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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

STEVE MARSHALL
ATTORNEY GENERAL

501 WASHINGTON AVENUE
P.O. BOX 300152
MONTGOMERY, AL 36130-0152
(334) 242-7300
ALABAMAAG.GOV

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Honorable Frank Williamson
Sheriff, Colbert County
201 Main Street
Tuscumbia, Alabama 35674

Sheriffs – Jails – Prisoners and
Prisons – DNA – Colbert County

Pursuant to section 36-18-25(c)(1) of the Code of Alabama, a person arrested for a felony or a sexual offense has no right to refuse to submit to a DNA sample upon arrest.

The sheriff may wish to request a standing order requiring that arrestees subject to section 36-18-25(c)(1) must submit to a DNA sample as a condition of release.

Dear Sheriff Williamson:

This opinion of the Attorney General is issued in response to your request.

QUESTION

What recourse does the Sheriff and Jail Staff have when an arrestee refuses to submit a DNA sample to the jail staff?

FACTS AND ANALYSIS

Your request states that you have arrestees who are refusing to submit DNA samples to the jail staff upon arrest and ask what recourse is available to the sheriff and the jail staff. It is noted that a sheriff "has the legal custody and charge of the jail in his or her county and all prisoners committed thereto, except in cases otherwise provided by law." ALA. CODE §14-6-1 (2018)

The Director of Forensic Sciences is required to create and establish a DNA database. ALA. CODE §36-18-24(a) (Supp. 2021). The database shall contain the DNA records of "persons arrested on or after October 1, 2010, for any felony offense or for any sexual offense including, but not limited to, those that would require registration pursuant to the Alabama Sex Offender Registration and Community Notification Act." ALA. CODE §36-18-24(b)(6) (Supp. 2021).

The DNA sample is collected by the sheriff's jail staff at the time of arrest pursuant to section 36-18-25 of the Code, which states as follows:

(c)(1) All persons arrested for any felony offense on or after October 1, 2010, or for any sexual offense including, but not limited to, those that would require registration pursuant to the Alabama Sex Offender Registration and Community Notification Act, commencing with Section 15-20A-1, of Chapter 20A, Title 15, or the former Community Notification Act, Article 2, of Chapter 20 of Title 15, on or after October 1, 2010, shall have a DNA sample drawn or taken, as specified by the director, at the same time he or she is fingerprinted pursuant to the booking procedure or at the time of arrest.

ALA. CODE §36-18-25(c)(1) (Supp. 2021) (emphasis added). Subsection (c)(3) further provides that no sample is required to be taken "if it is determined that the person's DNA sample has been included in the DNA database, and has not been subject to a court's expunging the record from the DNA database." ALA. CODE §36-18-25(c)(3) (Supp. 2021). The Director of Forensic Sciences has adopted regulations that direct how DNA samples are drawn or taken. ALA. ADMIN. CODE r. 370-2-1, *et seq.* (1998). DNA samples are authorized to be taken by (1) a blood specimen drawn by a trained phlebotomist using medically-approved procedures or (2) a

collection of buccal cells collected by orally swabbing inside the donor's mouth using the DNA Database Swab Collection Kit. *Id.*

The plain language of section 36-18-25(c)(1) of the Code provides that all persons arrested for a felony on or after October 1, 2010, or for any sexual offense shall have a DNA sample drawn or taken at the same time he or she is arrested. The United States Supreme Court has held that the DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. *Maryland v. King*, 569 U.S. 435 (U.S. 2013). The Alabama Court of Criminal Appeals held that an inmate lacked the right to refuse to submit to DNA testing where the statute mandates submission to DNA testing before the inmate is released. *Hammonds v. State*, 777 So. 2d 750 (Ala. Crim. App. 1999).

Based upon the foregoing, the taking of a DNA sample of a person arrested for a felony offense is mandatory at the time of arrest. Accordingly, the jail staff may take a DNA sample from an arrestee even if the arrestee refuses to submit to the sample as the arrestee has no right to refuse the taking of the sample. The methods used to secure and process prisoners are best left to the discretion of those officials charged with custody of the inmate. *See*, Opinion to Honorable Frank Williamson, Colbert County Sheriff, dated Mar. 16, 2021, A.G. No. 2021-024 ("Law enforcement officials charged with maintaining the jail, rather this Office, should determine how to reasonably enforce [policies] but should be mindful of the rights guaranteed to inmates under the United States Constitution, and any other applicable laws.").

In recognition of these Constitutional concerns, it is suggested that the Sheriff obtain a court order for collection of the DNA sample. Courts are authorized to issue standing orders in such circumstances. For instance, Rule 7.3 of the Alabama Rules of Criminal Procedure provides mandatory conditions for release of defendants before conviction and authorizes a court to include additional conditions necessary to secure a defendant's appearance. Ala. R. Crim. P. 7.3. Rule 7.3(b)(6) specifically allows "any other conditions which the court deems reasonably necessary." Ala. R. Crim. P. 7.3(b)(6). Thus, the sheriff may wish to seek from the circuit court a standing order that requires all arrestees who are subject to section 36-18-25(c)(1) of the Code to submit to a DNA sample as a condition of release. This would alleviate the need for a court order each time an arrestee refuses to submit to a DNA sample and provide guidance to the jail staff and the sheriff with respect to the taking of the DNA sample.

CONCLUSION

Pursuant to section 36-18-25(c)(1) of the Code of Alabama, a person arrested for a felony or a sexual offense has no right to refuse to submit to a DNA sample upon arrest. The sheriff may wish to request a standing order requiring that arrestees subject to section 36-18-25(c)(1) of the Code must submit to a DNA sample as a condition of release.

I hope this opinion answers your question. If this Office can be of further assistance, please contact me.

Sincerely,

STEVE MARSHALL
Attorney General

By:

A handwritten signature in black ink, appearing to read "Ben Baxley", written in a cursive style.

BEN BAXLEY
Chief, Opinions Division

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