MEMORANDUM

TO: ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
ALL UNITED STATES ATTORNEYS
DEPUTY DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES
ACTING ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION
DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION
DIRECTOR OF THE UNITED STATES MARSHALS SERVICE

FROM: Eric H. Holder, Jr.
Attorney General

SUBJECT: DNA Sample Collection from Federal Arrestees and Defendants

DNA identification is a landmark advance in law enforcement identification technology, comparable in significance to the historical development of fingerprint identification and photographic identification methods. DNA provides a powerful new tool in the enforcement of federal and state criminal laws and the administration of justice, helping both to bring the guilty to justice and to protect the innocent from mistaken suspicion, accusation, and conviction. As with other forms of identification information that are taken from persons who enter the justice system, including fingerprints and photographs, the value of DNA identification information is maximized by obtaining it at the earliest feasible point in the criminal justice process. Accordingly, the regular collection of DNA samples from federal arrestees and defendants must be a priority.

The purpose of this memorandum is to review with federal prosecution offices and Department of Justice investigative agencies the requirement to collect DNA samples from federal arrestees and defendants and to provide guidance concerning issues that have arisen in the implementation of this requirement. The matters discussed include the general requirement to collect DNA samples, the status of implementation of the requirement and the treatment of cases in which an arresting agency is unable to collect a sample, and situations in which implementation is impeded by adverse judicial decisions.

I. THE DNA SAMPLE COLLECTION REQUIREMENT

Federal law has required the collection of DNA samples from most persons *convicted* of federal crimes since 2004, and more recent developments have extended DNA collection to include arrestees and defendants in the federal jurisdiction.[1] Specifically, the DNA Fingerprint Act, enacted in 2006, authorized the Attorney General to implement this reform. See 42 U.S.C. § 14135a(a)(1)(A). The Attorney General exercised this authority in 28 C.F.R. § 28.12, as amended by the rulemaking at 73 Fed. Reg. 74932.[2]

The rule, which went into effect on January 9, 2009, in part directs federal agencies to "collect DNA samples from individuals who are arrested, facing charges, or convicted . . . under the authority of the United States." 28 C.F.R. § 28.12(b). In relation to persons arrested for or charged with federal crimes, the effect is to add DNA to the types of identification information that are routinely taken in booking, generally on a par with fingerprinting.

The DNA Fingerprint Act also enacted complementary changes in 18 U.S.C. § 3142(b), (c)(1)(A), making cooperation in DNA sample collection a mandatory condition of pretrial release. Moreover, failure to cooperate in such collection is independently a federal crime, as provided in 42 U.S.C. § 14135a(a)(5).

The authorized method of DNA sample collection from non-convicts in the federal jurisdiction is by buccal (cheek) swab. The FBI provides buccal swab kits without charge to the agencies responsible for sample collection for this purpose, and the completed kits are returned to the FBI Laboratory for analysis and entry of the resulting DNA profiles into the Combined DNA Index System (CODIS).[3] Instructions for ordering and using the buccal swab kits are available on the FBI's website. See www.fbi.gov/about-us/lab/dna-nuclear/nuclear-dna, under links "Buccal Kit Collection Instructions" and "Buccal Collection Kit Re-Order Form."

II. IMPLEMENTATION

The principal investigative agencies of the Department of Justice—FBI, DEA, ATF, and USMS—have implemented the DNA Fingerprint Act and 28 C.F.R. § 28.12 as amended and are collecting DNA samples from their arrestees. Investigative agencies in other Departments are at varying stages in their implementation efforts.

As noted, cooperation in DNA sample collection is a mandatory condition of pretrial release in federal cases. This condition is moot if the arresting agency has already taken a DNA sample in booking, prior to the defendant's initial appearance in court.

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[1] Almost all of the states similarly collect DNA samples at least from all convicted felons, and over 20 states also authorize DNA sample collection from various non-convict (arrestee or defendant) classes.

[2] The preamble to the rule provides extensive information about the background, rationale, and operation of the current DNA sample collection policy, discussion of related legal and policy matters, and responses to objections. *See* 73 Fed. Reg. 74932-42.

[3] The Department of Defense is an exception, not relying on the FBI for these purposes because it has its own capacity to prepare DNA sample collection kits and to derive DNA profiles for persons in the military justice system.

In some cases, however, defendants will appear in court without having previously provided DNA samples. This may occur for various reasons. One reason is that in some cases arrestees may refuse to cooperate in DNA sample collection in booking. In such a case, the arresting agency may judge that the most appropriate response is to forgo DNA collection at the booking stage, and instead to bring the arrestee to court. Another possible reason is that the arresting agency may not yet have implemented arrestee DNA sample collection as a general matter. For example, the Department of Homeland Security has advised that additional time will be needed to implement arrestee DNA sample collection by its agencies. Whatever the reason, if a defendant appears in court without prior collection of a DNA sample, the court can then order the defendant to cooperate in such collection as a mandatory pretrial release condition under 18 U.S.C. § 3142(b), (c)(1)(A), and as necessary to abate the defendant's commission of the crime of non-cooperation in DNA sample collection under 42 U.S.C. § 14135a(a)(5).

For cases in which the arresting agency has not collected a DNA sample and is unable to do so following the defendant's production in court, the U.S. Attorney's Office should attempt to coordinate with other agencies to seek their assistance in taking the buccal swab. The district courts may be amenable to general arrangements under which the U.S. Probation or Pretrial Services Office will function as the default DNA sample collection agency in cases where an executive agency is unable to carry out this function. The Probation Offices have collected DNA (in the form of blood samples) from convicted offenders under their supervision for many years, *see* 42 U.S.C. § 14135a(a)(2). The Probation and Pretrial Services Offices are similarly subject to the current requirement that federal agencies that supervise persons facing charges collect DNA samples, *see* 73 Fed. Reg. 74940, with the proviso that the authorized form of DNA sample collection from non-convicts is buccal swab rather than blood sample, as noted above. The Probation and Pretrial Services Offices may order buccal swab kits from the FBI and use them in the same manner as executive agencies.

III. ADVERSE DECISIONS

The U.S. Attorney's Office should inform its Criminal Division, Appellate Section contact regarding challenges to DNA sample collection from arrestees or defendants. The issue has been litigated in a number of cases with mixed results. In *United States v. Pool*, 621 F.3d 1213 (9th Cir. 2010), the Ninth Circuit Court of Appeals rejected a constitutional challenge to DNA sample collection from federal arrestees and defendants, affirming a district court decision reported at 645 F.Supp.2d 903 (E.D. Cal. 2009) and 2009 WL 2152029 (E.D. Cal. July 15, 2009). In *Haskell v. Brown*, 677 F.Supp.2d 1187 (N.D. Cal. 2009), the district court rejected a constitutional challenge to California's provision for DNA sample collection from arrestees, a provision that presents essentially the same issues as the federal statute and rule. On the other side, in *United States v. Mitchell*, 681 F.Supp.2d 597 (W.D. Pa. 2009), the district court held that the federal statute and rule are unconstitutional. The case is pending on the Government's appeal before the Third Circuit. A second adverse decision is *United States v. Frank*, No. 2:09-cr-2075 (E.D.Wash. Mar. 10, 2010).

In the event of an adverse decision by a district judge regarding the validity of 42 U.S.C. § 14135a(a)(1)(A) or its implementing rule, the U.S. Attorney's Office may continue to press the

issue in litigation before other judges in the district. Alternatively, the U.S. Attorney's Office may conclude that further efforts to enforce the DNA sample collection requirement at the district court level would likely be unproductive and should be suspended during the pendency of an appeal of the adverse decision to the Court of Appeals. This is an issue of effective litigation strategy that the USAO should decide in consultation with the Criminal Division, Appellate Section contact.

In a district in which there is an adverse decision by a district judge that has not yet been corrected on appeal, investigative agencies must suspend DNA sample collection from arrestees in that district in the absence of a supporting court order for collection in a specific, individual case. This will protect investigative agents in that district from accusations and potential lawsuits charging that they have violated the alleged right of arrestees to be free of DNA sample collection, as declared in the adverse decision.

An adverse district court decision in a particular district regarding DNA sample collection does not affect the collection of DNA samples in other districts. Investigative agencies should continue to collect DNA samples from their arrestees elsewhere and federal prosecutors should continue to insist that defendants be required to cooperate in DNA sample collection in litigation in other districts.

Further questions about the DNA sample collection policy and its implementation may be directed to Anne Pings, EOUSA, Legislative Counsel, telephone: 202-252-1435, email: Anne.Pings@usdoj.gov.