AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

Committee:	Committee on Judiciary
Hearing Date/Time:	Thursday, February 3, 2011, 2:00 p.m.
Place:	Room 325
Re:	*Testimony of the ACLU of Hawaii in Opposition to H.B. 132, Relating to Civil Rights*

Dear Chair Keith-Agaran and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 132, which seeks to require the State to maintain a database of genetic information on innocent individuals. The ACLU opposes this bill because it is unconstitutional, ineffective, and costly.

I. DNA Collection of Arrestees is Unconstitutional

A bedrock constitutional principle is that individuals are innocent until proven guilty. House Bill 132, however, ignores this principle and treats those who are arrested as though they are guilty upon arrest.

Subjecting arrestees to DNA tests would violate arrestees' Fourth Amendment rights to be free from unreasonable searches and seizures. In fact, several courts have already ruled that this practice is unconstitutional: in *In re C.T.L.*, 722 N.W.2d 484, 491 (Min. App. 2006), the court ruled that there was "no basis for concluding that the state's interest in taking a biological specimen from a person solely because the person has been charged outweighs the person's right to privacy." *See also United States v. Mitchell*, 681 F. Supp. 2d 597, 610 (W.D. Pa. 2009) ("[A] universal requirement that a charged defendant submit a DNA sample for analysis and inclusion in a law enforcement databank for criminal law enforcement and /or identification purposes is unreasonable under, and therefore in violation of, the Fourth Amendment to the United States Constitution."). Unless and until an arrestee is provided with due process and is convicted, the arrestee retains the same privacy rights as any other member of society; subjecting arrestees to DNA tests therefore violates their Fourth Amendment rights, along with the analogous provisions of the Hawaii Constitution. *See* Hawaii Const. Art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."); *id.* at § 7 ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated[.]").

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Notably, the European Court of Human Rights ("ECHR") ruled in December 2008 that Great Britain's program of collecting DNA from arrestees violated arrestees' basic human rights: "the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences . . . fails to strike a fair balance between the competing public and private interests[.]" *S. and Marper v. The United Kingdom*, Application nos. 30562/04 and 30566/04, Eur. Ct. H.R. (2008), at ¶ 125.[1] The ECHR went on to explain that government maintenance of a genetic database of innocent individuals "constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society."

With regard to privacy rights, the Legislature should take into account the amount of personal and private data contained in a DNA specimen. The DNA provides insights into the most personal family relationships and the most intimate workings of the human body, including the likelihood of the occurrence of over 4,000 types of genetic conditions and diseases. Because genetic information pertains not only to the individual whose DNA is sampled, but to everyone who shares in that person's blood line, potential threats to genetic privacy posed by the collection of genetic information extends well beyond those individuals whose DNA is collected. *Mitchell*, 681 F. Supp. 2d at 608 ("[T]o compare the fingerprinting process and the resulting identification information obtained therefrom with DNA profiling is pure folly. Such oversimplification ignores the complex, comprehensive, inherently private information contained in a DNA sample. DNA samples may reveal private information regarding familial lineage and predisposition to over four thousand types of genetic conditions and diseases; they may also identify genetic markers for traits including aggression, sexual orientation, substance addiction, and criminal tendencies.").

II. DNA Collection of Arrestees is Ineffective and Costly

We should not saddle law enforcement personnel with additional tasks like analyzing innocent individuals' DNA – a task that has a low probability of solving or preventing crime – when they do not have the resources to investigate those areas with the highest probability of leading to an arrest or conviction. Sexual assault victims frequently have to wait upwards of a year for the state laboratory to analyze rape kits, and it may be years before law enforcement personnel complete DNA testing of all convicted felons. Although we often hear that expanding

[1] The full text of the decision is available at http://www.coe.int/t/dghl/standardsetting/dataprotection/Judgments/S.%20AND%20MARPER%20v.%20THE%20UNITED%20KINGDOM%20EN.pdf.

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the DNA database will improve law enforcement capabilities, we cannot improve our chances of finding a needle in a haystack by increasing the size of the haystack. Instead, law enforcement personnel should spend their resources wisely, focusing on those areas that are most likely to result in an arrest or conviction.

In the United Kingdom, the enactment of arrestee testing in 2004, which has corresponded with a ballooning of the UK database from 2 million to 3 million profiles (including those of more than 125,000 people never charged with any crime), has actually corresponded with a slight *decrease* in matches with crime scene evidence. *See* GeneWatch UK, *The Police National DNA Database: An Update* (Human Genetics Parliamentary Briefing No. 6, July 2006).[2]

Finally, we suggest that this Committee should consider the cost of DNA testing of arrestees. The State of Tennessee decided not to proceed with its plans to expand its DNA databases when it determined the cost of hiring six additional DNA analysts was too high.[3] Money spent on DNA testing of arrestees is money not being spent on other law enforcement strategies that have been proven to work (such as hiring additional police officers), nor are these dollars being spent on other programs that have been proven to reduce crime rates (such as education or mental health care).

Thank you for this opportunity to testify.

Sincerely,

Daniel M. Gluck
Senior Staff Attorney
ACLU of Hawaii

[2] Available at http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/MPSBrief_1.pdf.

[3] *See* Tania Simoncelli and Sheldon Krimsky, *A New Era of DNA Collections: At What Cost to Civil Liberties?*, American Constitution Society for Law and Policy (August 2007), *available at* http://www.acslaw.org/files/Microsoft%20Word%20-%20Simoncelli%20&%20Krimsky%20-%20DNA%20Collection%20&%20Civil%20Liberties%20-%20September%202007_0.pdf.

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LATE TESTIMONY

From: Lisa Hurst, Government Affairs
Gordon Thomas Honeywell

To: House Judiciary Committee

Date: February 3, 2011 2:00pm

RE: HB 132
The Collection of DNA Samples from arrestees of Sexual Offenses Against Minors

Please see the attached Testimony

Collection of DNA Upon Arrest Not A Fourth Amendment Violation

Many US states have begun to protect victims and the innocent, while more quickly identifying dangerous perpetrators, by requiring DNA to be collected upon felony arrest. However, many other states, have been reticent to pass a law that some opponents claim to be unconstitutional and a violation of the Fourth Amendment However, many of opponents to this law used the same arguments against collection of DNA from convicted offenders. After losing the legislative battle, oppoenents challenged the constitutionality of laws for convicted offender DNA testing in state and federal courts. The statutes were overwhelmingly upheld. While most states with arrestee DNA laws have yet see challenges to these new statutes, previous court decisions and the rationale supporting those decisions have been clear that the processes, procedures and benefits of taking DNA is as constitutionally sound as taking fingerprints during the criminal booking process.

The Fourth Amendment

The Fourth Amendment to the Constitution protects individuals from those searches and seizures which are "unreasonable." For years, the Courts, including the US Supreme Court, have found that, when a suspect is arrested with probable cause, identification is a matter of legitimate state interest. The rationale to this decision is that identification of suspects is "relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes." (*Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992); *Johnson v. Commonwealth*, 259 Va. 654, 672, 529 S.E.2d 769, 779 (2000).) This becomes particularly clear when we consider the universal nature of booking procedures for every suspect arrested for a felony, whether or not the proof of a particular suspect's crime involves fingerprint evidence.

Throughout the country, the collection of DNA samples at arrest has been widely accepted. In fact, in the only challenge to arrestee DNA statutes to reach the state Supreme Court level, the Virginia Supreme Court ruled in *Anderson v. Commonwealth* (2007 Va. LEXIS 115 (Va. September 14, 2007)) that, "the taking of Anderson's DNA sample upon arrest in Stafford County pursuant to Code § 19.2-310.2:1 is analogous to the taking of a suspect's fingerprints upon arrest and was not an unlawful search under the Fourth Amendment." In addition to the *Jones* and *Anderson* rulings, also consider:

- The Second Circuit held "[t]he collection and maintenance of DNA information, while effected through relatively more intrusive procedures such as blood draws or buccal check swabs, in our view plays the same role as fingerprinting." *Nicholas v. Goord*, 430 F.3d 652, 671 (2d Cir. 2005), cert. denied, ___ U.S. ___, 127 S.Ct. 384 (2006).
- The Third Circuit held "[t]he governmental justification for [DNA] identification relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods." *United States v. Sczubelek*, 402 F.3d 175, 185-86 (3d Cir. 2005), cert. denied, ___ U.S. ___, 126 S.Ct. 2930 (2006).
- The Ninth Circuit held"[t]hat the gathering of DNA information requires the drawing of blood rather than inking and rolling a person's fingertips does not elevate the intrusion upon the plaintiffs' Fourth Amendment interests to a level beyond minimal." *Rise v. State*, 59 F.3d 1556, 1560 (9th Cir. 1995).
- Maryland held "The purpose [of the DNA profile] is akin to that of a fingerprint. (*State v. Raines*, 857 A.2d 19, 33 (Md. 2004).
- New Jersey held, "We harbor no doubt that the taking of a buccal cheek swab is a very minor physical intrusion upon the person . . . [T]hat intrusion is no more intrusive than the fingerprint procedure and the taking of one's photograph that a person must already undergo as part of the normal arrest process." *State v. O'Hagen*, 914 A.2d 267, 280 (N.J. 2007)
- Oregon held, "Because using a swab to take a DNA sample from the mucous membrane of an arrestee's cheek is akin to the fingerprinting of a person in custody, we conclude that the seizure of defendant's DNA did not constitute an unreasonable seizure under the constitution." *State v. Brown*, 157 P.3d 301, 303 (Or. Ct. App. 2007)

Arrestee DNA Databases

24 States Have Passed Arrestee DNA Database Laws

14 States Have Introduced Arrestee DNA Database Bills