

THE EXPANSION OF NEW JERSEY'S DNA DATABASE STATUTE: THE INCLUSION OF ALL CONVICTED FELONS

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I. Introduction

For three months during the fall and winter of 2002, a serial rapist-robber terrorized women working in retail shops in Bergen County, New Jersey.¹ The masked man maneuvered around closing time, targeting female clerks who were left alone to close up.² His modus operandi was to rush into the store, face covered and armed, force the

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¹ Peter Pochna, *Man Held in String of Rapes, Holdups*, THE BERGEN RECORD, Jan. 10, 2003, at A1.

² Chris Gale, *Police Arrest Serial-Rape Suspect*, THE HERALD NEWS (N.J.), Jan. 10, 2003, available at <http://www.bergenrecord.com/page.php?qstr=eXJpcnk3ZjcxN2Y3dnFIZUVFeXkzJmZnYmVsN2Y3dnFIZUVFeXk2MjU2NjMw> (last visited Oct. 4, 2003).

victim into the back room, tie her up and then rape her.³ In one attack, the masked man rushed in and struck the clerk several times before sexually assaulting her; in another, he pointed his gun at the victim's young son before she chased him away with a pair of scissors.⁴ In three months, the attacker terrorized ten towns.⁵

The amounts taken from the stores were minimal, ranging from \$20 to \$150, but the effect on Bergen County was much greater.⁶ For three months, Bergen County police were stumped: they had one hundred investigators on the case, few leads, and had resigned to warning storeowners not to leave female clerks alone.⁷ Then came the big break. At 11:30 a.m. on Wednesday, January 8, 2003, the State Police laboratory notified the investigators that there was a DNA match to a sample collected at the scene of one of the attacks.⁸ The DNA match implicated Charles Rawlings, a Lodi, New Jersey man, and hours later Rawlings was arrested and charged with the crimes.⁹

Rawlings' DNA was recorded in the system because of his time served in a federal prison for a Georgia bank robbery.¹⁰ Upon his release in October 1998, Rawlings was required to provide a DNA sample, as are all federal prisoners.¹¹ Had the federal government not enacted an expanded DNA database law requiring all felons to submit a sample, Rawlings' spree could have continued for much longer than it had because he would not have been in the system.¹²

The Rawlings case brought to light a number of deficiencies in the New Jersey State DNA database. Had Rawlings been a New Jersey

³ *Id.*

⁴ Pochna, *Man Held in Rapes*, *supra* note 1.

⁵ Troy Graham, *N.J. May Soon Expand Records of Criminals' DNA for Probes; A Database Push Began After a Bergen County Case Was Solved. A Bill Awaits McGreevey's Signature*, THE PHILA. INQUIRER, June 13, 2003, at B9.

⁶ Gale, *supra* note 2.

⁷ See Pochna, *Man Held in Rapes*, *supra* note 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* Rawlings had a previous record in New Jersey as well. See Peter Pochna, *Suspect's Colleagues, Neighbors Aghast at Rape, Robbery Charges*, THE BERGEN RECORD, Jan. 11, 2003, at A1. While living in Teaneck, NJ in the early 1980s, he was convicted of burglary and served five months of a three-year sentence before being released on probation. *Id.*

¹¹ See Pochna, *Man Held in Rapes*, *supra* note 1.

¹² See Graham, *supra* note 5. The then current New Jersey database included samples from sexual offenders, murderers, and other violent felons. See *id.*

convict, he would not have been in the system.¹³ The case caused Bergen county officials to call for an expansion of the database from violent offenders to all convicted felons.¹⁴ Two New Jersey State Senators and an assemblyman took up the cause and sponsored a bill to expand the database.¹⁵ Assembly Bill 2617 was passed by both houses of the New Jersey Legislature on June 23, 2003, and signed into law by the governor on September 22nd of the same year.¹⁶

This note will explore the gradual expansion of the New Jersey DNA database law since its inception in 1994, the implications of the latest expansion, and the possible future for the New Jersey database law. It is first important to understand the nationwide development and growth of DNA legislation and databases,¹⁷ and then with that proper context, one can more easily dissect and understand the New Jersey law.¹⁸ After discussing the technical passage of the latest bill, this note will delve into the effects, both tangible and intangible, the validity, and the appropriateness of Assembly Bill 2617.¹⁹

II. Background

In the late 1980s, the federal government began to examine the possibility that DNA could be used to investigate crime, and the viability of a DNA database that could connect investigators at all levels of government.²⁰ The goal was to increase the reliability and fairness of criminal proceedings as well as exonerate those who may have been wrongly convicted.²¹ The result was the Combined DNA Index System

¹³ See *id.*

¹⁴ See *id.* Rawlings was charged with and plead guilty to eleven counts of rape and robbery. See Peter Pochna, *Serial rapist will be behind bars until he's 86*, THE BERGEN RECORD, July 26, 2003, at A3. He was sentenced to fifty years in prison, and must serve at least forty-two of those years before he will be eligible for parole. *Id.*

¹⁵ Graham, *supra* note 5.

¹⁶ 2002 LEXIS Bill Tracking NJ A.B. 2617 (2003).

¹⁷ See *infra* Part II.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part IV.

²⁰ See U.S. DEP'T OF JUSTICE, *Fact Sheet: Legislation to Advance Justice Through DNA Technology*, Mar. 11, 2003, available at www.usdoj.gov/ag/dnalegislation.htm (last visited Oct. 11, 2003).

²¹ See U.S. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, *Advancing Justice Through DNA Technology*, March 2003, available at www.usdoj.gov/ag/dnapolicybook_cov.htm (last visited Oct. 11, 2003) [hereinafter U.S. DEP'T OF JUSTICE, *Advancing Justice Through DNA Technology*].

(“CODIS”), operated by the Federal Bureau of Investigation (“FBI”), which stores DNA profiles for federal, state, and local government systems in a nationwide web of databases that are available to police agencies at all levels.²² With the encouragement of the federal government, states began to take advantage of CODIS and passed legislation that would allow their inclusion in the federal database.²³ By 1998, all fifty states had enacted statutes requiring DNA collection from certain convicted criminals.²⁴

When CODIS first began operating, the majority of states required only sex offenders to submit DNA samples.²⁵ However, the recent trend among states has been a broad expansion of DNA database legislation to include a greater number of convicts, in many cases extending the statute to include all felonies.²⁶ As of October 2003, thirty states had enacted legislation requiring all felons to submit a DNA sample.²⁷ In 2003 alone, eight states, including New Jersey, enacted “all-felon” legislation.²⁸ Alternatively, some states have rejected all-felon laws altogether,²⁹ while others have attempted to go even further by requiring

²² See *id.* CODIS operates on three levels. See FEDERAL BUREAU OF INVESTIGATIONS, U.S. DEP’T OF JUSTICE, THE FBI’S COMBINED DNA INDEX SYSTEM PROGRAM: CODIS (2000). All DNA samples begin at the local level, LDIS, proceed to the state level, SDIS, and then to the national level, the National DNA Index System. *Id.* This allows for differing state laws to operate separately and independently rather than on a mandate from the national level. *Id.* At the NDIS level, the database is divided into two indexes: the forensic index that logs DNA profiles from crime scenes, and the offender index that logs profiles of individual criminals. *Id.*

²³ See U.S. DEP’T OF JUSTICE, *Advancing Justice Through DNA Technology*, *supra* note 21.

²⁴ Federal Bureau of Investigations, U.S. Dep’t of Justice, The FBI’s Combined DNA Index System Program: CODIS (2000).

²⁵ See *id.*

²⁶ See *id.* It is noteworthy that the FBI states an institutional goal requiring all states to include all felonies in their databases. *Id.*

²⁷ INT’L ASS’N OF CHIEFS OF POLICE, *State Legislative Summary*, IACP CAPITAL REPORT, Oct. 8, 2003, at 1. The progression was as follows: 1998, five states required all felons; 1999, six states required all felons; 2000, seven states required all felons; 2001, fourteen states required all felons; 2002, twenty-three states required all felons; and by 2003, thirty states required all felons to submit a DNA sample. Smith Alling Lane, *History of All Felons DNA Database Expansion*, at http://www.dnaresource.com/New_Folder/DNA/maps.htm (last visited Aug. 30, 2003).

²⁸ INT’L ASS’N OF CHIEFS OF POLICE, *State Legislative Summary*, IACP CAPITAL REPORT, Oct. 8, 2003, at 1. The states that adopted all-felon laws are: Alaska, Arkansas, Connecticut, Louisiana, Mississippi, New Jersey, North Carolina, and South Dakota. *Id.*

²⁹ *Id.* All-felon statutes were rejected in California, Hawaii, Indiana, Missouri, Nebraska, New York, Rhode Island, Pennsylvania, and Vermont. *Id.*

all suspects and arrestees to submit a DNA sample.³⁰ States are not alone in the expansion efforts; the federal government is also taking steps to make it easier for states to administer their DNA database systems in conjunction with CODIS.³¹ One such federal initiative is the Advancing Justice Through DNA Technology Act, which, if enacted, would authorize more than \$1 billion in funding for state DNA programs and expand CODIS to include all people required to submit DNA under state laws.³²

The basic rationale behind these vast expansions is efficiency. If there are more samples on hand, more crimes will be solved.³³ Further, there will be less crime if a perpetrator can be apprehended quickly, and the innocent more likely to be exonerated.³⁴ A common argument for expansion is that non-violent felons, for whom DNA would not be taken under many state statutes, later often commit violent crimes.³⁵ If the DNA of a non-violent felon is not on record, it becomes more difficult to apprehend him if and when he goes on to commit violent crimes.³⁶

³⁰ See Smith Alling Lane, *State DNA Database Law Qualifying Offenses*, at http://www.dnaresource.com/New_Folder/DNA/support_documents.htm (last visited Aug. 30, 2003).

³¹ See *House Committee Passes Compromise DNA Bill; Legislation on Fast Track*, IACP CAPITAL REPORT (Int'l Ass'n of Chiefs of Police), Oct. 8, 2003, at 1.

³² See *id.* The bill, which was approved by the U.S. House Judiciary Committee in early October 2003, allocates \$755 million to help states eliminate the backlog in analyzing the DNA evidence. *Id.* In addition, the bill would allocate \$500 million for various grant programs that would advance needs such as DNA training and education for police agencies and medical professionals, research and development of new technology, elimination of state and local backlogs, promotion of use of DNA technology in missing person investigations, and ensuring that inmates have access to post-conviction relief DNA testing. See *id.*

³³ Smith Alling Lane, *Benefits of Expanding Criminal DNA Databases*, at http://www.dnaresource.com/New_Folder/DNA/support_documents.htm (last visited Aug. 30, 2003).

³⁴ See *id.*

³⁵ See *id.*

³⁶ See VA DEP'T OF CRIMINAL JUSTICE SERV., DNA DATABANK STATISTICS, at <http://www.dcjs.org/forensic> (last visited Oct. 1, 2003). Data is provided demonstrating that in Virginia, the greatest number of "hits" in the DNA database comes from those who are previously convicted of non-violent felonies. *Id.* A hit is when the DNA from a suspectless crime scene matches a DNA sample currently in the database. *Id.* In thirty-five percent of hits for violent felonies, the sample came from offenders with prior property crime convictions. *Id.* Virginia estimates that eighty-two percent of DNA hits would be lost if the VA database was limited to violent felons. *Id.*

III. *The History of New Jersey's DNA Database*

Since New Jersey enacted its first DNA database law, the State has taken several steps to expand its reach. The original law required DNA to be taken from adult sexual offenders.³⁷ Later amendments gradually expanded the scope of the law to include, in turn, juvenile sexual offenders and those found not guilty of sexual offenses by reason of insanity, and then adult and juvenile violent offenders, and those found not guilty of violent felonies by reason of insanity.³⁸ The following section details this trend.

A. *The DNA Database and Databank Act of 1994*

In 1994, following the trend of states enacting DNA legislation, freshman Assemblywoman Joan Quigley introduced New Jersey's first DNA database law.³⁹ Despite what Assemblywoman Quigley classified as political roadblocks,⁴⁰ the bill passed that same year and was enacted as the DNA Database and Databank Act of 1994.⁴¹ The stated purpose of the law, according to the legislative findings, was to aid criminal investigations and to "deter and detect recidivist acts" of serious sexual

³⁷ DNA Database and Databank Act of 1994, 1994 N.J. Sess. Law Serv. 136 (West) (codified as amended at N.J. STAT. ANN. §§ 53:1-20.17 to -20.28. (West 1994)) [hereinafter DNA Database and Databank Act of 1994].

³⁸ See DNA Database and Databank Act, 1997 N.J. Sess. Law Serv. 341 (West) (codified as amended at N.J. STAT. ANN. § 53:1-20.17 to -20.28. (West 1998)) [hereinafter DNA Database and Databank Act, 1997 Amendment]; DNA Database and Databank Act, 2000 N.J. Sess. Law Serv. 118 (West) (codified as amended at N.J. STAT. ANN. § 53:1-20.17 to 20.28. (West 2001)) [hereinafter DNA Database and Databank Act, 2000 Amendment].

³⁹ See E-mail from Joan Quigley, Assemblywoman, N.J. General Assembly, to Suzanne Nelson (Oct. 21, 2003, 03:12 EST) (on file with author). Assemblywoman Quigley noted that she developed an interest in CODIS after reading a book on the FBI, which detailed the formation of the national database. *Id.* Upon learning that New Jersey was not one of the participating states, she began researching the system, touring FBI facilities, and gaining an understanding of what New Jersey would need to become a part of the system. *Id.*

⁴⁰ See *id.* Assemblywoman Quigley noted that she faced several challenges. *Id.* First, she was a freshman legislator from the minority party, and as such was expected not to make waves. *Id.* However, she persisted and made quick allies with members of the FBI. *Id.* She appeared at news conferences flanked by FBI agents. *Id.* She rallied support from Curtis Sliwa, the president and founder of the Guardian Angels. *Id.* Assemblywoman Quigley writes that the majority party had a hard time ignoring her bill because of the amount of attention she was generating. *Id.* The DNA bill became part of the "Megan's Law" package being pushed by the majority party and survived intact. *Id.*

⁴¹ DNA Database and Databank Act of 1994, *supra* note 37.

offenders.⁴² The legislature also noted that it was New Jersey's policy "to assist federal, state and local criminal justice and law enforcement agencies in the identification and detection of individuals who are the subjects of criminal investigations."⁴³ In other words, the law authorized New Jersey's participation in the emerging federal CODIS program.⁴⁴

The original Act required felons convicted after January 1, 1995 of serious sexual offenses, including aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, or any attempt thereof, to submit a blood sample for DNA record purposes.⁴⁵ The requirement applied whether the sentence included incarceration or mere probation, and further included a retroactivity clause that required those convicted prior to the trigger date to submit a blood sample before being paroled or released.⁴⁶ In addition, the original statute did not require juvenile offenders to provide a sample.⁴⁷

Besides the provisions for collection of DNA, the statute also authorized procedures for drawing blood, creating a laboratory to analyze samples, storing profiles, ensuring compatibility with federal CODIS, and expunging the DNA profile from the database if the conviction was reversed and no other qualifying convictions remained.⁴⁸

⁴² *Id.* at para. 2.

⁴³ *Id.*

⁴⁴ N.J. Assembly Judiciary, Law and Pub. Safety Comm. Statement on A. 1592, A. 206-1592, 1st Sess. (1994).

⁴⁵ *See supra* note 39. The provision provided in relevant part:

On or after January 1, 1995 every person convicted of aggravated sexual assault and sexual assault or aggravated criminal sexual contact and criminal sexual contact or any attempt to commit any of these crimes and who is sentenced to a term of imprisonment shall have a blood sample drawn for purposes of DNA testing upon commencement of the period of confinement.

DNA Database and Databank Act of 1994, *supra* note 37, at para. 4.

⁴⁶ DNA Database and Databank Act of 1994, *supra* note 37. The provision provided in relevant part:

In addition, every person convicted on or after January 1, 1995 of these offenses, but who is not sentenced to a term of confinement, shall provide a DNA sample as a condition of the sentence imposed. A person who has been convicted and incarcerated as a result of a conviction of one or more of these offenses prior to January 1, 1995 shall have a DNA sample drawn before parole or release from incarceration.

Id. at para. 4.

⁴⁷ *See id.* The statute did not include juvenile offenders, which is indicated by the use of terminology reserved for adult offenders, such as "convicted." *See id.*

⁴⁸ *See id.* at para. 6, 7, 9.

The law also authorized the storage and classification of the samples, as well as the dissemination to qualified law enforcement agencies upon valid requests.⁴⁹ To protect confidentiality, those with access to individual identification data were held personally liable for providing information to unauthorized sources.⁵⁰ In regards to funding the DNA database, the attorney general was to administer the database using funds from the public sale of seized, forfeited, and abandoned property.⁵¹

B. *The 1997 Amendment*

In 1997, the New Jersey Legislature took the DNA database a few steps forward by including juvenile sexual offenders and those found not guilty by reason of insanity of sexual offenses.⁵² The legislature found that it was in the State's best interests to include these offenders in order to better promote the State policy of effective law enforcement, reliable justice, and consistent aid to other law enforcement agencies.⁵³ Specifically, the amendment, effective on January 1, 1998, added to the database: juveniles adjudicated delinquent for acts that, if committed by an adult, would be considered aggravated sexual assault; sexual assault; aggravated criminal sexual contact; criminal sexual contact; and any attempt thereof.⁵⁴ Furthermore, the amendment required a blood sample from adults found not guilty by reason of insanity and juveniles adjudicated not delinquent by reason of insanity for the included sexual offenses.⁵⁵

⁴⁹ *See id.* at para. 8.

⁵⁰ *See id.* at para. 10.

⁵¹ *See id.* at para. 12.

⁵² DNA Database and Databank Act, 1997 Amendment, *supra* note 38.

⁵³ *See id.* at para. 2.

⁵⁴ *Id.* at para. 4b. The provision provided in relevant part:

On or after January 1, 1998 every juvenile adjudicated delinquent for an act which, if committed by an adult, would constitute aggravated sexual assault or sexual assault or aggravated criminal sexual contact or criminal sexual contact, or any attempt to commit any of these crimes, shall have a blood sample drawn for purposes of DNA testing.

Id.

⁵⁵ *Id.* at para. 4c. The provision provided in relevant part:

On or after January 1, 1998 every person found not guilty by reason of insanity of aggravated sexual assault or sexual assault . . . or aggravated criminal sexual contact or criminal sexual contact . . . , or any attempt to commit any of these crimes, or adjudicated not delinquent by reason of insanity for an act which, if committed by an adult, would constitute one of these crimes, shall have a blood

C. *The 2000 Amendment*

In 2000, the New Jersey Legislature once again amended the DNA Database and Databank law to include not only sexual offenders but also certain violent felons.⁵⁶ Specifically, the law was expanded to include offenders found guilty of murder, manslaughter, aggravated assault of the second degree, kidnapping, luring or enticing a child, engaging in conduct tending to debauch or impair the morals of a child, or an attempt of any of these crimes.⁵⁷ The expansion, which had a trigger date of January 1, 2000, was identical for juveniles, as well as adults and juveniles found not guilty, or adjudicated not delinquent, by reason of insanity.⁵⁸ Despite the trigger date, the amendment, like the original law, contained a retroactivity clause which provided that offenders convicted of qualifying offenses before January 1, 2000

sample drawn for purposes of DNA testing.

Id. Of course, in addition to simply expanding the list of qualifying crimes, the legislature updated all remaining provisions in the statute, such as confidentiality, compliance with CODIS, and expungement provisions, to include the newly qualifying offenses. See DNA Database and Databank Act, 1997 Amendment, *supra* note 38.

⁵⁶ DNA Database and Databank Act, 2000 Amendment, *supra* note 38.

⁵⁷ See *id.* at para. 4d. The provision provided in relevant part:

On or after January 1, 2000 every person convicted of murder, manslaughter, aggravated assault of the second degree, kidnapping, luring or enticing a child, engaging in sexual conduct which would impair or debauch the morals of a child, or any attempt to commit any of these crimes and who is sentenced to a term of imprisonment shall have a blood sample drawn or other biological sample collected for purposes of DNA testing upon commencement of the period of confinement.

Id.

⁵⁸ See *id.* at para. 4e, 4f. The provisions provided in relevant parts:

On or after January 1, 2000 every juvenile adjudicated delinquent for an act which, if committed by an adult, would constitute murder, manslaughter, aggravated assault of the second degree, kidnapping, luring or enticing a child, engaging in sexual conduct which would impair or debauch the morals of a child, or any attempt to commit any of these crimes, shall have a blood sample drawn or other biological sample collected for purposes of DNA testing.

On or after January 1, 2000 every person found not guilty by reason of insanity of murder, manslaughter, aggravated assault of the second degree, kidnapping, luring or enticing a child, engaging in sexual conduct which would impair or debauch the morals of a child, or any attempt to commit any of these crimes, or adjudicated not delinquent by reason of insanity for an act which, if committed by an adult, would constitute one of these crimes, shall have a blood sample drawn or other biological sample collected for purposes of DNA testing.

Id.

would be required to give a DNA sample prior to release.⁵⁹

Also notable, the 2000 amendment added the words “or other biological sample” to the term “blood sample.”⁶⁰ In other words, it allows for other samples, such as cell samples, to be taken in addition to blood samples.⁶¹ This change was important, not only to keep up with changing technology, but also to eventually lower the cost of DNA testing.⁶² The New Jersey Assembly Appropriations Committee noted that the cost of conducting a blood analysis was approximately \$41.60 per inmate.⁶³ With an estimated 5,000 inmates who would be required to provide samples, the cost of blood analysis would amount to \$208,000.⁶⁴ The Committee, while not saying definitively that other methods are less expensive, noted that the use of other biological samples could be more cost efficient.⁶⁵

D. *The 2003 Amendment: Assembly Bill 2617*

In 2002, faced with a serial rapist with a prior record,⁶⁶ and positive statistics from states using expanded databases,⁶⁷ the New Jersey Legislature once again resurrected the DNA database cause.

The 2002 amendment, Assembly Bill 2617, contemplated an extension of the New Jersey database law to include all convicted criminals and all juveniles adjudicated delinquent for an act that would be a crime if committed by an adult.⁶⁸ The bill also included all adult or

⁵⁹ See *id.* at para. 4d.

⁶⁰ DNA Database and Databank Act, 2000 Amendment, *supra* note 38.

⁶¹ See *id.*

⁶² See N.J. Assembly Appropriations Comm. Statement on S. 439, A. 207-439, 2d Sess., (2000).

⁶³ See *id.*

⁶⁴ See *id.* While inmates are generally liable for the cost of their testing, most are unable to pay; therefore State costs are rarely reduced. *Id.*

⁶⁵ See *id.*

⁶⁶ See *supra* notes 1-14 and accompanying text.

⁶⁷ See Press Release, N.J. Senate Democrats, Sacco/Coniglio DNA Testing on Criminals Passes Committee (Nov. 25, 2002) (on file with author). Senator Sacco, one of the primary sponsors of the Senate version of the bill, noted that in the other states that had employed expanded databases, there had been a large reduction in the number of unsolved crimes. *Id.*

⁶⁸ DNA Database and Databank Act, 2003 N.J. Sess. Law Serv. 183 (West) (codified as amended at N.J. STAT. ANN. § 53:1-20.17 to -20.28. (West 2001)) [hereinafter “DNA Database and Databank Act, 2003 Amendment”]. Assembly Bill 2617 provided in relevant part:

g. Every person convicted or found not guilty by reason of insanity of a crime

juvenile persons found not guilty, or adjudicated not delinquent, by reason of insanity.⁶⁹ Furthermore, Assembly Bill 2617 contained a retroactivity clause requiring all persons convicted of a crime prior to the effective date of the amendment and currently serving a sentence, to provide a DNA sample before being released on parole.⁷⁰ Essentially, the bill required all persons incarcerated at the time of passage, and those incarcerated after passage, to submit a DNA sample.⁷¹ The motivation behind the bill, according to the sponsor's statement, was to improve law enforcement and increase the number of hits on the DNA database, especially in regards to property crimes.⁷²

shall have a blood sample drawn or other biological sample collected for purposes of DNA testing. If the person is sentenced to a term of imprisonment or confinement, the person shall have a blood sample drawn or other biological sample collected for purposes of DNA testing upon commencement of the period of imprisonment or confinement. If the person is not sentenced to a term of imprisonment or confinement, the person shall provide a DNA sample as a condition of the sentence imposed. A person who has been convicted or found not guilty by reason of insanity of a crime prior to the effective date . . . and who, on the effective date, is serving a sentence of imprisonment, probation, parole or other form of supervision as a result of the crime or is confined following acquittal by reason of insanity shall provide a DNA sample before termination of imprisonment, probation, parole, supervision or confinement, as the case may be.

h. Every juvenile adjudicated delinquent, or adjudicated not delinquent by reason of insanity, for an act which, if committed by an adult, would constitute a crime shall have a blood sample drawn or other biological sample collected for purposes of DNA testing. If under the order of disposition the juvenile is sentenced to some form of imprisonment, detention or confinement, the juvenile shall have a blood sample drawn or other biological sample collected for purposes of DNA testing upon commencement of the period of imprisonment, detention or confinement. If the order of disposition does not include some form of imprisonment, detention or confinement, the juvenile shall provide a DNA sample as a condition of the disposition ordered by the court. A juvenile who, prior to the effective date . . . has been adjudicated delinquent, or adjudicated not delinquent by reason of insanity for an act which, if committed by an adult, would constitute a crime and who on the effective date is under some form of imprisonment, detention, confinement, probation, parole or any other form of supervision as a result of the offense or is confined following an adjudication of not delinquent by reason of insanity shall provide a DNA sample before termination of imprisonment, detention, supervision or confinement, as the case may be.

Id. at para. 4g, 4h.

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.*

The bill was first referred to the Assembly Law and Public Safety Committee, which amended the bill to address the financial stresses of expansion.⁷³ The committee amendment imposed a two-dollar surcharge on traffic offenses to finance the “New Jersey Forensic DNA Laboratory Fund,” which would pay expenses related to the DNA laboratory and other forensic needs.⁷⁴ After the Committee reported the bill back to the Assembly, it was referred to the Assembly Appropriations Committee, which made technical amendments dealing with the collection of samples.⁷⁵ On April 24, 2003, the Assembly passed the bill by a vote of fifty-eight for, seven against, and thirteen abstentions.⁷⁶

After passing the Assembly, the bill was received in the Senate, and referred to the Senate Budget and Appropriations Committee.⁷⁷ The Committee reported the bill back to the full Senate with amendments regarding reports to be made on the collection process.⁷⁸ On May 29, 2003, the Senate passed Assembly Bill 2617 by a vote of thirty-eight for, zero against.⁷⁹ After a second passage by both houses to include new amendments, Assembly Bill 2617 was signed into law by Governor James McGreevey and codified as Public Law 2003, chapter 183.⁸⁰

⁷³ N.J. Assembly Law and Pub. Safety Comm. Statement on A. 2617, A. 210-2617, 1st Sess. (2002).

⁷⁴ *Id.* The added provision stated:

f. \$2.00 shall be added to the amount of each fine and penalty imposed and collected by a court under authority of any law for any violation of the provisions of Title 39 of the Revised Statutes or any other motor vehicle or traffic violation in this State The State Treasurer shall annually deposit those monies so forwarded in the “New Jersey Forensic DNA Laboratory Fund”

DNA Database and Databank Act, 2003 Amendment, *supra* note 68.

⁷⁵ See N.J. Assembly Appropriations Committee Statement on A. 2617, A. 210-2617, 1st Sess. (2003).

⁷⁶ 2002 LEXIS Bill Tracking NJ A.B. 2617 (2003).

⁷⁷ *Id.*

⁷⁸ N.J. Senate Budget and Appropriations Committee Statement on A. 2617, A. 210-2617, 1st Sess.

⁷⁹ 2002 LEXIS Bill Tracking NJ A.B. 2617.

⁸⁰ *Id.* The bill was passed by the Assembly by a vote of 73-2-2, and the Senate by a vote of 38-0. *Id.* The public law has been codified throughout N.J. Statute Annotated sections 53:1-20.19 to -20.28. *Id.* For convenience, I will continue to refer to the law as “Assembly Bill 2617.”

IV. *Effects of Assembly Bill 2617: Tangible and Intangible*

Assembly Bill 2617, now law, has myriad possible effects, ranging from the tangible, such as cost, to the intangible, such as civil liberty violations. This section will first discuss the most significant tangible effects: law enforcement, cost, and the DNA backlog.⁸¹ After gaining an understanding of the logistical pros and cons of the expansion, the discussion will turn to the constitutional opposition the law is facing.⁸²

A. *Effects on Law Enforcement*

The most obvious effect of DNA legislation in general is its impact on law enforcement. Proponents of expansion argue that DNA testing and profiling will lead to “solutions to some of New Jersey’s most perplexing and unsolved crimes.”⁸³ In addition, proponents argue that a greater number of profiles will decrease the crime rate because it will lead to the apprehension of offenders before they have the opportunity to commit more violent criminal acts later on.⁸⁴ While most agree that these are legitimate law enforcement goals, questions arise as to whether the inclusion of lesser felons will truly aid law enforcement.⁸⁵

Proponents of DNA expansion often support their arguments by citing the DNA success stories that surface in the media.⁸⁶ For example, New Jersey State Senator Nicholas Sacco, in a press release announcing the passage of the new bill, used the arrest of Baton Rouge serial killer Derrick Todd Lee as a prime example of how DNA evidence can be crucial to crime fighting.⁸⁷ Using this example, he also pointed out that had Louisiana previously expanded its DNA database to include all felons, the investigation would have lasted days, rather than months,

⁸¹ See *infra* Parts IV.A-C.

⁸² See *infra* Part IV.D.

⁸³ See N.J. Senate Democrats, *supra* note 67.

⁸⁴ See *id.*

⁸⁵ See Brendan McCarthy, *DNA File on Felons is Poised to Pass Nonviolent Crimes would Go in Database*, BOSTON GLOBE, Sept. 30, 2003, at B1. In discussing the up-and-coming Massachusetts DNA database law, which is similar to New Jersey’s in that it would include all convicted felons, legal director of the American Civil Liberties Union of Massachusetts noted that there is no rationale for including white-collar crimes and fraud in the database. *Id.*

⁸⁶ See Press Release, N.J. Senate Democrats, Sacco DNA Testing on Criminals Advances in Senate (May 29, 2003) (on file with author).

⁸⁷ See *id.* Senator Sacco noted that DNA played a crucial role in the apprehension and arrest of Derrick Lee Todd, ending a ten-month investigation. *Id.*

due to Lee's prior record of breaking and entering and stalking.⁸⁸ Therefore, the case of Derrick Todd Lee illuminated the need for expansion to ensure efficient law enforcement.⁸⁹

The most compelling evidence in favor of DNA database expansion is the purported successes in states that already have expanded databases.⁹⁰ Perhaps the best example of a DNA database expansion "success story" is Virginia.⁹¹ In 1989, Virginia became the first state to offer DNA analysis to law enforcement agencies, as well as the first state to keep DNA profiles of prior sexual offenders.⁹² The following year, Virginia became the first state to enact legislation to create a DNA database, which required all convicted felons to submit a DNA sample.⁹³ In 1992, Virginia became the first to join the national CODIS database system.⁹⁴ Two years later, the Virginia database scored its first "cold hit" that resulted in a conviction.⁹⁵ Another two years passed, and Virginia enacted legislation to expand its database to include all juvenile offenders, so long as the juvenile was over the age of fourteen at the time of commission of the offense.⁹⁶ The most recent addition to the Virginia database system became effective on January 1, 2003.⁹⁷ The expansion created an arrestee database, which required every person arrested for a violent felony to give a DNA sample, after an independent magistrate determined the probable cause for arrest.⁹⁸ If the final disposition of the case is favorable to the defendant, either by

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See* E-mail from Herbert Conaway, Assemblyman, N.J. General Assembly, to Suzanne Nelson (Sept. 30, 2003, 06:09 EST) (on file with author). Assemblyman Conaway noted in his email that evidence from other states of identification and apprehension of career criminals because of DNA hits weighed heavily in the decision to pass Assembly Bill 2617. *See id.*

⁹¹ *See* Jim Edwards, *Press be Damned: Harvey Presses His Own Agenda as Attorney General*, N.J. L.J., Aug. 25, 2003, available at <http://www.law.com/nj> (last visited Nov. 13, 2003). In discussing the then upcoming bill, New Jersey Attorney General Peter Harvey commented that New Jersey was far behind Virginia, and indicated that it was New Jersey's goal to be at the same level. *See id.*

⁹² VA. DEP'T OF CRIMINAL JUSTICE SERV., FORENSIC SERVICE OVERVIEW, available at <http://www.dcjs.org/forensic> (last modified April 8, 2003).

⁹³ VA. CODE ANN. § 19.2-310.2 (West 2003).

⁹⁴ *See* VA DEP'T OF CRIMINAL JUSTICE SERV., *supra* note 92.

⁹⁵ *Id.*

⁹⁶ VA. CODE ANN. § 16.1-299.1 (Michie 2003).

⁹⁷ VA. CODE ANN. § 19.2-310.2:1 (Michie 2003).

⁹⁸ *See id.*

dismissal or acquittal, the sample and all records are destroyed.⁹⁹

The expansive nature of the Virginia database is impressive, but only second to its successes. The statistics speak for themselves.¹⁰⁰ As of September 1, 2003, the Virginia DNA database contained 206,960 samples, and had recorded 1,476 hits.¹⁰¹ In the first nine months of 2003 alone, the DNA database scored 440 hits, and the arrestee database scored an additional 40 hits.¹⁰² In August 2003, the database scored a record number of hits for a single month with 94.¹⁰³ Of the 1,476 hits, 832 aided in the investigation of burglary, breaking and entering, grand larceny, or robbery offenses; 332 hits assisted in the investigation of sex crimes; and 159 hits assisted in the investigation of homicides.¹⁰⁴ It is also important to note that as the total number of samples stored increased, so did the number of hits.¹⁰⁵

The Virginia statistics also support the argument that recidivist acts of a non-violent felon are often more violent than the original crime. In fact, felons with previous property crime convictions committed thirty-six percent of the violent crimes solved with the aid of DNA.¹⁰⁶

Furthermore, eighty-two percent of the recorded hits would have been missed if the database were limited to violent offenders.¹⁰⁷ These statistics make strong arguments for the proposition that the number of violent crimes can be reduced, or at the very least violent crimes can be solved more efficiently, if non-violent offenders are included in databases.¹⁰⁸

⁹⁹ *See id.*

¹⁰⁰ Statistics are from the VA Department of Criminal Justice Services. All statistics are recorded as of September 1, 2003, unless otherwise noted.

¹⁰¹ *See* VA. DEP'T OF CRIMINAL JUSTICE SERV., FORENSIC SERVICES-DNA DATABANK STATISTICS, available at <http://www.dcjs.org/forensic> (last visited Sept. 30, 2003).

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* In 1998, there were 26,090 samples in the Virginia database and only five hits. *Id.* In 1999, there were 108,908 samples and 74 hits. *See id.* In 2000, there were 135,322 samples and 178 hits. *See id.* The greatest number of hits to date occurred in 2002 when there were 188,940 samples and 445 hits. *See id.*

¹⁰⁶ *See id.*

¹⁰⁷ *See* VA. DEP'T OF CRIMINAL JUSTICE SERV., *supra* note 101.

¹⁰⁸ *See id.* If statistics show that non-violent offenders tend to go on to commit violent offenses, and non-violent offenders already have submitted DNA samples, then if and when they commit a violent felony, police will be able to match their DNA to any samples from the scene. *See id.* Therefore, crimes will be solved more quickly, and perhaps even prevented because the offender knows the state has his DNA on file. *Id.*

The New Jersey database, as of June 2003, contained eleven thousand samples, yet had recorded only nineteen hits.¹⁰⁹ It is estimated that within two years of the passage of Assembly Bill 2617, the database will contain more than 140,000 samples.¹¹⁰ As the statistics from Virginia demonstrate, the number of samples generally correlates positively with the number of hits.¹¹¹ Thus, if New Jersey has the same success as Virginia, with a greater number of samples in the New Jersey database, there would be more hits and fewer cold crime cases.¹¹² Therefore, from a purely “law and order” perspective, any expansion of the New Jersey DNA database is a positive move because it is bound to create more hits and thus, more effective law enforcement.

B. *Cost*

DNA databases are clearly effective crime-fighting tools, but the costs can be daunting. While it may be argued that the greatest expense of DNA databases is privacy, or civil liberties, this section will focus only on the tangible, dollar and cents expenditures.

The sheer amount of money spent on DNA databases each year can boggle the mind. The New Jersey Office of Legislative Services estimated that Assembly Bill 2617 would cost nearly \$8.1 million in the first year of implementation, and would level off at approximately \$7.6 million for subsequent years.¹¹³ As noted earlier, the funding for the expansion comes from a two-dollar surcharge on all traffic fines collected, and is estimated to amount to \$8.2 million yearly.¹¹⁴ A large amount of the money collected in the first year will go toward hiring an

¹⁰⁹ See Graham, *supra* note 5.

¹¹⁰ See Michael Booth, *New Law Expands DNA Testing to All Convicted Persons in New Jersey*, N.J.L.J., Sept. 29, 2003, at <http://www.law.com/nj> (last visited Jan. 17, 2004).

¹¹¹ See VA. DEP'T OF CRIMINAL JUSTICE SERV., *supra* note 101; see also *supra* text accompanying note 105.

¹¹² See *id.*

¹¹³ See N.J. OFFICE OF LEGISLATIVE SERVICES FISCAL NOTE ON A. 2617, A. 210-2617 (June 27, 2003). Note that the Office of Legislative Services (“OLS”) is a non-partisan office available to partisan staff for support in legislative matters. OLS determined its figures based upon those estimated by the executive branch and concurred in the result. See *id.*

¹¹⁴ See DNA Database and Databank Act, 2003 Amendment, *supra* note 68; N.J. OFFICE OF LEGISLATIVE SERVICES FISCAL NOTE ON A. 2617, A. 210-2617 (June 27, 2003). In the first year of expansion, \$475,000 is earmarked for administration of the Automated Traffic System Fund. See *id.*

additional forty DNA analysts to deal with the influx of samples.¹¹⁵ These costs, while seemingly immense, are necessary to ensure that the DNA databases contain proper records, and perhaps more importantly, are functioning efficiently.¹¹⁶

C. *Backlog and Efficiency*

The astronomical costs of DNA databases are inextricably linked to the problem of backlog. States continually expand and update their databases to fall in line with the federal government's CODIS system, yet the finances, and often the manpower, are not available to handle the influx of samples.¹¹⁷ These "unfunded mandates" are a source of perpetual frustration and backlog for states.¹¹⁸ This begs the question, if backlog is such a serious problem, how will the New Jersey DNA laboratories handle an additional 130,000 samples?¹¹⁹

In 2001, a study of DNA crime laboratories revealed that 81% had backlogs totaling close to 300,000 samples.¹²⁰ This backlog occurred in the face of ever increasing caseloads, without corresponding increases in manpower or financing.¹²¹ DNA crime laboratories experienced a 51% increase in cases received between 1997 and 2001, as well as an impressive 73% increase in cases analyzed.¹²² However, despite the increase in cases analyzed, the backlog of cases also increased by an astonishing 135%.¹²³

The federal government generally provides aid to the states in the form of grants.¹²⁴ In 2000 alone, Congress authorized \$170 million to simply eliminate the analysis backlog that had built up within the

¹¹⁵ See Booth, *supra* note 110.

¹¹⁶ See N.J. Office of Legislative Services Fiscal Note on A. 2617, A. 210-2617 (June 27, 2003).

¹¹⁷ See Donna Lyons, *Proof Positive*, STATE LEGISLATURES, June 2001, at 10-17. Lyons notes that DNA databases are often created without the laboratory resources to support the type of work that is necessary to run an efficient database. *Id.* Most labs are prepared to analyze crime-scene evidence, not to profile DNA. *See id.*

¹¹⁸ *Id.*

¹¹⁹ See Booth, *supra* note 110 and accompanying text. (citing Governor James McGreevey's estimate in a statement announcing the signing of the bill).

¹²⁰ Greg W. Steadman, Bureau of Justice Statistics, Survey of DNA Crime Laboratories, 2001, 1 (2002).

¹²¹ *See id.* at 2.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See Lyons, *supra* note 117.

national system.¹²⁵ It was then up to the states to employ the funding in the most appropriate manner for their systems.¹²⁶ In order to more efficiently manage their caseloads, many states have turned to private laboratories.¹²⁷ Virginia entered into a three-year contract with a private laboratory in 1998 to handle backlogged cases and found the system to be so efficient that it has continued to outsource its convicted offender samples.¹²⁸ Similarly, New York City has privately contracted with laboratories to handle its backlogged rape kits.¹²⁹ According to Chris Asplen, the executive director of the Justice Department National Commission on the Future of DNA Evidence, such private contracting is allowing the states to realize the full potential of DNA profiling.¹³⁰ As a greater number of samples are profiled, databases are seeing a greater number of hits, with some states even having their first hits.¹³¹

New Jersey's current backlog is significant. Currently, the system takes 210 days to analyze a sample.¹³² With the passage of Assembly Bill 2617, and the funding providing for an additional forty DNA technicians, the time needed to analyze a sample is expected to drop to thirty days.¹³³ While New Jersey is preparing to accommodate the flood of samples into the system, these efforts may not be adequate.

The influx of samples will necessarily be greater in the first few years following the enactment of Assembly Bill 2617 due to the large number of offenders currently serving sentences that would not have previously been included in the database.¹³⁴ For example, there were

¹²⁵ See *id.* Lyons notes that the DNA Analysis Backlog Elimination Act of 2000 authorized the earmarking of funds to deal with the backlog problem. *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See VA. DEP'T OF CRIMINAL JUSTICE SERV., *supra* note 101. Virginia entered into a contract with the Bode Technology Group of Springfield. *Id.* The private laboratory handled convicted offender samples while the Division of Forensic Science technicians focused on the suspect-less cases. *Id.*

¹²⁹ Lyons, *supra* note 117.

¹³⁰ See *id.*

¹³¹ *Id.*

¹³² See Booth, *supra* note 110.

¹³³ *Id.*

¹³⁴ See DNA Database and Databank Act, 2003 Amendment, *supra* note 68. Because the latest amendment to the DNA database requires all convicted felons to provide a sample in order to update the database, all felons who did not previously have to provide a sample will now have to do so. See *id.* As the database is updated with previously convicted felons, the numbers of samples needing analysis will level off to only newly convicted felons. See *id.* This will cause a heavily front-loaded influx of samples in laboratories. *Id.*

9,683 drug offenders incarcerated in the New Jersey prison system in 2001.¹³⁵ None of these offenders were included in the database upon their incarceration, yet all those still serving their terms will now be required to give samples.¹³⁶ The New Jersey legislature purportedly addressed this issue by allotting greater funding for the program in the first year.¹³⁷ However, additional funding may not be enough. Even if the laboratory could analyze twenty-six drug offender samples per day, it would take more than one year to eliminate the backlog resulting from only the drug offenders.¹³⁸ Moreover, these analyses would be happening at the same time as current cases, in addition to crime scene evidence and other convicted criminal samples that have not yet been entered into the system.¹³⁹

Realistically, because of the passage of Assembly Bill 2617, New Jersey will be faced with a backlog for several years.¹⁴⁰ Because the problem is so necessarily front-loaded, the best solution must also be front-loaded. New Jersey forensic officials should consider options increasing laboratory capabilities and efficiency in the first three to five years of the expanded database.¹⁴¹ This would best be accomplished by contracting with private laboratories to analyze the convicted offender samples—those that would cause the greatest backlog.¹⁴² The outsourcing would not necessarily be permanent. Rather, a temporary contract with a limited term to address a specific issue would be

¹³⁵ N.J. Dep't of Corrections, Offender Characteristics Report 7 (2001).

¹³⁶ See DNA Database and Databank Act, 2003 Amendment, *supra* note 68. As discussed in Part III.D, the latest amendment requires all offenders convicted and sentenced prior to the enactment of the amendment to provide a sample before completing their sentences or becoming eligible for parole. See *supra* Part III.D.

¹³⁷ See N.J. OFFICE OF LEGISLATIVE SERVICES, *supra* note 113, and accompanying text.

¹³⁸ See N.J. DEP'T OF CORRECTIONS, OFFENDER CHARACTERISTICS REPORT 7 (2001). This statistic is determined by dividing the number of drug offenders incarcerated in 2001 (9,683) by 365 days. See *id.* The resulting number (26.529) is the number of samples that would need to be analyzed per day for the lab to complete the drug offender samples in a true year, not discounting weekends and holidays. *Id.*

¹³⁹ DNA Database and Databank Act, 2003 Amendment, *supra* note 68. Of course, the statute requires that new cases as well as previously convicted felons will also be entered into the system. *Id.* Therefore, the influx of previously convicted felon samples will necessarily affect the efficient analysis of new samples as well. *Id.*

¹⁴⁰ See N.J. DEP'T OF CORRECTIONS, OFFENDER CHARACTERISTICS REPORT 7 (2001). This estimate is based on the huge number of offenders, like drug offenders, that have not previously been entered into the system that must now be entered. See *id.*

¹⁴¹ See *supra* note 128, and accompanying text.

¹⁴² See *id.* Virginia and other states have had success with lessening or eliminating backlogs by farming out samples to private laboratories. *Id.*

sufficient. This system, much like the one Virginia employs, would allow New Jersey's forensic scientists to focus on fresh cases and analyze them more efficiently.¹⁴³ Once the backlog has been eliminated, the state could then reduce costs by terminating private contracts and relying only on state technicians who, without the backlog, would be free to address current cases.

D. *Questions of Appropriateness and Validity*

The greatest question of the validity of all DNA databases arises under the Fourth Amendment protection against unreasonable searches and seizures. Currently, Assembly Bill 2617 is being challenged in the United States District Court by a New Jersey parolee, Edward Forchion.¹⁴⁴ Forchion, who was convicted of possessing twenty-five pounds of marijuana and sentenced to a sixteen-month prison term, is currently participating in an intensive supervision program.¹⁴⁵ Accordingly, Forchion received a letter informing him that under the new law, as a condition of his parole, he was required to provide a blood sample for DNA purposes.¹⁴⁶ Forchion brought suit against the state, arguing that the statute constitutes an unconstitutional search without probable cause and an *ex post facto* punishment because it retroactively applies to persons whose sentence did not originally include a DNA requirement.¹⁴⁷

Forchion's arguments are not unique; they have been made time and again by various defendants since the inception of the DNA database laws. However, virtually every challenge has failed, and the DNA statutes have been held constitutional in the face of Fourth Amendment concerns.¹⁴⁸

¹⁴³ *Id.*

¹⁴⁴ See Jason Nark, *S.J. Parolee Tries to Block DNA Testing*, COURIER-POST (Camden) Oct. 2, 2003, at 1G.

¹⁴⁵ See Jim Edwards, *Suit Seeks Limits on DNA Sampling*, N.J. L.J., Nov. 10, 2003, available at <http://www.law.com>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* Forchion compares the new statute to the movie *Minority Report*, in which the government succeeds in reducing the crime rate to zero by arresting people for crimes they only plan to commit. *Id.*

¹⁴⁸ See *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999) (holding the Connecticut DNA database statute constitutional under a "special needs" analysis); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992) (holding the Virginia DNA database statute constitutional under a traditional Fourth Amendment analysis, but finding that it violated the *ex post facto* clause to the extent that it modified mandatory parole); *Groceman v. United States Dep't of*

Courts generally examine Fourth Amendment challenges of DNA database statutes under one of two tests, either a traditional Fourth Amendment “reasonableness” analysis or a “special needs” analysis.¹⁴⁹ Any Fourth Amendment analysis begins by noting that a blood sample for the purposes of DNA testing implicates Fourth Amendment rights and, as such, is a search.¹⁵⁰ Therefore, in order for the search to be valid, it must address individualized suspicion and either be reasonable or fall within the special needs doctrine.¹⁵¹

The “reasonableness” analysis first asks whether there is individualized suspicion to conduct the search.¹⁵² This initially creates a problem for DNA database statutes because there seems to be no possibility that there can be individualized suspicion for future crimes.¹⁵³ However, courts have addressed this problem by holding that specific individualized suspicion is not necessary because the felon has already been convicted and has a diminished expectation of privacy.¹⁵⁴ In *Jones v. Murray*, the Fourth Circuit noted that the government has

Justice, 354 F.3d 411 (5th Cir. 2004) (holding the federal DNA Analysis Backlog Elimination Act of 2000 constitutional under a traditional Fourth Amendment analysis); *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004) (holding the Wisconsin DNA statute constitutional under a “special needs” analysis); *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003) (holding the federal DNA statute constitutional under a “special needs” analysis). *But see* *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), *vacated by* 2004 U.S. App. LEXIS 89 (9th Cir. Jan. 5, 2004) (holding that the federal DNA Analysis Backlog Elimination Act of 2000 violated the Fourth Amendment under a “special needs” analysis).

¹⁴⁹ See *supra* note 148 and accompanying text.

¹⁵⁰ *Schmerber v. California*, 384 U.S. 757, 767 (1966). “Compulsory administration of a blood test . . . plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment.” *Id.*

¹⁵¹ *Id.* at 768. The Court notes that the Fourth Amendment does not preclude all intrusions of the body, but rather those

which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring the petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

Id.

¹⁵² See *Jones*, 962 F.2d at 306.

¹⁵³ *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Individualized suspicion can be defined as follows: “in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* In the case of a future crime, a police officer has no specific and articulable facts to which he can point to substantiate individualized suspicion.

Id.

¹⁵⁴ See *Jones*, 962 F.2d at 306.

never been required to establish probable cause to conduct a limited search of a convicted felon determining “the identity of a person who is lawfully confined to prison.”¹⁵⁵ To say that taking a blood sample for DNA purposes from a convicted felon, who has been deemed such beyond a reasonable doubt, requires individualized suspicion would run contrary to this principle.¹⁵⁶ To determine if the search is reasonable, the analysis then balances the Fourth Amendment infringement against the minimal intrusion of a blood sample, the state interest in collecting DNA samples to investigate crime, and the prisoner’s diminished expectation of privacy.¹⁵⁷ The courts have generally held that the state’s legitimate interests in establishing a database to investigate crime,¹⁵⁸ and properly and permanently recording the identity of convicted felons, outweigh any Fourth Amendment encroachment.¹⁵⁹

Unlike the reasonableness analysis, which assumes individualized suspicion, the special needs analysis does not require individualized suspicion at all.¹⁶⁰ Rather, the search is valid if it serves “special needs, beyond the normal need for law enforcement.”¹⁶¹ A special need is often defined in terms of a governmental interest in public safety, security, and order.¹⁶² The special need is then balanced against the nature of the intrusion, the felon’s expectation of privacy, and the manner by which it is carried out.¹⁶³

¹⁵⁵ *Id.*

¹⁵⁶ *See id.*

¹⁵⁷ *See Groceman v. United States Dep’t of Justice*, 354 F.3d 411 (5th Cir. 2004) (holding the federal DNA Analysis Backlog Elimination Act of 2000 constitutional under a traditional Fourth Amendment analysis). *See also Jones*, 962 F.2d at 307. “Blood testing can be reasonable under the Fourth Amendment, even with respect to free persons, where the slight intrusion is outweighed by the governmental interest advanced by the intrusion.” *Id.*

¹⁵⁸ *See Groceman*, 354 F.3d at 413.

¹⁵⁹ *Jones*, 962 F.2d at 307.

¹⁶⁰ *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

¹⁶¹ *Id.* (holding a road block checkpoint invalid when the primary purpose was to stop narcotics trafficking, a general law enforcement purpose).

¹⁶² *Roe v. Marcotte*, 193 F.3d 72, 78 (2d Cir. 1999). Special needs have been held to include urine tests for students participating in extracurricular activities to prevent safety risks associated with drug use, *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002), sobriety checkpoints to combat the dangers of drunk driving, *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990), and border checks to deter contraband smuggling, *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985).

¹⁶³ *See Green v. Berge*, 354 F.3d 675, 678 (7th Cir. 2004) (citing *Griffin v. Wisconsin*, 783 U.S. 868 (1987)).

In DNA database cases where the court applies a special needs analysis, courts often draw analogies between the cases and *Griffin v. Wisconsin*.¹⁶⁴ In *Griffin*, a search of a probationer's home to determine if the probationer had possessed contraband in violation of his probation agreement was held reasonable.¹⁶⁵ The probationer was subject to a wide range of restrictions meant to protect the public, based on studies revealing that intense supervision reduced recidivism rates.¹⁶⁶ Therefore, the Court found that supervision was a special need of the state to be weighed against the probationer's reduced expectation of privacy.¹⁶⁷ Similarly, in *Roe v. Marcotte*, the Second Circuit found that the inclusion of greater numbers of offenders in DNA databases greatly reduced recidivism rates, and deterred future crimes for fear of being caught.¹⁶⁸ Therefore, while the ultimate use of DNA is law enforcement, the primary purpose is public safety, in both solving past and future crimes, and deterring those who have offended from doing so again.¹⁶⁹

While the vast majority of courts have found that DNA statutes meet Fourth Amendment standards, under at least one of the tests, the Ninth Circuit recently handed down a decision that ran contrary to all others.¹⁷⁰ However, this decision was later vacated by the Ninth Circuit *en banc* and currently awaits rehearing.¹⁷¹ Despite the vacation of the decision, the opinion is instructive in its arguments. In *United States v. Kincade*, the Ninth Circuit found that the federal DNA Analysis Backlog Elimination Act of 2000¹⁷² violated the Fourth Amendment.¹⁷³ Kincade, like Forchion, was a parolee who was required by the Act to provide a DNA sample.¹⁷⁴ The Ninth Circuit panel first analyzed the federal law under the traditional Fourth Amendment reasonableness test.¹⁷⁵ The court found that individualized suspicion was required to

¹⁶⁴ *See id.*

¹⁶⁵ *See Griffin*, 483 U.S. at 873.

¹⁶⁶ *Id.* at 875.

¹⁶⁷ *Id.*

¹⁶⁸ *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999).

¹⁶⁹ *See id.*

¹⁷⁰ *U.S. v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), *vacated by* 2004 U.S. App. LEXIS 89 (9th Cir. Jan. 5, 2004).

¹⁷¹ *See id.*

¹⁷² 42 U.S.C.A. § 14135a (West 2003).

¹⁷³ *Kincade*, 345 F.3d at 1096.

¹⁷⁴ *Id.* at 1098.

¹⁷⁵ *See id.* at 1102.

search a parolee's body, and none was present.¹⁷⁶ The court then noted that while a parolee's expectation of privacy is diminished, it is not extinguished.¹⁷⁷ Balancing the bodily intrusion, the government interest, and the parolee's expectation of privacy, the court determined that Kincade's privacy interest outweighed the government's interest in a complete database.¹⁷⁸ Having decided that the federal law failed the reasonableness test, the court went on to examine it under the special needs doctrine, for which no individualized suspicion is necessary.¹⁷⁹ By examining the legislative history and stated purposes of the law, the court determined that the primary purpose of the law was *not* exoneration of the innocent¹⁸⁰ or "to fill a gap in the CODIS database,"¹⁸¹ but to "provide law enforcement officials . . . with information about individuals that can be used to identify them as criminals and to prosecute them for their crimes."¹⁸² This, the court held, was a clear law enforcement purpose and therefore, not valid under the special needs exception to individualized suspicion.¹⁸³

Under either Fourth Amendment test, it seems likely that the New Jersey statute will be held constitutional. Under a reasonableness analysis, as the circuit courts of appeal have held, individualized suspicion may be assumed because of the felon's conviction beyond a reasonable doubt and the lower expectation of privacy afforded him.¹⁸⁴ When the state interests in effective law enforcement¹⁸⁵ and properly identifying its penal charges¹⁸⁶ are weighed against the felon's reduced expectation of privacy and the minimal intrusion of a blood sample, it is hard to see how the Fourth Amendment infringement would not be vindicated as reasonable. Admittedly, it is more difficult to argue that a DNA database serves some interest other than law enforcement under a

¹⁷⁶ *Id.*

¹⁷⁷ *See id.*

¹⁷⁸ *See id.* at 1103.

¹⁷⁹ *Kincade*, 345 F.3d at 1104.

¹⁸⁰ *See id.* at 1112.

¹⁸¹ *Id.* at 1111.

¹⁸² *Id.* at 1113.

¹⁸³ *Id.*

¹⁸⁴ *See Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992). *See also Griffin v. Wisconsin*, 483 U.S. 868 (1987).

¹⁸⁵ *See Conaway E-mail*, *supra* note 90. Assemblyman Conaway, the primary sponsor of the Assembly Bill 2617, noted in his correspondence: "this bill . . . will strengthen the hand of law enforcement in accurately apprehending criminals." *Id.*

¹⁸⁶ *Jones*, 962 F.2d at 306.

special needs analysis.¹⁸⁷ However, as the Second Circuit noted in *Roe v. Marcotte*, the primary purpose of such laws is public safety as they reduce recidivism rates and deter future criminal acts.¹⁸⁸ Therefore, while the statute may ultimately aid law enforcement, it serves the special need of ensuring and furthering public safety and thus, the special need outweighs the felon's reduced expectation of privacy.

V. Conclusion

In all, Assembly Bill 2617 was the right step for New Jersey. While it may initially cost more to process the influx of samples, the benefits the state will see in law enforcement efficiency and efficacy greatly outweigh the expenditures. When the success of states, such as Virginia, is examined, it becomes clear that DNA databases work.¹⁸⁹ Such databases allow law enforcement officials to more quickly apprehend repeat offenders, and often allow past unsolved crimes to be solved. Granted, opponents see the potential for backlog as reason enough to criticize the statute, but temporarily out-sourcing the samples of prior convicted felons affected by the retroactivity clause will cost effectively deal with backlog. Such outsourcing would afford state technicians the time and resources to analyze current case samples.

Assembly Bill 2617 faces the greatest challenge from constitutional concerns. However, the courts have made it clear that such concerns are essentially non-issues. Whether the circuits are correct is yet to be seen. As of yet, the United States Supreme Court has not addressed the question. However, if and when the Court does conclusively answer the Fourth Amendment question, it is likely that it will do so in line with the "law and order" notion that DNA databases are an effective road to efficient law enforcement. Therefore, it seems that the New Jersey database faces few, if any, viable challenges to its

¹⁸⁷ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 43-44 (2000). In invalidating a road-side narcotics check-point, the Court notes that while the "detection and punishment of almost any criminal offense serves broadly the safety of the community," only certain offenses are so immediately dangerous, such as driving while intoxicated, as to allow an intrusion. *Id.* at 43. The Court went on to "decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes." *Id.* at 44. If the DNA databases are equated with checkpoints designed for the purpose of investigating crime, then it is unlikely that they will fall into the special needs doctrine. *Id.*

¹⁸⁸ *Roe v. Marcotte*, 193 F.3d 72, 79 (2d Cir. 1999).

¹⁸⁹ See *supra* Part IV.A.

expansion.

The question remains, whether New Jersey, like Virginia, should go even further in expanding its DNA database, and extend it to include arrestees in its system.¹⁹⁰ While the Virginia Arrestee database has not been held unconstitutional, the law raises greater questions of procedural fairness and due process. DNA databases are legitimate for convicted felons in part because the state has an interest in properly identifying its charges and in ensuring public safety. It is a logical stretch to argue the same for those who have not been given the benefit of a fair trial, and have not been proven guilty beyond a reasonable doubt. An arrestee database infringes Fourth Amendment and due process rights in a much greater way than a convicted felon database.

Despite possible positive effects on law enforcement, New Jersey should not extend further into the realm of arrestees. Any further expansion will begin to implicate the "Minority Report" scenario that Edward Forchion argues currently exists.¹⁹¹ The state has an interest in protecting the public from proven offenders, not necessarily from those who are as yet presumed innocent. New Jersey has taken the necessary steps to protect the public, and so long as the statute operates as intended, no further expansion is necessary.

¹⁹⁰ See *supra* notes 97-99 and accompanying text.

¹⁹¹ See Edwards, *supra* note 147.