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## Collection of Biological Specimens for DNA Analysis

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Sincerely,

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## Collection of Biological Specimens for DNA Analysis

**Reference Number:** CTAS-1361

When a court sentences a person convicted of violating or attempting to violate T.C.A. § 39-13-502 (aggravated rape), T.C.A. § 39-13-503 (rape), T.C.A. § 39-13-504 (aggravated sexual battery), T.C.A. § 39-13-505 (sexual battery), T.C.A. § 39-13-522 (rape of a child) or T.C.A. § 39-15-302 (incest), or when a juvenile court adjudicates a person to be a delinquent child for violating or attempting to violate T.C.A. § 39-13-502 (aggravated rape), T.C.A. § 39-13-503 (rape), T.C.A. § 39-13-504 (aggravated sexual battery), T.C.A. § 39-13-505 (sexual battery), T.C.A. § 39-13-522 (rape of a child) or T.C.A. § 39-15-302 (incest), it shall order the person to provide a biological specimen for the purpose of DNA analysis. Public Chapter 965 (effective May 10, 2012) amends Tenn. Code Ann. § 40-35-321(e)(3) by expanding the list of violent felony offenses that result in a defendant who is arrested for the commission of such offense being required to undergo DNA testing. The offenses added by this bill are: aggravated vehicular homicide; criminally negligent homicide; reckless homicide; vehicular homicide; and voluntary manslaughter. If the person is not incarcerated at the time of sentencing, the order shall require the person to report to the probation division of the department charged by law with the supervision of probationers, which shall gather the specimen. If a probation officer is not available to gather the specimen, the court may designate a person to do so. The cost of taking, processing and storing the specimen shall be paid by the defendant and shall be collected by the probation officer in the same manner as other fees. If the person is incarcerated at the time of sentencing, the order shall require the chief administrative officer of the institution of incarceration to designate a qualified person to gather the specimen. The biological specimen is to be forwarded by the approved agency or entity collecting the specimen to the Tennessee Bureau of Investigation, which shall maintain it as provided in T.C.A. § 38-6-113. The court shall make the providing of such a specimen a condition of probation or community correction if either is granted. T.C.A. § 40-35-321(b).

If a person convicted of violating or attempting to violate T.C.A. § 39-13-502 (aggravated rape), T.C.A. § 39-13-503 (rape), T.C.A. § 39-13-504 (aggravated sexual battery), T.C.A. § 39-13-505 (sexual battery), T.C.A. § 39-13-522 (rape of a child) or T.C.A. § 39-15-302 (incest) and committed to the custody of the commissioner of correction for a term of imprisonment has not provided a biological specimen for the purpose of DNA analysis, the commissioner or the chief administrative officer of a local jail shall order the person to provide a biological specimen for the purpose of DNA analysis before completion of the person's term of imprisonment. The biological specimen shall be forwarded by the approved agency or entity collecting such specimen to the Tennessee Bureau of Investigation, which shall maintain it as provided in T.C.A. § 38-6-113. No person shall be released on parole or otherwise unless and until such person has provided such a specimen as required by law. T.C.A. § 40-35-321(c).

When a court sentences a person convicted of any felony offense committed on or after July 1, 1998, it shall order the person to provide a biological specimen for the purpose of DNA analysis. If the person is not incarcerated at the time of sentencing, the order shall require the person to report to the probation division of the department charged by law with the supervision of probationers, which shall gather the specimen. If a probation officer is not available to gather the specimen, the court may designate a person to do so. The cost of taking, processing and storing the specimen shall be paid by the defendant and shall be collected by the probation officer in the same manner as other fees. If the person is incarcerated at the time of sentencing, the order shall require the chief administrative officer of the institution of incarceration to designate a qualified person to gather the specimen. The biological specimen shall be forwarded by the approved agency or entity collecting such specimen to the Tennessee Bureau of Investigation, which shall maintain it as provided in T.C.A. § 38-6-113. The court shall make the providing of such a specimen a condition of probation or community correction if either is granted. T.C.A. § 40-35-321(d)(1).

If a person convicted of any felony offense and committed to the custody of the commissioner of correction for a term of imprisonment has not provided a biological specimen for the purpose of DNA analysis, the commissioner or the chief administrative officer of a local jail shall order the person to provide a biological specimen for the purpose of DNA analysis before completion of the person's term of imprisonment. The biological specimen shall be forwarded by the approved agency or entity collecting such specimen to the Tennessee Bureau of Investigation, which shall maintain it as provided in T.C.A. § 38-6-113. T.C.A. § 40-35-321(d)(2).

In August 2006, the Tennessee State Supreme Court released its opinion in *State v. Scarborough*, 201 S.W.3d 607 (Tenn. 2006), holding that the collection of blood from a convicted and incarcerated defen-

dant for DNA analysis and identification purposes pursuant to Tennessee's DNA collection statute was a search for Fourth Amendment Purposes. *Id.* at 616. However, the Court determined that "searches of incarcerated felons undertaken pursuant to Tennessee's DNA collection statute pass constitutional muster when they are reasonable under all of the circumstances." After careful analysis, the Court summarized:

*Id.* at 621. Applying the totality of the circumstances test, the Court concluded that the drawing of blood and the subsequent DNA analysis, conducted pursuant to the Tennessee DNA collection statute, was reasonable and did not violate that defendant's rights under the Fourth Amendment or the Tennessee Constitution.

Although the Tennessee Supreme Court in *Scarborough* justified the statutorily mandated searches of convicted prisoners, the first justification for such searches was a finding, beyond a reasonable doubt, that those persons had committed criminal offenses. The legislation under consideration broadens the range of persons required to provide a DNA sample to include any person arrested for the commission of a violent felony, based on a probable cause determination by a magistrate or grand jury that probable cause exists for the arrest.

In this office's earlier opinion, it was noted that, when a person is arrested and detained upon probable cause to believe he has committed a crime, he loses the right of privacy from routine searches of the cavities of his body and his jail cell during his detention. See *Bell v. Wolfish*, 441 U.S. 520, 559-560, 99 S.Ct. 1861, 1884-1885, 60 L.Ed.2d 447 (1979) (balancing the interest in maintaining security in a detention facility against the privacy interests of the detained person).

The Court in *Purdy* recognized that courts across the country have upheld laws requiring convicted prisoners to provide biological specimens for DNA analysis, but distinguished the status of convicted prisoners from that of mere arrestees:

Arrestees and persons in custody may not qualify as the "general public," but neither do they have the same status as convicted felons. See *Rise v. Oregon*, 59 F.3d 1556, 1560 (9th Cir. 1995) (noting that convicted felons "do not have the same expectation of privacy in their identifying genetic material that free persons and *mere arrestees* have: once a person is convicted of certain felonies "his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from the blood sampling"). There is an obvious and significant distinction between the DNA profiling of law-abiding citizens. . . .

34 J.L. Med. & Ethics at 181.

Undeniably, the collection of DNA and the development of a database whereby unsolved crimes may be revitalized promotes the interests of justice and security. However, based on the current state of the law, the constitutionality of requiring one accused and arrested, yet not convicted of a crime, remains questionable. Accordingly, it is the opinion of this office that Senate Bill 1196/ House Bill 867 is constitutionally suspect. Tenn. Attny. Gen. 07-45 (April 9, 2007)

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