OFFENDER PROFILES AND POST-CONVICTION TESTING

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# TABLE OF CONTENTS

**Introduction** .................................................................................................................................................. 1
  - Methodology ............................................................................................................................................... 1
  - Deoxyribonucleic Acid (DNA) .................................................................................................................. 2
**DNA Databases: Linking Federal, State and Local Systems** ................................................................. 3
  - The Combined DNA Identification System (CODIS) ............................................................................. 3
  - Forensic and Offender Indexes ............................................................................................................... 4
  - Table 1: NDIS DNA Profiles by SLC State August 2002 ................................................................. 5
**Southern State Offender Profiles: Qualifying Offenses** ........................................................................ 6
  - All-Felons Requirements .................................................................................................................. 7
  - Cost Concerns ....................................................................................................................................... 7
  - Other Qualifying Offenses ................................................................................................................... 8
  - Misdemeanor Requirements ............................................................................................................... 8
  - Arrestee/Suspect Requirements ......................................................................................................... 8
  - Juvenile Requirements ....................................................................................................................... 9
  - Retroactivity ......................................................................................................................................... 10
  - Offender Fees ....................................................................................................................................... 10
  - Table 2: SLC State Offender Database Laws: Qualifying Offenses September 2002 .................. 11
  - Refusal to Submit ............................................................................................................................ 12
  - DNA Testing, Use and Disclosure .................................................................................................... 12
  - Table 3: Statutory Requirements on DNA Testing, Use and Disclosure ......................................... 13
  - Crimes and Penalties for Unauthorized Disclosure ........................................................................ 14
  - Table 4: Crimes and Punishments for Unlawfully Disclosing Offender DNA Information ........ 15
  - Unauthorized Receipt ......................................................................................................................... 15
  - Expunging Offender Profiles .............................................................................................................. 15
**Post-Conviction DNA Testing** ............................................................................................................ 16
  - Southern States’ Post-Conviction Statutes ......................................................................................... 17
  - Concerns .............................................................................................................................................. 17
  - Victim Notification ............................................................................................................................. 18
  - Eligible Offenders ............................................................................................................................... 18
  - Criteria for Testing ............................................................................................................................. 18
  - Statutes of Limitations ....................................................................................................................... 21
  - Testing Cost and Provision of Counsel ............................................................................................. 22
  - Preservation of Evidence .................................................................................................................... 22
  - Post-Conviction DNA Exonerations .................................................................................................. 23
  - The Federal Innocence Protection Act ............................................................................................. 23
  - Table 5: Southern State Post-Conviction DNA Petitioning October 2002 ....................................... 25
**SLC State Section** .................................................................................................................................. 26
  - Alabama ............................................................................................................................................... 27
  - Arkansas ............................................................................................................................................... 28
  - Florida .................................................................................................................................................. 30
  - Georgia ............................................................................................................................................... 32
  - Kentucky ............................................................................................................................................ 33
  - Louisiana ............................................................................................................................................. 35
  - Maryland ............................................................................................................................................. 37
  - Mississippi .......................................................................................................................................... 38
  - Missouri ............................................................................................................................................. 39
  - North Carolina .................................................................................................................................... 40
  - Oklahoma ........................................................................................................................................... 42
  - South Carolina .................................................................................................................................... 43
  - Tennessee ............................................................................................................................................ 44
  - Texas .................................................................................................................................................... 45
  - Virginia ............................................................................................................................................... 47
  - West Virginia ...................................................................................................................................... 49
**DNA Backlogs and Federal Funding** .................................................................................................... 50
  - Federal Assistance to State and Local Laboratories ......................................................................... 51
**Summary** .................................................................................................................................................. 53
  - Offender Profiles and Database Matches ......................................................................................... 53
  - Post-Conviction DNA Exonerations ................................................................................................. 54
**Endnotes and References** ..................................................................................................................... 56
DNA (deoxyribonucleic acid) is a double-stranded molecule that is twisted into a helix like a spiral staircase. Each strand comprises a sugar-phosphate backbone and numerous base chemicals attached in pairs. The four bases that make up the stairs in the spiraling staircase are adenine (A), thymine (T), cytosine (C) and guanine (G). These stairs act as the “letters” in the genetic alphabet, combining into complex sequences to form the words, sentences and paragraphs that act as instructions to guide the formation and functioning of the host cell.
Since its introduction in a United States court in 1986, the use of deoxyribonucleic acid (DNA) as evidence has become one of the foremost forensic techniques in criminal investigations, instrumental in solving crimes by facilitating the identification, detection and exclusion of suspects; ensuring verdicts; leading to guilty pleas; and promoting fairness and certainty in the justice system. While forensic DNA testing faced early challenges over its validity and reliability, genetic identification technology is now widely accepted by the scientific community as producing reliable results and is admissible as evidence in all United States court jurisdictions.

Recognizing its unique abilities and general acceptance, states increasingly have implemented measures taking advantage of DNA analysis in the criminal justice process, not only as a tool to identify suspects and convict the guilty, but also to exonerate the innocent. Further enhancing this effort, states, with the support of the federal government, have created and linked DNA databases into a national network to maximize DNA's potential by allowing law enforcement agencies across the country to share and compare critical information in crime investigations.

This Special Series Report examines Southern state DNA criminal justice laws and databases, along with their development, over the past decade and states’ post-conviction DNA testing statutes. In particular, focus centers in two areas: the development of databases through offender profiles – requiring the submission of DNA samples from convicted offenders and select others; and the ability of incarcerated persons to petition for the introduction of DNA evidence in post-conviction appeals in the hope that it may exonerate them.

**METHODOLOGY**

Information for this report was compiled directly from state statute. In addition, criminal justice and/or legislative officials in all 16 SLC states were contacted and sent surveys gauging various aspects of their DNA laws. Once states completed surveys and their laws were reviewed, a draft of each state’s pages was compiled, then returned to them for verification and
comment. Information from Maryland was prepared by statute alone due to a lack of response by officials with the Maryland Department of Public Safety and Correctional Services.

DEOXYRIBONUCLEIC ACID (DNA)

By way of brief background, deoxyribonucleic acid (DNA) is located in the nucleus of cells and provides an individual’s genetic blueprint. DNA can be generated from a person’s blood, bone, hair, saliva, semen, skin cells, perspiration and other body tissues and products, and determines identification characteristics specific to the person. A person’s DNA is the same in every cell, no matter its origin, and each person’s DNA is unique to that individual, except in the case of siblings of multiple births.

DNA can be taken from virtually anywhere for the purposes of analysis or storage, or both, and its forensic value as evidence can last decades, though several environmental and other factors may affect its usefulness if it is not properly preserved. While it is not possible to use all DNA evidence for conclusive analysis, advances in testing technology enable investigators to more readily generate analysis from smaller DNA samples from a broader array of sources.\(^1\)

For the purposes of this report, a DNA sample is any biological sample containing DNA. A DNA record refers to identification information stored in a DNA database for the purpose of generating investigative leads. The results of all DNA identification tests on an individual’s patterned chemical structure of genetic information are collectively referred to as an individual’s DNA profile or fingerprint. A DNA database is a local, state or federal DNA identification record system used for collecting, storing and maintaining DNA profiles. A DNA databank is the repository for DNA samples.
DNA DATABASES: LINKING FEDERAL, STATE AND LOCAL SYSTEMS

THE COMBINED DNA IDENTIFICATION SYSTEM (CODIS)

In 1990, states were at various early stages in collecting, analyzing, storing and comparing DNA samples collected from crime scenes and from those suspected or convicted of criminal offenses. Work in this area was mostly decentralized with a number of forensic laboratories, both public and private, performing DNA analysis on behalf of states and local law enforcement agencies. Moreover, it was at times challenging and time consuming for crime laboratories in different states to compare and exchange DNA profiles.

In just a decade’s time, however, this patchwork of laboratories and databases has become increasingly linked, with law enforcement agencies from all levels and jurisdictions more able to share DNA information in criminal investigations. This linking was made possible through a concerted effort by the federal government, states, and an array of other criminal justice stakeholders. Its coordination was spearheaded by the Federal Bureau of Investigation (FBI), which aided states by helping develop systems for DNA analysis and storage, offering support and funding for state databasing, and standardizing database testing and compatibility so that DNA data can be compared among them.

Maintained by the FBI, the Combined DNA Identification System (CODIS) began as a pilot project in 1990 among 14 state and local forensic laboratories. Its purpose was to exchange and compare DNA information electronically among participating labs, blending computer and DNA technologies into a crime-fighting tool. With passage of the DNA Identification Act of 1994, the FBI was authorized to establish a national DNA databank for law enforcement purposes. While this formally established CODIS and enabled its expansion, it did not authorize the collection of DNA samples from federal offenders. In passing the DNA Analysis Backlog Elimination Act in December 2000, Congress authorized the collection of DNA samples from persons convicted of certain felony
offenses. As of October 2002, the federal government requires DNA from all violent felons, and those convicted of military and terrorism crimes.

In October 1998, the FBI implemented the National DNA Index System (NDIS) to serve as a single central repository of DNA records generated by state and local laboratories across the country. Its purpose is to serve as a tool allowing investigators in one state to match a DNA sample found at a crime scene with the DNA profile in another state’s database. Enhancing state and lab coordination, system-wide standards were established to ensure that only reliable and compatible DNA profiles are contained in the NDIS files.

The FBI describes CODIS as a distributed database with three levels: NDIS; state DNA index systems (SDIS); and local DNA index systems (LDIS). Each state has a single SDIS, or DNA database, in which DNA profiles submitted by different laboratories within the state are compared. At the community level, an LDIS is operated by local law enforcement agencies and access is traditionally limited to personnel at the participating laboratories. Bringing these labs and resources together allows federal, state and local law enforcement agencies to share DNA evidence in a combined effort to link crimes together, and crimes to convicted offenders, on the national level.

The tiered approach, states the FBI, allows state and local law enforcement agencies to operate their databases according to their specific legislative or legal requirements. The FBI provides CODIS software, together with installation, training and user support free of charge to any state and local law enforcement labs performing DNA analysis. Viet Dinh, Assistant United States Attorney General, notes that CODIS is “a federal system, but the states are at the heart of it.”

Conforming to the nationwide system, state statutes creating DNA databases require that they be compatible with CODIS to the extent required by the FBI to permit the useful exchange and storage of DNA records. As statutory examples, the 1995 law establishing Texas’ DNA database required that it be “compatible with CODIS to the extent required by the FBI to permit the useful exchange and storage of DNA records or information derived from those records,” language directly taken from the FBI. Similarly, statute establishing Louisiana’s DNA Identification System in 1997 required that it “shall be compatible with the procedures specified by the FBI, including use of comparable test procedures, laboratory equipment, supplies and computer software.” Other Southern state database statutes contain similar, if not identical, language.

FORENSIC AND OFFENDER INDEXES

The CODIS program uses two indexes to investigate crimes from which biological evidence has been recovered. The Forensic Index (casework index) contains DNA profiles collected from biological evidence found at crime scenes. Matching these DNA profiles can link crime scenes, help identify serial offenders, and allow police in multiple jurisdictions to coordinate investigations and share the leads they develop independently. The program’s Offender Index contains the DNA profiles of convicted offenders, with states having different laws on which offenders are required to provide DNA samples.

CODIS software automatically searches the two for matching DNA profiles and, if a match is made between a sample and a stored profile, can identify perpetrators of unsolved crimes. Matches can occur as cases linked to each other (forensic hit) or as unsolved cases linked to an offender (offender hit). The latter is referred to as a “cold hit,” as it provides law
enforcement with an investigative lead that would not otherwise have been possible. The FBI measures the success of the CODIS program by the crimes it helps to solve, or the number of investigations the system has aided through hits.

As of August 2002, CODIS contained DNA profiles from more than 130 labs in 44 states, Puerto Rico, the United States Army and the FBI. While every state has a DNA database containing varying amounts of both forensic and offender profiles, a few were not ready to participate with the NDIS as of August 2002, including Alabama and Mississippi. Louisiana and Oklahoma had just begun participating with NDIS. In total, NDIS databank contained 1,158,223 DNA profiles: 39,096 DNA forensic profiles and 1,119,127 offender profiles. The FBI reported that CODIS/NDIS had produced 4,943 hits, assisting in 5,442 investigations in 34 states nationwide.

Southern states had entered a total of 597,634 DNA profiles into NDIS – more than 50 percent of the national total – as of August 2002, including 582,209 offender profiles and 15,425 forensic profiles. Florida had entered the most offender profiles (133,218); followed by Texas (128,625); Virginia (123,233) and Georgia (54,525). Florida also had entered the most forensic profiles (4,004); followed again by Texas (3,654); then Georgia (2,484) and Missouri (1,733). Overall, NDIS had aided 2,883 investigations in 12 Southern states as of that date.

### NDIS DNA Profiles by SLC State August 2002

<table>
<thead>
<tr>
<th>State</th>
<th>Offender Profiles</th>
<th>Forensic Profiles</th>
<th>Number of CODIS Labs</th>
<th>NDIS Participating Labs</th>
<th>Investigations Aided</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>126</td>
</tr>
<tr>
<td>Arkansas</td>
<td>13,297</td>
<td>174</td>
<td>1</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>Florida</td>
<td>133,218</td>
<td>4,004</td>
<td>10</td>
<td>9</td>
<td>917</td>
</tr>
<tr>
<td>Georgia</td>
<td>54,525</td>
<td>2,484</td>
<td>2</td>
<td>2</td>
<td>277</td>
</tr>
<tr>
<td>Kentucky</td>
<td>3,737</td>
<td>516</td>
<td>1</td>
<td>1</td>
<td>29</td>
</tr>
<tr>
<td>Louisiana</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Maryland</td>
<td>11,479</td>
<td>355</td>
<td>3</td>
<td>3</td>
<td>23</td>
</tr>
<tr>
<td>Mississippi</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Missouri</td>
<td>21,924</td>
<td>1,733</td>
<td>4</td>
<td>4</td>
<td>130</td>
</tr>
<tr>
<td>North Carolina</td>
<td>35,006</td>
<td>1,010</td>
<td>2</td>
<td>2</td>
<td>77</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>15,032</td>
<td>120</td>
<td>1</td>
<td>0</td>
<td>8</td>
</tr>
<tr>
<td>South Carolina</td>
<td>16,776</td>
<td>332</td>
<td>1</td>
<td>1</td>
<td>18</td>
</tr>
<tr>
<td>Tennessee</td>
<td>24,597</td>
<td>678</td>
<td>3</td>
<td>3</td>
<td>34</td>
</tr>
<tr>
<td>Texas</td>
<td>128,625</td>
<td>3,654</td>
<td>15</td>
<td>15</td>
<td>302</td>
</tr>
<tr>
<td>Virginia</td>
<td>123,233</td>
<td>365</td>
<td>4</td>
<td>4</td>
<td>927</td>
</tr>
<tr>
<td>West Virginia</td>
<td>760</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>SLC Total</td>
<td>582,209</td>
<td>15,425</td>
<td>55</td>
<td>48</td>
<td>2,883</td>
</tr>
<tr>
<td>U.S. Total</td>
<td>1,119,127</td>
<td>39,096</td>
<td>NA</td>
<td>NA</td>
<td>5,442</td>
</tr>
<tr>
<td>SLC Percentage of U.S. Total</td>
<td>52%</td>
<td>39%</td>
<td>NA</td>
<td>NA</td>
<td>53%</td>
</tr>
</tbody>
</table>


Notes: Select states have provided updated offender profile figures in their respective sections. While Alabama, Louisiana and Mississippi all had DNA databases, as of August 2002, they had not yet linked them to the NDIS system, thus their index information is not reflected here.
To maximize DNA’s potential as a crime-fighting tool, states, with the support and approval of the U.S. Department of Justice, have gradually adopted requirements that various felony offenders submit DNA samples upon their conviction for the purpose of criminal DNA databasing. States began the drive in the early 1990s, first requiring DNA from convicted sex offenders, a move pioneered by Colorado in 1989.

By 2002, not only were 50 states requiring DNA from sex offenders to construct databases, but many had expanded offender requirements to a broad array of other offenders as well. In general, subsequent to collecting DNA from sex offenders, violent offenders were the next group required to provide DNA samples, followed by burglars, various other felons and, most recently, from all convicted felons. The logic, according to the National Institute of Justice (NIJ), is that the more offenders that are included in the database, the more crimes that will be solved. According to Dawn Herkenham, an Albany, New York, lawyer who advises the FBI on DNA matters, “there’s a definite connection between the size of your DNA database and your success rate. You have to maximize your convicted offender samples to really see what the system is capable of.”

Proponents of offender DNA requirements stress genetic testing’s crime-solving abilities in the areas of ensuring prompt and public verdicts, leading to guilty pleas which could spare fragile sexual assault and child victims the trauma of trial, and saving taxpayer dollars by reducing court staff time and the cost of a trial. Furthermore, it promotes fairness, confidence and certainty in the administration of laws. Databases are seen as an irreplaceable investigative tool for law enforcement, with many advocating the collection of DNA from all felons to solve more crimes and prevent others.

Opponents of expanding DNA offender indexes often cite its prohibitive costs and express concerns over privacy, arguing that cataloguing
offenders’ DNA violates their constitutional right to privacy and protections against illegal search and seizures.

Jeff Vessels, executive director of the American Civil Liberties Union of Kentucky is concerned that the pool of individuals from which DNA is collected keeps growing. “When the government creates a large database of personal information, they initially want it for only one purpose. But then they decide to use it for other things,” Vessels warns. In response, Kentucky State Representative Brent Yonts, in sponsoring the unsuccessful 2001 all-felons bill, commented “if you’re convicted of a felony, you largely give up your civil rights. You give up your right to have secrets.”

ALL-FELONS REQUIREMENTS

In 1990 Virginia became the first state in the country to require all convicted felons to submit DNA samples. While few states followed with “all-felons” statutes throughout most of the decade, the turn of the century witnessed a dramatic increase in such requirements as early successes with CODIS databases and the activation of the NDIS may have served as the catalyst for states to keep broadening the coverage of their databases. By 1998, five states had adopted all-felons requirements, including Tennessee and Alabama in the South; by 2000, seven states, including Georgia, had joined that list; by 2001, all-felons laws had been adopted by 14 states, including Florida and Texas (both laws yet to be implemented); and by October 2002, 22 states nationwide permitted the taking of DNA samples from all convicted felons, with Maryland being the most recent Southern state to do so. In addition, five other Southern states (Kentucky, Oklahoma, Mississippi, North Carolina and West Virginia) considered, but did not pass, legislation requiring DNA samples from all felons in 2002.

According to Smith Alling Lane, a Tacoma, Washington, law office renown for its expertise and research in DNA statutes, other factors driving “all-felons” legislation over this period include state agency advocacy, federal funding, law enforcement association advocacy and the neutrality of the American Civil Liberties Union (ACLU), and the Criminal Defense Bar. While the two latter groups have expressed reservations over broadening DNA requirements, they also appreciate DNA’s ability to exonerate persons wrongly accused of crimes.

COST CONCERNS

As states increase the type of offenders from which they collect DNA, crime labs and law enforcement agencies have seen their workloads increase dramatically, with many cautioning states not to pass all-felons and other encompassing legislation without first appropriating the funding necessary to perform and analyze the testing.

Addressing these concerns, of the seven Southern states enacting statutes requiring DNA from all convicted felons, three conditioned those requirements on funding being made available, while another conditioned the expansion of requiring DNA from violent and other offenses on available funding:

- Florida will begin collecting DNA from all felons in 2005, “based on legislative appropriations;”
- Maryland’s all-felons law was contingent on the Department of State Police receiving at least a $1.5 million grant from any private entity or federal agency – a requirement which has been met;
- Texas’ all-felons law, not yet implemented, will take effect upon the receipt of sufficient funds from the federal government or other
sources to pay all costs associated with expanding its list of DNA-required offenses; and

- while Kentucky has not passed legislation requiring DNA from all felons, the effect of a 2002 law expanding requirements beyond sex and family offenders is determinate upon full funding being made available for its implementation.

OTHER QUALIFYING OFFENSES

While seven Southern states have adopted legislation requiring DNA from all convicted felons by 2002, all Southern states require that DNA be submitted by sex offenders, and all but Mississippi require that samples be collected from violent felons, although there is some variation in defining violent crime. In addition, 12 of 16 states now collect DNA from those convicted of burglary and nine of 16 now require some drug offenders to submit samples. Some state statutory requirements incorporate a lengthy and broad array of offenses applicable to offender DNA requirements.

MISDEMEANOR REQUIREMENTS

In addition to requiring DNA from felony offenders, five Southern states (Alabama, Arkansas, Maryland, Tennessee and West Virginia) may also require DNA from those convicted of select misdemeanor offenses:

- Alabama requires those convicted of any misdemeanor sexual or domestic violence offense, among others, to submit DNA;
- Arkansas requires DNA for misdemeanor convictions of burglary, sex, violent or repeat offenses;
- Maryland requires DNA for misdemeanor convictions of fourth degree burglary or breaking and entering a motor vehicle; and
- Tennessee requires DNA for any sex offense, be it a felony or misdemeanor.

ARRESTEE/SUSPECT REQUIREMENTS

Some argue that states should go one step further in expanding DNA databases, increasing the likelihood of forensic hits by requiring DNA from arrestees as well as convicted offenders. Proponents, such as former New York City Police Commissioner Howard Safir, argue that most major crimes involve people who also have committed prior offenses and that moving the point of testing from the conviction to arrest phase would result in savings in investigation, prosecution and incarceration.\(^{14}\)

Others object to requiring DNA from arrestees. Louisiana ACLU director, Joe Cook, states, “ours is a Fourth Amendment right. A person is innocent until proven guilty. There ought to be a procedure for destroying that profile, if there’s not justification for you to be in the system in the first place.”\(^{15}\) Warns the Virginia ACLU director, “first, [DNA collection] was just from those convicted, now it’s from those arrested, and who knows what the next categories will be.”\(^{16}\)

Heeding privacy concerns, Virginia Governor Mark Warner initially had objected to 2002 legislation requiring DNA from arrestees. However, Warner became more receptive to the measure when an amendment was added providing for the destruction of samples in the case of an acquittal or when the case is dismissed.\(^{17}\) The bill was subsequently signed into law.

As of August 2002, four states nationwide (California, Louisiana, Texas and Virginia) had adopted legislation allowing for the collection of DNA samples from those arrested for, but not convicted of, select crimes. Of note, while Texas allows this, statute requires that funds must first be available;
Louisiana has not yet begun to collect DNA from qualifying arrestees; and Virginia’s law does not take effect until January 1, 2003. All three of the Southern states have statutory provisions addressing the removal of arrestees’ DNA profiles absent a conviction:

- Louisiana may take DNA from any person arrested for a crime for which a convicted offender must supply a sample. Arrestees may request that their profiles be removed if their arrest does not result in a conviction;
- Texas, provided funds are available, may collect DNA from persons indicted for select sex offenses, kidnapping and first degree burglary. The state may also collect DNA from persons arrested for those crimes, if they have previously been convicted or adjudicated of them or of second degree burglary, or have been convicted of public lewdness or indecent exposure. The state must destroy arrestees’ DNA profiles, and all other identifiable records, if the person is acquitted or the case is dismissed; and
- Virginia may require DNA from those arrested for select violent crimes; mob-related felonies; burglary; robbery; arson of an occupied structure; and entering a dwelling, house, etc., with intent to commit a felony or misdemeanor. The state must destroy arrestees’ DNA profiles, and all other identifiable records, if the person is acquitted or the case is dismissed.

It is important to note that while states are free to include arrestee profiles in their own DNA databases, they may not enter them into NDIS, as the DNA Identification Act only refers to databasing profiles from “convicted” offenders, not arrestees. Whether these three states actually collect DNA samples from arrestees and allow them to be compared and/or maintained at the state level may, however, be influenced by any backlogs their forensic laboratories are facing and, as Texas law prescribes, the availability of funding.

**JUVENILE REQUIREMENTS**

Most Southern states also allow or require that DNA be collected from certain classes of juvenile delinquents. While the majority of states maintain the same offender requirements for juveniles who have been tried and convicted as adults, other states also allow DNA to be collected from juveniles adjudicated delinquent for certain offenses. Of these, states primarily require DNA from juvenile delinquents who have committed the same offenses for which adults, if convicted, would also be required to submit DNA. Among Southern states:

- Alabama and Kentucky require DNA from juveniles adjudicated delinquent for sex offenses;
- Florida’s adult offender requirements also apply to juveniles who are found delinquent and are committed to, or are under the supervision of, a county jail or the Department of Juvenile Justice;
- Arkansas, Louisiana, South Carolina, Tennessee and Texas require DNA from juveniles adjudicated delinquent of any offense for which a convicted adult offender must provide DNA;
- Oklahoma requires DNA from juveniles convicted of offenses for which adults are required to provide DNA samples; and
- Virginia requires juveniles, age 14 and over, to provide a DNA sample if they are convicted of any felony, or if they are adjudicated delinquent of any crime which would be a felony if committed by an adult.
As is the case with arrestees, however, states cannot enter the DNA profiles of juveniles adjudicated delinquent into the NDIS, as federal statute dictates the national system can only accept records from those convicted of a crime.¹⁹

RETRORACTIVITY

For the most part, state offender DNA laws are retroactive, requiring DNA samples from those who were incarcerated, for applicable offenses, on or before the date on which the law the took effect. Proponents of retroactive laws point out that they prevent dangerous offenders from first being released prior to determining if they had committed other unsolved crimes, and allow that person’s DNA to be kept on file in order to possibly match it with future crime scene evidence in the case the individual turns out to be a recidivist.

Jails and Prisons – As of September 2002, offender DNA statutes were retroactive to persons incarcerated in 31 states nationwide, and in 15 of 16 Southern states – Tennessee being the sole SLC exception. While statutes vary slightly in retroactive language, Southern state laws mostly require only that the DNA sample be taken before or upon the inmate’s prison release. Two states are a little more specific, with Georgia requiring incarcerated offenders to submit DNA within the 12 months preceding their release and Florida requiring samples no less than 45 days prior to an inmate’s release.

Probation and Parole – In addition to being retroactive to those incarcerated, offender DNA laws in 17 states nationwide were retroactive to those serving on probation or parole at the time they took effect. Offender DNA states were retroactive to those on probation or parole in five Southern states: Alabama, Florida, Missouri, South Carolina, and Virginia.²⁰

Some point out that waiting until an inmate is about to be released before taking and analyzing their DNA makes it impossible to match that offender’s DNA to an open case prior to that point, thus potentially prolonging a “hit” and leaving a case unsolved. However, states inundated with offender sample requirements and laboratory backlogs often find more expedited approaches unrealistic. Making ends meet with limited resources, forensics labs’ priorities center on first analyzing cases ordered by the courts and requested by crime investigators to assist in solving cases, then cataloging offender samples that are retroactively required. After the initial database inundation following the expansion of offender DNA requirements, and after states have caught up in with processing court-required DNA samples, more emphasis will likely be placed on databasing profiles from offenders already incarcerated.

OFFENDER FEES

Some Southern states have looked to the offenders themselves to help offset the costs of DNA testing and database maintenance. As of September 2002, five Southern states allowed offenders to be charged fees for the collection of their DNA, with policies differing on actual collection and their application to the indigent:

- Arkansas officials note that while a sentencing court may mandate a fine of up to $250, fines are rarely collected;
- Florida requires offenders, unless they are declared indigent, to reimburse the state the “actual costs” of collecting the sample;
- Louisiana statute allows offenders to be charged a $250 fee unless undue hardship would result; however, corrections officials noted that the fee is rarely assessed;
- Oklahoma offenders must pay a $150 fee; and
<table>
<thead>
<tr>
<th>State</th>
<th>All Felonies</th>
<th>All Violent Crimes</th>
<th>Sex Crimes</th>
<th>Burglary</th>
<th>Some Drug Crimes</th>
<th>Some Misdemeanors</th>
<th>Arreestees/ Suspects</th>
<th>Juveniles</th>
<th>Cost to Offenders for Sample</th>
<th>Law Retroactive to Prisoners</th>
<th>Retroactive to Probation and Parole</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>x</td>
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<td>$250</td>
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<td>39</td>
<td>27</td>
<td>22</td>
<td>4</td>
<td>30</td>
<td>NA</td>
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</table>

Source: Respective SLC state statutes. Source for total nationwide figures: Smith Alling Lane, State DNA Database Laws Qualifying Offenses, June 2002.

Notes: Florida’s all-felons law will be effective 07/01/05, dependent on legislative appropriations. Kentucky’s offender DNA requirements, outside sex and family offenses for which they are mandatory, are dependent on available funding. Texas’ all-felons, arrestee and drug crime requirements are dependent on available funding. Virginia’s arrestee requirements become effective 07/01/03. “No Response,” indicates state officials did not respond to the survey. “Many” indicates that the state specifically lists select violent offenses for which to require DNA; while those crimes may be many, they are not all violent crimes as defined in other states’ statutes.
Virginia requires offenders to pay a $25 fee to have their DNA sample taken.

REFUSAL TO SUBMIT
In April 2002, a study by USA Today revealed that thousands of inmates throughout the country had refused to supply DNA as required by state laws, thus threatening efforts to build NDIS’ database of offender profiles. The study focused on California, where more than 900 inmates had declined to give samples in the past year. Because the state could only use administrative sanctions to try to coax inmates into cooperating, corrections officials argued for a law allowing them to use force in collecting inmates’ DNA samples. According to the newspaper, only 11 states had such laws at that time.21

DNA statutes in the region vary as to whether they authorize the use of force in collecting a DNA sample from an offender who refuses to submit one. While all state corrections and other departments likely have internal policies addressing the use of force, court orders, etc., to obtain DNA samples, statutes in the following four states specifically authorize such force:

- Arkansas officials may employ “reasonable force” to obtain a DNA sample;
- Florida officials may use reasonable force, and will not be civilly or criminally liable for actions taken;
- Missouri officials may use “such force as necessary to the effectual carrying out” of the process, and are not liable when the act is “performed in a reasonable manner;” and
- Texas officials may use force “when and to the degree the employee reasonably believes the force is necessary” to obtain an offender’s sample.

All states’ retroactive provisions require those in prison to submit a sample in order to be released, and retroactive provisions applicable to probation or parole require offenders to submit samples as a condition of that sentence. Refusing to do so for the latter would be a violation of probation or parole requirements, thus leading to the revocation of the sentence and landing the offender back behind bars. Besides force, state corrections departments also are likely to employ a number of other penalties, such as preventing the accumulation of good-time or meritorious-time credits or the application of other penalties or restrictions in order to encourage inmates to submit required DNA samples.

DNA TESTING, USE AND DISCLOSURE
While many are not necessarily opposed to requiring DNA samples from offenders, they urge that offenders’ DNA profiles be limited to purposes related to crime solving and database matching, thus preventing testing for other personal information such as an individual’s predisposition to certain diseases or health problems, prediction of future behavior patterns, or even legitimacy of birth. Such analysis, it is argued, increases the potential for subsequent genetic discrimination by banks, insurance companies, employers and the government, among others.

Since states began collecting and comparing offenders’ DNA profiles in the early 1990s, there has been considerable debate over whether the federal government should step in and require uniform testing and database standards. Proponents argue that, because state policies could vary significantly in this area, federal law should set such policies as the types of genetic information which can be obtained from offender DNA, how DNA
### Statutory Requirements on DNA Testing, Use and Disclosure

<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Used only for law enforcement identification purposes in criminal investigations; supporting identification research and protocol development of DNA forensic methods; creating and maintaining DNA quality control standards; assisting the recovery or identification of human remains from natural or mass disasters; creating a DNA population database (provided no identifying information is incorporated); and for other humanitarian purposes. Statute does not specifically limit what tests may be performed on DNA.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Used “only for law enforcement identification purposes or to assist in the recovery or identification of human remains from disasters or for other humanitarian identification purposes, including identification of missing persons.” Profiles may only be made available to criminal justice agencies or crime laboratories; shared in the furtherance of a criminal investigation; or to create a population database, after all personal identification is removed. Statute does not specifically limit what tests may be performed on DNA.</td>
</tr>
<tr>
<td>Florida</td>
<td>Released only to criminal justice agencies in relation to a criminal investigation. Statute does not specifically limit what tests may be performed on DNA.</td>
</tr>
<tr>
<td>Georgia</td>
<td>Used only for law enforcement purposes; and to create a statistical database (provided that no identifiable information is included). DNA may be tested only to determine identification characteristics specific to the offender and will remain confidential.</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Used only for law enforcement purposes. Statute does not specifically limit what tests may be performed on DNA.</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Used only for law enforcement identification purposes and shared in the furtherance of an official crime investigation; to assist in the recovery or the identification of human remains from disasters; for other humanitarian identification purposes, including the identification of missing persons; or to create a separate population database, once all personal identification is removed. Profiles are to be kept confidential. Statute does not specifically limit what tests may be performed on DNA.</td>
</tr>
<tr>
<td>Maryland</td>
<td>Used only in the furtherance of an official crime investigation; to assist in the identification of human remains; to assist in the identification of missing persons; or for research and administrative purposes. While statute does not specifically limit what tests may be performed, only DNA records that directly relate to an individual’s identification are maintained.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Statute does not specify how the information in an offender’s profile may be used nor specifically limit the testing which may be done on offender’s DNA.</td>
</tr>
<tr>
<td>Missouri</td>
<td>Used to assist criminal justice and law enforcement agencies in crime investigations; to support the development of a population statistics database, when personal identifying information is removed; support identification research of forensic DNA analysis methods; assist in the recovery or identification of human remains; and for quality control purposes. Statute does not specifically limit what tests may be performed on DNA.</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Shared in the furtherance of an official investigation of a criminal offense and for research and administrative purposes, including development of a population database when personal identifying information is removed; to support identification research and protocol development of forensic DNA analysis; for quality control purposes; and to assist in the recovery or identification of human remains. May be tested only for law enforcement identification purposes.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Disclosed or disseminated only to federal, state, county or municipal law enforcement or criminal justice agencies in order to detect or exclude individuals who are subjects to criminal investigations. DNA data is confidential and is inadmissible as evidence in civil court proceedings. Statute does not specifically limit what tests may be performed on DNA.</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Made available only to other law enforcement agencies, approved crime laboratories and the courts in crime investigations. DNA may be used to develop a population database, once identifying information is removed; for quality control or quality assurance purpose; to assist in the recovery and identification of human remains from mass disasters; and for other humanitarian purposes, including identifying missing persons. DNA information must remain confidential. Statute does not specifically limit what tests may be performed on DNA.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Made available only to law enforcement officials in connection with criminal investigations. Statute does not specifically limit what tests may be performed on DNA.</td>
</tr>
<tr>
<td>Texas</td>
<td>Used only in the investigation of an offense, the exclusion or identification of suspects, and the prosecution of a case. Records also may be used to assist in recovering or identifying human remains from a disaster or for humanitarian purposes; identify living or deceased missing persons; establish a population statistics database, if personal identifying information is removed; assist in identification research and protocol development; and assist in database or laboratory quality control. DNA may not be tested to obtain information about human physical traits or predisposition for disease.</td>
</tr>
<tr>
<td>Virginia</td>
<td>Made available only to law enforcement agencies in the furtherance of official criminal investigations and to create a statistical database from profiles from unknown individuals – the information from which cannot be shared. DNA may be tested only to determine identification characteristics specific to the person.</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Shared with other law enforcement agencies; used solely for law enforcement identification purposes; in judicial proceedings; or for a population statistics database, identification research, protocol development or quality control purposes if personal identifying information is removed. May be tested solely for criminal identification purposes, and any information must remain confidential.</td>
</tr>
</tbody>
</table>
profiles may be used and shared, and how long they can be preserved or must be destroyed, etc. Warns Binny Miller, a law professor at American University in Washington, D.C., “once DNA information is collected, it may be hard to prevent it from being disseminated. There are enough leaks in any system.”

While Congress has neither passed such a law nor specifically required states to follow uniform procedures, the federal government was nonetheless instrumental in setting nationwide standards in these areas. The DNA Identification Act of 1994 established guidelines for the Federal Bureau of Investigation for the nationwide NDIS. These standards must subsequently be followed by states if they wish to participate in the program. By federal statute, DNA profiles in CODIS may be used for law enforcement purposes only, and access to the database is limited to criminal justice agencies performing DNA analysis – provisions followed by 15 of 16 Southern states.

The FBI also sets quality assurance standards for DNA testing in public or private laboratories which must be followed in order for states to be eligible to receive federal grants. Among the standards, any state or local laboratory requesting federal funding must certify that DNA samples are made available only to criminal justice agencies for law enforcement identification purposes; in judicial proceedings; or for criminal defense purposes. States may also, once personally identifiable information is removed, use DNA information to form a population statistics database, for identification research, protocol development, or quality control purposes.

In addition to following federal guidelines on DNA use and dissemination, six states in the region have gone one step further, crafting statutes that specifically limit the tests which may be performed on offenders’ DNA:

- Georgia and Virginia require that only testing to determine identification characteristics specific to the offender be conducted;
- Maryland allows only DNA records directly relating to an individual’s identification to be maintained;
- North Carolina and West Virginia specify that DNA may only be tested for law enforcement identification purposes; and
- Texas specifies that DNA may not be tested to obtain information about human physical traits or predisposition for disease.

Specific information relating to Southern states’ limitations on offender DNA testing and disclosure may be found in Table III and in respective state sections.

CRIMES AND PENALTIES FOR UNAUTHORIZED DISCLOSURE

Further ensuring that policies relating to offender DNA privacy, use and dissemination are adhered, 12 of 16 states also statutorily provide the crimes and punishments applicable for laboratory or law enforcement officials knowingly disclosing offender DNA information in an unauthorized or illegal manner. Table IV outlines the crimes and punishments for unlawfully disclosing offender DNA information.
Unauthorized Receipt

In addition to spelling out crimes and punishments applicable to those disseminating DNA information, all 12 of the states providing punishment for unauthorized DNA information disclosure also provide the crime and punishment for those unlawfully obtaining DNA information from state databases. While in some states crime classification was identical for those disseminating and those obtaining unauthorized information, the majority of states increase the crime and punishments for obtaining DNA information—in some cases significantly. In no state was the crime/penalty of receiving unauthorized DNA information less than for the offense of disseminating it.

Expunging Offender Profiles

While all Southern states may, by statute, maintain an offender’s DNA record indefinitely, all but one, Missouri, have provisions whereby a person may request that their DNA profile, as well all other identifying information, be expunged if their conviction is overturned and their case is dismissed.

### Crimes and Punishments for Unlawfully Disclosing Offender DNA Information

<table>
<thead>
<tr>
<th>State</th>
<th>Crime</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Class C felony</td>
<td>Fine of up to $5,000; imprisonment between one and 10 years; or both</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Class A misdemeanor</td>
<td>Fine of up to $1,000; imprisonment for up to one year; or both</td>
</tr>
<tr>
<td>Georgia</td>
<td>Misdemeanor</td>
<td>Fine of up to $1,000; imprisonment for up to one year; or both</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Class A misdemeanor</td>
<td>Fine of up to $500; imprisonment for up to one year; or both</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Misdemeanor</td>
<td>Fine of up to $500; imprisonment for up to six months (with or without hard labor); or both</td>
</tr>
<tr>
<td>Maryland</td>
<td>Misdemeanor</td>
<td>Fine of up to $1,000; imprisonment for up to three years; or both</td>
</tr>
<tr>
<td>Missouri</td>
<td>Class A misdemeanor</td>
<td>Fine of up to $1,000; imprisonment for up to one year; or both</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Misdemeanor</td>
<td>Imprisonment for up to one year</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Misdemeanor</td>
<td>Fine of up to $500; imprisonment for up to one year; or both</td>
</tr>
<tr>
<td>Texas</td>
<td>Misdemeanor</td>
<td>Fine of up to $1,000; imprisonment for up to six months; or both</td>
</tr>
<tr>
<td>Virginia</td>
<td>Class 1 misdemeanor</td>
<td>Fine of up to $2,500; imprisonment for up to one year; or both</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Misdemeanor</td>
<td>Fine of between $50 and $500; imprisonment for up to one year; or both</td>
</tr>
</tbody>
</table>
O
n June 25, 2002, a Michigan Circuit Judge overturned the rape and murder convictions of Eddie Joe Lloyd, freeing him from prison after serving 17 years of a life sentence for a crime he did not commit. Though Lloyd confessed to the crime while in a mental hospital in 1984, DNA analysis in 2002 (analysis not possible two decades earlier) proved his innocence. Michigan passed legislation in 2001 allowing convicted offenders to petition the court for DNA testing and a new trial if they can show the tests might prove their innocence. Mr. Lloyd became the 110th convicted person in the United States to be exonerated by post-conviction DNA testing. As of October 2002, there had been 114 exonerations due to DNA testing.

Not only has DNA evidence increasingly been called upon to identify and convict offenders in recent years, it also has become a key tool in eliminating suspects in criminal investigations and to exonerate those who have been wrongly convicted. Improvements in the accuracy of DNA testing coupled with the longevity of DNA molecules make it possible to reexamine evidence from crimes committed years, or even decades ago. Concerned with the growing number of inmates who have been exonerated through DNA evidence and recognizing technological advances, several states have adopted post-conviction DNA testing measures allowing inmates access to DNA testing several years after their conviction, if that testing has the ability to exonerate them or, in some cases, if the results are otherwise favorable to the defendant.

Traditionally, following the exhaustion of the appeals process, defendants have had to persuade judges and prosecutors to conduct DNA analysis and have it introduced in a new trial. In many cases, post-conviction relief and statutory time limits for the introduction of evidence expired before modern, and more conclusive, DNA technology was available. A 1999 report by the National Commission on the Future of DNA Evidence (a national group of legal and criminal justice experts...
created at the request of Attorney General Janet Reno) pointed out that post-conviction DNA testing did not “fit well into existing procedural schemes or established constitutional doctrine.” The Commission noted that law in many jurisdictions was not clear as to the legal theory that entitled the petitioner to have their test request granted, or what the appropriate procedural mechanisms were for making testing requests.26

The Commission recommended guidelines for handling post-conviction DNA requests, saying that both prosecutors and defense counsels should concur on the need for post-DNA testing in cases in which biological evidence was collected and still exists, and if the testing were favorable, would exonerate the petitioner. Addressing these concerns, the Innocence Project – a non-profit legal clinic at the Cardozo School of Law, New York, leading the nation in handling post-conviction cases – advocated the passage of laws mandating timeframes for the preservation of evidence which may contain genetic material; providing inmates with a procedural vehicle to gain access to that preserved evidence; and extending the timeframe in which an inmate may file a motion for a new trial.27

Several states have acted by adopting post-conviction laws and statutorily providing eligible inmates an automatic mechanism by which to petition the court to have biological evidence examined or reexamined. Applicable cases would involve evidence that either had not been previously admissible in court, previously subjected to testing, or subjected to the type of DNA testing capable of providing more conclusive genetic identity.

The focus of this section of the report is the access offenders have to petition for post-conviction DNA testing and standards which must be met in order for the request for testing to be granted. Subsequent to the petitioning process is the actual DNA analysis (including the timing and location of the testing); the determination of whether testing results are conclusive and/or favorable to the petitioner; the hearing process; the order to vacate a defendant’s conviction, mitigate their sentence, or grant a new trial; and the appeals process, if any.

SOUTHERN STATES’ POST-CONVCTION STATUTES

The state of New York passed the nation’s first post-conviction DNA statute in 1994. By 1999, only one other state, Illinois, had followed suit. The turn of the century, however, witnessed a groundswell of support for such legislation. By October 2002, 26 states adopted post-conviction DNA statutes, including 11 Southern states. Oklahoma was the first Southern state to enact legislation in 2000; followed by Arkansas, Florida, Louisiana, Maryland, Missouri, North Carolina, Tennessee and Texas in 2001; and Kentucky and Virginia in 2002.

CONCERNS

Proponents of post-conviction statutes argue that the laws are not only essential in exonerating the innocent and bringing fairness and certainty to the system, but also in leading to the identification of guilty persons before they are able to commit more crimes. In debate following Virginia’s 2001 consideration of a post-conviction DNA bill, chief sponsor Senator Kenneth Stolle explained, as policymakers in several other states have, the reason for passing the post-conviction DNA measure was to “fix the problem that was eroding public confidence in the criminal justice system.”28

Others, while acknowledging the importance of exonerating the innocent, caution that petitioning and testing, if not restricted, can be used as a stalling tactic to prevent the execution of a sentence and the service of justice. In addition, testing is costly and time consuming, and most
government crime laboratories already are working at maximum capacity in order to analyze current DNA samples from offender and forensic requests. Diane Beckham, senior staff counsel for the Texas District and County Attorneys Association, said of Texas’ post-conviction law, “its intent is not to make testing available every time a defense lawyer has a new theory about a crime, but when the test might provide proof of innocence.”

**VICTIM NOTIFICATION**

Understandably, concerns also have been raised from crime victims and their families who are subjected to additional trauma in what may seem as a never-ending appeals process and an extension of the rights of those convicted. While no Southern state post-conviction statute requires that victims or their families be notified if the convicted offender has petitioned or been granted post-conviction DNA testing, other laws may require such notification of any court proceedings subsequent to a conviction.

**ELIGIBLE OFFENDERS**

To avoid subjecting themselves to frivolous motions, the 11 Southern states having enacted post-conviction statutes require certain specific standards be met in order for an inmate to be eligible to petition for testing. Though standards vary significantly in some areas, they are similar, if not identical, in others. While the statutory language setting the eligibility parameters seems trivial, it, as well as courts’ interpretation of it, entirely determines a person’s eligibility to file a post-conviction DNA testing motion.

While seven of the 11 Southern states with post-conviction laws allow incarcerated felons to petition for testing (once other standards are met), there is some variation in defining offender eligibility. As examples, Arkansas and Texas’ laws apply to persons convicted of a crime; Louisiana’s applies to persons convicted of a felony and in custody; Maryland’s applies to persons convicted of first or second degree felonies; Missouri’s applies to any persons in custody; North Carolina’s to any defendant; and Virginia’s law allows any person convicted of a felony, whether or not they are in custody, to petition for post-conviction DNA testing. Four of the 11 Southern states have more limited eligibility:

- Florida allows only those who have been tried, found guilty and who have been sentenced for a crime to petition for post-conviction DNA testing;
- Kentucky’s law only applies to those sentenced to death;
- Oklahoma’s law applies only to indigent offenders; and
- Tennessee’s law applies to persons convicted of first or second degree murder; rape; aggravated rape; aggravated sexual battery or rape of a child; the attempted commission of any of these crimes; or any other offense at the direction of the trial judge.

**CRITERIA FOR TESTING**

In addition to applying to only certain offenders, all Southern states’ post-conviction laws require other criteria be met in order for a motion for testing to be approved. Among these standards are whether or not identity was an issue at trial; whether DNA testing, or more advanced testing, was available during trial; whether evidence is available; and whether testing results would produce a favorable outcome for the petitioner.

*Identity* – Six Southern states’ post-conviction statutes (Arkansas, Kentucky, Maryland, Missouri, Texas and Florida) require that the offender’s identity must have been an issue. For example, if the perpetrator
and victim knew each other, or it was unlikely that the wrong person
had been identified, then identity would not be an issue. If the two were
not acquainted, but the perpetrator was identified by an eyewitness or an
unacquainted victim, then a court may rule that identity was an issue.

**Availability/Technology of DNA Testing at Trial** – Most Southern
state post-conviction statutes specifically require that, in order be eligible
to petition for testing, the evidence in question was either not subject to
DNA testing because the technology was not available at the time of the
conviction, or that it may have been tested, but the then-current DNA
techniques were unable to generate a genetic profile from the evidence. The
former, taken literally, would exclude most persons, as the argument could
be made that since 1987 there has existed some sort form of DNA testing.
Since the late 1990s, however, improvements in technology have made
DNA testing significantly more accurate in generating genetic profiles from
smaller amounts of biological material. For the most part, statutes account
for advances in DNA technology and, if more modern testing techniques can
show that a defendant is innocent, will allow that testing.

In this area, post-conviction statutes in Louisiana, Missouri and
Virginia are considered more restrictive because they do not allow evidence
to be tested simply because testing had not been conducted previously.
For example, if determinate DNA testing and the evidence in question
were available at trial, but the defense simply failed to seek the evidence’s
introduction, an inmate would be prohibited from petitioning for post-
conviction testing. In other words, if the evidence was available, the
laws mandate it only be tested if a newer technology, which could prove
conclusive or more accurate, is available. A petition may be granted in:

- Florida – if testing was not previously conducted or new DNA
testing technology may be more conclusive;
- Kentucky – if evidence was not previously subjected to testing, or
to the type of testing being requested that may resolve an issue not
solved by earlier testing;
- Maryland – if evidence has not been previously subjected to
the type of testing required for “reasons beyond the control of
the petitioner,” or type of testing must be different from tests
previously conducted and would have a reasonable likelihood of
providing a more probative result than tests previously conducted;
- Missouri – if evidence was not previously tested because the
technology was not reasonably available at the time of trial, the
defendant was not aware of the existence of the evidence, or the
evidence was otherwise unavailable;
- North Carolina – if evidence either was not previously tested for
DNA, or was tested, but the requested DNA tests would provide
results that are significantly more accurate and probative of the
identity of the perpetrator, or have a reasonable probability of
contradicting prior test results;
- Tennessee – if evidence was never subjected to DNA analysis, or
to the analysis now being requested, which could resolve an issue
not resolved by previous analysis;
- Texas – if evidence was not previously subjected to DNA testing
or the testing was not available – or was available, but was not
technologically capable of providing probative results; and
- Virginia – if evidence was not known or available at the time of
the conviction or was not previously subjected to testing due to the
unavailability of the testing procedure.
Evidence Must Have Been Preserved – Post-conviction testing of evidence that may contain DNA material is impossible if the evidence has not been preserved in such a way that testing may still be conducted, a chain of custody has been established, and its integrity cannot be called into question – a condition specifically addressed by most Southern states’ post-conviction statutes. A motion may be granted in:

- Arkansas – if the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect;
- Florida – if the evidence exists and is admissible in court;
- Kentucky – if the evidence is in a condition that allows DNA testing;
- Louisiana – if the evidence to be tested is available and is in a condition to permit DNA testing;
- Maryland – if the evidence was secured properly and has been subject to a chain of custody;
- Missouri – if there is evidence, secured in relation to the crime, upon which DNA testing can be conducted;
- Tennessee – if the evidence still exists and is in a condition to allow DNA testing;
- Texas – if the evidence still exists, is in a condition making DNA testing possible, and has been subjected to a sufficient chain of custody; and
- Virginia – if the evidence was not known or available at the time the conviction became final or was not previously subjected to testing because the testing procedure was not available.

Making a Showing – In setting the parameters that determine eligibility for petitioning for post-conviction DNA testing, all Southern states’ statutes require defendants to make a showing that the requested DNA testing could provide favorable evidence related to the verdict or outcome in his or her case. In other words, if there is a preponderance of other evidence of guilt, then a motion for post-conviction DNA testing will be denied as the testing alone could not exonerate the petitioner. While most would agree that post-conviction testing is appropriate in cases when favorable results could prove innocence, opinions vary as to whether testing should be allowed in cases in which favorable results would be helpful, but not definitive in proving innocence; would not exonerate a petitioner, but might mitigate the sentence; or might only call into question whether the defendant would have been prosecuted or convicted to begin with.33

This is perhaps the most contentious area of post-conviction DNA statutes and often is where attorneys and courts focus their attention in arguing for, or determining, eligibility for testing. If other standards are met, a post-conviction testing motion will be approved in:

Actual Innocence
- Arkansas – if testing has the potential to produce evidence materially relevant to a defendant’s assertion of actual innocence;
- Louisiana – if the court finds that there is an articulable doubt as to the guilt of the petitioner and there is a reasonable likelihood that the requested DNA testing will resolve the doubt and establish the innocence of the petitioner;
- Maryland – if a reasonable probability exists that the DNA testing has the scientific potential to produce results materially relevant to the petitioner’s assertion of innocence; and
- Virginia – if testing is materially relevant, noncumulative and necessary, and may prove the convicted person’s actual innocence.
**More Favorable Verdict/Sentence**
- Florida – if favorable results have a reasonable probability of acquitting petitioners or mitigating their sentence;
- Kentucky – (testing is permissive) if there is reasonable probability that the verdict or sentence would have been more favorable;
- North Carolina – if there exists a probability that the requested DNA testing might produce a verdict more favorable to the defendant; and
- Tennessee – (testing may be ordered) if it might lead to a more favorable sentence or verdict.

**May Have Avoided Prosecution/Conviction**
- Kentucky – (testing is required) if a reasonable probability exists that the offender would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;
- Missouri – if a reasonable probability exists that the petitioner would not have been convicted if exculpatory results had been obtained through DNA testing;
- Tennessee – (testing must be ordered) if a probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis; and
- Texas – if offenders establish by a preponderance of evidence that a reasonable probability exists that they would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.

While Texas’ law requires that a defendant show that favorable DNA testing would provide a reasonable probability that he or she would not have been prosecuted or convicted, a ruling by the Texas Court of Criminal Appeals subsequently narrowed an inmate’s ability to have DNA testing performed. In April 2002, the Court ruled that convicts must actually demonstrate that a “reasonable probability exists that exculpatory DNA tests would prove their innocence,” in order to have their petition granted.34

**No Frivolous Testing** – In addition to other criteria, three of the 11 Southern states’ post-conviction DNA statutes explicitly forbid the granting of a petition if its purpose is deemed frivolous or is to otherwise delay the execution of a sentence. In the following states, inmates may not petition for testing:
- Tennessee and Texas – to unreasonably delay the execution of a sentence or administration of justice; and
- Virginia – to delay setting an execution date or to grant a stay of execution.

**STATUTES OF LIMITATIONS**
Nine of the 11 Southern states with post-conviction DNA statutes do not limit the time period during which an offender, once standards are met, may petition for DNA testing. The two exceptions being:
- Florida, which has a statute of limitations of two years to petition, or by October 1, 2003, whichever comes later; and
- Louisiana, which has a four-year statute of limitations except in capital cases decided prior to the law’s effective date, for which there is no time limit on petitioning.
TESTING COST AND PROVISION OF COUNSEL

Other concerns with post-conviction DNA testing have centered on whether states and crime laboratories can, or should, accommodate the costs of providing testing for indigent defendants. Overall costs depend on the number of inmates who apply and are ruled eligible for testing. Once standards are met:

- Arkansas, Oklahoma, Texas and Virginia will assume the cost of post-conviction testing;
- Florida, Louisiana, and North Carolina require the petitioner to pay, unless he or she is declared indigent; and
- Kentucky, Maryland, Missouri and Tennessee direct fees based on select variables (see Table 5 or respective state sections).

Post-conviction DNA testing laws in all Southern states except Maryland provide for counsel to be appointed to indigent petitioners.

PRESERVATION OF EVIDENCE

Traditionally, procedures for the preservation of crime scene evidence have varied widely both within and across states, and have been governed by few uniform standards or enforcement mechanisms. Addressing this and future possibilities for reexamining evidence, Southern states are including provisions for preserving evidence in post-conviction and related statutes to ensure the availability of post-conviction relief. Preservation measures particularly apply to evidence having the potential to produce biological material; in cases in which the offender is eligible to petition for the testing; in capital cases; and, appropriately, in cases in which a motion for testing has been filed by a defendant. Unless a notification process is followed, post-conviction laws in:

- Arkansas – require DNA evidence from trials resulting in a violent crime conviction to be preserved permanently; for sex offenses, to be preserved for 25 years; and for any felony under which the offender must provide a DNA sample, evidence must be preserved for seven years;
- Florida – require evidence for which post-sentencing testing of DNA may be requested in a non-death penalty case to be preserved for at least the time period during which the person may petition for post-conviction DNA testing. In capital cases, evidence must be maintained up until 60 days following the execution of the sentence;
- Kentucky – require, if a post-conviction DNA petition is filed, the state to preserve all evidence that could be subjected to DNA testing for the duration of the proceeding;
- Louisiana – require, once an application for post-conviction testing is filed, that no evidence be destroyed that is relevant to that application until the case is resolved by the court. In capital cases, regardless of petitioning, evidence that is known to contain biological material must be preserved until the sentence is executed;
- Maryland – require evidence secured in connection with an offense for which post-conviction DNA testing is possible to be preserved for at least three years if there is reason to believe it contains DNA material;
- North Carolina – require DNA evidence to be preserved for the time a convicted felon is incarcerated in connection with that case;
- Oklahoma – require biological evidence from a violent felony conviction to be preserved for as long as the person remains incarcerated;
- Tennessee – require, unless a post-conviction testing petition is dismissed, that all evidence that could be subjected to DNA analysis be preserved during the petitioning process;
- Texas – require evidence used in criminal cases to identify a perpetrator or to exclude a person to be preserved until the person dies or is released from incarceration;
- Virginia – require biological evidence connected to a felon’s case to be preserved for 15 years following their conviction date. In capital cases, evidence must be preserved until the judgment is executed or the sentence is reduced, in which case the 15-year rule applies.

POST-CONVICTIO N DNA EXONERATIONS

As states extend access to post-conviction DNA testing, and through the diligent defense efforts of the Innocence Project and similar groups, the pace of post-conviction DNA exonerations has increased dramatically in recent years. In 1993, there were only three convicted persons who had been exonerated due to DNA testing. By 2000, there were 16 exonerations. In 2001, 27 persons had been exonerated; and by October 2002, there had been 114 convicted felons exonerated based on post-conviction DNA testing in the United States. Thirteen of those exonerated had at one time been sentenced to death.35

While the vast majority (predicted at 80 percent) of tried felony cases do not involve biological evidence that has been preserved and can be subjected to DNA testing, the unique importance of post-conviction testing in exoneration cases cannot be overlooked, argues the Innocence Project. The group asserts that the availability of post-conviction DNA testing is a “win-win” proposition for law enforcement, innocents, crime victims, for the families of all involved and for anyone who believes in justice, as “it permits us to identify as never before the causes of wrongful convictions and their remedies for the good of the entire system.”36

THE FEDERAL INNOCENCE PROTECTION ACT

While 26 states had passed post-conviction DNA statutes as of October 2002, and many more have considered such legislation, some proponents of testing are dismayed that not all states have acted – or that states which have acted have been too restrictive. Consequently, many have called for Congress to step in and establish minimum post-conviction DNA testing protections that all states must adopt.

Calls for federal intervention have not gone unheeded. At the time of this report’s publication, Congress was, for the second time in as many years, considering passage of the Innocence Protection Act of 2001 (SB 486 and H.R. 912). The Act, among other provisions, would ensure federal inmates, once standards are met, access to post-conviction DNA testing. In order to be eligible to receive federal funds for DNA-related programs, states would be required to:

- make post-conviction testing available to state inmates, using the same standards required for federal inmates;
- fund tests for indigent inmates; and
- preserve all evidence “that was secured in relation to the investigation or prosecution of a state crime, and that could be subjected to DNA testing, for not less than the period of time that any person remains subject to incarceration in connection with the investigation or prosecution.”
Regardless of funding eligibility, under its Fourteenth Amendment enforcement mechanism, the Act would forbid any state from denying an application for DNA testing from a death-row inmate if the proposed testing had the potential to lead to new exculpatory evidence to support an inmate’s claim of actual innocence.

Not all attorneys general are enthusiastic with this proposed legislation, and a majority have expressed their discontent with federal preemption in this area. In a September 2002 letter to Senators Orrin Hatch and Patrick Leahy, chairman and ranking member of the United States Senate Judiciary Committee, 30 state attorneys general, including those from 11 of 16 SLC states, urged caution in enacting federal legislation to address the use of DNA testing in state proceedings. Noting that DNA testing issues are at the forefront of state legislative initiatives, the letter expressed serious “concerns about federalism and about Congress prematurely intruding into and trying to displace an ongoing process in our states.” The attorneys general concluded their letter asking Congress to “provide an opportunity for the state legislatures to seek a resolution to these issues and pursuing meaningful discussions with those of us who represent the states’ interests.”
<table>
<thead>
<tr>
<th>State</th>
<th>Year of Statute Enactment</th>
<th>Who is Eligible to Petition, Provided Other Standards are Met</th>
<th>Time Limitations for Petitioning</th>
<th>Who Pays for Post-Conviction DNA Testing/ Counsel Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>2001</td>
<td>Persons convicted</td>
<td>None</td>
<td>State pays for testing; counsel will be appointed to indigent</td>
</tr>
<tr>
<td>Florida</td>
<td>2001</td>
<td>Persons tried, found guilty, and sentenced</td>
<td>Within 2 years of conviction; of that conviction being affirmed on appeal; or by October 1, 2003, whichever comes later</td>
<td>Petitioner pays, unless declared indigent; counsel may be appointed to indigent</td>
</tr>
<tr>
<td>Kentucky</td>
<td>2002</td>
<td>Persons sentenced to death</td>
<td>None</td>
<td>State pays if testing is “required;” petitioner pays if testing is “permissive” (see state section); counsel appointed to indigent</td>
</tr>
<tr>
<td>Louisiana</td>
<td>2001</td>
<td>Persons convicted of a felony and in custody</td>
<td>Petition must be filed by August 31, 2005; no limit in capital cases decided prior to the law’s effective date</td>
<td>Petitioner pays, unless declared indigent; counsel appointed to indigent</td>
</tr>
<tr>
<td>Maryland</td>
<td>2001</td>
<td>Persons convicted of manslaughter, murder, rape, or other first or second degree felony</td>
<td>None</td>
<td>State pays if DNA testing is favorable; petitioner pays if results unfavorable; statute does not address the provision for counsel</td>
</tr>
<tr>
<td>Missouri</td>
<td>2001</td>
<td>Persons in custody</td>
<td>None</td>
<td>State pays for successful petitioners, provided that testing is performed at a state crime lab; counsel appointed to indigent</td>
</tr>
<tr>
<td>North Carolina</td>
<td>2001</td>
<td>A defendant</td>
<td>None</td>
<td>Petitioner pays, unless declared indigent; counsel appointed to indigent</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>2000</td>
<td>Indigent persons convicted of a felony and in custody</td>
<td>None</td>
<td>State pays; counsel appointed to indigent</td>
</tr>
<tr>
<td>Tennessee</td>
<td>2001</td>
<td>Persons imprisoned due to a conviction of first or second degree murder; rape; aggravated rape; aggravated sexual battery or rape of a child; the attempted commission any of these offenses; or any other offense at the direction of the trial judge</td>
<td>None</td>
<td>State pays in post-conviction cases where the court “shall” order testing; petitioner pays if the court “may” order testing (see state section); counsel may be appointed to the indigent</td>
</tr>
<tr>
<td>Texas</td>
<td>2001</td>
<td>Persons convicted</td>
<td>None</td>
<td>State pays; counsel appointed to indigent</td>
</tr>
<tr>
<td>Virginia</td>
<td>2002</td>
<td>Persons convicted of a felony</td>
<td>None</td>
<td>State pays; counsel appointed to indigent</td>
</tr>
</tbody>
</table>
The state sections summarize specifics of offender DNA requirements in 16 Southern states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. In addition, statutory requirements for post-conviction DNA testing are included in the respective sections of the 11 Southern states having enacted such statutes as of October 2002.

Information was compiled directly from respective state statutes, with statute cited where appropriate. In select cases, state information has been complemented with information from federal sources, in particular the United States Department of Justice, and from various newspapers, other periodicals and criminal justice organizations.
Alabama

Offender DNA Requirements (Code of Alabama § 36-18-20 et. seq.)

Applicability – Alabama requires all persons convicted of a felony after May 6, 1994, to submit a DNA sample. Samples also are required from persons convicted of the following offenses, whether the crimes are classified as felonies or misdemeanors: homicide; assault; kidnapping, unlawful imprisonment and related offenses; sexual offenses, including those committed with the aid of a computer and involving a child; stalking; and domestic violence.

Juveniles – Juveniles who have been adjudicated delinquent for sex offenses also are required to submit DNA.

Retroactivity – Offender DNA requirements were retroactive, applying to convicted offenders already imprisoned on May 6, 1994, and those on probation or serving a sentence not requiring incarceration at that time for an applicable offense.

Cost/Refusal to Submit – Offenders are not charged a fee for having their DNA collected and analyzed. Statute does not address procedures for handling offenders who refuse to submit samples.

DNA Testing, Use and Disclosure – Statute authorizes DNA profiles to be used in assisting law enforcement agencies in the identification, detection or exclusion of persons who are subjects of criminal investigations; supporting identification research and protocol development of DNA forensic methods; creating and maintaining quality control standards; assisting the recovery or identification of human remains from natural or mass disasters; creating a DNA population database (provided no identifying information is incorporated); and for other humanitarian purposes. Persons knowingly violating disclosure laws are guilty of a Class C felony, punishable by between one and 10 years in prison or a fine of up to $5,000, or both.

Expunging DNA Profiles – While offenders’ DNA profiles may be kept indefinitely, persons may request that their profile be expunged if their conviction has been reversed.

DNA Database – Established in 1994, the state’s DNA database is maintained by the Alabama Department of Forensic Sciences. As of September 2002, the database maintained 50,000 offender profiles, with another 50,000 backlogged and awaiting processing.

Post-Conviction DNA Petitioning

Statute does not address post-conviction DNA testing petitioning.
Arkansas

Offender DNA Requirements (Arkansas Code §12-12-1101 et. seq.)

Applicability – Effective August 1, 1997, the DNA Detection of Sexual and Violent Offenders Act requires persons convicted of a sex offense, a violent offense, a residential or commercial burglary, or a repeat offense to submit DNA samples to the state. Violent offenses are murder; manslaughter; robbery; battery; aggravated assault; first degree terroristic threatening; engaging in a continuing criminal gang, organization or enterprise; kidnapping; first degree false imprisonment; and permanent detention or restraint.

Juveniles – Juveniles who have been adjudicated delinquent of the preceding offenses are also required to submit DNA.

Retroactivity – Offender DNA requirements were retroactive, with those convicted of the aforementioned offenses before August 1, 1997, and who were still serving a term of confinement on that date, required to submit DNA prior to their release. The law was not retroactive to those serving on parole or probation at the time of its effect.

Costs/Refusal to Submit – While a sentencing court may mandate a fine of up to $250 on an offender who is required to provide a DNA sample, state officials note that fines are rarely collected. Law enforcement and corrections personnel may employ reasonable force to obtain the DNA sample if an individual refuses to submit it. Offenders refusing to provide samples are not eligible to receive good-time credits or other meritorious reductions in their sentence.

DNA Testing, Use and Disclosure – While statute does not limit what tests may be performed on DNA, offender samples may be used “only for law enforcement identification purposes or to assist in the recovery or identification of human remains from disasters or for other humanitarian identification purposes, including identification of missing persons.” DNA profiles may only be made available to criminal justice agencies or crime laboratories, in furtherance of a criminal investigation, or to create a population database – once all personal identification is removed.

Expunging DNA Profiles – Offenders’ DNA profiles may be maintained indefinitely; however, persons whose convictions have been reversed or whose cases are dismissed may apply to a circuit court to have their profile removed and destroyed.

DNA Database – The State Crime Laboratory was entrusted with maintaining the DNA database in 1997. As of August 2002, the database contained DNA profiles from 13,500 convicted felons.

Post-Conviction DNA Petitioning (Arkansas Code §16-112-201, 205, and 207)

Application – Legislation was passed in April 2001 allowing persons convicted of a crime to petition for post-conviction DNA testing if the defendant claims that scientific evidence not available at trial establishes innocence, or “the scientific predicate for the claim could not previously have been discovered through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.” In order to make a motion, the evidence in question must not have been subject to DNA testing because technology prevented it or it was not available; identity must have been an issue at the trial; and the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect. The court will order that DNA testing be done...
if the above conditions are met and if the testing has the potential to produce evidence materially relevant to the defendant’s assertion of innocence.

*Time Limitations for Petitioning* – There is no time limit by which a convicted offender may petition for DNA testing.

*Cost and Counsel* – The state pays for post-conviction DNA petitioning, filing and analysis, and will provide counsel for the indigent.

*Preservation of Evidence* – After a trial resulting in a conviction, a law enforcement agency shall preserve DNA evidence permanently for violent crime convictions; 25 years for sex offenses; and for seven years following any felony conviction for which the offender is required to submit a DNA sample.
**FLORIDA**

**Offender DNA Requirements** *(Florida Statute, Chapter 943.325)*

**Applicability** – As of August 2002, felons convicted of murder, sexual battery, aggravated battery, lewdness, burglary, carjacking, home invasion, sexual offenses, and robbery are required to provide DNA samples to the state. Based on legislative appropriations, offender DNA requirements will expand in coming years:

- effective July 1, 2003, DNA samples will also be required from those committing manslaughter, kidnapping or false imprisonment;
- effective July 1, 2004, the crimes of forcible felony, aggravated child abuse or abuse of an elderly/disabled person and felonies involving the use or possession of a firearm are added to the list; and
- effective July 1, 2005, all convicted felons will be required to submit DNA samples.

**Juveniles** – DNA requirements apply also to juveniles who are convicted or found delinquent and are committed to or are under the supervision of a county jail or under the supervision of the department of juvenile justice.

**Retroactivity** – Upon the implementation of each of the above tiers, offender DNA requirements are retroactive, mandating samples from both those already incarcerated, and offenders “within the confines of the legal state boundaries and on probation, community control, parole, conditional release, control release, or any other type of court-ordered supervision.” Those incarcerated must supply a sample no less than 45 days before the date of their release.

**Cost/Refusal to Submit** – Unless the sentenced offender has been declared indigent, he or she must reimburse the state for the “actual cost” of collecting the DNA sample. The reimbursement payment may be deducted from any existing balance in the inmate’s bank account. Reasonable force may be used by law enforcement or corrections personnel in securing a DNA sample from an offender, with persons utilizing such force not being civilly or criminally liable for actions taken.

**DNA Testing, Use and Disclosure** – Offenders’ DNA profiles are to be released only to criminal justice agencies (the court, departments of corrections and juvenile justice, the protective investigations component of the Department of Children and Family Services, and any other governmental agency performing the administration of criminal justice) in relation to a criminal investigation or as a result of a match to the DNA database. Otherwise, profiles are kept confidential. Statute does not address penalties for violating these procedures or limit what tests may be performed on DNA.

**Expunging DNA Profiles** – Offenders’ DNA profiles may be filed indefinitely.

**DNA Database** – The Department of Law Enforcement maintains Florida’s DNA database. As of August 2002, the database contained the DNA profiles of approximately 122,750 offenders.

**Post-Conviction DNA Petitioning** *(Florida Statute, Chapter 925.110)*

**Application** – Effective October 1, 2001, persons who have been tried and found guilty and sentenced for a crime may petition the court for an examination of crime scene evidence if they show that identity was a genuinely disputed issue in the case and why it was; the evidence was not previously tested for DNA, or that advanced DNA testing technology would be more conclusive; if they claim innocence; and if they state why the DNA testing would either exonerate them or mitigate their sentence. Those who plead guilty or no contest are not eligible to petition for post-conviction DNA testing, a provision upheld by the Florida Supreme Court in October 2002.
In order for the court to approve a petition, it must find that physical evidence that may contain DNA still exists; that any DNA from that evidence would be admissible in court; and there is a reasonable probability that the offender would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

**Time Limitations for Petitioning** – Offenders must file the petition within two years of their conviction date if it is not appealed; within two years following the date that the conviction is affirmed on direct appeal if an appeal is taken; within two years following the date that collateral counsel is appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case; or by October 1, 2003, whichever occurs later.

**Cost and Counsel** – The petitioning offender must pay for this testing unless declared indigent, in which case the state will pay. Counsel may be appointed to an indigent person if the petition proceeds to a hearing and if the court determines that the assistance of counsel is necessary.

**Preservation of Evidence** – In non-death penalty cases, governmental agencies must maintain physical crime scene evidence (for which a post-sentencing testing of DNA may be requested) for at least the time period in which the offender may petition for post-conviction DNA testing. In a death penalty case, evidence shall be maintained for 60 days after the execution of the sentence.
GEORGIA

Offender DNA Requirements (Georgia Code § 24-4-60 et. seq.)

Applicability – Effective July 1, 2000, Georgia requires all persons convicted of a felony and serving their sentence in a state or private correctional facility, including inmate work and boot camps, to submit a DNA sample to the state within 30 days of their incarceration. Convicted felons who are not incarcerated must submit a DNA sample as a condition of their probation.

Juveniles – Juveniles adjudicated delinquent are not required to submit DNA.

Retroactivity – Offender DNA requirements were retroactive, requiring those already serving their sentence at the time of the law’s effect to submit a DNA sample within the 12 months preceding their release. The law was not retroactive in applying to those serving on probation or parole when it took effect.

Cost/Refusal to Submit – Felons are not charged a fee to have their DNA sample taken and analyzed. Statute does not address the taking of samples from those who refuse to submit.

DNA Testing, Use and Disclosure – DNA tests must be limited to determining identification characteristics specific to the person submitting the sample and will remain confidential. The name of the offender whose profile is contained in the database may be disseminated only for law enforcement purposes. Persons knowingly disseminating DNA information without authority are guilty of a misdemeanor, punishable by a fine of no more than $1,000, imprisonment for no longer than one year, or both.

Expunging DNA Profiles – DNA profiles may be kept indefinitely; however, a person may request to have their profile, as well as all records and identifiable information, expunged if their conviction is reversed and their case is dismissed.

DNA Database – Offenders’ DNA profiles are maintained by the Division of Forensic Sciences, Georgia Bureau of Investigation. As of August 2002, the state’s DNA database contained profiles from approximately 53,000 convicted felons.

Post-Conviction DNA Petitioning (Georgia Code § 24-4-63(b)(3))

Application – An inmate wishing to reopen an old case based upon “actual innocence” and a lack of DNA testing at trial must file an Extraordinary Motion of New Trial based upon newly discovered evidence. The inmate must show that the outcome of the case would have been different had DNA testing been available at their trial.39

Cost – Petitioners must pay for post-conviction DNA testing.

Preservation of Evidence – Statute does not address how long DNA evidence collected at a crime scene must be preserved.
Kentucky DNA Offender Requirements (Kentucky Revised Statutes, Chapter 17.170 et. seq.)

Applicability – Effective July 14, 1992, offenders convicted of sexual abuse and family offenses were required to submit DNA samples to the state for testing and analysis. On July 15, 2002, legislation was enacted requiring DNA samples from those convicted of unlawful transaction with a minor; the use of a minor in a sexual performance; first or second degree burglary; a capital offense; Class A felony; or Class B felony involving the death or serious injury of the victim.

Addressing cost and backlog concerns, while the expanded offender DNA requirements were enacted in 2002, statute allows compliance with each applicable offense to be delayed until full funding is available for their implementation, with requirements implemented for offenses [provisions] in the order they are listed above; e.g., DNA will be collected first from sex offenders, then from burglars, capital offenders, Class A felons, etc. Once implementation of any of these provisions is begun, it cannot be discontinued.

Juveniles – Juveniles adjudicated guilty or in the custody of the Department of Juvenile Justice for sexual offenses must also provide DNA samples.

Retroactivity – Offender DNA laws are retroactive in applying to offenders who were already incarcerated on their effective date. Laws were not retroactive in applying to those on probation or parole.

Cost/Refusal to Submit – Offenders are not charged a fee to have their DNA sample taken and analyzed.

DNA Testing, Use and Disclosure – While statute does not limit the types of tests that may be conducted on offenders’ DNA, profiles are to be used only for law enforcement purposes. Persons who knowingly disseminate or otherwise use information in the DNA database unlawfully are guilty of a Class A misdemeanor, punishable by a fine of up to $500, incarceration for up to one year, or both.

Expunging DNA Profiles – Profiles may be filed indefinitely; however, offenders may request they be expunged, along with all other identifiable information, if their conviction is reversed and the case has been dismissed.

DNA Database – The Department of State Police’s forensic laboratory maintains Kentucky’s DNA database. As of August 2002, it contained DNA profiles from 3,240 offenders.

Post-Conviction DNA Petitioning (Kentucky Revised Statutes, Chapter 422.285)

Application – Effective July 15, 2002, persons convicted of a capital crime and sentenced to death may request DNA testing and analysis of any evidence that is related to the investigation or prosecution that resulted in the conviction if the evidence in question still exists; is in a condition that allows DNA testing; was not previously subjected to testing, or to the type of DNA testing currently being requested that may resolve an issue not resolved by the previous testing; and identity was an issue at the trial. Post-conviction testing is required if the court finds that a reasonable probability exists that the offender would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing. Testing is permissive if there is reasonable probability that the verdict or sentence would have been more favorable or if it will produce exculpatory evidence.

Time Limitations for Petitioning – If the results of testing are favorable, there is no time limitation for the introduction of DNA evidence in felony post-conviction appeals.

Cost and Counsel – If testing is required, the state pays the costs; if it is permissive, the petitioner must pay. Counsel will be appointed to those indigent.
Preservation of Evidence – If a post-conviction DNA petition is filed, the state must, for the duration of the proceeding, preserve all evidence that could be subjected to DNA testing. Unless a specific notification process is followed, the “appropriate government entity shall retain any biological materials secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case.”
Louisiana

Offender DNA Requirements (Louisiana Revised Statutes §15:601 et. seq.)

Applicability – Effective September 1, 1999, individuals arrested, convicted or already incarcerated for rape; sexual battery; intentional exposure to the AIDS virus; carnal knowledge of a juvenile; indecent behavior with a juvenile; pornography involving juveniles; molestation of a juvenile; murder; manslaughter; negligent homicide; vehicular homicide; feticide; several battery offenses; disarming of a peace officer; several assault offenses; unlawful use of a laser on a police officer; mingling harmful substances; terrorizing/terrorism; and stalking are required to submit DNA samples. Those arrested will have the sample taken at the time they are fingerprinted pursuant to the booking procedure. Those sentenced to prison, jail or a juvenile detention facility must submit a DNA sample upon intake or sentencing.

Juveniles – Juvenile delinquents are subject to the same offender DNA requirements as adults.

Retroactivity – Upon their effective date, offender DNA requirements were retroactive in that they required DNA from already-incarcerated felons prior to their release. Laws were not retroactive in applying to those on probation or parole.

Cost/Refusal to Submit – Offenders are not charged a fee to have their DNA sample taken and analyzed.

DNA Testing, Use and Disclosure – Statute does not limit what tests may be performed on DNA. Offenders’ DNA profiles are to be kept confidential and may be used only for law enforcement identification purposes; to assist in the recovery or the identification of human remains from disasters; for other humanitarian identification purposes, including the identification of missing persons; or to create a separate population database, once all personal identification is removed. Profiles may be shared only with criminal justice agencies, crime laboratories, or in the furtherance of an official criminal investigation. Persons who knowingly disclose identifiable information from the database in an unauthorized manner may be fined up to $500, imprisoned, with or without hard labor, for up to six months, or both.

Expunging DNA Profiles – While offender DNA profiles may be kept indefinitely, persons may request to have their DNA record expunged if their conviction has been reversed and their case dismissed. Arrestees may request their profiles be removed if their arrest does not result in a conviction.

DNA Database – Created in 1997 and effective September 1, 1999, the state’s DNA database is maintained by the Office of State Police in the Department of Public Safety and Corrections. As of August 2002, the database contained profiles from approximately 2,000 convicted felons. While 15,000 offender DNA samples have been taken, 13,000 were in the process of being analyzed. The state plans to link its DNA database to CODIS in fall 2002, making it the 49th state to do so.

Post-Conviction DNA Petitioning (2001 Louisiana Acts 1020)

Application – During its 2001 regular session, the Louisiana Legislature passed Senate Bill 511, allowing a four-year period during which felony offenders in custody (incarceration or on probation or parole supervision) may petition for post-conviction DNA testing in seeking to have their sentence set aside. In order to grant the testing, the court must find that there is an articulable doubt (based on competent evidence, whether or not introduced at trial) as to the guilt of the petitioner and that there is a reasonable likelihood that the requested DNA testing will resolve the doubt and establish the innocence of the petitioner; and the evidence to be tested is available and is a condition to permit DNA
testing. The law specifically prohibits relief from being granted solely because there is evidence currently available for DNA testing but the testing was not available or was not done at the time of the conviction.

**Time Limitations for Petitioning** – Felony offenders have until August 31, 2005, to file a petition for post-conviction DNA testing, except in capital cases decided prior to the law’s effective date, for which there is no time limit on petitioning.

**Cost and Counsel** – If a petitioner is found to be indigent, the state’s DNA Testing Post-Conviction Relief for Indigents Fund will pay for the testing. The court will appoint counsel for indigents.

**Preservation of Evidence** – No evidence may be destroyed that is relevant to a case in which an application for DNA testing has been filed until the case has been finally resolved by the court. The state must preserve until August 31, 2005, all items of evidence in their possession which are known to contain biological material that can be subjected to DNA testing. In all cases in which the defendant has been sentenced to death prior to the effective date of the law, evidence known to contain biological material that can be subjected to DNA testing must be preserved until the sentence is executed.
MARYLAND

Offender DNA Requirements (Maryland Code, Article 88B, §12A)

Applicability – Effective October 1, 2002, Maryland extended its offender DNA law and now requires all convicted felons – and misdemeanants convicted of fourth degree burglary or breaking and entering a motor vehicle – to submit a DNA sample upon their intake to prison or a detention facility. If the offender is not sentenced to confinement, the sample must be submitted as a condition of probation. The 2002 law was contingent on the Department of State Police receiving at least a $1.5 million grant from any private entity or federal agency by September 1, 2002, to be used for its implementation. A federal grant of $5 million was received prior to the September deadline for “cold-hit” analysis, satisfying this requirement.

Juveniles – Corrections officials did not respond to this survey question.

Retroactivity – Offender DNA requirements are retroactive, with felons and select misdemeanants who were incarcerated on or after October 1, 2002, required to submit DNA samples prior to their release. The law did not apply retroactively to those on probation or parole at the time of its effect.

Cost/Refusal to Submit – Corrections officials did not respond to this survey question.

DNA Testing, Use and Disclosure – DNA profiles may be used only in the furtherance of an official crime investigation; to assist in the identification of human remains; to assist in the identification of missing persons; and for research and administrative purposes. While statute does not limit what tests may be performed, only DNA records that directly relate to an individual’s identification shall be collected and stored. Persons willfully disclosing DNA information in an unlawful manner are guilty of a misdemeanor, punishable by a fine of up to $1,000, imprisonment for up to three years, or both.

Expunging DNA Profiles – While DNA profiles may be maintained indefinitely, a person may request that their profile, along with all other identifiable information, be expunged if their conviction is overturned.

DNA Database – Created in 1994, Maryland’s DNA database is maintained by the Department of State Police. As of August 2002, it contained approximately 11,500 offender profiles.

Post-Conviction DNA Petitioning (Maryland Code of Criminal Procedure §8-201)

Application – Effective October 1, 2001, persons convicted of manslaughter, murder, attempted murder, first and second degree rape, or first or second degree felony offense may petition for DNA testing of scientific identification evidence that the state possesses. A court will order DNA testing if it finds that the evidence was not previously subjected to the testing being requested for reasons beyond the control of the petitioner, or that the type of test being requested is different from testing previously conducted and would have a reasonable likelihood of providing a more probative result than earlier tests. In addition, evidence must have been secured properly; identity must have been an issue in the trial; and a reasonable probability exists that testing has the scientific potential to produce results materially relevant to the petitioner’s claim of innocence.

Time Limitation for Petitioning – There is no time limit for the petitioning of post-conviction DNA testing.

Cost and Counsel – If the results of the post-conviction testing are favorable to the petitioner, the state will provide reimbursement for the cost of the DNA testing. If results are unfavorable, the petitioner must pay.

Preservation of Evidence – Unless notification is given to a defendant, the state is required to preserve crime scene evidence for a period of at least three years if it is secured in connection with one of the above post-conviction offenses and there is reason to believe it contains DNA material.
MISSISSIPPI

**Offender DNA Requirements (Mississippi Code § 45-33-37)**

*Applicability* – Effective January 1, 1996, Mississippi requires persons convicted of felony sex offenses to provide DNA samples.

*Juveniles* – Juveniles adjudicated delinquent are not required to submit DNA.

*Retroactivity* – The 1996 law was retroactive, requiring sex offenders who already were incarcerated to submit samples prior to their release or transfer. The law was not retroactive to those on probation or parole when it took effect.

*Cost/Refusal to Submit* – Sex offenders are not charged a fee to have their DNA sample taken and analyzed. Statute does not address the handling of offenders refusing to submit to DNA testing.

*DNA Testing, Use and Disclosure* – Statute does not limit the testing which may be done on offender’s DNA, nor specify how the information in an offender’s profile may be used.

*Expunging DNA Profiles* – Offender profiles may be kept indefinitely; however persons may request their DNA profile be expunged if their conviction is overturned and their case is dismissed.

*DNA Database* – As of August 2002, the state’s DNA database, maintained by the state crime laboratory, contained 3,334 offender DNA profiles.

**Post-Conviction DNA Petitioning**

Mississippi statute does not address post-conviction DNA testing.
MISSOURI

**Offender DNA Requirements** *(Missouri Revised Statutes §650.055)*

*Applicability* – Missouri statute requires persons convicted of sex offenses (effective August 28, 1991) and violent felony offenses (effective August 28, 1996) to submit DNA samples for analysis upon their incarceration or before their release from a county jail or detention facility. Violent felony offenses include, but are not limited to, murder, manslaughter, assault, domestic assault, unlawful endangerment, kidnapping, child abduction and elder abuse. Of note, unsuccessful legislation in 2002 would have specified the exact crimes for which DNA samples must be submitted.

*Juveniles* – Juvenile delinquents are not required to submit DNA.

*Retroactivity* – Sexual and violent offender DNA laws were retroactive, applying both to those already incarcerated on the laws’ effective dates, as well as to those on probation and parole.

*Cost/Refusal to Submit* – Offenders are not required to pay a fee to have their DNA sample taken and analyzed. Authorized personnel may use such “force as necessary to the effectual carrying out” of the process, and are not liable when the act is performed in a reasonable manner.

*DNA Testing, Use and Disclosure* – Offenders’ DNA profiles may be used to support the development of a population statistics database, if personal identifying information is removed; support identification research of forensic DNA analysis methods; assist in the recovery or identification of human remains; or for quality control purposes. Unauthorized use of an offender’s DNA information for purposes other than criminal justice or law enforcement is a Class A misdemeanor, punishable by a fine of up to $1,000, incarceration for up to one year, or both.

*Expunging DNA Profiles* – The state may keep DNA profiles indefinitely. Unsuccessful legislation in 2002 would have specified the procedures for “requesting, searching, using, disseminating, and expunging DNA profiles from the Missouri DNA profiling system.”

*DNA Database* – The state’s DNA Profiling System (database) was established in 1991 within the State Highway Patrol, Department of Public Safety. As of August 2002, it maintained approximately 22,000 offender DNA profiles.

**Post-Conviction DNA Petitioning** *(Missouri Revised Statutes §547-035)*

*Application* – Effective August 28, 2001, an incarcerated offender may petition for post-conviction testing if there is evidence, secured in relation to the crime, upon which DNA testing can be conducted; the evidence was not previously tested because the technology was not reasonably available at the time of trial, the defendant was not aware of the existence of the evidence, or the evidence was otherwise unavailable; identity was an issue at trial; and a reasonable probability exists that the petitioner would not have been convicted if exculpatory results had been obtained through DNA testing.

*Time Limitations for Petitioning* – There is no time limit by which an incarcerated offender may petition for DNA testing.

*Cost and Counsel* – Successful petitioners will not have to pay for post-conviction DNA testing if the analysis is performed at a state crime lab. Counsel will be appointed to the indigent.

*Preservation of Evidence* – The State Highway Patrol is responsible for preserving any evidence, which has been or can be tested for DNA, leading to a conviction. There is no uniform procedure for the preservation of evidence, or the duration of that preservation.
NORTH CAROLINA

Offender DNA Requirements (North Carolina General Statutes § 15A-266.4 et seq.)

Applicability – Effective July 1, 1994, persons convicted of the following felony offenses, whether or not they have been incarcerated, must submit a DNA sample: first or second degree rape or sexual offense; malicious castration, maiming, throwing of corrosive acid or alkali or assault in secret manner; castration or other maiming; assault with deadly weapon with intent to kill; assault on handicapped persons; discharging a firearm into an occupied property; assault on a law enforcement officer, fireman or EMS personnel; kidnapping for the purpose of doing serious bodily harm; malicious use of an explosive or incendiary; burning of a mobile home, manufactured-type house or recreational trailer home; taking indecent liberties with children; robbery with a dangerous weapon; stalking; robbery and first degree arson. Those convicted of these felonies, but not incarcerated, must also submit a DNA sample as a condition of their sentence.

Juveniles – Juveniles adjudicated delinquent for the above or other offenses are not required to provide DNA samples.

Retroactivity – The law was retroactive, requiring persons convicted of, and incarcerated for, one or more of the above crimes before the law’s effective date to submit a DNA sample prior to their release on parole or probation.

Cost/Refusal to Submit – Offenders are not charged a fee to have their DNA sample taken.

DNA Testing, Use and Preservation – The state is only allowed to test DNA samples for law enforcement identification purposes, and for research and administrative purposes, including development of a population database when personal identifying information is removed; to support identification research and protocol development of forensic DNA analysis; for quality control purposes; and to assist in the recovery and identification of human remains. DNA profiles may be shared in the furtherance of an official investigation of a criminal offense.

Expunging DNA Profiles – While DNA profiles may be kept indefinitely, persons may apply to have their profile, and all other identifiable information, removed for the applicable crime if their felony conviction has been reversed and the case is dismissed, or upon receipt of a pardon of innocence.

DNA Database – The state’s DNA databank was established in 1993 and is maintained by the State Bureau of Investigation. As of August 2002, it contained approximately 40,000 offender DNA profiles.

Post-Conviction DNA Petitioning (North Carolina General Statutes § 15A-269)

Application – Effective October 2, 2001, a defendant may make a motion for post-conviction DNA testing before the trial court that entered the judgment of conviction when the evidence is material to the defendant’s defense; related to the investigation or prosecution that resulted in the judgment; and the evidence either was not previously tested for DNA, or was tested, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator, or have a reasonable probability of contradicting prior test results. The court must grant the petition for DNA testing if it determines that the above conditions are met, and there exists a probability that the requested DNA testing might produce a verdict more favorable to the defendant.

Time Limitations for Petitioning – There is no time limit to petition for post-conviction DNA testing.

Cost and Counsel – The petitioner must pay for post-conviction DNA testing unless declared indigent. Counsel will be appointed to indigents.
Preservation of Evidence – Unless a notification process is followed, the government entity that collects DNA evidence in the course of a criminal investigation must preserve a sample of the evidence for the time a convicted felony offender is incarcerated in connection with that case.
OKLAHOMA

Offender DNA Requirements (Oklahoma Statutes, Title 74, § 150.27a)

Applicability – As of 2001, DNA samples are required from persons convicted of the following violent and sex offenses: murder; manslaughter; assault; battery; burglary; robbery; shooting with intent to kill; maiming; stalking; knowingly spreading infectious diseases or HIV; mingling poison, drugs or sharp objects with a food or drink; kidnapping; child stealing; child pornography; incest; rape; lewd acts with a minor or any other crime requiring sex-offender registration.

Juveniles – Juveniles convicted of these crimes must also submit DNA samples.

Retroactivity – The offender DNA law was retroactive, requiring DNA samples from offenders already incarcerated.

Cost/Refusal to Submit – Applicable offenders must pay a fee of $150 to have their DNA sample taken and analyzed.

DNA Testing, Use and Disclosure – Offender DNA profiles are confidential and cannot be released to the public. Information can only be disclosed or disseminated to federal, state, county or municipal law enforcement or criminal justice agencies in order to detect or exclude individuals who are subjects to criminal investigations in which biological evidence is recovered. Persons violating these requirements are guilty of a misdemeanor punishable by imprisonment in a county jail for not more than one year.

Expunging DNA Profiles – The state may maintain and preserve offender DNA profiles indefinitely; however, a person may apply to have his or her DNA record expunged, along with all other identifiable information, if the conviction is reversed and the case is dismissed.

DNA Database – Established in 1991, the Oklahoma DNA Offender Database is maintained by the State Bureau of Investigation. As of August 2002, the database contained approximately 15,400 offender DNA profiles.

Post-Conviction DNA Petitioning (Oklahoma Statutes, Title 22, § 1371 et. seq.)

Application – Oklahoma’s DNA Forensic Testing Act, effective July 1, 2000, allows incarcerated indigent persons convicted of a felony to petition to have biological samples submitted for DNA testing. The results of testing must be capable of establishing by clear and convincing evidence that no reasonable jury would have found the defendant guilty beyond a reasonable doubt in light of the new evidence. Priority is given to petitions from defendants with lengthy or death sentences, and to cases in which testing could provide conclusive or near-conclusive proof that the person is factually innocent.

Cost and Counsel – The state will assume the cost of post-conviction DNA testing. Counsel will be provided for indigents.

Preservation of Evidence – Unless a notification process is followed, the criminal justice agency having possession of biological evidence from a violent felony conviction must retain and preserve that biological evidence during the time period that the convicted offender remains incarcerated. In unsolved cases, there is no uniform rule on preserving biological evidence.
**SOUTH CAROLINA**

**Offender DNA Requirements (Code of Laws of South Carolina §23-3-620 et. seq.)**

**Applicability** – As of July 1, 2000, South Carolina requires DNA samples from most felony offenders, including those convicted of violent crimes; arson; involuntary manslaughter; assault and battery; criminal sexual conduct; burglary; spousal sexual battery; aggravated domestic violence; eavesdropping or peeping; stalking; committing or attempting a lewd act upon a child under 16; sexual exploitation of a minor; sexual intercourse with patient or trainee; and any offender ordered by the court to submit one. Samples are taken upon an inmate’s intake into prison. Offenders who are not incarcerated must also provide DNA as a condition of their sentence.

**Juveniles** – Juveniles who have been adjudicated delinquent of the above crimes must also submit DNA.

**Retroactivity** – Offender DNA requirements are retroactive, requiring samples from offenders who have been convicted and were incarcerated on or after July 1, 2000, as well as those on probation or parole at that time.

**Cost/Refusal to Submit** – Offenders are charged a $250 fee to have their DNA sample taken. For those incarcerated, this fee must be paid prior to their parole or release, and may be garnished from prison wages.

**DNA Testing, Use and Disclosure** – Offender DNA profiles may be used to develop a population database; for quality control or quality assurance purpose; to assist in the recovery and identification of human remains from mass disasters; and for other humanitarian purposes, including identifying missing persons. They are to be confidential and made available only to other law enforcement agencies, approved crime laboratories and the courts. Persons willfully disclosing DNA information in an unapproved manner are guilty of a misdemeanor and may be fined up to $500, imprisoned for up to one year, or both.

**Expunging DNA Profiles** – An offender’s DNA profile will be filed indefinitely, but may be expunged, along with all other identification information, if the person’s conviction is reversed, set aside or vacated.

**DNA Database** – The South Carolina Law Enforcement Division maintains the State DNA Identification Record Database. As of August 2002, the database contained approximately 30,000 offender DNA profiles.

**Post-Conviction DNA Petitioning**

Statute does not address post-conviction DNA testing petitioning.
TENNESSEE

Offender DNA Requirements (Tennessee Code §40-35-321)

Applicability – Upon sentencing, Tennessee requires all persons convicted of felony or sex offenses, committed on or after July 1, 1998, to submit a DNA sample. These requirements apply to all convicted felons, whether or not they are incarcerated.

Juveniles – Juveniles adjudicated delinquent for these offenses must also provide DNA.

Retroactivity – Offender DNA requirements were not retroactive, only applying to offenders convicted on or after the date on which they took effect.

Cost/Refusal to Submit – Statute does not address whether offenders must pay for DNA testing or whether force may be used in securing a DNA sample.

DNA Testing, Use and Disclosure – Offenders’ DNA profiles may only be made available to law enforcement officials in connection with criminal investigations.

DNA Database – The state’s DNA database is maintained by the Tennessee Bureau of Investigation. As of August 2002, the base maintained approximately 22,000 offender DNA profiles.

Post-Conviction DNA Petitioning (Tennessee Code §40-30-401 et. seq.)

Application – The Post-Conviction DNA Analysis Act of 2001 allows persons imprisoned due to a conviction of first or second degree murder; rape; aggravated rape; aggravated sexual battery or rape of a child; the attempted commission of any of these crimes; or any other offense at the direction of the trial judge to petition for DNA testing of any evidence that exists and that resulted in the conviction and that may contain biological evidence.

A court shall order DNA analysis if it finds that probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis; the evidence still exists and can be tested; was never subjected to DNA analysis or to the analysis now being requested which could resolve an issue not resolved by previous analysis; and the petition is filed for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice. A court may order DNA analysis if it is possible that the testing might lead to a more favorable sentence or verdict for the petitioner, and all other conditions noted are met. If the results of the petition are favorable to the petitioner, the court must order a hearing.

Time Limitations for Petitioning – There is no time limit for petitioning for post-conviction DNA testing.

Cost and Counsel – In post-conviction cases where the court “shall” order DNA analysis, the state will pay for it. If the court “may” order post-conviction testing, the petitioner may be required to pay. The court may appoint counsel for an indigent petitioner.

Preservation of Evidence – Unless a post-conviction petition is dismissed, the court must order that all evidence that could be subjected to DNA analysis be preserved during the proceeding process.
Texas

Offender DNA Requirements (Texas Government Code §411.148)

Applicability – Texas currently requires DNA samples from convicted offenders serving a sentence, both within and outside the institutional division, for murder, aggravated assault, burglary, or any offense for which the inmate is required to register as a sex offender. Following legislation passed in 2001, Texas will require all convicted felons serving a sentence in the institutional division to submit DNA samples upon the date on which the state receives funds from the federal government or other sources in a sufficient amount to pay all costs associated with expanding its list of DNA-required offenses. Provided funds are available, DNA samples may also be required from those:

- indicted for aggravated kidnapping; indecency with a child; sexual assault; prohibited sexual conduct; first degree burglary; compelling prostitution; compelling sexual performance by a child; or possession or promotion of child pornography (Texas Government Code §411.141); or
- arrested for any of the above crimes, if the person has previously been convicted or placed on deferred adjudication for them; second degree burglary of a habitation; or has been previously convicted of public lewdness or indecent exposure.

Juveniles – Juveniles adjudicated delinquent for any crime for which an adult offender is required to submit DNA, also must provide a DNA sample.

Retroactivity – Offender DNA requirements for convicted felons are retroactive, applying to those who already were incarcerated when the law(s) took effect.

Cost/Refusal to Submit – Convicted offenders are not charged a fee to have their DNA sample taken and analyzed. Employees of the institutional division and the Texas Youth Commission for Juveniles may use force to acquire DNA “when and to the degree the employee reasonably believes the force is immediately necessary to obtain the sample.”

DNA Testing, Use and Disclosure – DNA profiles are only to be used in the investigation of an offense, the exclusion or identification of suspects, and the prosecution of a case. Other purposes include assisting in the recovery or identification of human remains from a disaster or for humanitarian purposes; identifying living or deceased missing persons; establishing a population statistics database, if personal identifying information is removed; assisting in identification research and protocol development; and assisting in database or lab quality control. Profiles may not be used to obtain information about human physical traits or predisposition for disease. DNA records are confidential and are not subject to disclosure under the open records law. Persons knowingly violating DNA information requirements are guilty of a misdemeanor, punishable by a fine of not more than $1,000, a jail sentence of up to six months, or both. DNA samples taken from arrestees are required to be preserved by the law enforcement agency taking the sample. That agency is prohibited from creating a DNA record of the DNA sample.

Expunging DNA Profiles – Offender profiles may be kept indefinitely, but may be expunged by request if an arrestee’s charges are dropped or a convicted felon has been acquitted in the appeals process or pardoned. If applicable, when arrestees are acquitted or their case is dismissed, their DNA sample must be destroyed, as must any record of its receipt.

DNA Database – The Department of Public Safety maintains the state’s criminal justice database, which was established in 1995. According to the FBI, as of August 2002, the database contained approximately 129,000 offender profiles from those both presently and previously incarcerated.
Post-Conviction DNA Petitioning (Texas Code of Criminal Procedure, Chapter 64)

Application – Effective April 5, 2001, convicted offenders, no matter their plea, may petition for DNA testing of evidence if the evidence still exists, is in a condition making DNA testing possible, and has been subjected to a sufficient chain of custody. In addition, identity must have been an issue in the case; the evidence must not have previously been subjected to DNA testing or such testing was not available – or was available, but not technologically capable of providing probative results; the offender must establish by a preponderance of evidence that a reasonable probability exists that they would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing; and the request must not be made to unreasonably delay the execution of sentence or the administration of justice.

Time Limitations for Petitioning – There is no time limit for petitioning for post-conviction DNA testing.

Cost and Counsel – The state will pay for post-conviction DNA testing and will provide indigent defendants counsel in the petition and hearing processes.

Preservation of Evidence – Evidence used in criminal cases to identify a perpetrator or to exclude a person is required to be preserved until the person dies, is executed, is released on parole or completes his or her sentence. Prosecutors, court clerks or other officers in possession of evidence are responsible for filing and preserving DNA evidence collected from a crime scene.
**VIRGINIA**

**Offender DNA Requirements (Virginia Code §19.2-310.2)**

*Applicability* – Effective July 1, 1990, every person convicted of a felony must submit a DNA sample to the state as a condition of their sentence. The law applies to both felons who are incarcerated and those who are not.

Effective January 1, 2003, persons may also be required to submit DNA samples if they are arrested for any of the following crimes: first and second degree murder or voluntary manslaughter; mob-related felonies; any kidnapping or abduction felony; any malicious felonious assault or malicious bodily wounding; burglary; robbery; carjacking; felony sexual assault; arson of an occupied structure; and entering a dwelling, house, etc., with intent to commit a misdemeanor or felony. Arrestees’ profiles are entered into the state DNA databank and are available to law enforcement agencies for comparison purposes in unsolved cases. If the defendant is acquitted or the case is dismissed, the DNA sample/profile, and all records thereof, must be destroyed. (Va. Code Ann. §19.2-310.2:1)

*Juveniles* – Juveniles convicted of felonies, or adjudicated delinquent for an offense that would be classified a felony if it were committed by an adult, also are required to give DNA if they are age 14 or older at the time of their applicable offense.

*Retroactivity* – Convicted offender DNA requirements were retroactive in that they applied both to persons who were in custody or on probation or parole on July 1, 1990. Those incarcerated for a felony rape conviction on or after July 1, 1989, also were required to provide DNA.

*Cost/Refusal to Submit* – Felons are charged a $25 fee to have their DNA sample taken. Statute does not address the handling of offenders who refuse to submit a sample.

*DNA Testing, Use and Disclosure* – Offenders’ DNA analyses may only be used to determine identification characteristics specific to the person, and profiles are made available to law enforcement agencies to further criminal investigations. Profiles from unknown individuals may be used to create a statistical database, the information from which cannot be shared. Arrestees’ samples may be used to determine identification characteristics of the individual or to create a statistical database, provided no identifying information is included and DNA profiles are made available to other law enforcement agencies for criminal investigations. Persons unlawfully disseminating DNA databank information are guilty of a Class 3 misdemeanor, punishable by a fine of no more than $500. Those knowingly doing so are guilty of a Class 1 misdemeanor, punishable by a jail term of no more than one year, a fine of no more than $2,500, or both. While DNA profiles may be kept indefinitely, persons may request that they be expunged, along with any identifiable information, if their felony conviction has been reversed and the case dismissed.

*DNA Database* – The state’s DNA database is maintained by the Department of Criminal Justice Services’ Division of Forensic Science. As of August 2002, the database contained 181,445 offender DNA profiles.

**Post-Conviction DNA Petitioning (Virginia Code §19.2-327.1)**

*Application* – Any person convicted of a felony may apply for a new scientific investigation of biological evidence related to their case if the evidence was not known or available at the time of the conviction or was not previously subjected to testing due to the unavailability of the testing procedure; the evidence was preserved appropriately; the testing may prove the convicted person’s actual innocence; and the convicted person has not unreasonably delayed the filing of the post-conviction petition after the evidence (or the test for
the evidence) became available at the Division of Forensic Science. Petitioning for post-DNA testing would not constitute grounds to delay setting an execution date or to grant a stay of execution.

Virginia’s is a two-step process. The above focuses on the eligibility criteria for petitioning for post-conviction DNA testing. If testing is granted and is favorable (effective November 15, 2002), the individual is then eligible to seek relief through filing a Petition for a Writ of Actual Innocence with the state supreme court. (Prior to this date, if testing results were favorable, the petitioner’s only relief is seeking a pardon from the governor.) In order to be issued a Writ of Actual Innocence, petitioners must be incarcerated felons who have been convicted following plea of not guilty or persons, regardless of plea, who have been sentenced to death, convicted of a Class 1 or Class 2 felony, or convicted of any felony for which the maximum penalty is a life sentence.

Time Limitations for Petitioning – There is no time limit for petitioning for post-conviction DNA testing.

Cost and Counsel – The state will cover the cost of post-conviction DNA testing. Indigent petitioners will be provided counsel when issuing a Writ of Actual Innocence.

Preservation of Evidence – The Division of Forensic Science preserves biological evidence connected to a felon’s case for 15 years following their conviction date. In capital cases, biological evidence must be preserved until the judgment is executed or the sentence is reduced – in which case the aforementioned requirement applies.
WEST VIRGINIA

Offender DNA Requirements (West Virginia Code §15-2B-1 et. seq.)

Applicability – West Virginia requires DNA samples from those convicted of first or second degree murder; voluntary and involuntary manslaughter; assault; battery; violent crimes against the elderly; kidnapping; incest; attempt to kill or injure by poison; extortion; first, second or third degree arson; burglary; robbery; felony breaking and entering; grand larceny; counterfeiting; illegal possession or criminal use of destructive or incendiary devises or explosive materials; felony stalking or harassment; or any sexual or child abuse offenses.

Juveniles – State corrections officials did not address juvenile DNA requirements, if any.

Retroactivity – Offender DNA requirements were retroactive, applying to those already serving prison sentences; they did not apply retroactively to those on probation or parole.

Cost/Refusal to Submit – Offenders are not charged a fee for submitting their required DNA sample. The state shall apply to a circuit court for an order requiring the withdrawal of DNA from any offender who refuses to provide a sample.

DNA Testing, Use and Disclosure – DNA records may be shared with other law enforcement agencies and may be used solely for criminal identification purposes; in judicial proceedings; or for a population statistics database, identification research, protocol development or quality control purposes if personal identifying information is removed. Persons knowingly and unlawfully disclosing DNA information are guilty of a misdemeanor and shall be fined between $50 and $500, be imprisoned for up to one year, or both.

Expunging DNA Profiles – While DNA profiles may be maintained indefinitely, persons may apply to have their profile, and all other identifying information, expunged if their felony conviction is reversed and their case is dismissed.

DNA Database – Established in 1995, West Virginia’s DNA database is maintained by the State Police, Department of Military Affairs and Public Safety. As of August 2002, the state maintained 760 offender DNA profiles in its database.

Post-Conviction DNA Petitioning
Statute does not address post-conviction DNA testing.
Requests for analysis of DNA have increased so substantially that many public laboratories have become inundated, causing delays and backlogs in processing as DNA has become a permanent fixture of the United States criminal justice system and states have striven to enlarge their databases with both forensic and offender profiles. Though accounts of backlogged samples for analysis vary, most believe there are tens of thousands caused by several factors, including dramatic workload increases, lengthy testing methods, lack of scientists needed to analyze DNA, and an overall scarcity of law enforcement resources.

Complicating matters, states’ fiscal woes in the past few years have led most to cut, or at least not increase, law enforcement budgets at the same time the nation is witnessing what some have labeled an explosion in forensic DNA collection. Agencies, in turn, then have to prioritize funding among their many programs, including the staffing and operations of crime laboratories. The labs, in turn, must prioritize which DNA analyses are first performed, and some labs have even stopped doing DNA testing on cases with no suspects. Accordingly, the processing of offender DNA samples, among others, may be delayed.

The Bureau of Justice Statistics (BJS) of the United States Department of Justice reported that, at the beginning of 2001 (the most recent date for which national statistics were available), 81 percent of publicly-funded DNA crime laboratories reported backlogs of DNA analysis. Of the laboratories surveyed that year, the backlog consisted of 16,081 casework and 265,329 offender samples. As offender profile requirements have increased, the challenge has been compounded. According to the National Institute of Justice (NIJ), delays in processing offender samples not only reduce the number of cases solved, but can lead to situations where offenders are released from custody before the evidence linking them to other crimes has been analyzed. Backlogs also delay prosecutions.
According to BJS, 70 percent of prosecutors’ offices throughout the country identified excessive delays in getting laboratory results as their most common problem with the use of DNA evidence. In an effort to relieve some of this workload, 45 percent of these laboratories reported contracting private laboratories to do forensic DNA testing in 2000.

More recent research by the NIJ indicates that, as of May 2002, hundreds of thousands of both convicted offender and crime scene casework” samples are awaiting analysis in evidence storage lockers and forensic laboratories across the United States. In addition, states’ backlog of casework samples continue to increase as recently-enacted state laws require more felons to submit DNA samples, and as more evidence from unsolved cases is reexamined in hopes that DNA analysis will help solve them. As an example of the lab backlogs at the state level, Mr. Trey Boudreaux, undersecretary for the Louisiana Department of Public Safety and Corrections, noted that, as of September 2002, while 15,000 offender samples had been collected by the state, only 2,000 of them had been analyzed and have had profiles entered in the CODIS database. The remaining 13,000 samples had yet to be analyzed.

FEDERAL ASSISTANCE TO STATE AND LOCAL LABORATORIES

In addition to coordinating a nationwide system of sharing DNA evidence, providing CODIS software, training and support to state and local laboratories performing DNA testing, the federal government offers some financial assistance to states for DNA analysis, although many argue it is insufficient.

Enacted in 1994, the DNA Laboratory Improvement Program marked the first federal funding to support DNA analysis. The program, authorized from FY 1996 to FY 2000, awarded more than $39 million to more than 140 individual laboratory facilities in 48 states and Puerto Rico to buy and update laboratory equipment, train laboratory staff in new DNA testing methods, implement advanced testing methods, analyze convicted offender samples and increase participation with CODIS.

In FY 2000, the National Institute of Justice expanded the program to encompass more forensic DNA testing, particularly to improve state capabilities and capacities to conduct DNA analysis through “improving the overall efficiency of evidence examination.” The expanded program, known as CLIP (Crime Laboratory Improvement Program), made funding available to assist with all forensic disciplines, but gave priority to states seeking funds to improve laboratories’ output, turnaround times, staff hours, and/or costs in the section of lab where funds are focused. In FY 2001, NIJ awarded states $9 million through CLIP. In FY 2002, awards totaled approximately $5 million, with states limited to a maximum grant of $250,000 each – states are required to provide a 25 percent match.

The NIJ encourages states seeking federal assistance to reduce DNA backlogs of convicted offender or no-suspect casework cases to apply for federal grants under the Convicted Offender DNA Backlog Reduction Program or No Suspect Casework DNA Backlog Reduction Program. The NIJ defines no-suspect casework as cases where law enforcement has not developed a suspect, or cases in which a suspect has been eliminated through testing or other investigative means.

The DNA Backlog Elimination Act of 2000, funded in 2001, provided $35 million to states ($15 million for convicted offender and $20 million for no-suspect cases) to help reduce state backlogs with both offender and
casework cases in FY 2002. For FY 2003, the Department of Justice has earmarked $100 million to states under the program, with approximately $40 million available for reducing offender backlogs and $60 million for assisting forensic cases. Funds may be used for overtime or other compensation for existing staff; laboratory equipment and supplies; contractor-provided services to perform various steps in the process; in-state travel to identify or collect cases; transfer of evidence; travel to outsourcing laboratories; in-state travel and support for education and training programs and quality assurance measures.

In late 2000, Congress enacted the Paul Coverdell National Forensic Sciences Improvement Act (NFSIA) which authorizes funding to states to improve the quality, timeliness and credibility of forensic science services for criminal justice purposes. The primary objective of these grants is to facilitate consolidated state plans for forensic laboratories by aiding states in identifying and alleviating bottlenecks and general inefficiencies in their lab system. Toward this endeavor, NFSIA allocations may be used for expenses related to facilities, personnel, computerization, equipment, supplies, accreditation, certification, education, and training. In FY 2002, $4.9 million was made available to states based on states’ population and violent crime rates. Funds do not require a state match.36

To date, the federal government claims that, as a result of the CLIP and Backlog Elimination funding programs, approximately 400,000 convicted offender samples and almost 11,000 no-suspect cases have been analyzed. As of May 2002, the FBI had reported more than 900 CODIS “cold hits” had been made as a direct result of the program – 900 cases previously unsolved. To many states, however, more assistance is needed as their laboratory costs continue to rise, and more DNA samples need analyzing.
SUMMARY

Since its first introduction as evidence in 1986, the use of forensic DNA evidence has risen from near obscurity to become a permanent fixture in America’s criminal justice system. According to federal figures, DNA has been instrumental in linking thousands of criminal investigations and helping solve over 5,442 previously unsolved crimes. In addition, DNA testing also has been expanded to post-conviction cases, exonerating over a hundred defendants who had been wrongfully convicted of crimes they did not commit. While these figures are significant, DNA’s forensic value will likely continue to increase in the years to come while the need for post-conviction DNA wanes.

OFFENDER PROFILES AND DATABASE MATCHES

In the past decade, states and the federal government have analyzed and recorded over 1,158,223 offender and forensic profiles in the National DNA Index System (NDIS). The number of collected offender profiles continually increases as states move beyond requiring DNA from sex and violent offenders, to collecting it from less violent felons, all convicted felons and, in four states, from persons arrested for, but not convicted of, certain crimes.

Among Southern states, the number of DNA profiles uploaded into NDIS varies significantly. On one end of the spectrum, Florida, Texas and Virginia have entered more than 100,000 profiles each into NDIS by August 2002, accounting for about 35 percent of the total offender profiles stored nationwide. By November of 2002, Virginia alone had entered more than 187,000 profiles, and was among states leading the nation in the number of investigations that have been aided from its offender index, having recently announced its 1,000th “cold hit,” or match between a DNA sample found at a crime scene to an existing offender profile. Of this total, DNA matches have assisted the state in solving 109 homicides, 241 rapes, 12 rape-homicides, 57 robberies, 14 car jackings, nine malicious woundings, 465 burglaries, and 86 other assorted felonies. 47
Outside Virginia and a few select other states, however, many states’ databases remain in their infancy, and the actual number of convicted offenders from whom DNA has been collected and analyzed remains relatively small. Consequently, many observe, efforts to link offender profiles to unsolved criminal investigations have been hampered, with DNA’s full crime-solving potential yet to be realized. Further challenging these efforts are increasing requests for DNA analysis of both offender and casework samples and growing laboratory backlogs. These challenges will continue in the short term as offender DNA requirements continue to expand and crime laboratory resources are spread thin due to states’ budget woes and limited federal assistance. Within a few years, however, many feel that these obstacles will be overcome, laboratory DNA backlogs will be reduced, and the full effective of DNA as a crime-fighting tool will be realized.

Technological advances in procedures for collecting and testing DNA have improved markedly since the late 1990s alone, making processing faster, more sensitive and reliable, and cheaper. Consequently, the turnaround time for DNA analysis continues to lessen, making easier the processing of offender and forensic DNA profiles for state and federal databases. As databases expand and become better networked, the sharing and comparison of DNA profiles will be facilitated.

In addition, calls for increased laboratory funding continue at both the federal and state levels and there appears to be a growing consensus to direct more resources to this technology. Furthermore, states continue to pass laws extending DNA’s admissibility in court and extending or eliminating statutes of limitation in the filing of cases involving biological evidence. All of these factors will increase the collection and analysis of DNA evidence from crime scenes, enlarge state DNA databases and, consequently, further state and federal law enforcement abilities to link unsolved crimes with offender profiles.

**POST-CONVICTION DNA EXONERATIONS**

As of November 2002, a total of 26 states nationwide (including 11 in the Southern region) had adopted post-conviction DNA testing statutes, allowing select convicted offenders access to DNA testing in cases where it may establish their actual innocence or provide for a more favorable verdict or sentence. Facilitated by these statutes and the assistance of advocacy groups, the pace of post-conviction DNA testing petitions has increased and the number of DNA exonerations has grown in recent years. While there were only three convicted persons who had been exonerated as a result of DNA testing in 1993, there had been 114 exonerations based on post-conviction testing by November 2002.

More states, and perhaps the federal government, are likely to pass statutes enabling broader access to post-conviction DNA testing in order to exonerate the innocent and restore fairness and public confidence in the criminal justice process. In the next few years petitioning for post-conviction testing will likely increase as may exonerations. According to the National Commission on the Future of DNA Evidence, however, the need for post-conviction DNA testing will wane over time as DNA testing with highly discriminatory results will undoubtedly be performed in the vast majority of cases in which biological evidence is relevant, and advanced technologies will become commonplace in all laboratories. In short, as DNA technology improves, the cost of testing decreases, and DNA testing becomes standard procedure in criminal cases, there will be fewer incarcerated persons who can claim that testing, or conclusive testing, was not available to them during their initial trial and appeals process.

As has been explored, the testing of DNA evidence has become one of the foremost forensic techniques used in crime investigations today. States have come to recognize DNA’s unique abilities in crime solving, legislating measures to harness its powers through building and networking databases and providing...
opportunities for post-conviction DNA testing. To date, DNA’s full effectiveness as a crime-fighting tool has yet to be realized. However, as testing technology becomes less expensive and more accurate and current economic conditions improve, states will be better able to collect samples and provide crime laboratories with the resources needed to analyze them; eliminate laboratory backlogs; expand their databases and search capabilities; and harness DNA’s full potential.
ENDNOTES AND REFERENCES


7 Sarah V. Hart, National Institute of Justice, testimony before the United States Senate Judiciary Committee, Subcommittee on Crime and Drugs, May 14, 2002.

8 Richard Willing.

9 Sarah V. Hart.


11 Dawn Harkenham.

12 Smith Alling Lane, “Forensic DNA Databases: How Far Have We Come and Where Are We Going?,” Third Annual DNA Grantees Workshop, June 25, 2002, Washington, D.C.

13 Smith Alling Lane, “The Recent Trend to All Felons,” July 2002.


18 Sarah V. Hart.

19 Ibid.

20 National figures are from Smith Alling Lane, “State DNA Database Laws: Qualifying Offenses,” June 2002.


23 United States Code, Section 14131 of Title 42.


27 Jill G. Polster, President, Georgia Innocence Project, e-mail correspondence, October 7, 2002.


30 The SLC survey asked all Southern states having post-conviction statutes this question.

31 A provision upheld by the state’s Supreme Court, Florida’s post-conviction law effectively prevents those who have pled guilty to their crime from being eligible to petition for DNA testing.

32 Barry Scheck, co-founder, the Innocence Project, testimony before the United States Senate Judiciary Committee, June 13, 2000.


34 Ibid.


37 Attorneys general from the following Southern states signed the letter: Alabama, Arkansas, Florida, Georgia, Maryland, Mississippi, Missouri, Oklahoma, South Carolina, Tennessee and Texas.


39 Jill G. Polster.

40 South Carolina’s listed violent crimes are: murder; first and second degree criminal sexual conduct or criminal sexual conduct with minors; first and second degree assault with intent to commit criminal sexual conduct; assault and battery with intent to kill; kidnapping; voluntary manslaughter; armed robbery; attempted armed robbery; carjacking; some drug trafficking; first and second degree arson; first and second degree burglary; engaging a child for a sexual performance; homicide by child abuse; inflicting great bodily injury upon a child; allowing great bodily injury to be inflicted upon a child; and taking of a hostage by an inmate.


42 Sarah V. Hart.


44 Ibid.


48 “Postconviction DNA Testing: Recommendations for Handling Requests.”