# LEGAL BULLETIN 9.4

## DNA Collection and Testing

Set 9: Post-Conviction – Bulletin 9.4 (Updated June 2005)

---

Lewisburg Prison Project
P.O. Box 128
Lewisburg, PA 17837

**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:
**The statute distinguishes between felony sex offenses and "other offenses." Basically, however, a person convicted of any 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.

Constitutionality of DNA Collection

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. Skinner v. Ry. Labor Executives' Association, 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 United States v. Knights, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) or the "special needs" doctrine explained by Griffin v. Wisconsin, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987).

In Knights, 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.

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. 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. Mejer, 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 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.
- 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.

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,