
PRACTICUM

ALASKA'S DNA DATABASE: THE STATUTE, ITS PROBLEMS, AND PROPOSED SOLUTIONS

This Practicum examines Alaska Statutes section 12.55.015(h) and its associated Amendment, House Bill 49, which established Alaska's current DNA database. Following a brief overview of the Statute and the Amendment, the Practicum analyzes the benefits and detriments associated with section 12.55.015(h). The Practicum notes the amended statute's potential to aid law enforcement, but argues that such a tool is presently ineffective, requires more funding, and has serious privacy ramifications. The Practicum concludes with proposals to enhance the law's effectiveness.

I. INTRODUCTION

As scientific and criminological knowledge regarding DNA grows, state and federal legislators struggle to keep the legal world current with the technological world. In June of 2003, Alaska legislators passed House Bill 49 ("Amendment"), amending Alaska Statutes section 12.55.015(h) to expand Alaska's DNA database.¹ Although supporters of the Amendment tout the improvements it will bring to the criminal justice system, there are potential problems with the legislation that should not be overlooked.

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1. ALASKA STAT. § 12.55.015(h) (Michie 2003) (ordering individuals who are required to submit DNA samples as part of their sentences to either submit a sample to health care professionals or to give an oral sample to a state official when requested by the state).

II. OVERVIEW OF SECTION 12.55.015(h)

Alaska Statutes section 12.55.015(h) reflects the nationwide agreement that DNA databases are a necessary criminological tool. Beginning in the 1980s, the federal government created the Combined DNA Index System (“CODIS”), a means to store and exchange DNA profiles between federal, state and local laboratories.² The FBI also published guidelines for states to consider when passing their DNA database registration statutes, including a recommendation that states bring “all felony offenders and misdemeanor sex offenders within the scope of their database laws.”³ To date, every state has passed a statute providing for DNA collection from various categories of felons, and all states require sex offenders to register their DNA.⁴ Despite the unanimity for registering sex offenders, states differ widely concerning which other categories of felons should be subject to DNA testing; the current trend is toward expanding the categories of persons required to register.⁵

Alaska first began DNA testing in 1992, and in 1996, the State established its own DNA registration system.⁶ This early system required individuals convicted after 1996 of a felony crime against a person to provide a blood or saliva sample for the database.⁷ This early system had problems, however, as it did not apply retroactively and therefore did not require felons convicted prior to 1996 to provide a sample for the database.⁸ In addition, the early system

2. *The FBI's DNA Program, Before the House Comm. on Gov't Reform, Subcomm. on Gov't Efficiency, Fin. Mgmt. and Intergov't Relations*, 2001 Leg., 22nd Sess. (AK June 12, 2001) (statement of Dwight E. Adams, Deputy Assist. Dir., Lab. Div., FBI), available at <http://www.fbi.gov/congress/congress01/dwight061201.htm> (last visited Sept. 19, 2003).

3. *Id.*

4. SMITH ALLING LANE GOVERNMENTAL AFFAIRS, STATE DNA DATABASE LAWS (June 2003) at <http://www.dnaresource.com/Table%20of%20State%20DNA%20Laws%20-%202003.pdf> (last visited Sept. 19, 2003) [hereinafter “STATE DNA DATABASE LAWS”].

5. DEP'T OF JUSTICE, FACT SHEET: LEGISLATION TO ADVANCE JUSTICE THROUGH DNA TECHNOLOGY (2003) at <http://www.usdoj.gov/ag/dna/legislation.htm> (last visited Sept. 19, 2003).

6. *An Act Relating to the DNA Identification Registration System; and Providing for an Effective Date: Hearing on H.B. 49 Before the House Judiciary Standing Comm.*, 2003 Leg., 23rd Sess. (AK Feb. 28, 2003) (statement of Chris Beheim, Dir., Scientific Detection Lab., Dep't of Public Safety), available at http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm23/query=*/doc/{t1380} (last visited Sept. 19, 2003) [hereinafter “H. Jud. Mins. I”].

7. *Id.*

8. *Id.*

included only samples from individuals convicted of a felony crime against a person, thereby excluding individuals convicted of non-violent felony offenses.⁹ Accordingly, in 2001, burglary was added as a qualifying conviction.¹⁰

The 2003 Amendment to section 12.55.015(h), introduced as House Bill 49 by Representative Tom Anderson, requires all individuals convicted of a crime against a person or any felony, as well as juveniles adjudicated as delinquents for the same offenses, to submit their DNA to the state database.¹¹ Although this expansion of Alaska's DNA database may appear severe, Representative Anderson contended that the expansion has multiple benefits.¹² First, the expanded statute will help solve crimes.¹³ By increasing the number of offenders required to submit their DNA, there will be more "cold hits"¹⁴ on DNA left behind at a rape or murder scene.¹⁵ Second, the expansion of the database will prevent crimes from occurring by identifying criminals before they have the opportunity to commit more crimes.¹⁶ Third, it will prevent innocent individuals from being wrongly suspected, arrested, and convicted of crimes they did not commit.¹⁷ Fourth, it can help to exonerate individuals who have already been wrongly convicted by providing scientific evidence that the individual's DNA does not match the DNA at the scene of the crime.¹⁸ Fifth, the expansion of the database would increase the cost efficiency of the Alaska criminal jus-

9. *Id.*

10. *Id.*

11. *An Act Relating to the DNA Identification Registration System; and Providing for an Effective Date: Hearing on H.B. 49 Before the House Fin. Comm.*, 2003 Leg., 23rd Sess. (AK April 9, 2003) (statement of Rep. Tom Anderson), available at http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm23/query=*/doc/{t646} (last visited Sept. 19, 2003) [hereinafter "H. Fin. Mins."].

12. *Id.*

13. *Id.*

14. A "cold hit" is when the DNA lab enters a crime scene sample into the database without any knowledge of who the perpetrator is and obtains a match. See H. Jud. Mins. I, *supra* note 6.

15. See H. Fin. Mins., *supra* note 11.

16. See *id.* (noting DNA databases will solve some crimes more quickly, "[w]hich has a dual effect on preventing additional crimes by the same perpetrators").

17. See *id.* (discussing "[t]wo common scenarios [which] exemplify how a larger DNA database protects such innocent people, one where the guilty party is listed and secondly, where the innocent party is in the database").

18. *Id.*

tice system.¹⁹ Although the expansion may initially result in increased costs, Anderson argued that in the long run the database's expansion will reduce overall costs.²⁰ In sum, the Amendment promises to have a positive impact on the Alaska criminal justice system.

Compared with other states, Alaska's amended statute is one of the most broadly encompassing statutes, allowing DNA collection for all violent crimes, including sex crimes and murder; all felonies, including burglary and drug crimes; and, for juveniles, some misdemeanors.²¹ It orders DNA collection from jailed offenders, as well as offenders subject to community corrections, retroactive jail and prison terms, and retroactive probation and parole.²² Only Kansas, Louisiana, New Jersey, Oregon, South Dakota and Utah have similarly broad DNA database registration laws.²³ However, Alaska's statute is less encompassing than Louisiana's because Alaska's statute does not provide for DNA collection from those who are merely arrested or suspected of a crime—Alaska requires conviction before DNA collection can take place.²⁴

III. POTENTIAL PROBLEMS OF SECTION 12.55.015(H)

Although proponents of the new amended statute boast of a “win-win situation” for the state, there are potential problems with

19. *See id.* (noting cost decreases associated with a reduction in the number of rapes due to quicker apprehension of offenders).

20. Representative Anderson cited a study completed by the National Institute of Justice as evidence of this likely cost reduction. According to the study, rape is the costliest crime in America, with an estimated cost of \$87,000 per victim. Therefore, if the average rapist commits eight rapes, but the DNA databank stops a rapist after four, preventing four likely future rapes, the state saves \$348,000. *Id.*

21. *See* STATE DNA DATABASE LAWS, *supra* note 4 (comparing qualifying offenses of each state's DNA database laws).

22. *Id.*

23. *Id.*; *see* KAN. STAT. ANN. § 21-2511 (2002); LA. REV. STAT. ANN. § 15:609 (2002); N.J. STAT. ANN. § 53:1-20.20 (2003); OR. REV. STAT. § 181.085 (2001); S.D. CODIFIED LAWS § 23-5A-5 (Michie 2003); UTAH CODE ANN. § 53-10-403 (2003). These statutes allow DNA collection for all violent crimes, including sex crimes and murder; all felonies including burglary and drug crimes; and, for juveniles, some misdemeanors; jailed offenders, as well as offenders subject to community corrections, retroactive jail and prison terms, and retroactive probation and parole.

24. *See* STATE DNA DATABASE LAWS, *supra* note 4 (comparing qualifying offenses of each state's DNA database laws).

the Amendment that have not been fully explored.²⁵ Such problems include: (1) cost; (2) logistics; and (3) privacy issues.

First, the collection, processing, and storage of DNA is a costly business.²⁶ Since the amendment expanded the database to include *all* felons, including those convicted of forgery, felony DUI, or lying under oath, the state is now collecting many more samples than it had before, thus increasing the cost exponentially.²⁷ Federal funds currently exist to pay for the program, as President Bush recently signed a referendum granting \$1 billion dollars to fund both state and federal DNA databases nationwide.²⁸ However, there is no guarantee that this federal funding will continue indefinitely. As Representative Gara stated in the House Judiciary Minutes: “[I]n a few years maybe there won’t be [federal money]. And then, maybe we’ve expanded this database so broadly that it’s now cutting into our public safety budget, and we’re losing troopers on the streets and law enforcement officers on the street in Anchorage.”²⁹ The state needs to have finances in place to prepare for this possibility.

Second, there are logistical problems associated with the Amendment. Specifically, the Amendment is devoid of language concerning samples from repeat offenders.³⁰ Under the language of the statute, repeat offenders who have already given a DNA sample to the state database could be required to give a second, third, or fourth sample because the statute does not indicate otherwise. Currently, the Commissioner of the Department of Public Safety has circulated a memorandum stating that the State will not collect

25. *An Act Relating to the DNA Identification Registration System; and Providing for an Effective Date: Hearing on H.B. 49 Before the House Judiciary Standing Comm.*, 2003 Leg., 23rd Sess. (AK Feb. 28, 2003) (statement of Rep. Tom Anderson, Vice Chair, House Judiciary Comm.), available at http://www.legis.state.ak.us/cgi-bin/folioisa.dll/cm23/query=*/doc/{t1380} (last visited Sept. 19, 2003). Representative Anderson stated that the adoption of House Bill 49 “will create a win-win situation.” *Id.*

26. *See id.* (commenting that “expanding the DNA database may initially result in increased costs”). The estimated processing cost for a convicted-offender sample is \$40. *Id.*

27. *See* H. Jud. Mins. I, *supra* note 6 (noting increased costs resulting from the Amendment).

28. *See* H. Fin. Mins., *supra* note 11 (suggesting that “the fiscal note indicates zero because federal funding is concurrent with the program”).

29. *Id.*

30. *See* ALASKA STAT. § 12.55.015(h) (Michie 2002) (stating only that “the courts shall order a person convicted of an offense. . .to submit to collection”).

duplicate samples, but this policy can be changed.³¹ Additionally, there is no requirement that the State destroy the samples when they are no longer needed.³² This could create problems with the organization and use of the database because samples continuously come into the database and none are discarded. Furthermore, DNA samples have long been stored in deep freezers.³³ Retrieval and removal of DNA samples from these freezers is a cumbersome and time-consuming process.³⁴

Analyzing the increasing numbers of DNA samples is a large and growing problem; it is of little use for the State to collect DNA samples that will only sit in storage. The federal government has acknowledged that “one of the biggest issues facing the criminal justice system today is the substantial backlog of unanalyzed DNA samples and biological evidence from crime scenes.”³⁵ This backlog will continue to grow as states are burdened with increasing DNA samples—not just from crime scenes, but from those convicted of the expanded list of specified crimes.³⁶ For instance, there are more than 350,000 unanalyzed DNA samples from rape and homicide cases nationwide.³⁷ In addition, there are, by some estimates, more than 200,000 unanalyzed DNA samples from those persons required by state law to provide them.³⁸ Further, it is estimated that there are more than 500,000 persons nationwide required by law to provide a DNA sample whose samples have not yet been collected.³⁹ Thus, Alaska’s expansion of the class of persons required to provide the state with DNA samples will not meet the state’s goals if the samples are left unanalyzed or are not even collected.

Finally, section 12.55.015(h) implicates privacy concerns.⁴⁰ It has been suggested that DNA databanks are no different from da-

31. Memorandum from William Tandeske, the Commissioner of Department of Public Safety, to Tom Clemons, President, Alaska Association of Chiefs of Police (July 22, 2003) (on file with authors).

32. See ALASKA STAT. § 12.55.015(h) (failing to discuss terms of storage or destruction).

33. *Storing Genetic Material: Calif. Firm Streamlines Lucrative Process*, FAIRBANKS DAILY NEWS MINER, Aug. 12, 2003, at D1.

34. *Id.*

35. *The President’s Initiative to Advance Justice Through DNA Technology*, United States Dep’t of Justice, at www.usdoj.gov/ag/dnaoverviewinitiative21.htm (last visited Sept. 19, 2003) [hereinafter “The President’s Initiative”].

36. ALASKA STAT. § 12.55.015(h).

37. See *The President’s Initiative*, *supra* note 35.

38. *Id.*

39. *Id.*

40. See ALASKA CONST. art. I § 22 (“The right of the people to privacy is rec-

tabanks of fingerprints maintained by law enforcement agencies, which do not implicate such concerns.⁴¹ However, whereas fingerprinting provides information for identification purposes only, DNA can provide insights into the most personal familial relationships and the most intimate workings of the human body.⁴² DNA reveals information about a person's ethnicity, the likelihood of occurrence of over 4,000 types of genetic conditions and diseases, private information such as legitimacy of birth, and possibly genetic markers for aggression, substance addiction, criminal tendencies, and sexual orientation.⁴³ Additionally, DNA not only reveals information about the individual being sampled, but also about every person who shares in that individual's bloodline.⁴⁴ While the general rule is that every person's DNA is unique, identical twins share the same DNA markers and family members share similar DNA.⁴⁵ Thus, potential threats to genetic privacy may extend well beyond the actual felons required to provide a DNA sample. While prisoners have a reduced expectation of privacy,⁴⁶ this reduced expectation does not extend to prisoners' family members.⁴⁷

ognized and shall not be infringed.”). The privacy problems associated with the Amendment might be considered more serious in light of *U.S. v. Kincade*, the Ninth Circuit's recent opinion involving the constitutionality of a federal DNA database law. No. 20-50380, 2003 WL 22251374 (9th Cir. Oct. 2, 2003). In *Kincade*, the Ninth Circuit held that forcing parolees to give blood samples for the federal DNA database violated the parolees' right to due process under the Fourth Amendment. *Id.* at *3. Although the court's ruling extended only to parolees and not to prisoners, the court's reasoning could have possible future implications for Alaska's DNA statutes. *Id.*

41. Thomas F. Wieder, *Privacy Protection is Needed for DNA*, 2002 L. REV. M.S.U.-D.C.L. 927, 928 (Winter 2002).

42. *Id.*

43. *Id.*

44. See *An Act Relating To The DNA Identification Registration System; and Providing For An Effective Date: Hearing on H.B. 49 Before the House Judiciary Comm.*, 2003 Leg., 23rd Sess. (AK March 12, 2003) (statement of Jennifer Ruderger, Exec. Dir., Alaska Civil Liberties Union), available at <http://www.legis.state.ak.us/PDF/23/M/HJud2003-03-121304.pdf> [hereinafter “H. Jud. Mins. II”].

45. Raju Cheblum, *State DNA laws help fight crime, but critics cite privacy concern* (Oct. 19, 2000), at www.cnn.com/2000/LAW/10/24/states.dna.cr/.

46. See *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) (holding that the recognition of privacy rights for prisoners cannot be recognized in light of the concept of incarceration and the objectives of the penal institution).

47. See *Lawrence v. Texas*, 123 S.Ct. 2472, 2477 (2003) (recognizing that individuals retain a “right to privacy”).

Although Alaska places some limits on the uses of DNA samples, these uses are not limited to law enforcement purposes.⁴⁸ Alaska Statutes section 44.41.035(f)(3) allows DNA samples to be used for “statistical blind analysis” and section 44.41.035(f)(4) allows the DNA samples to be used to “improv[e] the operation of the [DNA database].”⁴⁹ Alaska’s failure to limit the tests that police can conduct on the DNA samples allows for the possibility of significant privacy intrusions as to those innocent citizens who were never required to submit their DNA to the state database.⁵⁰ Further, since there is no requirement that the DNA samples be destroyed,⁵¹ individuals’ personal information may remain in the database indefinitely, thus increasing the potential for abuse. While there are currently some general limits placed on the use of the DNA samples, there is no guarantee that the law will not change in the future to allow for alternative uses of the personal information contained in the DNA database.⁵²

Although some of these problems were addressed before the Amendment was codified, the wording of the Amendment does not reflect a recognition of its potential problems. In addition, no regulations have been implemented for section 12.55.015(h). By failing to address any of the problems in the statute or administrative regulations, Alaska legislators left the door open for potential abuse.

IV. PROPOSALS TO MAKE SECTION 12.55.015(H) MORE EFFECTIVE

Of all the impediments the Amendment is facing, the most critical is funding for collecting and analyzing the samples. Currently, Alaska relies on federal funding for the expenses incurred during the process of expanding the DNA database.⁵³ Alaska did

48. ALASKA STAT. § 44.41.035(f) (Michie 2003).

49. *Id.*

50. Cheblum, *supra* note 45.

51. *See* H. Jud. Mins. II, *supra* note 44 (“There is no requirement in House Bill 44 or in the Alaska Statutes or in federal law that the DNA samples. . .from which the genetic information is taken will ever be destroyed.”).

52. The United States Government has a long history of finding new ways to use personal information initially intended for only a limited purpose. *See id.* (“For example, social security numbers were initially intended only to track social security payments, and the law had strict controls to prevent other uses, but now social security numbers are universal identifiers.”).

53. Proposed federal funding for all states includes \$92.9 million to help alleviate the backlog and DNA sample analysis; \$90.4 million to improve crime labs so that they can process the DNA samples more efficiently and cost-effectively;

not budget any state dollars to help defray the cost.⁵⁴ In fact, Alaska expects to rely upon continued federal funding to pay for the database until 2009.⁵⁵ However, as budgets become tighter, Alaska may not be able to rely on the federal government. Further, expenditures by the federal government alone are insufficient to bear the brunt of the increasing expenses.⁵⁶ Thus, to fund the system adequately, Alaska may be forced to compromise other aspects of its criminal justice system. It is untenable for Alaska to wait until federal funding is reduced to develop a solution. Alaska must deal with these concerns now by developing a detailed and proactive funding program articulating how Alaska will fund its DNA database if federal funding falls through, and how it will meet the discrepancy between the funds that the federal government provides and the funds that are required to operate the DNA database effectively.

To surmount the logistical hurdles associated with section 12.55.015(h), Alaska legislators must implement regulations specifying how the collection, storage, and retrieval of DNA samples will operate. For example, Commissioner Tandeske of the Department of Public Safety has indicated that the State will not collect duplicate samples from repeat offenders.⁵⁷ However, there is no official regulation, and Commissioner Tandeske, or subsequent commissioners, are free to change or disregard the memorandum indicating that duplicate samples will not be collected. Further, if legislators insist on keeping all samples indefinitely, Alaska must adopt a more sophisticated method for storage than cumbersome deep freezers.⁵⁸ To that end, a California-based company has developed a streamlined DNA storage system that takes up less space and allows the samples to be retrieved using computers in a matter

\$24.8 million for research and development of new methods of analyzing DNA samples; \$17.5 million for training professionals in the criminal justice system in collecting and using the DNA samples; a \$5 million grant program to help states defray costs of post-conviction DNA testing; and \$2 million for identifying human remains to solve missing person cases. The President's Initiative, *supra* note 35.

54. Staff of House Judiciary Comm., 23rd Sess., Fiscal Note No. 2 on House Bill No. 49 (AK Mar. 24, 2003) (on file with authors).

55. *Id.* The Fiscal Note shows that no funds will be budgeted towards these costs through 2009.

56. Cheblum, *supra* note 45.

57. Memorandum from William Tandeske, *supra* note 31.

58. See *Storing Genetic Material*, *supra* note 33 ("For years, the storage method of choice for DNA has been deep freezers, which are space and energy hogs.").

of minutes.⁵⁹ Alaska should adopt a similar system so as to avoid the logistical nightmare that could result from trying to organize thousands of DNA samples.

In order to protect individuals' privacy rights, Alaska legislators need to limit the uses of the collected DNA samples. Alaska Statutes section 44.41.035 should be amended to limit the official uses of DNA samples to curb the opportunity for misuse. Alaska does have severe punishments for those who unlawfully possess the DNA samples or who allow others access to the samples or identification data in the DNA database.⁶⁰ Given the importance of the privacy issues, however, it is not enough to just punish the offenders. Alaska must work to ensure that the statute is not violated in the first instance.

V. CONCLUSION

Although it is tempting to dismiss the disadvantages associated with Alaska Statutes section 12.55.015(h) and look only toward the positive impact the Amendment will have on crime control, such a dismissal would be misguided. Practitioners, judges, and legislators alike should be wary of the potential problems the Amendment might have for Alaska. Further, though the amended statute has the potential to be a valuable tool for law enforcement, this tool is wasted when there is not adequate funding to analyze the DNA samples in a timely manner. Finally, the privacy issues that arise from the wealth of information that DNA samples provide cannot be swept under the rug. These issues affect people who were never convicted of a crime, but are related to felons. Additionally, the potential uses to which the DNA samples are subject are not sufficiently limited.

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59. *Id.*

60. ALASKA STAT. § 11.56.762 (Michie 2003). Violation of this section is a Class C felony. *Id.*