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"Screening" the Poor: The Legality of Drug Testing for Welfare Benefits

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COMMENTS

"SCREENING" THE POOR: THE LEGALITY OF DRUG TESTING FOR WELFARE BENEFITS

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I. INTRODUCTION

On March 8, 2014, at the conclusion of the 2014 Virginia General Assembly regular session, Virginia joined at least 17 other states that, in this year alone, have introduced proposals to screen or test applicants for illegal substances prior to obtaining public assistance.[1] Following the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which permitted states to conduct drug testing as part of the Temporary Assistance for Needy Families (TANF) program, states began proposing drug screenings for applicants of public welfare benefits.[2] Despite a 2003 Sixth Circuit decision holding that suspicionless drug testing is unconstitutional, in the last three years, eleven states have passed legislation that permit drug testing for welfare benefits in certain situations.[3]

The Virginia House of Delegates considered a similar measure this session with House Bill 234, which, if passed, would have required local social services departments to "screen" all recipients of public assistance in Virginia to determine whether probable cause existed to warrant drug testing of the recipient.[4] While H.B. 234 was not as brazen as similar attempts in other states to indiscriminately drug test all applicants, the bill's failure to outline what constitutes "screening" still presents the constitutional question of whether this assessment represents an unreasonable search, thus violating the Fourth Amendment.

II. BACKGROUND

A. Temporary Assistance for Needy Families

In 1996 the United States Congress passed, and President Clinton signed, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).[5] This law represented a significant change in the United

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[1] H.B. 234, 2104 Gen. Assemb., Reg. Sess. (Va. 2014) *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?141+ful+HB234H1+pdf; *Drug Testing for Welfare and Public Assistance*, NAT'L CONF. OF STATE LEGS. (Aug. 7, 2014), http://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx.

[2] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; *Drug Testing for Welfare and Public Assistance*, *supra* note 1.

[3] *See Drug Testing for Welfare and Public Assistance*, *supra* note 1; Marchwinski v. Howard, 113 F. Supp.2d 1134, 1143 (E.D. Mich. 2000).

[4] Va. H.B. 234.

[5] Personal Responsibility and Work Opportunity Reconciliation Act, 110 Stat. 2105.

States welfare system by authorizing states to create and run their own welfare programs.[6]

PRWORA repealed Aid to Families with Dependent Children (AFDC) and replaced it with Temporary Assistance for Needy Families (TANF), a federal program that provides block grants to states in order to operate monthly cash-assistance programs.[7] The Department of Health and Human Services (HHS) has stated that the purpose of TANF is to increase state flexibility in operating programs designed to:

> (1) provide assistance to needy families so that children may be cared for in their own homes or the homes of relatives; (2) end dependence of needy parents by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies; and (4) encourage the formation and maintenance of two-parent families.[8]

However, the federal government's broad policy goals to help needy families achieve self-sufficiency have been implemented in a variety of ways across the nation as each state has "wide flexibility to determine their own eligibility criteria, benefit levels, and the types of services and benefits available to TANF recipients."[9]

B. Virginia TANF and VIEW

Virginia's TANF requirements are outlined in the *Code of Virginia* § 63.2 and provide for a maximum of sixty months (five years) of benefits for Virginia residents who have children under the age of eighteen.[10] Virginia residents can apply for benefits through an online system, or manually submit a lengthy application to the Virginia Department of Social Services, who then reviews the applications to determine whether applicants meet the eligibility criteria and are considered "financially needy."[11] If the applicant is approved, the monthly TANF benefits are calculated using a formula that accounts for the number of children in the home, as well as other public

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[6] Abby E. Schaberg, *State Drug Testing Requirements for Welfare Recipients: Are Missouri and Florida's New Laws Constitutional?*, 77 MO. L. REV. 567, 569 (2012).

[7] DEPT. OF HEALTH AND HUMAN SERV., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES FISCAL YEAR 2012 BUDGET REQUEST 310, *available at* http://www.acf.hhs.gov/sites/default/files/olab/tanf.pdf.

[8] *Id.*

[9] *Id.* at 311.

[10] VA. CODE ANN. § 63.2-600 (2014); *Virginia TANF Eligibility Requirements*, TANF PROGRAM, http://www.tanfprogram.com/virginia-tanf-eligibility (last visited Aug. 2, 2014).

[11] *Virginia Temporary Assistance for Needy Families*, BENEFITS.GOV, http://www.benefits.gov/benefits/benefit-details/1361 (last visited Aug. 14, 2014); *see, e.g.*, *Application for Benefits*, DEP'T SOC. SERV., COMMONWEALTH OF VA., http://www.dss.virginia.gov/files/division/bp/fs/intro_page/forms/032-03-0824-29-eng.pdf (last visited Aug. 2, 2014) (providing application and instructions for completion).

benefits in use.[12] Additionally, as a condition of eligibility, TANF recipients in Virginia must participate in the Virginia Initiative for Employment not Welfare (VIEW) program. VIEW participants work with an assigned social worker to develop a job search plan, education training or other vocational experience in order to obtain employment in the future.[13] The requirements for VIEW are also outlined in the *Code of Virginia* § 63.2.[14]

C. Authorization of Drug Testing

In addition to creating the framework for the TANF program, PRWORA specifically permitted states to drug test individuals before receiving state assistance without any suspicion of prior drug use on the part of the recipient.[15] This provision has paved the way for state efforts to blanket drug test all welfare beneficiaries regardless of suspicion, and in spite of the Fourth Amendment's prohibition against unreasonable searches of "persons, houses, papers and effects."[16] The Sixth Circuit addressed the issue of the reasonableness of drug testing in the welfare context, and held that the collection and testing of urine samples is a "universally agreed" search within the meaning of the Fourth Amendment;[17] and requiring drug testing to access public benefits should be considered unreasonable because it promotes the unfair and unfounded connotation that citizens seeking welfare funds are

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[12] *See* TY JONES, VA. POVERTY LAW CTR., TEMP. ASSISTANCE FOR NEEDY FAMILIES: A GUIDE TO VIRGINIA'S CASH ASSISTANCE PROGRAM 4 , *available at* http://www.vplc.org/wp-content/uploads/2012/05/TANF-Booklet.pdf (last visited Aug. 2, 2014); DEP'T SOC. SERV., COMMONWEALTH OF VA., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES GUIDANCE MANUAL, ch. 502.2, at 3–3a, *available at* http://www.dss.virginia.gov/files/division/bp/tanf/manual/500.pdf.

[13] *See Virginia Initiative for Employment not Welfare(VIEW) Information*, CITY OF VIRGINIA BEACH, http://www.vbgov.com/government/departments/human-services/your-dhs/Pages/virginia-initiative-for-employment-not-welfare-view.aspx (last visited Aug. 2, 2014); *see also* DEP'T SOC. SERV., COMMONWEALTH OF VA., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES GUIDANCE MANUAL, ch. 900, at 1–2, *available at* http://www.dss.virginia.gov/files/division/bp/tanf/manual/900.pdf.

[14] VA. CODE ANN. § 63.2-608(A), (C), (D) (2014).

[15] 21 U.S.C. § 862b (2006) (stating that "States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances."); Schaberg, *supra* note 6, at 568–69.

[16] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); *see generally Drug Testing for Welfare Recipients and Public Assistance*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 7, 2014), http://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx (discussing efforts in Oklahoma, Florida, Georgia, and Tennessee to pass legislation requiring drug testing for all welfare applicants, regardless of suspicion).

[17] Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1138 (E.D. Mich. 2000) (citing Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602, 617, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)).

more likely to engage in illegal drug usage, despite the data that demonstrates otherwise.

III. SIMILAR STATE EFFORTS

A. Michigan: *Marchwinski v. Howard*

Until a very recent Florida case, there had been only one challenge to a state law that authorized drug testing for welfare recipients. In 1999, the American Civil Liberties Union of Michigan brought a case, *Marchwinski v. Howard*, in response to Michigan's mandatory welfare drug testing program.[18] The District Court found that absent some special need or public safety necessity warranting suspicionless drug testing, Michigan's law did not justify "departure from the ordinary Fourth Amendment requirement of individualized suspicion."[19] On appeal, the Sixth Circuit reversed the decision of the District Court. However, shortly thereafter a majority of judges on the Sixth Circuit voted to hear the case en banc, which resulted in a split decision, reaffirming the District Court's holding.[20] The Court reviewed several circumstances in which suspicionless drug testing was justified, including: railroad employees involved in train accidents; U.S. Customs agents directly involved in drug interdiction; and when the government identifies specific public safety concerns.[21] However, the Court found that the plaintiffs could not demonstrate a similar special need "grounded in public safety" to justify suspicionless drug testing, and held that without a notion of suspicion, testing welfare recipients could open the floodgates to drug testing for other public benefits, including Medicaid, state emergency relief, and education grants and loans.[22] This "dangerous precedent" helped prevent similar measures in other states until their recent reemergence in the last few years.[23]

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[18] *Id.*; *Michigan ACLU Seeks Halt to Nation's First Mandatory Welfare Drug Testing Program*, ACLU, (Sept. 30, 1999), https://www.aclu.org/drug-law-reform/michigan-aclu-seeks-halt-nations-first-mandatory-welfare-drug-testing-program.

[19] *Marchwinkski*, 113 F. Supp. 2d at 1139–40.

[20] *Id.*, *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

[21] *Marchwinkski*, 113 F. Supp. 2d at 1138–39.

[22] *Id.* at 1142–43.

[23] *Id* at 1142; Frances Robles, *Florida Law on Drug Tests for Welfare Is Struck Down*, N.Y. TIMES, Dec. 31, 2013, http://www.nytimes.com/2014/01/01/us/florida-law-on-drug-testing-for-welfare-is-struck-down.html.

B. Florida: *Lebron v. Wilkins*

In 2011, the Florida House of Representatives passed House Bill 353, requiring the Florida Department of Children and Family Services to perform drug tests on all recipients of TANF funds in Florida.[24] Governor Rick Scott, who campaigned on the issue and remains an outspoken proponent of the legislation, signed the bill into law on May 31, 2011.[25] Under H.B. 353, recipients who failed their first drug test would lose TANF benefits for one year, while a second failure would result in the loss of benefits for three years.[26] However, reporting data has demonstrated that out of the 4,086 people drug tested under this law, only 108 individuals, or 2.6 percent, tested positive for illegal substances.[27] This is 6.6 percentage points lower than the national average of drug users, which stands at 9.2 percent, as reported by the National Institute on Drug Abuse.[28] Further, state records demonstrate that the program costs more to carry out the drug-testing regime than is saved through the relinquishment of benefits.[29]

Despite these statistics, Florida is appealing a December 31, 2013 U.S. District Court ruling in *Lebron v. Wilkins*, which held that "there is no set circumstances under which the warrantless, suspicionless drug testing at issue in this case could be constitutionally applied."[30] This decision marks the second decision in which a federal court has overturned a state law on suspicionless drug testing based on the Fourth Amendment. However, adapting to this legal reality, states like Virginia have begun proposing bills that offer a "screening" mechanism instead of a blanket drug-testing regime in order to prevent legal challenges based on the Fourth Amendment's prohibition against unreasonable searches.

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[24] H.B. 353, 2011 Leg., Reg. Sess. (Fla. 2011); *CS/CS/CS/CS/HB 353 - Drug Screening of Potential and Existing Beneficiaries of Temporary Assistance for Needy Families*, FLA. H. OF REP, http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=45214 (last visited Aug. 11, 2014).

[25] *CS/CS/CS/CS/HB 353 - Drug Screening of Potential and Existing Beneficiaries of Temporary Assistance for Needy Families*, *supra* note 24; Maria Kayanan, *Shaping a Legal Aid Challenge to the Drug-Testing of Welfare Applicants*, SHRIVER CTR. (July 8, 2013), http://povertylaw.org/communication/advocacy-stories/kayanan.

[26] Fla. H.B. 353.

[27] Robles, *supra* note 23.

[28] NAT'L INST. ON DRUG ABUSE, DRUGFACTS: NATIONWIDE TRENDS (2014), http://www.drugabuse.gov/publications/drugfacts/nationwide-trends.

[29] Robles, *supra* note 23.

[30] Lebron v. Wilkins, 2013 WL 6875563 *1, *12 (M.D. Fla. Dec. 31, 2013); Curt Anderson, *Supreme Court Turns Away Rick Scott Appeal on Drug Testing Order*, HUFFINGTON POST, Apr. 21, 2014, http://www.huffingtonpost.com/2014/04/21/supreme-court-florida-drug-testing_n_5185951.html.

C. Other Recent State Developments

On March 24, 2014, Mississippi Governor Phil Bryant signed into law H.B. 49, requiring that TANF beneficiaries submit to drug testing if a "written screening questionnaire" determines they are likely to have a substance abuse problem.[31] The bill only provides that the questionnaire must "indicate a reasonable likelihood that an adult recipient may have a substance use disorder involving the misuse of a drug."[32] The bill does not qualify the meaning of "substance use disorder," "misuse of a drug" or what "reasonable likelihood" would include. This wide-ranging standard permits Mississippi to drug test recipients under the guise of probable cause without identifying the parameters. If a recipient tests positive following a drug test, he or she must undergo drug treatment for substance abuse.[33] Additionally, if the same recipient tested positive a second time, they are disallowed from obtaining TANF benefits for a period of 90 days, and if it happens a third time, he or she loses benefits for one year.[34] The bill was slated to go into effect on July 1, 2014, but has since been delayed by the Mississippi Department of Human Services following outcries by civil liberties advocates.[35] The Mississippi Center for Justice and the American Civil Liberties Union of Mississippi expressed numerous concerns about the law, including the lack of a public hearing prior to the bill's enactment, and the Mississippi Department of Human Services' failure to release the questionnaire that applicants will be required to answer.[36] Additionally, opponents to the law have raised questions about who is responsible for paying for drug treatment if an applicant tested positive, and many have stressed that the language of the bill is "ambiguous."[37] Finally, unlike other state policies that allow children of parents who have tested positive to continue to receive welfare benefits through a surrogate payee provision, the Mississippi law would cut off benefits entirely to all members of a household including minor children.[38]

Similarly, Kansas and North Carolina enacted legislation in 2013 that required drug testing for recipients who were reasonably suspected of engag-

[31] H.B. 49, 2014 Leg. Sess. (Miss. 2014).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Anna Wolfe, *Drug Test Law: Punishing Parents, Starving Kids*, JACKSON FREE-PRESS, July 23, 2014, 11:34 AM, http://www.jacksonfreepress.com/news/2014/jul/23/drug-test-law-punishing-parents-starving-kids/.
[36] *See id.*
[37] *Id.*
[38] *See id.*

ing in illegal drug use.[39] A year earlier, Utah and Tennessee enacted similar legislation.[40] Georgia and Oklahoma instituted across-the-board drug testing for all TANF recipients in 2012.[41] The Georgia and Oklahoma measures have faced legal hurdles similar to those in Michigan and Florida, given that they lack any type of suspicion-based testing. Finally, the 2014 Virginia House of Delegates bill follows the same trajectory of Mississippi, Kansas and North Carolina by requiring that some level of probable cause be established prior to testing.

IV. VIRGINIA HOUSE OF DELEGATES BILL 234

The 2014 Regular Session of the Virginia General Assembly commenced on January 8, 2014. In the House of Delegates, the Republican Party holds a strong majority of seats, 68-32.[42] Comparatively, in the Senate, when the bill was under consideration the body was evenly split with 20 Democrats and 20 Republicans.[43] Over the 60-day regular session, the Virginia General Assembly filed 2,888 bills for consideration.[44]

One such bill was House Bill 234, introduced by Delegate Robert Bell (R-Albemarle). While less than a page long, H.B. 234 proposed sweeping changes to the process for obtaining TANF funds in Virginia. H.B. 234 required that as a condition of participating in VIEW, TANF recipients would be "screened" prior to receiving benefits to determine "whether probable cause exists to believe such participant is engaged in the use of illegal substances."[45] Despite the bill's lack of description of what would constitute "screening," or "probable cause," if such a threshold could be established, then the participant must submit to mandatory drug testing.[46] The bill also failed to define which illegal drugs would be screened for in the testing.[47]

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[39] *See Drug Testing for Welfare and Public Assistance*, *supra* note 1.

[40] *Drug Testing for Welfare and Public Assistance*, *supra* note 1.

[41] *Drug Testing for Welfare and Public Assistance*, *supra* note 1.

[42] *Virginia House of Delegates Member Listings*, VA. GEN. ASSEMB., http://virginiageneralassembly.gov/house/members/ members.php (last visited Aug. 20, 2014).

[43] *Senate of Virginia Telephone Listings*, VA. GEN. ASSEMB., http://apps.lis.virginia.gov/sfb1/Senate/TelephoneList.aspx (last visited Aug. 20, 2014). Lt. Governor Northam (D) serves as the tie-breaking vote. Since this article was written the Senate makeup has shifted following the resignation of Democratic Senators Phillip Puckett and Henry Marsh. Republicans currently hold a 20-18 majority given the two vacancies. Scott Wise and Joe St. George, *Henry Marsh to Resign from Virginia Senate*, CBS 6 WTVR RICHMOND (July 1, 2014, 2:13 PM), http://wtvr.com/2014/07/01/henry-marsh-to-retire/comment-page-1/.

[44] *2014 Bills*, RICHMOND SUNLIGHT, http://www.richmondsunlight.com/bills/2014/1/.

[45] Va. H.B. 234.

[46] *Id.*

[47] *See id.*

Consequently, if the participant fails the drug test, then the person is ineligible from receiving TANF benefits unless he or she fully complies with an undescribed drug treatment program.[48]

A. Legislative History

House Bill 234 was favorably voted out of the Health, Welfare, and Institutions Committee of the House of Delegates on January 28, 2014 by a vote of 20-2, before ultimately being tabled by a voice vote in the House Appropriations subcommittee on February 4, 2014.[49] Prior to this final action that halted the bill for this legislative term, H.B. 234 garnered both support and significant opposition from local advocacy groups and organizations who argued that the bill was unfair, discriminatory, and not cost effective.

In a January 23, 2014 Health, Welfare, and Institutions Subcommittee hearing, five different organizations testified that the bill would hurt Virginia families in need.[50] The American Civil Liberties Union of Virginia opposed the bill and argued that H.B. 234 rested on the notion that people in poverty are more likely to engage in drug abuse.[51] Additionally, the ACLU took issue with the underlying probable cause analysis for testing.[52] Voices for Virginia's Children expressed concern that the bill could impact children of TANF recipients, who might lose benefits through no fault of their own.[53] Virginia's faith communities also collectively opposed the bill, arguing that it unnecessarily discriminated against poor people and would be a step backward to limit public benefit access.[54] Finally, the Virginia Catholic Conference also opposed the bill as written, arguing that assistance should be tied to need, rather than behavior.[55] The only Delegate to orally oppose the bill was Delegate Patrick Hope (D-Arlington), who contended that H.B. 234 was "counterproductive," would hurt Virginia families and might cause recipients to turn to crime or end up homeless as a result.[56]

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[48] *Id.*

[49] *Bill Tracking, 2014 Session, HB 234 VIEW*, VA. LEGISLATIVE INFO. SYS., https://lis.virginia.gov/cgi-bin/legp604.exe?ses=141&typ=bil&val=HB234 (last visited Aug. 11, 2014).

[50] *See* E-mail from Jacquelyn Bolen, Author, to Leah Dubuisson, Exec. Editor, Richmond Journal of Law and the Public Interest (Sept. 22, 2014, 9:23 PM) (on file with editor).

[51] *See id.* (statement of American Civil Liberties Union of Virginia representative).

[52] *See id.*

[53] *See id.* (statement of the Voices for Virginia's Children representative).

[54] *See id.* (joint statement of Virginia's interfaith communities).

[55] *See id.* (statement of the Virginia Catholic Conference representative).

[56] *See* E-mail from Jacquelyn Bolen, Author, to Leah Dubuisson, Exec. Editor, Richmond Journal of Law and the Public Interest (Sept. 22, 2014, 9:23 PM) (on file with editor) (statement of Delegate Pat-

Despite this opposition, Delegate Bell moved forward with the bill and stressed "the idea we are giving cash to someone who is actively using drugs is impossible to believe."[57] Along with the vote of 19 other delegates, Bell's bill advanced to the House Appropriations Committee for consideration. H.B. 234 required passage in House Appropriations as well because bills that will net a cost to the state as a result of their passage require a full fiscal impact analysis from the Department of Planning and Budget, as well as a budget amendment. According to the fiscal impact statement for H.B. 234, the bill would have produced over $450,000 in additional expenditures to the state in 2015 alone.[58] These costs would have continued in subsequent years.[59] This proved to be too costly for the House Appropriations Committee, whose Members by voice vote decided to table the bill on February 4, 2014.[60]

V. IMPLICATIONS IF PASSED

If House Bill 234 had successfully moved through the General Assembly and been signed into law, the bill would have raised significant constitutional concerns relating to the drug "screenings" of applicants. Most notably, the bill's failure to fully and strictly define what constitutes a screening for probable cause prevents an adequate justification for drug testing. Without providing an example of what could cause a department official to have "reason to believe that the VIEW participant is engaged in the use of illegal substances," local department employees could broadly interpret this phrase in order to justify drug testing in otherwise unwarranted circumstances. In the absence of more specific justifications for drug testing, this model would likely also raise constitutional questions similar to those in states that have proposed suspicionless testing. There is no way of knowing whether the screening mechanism would be based on past drug convictions, unusual behavior by the recipient exhibited during the screening, or another method entirely. Using past drug convictions could raise issues of fairness and unusual behavior should not reach the threshold to trigger probable cause.

rick Hope (D-47th District).

[57] *See id.* (statement of Delegate Robert Bell (R-58th District)).

[58] DEP'T OF PLANNING AND BUDGET, 2014 VA. GEN. ASSEMB. REG. SESS., 2014 FISCAL IMPACT STATEMENT FOR H.B. 234 1 (2014) *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?141+oth+HB234FH1122+PDF.

[59] *Id.*

[60] Va. H.B. 234. This bill was tabled by House Appropriations on Feb. 4, 2014. *Bill Tracking, 2014 Session, HB 234 VIEW*, *supra* note 49.

A standardized, peer-reviewed system of analysis, such as the Substance Abuse Subtle Screening Inventory (SASSI)[61] should first be established before considering whether a "screening" mechanism would be constitutionally permitted. The SASSI questionnaire system, used in states like Utah, provides a more robust questionnaire to applicants with a high level of accuracy, mitigating concerns about screening ambiguity and uncertainty.[62] However, House Bill 234's undefined parameters invited a broad interpretation of what could be used as a screening mechanism. This shortfall makes the bill more susceptible to Fourth Amendment concerns.

While individualized suspicion models for drug testing welfare beneficiaries, like the one proposed in H.B. 234, have not been constitutionally tested in any states at this point, until a court can demonstrate the constitutionality of this method, states should approach this process with trepidation.

VI. CONCLUSION

Drug testing recipients of welfare benefits has become a prevalent issue in a swath of states throughout the country in recent years. Following the Sixth Circuit decision in *Marchwinski v. Howard*, and the recent Florida District Court decision in *Lebron v. Wilkins*, states have realized that in order to avoid raising blatant Fourth Amendment concerns from blanket and suspicionless drug testing, states must adopt screening tools to justify the drug testing of welfare recipients. Virginia House of Delegates Bill 234 sought to "screen" recipients in this format, mirroring efforts in other states such as Mississippi, Kansas and North Carolina.

However, the language of H.B. 234 does not provide details on what a "screening" would consist of in order to justify probable cause. Without a standardized basis for probable cause, this model raises significant constitutional questions that must be considered before implementation. Additionally, the high costs associated with testing prevented the passage of H.B. 234. Despite these concerns, it is expected that the General Assembly will revisit this bill in future legislative sessions. Until the legislature can adequately designate what would give rise to probable cause for drug testing welfare

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[61] *See Substance Abuse Subtle Screening Inventory*, SASSI INST., https://www.sassi.com/ (last visited August 7, 2014).

[62] L.E. LAZOWSKI, F.G. MILLER, ESTIMATES OF THE RELIABILITY AND CRITERION VALIDITY OF THE ADULT SASSI-3, 3 (SASSI Inst. 1997) *available at* https://www.sassi.com/wp-content/uploads/2013/12/Estimates-of-the-Reliability-and-Criterion-Validity-of-the-Adult-SASSI-3-9-4-131.pdf; Cathy McKitrick, $26,000 Spent to Check Utah Welfare Seekers for Drugs, SALT LAKE TRIBUNE, July 10, 2013, http://www.sltrib.com/sltrib/politics/56578680-90/drug-test-sassi-utah.html.csp.

recipients, this bill should continue to be tabled in Virginia until, hopefully, the constitutional question is answered elsewhere.