

Lawrence S. Lustberg
Gitanjali S. Gutierrez
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102-5496
(973) 596-4500

Edward L. Barocas
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION
P.O. Box 750
Newark, New Jersey 07101
(973) 642-2084

*Attorneys for Plaintiffs
A.A., by his parent and guardian B.A.,
and Jamaal Allah*

A.A., by his parent and guardian B.A., and
JAMAAL W. ALLAH

Plaintiff,

v.

ATTORNEY GENERAL OF NEW JERSEY,
the NEW JERSEY DEPARTMENT OF
CORRECTIONS, and MERCER COUNTY,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MERCER COUNTY

DOCKET NO. _____

CIVIL ACTION

**VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

Plaintiffs A.A., by his parent and guardian B.A., and Jamaal Allah, for their Complaint, by and through their attorneys, state their Complaint as follows:

I. NATURE OF ACTION

1. This is an action for a temporary restraining order, preliminary injunctive relief, permanent injunctive relief and declaratory relief arising out of plaintiffs' challenge to the New Jersey DNA Database and Databank Act of 1994, N.J.S.A. 53:1-20.17, et seq. (2003) ("the DNA Act"), under the New Jersey and federal constitutions. Specifically, plaintiffs allege that the

DNA Act authorizes compulsory sampling and analysis of DNA for investigative purposes without any showing of probable cause or individualized suspicion, in violation of the plaintiffs' right to privacy under the United States and New Jersey Constitutions, as well as in contravention of the Ex Post Facto Clause of the United States and New Jersey Constitutions.

II. PARTIES

2. Plaintiff A.A., a juvenile, and his next-friend, B.A. reside in the Township of Princeton Junction, New Jersey.

3. Plaintiff Jamaal W. Allah is presently incarcerated at Midstate Correctional Facility, P.O. Box 866, Range Road - 6 West Wrightstown, New Jersey 08562.

4. Defendant Department of Corrections is responsible for collecting a DNA sample from inmates.

5. Defendant Mercer County through its Probation Services is responsible for collecting a DNA sample from individuals on probation.

6. Defendant the Attorney General of the State of New Jersey is responsible for promulgating rules governing the procedures under the DNA Act and is responsible for fulfilling the duty to store, analyze, classify, and file the DNA records of identification pursuant to the DNA Act.

VENUE

7. Venue properly lies in this Court pursuant to R. 4:3-2(a)(2) and 4:3-2(a)(3).

FACTS

8. This action challenges the validity of the New Jersey DNA Database and Databank Act of 1994, N.J.S.A. 53:1-20.17 *et seq.* (2003), under the Fourth Amendment and Ex Post Facto Clause of the United States Constitution as well as Articles I and IV of the New Jersey State Constitution.

9. The DNA Act initially created a DNA database and databank program for adult sex offenders. Subsequent amendments expanded the DNA sampling program to include juvenile

sex offenders, L. 1997, c.136, as well as all adult and juvenile violent offenders, L. 2000, c. 118. The most recent amendments, L. 2003, c. 118, which entered into effect on September 22, 2003, have included within the DNA sampling program “persons convicted or found not guilty by reason of insanity of *any* crime.” Statement to Assembly, No. 2617, Sen. Budget and Appropriations Comm. (May 15, 2003) (emphasis added). For individuals, such as plaintiffs, who were convicted of a crime and were on probation or incarcerated on the effective date, the 2003 amendment requires that they “shall provide a DNA sample before termination of imprisonment [or] probation.” N.J.S.A. 53:1-20.20(g).

10 . The express purpose of the DNA Act is “to establish a DNA Database containing blood or other biological samples.” N.J.S.A. 53:1-20.18. Pursuant to the DNA Act, “the results of the DNA profile of individuals in the State database shall be made available to local, State, or federal law enforcement agencies.” N.J.S.A. 53:1-20.24. The statute states that “DNA databanks are an important tool in criminal investigations and in deterring and detecting recidivist acts.” N.J.S.A. 53:1-20.18. It aims to further the state’s policy of assisting “federal, state, and local criminal justice and law enforcement agencies in the identification and detection of individuals who are the subjects of criminal investigations.” Id.

11 . Statements made by the 2003 amendment sponsors and the Executive also refer to the investigatory purpose of the DNA Act. The Senate Budget and Appropriations Committee Statement to the 2003 amendments explains that “according to the sponsor, expanding this State’s DNA database will greatly enhance the ability of law enforcement to solve crimes.” Statement to Assembl., No. 2617, Sen. Budget and Appropriations Comm. (May 15, 2003); see also Statement to Assembl., No 2617, Assembl. Appropriations Comm. (Feb. 3, 2002) (containing identical language); see also Press Release, Office of the Att’y Gen.: Div. of Criminal Justice, McGreevy Signs Bill to Improve Use of DNA Evidence (Sept. 22, 2003), available at <http://www.state.nj.us.lps/dcj/releases/2003/dna0922.htm> (“‘Violent criminals can be more easily identified and aggressively prosecuted with this formidable tool,’ said Attorney General Peter Harvey.”); id. (“‘An expanded DNA database will better enable law enforcement

to solve crimes,’ said Assemblyman Gordon Johnson (D-Bergen).’); id. (“‘This new law will greatly expand the capabilities of our current DNA database to provide answers and solve crimes that would otherwise remain unsolved,’ said Senator Joseph Coniglio (D-Bergen). ‘[T]he victims of unsolved crimes can be sure that New Jersey’s police forces can use every tool at their disposal to solve these crimes.’”).

12 . The Attorney General, New Jersey’s chief law enforcement officer, N.J.S.A. 52:17B-4, is responsible for promulgating the “rules governing the procedures to be used in the submission, identification, analysis and storage of the DNA samples . . . submitted under this Act,” N.J.S.A. 53:1-20-23, as well as for fulfilling the “duty . . . to store, analyze, classify and file in the State database and with the FBI . . . the DNA record of identification,” N.J.S.A. 53:1-20.24.

13 . The DNA Act authorizes the compulsory extraction of blood or a biological sample for these investigatory purposes without a demonstration of probable cause or any showing of individualized suspicion.

14 . Plaintiff A.A. is currently a fifteen-year-old juvenile. B.A. is A.A.’s father.

15 . A.A. is subject to compulsory DNA sampling because on October 20, 2002, when he was fourteen-years-old, A.A. pled guilty to an act, which if committed by an adult, would have constituted assault upon a law enforcement officer, in violation of N.J.S.A. 2C:12-1b(5). This offense was a fourth degree crime and A.A. received 18 months probation, which he is currently serving. Previously, on February 13, 2002, when he was thirteen-years-old, A.A. pled guilty to an act, which if committed by an adult, would have constituted arson, in violation of N.J.S.A. 2C:17-1b(2). He completed a term of 6 months probation for this offense. These incidents arose from a then-undiagnosed mental health problem. A.A. has since-been diagnosed with Schizoaffective disorder and bulimia nervosa and is receiving appropriate treatment. For the past year, A.A., has benefited from psychiatric treatment and medication as well as counseling. A.A. is currently doing very well in school and continues to receive treatment and therapy for his illness.

16. Under the retroactive application of the 2003 amendment, A.A. must provide a DNA sample. On September 22, 2003, A.A. and his parents received an Order issued by the Mercer County Superior Court requiring A.A. to appear for DNA testing at a later date as required by L. 2003, c. 183. More recently, A.A.'s parents received a letter dated January 6, 2004, requiring A.A. to report on January 21, 2004, to the Mercer County Sheriff's Office so that a DNA sample may be taken. The letter informed A.A.'s parents that the failure to appear could result in a warrant being issued for A.A.'s arrest.

17. A.A.'s parents, school officials, and his counselors have all expressed concern that compelling A.A. to subject to DNA testing will undermine A.A.'s current treatment by threatening his self-esteem and thereby harming his chances of recovery.

18. Plaintiff A.A. by his parent and legal guardian B.A., now brings this action to bar Probation Services from extracting a biological sample from A.A. on January 21, 2004. In the absence of such an order, A.A., a juvenile, will experience an irreparable harm if immediate temporary relief is not granted to enjoin this extraction, including that his rights to privacy and bodily integrity under the state and federal constitutions will be violated.

19. Plaintiff Jamaal Allah is currently incarcerated at Midstate Correctional Facility in Wrightstown, New Jersey. He was sentenced on December 1, 2001, to concurrent terms of 5 to 10 years and 4 to 8 years for two drug related offenses in violation of N.J.S.A. 2C:35-5(2) and 2C:35-5(3), respectively. Because he was incarcerated on the date of the 2003 amendment's enactment, he is subject to compulsory DNA sampling prior to his release.

CAUSE OF ACTION

COUNT I: VIOLATION OF PLAINTIFFS' REASONABLE PRIVACY EXPECTATIONS UNDER THE UNITED STATES AND NEW JERSEY CONSTITUTIONS.

20. The foregoing paragraphs are incorporated and restated as if set forth fully herein.

21. The DNA Act, N.J.S.A. 53:1-20.17, authorizes the compulsory extraction of blood or biological samples and DNA analysis for investigatory purposes without requiring any showing of probable cause or individualized suspicion.

22. Both the compulsory extraction of a sample and the subsequent DNA analysis violate the plaintiffs' reasonable privacy expectations in bodily integrity protected under the Fourth Amendment of the United States Constitution and Article I, par. 7 of the New Jersey Constitution.

**COUNT II: VIOLATION OF PLAINTIFFS' RIGHTS UNDER THE EX POST FACTO
CLAUSE OF THE UNITED STATES AND NEW JERSEY CONSTITUTIONS**

23. The foregoing paragraphs are incorporated and restated as if set forth fully herein.

24. At the time of their conviction and sentencing, Plaintiffs' original sentences did not require them to provide a DNA sample as a term of their punishment.

25. The retroactive application of the 2003 amendment violates the Ex Post Facto Clause of the Constitutions of the United States and the New Jersey . U.S. Const., art. 1, § 10, cl. 1; N.J. Const., art. IV, §7, ¶3.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for:

1. A declaratory judgment that N.J.S.A. 53:1-20.17, et seq., is unconstitutional under the United States and New Jersey Constitutions.

2. A preliminary and permanent injunction requiring that Defendants refrain from subjecting plaintiffs to compulsory DNA testing.

3. Costs of suit, including reasonable attorneys fees.

4. Such further relief as the Court deems just and proper.

Respectfully submitted,
GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE,
A Professional Corporation

By: _____
Lawrence S. Lustberg, Esq.
Gitanjali S. Gutierrez, Esq.

Edward L. Barocas, Esq.
American Civil Liberties Union
Of New Jersey Foundation
P.O. Box 750
Newark, New Jersey 07101

Dated: January 16, 2004

VERIFICATION

I, _____, have read the foregoing Verified Complaint and the allegations contained therein. The allegations contained therein are true to the best of my personal knowledge and belief, except as to those allegations which are made upon information and belief. As to the allegations made upon information and belief, I believe those to be true.

B.A..

Sworn to and subscribed
before me this 15th
day of January, 2004.

CERTIFICATION PURSUANT TO RULE 4:5-1

Pursuant to Rule 4:5-1 of the Rules Governing the Courts of the State of New Jersey, it is hereby stated to the best of my knowledge and belief that the matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding. Also, to the best of my belief, no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this pleading, I know of no other parties that should be joined in the above action. Finally, I recognize the continuing obligation to file and serve all parties and the Court with an amended certification if there is a change in the facts stated here.

Gitanjali S. Gutierrez

Dated: January 15, 2004