LATE TESTIMONY

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

Committee:	Committee on Judiciary and Labor
Hearing Date/Time:	Tuesday, January 31, 2017, 9:00 a.m.
Place:	Room 016
Re:	*Testimony of the ACLU of Hawaii in **Opposition** to S.B. 320, Relating to Forensic Identification*

Dear Chair Keith-Agaran, Vice Chair Rhoads, and Committee Members:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in **opposition** to S.B. 320, which allows for the retroactive DNA sampling of past felony offenders who have already finished their sentence or were otherwise discharged from correctional supervision.

Coercing individuals who are no longer under the supervision of the criminal justice system to submit to DNA sampling constitutes an excessive government intrusion into personal genetic information. S.B. 320 does not require a showing of reasonable individualized suspicion, so while the courts have generally upheld DNA collection from arrestees and convicted felons who are incarcerated, on probation or parole, or in sex offender registries, individuals who are no longer under supervision of the state have *as significant* a privacy interest in their biological information as anyone else. Indeed, in U.S. v. Kincade, in which the 9th Circuit Court of Appeals ultimately upheld mandatory DNA sampling from offenders on probation, parole, or supervised release, Judge Gould, in his concurring opinion, drew an instructive distinction between those to whom Hawaii's current law would apply and individuals who would be subject to DNA sampling under the proposed amendments made by S.B. 320:

> What we do not have before us is a petitioner who has fully paid his or her debt to society, who has completely served his or her term, and who has left the penal system. In that case, the special need that I identify to maintain the DNA is gone, but the record of the felon's DNA in the CODIS database is not. Once those previously on supervised release have wholly cleared their debt to society, the question may be raised, "Should the CODIS entry be erased" Although it might seem counter-intuitive to law enforcement that a record once gleaned might be lost, there is a substantial privacy interest at stake. In a proper case where this issue is presented, we would presumably need to weigh society's benefit from retention of the DNA records of a felon against that person's right, in a classical sense, to privacy.[1]

Individuals who have completed their sentence and period of probation, parole, and/or supervised release have served their debt to society. Forcing these individuals to submit to seizures of biological information, under threat of criminal penalties, may violate the Fourth Amendment right against

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[1] *U.S. v. Kincade*, 379 F.3d 813, 841-42 (9th Cir. 2004) (en banc) (J. Gould, concurring on separate grounds).

unreasonable searches and seizures, the Fourteenth Amendment right to procedural and substantive due process, and the state constitutional right to privacy. Should S.B. 320 be enacted into law, it would likely be met with immediate legal challenge.

For these reasons, the ACLU of Hawaii urges the Committee to defer S.B. 320.

Thank you for this opportunity to testify.

Mandy Finlay
Advocacy Coordinator
ACLU of Hawaii

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for 50 years.

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