HB

124

SENATE COMMITTEE REPORT

DATE: 3/8/05

FURTHER:

DATE TURNED
IN TO OFFICE:_____

Judiciary Committee considered HOUSE BILL NO. 124 am

HB 124 COLLECTION OF DNA/USE OF FORCE

"An Act relating to the collection of, and the use of reasonable force to collect, a deoxyribonucleic acid sample from persons convicted of or adjudicated delinquent for certain crimes."

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

Senate Bill:
[ ] Same Title
[ ] New Title

House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
	X			
	✓			
GT =	✓			
	✓			
CHAIR:	✓			

Alaska State Legislature

Interim:
716 W. 4th Ave.
Anchorage, AK 99501-2133

Phone: (907) 269-0265
Fax: (907) 269-0264

Session:
Alaska State Capitol, Rm 408
Juneau, AK 99801-1182

Phone: (907) 465-4939
Fax: (907) 465-2418
Toll Free: (800) 465-4939
Rep.Tom_Anderson@legis.state.ak.us

Representative Tom Anderson
District 19 - Anchorage

Sponsor Statement
HB 124

HB 124 allows a correction, probation or parole officer to use reasonable force in the collection of DNA samples required by law and absolves them from civil or criminal liability for the use of that force. Officers shouldn't run the risk of being punished for carrying out their duties.

Currently, there is no way for a corrections, parole or patrol officer to collect the DNA samples required by law if the individual the DNA is to be collected from is uncooperative. If an officer were to try and use reasonable force to collect the sample, under current law they could be held liable for civil or criminal penalties.

For some convicted felons there is no incentive to provide this type of evidence because anything added to their sentence would make little difference. People serving extended sentences are one example. There is no punishment under the current statutes to efficiently encourage cooperation.

I urge your support of this bill.

Alaska State Legislature
House of Representatives

Official Business

State Capitol
Juneau, AK 99801-1182

Sectional Analysis for HB 124
BY: Representative Tom Anderson

Section 1. Amends AS 44.41.035(b)

This section of the bill adds municipal violations similar to felonies to the list of violations for which the state can collect DNA evidence.

Section 2. Adds a new subsection to AS 44.41.035

Gives a juvenile or adult correctional, probation or patrol officer the authority to use reasonable force in the procurement of DNA samples when such samples are required by law. Also provides immunity from civil and criminal liability stemming from the use of that force.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 124
(H) Publish Date: 2/24/05

Revision Date/Time (Note if correction):
Dept. Affected: Administration

Title: An Act relating to collection of DNA by force...
RDU: Legal and Advocacy Services
Component: Public Defender Agency

Sponsor: Rep. Anderson
Requester: House Judiciary
Component No.: 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill allows public safety employees, including juvenile and adult probation and parole officers to use reasonable force to collect authorized DNA samples, and grants them immunity from any civil or criminal liability. This bill, if enacted, is not expected to have a significant fiscal impact on the operations of the Agency.

Prepared by: Linda K. Wilson, Deputy Director
Phone: (907)334-4416
Division: Public Defender Agency
Date/Time: 2/22/05 9:52 AM

Approved by: Michael Tibbles, Deputy Commissioner
Date: 2/22/2005
Agency: Department of Administration

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: HB 124
(H) Publish Date: 2/?4/05

Revision Date/Time (Note if correction):
Dept. Affected: Corrections
Title "An act relating to the collection of, and the use of reasonable force to collect, a deoxyribonucleic acid sample"
RDU Institutional Facilities
Component Institution Director's Office
Sponsor Senator Bunde
Requester Judiciary, Finance
Component No. 524

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES ( )	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: *(Attach a separate page if necessary)*

Passage of this legislation will not have a measurable fiscal impact on the Department of Corrections.

Prepared by: Sharleen Griffin, Acting Director
Phone 465-4641
Division Administrative Services
Date/Time 2/18/05 9:44 AM
Approved by: Portia Parker, Deputy Commissioner
Date 2/18/2005
Agency Department of Corrections

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: HB 124
(H) Publish Date: 2/24/05

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to the collection of, and the use of reasonable force to collect, a deoxyribonucleic acid..."
RDU CRIMINAL
Component CDCO
Sponsor Representative Anderson
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)						
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill amends AS 44.41.035(b) (DNA identification system) by both narrowing the statute to apply to convictions that occur in Alaska, and widening to apply to violations of law or ordinances with elements similar to AS 11 (Criminal Law) or AS 28.35 (Motor Vehicle Offenses and Accidents). A new subsection to AS 44.41.035 is added that allows certain officials to use reasonable force in collection of DNA.

Passage of this legislation will have no foreseeable fiscal impact on the Department of Law.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 2/22/05 10:34 AM
Approved by: K. Daughhetee for Scott Nordstrand, Acting Attorney General
Date 2/22/2005
Agency Department of Law

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: HB 124
(H) Publish Date: 2/24/05

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: Use of Force for DNA Collection
RDU: Statewide Support
Component: Criminal Records & ID
Sponsor: Representative Anderson
Requester: House Judiciary
Component No.: 1190

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS:

Section 1 amends AS 44.41.035(b) by expanding the types of convictions that require deoxyribonucleic acid (DNA) registration. Under this bill, upon conviction in this state of crimes similar to crimes against persons, or felonies under AS 11 or AS 28.35, DNA must be collected. "Similar crimes" will include municipal misdemeanors, and preliminary estimates, based on the Uniform Offense Citation Table, are that this would include convictions under approximately 35 municipal misdemeanors from six municipalities – Anchorage, Juneau, Fairbanks, Ketchikan, Sitka, and Petersburg. In FY 2004 there were 680 persons with convictions under those municipal offenses. This number excludes duplicates (persons who were convicted of more than one qualifying municipal offense) and persons for whom DNA has already been collected for prior convictions (for whom subsequent collections will not be necessary).

continued on page 2

Prepared by: Director David Schade
Phone: 269-0202
Division: Statewide Services
Date/Time: 2/22/05 3:54 PM
Approved by: Commissioner William Tandeske
Date: 2/22/2005
Agency: Department of Public Safety

STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL NO. HB 124

ANALYSIS CONTINUATION

Collecting DNA for municipal misdemeanors will mean that when some defendants are subsequently convicted of other qualifying offenses, their DNA will already be on file, so this does not mean the numbers are absolute additions to the DNA database overall. Basically, this bill will shift the collection of DNA to earlier in a defendant's criminal career. "Similar crimes" will also include federal or military convictions, for which no preliminary numbers are available. Adding "similar crimes" will have an impact on Statewide Services Records & Identification and Information Services due to the increase in clerical and technical tasks, such as confirming fingerprints and modifying tables in the Alaska Public Safety Information Network (APSIN). This increase in the workload can be absorbed at present, although there is a cumulative impact on the APSIN staff workload. Similarly, the crime lab can absorb the increase in DNA submissions, although there is a cumulative impact on the crime lab workload as well.

Section 2 provides that reasonable force may be used in the collection of oral DNA samples. This section will have no impact on the workload of Statewide Services.

LEGISLATIVE RESEARCH REPORT

FEBRUARY 23, 2005

REPORT NUMBER 05.169

THE USE OF REASONABLE FORCE AND IMMUNITY FROM LIABILITY IN COLLECTING DNA SAMPLES FROM OFFENDERS

PREPARED FOR REPRESENTATIVE TOM ANDERSON

BY PATRICIA YOUNG, MANAGER

You wished to know if any states' laws provide for law enforcement or corrections personnel to use reasonable force in collecting DNA samples from persons who, although required by law to submit to DNA sampling, refuse to do so. You also wished to know if any such laws offer immunity from civil or criminal liability for the use of reasonable force in such situations.

We detail various state laws on this subject in Table 1. As you will see, we identified ten states with statutory provisions specifically authorizing the use of reasonable force under the described situations; in one additional state, an opinion by the attorney general notes that the use of reasonable force is permissible in such situations.[1] Among these eleven states, nine specifically grant immunity from civil or criminal liability to authorized personnel for the use of reasonable force in collecting DNA samples from individuals who refuse to comply with lawful requirements to do so.[2]

You will note that only the law in Vermont requires a court order prior to the forcible collection of a DNA sample. Wyoming law notes that the criminal justice agency *may apply* to the court for an order requiring a recalcitrant individual to comply.

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

---

[1] Other states may have laws of similar practical application but worded such that our LEXIS queries did not identify them.

[2] Laws in Louisiana and Virginia authorize the collection of DNA samples from individuals arrested for certain offenses. As of January of 2003, only those states and Texas authorized such sampling at the time of arrest.

907-465-3991
907-465-3908 (fax)

Alaska Legislature
Legislative Research Services
w3.legis.state.ak.us/Research/research_home.htm

State Capitol
Juneau, AK 99801

Arkansas	A.C.A. § 12-12-1110	Only those individuals qualified to draw ... DNA ... samples in a medically approved manner.	Authorized law enforcement and corrections personnel may employ reasonable force in cases where an individual refuses to submit to DNA testing. No such employee shall be criminally or civilly liable for the use of reasonable force.
Idaho	Idaho Code § 19-5511		Duly authorized law enforcement and correction personnel shall employ reasonable force in cases where an individual refuses or resists submission to procedures for collecting a DNA sample authorized by this chapter, and no employee shall be subject to criminal or civil liability for the reasonable use of force absent a showing of malice.
Illinois	730 ILCS 5/5-4-3	Only a physician authorized to practice medicine, a registered nurse or other qualified person trained in venipuncture may withdraw blood; only a person trained in the instructions promulgated by the state police on collecting saliva or tissue may collect saliva or tissue (respectively).	Duly authorized law enforcement and corrections personnel may employ reasonable force in cases in which an individual refuses to provide a DNA sample required under this Act.
Louisiana	La. R.S. 15:609		Duly authorized law enforcement and corrections personnel may employ reasonable force in cases in which an individual refuses to provide a DNA sample required under this Section and no such employee shall be civilly or criminally liable for the use of such reasonable force.
Massachusetts	ALM GL ch. 22E, § 4	Only a physician, registered professional nurse, licensed practical nurse, phlebotomist, health care worker with phlebotomist training or a person licensed and trained by the director	Duly authorized law enforcement and correction personnel may employ reasonable force to assist [authorized persons] in collecting DNA samples in cases where an individual refuses to submit to such collection as required by this chapter; such personnel shall not be subject to criminal prosecution or civil liability for the use of such reasonable force.
Pennsylvania	42 Pa.C.S. § 4717	Only those individuals qualified to draw DNA samples in a medically approved manner.	Duly authorized law enforcement and corrections personnel may employ reasonable force in cases where an individual refuses to submit to DNA testing authorized under this chapter, and no such employee shall be criminally or civilly liable for the use of reasonable force.
South Dakota	S.D. Codified Laws § 23-5A-13		Duly authorized law enforcement and corrections personnel may employ reasonable force in cases if an individual refuses to provide a DNA sample required under this chapter. No such employee may be held civilly or criminally liable for the use of such reasonable force.
Utah	Utah Code Ann. § 53-10-404	*See Note Below*	Responsible agencies may use reasonable force, as established by their individual guidelines and procedures, to collect a DNA sample if the person refuses to cooperate with the collection.
Vermont	20 V.S.A. § 1935	Blood samples may only be drawn by a physician, physician's assistant, registered nurse, licensed practical nurse, medical technologist, laboratory assistant, or phlebotomist.	If a person required to provide a DNA sample refuses, the agency shall file a motion for an order requiring the person to provide the sample. If the court finds that the person is required to provide a DNA sample, the court shall issue a written order requiring the person to provide the sample and specifying the manner by which it shall be obtained. The court's order may authorize law enforcement and correctional personnel to employ reasonable force to obtain the DNA sample. No such employee or health care professional shall be criminally or civilly liable for the use of reasonable force.

Virginia	Va. Code Ann. § 19.2-310.2:1 Va. Atty. Gen. Op. 02-138 Va. Code Ann. § 19.2-310.3:1		After a determination by a magistrate or grand jury that probable cause exists for an arrest for the commission or attempted commission of certain violent felonies or violations, a DNA saliva or tissue sample shall be taken prior to the person's release from custody. According to Virginia AG Opinion 02-138, issued May 13, 2003, reasonable force may be used, if necessary, to obtain a DNA sample from such an arrestee who refuses to comply with the sample collection. No civil liability shall attach to any person authorized to take saliva or tissue [in accordance with procedures adopted by the Division of Forensic Science] as a result of the act of taking saliva or tissue from any person submitting thereto, provided the sample was taken according to recognized medical procedures.
Wyoming	Wyo. Stat. § 7-19-406	DNA samples shall be collected in a medically approved manner by a physician, registered nurse, qualified clinical or laboratory technician or other person qualified by training and experience.	If a person required to provide a DNA sample under this act refuses to do so, the criminal justice agency having custody of the person may apply to the district court for an order requiring the person to provide the sample in conformity with the provisions of this act. Refusal to provide the sample shall be punishable as contempt of the court. Duly authorized law enforcement and corrections personnel may employ reasonable force in cases where a person refuses to submit to DNA testing as required under this act, and no such employee shall be criminally or civilly liable for the use of such reasonable force.

NOTES:
Utah–Unless substantial reasons exist for using a different method of collection *or the person refuses to cooperate with the collection*, the preferred method of collection shall be obtaining a saliva sample. If the person refuses, then a blood sample is taken. A blood sample must be taken by a licensed professional nurse, practical nurse, paramedic, qualified medical technician, licensed physician, or other person licensed by the state for this purpose. Reasonable force is acceptable (as noted above), and a person authorized [in this section] to draw a blood sample may not be held civilly liable for drawing a sample in a medically acceptable way.
SOURCE: State Statutes on LEXIS.

Arresting Developments In DNA Typing

Phillip B.C. Jones, Ph.D., J.D.

I. Introduction: Identity testing in criminal investigation

During the mid-to late nineteenth century, European intellectuals and government leaders worried about the rising crime rate that accompanied industrial progress and colonial expansion (Sankar, 2001). Analysts proposed a biological degeneration as the cause of rising crime in general, and in particular, the creation of a criminal class. To reverse this degeneration in England, Francis Galton proposed compulsory marriages between people of good stock. This presented the challenge of finding an outward sign of inward character, so that it would be possible to identify those who should be breeding. In the 1880s, Galton thought that he had found this marker in fingerprints. However, his studies showed that variations in papillary ridges would not provide an external marker of internal character, and hypothesized that this was due to a millennia of indiscriminate mixing of character types. Nevertheless, he decided that fingerprints could aid social improvement by providing a unique identifier, which would be especially useful to identify habitual criminals who took advantage of the anonymity offered by the new, large cities (Cole, 2001).

One hundred years later, Alec Jeffreys, a geneticist working in England on blood anomalies, developed DNA typing. As the analytic techniques evolved, "DNA fingerprinting" became more popular. In 1995, Britain began to take DNA samples from anyone arrested for a felony or misdemeanor (Cole, 2001). The United Kingdom's National DNA Database currently holds DNA profiles of more than 1.5 million suspects (Forensic Science Service, 2002). The United States is beginning to get as aggressive as the UK in collection of DNA samples for criminal identification.

II. DNA Testing in the United States

All states have laws authorizing the collection of biological samples for DNA analysis from convicted sex offenders (Gugliotta, 1999; Willing, 2002a). Although requirements vary from state to state, most also take samples from murderers, kidnappers, robbers, and child molesters. Virginia, which has the oldest DNA database in the U.S., has been at the forefront: taking samples from convicted felons, as well as from juvenile offenders whose crimes would have been felonies had they been of age (Siegel, 2002).
More states are moving to collect DNA samples from thousands of non-violent criminals, such as burglars and check forgers (Willing, 2002b,. The number of states collecting DNA from all convicted felons rose from seven in 2000 to 19 in 2002, a trend that may be driven by the observation that state DNA databases now routinely solve murders,

rapes, and other violent crimes by linking them to criminals convicted of non-violent offenses (Willing, 2002b). In Virginia, for example, nearly two-thirds of the 60 crimes linked to people convicted of drug possession were rapes or murders, and ten out of 22 forgers who were linked to other crimes were linked to murders or sexual assaults. The success of DNA databases has also spurred the authorization of the use of "reasonable force" with inmates reluctant to donate samples. To date, 11 states have authorized the use of such force (Willing, 2002a).

In addition to an expansion of the types of crimes that trigger biological sample collection, states are changing the point at which samples can be taken. In February, a Texas law took effect that requires testing of those indicted in sex crimes (Rein, 2002). That same month, Virginia took a more radical step. The legislature passed a bill that allows authorities to take biological samples for DNA analysis of everyone arrested in a felony case.

Virginia's SB535, which has an effective date of January 1, 2003, requires a saliva or tissue sample from every person arrested for a violent felony. A "violent felony" includes: first and second degree murder, voluntary manslaughter, mob-related felonies, a kidnapping or abduction felony, any malicious felonious assault or malicious bodily wounding, robbery, carjacking, a criminal sexual assault punishable as a felony, and certain forms of arson. After the law is in effect, a magistrate will determine that probable cause exists for the arrest, and then a biological sample will be taken prior to the person's release from custody. If the charge is dismissed or the person is acquitted at trial, the DNA sample will be destroyed by the Division of Forensic Science.

Dr. Paul Ferrara, the Director of the Virginia Division of Forensic Science, sees that the primary benefit of the new law is that, by taking a sample at the time of arrest instead of waiting for a conviction, DNA information is available earlier for comparing against DNA samples from unsolved crimes (Sigel, 2002). However, the notion of taking DNA samples from arrestees has stirred protests that it is unconstitutional and should not be done.

III. DNA Collection at the Time of Arrest

1. Is it permissible under the law?

Those who find DNA collection unconstitutional point to the Fifth or Fourth Amendments. Some commentators have argued that a suspect's Fifth Amendment right not to act as a witness against themselves provides a basis for refusing to give a genetic sample (Morin, 2002). However, courts have limited the right against self-incrimination to a suspect's oral testimony, and physical or behavioral characteristics are not testimonial. In Boling v. Romer, for example, a federal appellate court found that requiring DNA samples from inmates was not compulsory self-incrimination because DNA samples are not testimonial in nature. The Fourth Amendment provides a more substantial challenge to DNA testing.

Under the Fourth Amendment, suspects have a due process right against unreasonable searches and seizures. As a result, a warrant must be issued to conduct a search and probable cause must exist before the warrant is issued. One proponent of DNA testing detects support for the procedure in the U.S. Supreme Court decision, *Schmerber v. California*, in which the Court found that an involuntary blood draw to assess blood alcohol concentration was allowable without a warrant, because the evidence would have been metabolized by the time a warrant was issued (Scott, 2001). Of course, a suspect's DNA should be more stable than blood alcohol; if not, than the suspect has bigger problems than the law.

The Fourth Amendment guarantees that all people shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A governmental action is a search or seizure within the scope of the Fourth Amendment if the person invoking its protection can claim a legitimate expectation of privacy in the place search or the item seized. Courts have found that obtaining a biological sample, such as saliva, for DNA analysis can be considered a search under the Fourth Amendment (see, for example, *In re Shaddie Clark Shabazz*). However, the Fourth Amendment does not proscribe all searches and seizures, but only those deemed "unreasonable." The general rule is that the question of whether a particular action is unreasonable is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests (see, for example, *The People v. James Edward King*). When the governmental action is the taking of a sample for DNA analysis, courts have analogized to fingerprinting.

In *Rise v. State of Oregon*, the court noted that the gathering of fingerprint evidence from "free persons" constitutes a sufficiently significant interference with an individual's expectation of privacy that authorities are required to demonstrate that they have probable cause, or at least an articulable suspicion, to believe that the person committed a criminal offense and that the fingerprinting will establish or negate the person's connection with the offense. In contrast:

> [E]veryday "booking" procedures routinely require even the merely accused to provide fingerprint identification, regardless of whether investigation of the crime involves fingerprint evidence. . . . Thus, in the fingerprinting context, there exists a constitutionally significant distinction between the gathering of fingerprints from free persons to determine their guilt of an unsolved criminal offense and the gathering of fingerprints for identification purposes from persons within the lawful custody of the state. (p. 1560; citations omitted)

The same argument can be made for the routine collection of a biological sample, such as saliva or a buccal swab, for DNA analysis.

2. Should it be allowed?

In 1998, New York City Police Commissioner Howard Safir went public with his plan for city police to take a DNA sample along with fingerprints of everyone arrested ("DNA," 1998; "Proposal," 1998). Norman Siegel, the Director of the New York Civil

Liberties Union, objected that the major fallacy in Safir's plan was that he equated a fingerprint with DNA when taking a DNA sample, unlike recording a fingerprint, reveals a person's complete genetic makeup and is too intrusive ("DNA," 1998). The Director of the Connecticut Civil Liberties Union has gone further. According to Joseph Grabarz, when you give up DNA information, you are not just giving up information about yourself, but about your family, past, present, and future (Halloran, 1999). This concern, in turn, fuels the fear that genetic information will be used for genetic discrimination, or that law enforcement agencies might use the information for commercial purposes (Halloran, 1999; Kertscher, 2001). These fears are based upon a misunderstanding about the information derived from DNA analyses by crime laboratories.

There is a difference between the genetic information required for identification and the genetic information that informs about disease or phenotype. Fisher and Jones (2001) explain the differences this way. A genetic marker used for identification should be highly variable, and the more variable the markers, the fewer are needed for positive identification. In contrast, a gene examined in a genetic test is unlikely to be highly variable, because the test is geared to detect an abnormality, which most will not have. Furthermore, a nucleotide sequence is usually of interest in genetic testing because it codes for a protein. In identification, however, a noncoding nucleotide sequence is of most interest. This is because the mathematical modeling used in identification works best with noncoding sequences that are considered unaffected by natural selection.

3. Can it be done?

Even if the sampling of all arrestees' DNA may be performed, the question remains about whether it can be done. Arizona now tests only those convicted of certain crimes, including homicide, sexual offenses, and home burglary. However, the state legislature may soon pass a bill that would phase in testing of all convicted felons. Yet this increase in scope, which does not include arrestees, presents the unresolved issue of how to pay the estimated $2 million annual cost of expanded testing (Davenport, 2002). Since 1999, Louisiana has a law mandating arrestee testing, but staffing and funding problems have delayed the program (Rein, 2002).

On the federal level, experts have concluded that the collection of DNA samples at the time of arrest is cost prohibitive. According to the National Commission on the Future of DNA Evidence, the majority of crime laboratories face difficult prioritization decisions due to limited financial and personnel resources (National Institute of Justice, 2000). Laboratories find their first priority in cases necessary for upcoming trials, as they struggle to keep pace with prosecutors' demands for DNA evidence in court. The next priority lies in DNA analysis for investigative purposes, where a suspect exists but DNA evidence is necessary to effectuate an arrest. It is only after prioritizing court cases and suspect cases that laboratories can allocate resources to analysis of non-suspect crime scene samples. This is the class for which the FBI's Combined DNA Index System (CODIS) was designed and the class of cases where offenders are at liberty to re-offend. Due to current prioritization and funding constraints, most police departments maintain policies that prevent the submission of non-suspect cases to laboratories, creating a backlog of DNA cases maintained in police evidence lockers. To place the extent of the backlog into perspective, Congress is considering the DNA Database Completion Act of 2001 (H.R. 2680), which authorizes grants to eligible States for DNA analyses of samples taken from individuals convicted of a qualifying State offense, and of samples from crime

scenes, for inclusion in the Combined DNA Index System. The cost: $100,000,000 for each of fiscal years 2002 through 2006.

Given the current volume of DNA cases facing the nation's forensic labs and the current inability of the labs to keep pace with that volume, the Commission recommended that the Department of Justice should not pursue arrestee sampling unless the convicted offender database backlog is substantially eliminated, significant sources are allocated for the analysis of non-suspect cases, and sufficient funds are made available for the collection and analysis of arrestee samples. Until these conditions are met, the Commission concluded, the pursuit of arrestee sampling would seriously exacerbate the backlog and casework and prove more harmful than beneficial by diverting resources from non-suspect cases.

IV. Conclusion

The social development of DNA analysis is paralleling that of fingerprints: initial hesitancy followed by acceptance of police departments and courts, followed by a rush to implement the technology with an ever-expanding scope. According to Cole (2001), the history of fingerprinting should teach the difference between a biological marker and a code that informs about a person's abilities, weaknesses, or destinies. An emphasis on this distinction may aid the social acceptance of collecting DNA samples from arrestees, as long as there are sufficient assurances that DNA typing will only be used for identification. The cost of implementing such a biological sample collection is another matter. However, the U.S. public may be more inclined to foot the bill since the September 11 terrorist attacks.

References

Boling v. Romer, 101 F.3d 1336 (10th Cir. 1996).

Cole, S.A. (2001). *Suspect Identities* (Harvard University Press).

Davenport, P. (April 12, 2002). "Lawmakers moving to expand state's DNA testing of criminals," *The Associated Press State & Local Wire.*

"DNA from suspects: Plan raises fears," *Seattle Times* (Final Edition) A6 (December 15, 1998).

Fischer, E.A. and Jones, N.L. (2001). *DNA Identification and Evidence: Applications and Issues* (Novinka Books).

Forensic Science Service (2002). "History of the Forensic Science Service," Available: http://www.forensic.gov.uk/forensic/entry.htm.

Gugliotta, G. (July 7, 1999). "A rush to DNA sampling: Vital police tool? Affront to Liberty?" *The Washington Post*, A01.

Halloran, L. (October 24, 1999). "DNA testing fuels debate over privacy some say justice wins, others fear losing rights," *Hartford Courant*, A1.

In re Shaddie Clark Shabazz, 2002 U.S. Dist. LEXIS 8078 (April 23, 2002).

Kertscher, T. (May 4, 2001). "DNA tests raise privacy worries," *Milwaukee Journal Sentinel*, 03B.

Morin, S.K. (Spring 2002). "The physician as gatekeeper to the use of genetic information in the criminal justice system," *The Journal of Law, Medicine, & Ethics* 30:88-94.

National Institute of Justice. (January 16, 2000). "Recommendation of the National Commission on the Future of DNA Evidence to the Attorney General Regarding Arrestee DNA Sample Collection," Available: http://www.ojp.usdoj.gov/nij/dna/arrestrc.html.

"Proposal: DNA sample at arrest/Safir to speak today on controversial plan," *Newsday* (Combined Editions), A31 (December 14, '998).
Rein, L. (February 11, 2002). "Va. Senate Panel Backs DNA tests at time of arrest," *The Washington Post*, A1.
Rise v. State of Oregon, 59 F.3d 1556 (Ninth Cir. 1995).
Sankar, P. (2001). "DNA-Typing: Galton's Eugenic Dream Realized?," in *Documenting Individual Identity*, Caplan, J. and Torpey, J. (Eds.), pages 273-290 (Princeton University Press).
Schmerber v. California 384 U.S. 757 (1966).
Scott, G. (November 20, 2001). "Should Physicians help law enforcement authorities conduct 'DNA dragnets'?, *The New York Times* (Late Edition), F7.
Siegel, R. (February 18, 2002). All Things Considered National Public Radio.
The People v. James Edward King, 82 Cal. App. 4th 1363 (Ct Ap Cal 2000).
Willing, R. (2002a). "Some inmates say 'no' to DNA sample; Nation's database could be threatened," *USA Today* (Final Edition), A.03 (April 15, 2002).
Willing, R. (2002b). "Collection of prisoner DNA widens; Major crimes linked to non-violent offenders," *USA Today* (Final Edition), A.03 (May 2, 2002).

The Ethical Protocol for Collecting DNA Samples in the Criminal Justice System

Jennifer Graddy

States should collect DNA samples from convicted felons, arrestees, and suspects and should include these samples in a federally-mandated DNA database because the government's interests in solving and preventing crimes and seeking justice for victims far outweigh the minimal intrusion upon individuals by requiring submission to a DNA test.

I. Introduction and Background

Deoxyribonucleic acid ("DNA") databases are beneficial in many aspects. Police can use samples found in a DNA database to match samples found at crime scenes. Police also can match evidence and DNA samples found at different crime scenes to establish a link between different crimes.[2] States are authorized to collect DNA samples from their citizens under certain circumstances or with certain statutory limitations. Missouri's DNA profiling system and current Missouri law in this area will be discussed in the analysis section of this article. DNA databases are useful in solving past crimes that otherwise may remain unsolved.[3] DNA databases also can be used in solving future crimes.[4] For example, DNA samples taken from prisoners and entered into a DNA database proved useful in solving a Virginia case in which a woman was brutally attacked and raped in her home. Police had no physical description of the attacker, but the DNA sample in the database matched a sample of semen found at the scene of the crime. That sample helped police identify and convict a suspect who is now serving a life sentence in conjunction with an additional 30 years.[5]

DNA databases are also useful in exonerating suspects and those wrongly convicted.[6] For example, in 1991 a North Carolina man was arrested for rape and sentenced to 35 years in prison.[7] In 1997, however, DNA from the crime scene was matched to a Florida man who had served prison time on aggravated assault and drug convictions.[8] The state of Florida required the man to provide a blood sample as a condition prior to his release from prison.[9]

Moreover, DNA databases can provide new leads and help solve "old and cold" cases when police have few leads and no real suspects.[10] It is estimated that approximately 30% of sexual assault victims do not know and cannot identify their attackers.[11] In cases such as these, investigators are left without individual suspect profiles against which to compare DNA evidence collected from the victim or the crime scene.[12] However, "[m]iniscule amounts of DNA recovered from a crime scene can be used to link an otherwise [unidentified] suspect to the crime."[13] A simple search of a DNA database can help police solve cases that remain open "in police files for years with few leads and no real suspects."[14] For example, the state of Florida arrested a man in June 1999 for six sexual assaults in Jacksonville

between 1995 and 1998.[15] Arrests made in old cases are both rewarding for the police who investigate these crimes and extremely important to the victims.[16]

DNA evidence is more reliable than eyewitness testimony and decreases the current dependence on eyewitness testimony.[17] For example, the Department of Justice reviewed 28 cases of people wrongly convicted of sexual assault and later exonerated by DNA evidence. With the exception of six homicides included in the study, each case involved significant reliance on eyewitness testimony by the victim.[18] Eyewitness memory or other circumstantial evidence is no longer as critical with the availability of DNA evidence.[19] Even when the memory of a witness is no longer fresh or if the witness becomes inaccessible, DNA serves as the ultimate witness by conclusively identifying the perpetrator, tying him to the scene, or by exonerating the accused person.[20] In sum, DNA evidence is superior to any other type of evidence because of its accuracy and longevity, thereby rendering claims of "stale evidence" without merit.[21]

Prisoners' knowledge that their DNA samples are in a database, readily available to identify them, may deter them from re-offending after their release. A strong argument can be made that a universal DNA database would deter criminals, who are unlikely to commit crimes knowing that a simple search of a DNA database is nearly 100% accurate in conclusively identifying an offender.[22]

The final benefit of DNA analysis is the increased likelihood that defendants will enter guilty pleas when confronted with DNA test results, given that the government will have a stronger case against the defendant with positive DNA results.[23] The increased guilty pleas by defendants may result in victims reporting rapes to the police more often.[24] One current deterrent to victims reporting a rape to the authorities is the additional trauma they suffer by testifying in court.[25] However, the increased probability of defendants entering guilty pleas when confronted with positive DNA results may encourage victims to report more crimes in the future, as well as save courts time and money.[26] The range of crimes included in the state DNA database statutes has expanded and continues to increase from the purposes of identifying and reducing sexually-related crimes.[27] Over time, DNA databases will likely include samples from a greater range of criminal convictions. Fingerprints are currently routinely taken from arrested suspects as well as convicts, and it is conceivable that the same will occur with regard to DNA samples in the future.[28]

II. Analysis

A. States Are Authorized to Collect DNA Samples From Their Citizens

States are authorized to collect DNA samples from their citizens under certain circumstances or with certain statutory limitations. Virginia became the first state to employ a criminal DNA database in 1989.[29] Today, all 50 states have legislation requiring DNA testing for specific classes of convicted offenders.[30] Every state collects DNA samples from convicted sex offenders; beyond this, however, the states differ significantly.[31] Most states require DNA samples from only a narrow group of felons, such as those convicted of homicide and sexual assault.[32] Currently, four states — including Alabama, New Mexico, Virginia, and Wyoming — require DNA samples from all convicted felons.[33] A few states even require the collection of DNA samples for some classes of misdemeanors.[34] Idaho requires collection of DNA samples for offenses such as robbery, aggravated arson, and racketeering in addition to sexual abuse, rape, and murder.[35] North Carolina lists, among others, the burning of a mobile home and the malicious throwing of corrosive acid or alkali in its list of crimes included in the state DNA database law.[36] Louisiana has the most inclusive database and mandates the collection of DNA samples from any person arrested for felony sex offenses and other enumerated offenses.[37] In addition, Arizona, Kansas, and Oregon require juveniles to submit DNA samples if found delinquent for certain sex crimes, and these DNA samples then can be used in investigations once these juveniles reach the age of majority.[38]

Most states require prisoners to give a blood sample for analysis as a condition of parole or release from prison.[39] Many state statutes require retroactive application to an individual convicted in one state when parole or probation supervision is transferred to another state.[40] Even when an offender is not sentenced to prison, some state statutes mandate submission of a DNA sample as a condition of an offender's probation.[41] In Illinois, deliberately delaying or impeding the collection of a DNA sample from a required offender is punishable as a Class A misdemeanor.[42]

B. Courts Consistently Have Held That the Collection of DNA Samples is Reasonable Under the Fourth Amendment of the U.S. Constitution

In the first case to address the constitutionality of mandatory DNA sampling of non-violent offenders, the Fourth Circuit ruled in 1992, in *Jones v. Murray*, that the Fourth Amendment is not violated when blood samples are taken from convicted felons for inclusion in a state police database.[43] In *Jones*, six inmates in the custody of the Virginia Department of Corrections argued that DNA testing constituted an unreasonable search and seizure of their bodies without "individualized suspicion" that they had committed a crime and therefore violated the Fourth Amendment.[43] The Fourth Circuit found that convicted felons lose the right to privacy from routine bodily searches as well as searches of their jail cells.[45] Furthermore, the Fourth Circuit held that once a suspect has been arrested, the state develops a legitimate interest in his identity and connection to the crime at issue, as well as a means of solving future crimes.[46] In *Jones*, the court ultimately determined that the government interest in preventing future crimes through DNA analysis outweighs a prisoner's lessened expectation of personal privacy.[47] Thirteen years earlier, the United States Supreme Court held that prisoners have a much lower expectation of privacy than the general population.[48] The Supreme Court held that routine "shakedown" searches of prisoners are reasonable because prisoners have no reasonable expectation of privacy in their jail cells.[49] In the same case, the Supreme Court also held that routine, visual body cavity searches of prisoners are not unreasonable.[50] More recently, an Illinois state court held that the DNA collection procedure is a minimal intrusion of privacy and bodily integrity.[51]

"[T]he government has greater authority to conduct searches when there is a 'special need,'" such as a "governmental interest [is] at stake."[52] In 1993, the Supreme Court of Washington applied the stricter standard for the special needs test.[53] In *State v. Olivas*, the court held that requiring involuntary DNA tests from felons for inclusion in a DNA database for the "future prosecution of recidivist acts does not violate the Fourth Amendment['s]" prohibition against unreasonable searches and seizures.[54] The seven defendants in *State v. Olivas* pleaded guilty to their respective charges and, as a result, each defendant was required to submit to a DNA test.[55] The defendants argued that DNA testing "constitutes an unconstitutional warrantless search and seizure without probable cause."[56] In response, the state acknowledged that, while a DNA test constitutes a "search," it "is a lawful exercise of police power" that is reasonably necessary and substantially related to preventing a future crime.[57] The Supreme Court relied on two Virginia studies wherein 62.5% of all felons are "arrested for [another] felony or serious misdemeanor within 3 years of a release" from prison, in addition to recoverable DNA being left at the scene of a violent crime 30% of the time.[58] The court concluded that the government interest in deterring recidivist crime by implementing a DNA database was a need "beyond normal law enforcement" and, therefore, qualified as a "special need."[59]

In sum, after balancing the limited privacy rights of convicted felons to be free from unjustified government intrusion against the special needs that the government has for DNA samples, the *Olivas* court found no search violation under the Fourth Amendment.[60] Similarly, the Second Circuit held that Connecticut could require a man imprisoned for a sexual offense to provide a blood sample based upon the special needs exception.[61] A Massachusetts court held that the special needs analysis extended to the collection of DNA samples from arrested suspects.[62] That court compared the collection of DNA to "the taking and storing of fingerprints, photographs, and other criminal records."[63]

C. The Collection of DNA Samples is Not Cruel and Unusual Punishment Under the Eighth Amendment

Courts reject the theory that forcing a prisoner to submit to DNA testing is cruel and unusual punishment.[64] In 1995, a Minnesota court held, in *Kruger v. Erickson*, that when the drawing of blood is conducted by "a trained technician . . . in accordance with the medically acceptable BCA procedures," "the use of a needle is hardly the cruel and unusual punishment contemplated by the Eighth Amendment."[65]

D. Compelled DNA Testing Does Not Violate a Criminal Defendant's Constitutional Right Against Self-Incrimination

Requiring sex offenders to submit to DNA testing poses the question of whether compelled testing violates a criminal defendant's constitutional right against self-incrimination.[66] In *Schmerber v. California*, the United States Supreme Court held that a defendant's constitutional right had not been violated by a compulsory blood alcohol test and its admission into evidence.[67] The *Schmerber* Court ruled that, while the Fifth Amendment prohibits the state from compelling a suspect to give evidence of a testimonial or communicative nature, it does not prohibit the state from requiring a suspect to provide "real or physical evidence."[68] In *Schmerber*, the Court held that a compelled extraction of a blood sample and its chemical analysis for blood alcohol content did not amount to "testimonial or communicative" evidence and, therefore, was not prohibited by the Fifth Amendment.[69]

Missouri's DNA profiling statute, § 650.055, RSMo, withstood a similar Fifth Amendment challenge.[70] In *In re Cooper v. Gammon*, the defendant argued "that § 650.055 [violated] the Fifth Amendment privilege against self-incrimination by compelling him to be a witness against himself [by] forcibly taking potentially incriminating evidence from his body."[71] The Missouri court followed the reasoning in *Schmerber* and held that compelling an extraction of a blood sample for blood alcohol content is not "testimonial or communicative evidence" protected by the Fifth Amendment.[72] The defendant also raised the *ex post facto* clause, arguing that the drawing of a blood sample makes the punishment for the defendant's crime more burdensome and takes away substantial rights.[73] The Missouri court also held that although § 650.055 created the possibility of prisoners being punished for refusing to submit to a DNA test, any penalty would result from the prisoner's "refusal to comply with valid prison regulations rather than the commission of the crime for which [the prisoner] was sentenced."[74]

E. DNA Samples Collected From Felons or Arrested Suspects May Be Used in Evidentiary, Investigatory, and Profiling Functions

DNA evidence enables prosecutors to show the defendant's presence at a crime scene through direct evidence — the presence of the defendant's DNA at the scene.[75] As a result, DNA databases are used in "overcoming problems of false testimony" in court in that DNA samples are far more reliable than eyewitness testimony.[76] In sexual assault cases in which the physical description of the attacker or the offender's identity is unknown, DNA evidence is the unbiased witness that provides the conclusive link between the crime and the criminal.[77]

The Federal Bureau of Investigation ("FBI") has created a national DNA database in addition to the individual state databases.[78] In 1994, Congress passed the DNA Identification Act, which authorized the FBI to create the Combined DNA Index System ("CODIS").[79] CODIS is a three-tiered system of information.[80] Level one, the Local DNA Index System ("LDIS"), contains information entered by local police and sheriff's department laboratories.[81] The second level, State DNA Index System ("SDIS"), permits local laboratories to trade information within the state.[82] The third tier, the National DNA Index System ("NDIS"), gives states the option to exchange data with other states.[83]

CODIS is used to assist the police in identifying suspects in crimes where the attacker is not known.[84] For example, investigators using CODIS can compare DNA samples from the crime scene with DNA profiles in local and national databases in an effort to locate a match or a "cold hit."[85] Investigators can then use these DNA matches to identify and arrest potential suspects.[86] A study conducted by the Commonwealth of Virginia found that 62.5% of all people released from prisons in 11 states during 1983 were arrested for an additional felony or serious misdemeanor within three years.[87] The same study found that 22.7% of all prisoners were re-arrested for a violent offense within three years of release from prison.[88]

The cold hits resulting from the matching in CODIS identifies approximately one offender for every 1,000 samples contained in CODIS.[89] Despite the backlog of current DNA samples awaiting analysis, Virginia and Florida are both experiencing more than one cold hit each week.[90] Virginia reports that the offender's original DNA sample was taken in conjunction with a property crime arrest in 60% of the matches achieved from the state's database. In Florida, the estimate is fifty-two percent.[91]

F. DNA Profiling Has a Significant Impact in Prosecuting Sexual Assault Cases With Relation to the Statute of Limitations

Sexual assault crimes are subject to statutes of limitations in many states.[92] Statutes of limitations serve society's needs to punish criminal behavior and protect defendants from the prejudice created by the passage of time.[93] DNA technology raises questions about limiting the time in which the state can prosecute defendants for sexual assault crimes.[94] Opponents argue that DNA indictments vitiate the exact purpose for which statutes of limitations were created: "to preclude defendants from . . . stale charges" that presumptively prevent a defendant from gathering "potentially exculpatory evidence."[95] Proponents argue that rape survivors' interests should take precedence over statutes of limitations because the accuracy of DNA outweighs any potentially exculpatory evidence that the defendant might bring for his defense.[96]

In Missouri, prosecutors traditionally had assumed they could file charges of sexual assault regardless of how much time had elapsed since the alleged offense.[97] In December 2000, the Missouri Court of Appeals for the Western District issued a decision interpreting state law as imposing a three-year statute of limitations on sexual assault crimes.[98] The court ruled that lawmakers in 1990 had inadvertently changed the limit to three years.[99] The Missouri Court of Appeals for the Eastern District, meanwhile, upheld rulings that prosecution of a sexual assault case could begin at any time, regardless of the statute of limitations.[100] To address the different standards in the Eastern and Western districts, the Missouri General Assembly acted rapidly and drafted House Bill 1037/ Senate Bill 650. In a nearly unanimous vote, legislators passed the measure as an emergency bill on March 6, 2002. The new statute reads, in pertinent part, that a prosecution for a sexual assault may be commenced at any time.[101] The importance of the measure led Missouri Governor Bob Holden to sign the legislation in mid-session on March 6, 2002.[102]

G. Missouri's DNA Profiling System

Section 650.050, RSMo, authorizes the Missouri Department of Public Safety to "develop and establish a 'DNA Profiling System.'"[103] The profiling system is "referred to in sections 650.050 to 650.057 . . . to support criminal justice services in local communities [statewide] in DNA identification."[104] The DNA profiling system is compatible with the FBI system such that the state and federal agencies may exchange DNA records and the quality of samples remains [illegible]red.[105]

H. Missouri DNA Sample Collection

Section 650.055, RSMo, requires that prisons collect a blood sample from every individual convicted of a felony in a Missouri circuit court for purposes of DNA profiling.[106] The Department of Corrections will collect the sample upon an offender's entry into the Department of Corrections system, or "[b]efore release from a county jail or detention facility."[107] The DNA profiling statute applies to offenders in prison, on probation, and on parole.[108] The Missouri State Highway Patrol and the Department of Corrections enforce and oversee the DNA sample collection and storage process.[109] The DNA collection statute indemnifies employees who collect the samples from civil and criminal liability when the collection act is performed in a reasonable manner.[110] The statute authorizes the collection of DNA samples by force if necessary.[111]

I. The DNA Backlog

Although all 50 states require that convicted offenders submit to DNA samples, increased funding should be allotted to DNA analysis to decrease the backlog of DNA samples awaiting analysis so that authorities may solve past crimes and future crimes more efficiently.[112] Many samples are not tested for years due to the overwhelming demands placed on state laboratories because of the large volume of DNA evidence.[113] Analyzing the backlog of CODIS samples is estimated to take six years, and many samples may remain untested after statutes of limitations run.[114] Nearly 500,000 blood samples from felons nationwide await analysis, in addition to the samples not yet collected from one million convicted murderers and rapists.[115] The National Commission on the Future of DNA Evidence counsels against testing newly-arrested suspects because of this enormous backlog, and voices concerns about the continued lack of laboratory funding by state legislatures.[116]

III. Conclusion

States should collect DNA samples from convicted felons, arrestees, and suspects, and should include these samples in a federally-mandated DNA database because the government's interests in solving and preventing crimes and seeking justice for victims far outweigh the minimal intrusion upon individuals by requiring submission to a DNA test. DNA databases are useful in solving past and future crimes, as well as in exonerating suspects and those wrongfully accused and/or convicted. DNA evidence has proven effective in the courtroom setting and is more reliable than eyewitness testimony. DNA databases could deter repeat offenders from committing future crimes.

DNA evidence provides the prosecution with a stronger case when defendants are confronted with positive DNA test results linking them to the crime scene and crime charged; the result is more guilty pleas. These guilty pleas save the state and federal court systems time and money. In the last 10 years, the use of DNA evidence has gained widespread recognition in courts across the country. In 1992, the Fourth Circuit ruled that the collection of blood samples from convicted felons does not violate the Fourth Amendment with regard to its search and seizure protections. In 1995, a Minnesota district court found that collection of DNA samples was not cruel and unusual punishment under the Eighth Amendment. In 1997, the Missouri Court of Appeals found that compelled DNA testing does not violate a criminal defendant's constitutional right against self-incrimination. In sum, DNA evidence contained in a federally-mandated database is an invaluable tool to law enforcement and prosecutors who enforce criminal laws and attempt to protect society from future crimes committed by repeat offenders.

Footnotes

[1] Jennifer Graddy graduated cum laude from Drury University in Springfield in December 1997 with a dual major in Speech Communications and Spanish. She is a December 2002 graduate of the University of Missouri-Columbia School of Law, where she obtained both a Juris Doctor and specialty certification in the area of Dispute Resolution. Graddy is a Rule 17.04 certified court-appointed mediator. Through the MU School of Law Mediation Clinic, she mediated cases in both federal court and small claims cases at the Boone County Courthouse. She was employed as a

law clerk with the Missouri Attorney General's Offices in Jefferson City and Springfield for the past three years.

[2] Martha L. Lawson, *Personal Does Not Always Equal "Private": The Constitutionality of Requiring DNA Samples from Convicted Felons and Arrestees*, 9 Wm. & Mary Bill Rts. J. 645, 645 (2001).

[3] Edward Connors et al., U.S. Department of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, at xxvi (1996) ("DNA analysis is a powerful and often necessary tool for establishing the presence or absence of someone at a crime scene.").

[4] *Id.*

[5] Kenneth Bredemeier, *In Virginia, Freedom From Fear for Crime Victims, Relief for Families*, Wash. Post, July 7, 1999, at A14.

[6] Yale H. Yee, *Criminal DNA Data Banks: Revolution for Law Enforcement or Threat to Individual Privacy?*, 22 Am. J. Crim. L. 461, 476 (1995).

[7] Associated Press, *Inmate Released After DNA Analysis, A North Carolina Man Was Cleared of Rape as a Florida Man Was Charged*, Orlando Sentinel, July 8, 1997, at C6.

[8] *Id.*

[9] *Id.*

[10] *See Lawson*, note 2 at 658.

[11] Callie Marie Rennison, *Criminal Victimization*, 1999, Bureau of Justice Statistics National Crime Victimization Survey, *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv99.pdf (Aug. 2000).

[12] National Research Council, Committee on DNA Forensic Science: *The Evaluation of Forensic DNA Evidence*, National Academy Press, at http://www.nap.edu/readingroom/books/DNA (1996).

[13] Rebecca Sasser Peterson, *DNA Databases: When Fear Goes Too Far*, 37 Am. Crim. L. Rev. 1219, 1238 (2000).

[14] *See Lawson*, note 2 at 658.

[15] Erin Hallissy & Charley Goodyear, *How DNA Fights Crime*, S.F. Chron., Oct. 20, 1999, at A1.

[16] *Id.* (quoting David Coffman, the director of Florida's DNA database lab, as stating: "I really have the greatest job in the world. I actually break the cases open.").

[17] Chris Roberts, *Panel Studies Use of DNA in Inmate Appeals*, San Diego Union-Trib., May 8, 1999, at A10 (noting that DNA evidence has disproved eyewitness accounts on occasion).

[18] *See Connors*, note 3 at xiv.

[19] *See* Walter F. Rowe, Commentary site to Edward Connors et al., *Convicted by Juries, Exonerated by the Use of DNA Evidence to Establish Innocence After Trial*, at xv (1996) (noting that DNA molecules are "more stable than the polymorphic proteins" formerly used to link biological evidence to suspected offenders).

[20] Sally E. Renskers, *Trial by Certainty: Implications of Genetic "DNA Fingerprints,"* 39 Emory L.J. 309, 313-14 (1990).

[21] Amy Dunn, *Criminal Law—Statutes of Limitation on Sexual Assault Crimes: Has the Availability of DNA Evidence Rendered Them Obsolete?*, 23 U. Ark. Little Rock L. Rev. 839, 860 (2001).

22 Mark Schoofs, *Genetic Justice*, Village Voice, November 18, 1997, at 44 (quoting Carlos Rebren, the director of Alabama's forensic science department, who said that maintaining an individual's DNA profile might "discourage [him] from criminal misconduct").

[23] Stephanie A. Parker, *Compelled DNA Testing in Rape Cases: Illustrating the Necessity of an Exception to the Self-Incrimination Clause*, 7 Wm. & Mary J. Women & L. 499, 510 (2001).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[redacted]an McEwen & Phillip R. Reilly, *A Review of State Legislation on DNA Forensic Data Banking*, 54 Am. J. Hum. Genetics, 941, 944-45 (1994).

[28] *See Yee*, note 6 at 477.

[29] Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 Wake Forest L. Rev. 767, 774 (1999).

[30] *See Lawson*, note 2 at 650.

[31] *See Hibbert*, note 29 at 775-78.

[32] Peter Donnelly & Richard D. Friedman, *DNA Database Searches and the Legal Consumption of Scientific Evidence*, 97 Mich. L. Rev. 931, 939, (1999).

[33] *See* Ala. Code § 36-18-24 (2001); N.M. Stat. Ann. §§ 29-16-1- 29-16-13 (Michie 2003); Va Code Ann. § 19.2-310.2 (Cum. Supp. 2002); Wyo. Stat. Ann. §§ 7-19-401– 7-19-405 (Michie 20003).

34 *See* Ariz. Rev. Stat. Ann. § 31-281 (A) (West 2002); Ark. Code Ann. § 12-12-1109 (Supp. 2003); Del. Code ann. tit. 29 § 4713 (1997).

[35] *See* Idaho Code § 19-5506 (Michie Cum. Supp. 2003).

[36] *See* N.C. Gen. Stat. § 15A-266.4 (1997).

[37] La. Rev. Stat. Ann. § 15: 609 (West Cum. Supp. 2003).

[38] *See* Ariz. Rev. Stat. Ann. §§ 13-4438, 31-282 (West 2002); Kan. Stat. Ann. § 21-2511 (a) (Cum. Supp. 2002); Or. Rev. Stat. § 419C.473(1) (1999) (These statutes are an expansion of the standard statutes authorizing samples from convicted offenders because a juvenile is technically not convicted, but rather is adjudicated.).

[39] Nicholas Wade, *FBI Set to Open Its DNA Database for Fighting Crime*, N.Y.Times, Oct. 12, 1998 at A1 (quoting M. Dawn Herkenham, chief of the FBI's Forensic Science Systems Unit: "I think the trend is that ten years from now all the felonies will be covered. . . . We recommend that all violent felonies, burglaries, juveniles, and retroactivity for people on parole to be included.")

[40] *See, e.g.*, Ala. Code § 36-18-24 (2001); Ariz. Rev. Stat. Ann. § 13-4438 (West 2002); 730 Ill. Comp. Stat. 5/5-4-3 (West Cum. Supp. 2003).

[41] *See*, e.g., Ala. Code § 36-18-24 (2001); 730 Ill. Comp. Stat. Ann. 5/5-4-3 (Cum. Supp. 2003).

[42] 730 Ill. Comp. Stat. Ann. 5/5-4-3) (Cum. Supp. 2003).

[43] *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992).

[44] *Id.* at 305.

[45] *Id.* at 306.

[46] *Id.*

[47] *Id.* at 308.

[48] *Hudson v. Palmer*, 468 U.S. 517, 523-24 (1984); *see also Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

[49] *Id.*

[50] *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

[51] *People v. Wealer*, 636 N.E.2d 1129, 1136 (Ill. App. Ct. 1994).

[52] *See Lawson*, note 2 at 654-55.

[53] *State v. Olivas*, 856 P.2d 1076, 1086 (Wash. 1993) (noting the special needs approach is well-suited to meet the goal of balancing government needs and privacy rights of convicted persons).

[54] *Id.*

[55] *Id.* at 1077.

[56] *Id.* at 1080.

[57] *Id.* at 1081-82.

[58] *Id.* at 1085 (citing Virginia Dept. of Criminal Justice Services, Violent Crime in Virginia (1998) and Bureau of Justice Statistics, Special Report: Recidivism in Prisoner Released in 1983 (1989)).

[59] *Id.* at 1086; *see also Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999) (using the "special needs" approach to uphold the DNA database statute because of the high rate of recidivism among sexual offenders and the usefulness of DNA in solving sex crimes).

[60] *Id.*

[61] *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999).\

[62] *Landry v. Attorney General*, 709 N.E.2d 1085, 1092 (Mass. 1999).

[63] *Id.*

[64] *Kruger v. Erickson*, 875 F. Supp. 583 (D. Minn. 1995).

[65] *Id.* at 588.

[66] David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination*?, 33 UCLA L. Rev. 1063, 1095 (1986) (noting that a rule requiring factually guilty persons to provide evidence of their crimes is "so contrary to the basic human instinct of self-preservation that very few of us could conform to it.")

[67] *Schmerber v. California*, 384 U.S. 757, 767 (1966).

[68] *Id.* at 763-64.

69 *Id.* at 765.

[70] *In re Cooper v. Gammon*, 943 S.W. 2d 699, 705 (Mo. App. W.D. 1997).

[71] *Id.*

[72] *Id.*

[73] *Id.* at 706.

[74] *Id.*

[75] Harlan Levy. And the Blood Cried Out: A Prosecutor's Spellbinding Account of the Power of DNA 190 (Basic Books 1996) ("I firmly believe now, that DNA analysis can promote a more just society, both by making punishment of the guilty more likely and by assuring exoneration of the innocent.").

[76] *See Lawson*, note 2 at 660.

[77] *See Dunn*, note 21 at 867.

[78] Robert W. Schumacher II, *Article, Expanding New York's DNA Database: The Future of Law Enforcement*, 26 Fordham Urb. L.J.. 1635, 1646 (1999).

[79] *Id.*, *see also* 42 U.S.C. §§ 3751, 3753, 3793, 3797 (1994).

[80] *Id.*

[81] *Id.* at 1646, n.88.

[82] *Id.*

[83] *Id.*

[84] Christopher H. Asplen, *From Crime Scene to Courtroom: Integrating DNA Technology into the Criminal Justice System*, 83 Judicature 144, 147 (1999).

[85] *Id.*

[86] *Id.*

[87] *See Yee*, note 6 at 476.

[88] *Id.*

[89] *See Asplen*, note 84 at 147.

[90] Eric Slater, *Rape Case DNA Tests the Limits; Milwaukee Uses Genetic Evidence to File Warrants in Unsolved Crimes, National Databank is Overwhelmed by Samples, Underfunded and Undercoordinated*, L.A. Times, Feb. 11, 2000, at A1 (noting Virginia state crime lab director Paul Ferrara's belief that at least one murder of a 22 year-old woman would have been prevented had the backlog of unanalyzed DNA samples not led to the release of a suspected murderer/rapist before he could be linked to a prior murder and rape).

[91] Mark Hansen, *Banking on DNA: Prosecutors Hail Broadening Collections; Others See Privacy Violations*, ABA Journal, Aug. 1999, at 26.

[92] Allan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 Wm. & Mary L. Rev. 199, 251-52 (1995).

[93] J. Anthony Chavez, *Statutes of Limitations and the Right to a Fair Trial: When is a Crime Complete?*, Crim. Just., Summer 1995, at 2.

[94] Steve Chapman, *Rapists Shouldn't Be Able to Run Out the Clock*, Chi. Trib., Mar. 12, 2000, at 19.

[95] Andrew C. Bernasconi, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants' Constitutional and Statutory Rights*, 50 Am. U. L. Rev. 979, 999 (2001).

[96] Jonathan, W. Diehl, *Drafting a Fair DNA Exception to the Statute of Limitations in Sexual Assault Cases*, 39 Jurimetrics J. 431, 436 (1999).

[97] Tim Hoover, *Missouri Lawmakers Pass Bill Lifting Statute of Limitations on Rape*, Kansas City Star, Mar. 5, 2002.

[98] *State v. Hyman*, 37 S.W.3d 384, 388 (Mo. App. W.D. 2001).

[99] *Id.*

[100] *Id.*

[101] H.B. 1037, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002).

[102] *See Hoover.*

[103] Section 650.050, RSMo 2000.

[104] *Id*

[105] *Id.*

[106] Section 650.055, RSMo 2000.

[107] *Id*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *See Dunn*, at 856.

[113] *See Hibbert*, at 799.

[114] *See Asplen*, at 147.

[115] *See Hallissy*, at A1.

[116] Michael Higgins, *Acid Test*, ABA Journal, Oct. 1999, at 64, 66.

JOURNAL OF THE MISSOURI BAR
Volume 59 - No. 5 - September-October 2003