relating to luring a child into a motor vehicle) or 18 Pa. C.S. § 3126 (relating to indecent assault). Any attempt to commit any of these offenses also falls under the statute.

The statute distinguishes between felony sex offenses and "other offenses." Basically, however, a person convicted of <u>any</u> felony offense (or an attempt to commit a felony) is subject to DNA testing.

Much like the federal law, Pennsylvania law has made providing a DNA sample a condition of release for any person convicted of a qualifying offense. Additionally, the statute applies to anyone convicted of a qualifying offense still incarcerated or on any kind of supervised release, even if the conviction was prior to the effective date of the statute. Furthermore, any offender sentenced to death or life imprisonment without the possibility of parole is not exempt from the statute and must also provide a DNA sample.

Once the DNA sample is included in a DNA data bank, it is very difficult to expunge that record. A person may seek only seek to remove the sample on two grounds: the conviction that provided the authority to take the sample has been reversed and the case dismissed, or the DNA sample was included in the DNA data bank by mistake. In the former case, the state requires a written request along with a certified copy of the final court order. In the latter case, a written request and clear and convincing evidence of the mistake is needed. Offenders may not ask for their DNA records to be expunged because their convictions predated the effective date of the DNA Act. If a sample is expunged, it has no effect on any DNA match that may have occurred prior to the deletion of the sample.

<u>Constitutionality of DNA Collection</u>

The constitutionality of the DNA Act has been attacked on several grounds, including the Fourth Amendment and the Ex Post Facto clause. However, the Act (and its state derivatives) has been upheld at both the state and federal level.

Fourth Amendment

The Fourth Amendment of the United States Constitution protects an individual from unreasonable search and seizure. The withdrawal of a blood sample from a prisoner to provide a DNA sample is considered a search implicating Fourth Amendment rights. <u>Skinner v. Ry. Labor Executives' Association</u>, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). However, courts have found that such collection does not violate any Fourth Amendment rights, calling upon either the "reasonableness" test propounded by <u>United States v. Knights</u>, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) or the "special needs" doctrine explained by <u>Griffin v. Wisconsin</u>, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987).

In <u>Knights</u>, the Court examined the totality of the circumstances in determining whether a search without a warrant violated an individual's Fourth Amendment rights. Since the individual was on probation and subject to a search condition, he had a diminished expectation of privacy. The Court found that while the Fourth Amendment ordinarily required probable cause, a lesser degree satisfied the Constitution when the balance of governmental and private interests made such a standard reasonable.

United States v. Kincade, 379 F. 3d 813 (9th Cir. 2004) applied this analysis to prisoners on release affected by the DNA Act and decided there was no Fourth Amendment violation and DNA samples could be compelled without evidence of individualized suspicion. In making its decision, the court considered the conditional releasees' substantially diminished expectations of privacy, the minimal intrusion of blood sampling, and the overwhelming societal interests furthered by the collection of DNA information from convicted offenders. Recently, United States v. Sczubelek, 402 F.3d 175, 2005 U.S. App. LEXIS 4568 (3d Cir. 2005) used similar reasoning to uphold the taking of DNA samples from offenders on supervised release, citing the government's need to build a DNA database as a deciding factor when balancing the conflicting interests involved. Additionally, the court compared the DNA sampling to the fingerprinting convicted offenders must undergo, stating both are means of identification (a compelling governmental interest) and neither require additional individualized suspicion.

The same "totality of the circumstances" analysis is used when the individual is an inmate rather than an offender on supervised release. In Dial v. Vaughn, 733 A. 2d 1, 1999 Pa. Commw. LEXIS 432 (1999), the court ruled it was not a Fourth Amendment violation to compel an inmate to provide a DNA sample. The targeted population consisted of convicted inmates who had reduced privacy expectations. Withdrawing a blood sample was deemed a relatively minimal intrusion when compared to the state's need to maintain an identification system in order to deter recidivism. Groceman v. United States DOJ, 354 F. 3d 411, 2004 U.S. App. LEXIS 99 (5th Cir. 2004) also found inmates could constitutionally be subject to the DNA Act, citing the legitimate governmental interest of using DNA to investigate crime.

Other courts have used the "special needs" exception outlined by Griffin v. Wisconsin, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) to uphold the DNA Act. Griffin stated that the special needs of operating a state system of supervision over individuals on probation justified searches conducted on less than probable cause and without a warrant. The "special needs" doctrine can be used to justify the DNA Act because the Act's primary purpose is not discovery of evidence against a specific individual accused of a specific crime; rather, the purpose is to fulfill the need to create a neutral database and consequently, a more accurate criminal justice system. Vore v. United States DOJ, 281 F. Supp. 2d 1129 (U.S.D.C. Ariz. 2003).

Ex Post Facto

Art. I, § 9, cl. 3 of the United States Constitution prohibits the passage of an ex post facto law. A law that changes the punishment for an offense by inflicting greater punishment than the law applicable at the time of conviction is an example of an ex post facto law. It has been argued that the DNA Act is such a law since it affects offenders who may have been convicted prior to the passage of the Act and imposes new obligations and possible punishments that were not part of the original sentence. However, courts have dismissed this argument on various grounds.

In the case of an individual on supervised release whose parole conditions are subject to change, requiring the submission of a DNA sample is not itself penal in nature and therefore cannot violate the ex post facto clause even if the submission is not an original parole condition. Miller v. United States Parole Commission, 259 F. Supp. 2d 1166 (U.S.D.C. Kan. 2003). The court in Vore v. United States DOJ, 281 F. Supp. 2d 1129 (U.S.D.C. Ariz. 2003) found that even though the Act was passed after an offender's conviction, his refusal to provide a DNA sample would be punishable as a separate offense and would not increase his punishment for the original crime. Therefore, the Act was not an ex post facto law. Following similar reasoning, there is no ex post facto problem when the legislature creates a new offense (that of not providing the requisite DNA sample) that includes a prior conviction (the original offense that triggered application of the Act) as an element as long as other relevant conduct took place after passage of the law (the actual refusal to comply with the Act). United States v. Meier, 2002 U.S. Dist. LEXIS 25755 (U.S.D.C. Or. 2002).

Post-conviction DNA Testing

While DNA samples can be used to match a convicted offender to a previous or later crime, DNA testing can also be used to prove an offender's innocence. For federal inmates, a motion can be filed requesting post-conviction DNA testing according the guidelines set forth in 18 USCS § 3600. State prisoners should follow their particular state's law regarding post-conviction DNA testing. In Pennsylvania, the relevant statute can be found at 42 Pa. C.S. § 9543.1, and the procedures therein are very similar to the federal law. If there is no adequate remedy under state law, or if the inmate has exhausted all available remedies under state law, the inmate may file a request through the federal statute.

A written motion for DNA testing is filed with the court that convicted and sentenced the prisoner. An applicant must be able to satisfy several conditions under 18 USCS § 3600 in order for the court to allow evidence to be tested and compared to the applicant's DNA sample.

> An applicant must be able to assert he is innocent of the offense for which he is serving a sentence of imprisonment or death, or of an offense that was offered as evidence in a death sentencing hearing, and that DNA testing could prove exculpatory.
>
> The evidence to be tested must have been secured in relation to the investigation or prosecution of that offense and not previously subjected to testing.
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> The applicant must not have knowingly and voluntarily waived his right to request DNA testing of the evidence.
>
> The proposed DNA testing must be reasonable in scope and use acceptable techniques and methods.

The applicant's theory of defense must be consistent with an affirmative defense presented at trial. The theory, if proven, must establish the actual innocence of the applicant.

The identity of the perpetrator must have been at issue at trial.

An inmate seeking post-conviction DNA testing under federal law should file a request within 36 months of conviction or within 60 months of the enactment of the Justice for All Act (enacted on October 30, 2004), whichever is later. However, the court may overlook timeliness problems in certain situations such as the discovery of new DNA evidence or when the applicant is incompetent. Conversely, even if the motion is filed within the proper time period, the court can deny the request if the motion is made solely to cause delay or harass or if the motion is solely based on information used in a previously denied motion.

If the court grants the applicant's request, his DNA sample will be included in the National DNA Index System (NDIS), the national level of CODIS, and can be compared to DNA evidence from other criminal investigations. If the test results are inconclusive or prove the applicant was the source of the DNA evidence, the sample can be retained in NDIS. If the sample and the evidence are not a match, and the sample does not match any DNA evidence from other crimes, the sample will be destroyed and its record deleted from NDIS. If the sample matches evidence from other investigations, the sample will be preserved and the proper authorities will be notified.

If the results of the testing are inconclusive, the court may order additional testing or deny the applicant relief. If the DNA sample matches the DNA evidence from the crime, the court may find the applicant's assertion of innocence false and hold the applicant in contempt. In addition, the applicant may lose good conduct credit or be denied parole. On the other hand, if the testing is exculpatory and there is evidence to suggest the outcome of the trial would have been different, the court may order a new trial or resentencing.

The following recent Pennsylvania case law provides some examples of how the right to post-conviction DNA testing has been applied within the state:

Commonwealth v. Heilman, 2005 Pa. Super. 19, 867 A. 2d 542 (2005) – The offender argued that if his DNA was not found at the crime scene, he could not have committed the crime. The court denied his request for DNA testing because the absence of the inmate's DNA was not necessarily evidence of the inmate's absence.

Williams v. Erie County Dist. Atty.'s Office, 2004 Pa. Super. 127, 848 A. 2d 967 (2004) – The offender's request for DNA testing was denied because he had pled guilty to the offense. The court stated that a person who has pled guilty (in the absence of coercion or improper inducement) cannot make the claim of innocence that is a required element of a DNA testing request.

Commonwealth v. McLaughlin, 2003 Pa. Super. 405, 835 A. 2d 747 (2003) – The court denied a request for post-conviction DNA testing because the offender refused to submit to DNA testing at the time of trial. In doing so, he effectively waived his right to relief through post-conviction testing.