PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

■ 1. The authority citation for part 351 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.;* and 19 U.S.C. 3538.

§ 351.301. [Amended]

■ 2. Amend § 351.301 by removing and reserving paragraph (d)(5).

§ 351.414 [Amended]

■ 3. Amend § 351.414 by removing and reserving paragraphs (f) and (g).

Dated: November 24, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–29225 Filed 12–9–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF JUSTICE

28 CFR Part 28

RIN 1105–AB09; 1105–AB10; 1105–AB24

[OAG Docket Nos. 108, 109, 119; AG Order No. 3023–2008]

DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice by this publication is amending regulations relating to DNA-sample collection in the federal jurisdiction. This rule generally directs federal agencies 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, subject to certain limitations and exceptions.

By this rule, the Department is also finalizing, without change, two related interim rules concerning the scope of qualifying federal offenses for purposes of DNA-sample collection and a requirement to preserve biological evidence in federal criminal cases in which defendants are under sentences of imprisonment.

DATES: *Effective Date:* This rule is effective January 9, 2009.

FOR FURTHER INFORMATION CONTACT: David J. Karp, Senior Counsel, Office of Legal Policy, Main Justice Building, 950 Pennsylvania Ave., NW., Washington, DC 20530. Telephone: (202) 514–3273.

SUPPLEMENTARY INFORMATION:

This final rule finalizes a proposed rule, DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006 (OAG 119; RIN 1105-AB24) (published April 18, 2008, at 73 FR 21083), which was designed to implement amendments made by section 1004 of the DNA Fingerprint Act of 2005, Public Law 109–162, and section 155 of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109–248, to section 3 of the DNA Analysis Backlog Elimination Act of 2000, Public Law 106–546. These regulatory provisions direct agencies of the United States that arrest or detain individuals, or that supervise individuals facing charges, 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. Unless otherwise directed by the Attorney General, the collection of DNA samples may be limited to individuals from whom an agency collects fingerprints. The Attorney General also may approve other limitations or exceptions. Agencies collecting DNA samples are directed to furnish the samples to the Federal Bureau of Investigation (''FBI''), or to other agencies or entities as authorized by the Attorney General, for purposes of analysis and entry into the Combined DNA Index System.

The final rule also finalizes two interim rules. The first interim rule, DNA Sample Collection From Federal Offenders Under the Justice for All Act of 2004 (OAG 108; RIN 1105-AB09) (published on January 31, 2005, at 70 FR 4763), implemented section 203(b) of the Justice for All Act of 2004, Public Law 108–405. That statutory provision expanded the class of offenses constituting qualifying federal offenses for purposes of DNA-sample collection to include all felonies (as well as certain misdemeanors), thereby permitting the collection of DNA samples from all convicted federal felons.

The second interim rule, Preservation of Biological Evidence Under 18 U.S.C. 3600A (OAG 109; RIN 1105-AB10) (published on April 28, 2005 at 70 FR 21951), implemented 18 U.S.C. 3600A. That statute requires the government to preserve biological evidence in federal criminal cases in which defendants are under sentences of imprisonment, subject to certain limitations and exceptions. Subsection (e) of the statute requires the Attorney General to promulgate regulations to implement and enforce the statute. The regulations issued for that purpose, which are finalized by this final rule, explain and interpret the evidence preservation requirement of 18 U.S.C. 3600A, and include provisions concerning sanctions for violations of that requirement.

Background

All 50 States authorize the collection and analysis of DNA samples from convicted state offenders, and enter resulting DNA profiles into the Combined DNA Index System (''CODIS''), which the FBI has established pursuant to 42 U.S.C. 14132. In addition to collecting DNA samples from convicted state offenders, several states authorize the collection of DNA samples from individuals they arrest.

This final rule addresses corresponding requirements and practices in the federal jurisdiction. The DNA Analysis Backlog Elimination Act of 2000 (the ''Act'') initially authorized DNA-sample collection by federal agencies only from persons convicted of certain ''qualifying'' federal, military, and District of Columbia offenses. Public Law 106–546 (2000). The Act also addressed the responsibility of the Federal Bureau of Prisons (''BOP'') and federal probation offices to collect DNA samples from convicted offenders in their custody or under their supervision, and the responsibility of the FBI to analyze and index DNA samples. On June 28, 2001, the Department of Justice published an interim rule, Regulations Under the DNA Analysis Backlog Elimination Act of 2000 (OAG 101I; RIN 1105–AA78), to implement these provisions. 66 FR 34363. The rule, in part, specified the qualifying federal offenses for which DNA samples could be collected and addressed responsibilities of BOP and the FBI under the Act.

After publication of the June 2001 interim rule, Congress enacted the USA PATRIOT Act, Public Law 107–56. Section 503 of that Act added three additional categories of qualifying federal offenses for purposes of DNA-sample collection: (1) Any offense listed in section 2332b(g)(5)(B) of title 18, United States Code; (2) any crime of violence (as defined in section 16 of title 18, United States Code); and (3) any attempt or conspiracy to commit any of the above offenses. The Department of Justice published a proposed rule, DNA Sampling of Federal Offenders Under the USA PATRIOT ACT of 2001 (OAG 105; RIN 1105–AA78) on March 11, 2003, to implement this expanded DNA-sample collection authority. 68 FR 11481. On December 29, 2003, the Department published a final rule, Regulations Under the DNA Analysis Backlog Elimination Act of 2000 (OAG 101; RIN 1105-AA78), implementing this authority. 68 FR 74855.

After publication of the December 2003 final rule, the DNA-sample collection categories again were expanded by section 203(b) of the Justice for All Act of 2004, Public Law 108–405. The Justice for All Act expanded the definition of qualifying federal offenses to include any felony, thereby permitting the collection of DNA samples from all convicted federal felons. The Department published an interim final rule, DNA Sample Collection From Federal Offenders Under the Justice for All Act of 2004 (OAG 108; RIN 1105–AB09), implementing this reform on January 31, 2005. 70 FR 4763.

The Department is now finalizing without change the January 2005 interim rule implementing section 203(b) of the Justice for All Act.[1] The regulatory provisions adopted by that interim rule will not have much practical significance following the publication and effectiveness of this final rule, because this final rule—pursuant to subsequently enacted legislative authority as discussed below—extends the authorization of DNA-sample collection to substantially all persons convicted of federal crimes (as well as certain non-convict classes). Sample collection accordingly will no longer be limited to persons convicted of offenses in the felony and specified misdemeanor categories constituting ''qualifying'' federal offenses under the Justice for All Act provisions. Nevertheless, it is appropriate to retain the regulatory provisions determining specifically which federal crimes constitute ''qualifying'' federal offenses, 28 CFR 28.1–.2, because the statute contemplates such determination by the Attorney General, and because those provisions continue to define the statutory minimum for DNA-sample collection from persons convicted of federal crimes, independent of the exercise of the Attorney General's authority under later enactments to expand the DNA-sample collection categories by regulation.

In addition to extending the category of federal convicts subject to DNA-sample collection to include all felons, the Justice for All Act of 2004 enacted a post-conviction DNA testing remedy for the federal jurisdiction, appearing in 18 U.S.C. 3600, and related biological evidence preservation requirements for federal criminal cases, appearing in 18 U.S.C. 3600A. Subsection (e) of 18 U.S.C. 3600A directs the Attorney General to issue regulations to implement and enforce that section. The Department carried out this statutory requirement by publishing an interim rule, Preservation of Biological Evidence Under 18 U.S.C. 3600A (OAG 109; RIN 1105–AB10), on April 28, 2005. 70 FR 21951. The regulatory provisions adopted by that interim rule appear in 28 CFR 28.21–.28. This final rule is adopting those regulatory provisions as final without change. The preamble to the April 2005 interim rule, appearing at 70 FR 21951–56, provides explanation concerning the regulatory provisions that continues to apply to those provisions as finalized by this rule.

Section 1004 of the DNA Fingerprint Act of 2005 (''DNA Fingerprint Act''), Public Law 109–162, broadened the categories of persons subject to DNA-sample collection to authorize such collection from ''individuals who are arrested or from non-United States persons who are detained under the authority of the United States.'' Before publication of a rule implementing this new authority, the DNA-sample collection provisions were amended further by section 155 of the Adam Walsh Child Protection and Safety Act of 2006 (''Adam Walsh Act''), Public Law 109–248. The amendments made by that Act left the statute in its current form: ''The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested, facing charges, or convicted or from non-United States persons who are detained under the authority of the United States.'' 42 U.S.C. 14135a(a)(1)(A). The statute also provides that the Attorney General may ''direct any other agency of the United States that arrests or detains individuals or supervises individuals facing charges to carry out any function and exercise any power of the Attorney General under this section.'' *Id*. The Department published a proposed rule, DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006 (OAG 119; RIN 1105-AB24) (April 18, 2008, at 73 FR 21083), to implement the DNA Fingerprint Act and Adam Walsh Act amendments and this rule also finalizes that April 2008 proposed rule.

Purposes

The purposes of the portions of this rule that finalize pre-existing interim rules are explained above and in the previously published preambles to those interim rules. The part of this rule that is new—expanding DNA-sample collection pursuant to the authority under 42 U.S.C. 14135a(a)(1)(A)—furthers important purposes reflecting the emergence of DNA identification technology and its uses in the criminal justice system.

DNA analysis provides a powerful tool for human identification. DNA samples collected from individuals or derived from crime scene evidence are analyzed to produce DNA profiles that are entered into CODIS. These DNA profiles, which embody information concerning 13 ''core loci,'' amount to ''genetic fingerprints'' that can be used to identify an individual uniquely, but do not disclose an individual's traits, disorders, or dispositions. *See United States* v. *Kincade*, 379 F.3d 813, 818–19 (9th Cir. 2004) (en banc); *Johnson* v. *Quander*, 440 F.3d 489, 498 (D.C. Cir. 2006). Hence, collection of DNA samples and entry of the resulting profiles into CODIS allow the government to ''ascertain[] and record[] the identity of a person.'' *Jones* v. *Murray*, 962 F.2d 302, 306 (4th Cir. 1992). The design and legal rules governing the operation of CODIS reflect the system's function as a tool for law enforcement identification, and do not allow DNA samples or profiles within the scope of the system to be used for unauthorized purposes. *See* 42 U.S.C. 14132, 14133(b)–(c), 14135e.

The practical uses of the DNA profiles (''genetic fingerprints'') in CODIS are similar in general character to those of actual fingerprints, but the collection of DNA from individuals in the justice system offers important information that is not captured by taking fingerprints alone. Positive biometric identification, whether by means of fingerprints or by means of DNA profiles, facilitates the solution of crimes through database searches that match crime scene evidence to the biometric information that has been collected from individuals. Solving crimes by this means furthers the fundamental objectives of the criminal justice system, helping to bring the guilty to justice and protect the innocent, who might otherwise be wrongly suspected or accused, through the prompt and certain identification of the actual perpetrators. DNA analysis offers a critical

[1] The preamble explanation in the interim rule implementing section 203(b) of the Justice for All Act, at 70 FR 4764–66, continues to apply to its regulatory provisions as finalized by this rule. However, the following errata should be noted: (1) the reference to ''28.2(a)(1)'' in the final sentence of the second full paragraph in the middle column on 70 FR 4765 should be to ''28.2(b)(1)''; (2) the references to ''(b)(3)(A)'' in the third and fifth sentences of the first paragraph and the second sentence of the second paragraph in the right column on 70 FR 4765 should be to ''(b)(3)(i)''; (3) the references to ''(b)(3)(B)'' in the first and third sentences of the first full paragraph of the left column on 70 FR 4766 should be to ''(b)(3)(ii)''; (4) the reference to ''(b)(3)(I)'' in the third sentence of the second full paragraph of the left column on 70 FR 4766 should be to ''(b)(3)(ix)''.

complement to fingerprint analysis in the many cases in which perpetrators of crimes leave no recoverable fingerprints but leave biological residues at the crime scene. Hence, there is a vast class of crimes that can be solved through DNA matching that could not be solved in any comparable manner (or could not be solved at all) if the biometric identification information collected from individuals were limited to fingerprints.

In addition, as with taking fingerprints, collecting DNA samples at the time of arrest or at another early stage in the criminal justice process can prevent and deter subsequent criminal conduct—a benefit that may be lost if law enforcement agencies wait until conviction to collect DNA. Indeed, recognition of the added value of early DNA-sample collection in solving and preventing murders, rapes, and other crimes was a specific motivation for the enactment of the legislation that this rule implements. *See* 151 Cong. Rec. S13756–58 (daily ed. Dec. 16, 2005) (remarks of Sen. Kyl, sponsor of the DNA Fingerprint Act) (explaining the value of including all arrestees in the DNA database). Moreover, in relation to aliens who are illegally present in the United States and detained pending removal, 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. Since in most cases such aliens are not prosecuted for their immigration offenses, there is usually no later opportunity to collect a DNA sample premised on a criminal conviction. Hence, the individual's detention pending removal constitutes a unique opportunity to obtain this critical biometric information—and by that means to solve and hold the individual accountable for any crimes committed 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.

As with fingerprints, the collection of DNA samples at or near the time of arrest also can serve purposes relating directly to the arrest and ensuing proceedings. For example, analysis and database matching of a DNA sample collected from an arrestee may show that the arrestee's DNA matches DNA found in crime scene evidence from a murder, rape, or other serious crime. Such information helps authorities to assess whether an individual may be released safely to the public pending trial and to establish appropriate conditions for his release, or to ensure proper security measures in case he is detained. It may help to detect violations of pretrial release conditions involving criminal conduct whose perpetrator can be identified through DNA matching and to deter such violations. The collection of a DNA sample may also provide an alternative means of directly ascertaining or verifying an arrestee's identity, where fingerprint records are unavailable, incomplete, or inconclusive. Hence, conducted incident to arrest, DNA-sample collection offers a legitimate means to obtain valuable information regarding the arrestee. *See Anderson* v. *Virginia*, 650 S.E.2d 702, 706 (Va. 2006) (upholding a state statute authorizing DNA-sample collection from arrestees based on ''the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution'' (citation and quotation omitted)).

In sum, this rule implements new statutory authority that will further the government's legitimate interest in proper identification of persons ''lawfully confined to prison'' or ''arrested upon probable cause.'' *Jones*, 962 F.2d at 306. By expanding CODIS pursuant to statutory authority to include persons arrested, facing charges, or convicted, and non-United States persons detained, this rule will enhance the accuracy and efficacy of the United States criminal justice system.

Practical Implementation

The rule allows DNA samples generally to be collected, along with a subject's fingerprints, as part of the identification process. As discussed above, the uses of DNA for law enforcement identification purposes are similar in general character to the uses of fingerprints, and these uses will be greatly enhanced as a practical matter if DNA is collected regularly in addition to fingerprints. Law enforcement agencies routinely collect fingerprints from individuals whom they arrest. *See Anderson*, 650 S.E.2d at 706 (''Fingerprinting an arrested suspect has long been considered a part of the routine booking process.''); *Kincade*, 379 F.3d at 836 n.31 (''[E]veryday 'booking' procedures routinely require even the merely accused to provide fingerprint identification, regardless of whether investigation of the crime involves fingerprint evidence.'' (citation and quotation omitted)); *Jones*, 962 F.2d at 306 (noting ''universal approbation of 'booking' procedures * * * whether or not the proof of a particular suspect's crime will involve the use of fingerprint identification''). In addition, agencies that detain non-United States persons (i.e., persons who are not U.S. citizens or lawful permanent residents),[2] such as the Department of Homeland Security (''DHS''), often collect fingerprints from such individuals.

Accordingly, the Attorney General is directing all agencies of the United States that arrest or detain individuals or supervise individuals facing charges 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, pursuant to 42 U.S.C. 14135a(a)(1)(A), if the agencies take fingerprints from such individuals.

The Department recognizes, however, that there may be some circumstances in which agencies collect fingerprints but in which the collection of DNA samples would not be warranted or feasible. For example, in relation to non-arrestees, DHS will not be required to collect DNA samples from aliens who are fingerprinted in processing for lawful admission to the United States, or from aliens from whom DNA-sample collection is otherwise not feasible because of operational exigencies or resource limitations. If any agency believes that such circumstances exist within its sphere of operations, the agency should bring these circumstances to the attention of the Department, and exceptions to the DNA-sample collection requirement may be allowed with the approval of the Attorney General.

The Department also recognizes that some federal agencies exercising law enforcement authority do not collect fingerprints routinely from all individuals at a stage comparable to the arrest phase. For example, military personnel involved in court martial proceedings may not be fingerprinted because their fingerprints already are on file. In addition, persons facing federal charges in the District of Columbia may not be fingerprinted by any federal agency if they are fingerprinted by the Metropolitan Police Department. Nonetheless, the collection of DNA samples from such individuals serves

[2] Defining the scope of ''non-United States persons'' to mean persons who are not U.S. citizens or lawful permanent residents follows the common understanding of this term in other provisions of law. See, *e.g.*, 10 U.S.C. 2241 note, Public Law 108–7, div. M, § 111(e)(2)–(3), Feb. 20, 2003, 117 Stat. 536 (defining ''non-United States person'' as ''any person other than a United States person'' and ''United States person'' in the manner set forth in 50 U.S.C. 1801(i)); 50 U.S.C. 1801(i) (defining ''United States person,'' in relation to individuals, as ''a citizen of the United States * * * [or] an alien lawfully admitted for permanent residence'').

the same purposes, and is warranted to the same degree, as DNA-sample collection from other federal arrestees and defendants. Therefore, if directed by the Attorney General, certain agencies will be required to collect DNA samples from individuals from whom they would not otherwise collect fingerprints.

Agencies will be authorized to enter into agreements with other federal agencies, with state and local governments, and with private entities to carry out the required DNA-sample collection. Agencies that arrest, detain, or supervise individuals will not be required to duplicate DNA-sample collection if arrangements have been made to have the collection done by another authorized agency or entity, but will be responsible for ensuring that the DNA samples are collected and submitted for analysis and entry into CODIS. For example, an agency that arrests and fingerprints an individual and then transfers the individual to another agency (such as the United States Marshals Service) for detention cannot transfer responsibility for DNA-sample collection to the detention agency unless that agency agrees to assume responsibility for that function.

The Department of Justice understands that agencies will need to revise their current procedures in order to implement these new DNA-sample collection requirements. In addition, sample-collection kits will need to be distributed to the agencies and agency personnel will need to be trained in the proper collection techniques. Therefore, although the Attorney General is directing all agencies to implement DNA-sample collection by January 9, 2009, if sample-collection kits authorized by the Attorney General have not been made available to an agency in sufficient numbers to allow collection of DNA samples from all covered individuals, the Attorney General will grant an exception allowing the agency to limit its DNA-sample collection program to the extent necessary.

The collection of DNA samples by agencies will be performed in accordance with procedures and standards established by the Attorney General.

Under the pre-existing DNA-sample collection program for federal convicts, BOP and federal probation offices have taken blood samples for this purpose, utilizing sample-collection kits provided by the FBI. In earlier stages of the program, these samples generally were obtained through venipuncture (blood drawn from the arm), but currently the FBI provides kits that allow a blood sample to be collected by means of a finger prick. However, the states that collect DNA samples from arrestees typically do so by swabbing the inside of the person's mouth (''buccal swab''), and many states use the same method to collect DNA samples from convicts. Therefore, although even blood tests ''are a commonplace in these days of periodic physical examinations and experience with them teaches * * * that for most people the procedure involves virtually no risk, trauma, or pain,'' *Schmerber* v. *California*, 384 U.S. 757, 771 (1966) (footnote omitted), the rule permits and facilitates the use of buccal swabs to collect DNA samples.

Revisions to Existing Regulations

As set forth in the proposed rule, this final rule revises a section of the existing regulations, 28 CFR 28.12, to reflect the expansion of DNA-sample collection to include persons arrested, facing charges, or convicted, and non-United States persons detained under the authority of the United States.

Section 28.12, in paragraph (a), is revised to require BOP to collect DNA samples from all federal (including military) convicts in its custody, as well as from individuals convicted of qualifying District of Columbia offenses. The expansion of DNA-sample collection to include all federal or military convicts in BOP custody, whether or not they fall within the previously covered categories of persons convicted of qualifying federal or military offenses, is based on the Attorney General's authority under 42 U.S.C. 14135a(a)(1)(A). The requirement for BOP to collect samples from individuals convicted of qualifying District of Columbia offenses appears in 42 U.S.C. 14135b(a)(1).

A new paragraph (b) is inserted in section 28.12 to implement the new authority to collect DNA samples from federal arrestees, defendants, and detainees. As discussed above, agencies of the United States that arrest or detain individuals or supervise individuals facing charges will be required to collect DNA samples if they collect fingerprints from such individuals, subject to any limitations or exceptions the Attorney General may approve. This paragraph also specifies certain categories of aliens from whom DHS will not be required to collect DNA samples, even if DHS collects fingerprints. A new paragraph (c) is added that specifies a time frame for the implementation of the expanded DNA-sample collection program.

Current paragraph (c) is redesignated as paragraph (d) and is amended to reflect the expansion of the categories of individuals from whom DNA samples will be collected and the agencies that conduct DNA-sample collection. *See* 42 U.S.C. 14135a(a)(1)(A), 14135a(a)(4)(A). The current version of that paragraph refers only to the collection of DNA samples by BOP from persons convicted of qualifying offenses.

A new paragraph (e), replacing current paragraphs (b) and (d), provides in part that agencies required to collect DNA samples under the section may enter into agreements with other federal agencies, in addition to units of state or local governments or private entities, to carry out DNA-sample collection. The authority to make such arrangements with state and local governments and with private entities is explicit in 42 U.S.C. 14135a(a)(4)(B), and the Attorney General is delegating this authority to other federal agencies pursuant to 42 U.S.C. 14135a(a)(1)(A). The latter provision (42 U.S.C. 14135a(a)(1)(A)) also sufficiently supports allowing such arrangements between federal agencies, since it authorizes the Attorney General to delegate DNA-sample collection to any Department of Justice component and to any other federal agency that arrests or detains individuals or supervises individuals facing charges.

The new paragraph (e) also identifies three circumstances in which an agency need not collect a sample. The first is when arrangements have been made for some other agency or entity to collect the sample under that paragraph. The second is when CODIS already contains a DNA profile for the individual, an exception expressly authorized by 42 U.S.C. 14135a(a)(3). The third is when waiver of DNA-sample collection in favor of collection by another agency is authorized by 42 U.S.C. 14135a(a)(3) or 10 U.S.C. 1565(a)(2), statutes that provide that BOP and the Department of Defense need not duplicate DNA-sample collection with respect to military offenders.

Current paragraph (e) is redesignated as paragraph (f) and is amended to require agencies subject to the rule to carry out DNA-sample collection utilizing buccal-swab collection kits provided by the Attorney General or other means authorized by the Attorney General. The samples then must be sent to the FBI, or to another agency or entity authorized by the Attorney General, for purposes of analysis and indexing in CODIS. This paragraph also is amended to require taking of another sample if the original sample is flawed and hence cannot be analyzed to derive a DNA profile that satisfies the requirements for entry into CODIS.

A new paragraph (g) is added to clarify that the authorization of DNA-sample collection under this rule

pursuant to the DNA Analysis Backlog Elimination Act does not limit DNA-sample collection by an agency pursuant to any other authority.

Summary of Comments

The Department received comments from members of the public and interested organizations concerning the two interim rules and the proposed rule that are being finalized by this rule. The comments received on the interim rule concerning biological evidence preservation, published at 70 FR 21951, will be summarized first. Following that, the comments received on the interim and proposed rules concerning the expansion of DNA-sample collection in the federal jurisdiction, published at 70 FR 4763 and 73 FR 21083, will be summarized jointly because the number of comments received on the earlier (interim) rule was relatively small and those comments generally overlapped in substance with the comments received on the later proposed rule.

Comments on the Interim Rule, Preservation of Biological Evidence Under 18 U.S.C. 3600A (OAG 109; RIN 1105–AB10)

This interim rule implemented the biological evidence preservation requirements of 18 U.S.C. 3600A. *See* 70 FR 21951.

One commenter proposed that this rule should be changed to stipulate that federal agencies cannot maintain or transfer biological evidence to other federal agencies unless existing privacy protections are maintained, and that access to biological material whose preservation is required by 18 U.S.C. 3600A should be limited to federal criminal justice agencies for purposes of post-conviction DNA testing to determine if a convict is actually innocent or identification of additional perpetrators where there is evidence of the existence of such persons.

The rule has not been changed on the basis of this comment because nothing in section 3600A or its implementing rule purports to repeal or limit any existing privacy protections, because there is no reason to discern any greater likelihood of misuse of biological evidence retained pursuant to section 3600A's requirements than of misuse of biological evidence that would be retained otherwise, because addition of such restrictions is not necessary to carry out the statutory directive to implement and enforce section 3600A, and because there is no apparent legal authority for the Department to prescribe such rules for federal agencies on a government-wide basis. Moreover, the policies reflected in the changes proposed by the commenter are too restrictive, because they could preclude using retained biological evidence for legitimate purposes, such as to establish guilt in a new trial if the offender's original conviction is reversed.

Another commenter expressed concern about the rule's provision in 28 CFR 28.22(b)(3) that section 3600A's biological evidence preservation requirement ceases to apply when a defendant is released under supervision following imprisonment. However, this limitation of scope is explicit in the statute, which requires preservation of biological evidence only in relation to a defendant who is ''under a sentence of imprisonment.'' 18 U.S.C. 3600A(a); *see* 70 FR 21952 (explaining in preamble to interim rule that this statutory language does not cover convicts released under supervision).

The same commenter also expressed concern about 28 CFR 28.23, which provides that the evidence that must be retained is limited to sexual assault forensic examination kits and semen, blood, saliva, hair, skin tissue, or other identified biological material. The specific concern expressed was that evidence not found to contain biological material might be found to contain such material on reanalysis at some later time. However, the requirement as stated in the regulation tracks the statutory requirement in section 3600A(a). The statute does not require retention of evidence in which biological material has not been identified based on the speculative possibility that re-examination at some future time might identify such material and the rule would not accurately reflect the statute if it so provided.

Another commenter expressed support for the rule, stating that the biological evidence preservation requirement would help to prove without dispute the guilt or innocence of persons convicted of crimes, and did not propose any changes.

Comments on the Interim Rule, DNA Sample Collection From Federal Offenders Under the Justice for All Act of 2004 (OAG 108; RIN 1105–AB09), and on the Proposed Rule, DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006 (OAG 119; RIN 1105–AB24)

Comments were received on the interim rule (published at 70 FR 4763) implementing the Justice for All Act's expansion of DNA-sample collection from federal convicts to include all felons, and the proposed rule (published at 73 FR 21083) expanding DNA-sample collection in the federal jurisdiction to include certain non-convict classes, including arrestees and non-U.S. person detainees as specified. The ensuing discussion summarizes the principal issues that were raised in comments received from various individuals or organizations, followed by a summary of comments received from some particular commenters that merit separate mention or discussion. The main matters raised in the comments are as follows:

Scope of Sample Collection

Some commenters objected to the scope of DNA-sample collection under the rule, such as by stating that DNA-sample collection should not be extended beyond convicts to arrestees, or that DNA-sample collection should be limited to individuals convicted of or implicated in particularly serious or violent crimes. Other commenters agreed with the approach of the rule, noting the public safety benefits of collecting DNA samples on a broader basis.

The rule has not been changed on the basis of comments in this category. Extending DNA-sample collection beyond convicts to other persons implicated in illegal activity is the central reform of the DNA Fingerprint Act that this rule implements. This extension generally brings DNA-sample collection into conformity with the practice regarding fingerprints, which are collected as part of routine booking procedure in connection with arrests, and it offers critical benefits that would be lost if DNA-sample collection were authorized only if and when an arrested person is convicted. The matter is further discussed above in connection with the purposes and practical implementation of this rule.

Some of the comments on this point objected to the extension of DNA-sample collection to arrestees on the ground that it would violate the presumption of innocence or result in innocent persons being included in the DNA database. This objection is essentially question-begging, presupposing that DNA-sample collection from an individual is not justifiable unless there has been an adjudication establishing the individual's commission of a criminal offense. That is not the rationale of DNA-sample collection under this rule and the legislative enactments it implements. Rather, the rule reflects a judgment that the implication of individuals in criminal activity to the extent of being arrested sufficiently supports the taking of certain identification information from such individuals. The same judgment is made

without difficulty with respect to other forms of biometric identification, including fingerprinting and photographing of arrestees, and the corresponding judgment is sound with respect to DNA identification information.

Some commenters believed that the rule's expansion of DNA-sample collection would adversely affect innocent persons in a different way, by supposedly increasing the risk of spurious matches resulting from an enlarged DNA database. The premise of this objection is mistaken. The technical design of the DNA identification system, including the number and selection of the core loci used in DNA identification, is sufficiently discriminating to foreclose a significant risk of coincidental matching of DNA profiles between different individuals that could result in an innocent person being mistakenly implicated in a crime he did not commit. Increasing the number of DNA profiles in CODIS accordingly does not create a risk to the innocent of the sort that concerns these commenters, just as the increase in the number of fingerprints in criminal justice databases does not create a significant risk of innocent persons being implicated in crimes because of coincidental congruences between their fingerprints and those of offenders.

Some commenters objected that extending DNA-sample collection to arrestees would disproportionally impact certain racial or ethnic groups. However, the rule is race-neutral, providing for the collection of DNA samples from arrestees on an evenhanded basis, regardless of their racial or ethnic background. The demographic proportions in the class of individuals from whom DNA samples are taken upon arrest will parallel the representation of different demographic groups in the general class of arrestees, just as the demographic proportions in the class of individuals from whom fingerprints are taken upon arrest parallels the representation of different demographic groups in the general class of arrestees. The resulting proportions in either case provide no reason to refrain from taking biometric information from arrestees, whose use for law enforcement identification purposes will help to protect individuals in all racial, ethnic, and other demographic groups from criminal victimization.

As noted above, some commenters opined that DNA-sample collection should be limited to cases involving individuals implicated in particularly serious or violent crimes. The uses of DNA identification include solving the most serious crimes, such as rape and murder, but also legitimately include solving other types of crimes in which the perpetrators leave identifiable biological residues at the crime scenes from which DNA can be recovered. Moreover, even if only the objectives of solving and preventing the most serious crimes were considered, the scope of sample collection provided in this rule would be justified, because the efficacy of the DNA identification system in solving such crimes depends in large measure on casting a broader net in sample collection. The issue of the scope of predicate offenses was before Congress during the consideration of the enactments that this rule implements and the legislative decision was against imposing any such limitation:

> [T]he Committee has made the salutary reforms * * * that expand the collection and indexing of DNA samples and information generally applicable, and has not confined the application of these reforms to cases involving violent felonies or some other limited class of offenses. The experience with DNA identification over the past fifteen years has provided overwhelming evidence that the efficacy of the DNA identification system in solving serious crimes depends upon casting a broader DNA sample collection net to produce well-populated DNA databases. For example, the DNA profile which solves a rape through database matching very frequently was not collected from the perpetrator based upon his prior conviction for a violent crime, but rather based upon his commission of some property offense that was not intrinsically violent. As a result of this experience, a great majority of the States, as well as the Federal jurisdiction, have adopted authorizations in recent years to collect DNA samples from all convicted felons—and in some cases additional misdemeanant categories as well—without limitation to violent offenses. * * * The principle is equally applicable to the collection of DNA samples from non-convicts, such as arrestees. By rejecting any limitation of the proposed reforms to cases involving violent felonies or other limited classes, the Committee has soundly maximized their value in solving rapes, murders, and other serious crimes.

151 Cong. Rec. S13758 (daily ed. Dec. 16, 2005) (remarks of Sen. Kyl, sponsor of the DNA Fingerprint Act, quoting the Justice Department's statement of views).

Finally, some commenters objected that the rule would result in the collection of DNA samples from persons arrested in the course of demonstrations or protests. However, the rule involves no targeting of anyone based on expressive activities or other constitutionally protected conduct. It is a neutral provision for the collection of an additional type of biometric information from arrestees, regardless of the context in which they are arrested. Persons arrested for criminal activities occurring in the context of demonstrations are subject to the normal incidents of arrest, including fingerprinting and photographing. There is no reason DNA-sample collection should be treated differently.

Constitutionality

Some commenters alleged that DNA-sample collection as authorized by the rule would violate the Fourth Amendment's prohibition of unreasonable searches and seizures or other constitutional provisions. Other commenters believed that the rule's requirements are consistent with the Constitution.

The constitutionality of collecting DNA samples from convicts on a categorical basis has been considered by numerous federal and state courts, which have reached the substantially unanimous conclusion that such collection is constitutional. With respect to the broader collection of DNA samples from arrestees, defendants, and non-U.S. person detainees as authorized by this rule, the Department of Justice has carefully considered the issue and has concluded that the rule fully comports with constitutional requirements. A number of the considerations supporting this conclusion are discussed above in the explanation of the purposes and practical implementation of this rule.

Privacy

Some commenters objected to the rule on the ground that DNA, in contrast to fingerprints, can potentially be used to derive sensitive information about individuals, such as information about genetic disorders, dispositions to medical conditions, and possibly behavioral predispositions. Some stated that this concern is aggravated by the retention of the DNA samples themselves (buccal swabs or blood samples) after the samples have been analyzed to derive the DNA profiles that are entered into CODIS.

The rule has not been changed on the basis of these comments because the concerns they raise were recognized, and these concerns were fully considered and addressed, in the design of the DNA identification system and the legal and administrative rules governing the system's operation. As discussed above in connection with the purposes of this rule, the DNA profiles retained in the system are sanitized ''genetic fingerprints'' that can be used to identify an individual uniquely, but do not disclose an individual's traits, disorders, or dispositions. The rules

governing the operation of CODIS reflect its function as a tool for law enforcement identification, and do not allow DNA information within the scope of the system to be used to derive information concerning sensitive genetic matters. *See* 42 U.S.C. 14132(b), 14133(b)–(c), 14135e.

The retention of DNA samples after DNA profiles have been derived does not compromise these protective measures, because the DNA samples are maintained in secure storage and are subject to essentially the same use restrictions and privacy protections as DNA profiles. *See* 42 U.S.C. 14132(b)(3), 14133(c)(2), 14135e. Moreover, retention of the samples has neither the purpose nor the effect of jeopardizing the privacy of individuals from whom the samples have been collected, but rather serves to protect valid individual and systemic interests. For example, in cases in which a search against CODIS obtains an apparent match between an individual's DNA profile in the system and the DNA of the perpetrator of a crime derived from crime scene evidence, the original sample taken from the individual is reanalyzed to ensure that the profile in the system is actually that of the identified individual before the match information is disclosed to investigators. This measure, which functions as a backstop protection to ensure that innocent persons are not mistakenly suspected or accused, could not be carried out if the DNA samples were destroyed.

Finally, some commenters objected to the retention of the DNA samples collected under the rule on the view that such retention could lead to ''familial searching.'' By ''familial searching'' the commenters apparently mean searches directed at finding DNA profiles in a database that do not match to the DNA found in crime scene evidence, but are sufficiently close (''partial matches'') to create a probability that the perpetrator is a relative of an identifiable individual in the DNA database. The current design of the DNA identification system does not encompass searches of this type against the national DNA index. Occasionally partial matches appear incidentally as a result of ordinary searches seeking exact matches, and in such cases the partial match information may be shared with investigators, for use as an investigative lead.

This rule makes no change in policies or practices relating to partial matches or searches therefor, nor does the concern raised by these commenters have any obvious relationship to the matters addressed in the rule. The question whether or to what extent partial match information may be sought or used is independent of the question whether DNA samples are to be collected only from convicts or from persons in certain non-convict classes as well. It is also independent of policy decisions regarding the retention or disposal of DNA samples. The concern raised by these commenters concerning the possibility of ''familial searching'' accordingly provides no logical basis for changing this rule.

Impact on Aliens

Some commenters objected to the rule insofar as it would result in the collection of DNA samples from non-U.S. persons arrested or detained for immigration law violations, and proposed various limitations to curtail or exclude such sample collection. Other commenters supported the application of the rule to collect DNA samples in these circumstances.

One concern raised by commenters critical of the rule was that collecting DNA samples from non-U.S. persons who are arrested or detained would result in resentment in immigrant communities. However, persons who are illegally present in the United States are subject to arrest or detention and removal from the country. When such persons are arrested or detained pending removal they are subject to the normal incidents of being taken into custody, including fingerprinting. The rule would only add the collection of another type of biometric information to the process, normally by taking a buccal swab. Some degree of resentment at the enforcement of the nation's immigration laws may be an unavoidable consequence of the removal from the United States of individuals illegally present, with whom others in immigrant communities may identify based on common origin or background. A minor addition to the associated booking procedure in connection with removal, as provided in this rule, should not change the situation materially. Moreover, even if some additional resentment concerning the enforcement of the immigration laws were to result, it would not be sufficient reason to refrain from implementing an advance in law enforcement identification methods that offers important benefits in increased safety against criminal victimization to all elements of the national community, including immigrant communities.

Some comments critical of the rule's reforms suggested a general exclusion of immigration violations as a basis for DNA-sample collection under the rule. However, the statute (42 U.S.C. 14135a(a)(1)(A)) permits DNA-sample collection from arrestees with no restriction, and authorizes DNA-sample collection from non-U.S. persons more broadly, allowing DNA samples to be collected from such persons on the basis of detention (even if they are not arrested). Generally excluding aliens apprehended for immigration violations from DNA-sample collection would create an arbitrary difference between such persons and persons arrested for non-immigration federal offenses, and would virtually nullify the broader statutory authorization to collect DNA samples from non-U.S. person detainees, since immigration law violations are the typical reason non-U.S. persons may be detained (beyond ordinary arrest situations for other sorts of crimes). There is no justification for such restriction in the statutory text, on the basis of legislative intent, or on grounds of policy. *See generally* 151 Cong. Rec. S13757 (daily ed. Dec. 16, 2005) (remarks of Sen. Kyl) (noting breadth of authorization to collect DNA samples in immigration contexts under DNA Fingerprint Act).

Some commenters urged more specifically that collection of DNA samples from non-U.S. persons based on detention should be stringently limited, such as by limiting such collection to aliens held under final orders of removal. For the reasons discussed below, the Department has not made such a change in the final rule.

A ground offered by the commenters in support of such restriction is that persons who are citizens or lawful permanent residents may be mistakenly identified as non-U.S. persons and subjected to removal proceedings. In rare cases, a person born abroad may be able to establish derivative U.S. citizenship based upon the naturalization of one or both of the person's parents while he or she was a minor. It is also true that a small number of lawful permanent resident aliens are placed in removal proceedings, for example, based on their having committed certain types of crimes or on their engaging in such conduct as alien smuggling or immigration fraud. Such aliens retain their permanent resident status—and hence remain U.S. persons—until the issuance of a final removal order. 8 CFR 1.1(p).

While the statute limits the authority to collect DNA samples from detainees (not arrested, facing charges, or convicted) to non-U.S. persons, it does not prescribe a particular quantum of proof or any adjudicatory process to establish non-U.S. person status. Even the proposal of some commenters to limit DNA-sample collection to aliens

held under final orders of removal could not definitively preclude all mistakes, given the possibility that some such orders reflect errors of law or fact. The Department of Homeland Security or any other agency detaining persons for immigration violations will be able to consider whether there is any available information tending to indicate that a detainee is a lawful permanent resident or a U.S. citizen. While lawful permanent residents who are detained pending removal proceedings are not subject to DNA-sample collection based on non-U.S. person status before their permanent resident status is terminated at the conclusion of the removal proceedings, that is not a reason to defer collection of DNA samples from the vast majority of detained aliens who are not permanent resident aliens.

In interpreting the statutory authorization to collect DNA samples from non-U.S. person detainees, it is most plausibly understood in parity with the earlier part of the statutory provision, which permits DNA-sample collection from arrestees. The purpose of the authorization relating to arrestees is to extend DNA-sample collection beyond persons whose commission of crimes has been established by the relevant adjudicatory process (criminal conviction). Rather, the quantum of information sufficient to warrant an arrest—probable cause that the individual has committed a crime—is deemed a sufficient basis for the collection of certain biometric information, including DNA. Similarly, under the later portion of the statutory provision concerning non-U.S. person detainees, the quantum of information sufficient to warrant the detention of an individual based on indicia of the individual's being a non-U.S. person subject to removal is a sufficient basis for the collection of such information.

Considering the matter at a practical level, the largest class of persons who may be affected by the rule are aliens apprehended near the southwest border who have entered the country illegally. In most cases such aliens do not dispute their status or the illegality of their presence in the United States, and accept prompt repatriation following brief detention without further proceedings. Hence, radically limiting the application of the statute's DNA-sample collection authorization for non-U.S. person detainees—for example, limiting it to aliens held under final orders of removal—would exclude most individuals to whom it was meant to apply.

A further relevant consideration is that aliens who are apprehended following illegal entry have likely committed crimes under the immigration laws for which they could be arrested. *See, e.g.*, 8 U.S.C. 1325(a), 1326. Most accept prompt repatriation and are not prosecuted, but a substantial number are prosecuted. Whether prosecution will be pursued is a matter of executive discretion, and the decision about that may not occur until some time after the alien's apprehension. 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. There would be little sense in an understanding of the statute as limiting DNA-sample collection from individuals as non-U.S. person detainees to circumstances in which their non-U.S. person status has, for example, been finally established through an immigration adjudication, where the statute would clearly allow DNA-sample collection from the same individuals under far less stringent requirements as persons arrested on probable cause for immigration law violations.

Finally, some commenters criticized the rule as requiring the collection of DNA samples from lawful immigrants seeking admission to the country. This comment is simply wrong. The rule provides an express exception to the collection requirement under section 28.12(b)(1) for ''[a]liens lawfully in, or being processed for lawful admission to, the United States.''

Backlogs

Some commenters expressed the concern that the rule would increase backlogs of unanalyzed DNA samples. However, the Department of Justice is fully aware of the increased demand for DNA analysis that will result, and the Department has requested additional resources for the FBI Laboratory to increase analysis capacity in order to address the larger volume of samples that will be collected and will need to be analyzed. Moreover, even if backlogs are temporarily increased, the collected samples will be stored until they can be analyzed, and the DNA profiles ultimately derived thereby will be useful in solving crimes whenever they become available and are entered into CODIS. The concern expressed by some of these commenters that having a larger number of stored samples could hinder criminal investigations is also not well-founded. The existence of samples in storage does not impair the operation of CODIS with respect to DNA profiles that have already been entered into the system. Analysis of DNA samples collected from individuals can be prioritized in cases in which the circumstances suggest a particular probability that matches to DNA in crime scene evidence from other offenses will result, regardless of the number of stored samples awaiting analysis.

Use of Contractors

Some commenters asserted that the rule contemplates federal agencies contracting with third parties to collect and store DNA samples, which they believed would lead to abuse. The reference may be to section 28.12(e), which states that agencies required to collect DNA samples under the rule may enter into agreements with other federal agencies, ''with units of state or local governments, and with private entities to carry out the collection of DNA samples.'' However, the quoted language in the rule tracks statutory language that authorizes such agreements. *See* 42 U.S.C. 14135a(a)(4)(B) (authorizing agencies to ''enter into agreements with units of State or local government or with private entities to provide for the collection of [DNA] samples''). For example, under this language, federal probation offices have been permitted to contract with medical personnel to carry out DNA-sample collection, in the form of blood-sample collection, from offenders under their supervision. The use of contract personnel does not waive or modify the privacy and security requirements of the DNA identification system and the authorization for this purpose in the rule contemplates nothing essentially different from what has previously been allowed (and continues to be allowed) under the statutory provisions. There is no basis for some commenters' apparent perception of this aspect of the rule as a novel measure entailing some grave risk of abuse.

Likewise, there is no force to an objection raised by some commenters that the rule does not prohibit outsourcing of DNA samples collected under the rule to private laboratories for analysis. The Department of Justice is moving to increase the FBI Laboratory's capacity for DNA analysis to address the expected increase in DNA analysis workload resulting from this rule. If there is also use of private laboratories to carry out some of the required DNA analysis, it is no cause for concern. Outsourcing of DNA analysis to private laboratories has widely been used for many years in analyzing DNA samples collected from individuals, including as

part of the federal DNA analysis backlog elimination funding program administered by the Department's National Institute of Justice. Where private laboratories carry out such analysis, they are subject to the stringent quality assurance and proficiency requirements and standards that laboratories deriving DNA profiles for entry into CODIS must meet, and to the privacy and security requirements associated with CODIS. Nothing in this rule would modify or weaken these protections, if it were decided to outsource some DNA samples collected under the rule for analysis by private laboratories.

Expungement

Some commenters stated that the rule should be modified to provide for expungement of DNA information in certain circumstances, such as cases in which an arrestee from whom a DNA sample was collected is acquitted. The rule has not been modified to incorporate expungement provisions because expungement is provided for and governed by statutory provisions appearing in 42 U.S.C. 14132(d). Under the applicable statutory expungement procedure, the FBI expunges from the national DNA index the DNA information of a person included in the index on the basis of conviction for a qualifying federal offense if the FBI receives a certified copy of a final court order establishing that the conviction has been overturned. Likewise, the FBI expunges the DNA information of a person included in the index on the basis of an arrest under federal authority if it receives a certified copy of a final court order establishing that the charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period. *See* 42 U.S.C. 14132(d)(1)(A). By December 31, 2008, the FBI will publish instructions on its Web site describing the process by which an individual may seek expungement of his or her DNA records in accordance with 42 U.S.C. 14132(d)(1)(A).

Use of Reasonably Necessary Means

Some commenters objected to the authorization in section 28.12(d) for agencies to use reasonably necessary means to collect DNA samples from individuals covered by the rule who refuse to cooperate in the collection of the sample. This regulatory provision is based on the statutory authorization to use such reasonable means appearing in 42 U.S.C. 14135a(a)(4)(A). The comments on this point did not provide persuasive reasons to refrain from paralleling the statutory authorization in the regulation.

Granting of Exceptions

Some comments criticized the rule as not sufficiently specifying the circumstances in which the Attorney General will allow exceptions to the rule's DNA-sample collection requirement. The rule has not been changed on this point. The preamble discussion in this rule above adequately explains why some authority to allow exceptions is necessary, and the types of grounds (such as operational exigencies or resource constraints) on which exceptions may be permitted.

Comments From Senator Jon Kyl

Senator Jon Kyl, the legislative author of the DNA Fingerprint Act and the related Adam Walsh Act amendment, submitted comments stating that the rule properly implements the authority created by these laws. He stated that he did not recommend any change in the regulations because they are consistent with the clear meaning and spirit of the statutory authorization.

Senator Kyl responded in his comments to the privacy concerns raised by other commenters. This included providing detailed explanation why it would be practically impossible to divert the relevant DNA analysis laboratory processes for preparation of CODIS DNA profiles so as to extract and misuse genetically sensitive information. Finally, Senator Kyl responded to and rejected a range of comments and proposed changes in the rule that had been submitted by other commenters who were critical of the rule.

Comments From the Administrative Office of the United States Courts

Comments were submitted by the Administrative Office of the United States Courts asking that the Department consider modifying the rule to specify that covered ''agenc[ies] of the United States'' that will be required to collect DNA samples include only executive branch agencies. The rule has not been so changed because the suggested change would be an incorrect reading of the law. The federal probation offices have been responsible for collecting DNA samples from convicts under their supervision, as provided in 42 U.S.C. 14135a(a)(2). Against this background, it is not plausible that they were meant to play no corresponding role under the enactment expanding DNA-sample collection in the federal jurisdiction to certain non-convict classes. The laws relating to pretrial release in federal cases were amended by the DNA Fingerprint Act to make it a mandatory condition of pretrial release that a defendant cooperate in required DNA-sample collection. *See* 18 U.S.C. 3142(b), (c)(1)(A). This heightens the implausibility of an assumption that the federal probation and pretrial services offices were not meant to have any responsibility with respect to DNA-sample collection, which is a mandatory pretrial release condition. The expanded DNA-sample collection authorization in 42 U.S.C. 14135a(a)(1)(A) states that the Attorney General may ''authorize and direct any other agency of the United States that * * * supervises individuals facing charges'' to carry out the DNA-sample collection function. There is no plausibility to a reading of this statutory language as intended to exclude almost all of the federal agencies (the federal probation and pretrial services offices) that supervise individuals facing federal charges.

The comments of the Administrative Office of the U.S. Courts also suggested that the rule be modified to include procedures by which probation officers will be notified when a DNA sample has been collected by some other agency, so as to avoid duplicative sample collection. Other commenters in some instances similarly suggested that the rule specify procedures or mechanisms to avoid duplicative collection by multiple agencies. The Department of Justice intends to establish such mechanisms, but their design and operation can most readily be worked out in the implementation of this rule in cooperation with the affected agencies. Consequently, the rule has not been modified on this point.

Comments From the National Congress of American Indians

Comments received from the National Congress of American Indians expressed concern about the lack of consultation with tribal officials regarding the proposed rule. The comments noted that federal jurisdiction exists to prosecute major crimes committed in Indian country, and recommended that the applicability of the rule be contingent on the assent of particular tribes. Various other restrictions were also recommended similar to those proposed by other commenters critical of the rule, such as limiting DNA-sample collection to convicts, and requiring the destruction of DNA samples after the DNA profiles have been derived and entered into CODIS. The underlying concern reflected in these comments was that collected samples would be misused to derive sensitive genetic information and not properly limited to legitimate law enforcement purposes.

The Department of Justice is aware of the concerns regarding the obtaining of sensitive genetic information concerning Native Americans and misuse of such information. But these concerns are misplaced in relation to this rule, under which collected DNA samples and resulting DNA profiles are subject to the stringent privacy protections of CODIS, reinforced and secured through numerous design elements and governing laws and rules that limit the use of DNA information to proper law enforcement identification purposes. These matters are discussed and documented at length in earlier portions of this preamble and summary. Hence, limiting the application of the rule in relation to crimes committed in Indian country or through other restrictions would not further any purpose of protecting the privacy of Native Americans. Rather, it would only serve to limit the strength and efficacy of the DNA identification system in protecting all elements of the American public, including Native American communities, from rape, murder, and other crimes.

Comments From the New Hampshire Department of Safety

Comments submitted by the New Hampshire Department of Safety urged that the rule be modified to create an exception to DNA-sample collection based on detention for minor, nonviolent offenses, or that resulting DNA profiles in such cases not be entered into CODIS until after conviction. The comments stated that members of the New Hampshire Legislature had advised that there would be a move to prohibit New Hampshire from participating in CODIS if the rule were not restricted.

The preamble of this rule above explains the basis for the conclusion that collecting DNA samples from federal arrestees on the same footing as fingerprints is the approach most conducive to public safety and is not overly broad. Moreover, this rule affects only DNA-sample collection in the federal jurisdiction. It imposes nothing on New Hampshire or other states, which remain free to set their own DNA-sample collection policies. Withdrawal from CODIS by a state would harm its own people, denying them the benefits of the nationwide DNA identification system that has come to play a critical role in protecting the public from crime.

Comments From a Canadian Member of Parliament

A member of the Canadian Parliament submitted comments expressing concern about the rule, in relation to possible DNA-sample collection from Canadians lawfully visiting the United States. The comments appear to reflect misunderstandings concerning the provisions and intent of the rule. One limitation of the rule is that it generally equates the requirements for DNA-sample collection to those for fingerprinting. Hence, to the extent that Canadian visitors to the United States are exempt from fingerprinting, they would also be exempt from the DNA-sample collection requirement prescribed by the rule. More basically, the rule has an express exemption for aliens lawfully in, or being processed for lawful admission to, the United States. The rule's objectives in relation to non-U.S. persons generally concern those implicated in illegal activity (including immigration violations), and will not affect lawful Canadian visitors.

Other Comments

Beyond the recurrent and major comments discussed above, no other comments received on the rule provided any persuasive reason to reconsider or depart from the rule text as previously proposed. Hence, the Department of Justice has carefully considered all comments and has concluded that the rule should be finalized without modification.

Regulatory Certifications

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the following reason: The regulation concerns the collection, analysis, and indexing of DNA samples from certain individuals, and the preservation of biological evidence, by federal agencies. *See* 5 U.S.C. 605(b).

Executive Order 12866—Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, § 1(b) (''The Principles of Regulation''). The Department of Justice has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, § 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget. With respect to the expanded collection of DNA samples from certain individuals under this regulation, the cost of buccal swab kits is expected to be similar to the cost of finger-prick kits, which the FBI has provided in the existing program for the collection of DNA samples from federal convicts. Resulting per-sample analysis and storage costs also are expected to be similar. A finger-prick DNA-sample collection kit costs approximately $7.50, and it costs the FBI approximately $28.50 to analyze the DNA sample and $1.50 to store the sample (for a total of $37.50). When a match occurs, the FBI reanalyzes a DNA sample to confirm the match. The cost of such an analysis is approximately $37 per sample. The cost to the FBI to expunge a DNA record is approximately $100 per sample.

The individuals from whom DNA-sample collection is authorized under this rule, not covered by previous law and practice, generally fall into two broad categories: (1) Persons arrested for or charged with (but not yet convicted of) federal crimes, and (2) non-U.S. persons arrested or detained by DHS. According to the Department of Justice's 2004 Compendium of Federal Justice Statistics, over 140,000 suspects were arrested for federal offenses in fiscal year 2004. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Office of Justice Programs, Compendium of Federal Justice Statistics, 2004, available at *http://ojp.usdoj.gov/bjs/abstract/cfjs04.htm*, at 1, 13, & 18. According to the DHS 2006 Yearbook of Immigration Statistics, 1,206,457 aliens were apprehended. *Id.* at 91. Based on these figures, the Department estimates that on an annual basis the number of individuals from whom DNA-sample collection is authorized under this rule will be approximately 1.2 million. The actual number of individuals from whom DNA samples are collected will be less to the extent that the Attorney General grants exceptions or the Secretary of Homeland Security exercises his discretion to limit DNA-sample collection in accordance with 28 CFR 28.12(b), and to the extent that individuals entering the system through arrest or detention previously have had DNA samples collected and repetitive collection is not required.

The Department estimates that more than 61,000 crimes have been solved or their investigation assisted by the use of DNA collected from individuals since the inception of CODIS. In addition, there have been over 13,000 forensic matches of DNA. Forensic matches occur when DNA evidence from one crime scene is matched to DNA evidence from another crime scene. As of August 2008, more than 6.2 million offenders and 233,000 forensic profiles are contained in the database.

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 in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 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 companies to compete with foreign-based companies 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 interim rules published at 70 FR 4763 on January 31, 2005, and at 70 FR 21951 on April 28, 2005, and for the reasons stated in the preamble to this rule, the amendments set forth in those interim rules are adopted as final without change; and for the reasons stated in the preamble, part 28 of 28 CFR Chapter I is further amended to read 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; 42 U.S.C. 14132, 14135a, 14135b; 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.

■ 2. Section 28.12 is revised to read as follows:

§ 28.12 Collection of DNA samples.

(a) The Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of—

(1) A Federal offense (including any offense under the Uniform Code of Military Justice); or

(2) A qualifying District of Columbia offense, as determined under section 4(d) of Public Law 106–546.

(b) Any agency of the United States that arrests or detains individuals or supervises individuals facing charges 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. For purposes of this paragraph, ''non-United States persons'' means persons who are not United States citizens and who are not lawfully admitted for permanent residence as defined in 8 CFR 1.1(p). Unless otherwise directed by the Attorney General, the collection of DNA samples under this paragraph may be limited to individuals from whom the agency collects fingerprints and may be subject to other limitations or exceptions approved by the Attorney General. The DNA-sample collection requirements for the Department of Homeland Security in relation to non-arrestees do not include, except to the extent provided by the Secretary of Homeland Security, collecting DNA samples from:

(1) Aliens lawfully in, or being processed for lawful admission to, the United States;

(2) Aliens held at a port of entry during consideration of admissibility and not subject to further detention or proceedings;

(3) Aliens held in connection with maritime interdiction; or

(4) 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.

(c) The DNA-sample collection requirements under this section shall be implemented by each agency by January 9, 2009.

(d) Each individual described in paragraph (a) or (b) of this section shall cooperate in the collection of a DNA sample from that individual. Agencies required to collect DNA samples under this section may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual described in paragraph (a) or (b) of this section who refuses to cooperate in the collection of the sample.

(e) Agencies required to collect DNA samples under this section may enter into agreements with other agencies described in paragraph (a) or (b) of this section, with units of state or local governments, and with private entities to carry out the collection of DNA samples. An agency may, but need not, collect a DNA sample from an individual if—

(1) Another agency or entity has collected, or will collect, a DNA sample from that individual pursuant to an agreement under this paragraph;

(2) The Combined DNA Index System already contains a DNA analysis with respect to that individual; or

(3) Waiver of DNA-sample collection in favor of collection by another agency is authorized by 42 U.S.C. 14135a(a)(3) or 10 U.S.C. 1565(a)(2).

(f) Each agency required to collect DNA samples under this section shall—

(1) Carry out DNA-sample collection utilizing sample-collection kits provided or other means authorized by the Attorney General, including approved methods of blood draws or buccal swabs;

(2) Furnish each DNA sample collected under this section to the Federal Bureau of Investigation, or to another agency or entity as authorized by the Attorney General, for purposes of analysis and entry of the results of the analysis into the Combined DNA Index System; and

(3) Repeat DNA-sample collection from an individual who remains or becomes again subject to the agency's jurisdiction or control if informed that a sample collected from the individual does not satisfy the requirements for analysis or for entry of the results of the analysis into the Combined DNA Index System.

(g) The authorization of DNA-sample collection by this section pursuant to Public Law 106–546 does not limit DNA-sample collection by any agency pursuant to any other authority.

Dated: December 4, 2008.

Michael B. Mukasey,

Attorney General.

[FR Doc. E8–29248 Filed 12–9–08; 8:45 am]

BILLING CODE 4410–19–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 924

[MS–018–FOR; Docket No. OSM–2008–0017]

Mississippi Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule; approval of amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving an amendment to the Mississippi regulatory program (Mississippi program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Mississippi proposed revisions to its regulations and statute regarding ''valid existing rights'' as they pertain to designation of lands as unsuitable for surface coal mining operations. Mississippi intends to revise its program to be consistent with SMCRA.

DATES: *Effective Date:* December 10, 2008.

FOR FURTHER INFORMATION CONTACT: Sherry Wilson, Director, Birmingham Field Office. Telephone: (205) 290–7282. E-mail: *swilson@osmre.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the Mississippi Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, ''* * * a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.'' See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior approved the Mississippi program on September 4, 1980. You can find background information on the Mississippi program, including the Secretary's findings and the disposition of comments, in the September 4, 1980, **Federal Register** (45 FR 58520). You can find later actions on the Mississippi program at 30 CFR 924.10, 924.15, 924.16, and 924.17.

II. Submission of the Amendment

By letter dated April 5, 2006 (Administrative Record No. MS–0402), Mississippi sent us an amendment to its program under SMCRA (30 U.S.C. 1201 *et seq.*). Mississippi sent the amendment at its own initiative.

We announced receipt of the proposed amendment in the May 24, 2006, **Federal Register** (71 FR 29867). In the same document, we opened the public comment period and provided an opportunity for a public hearing or meeting on the adequacy of the amendment. No one requested a public hearing or meeting. The public comment period closed on June 23, 2006.

During our review of the amendment, we identified concerns about Mississippi's use of the term ''Valid Rights'' in its statute while the Federal regulations and statute uses the term ''Valid Existing Rights.'' We notified Mississippi of these concerns by letter dated August 17, 2006 (Administrative Record No. MS–0414).

By letter dated May 30, 2008 (Administrative Record No. MS–0416–02), Mississippi provided explanatory information concerning the meaning of the terms ''valid rights'' and ''valid existing rights'' as used in the State statutes and regulations. By e-mail dated July 23, 2008 (Administrative Record No. MS–0416–03), Mississippi sent us a revised copy of its regulations.

Based upon Mississippi's explanatory information and revisions to its amendment, we reopened the public comment period in the August 26, 2008, **Federal Register** (73 FR 50263). No one requested a public hearing or meeting. The public comment period closed on September 10, 2008.

III. OSM's Findings

Following are the findings we made concerning the amendment under SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17. We are approving the amendment as described below.

A. Changes to the Mississippi Code Annotated Section 53–9–71(4)

Mississippi proposed to revise section 53–9–71(4) to provide that after July 1, 1979, and subject to valid rights, no surface coal mining operations shall be permitted on certain lands. Those certain lands are specified in section 53–9–71(4) of the Mississippi statute.

The Federal counterpart statute to Mississippi's above statute is found at section 522(e) of SMCRA. Section 522(e) prohibits or restricts surface coal mining operations on certain lands, ''subject to valid existing rights,'' after the date of SMCRA's enactment (August 3, 1977), including, among other areas, units of the National Park System, Federal lands in national forests, and buffer zones for public parks, public roads, occupied dwellings, and cemeteries. The Act provides that these prohibitions and restrictions do not apply to operations in existence or under a permit on the date of enactment.

Mississippi's statute prohibits or restricts coal mining operations on the same lands as its Federal counterpart. It makes these prohibitions or restrictions subject to Valid Rights. We received a letter dated May 30, 2008 (Administrative Record No. MS–0416–02), from the General Counsel for the Mississippi Department of Environmental Quality stating that it was his opinion that the term ''valid rights'' as used in § 53–9–71(4) means ''valid existing rights'' as used in the State regulations and SMCRA. In addition, these prohibitions and restrictions do not apply to operations in existence or under a permit on the date of enactment of the State statute. Because rights that would exist under the Federal statute would also exist under the Mississippi statute, we find that Mississippi's proposed statute is no less stringent than the Federal statute.

B. Changes to the Mississippi Surface Coal Mining Regulations (MSCMR)

Mississippi proposed to revise its regulations in order to reconcile them with the State's above proposed statute revision. In this statute, Mississippi uses the term ''valid rights.'' Mississippi clarified that the term ''valid rights'' as used in the State statute means the same as its term ''valid existing rights'' as used in the State regulations at MSCMR Section 105. Following are the regulations that Mississippi proposed to add or revise:

MSCMR Section 105. Definitions

Mississippi proposed to add a definition for ''valid rights'' to read as follows:

Valid Rights—as used in § 53–9–71(4) of the Act means Valid Existing Rights.

MSCMR Section 1101. Authority

Mississippi proposed to revise this section to read as follows: