



BILLING CODE: 4410-19

DEPARTMENT OF JUSTICE

28 CFR Part 28

[Docket Number OAG-164; AG Order No. 4537-2019]

RIN 1105-AB56

DNA-Sample Collection from Immigration Detainees

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Proposed rule.

SUMMARY: The Department of Justice is proposing to amend regulations that require DNA-sample collection from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. The amendment would strike a provision authorizing the Secretary of Homeland Security to exempt from the sample-collection requirement certain aliens from whom collection of DNA samples is not feasible because of operational exigencies or resource limitations. This will restore the Attorney General's plenary legal authority to authorize and direct all relevant Federal agencies, including the Department of Homeland Security, to collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States.

DATES: Written and electronic comments must be sent or submitted on or before [Insert date 20 days after date of publication in the *Federal Register*]. Comments received by mail will be considered timely if they are postmarked on or before the last day of the comment period. The electronic Federal Docket Management System will accept electronic comments until Midnight Eastern Time at the end of that day.

ADDRESSES: Comments may be mailed to Regulations Docket Clerk, Office of Legal Policy, Department of Justice, 950 Pennsylvania Avenue, NW, Room 4234, Washington, DC 20530. To ensure proper handling, please reference Docket No. OAG-164 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: David J. Karp, Senior Counsel, Office of Legal Policy, United States Department of Justice, Washington, DC, 202-514-3273.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments. Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

You are not required to submit personal identifying information in order to comment on this rule. Nevertheless, if you still want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much

confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

Background and Purpose

This proposed rule removes 28 CFR 28.12(b)(4), a provision that authorizes the Secretary of Homeland Security to exempt certain detained aliens from DNA-sample collection.

The DNA Fingerprint Act of 2005, title X of Public Law 109-162, authorizes the Attorney General to collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States. *See* 34 U.S.C. 40702(a)(1)(A). The statute further authorizes the Attorney General to delegate the function of collecting DNA samples to other agencies, and to direct their discharge of this function, thereby empowering the Attorney General to establish and administer a government-wide sample-collection program for persons in the covered classes. *See id.* In 2008, the Attorney General issued an implementing rule for 34 U.S.C. 40702(a)(1)(A) that amended 28 CFR 28.12. *See* 73 FR 74932 (Dec. 10, 2008).

The rule generally requires DNA-sample collection from individuals in these categories if they are fingerprinted. Consequently, Federal agencies now collect DNA samples from persons they take into custody as a regular identification measure in booking, on a par with fingerprinting and photographing. The rule requires DNA-sample collection both for persons arrested on Federal criminal charges and for non-United States persons in detention for immigration

violations because DNA identification serves similar purposes and is of similar value in both contexts. *See* 28 CFR 28.12(b) (“Any agency of the United States that arrests or detains individuals . . . shall collect DNA samples from individuals who are arrested, facing charges, or convicted, and from non-United States persons who are detained under the authority of the United States.”); 73 FR at 74933–34, 74938–39. The rule defines “non-United States persons” for this purpose to mean persons who are not U.S. citizens and who are not lawfully admitted for permanent residence as defined in the relevant regulation (8 CFR 1.1(p), which has since been redesignated 8 CFR 1.2). 28 CFR 28.12(b).

The rule allows exceptions to the sample-collection requirement with the approval of the Attorney General. 28 CFR 28.12(b) (third sentence); 73 FR at 74934. As currently formulated, the rule also recognizes specific exceptions with respect to four categories of aliens, as provided in paragraphs (1)–(4) of 28 CFR 28.12(b).

The first exception, appearing in § 28.12(b)(1), is for aliens lawfully in, or being processed for lawful admission to, the United States. This reflects that the rule’s objectives in relation to non-U.S. persons generally concern those implicated in illegal activity (including immigration violations) and not lawful visitors from other countries. *See* 73 FR at 74941.

The second exception, appearing in § 28.12(b)(2), is for aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings. The second exception overlaps with the first and its rationale is similar. Lawful entrants from other countries may be regarded as detained when, for example, they are briefly held up at airports during routine processing or taken aside for secondary inspection. As with the first exception, when such entrants are not subject to further detention or proceedings, categorically requiring DNA-sample collection is not necessary to realize the rule’s objectives.

The third exception, appearing in § 28.12(b)(3), is for aliens held in connection with maritime interdiction, because collecting DNA samples in maritime interdiction situations may be unnecessary and practically difficult or impossible.

This proposed rule does not affect these three exceptions because the considerations supporting them have not changed since the issuance of the original rule in 2008.

The fourth exception, appearing in § 28.12(b)(4), is for other aliens, with respect to whom the Secretary of Homeland Security, in consultation with the Attorney General, determines that the collection of DNA samples is not feasible because of operational exigencies or resource limitations. This aspect of the current regulation is at odds with the treatment of all other Federal agencies, which may adopt exceptions to DNA-sample collection based on operational exigencies or resource limitations only with the Attorney General's approval. *See* 28 CFR 28.12(b). Nevertheless, the rule granted the Secretary of Homeland Security authority to make exceptions for certain aliens, recognizing that it might not be feasible to implement the general policy of DNA-sample collection immediately in relation to the whole class of immigration detainees, including the hundreds of thousands of illegal entrants who are taken into custody near the southwest border of the United States each year.

Then-Secretary of Homeland Security Janet A. Napolitano advised in a March 22, 2010, letter to then-Attorney General Eric H. Holder, Jr., that categorical DNA collection from aliens in this class was not feasible, on the grounds described in § 28.12(b)(4). However, subsequent developments have resulted in fundamental changes in the cost and ease of DNA-sample collection. DNA-sample collection from persons taken into or held in custody is no longer a novelty. Rather, pursuant to the mandate of § 28.12(b), it is now carried out as a routine booking measure, parallel to fingerprinting, by Federal agencies on a government-wide basis. The

established DNA-collection procedures applied to persons arrested or held on criminal charges can likewise be applied to persons apprehended for immigration violations.

Accordingly, this proposed rule removes the exemption authority of the Secretary of Homeland Security appearing in paragraph (b)(4) of § 28.12. The removal of that exemption authority will not preclude limitations and exceptions to the regulation's requirement to collect DNA samples, because of operational exigencies, resource limitations, or other grounds. But all such limitations and exceptions, beyond those appearing expressly in the regulation's remaining provisions, will require the approval of the Attorney General.

The Attorney General—exercising his plenary authority under the DNA Fingerprint Act of 2005 to authorize and direct DNA-sample collection by Federal agencies, and to permit limitations and exceptions thereto—will review DHS's capacity to implement DNA-sample collection from non-U.S. person detainees as required by the regulation. The Department of Justice will work with DHS to develop and implement a plan for DHS to phase in that collection over a reasonable timeframe.

The situation parallels that presented by the initial implementation of DNA-sample collection by other Federal agencies pursuant to 28 CFR 28.12. The regulatory requirements were not understood or applied to impose impossible obligations on the agencies to immediately collect DNA samples from all persons in their custody covered by the rule. Rather, the Department of Justice worked with the various agencies to implement the regulation's requirements in their operations without unnecessary delay, but in a manner consistent with the need to adjust policies and procedures, train personnel, establish necessary relationships with the Federal Bureau of Investigation Laboratory regarding DNA-sample collection and analysis, and take other measures required for implementation.

Many considerations support the decision to repeal the § 28.12(b)(4) exception. As an initial observation, the original rulemaking recognized that distinguishing the treatment of criminal arrestees and immigration detainees with respect to DNA identification is largely artificial, in that most immigration detainees are held on the basis of conduct that is itself criminal. Aliens who are apprehended following illegal entry have likely committed crimes under the immigration laws, such as 8 U.S.C. 1325(a) and 1326, for which they can be prosecuted. “Hence, whether an alien in such circumstances is regarded as an arrestee or a (non-arrested) detainee may be a matter of characterization, and the aptness of one description or the other may shift over time, depending on the disposition or decision of prosecutors concerning the handling of the case.” 73 FR at 74939. The practical difference between criminal arrestees and immigration detainees, for purposes of DNA-sample collection, has been further eroded through policies favoring increased prosecution for immigration violations.

The underlying legal and policy considerations support consistent DNA identification of individuals in the two classes. At the broadest level, “[t]he advent of DNA technology is one of the most significant scientific advancements of our era,” having an “unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.” *Maryland v. King*, 569 U.S. 435, 442 (2013) (quotation marks omitted). DNA analysis “provides a powerful tool for human identification,” which “help[s] to bring the guilty to justice and protect the innocent, who might otherwise be wrongly suspected or accused.” 73 FR at 74933. “[T]hrough DNA matching,” it enables “a vast class of crimes [to] be solved.” 73 FR at 74934. The need for consistent application of DNA identification measures may be particularly compelling “in relation to aliens who are illegally present in the United States and detained pending removal,” because “prompt DNA-sample collection could be essential to the detection and solution of crimes they may have

committed or may commit in the United States . . . before the individual’s removal from the United States places him or her beyond the ready reach of the United States justice system.” 73 FR at 74934.

Regardless of whether individuals are deemed criminal arrestees or immigration detainees, the use of collected DNA samples is the same and has similar value. The DNA profiles the government derives from arrestee or detainee samples amount to sanitized “genetic fingerprints”—they can be used to identify an individual uniquely, but they do not disclose the individual’s traits, disorders, or dispositions. The profiles are searched against the Combined DNA Index System (CODIS), which includes DNA profiles derived from biological residues left at crime scenes—for example, the DNA of a rapist secured in a sexual assault examination kit, or the DNA of a murderer found on an item he left or touched in committing the crime. A match to CODIS identifies the arrestee or detainee as the source of the crime-scene DNA and likely perpetrator of the offense. Equally for criminal arrestees and immigration detainees, the operation of the DNA identification system thereby furthers the interests of justice and public safety without compromising the interest in genetic privacy. *See King*, 569 U.S. at 442–46, 461–65; 73 FR at 74933, 74937–38.

For criminal arrestees and immigration detainees, the specific governmental interests supporting the use of the DNA technology are implicated in similar, if not identical, ways. One such interest is simply that of identification—“the need for law enforcement officers in a safe and accurate way to process and identify the persons . . . they must take into custody,” *King*, 569 U.S. at 449, which includes connecting the person “with his or her public persona, as reflected in records of his or her actions,” *id.* at 451. DNA is a “metric of identification” used to connect the individual to his “CODIS profile in outstanding cases,” which is functionally no different from

the corresponding use of fingerprints, except for “the unparalleled accuracy DNA provides.” *King*, 569 U.S. at 451–52; *see* 73 FR at 74933–34, 74936–37.

A second governmental interest is the responsibility “law enforcement officers bear . . . for ensuring that the custody of an arrestee does not create inordinate risks for facility staff, for the existing detainee population, and for a new detainee.” *King*, 569 U.S. at 452 (quotation marks and citation omitted); *see* 73 FR at 74934 (noting use of DNA information in ensuring proper security measures for detainees). For example, a match between the DNA profile of a person in custody and DNA left by the apparent perpetrator at the site of a murder is important information that officers and agencies responsible for the person’s custody should have, a consideration that applies equally whether the detention is premised on a criminal law violation or an immigration law violation.

Third, DNA identification informs the decision concerning continued detention or release, in the interest of ensuring that the individual will appear for future proceedings. In the criminal context this includes ensuring that an arrestee will appear for trial if released, and in the immigration context it includes ensuring that a detainee will appear for future proceedings relating to his immigration status if released. If DNA matching has shown or will show a connection between the person in custody and a crime for which he may be held to account if he has further contact with the justice system, the person’s incentive to flee must be considered in deciding whether to continue the detention pending further proceedings. *See King*, 569 U.S. at 452–53 (“A person who . . . knows he has yet to answer for some past crime may be more inclined to flee.”).

Fourth, DNA identification informs the decision concerning continued detention or release, and necessary conditions if release is granted, in the interest of public safety. *See King*,

569 U.S. at 453 (“an arrestee’s past conduct is essential to an assessment of the danger he poses to the public, and this will inform a . . . determination whether the individual should be released”); 73 FR at 74934 (DNA information “helps authorities to assess whether an individual may be released safely to the public . . . and to establish appropriate conditions for his release”). The results of DNA identification have the same significance for this purpose whether the person has been detained for criminal or immigration law reasons.

Fifth, DNA identification furthers the fundamental objectives of the criminal justice system, clearing innocent persons who might otherwise be wrongly suspected or accused by identifying the actual perpetrator, and helping to bring the guilty to justice. *See King*, 569 U.S. at 455–56; 73 FR at 74933–34. Here, too, it makes no difference whether the basis of the detention is suspected criminality or an immigration violation.

In this connection, consider the case of Raphael Resendez-Ramirez, the “Railway Killer,” who was executed in Texas in 2006. Resendez is believed to have committed numerous murders in the United States, including at least seven in the 1997-99 period, as well as additional murders in Mexico. Resendez was repeatedly taken into custody and repatriated to Mexico, including eight times between January 5, 1998 and June 1, 1999, and on earlier occasions going back to the 1970s. *See* U.S. Department of Justice, Office of the Inspector General, Special Report on the Raphael Resendez-Ramirez Case (March 20, 2000), <https://oig.justice.gov/special/0003>.

Suppose it had been possible on any occasion when Resendez was apprehended to take a DNA sample from him and match it to DNA evidence derived from any of his murders. The officers responsible for his custody would have been put on notice of his dangerousness upon receipt of the information, and he would have been held in custody for criminal proceedings rather than being released, thereby saving the lives of the victims he claimed thereafter.

This proposed rule's removal of the authorized exception to DNA collection for certain detained aliens appearing in 28 CFR 28.12(b)(4) will help to ensure that future avoidable tragedies of this nature will in fact be avoided, and that DNA technology will be consistently utilized to further public safety and the interests of justice in relation to immigration detainees, as has long been the case in relation to criminal arrestees, defendants, and convicts in the Federal jurisdiction.

In addition to removing § 28.12(b)(4), the proposed rule updates a citation in § 28.12(b), replacing "8 CFR 1.1(p)" with "8 CFR 1.2."

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation would not have a significant economic impact on a substantial number of small entities because it concerns Federal agencies' collection of DNA samples from certain aliens.

Executive Orders 12866, 13563, and 13771 – Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), Principles of Regulation, and Executive Order 13563, "Improving Regulation and Regulatory Review." The Department of Justice has determined that this rule is a "significant regulatory action" under Executive Order 12866, section 3(f).

This rule strikes paragraph (b)(4) of 28 CFR 28.12, which authorizes the Secretary of Homeland Security to exempt certain aliens from DNA-sample collection based on operational exigencies or resource limitations. Following the proposed change, the decision regarding

limitations and exceptions to DNA-sample collection from persons in the affected class will be fully vested in the Attorney General.

This proposed rulemaking is not subject to the requirements of Executive Order 13771 because any future costs of DNA-sample collection following this change in decision-making authority will be the same as the costs of DNA-sample collection pursuant to the existing regulation, subject to whatever limitations or exceptions the decision-maker chooses to allow. In other words, while future implementation decisions under 28 CFR 28.12 to collect DNA more broadly may entail costs, these costs could equally be realized under the current text of the regulation and do not result from this proposed rulemaking's change in the regulation. Fully vesting the authority regarding limitations and exceptions to the regulation's DNA-sample collection requirement in the Attorney General does not determine whether or to what extent limitations or exceptions will be adopted, and does not dictate any time frame for implementation of DNA-sample collection with respect to aliens in the affected class. The Attorney General will work with DHS, as he has done with other Federal agencies that have heretofore implemented DNA collection from persons in their custody, to ensure that any expansion of DNA-sample collection from such aliens will be effected in an orderly manner consistent with DHS's capacities.

For example, if DNA-sample collection were implemented in full with respect to aliens in the category implicated by 28 CFR 28.12(b)(4), pursuant either to the Secretary of Homeland Security's direction under the current text of the regulation, or the Attorney General's direction following the amendment of the regulation by this rulemaking, there would be the same implementation costs. The Department of Justice assumes in analyzing these costs that any such expansion of DNA-sample collection would be phased in over the first three years and that DHS

would utilize the Electronic Data Capture Project (EDCP). EDCP is a project designed to improve efficiencies by reducing the number of duplicate DNA samples collected by Federal agencies and by eliminating the manual collection of biographical data and inked fingerprints at the time of booking, by utilizing the information already electronically collected at the time of booking. This capability is estimated to reduce the time of DNA collection from approximately 15 minutes to less than 5 minutes. To obtain the EDCP technology, integrate it into their booking software, and create a training program for their staff, DHS would incur a total one-time cost of \$500,000.

Approximately 743,000 people fell into the category implicated by 28 CFR 28.12(b)(4) over the past 12 months, which is equivalent to approximately 755,000 samples, once repeated samples (due to rejection of initial samples) are considered. DHS submitted nearly 7,000 samples in FY2018. Therefore, assuming the population subject to DNA collection under the rule remains at this level, DHS would be expected to submit an additional 748,000 samples annually.

Utilizing EDCP, DHS would require approximately 20,778 additional work hours in the first year, 41,556 hours in the second year, and 62,333 hours in the third year to collect the additional samples. Using average compensation for U.S. Customs & Border Protection employees stationed along the southern border, the total cost to DHS with the EDCP software would be about \$5.1 million in the first three years. If future implementation decisions or changes in the volume of apprehensions ultimately resulted in annual submission of a number of additional DNA samples less than or greater than 748,000, required work hours and resulting costs would be reduced or increased correspondingly.

The FBI would also need to provide additional DNA-sample collection kits, at a per-kit cost of \$5.38, in sufficient numbers to collect samples at the volumes described above. For example, assuming a three-year phase-in period with an additional third of the eligible population added in each successive year, the additional sample-collection kit costs to the FBI would be \$1,341,413 to collect 249,333 samples in the first year, \$2,682,827 to collect 498,667 samples in the second year, and \$4,024,240 to collect 748,000 samples in the third year. The FBI will provide to DHS, without charge, the same services that it provides to other Federal agencies that collect DNA samples, including assistance with regard to training, DNA-sample collection kits, postage to return the collected samples, analysis of samples, inclusion in CODIS, and handling resulting matches.

Executive Order 13132 – Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 12988 – Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not

significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

List of Subjects in 28 CFR Part 28

Crime, Information, Law enforcement, Prisoners, Prisons, Probation and parole, Records.

Accordingly, for the reasons stated in the preamble, part 28 of chapter I of title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 28 – DNA IDENTIFICATION SYSTEM

1. The authority citation for part 28 is revised to read as follows:

Authority: 28 U.S.C. 509, 510; 34 U.S.C. 12592, 40702, 40703; 10 U.S.C. 1565; 18 U.S.C. 3600A; Public Law 106-546, 114 Stat. 2726; Public Law 107-56, 115 Stat. 272; Public Law 108-405, 118 Stat. 2260; Public Law 109-162, 119 Stat. 2960; Public Law 109-248, 120 Stat. 587; Public Law 115-50, 131 Stat. 1001.

§ 28.12 [Amended]

2. Amend § 28.12:

a. In the introductory text of paragraph (b) by removing “1.1(p)” and adding in its place “1.2”;

- b. At the end of paragraph (b)(2) by removing the semicolon and adding in its place “; or”;
- c. At the end of paragraph (b)(3) by removing “; or” and adding in its place a period; and
- d. By removing paragraph (b)(4).

Dated: October 15, 2019.

William P. Barr
Attorney General

[FR Doc. 2019-22877 Filed: 10/21/2019 8:45 am; Publication Date: 10/22/2019]