

CCDLA
“Ready in the Defense of Liberty”
Founded in 1988

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March 7, 2011

The Honorable Eric D. Coleman
The Honorable Gerald M. Fox.
Chairmen
Joint Committee on Judiciary
Room 2500, Legislative Office Building
Hartford, CT 06106

Re: Raised Bill No. 6489, An Act Requiring DNA Testing of Persons Arrested for the Commission of A Serious Felony

Dear Chairmen and Committee Members:

My name is Christopher Duby and I have my own law practice in North Haven. Since becoming a lawyer, I have focused a large part of my practice in representing defendants in criminal matters. As a part of my criminal practice, I represent indigent defendants in criminal, appellate and habeas corpus matters on a regular basis. I am also on the Executive Board of the Connecticut Criminal Defense Lawyers Association, on whose behalf I submit this testimony.

As the members of the Committee may know, the Connecticut Criminal Defense Lawyers Association (CCDLA) is a statewide organization of 350 lawyers dedicated to defending people accused of criminal offenses. Founded in 1988, CCDLA works to improve the criminal justice system by insuring that the individual rights guaranteed by the Connecticut and United States constitutions are applied fairly and equally, and that those rights are not diminished.

CCDLA opposes the passage of Raised Bill No. 6489, *An Act Requiring DNA Testing of Persons Arrested for the Commission of A Serious Felony*.

CCDLA opposes the taking of blood or other DNA samples from individuals **arrested but not yet convicted of a felony**. The Association opposes the raised bill for five reasons. They are:

(1) the intent of the proposed legislation is in direct and immediate conflict with various Connecticut and federal constitutional guarantees;

(2) such law, if enacted, violates the privacy of people who are arrested but whose guilt or innocence has yet to be adjudicated;

(3) local police departments would be required to absorb the cost of collecting DNA sample, thereby imposing an additional administrative cost on already-overburdened agencies;

(4) there is no assurance that the dismissal, nolle or other non-guilt disposition would result in any protection of the defendant's privacy rights;

(5) The Connecticut forensic lab is already over-burdened so the processing of DNA materials from those yet to be convicted will further add to the lab's work load.

The proposed legislation is similar to other legislation that has been before this Committee on prior occasions. In its present form, the proposed legislation requires, in relevant part:

Section 1. Section 54-102g of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2011*):

(a) Any person who is arrested on or after the effective date of this section for the commission of a serious felony shall, prior to release from custody and at such time as the law enforcement agency that arrested such person may specify, submit to the taking of a blood or other biological sample for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. For purpose of this subsection, "serious felony" means a violation of section 53a-54a, 53a-54b, 53a-54c, 53a-54d, 53a-55, 53a-55a, 53a-56, 53a-56b, 53a-57, 53a-59, 53a-59a, 53a-60, 53a-60a, 53a-60b, 53a-60c, 53a-70, 53a-70a, 53a-70b, 53a-72b, 53a-92, 53a-92a, 53a-94, 53a-94a, 53a-95, 53a-100aa, 53a-101, 53a-102, 53a-102a, 53a-103a, 53a-111, 53a-112, 53a-134, 53a-135, 53a-136, 53a-167c, 53a-179b, 53a-179c, or 53a-181c.

The Association recognizes that there is a long-standing policy for law enforcement agencies to take fingerprint samples from arrestees for **purely identification** purposes. Raise Bill No. 6489 would allow police to expand the process to collect DNA samples of individuals that have not been convicted of a crime. It is axiomatic that any person arrested for any crime, even the most heinous, are innocent citizens and their guilt must be proved by the State beyond a reasonable doubt. *In Re Winship, 397 US 358 (1970) [holding that the prosecutor must prove each element of a criminal offense beyond a reasonable doubt so that such conviction is constitutionally obtained]*

The taking of DNA samples is intrusive, unnecessary for identification purposes, is ripe for abuse, permits trolling of genetic markers for family members of those arrested, risks the permanent retention of DNA material of innocent citizens and provides unprecedented access to the private lives – down to their nuclear composition – of Connecticut citizens or people who were arrested here.

1) DNA Databases

As the members of this Committee are likely aware, the Federal Bureau of Investigation maintains the Combined DNA Index System or, as it is commonly know, "CODIS." CODIS provides two searchable databanks, one containing DNA profiles from individuals who have been convicted of one of several felonies, and the other containing DNA profiles from evidence that was obtained from crime scenes. *See, A Litigator's Guide to DNA From the Laboratory to the Courtroom, R. Michaelis, R. Flanders, P. Wulf, Academic Press, 2008* The DNA evidence obtained at crime scenes, if it is of human origin, is from people present at a crime scene but whose identity is not matched with that sample.

In Connecticut, defendants convicted of a felony are required to give a DNA sample by being convicted of certain offenses. *Conn. Gen. Stat. §54-102g* A convicted defendant's failure to comply with this provision is guilty of a Class C felony.

The Association presumes that any DNA material gathered from a person *arrested* for a serious felony would become a part of CODIS and therefore "designed to aid in future investigations. . ." *Ramos v. Commissioner of Correction*, 67 Conn. App. 654, 660 (2002)

2) Current DNA Gathering Procedure for Arrestees

The Association asserts that there already is a functioning means by which the State may obtain DNA samples from someone arrested for a violation of Connecticut law. In such instance, if the State is able to gather DNA evidence at the crime scene, the State often moves for an order from the trial court compelling the defendant to produce a DNA sample. This process permits a defendant to object or otherwise protect his rights against searches, while also protecting the State's ability to gather needed evidence which may also serve to free the defendant from any criminal liability.

3) The Intent of the Proposed Legislation Is in Direct and Immediate Conflict with Various Connecticut and Federal Constitutional Guarantees

The American Constitution Society published an analysis of the privacy issues surrounding the collection of DNA samples in August 2007. In its article "A New Era of DNA Collections: At What Cost to Civil Liberties?," Tania Simoncelli, Science Advisor in the Technology and Liberty Program at the American Civil Liberties Union, and Sheldon Krimsky, Professor of Urban & Environmental Policy & Planning, School of Arts and Sciences at Tufts University, describe the increasing use by law enforcement of DNA databanks and express concern about the civil liberty ramifications of this expansion. The authors of that report include the following concerns and comments, which are supplemented by the undersigned's additional research:

A. DNA Compared to Fingerprints

A person's DNA contains vast amounts of highly personal information. Those who argue vigorously for collecting and data banking DNA often compare this process to that of collecting and data banking fingerprints. However, fingerprints differ *substantially* from biological samples that provide DNA. Fingerprints are two-dimensional images of the raised portion of the skin around the fingertips. Using the visible individualized characteristics of a fingerprint, it can, on occasion, be used to identify a person, with certain and growing limitations.

The ability to identify a person via fingerprint analysis has been called into question by the National Academy of Sciences, a part of the National Research Council. *See, Strengthening Forensic Science in the United States, A Path Forward, National Research Council of the National Academies, 2009.*

By contrast, DNA, which must be extracted from a tissue sample and mined for data, contains exactly the kind of information that raises privacy and civil liberty concerns. DNA samples can provide insights into familial connections, physical attributes, genetic mutations, ancestry and disease predisposition. "Many common

diseases, such as cancer, Alzheimer disease, diabetes, asthma and cardiovascular disease, are caused by the additive, multiplicative or synergistic effective of several causative factors, including functional polymorphisms in critical genes. ***Many people worry that insurance companies, employers and others may use genetic information to discriminate against them on the basis of their predicted long-term health status.*** R. Michaelis, *supra*, at 12 (emphasis added)

Genetic information could be used in discriminatory ways and may include information that the contributor did not even want to know. Repeated claims that human behaviors such as aggression, substance addiction, criminal tendencies and sexual orientation can be explained by genetics render law enforcement's collection, use and retention of DNA potentially prone to abuse, at worst, or, at best, will reveal about a person private and serious issues that they may have wished to live their lives without knowing.

B. Fourth Amendment Considerations

The Fourth Amendment, made applicable to Connecticut through the Fourteenth Amendment, guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Article First, §7 of the Connecticut Constitution states: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize persons or things, shall issue without describing them as nearly as may be, not without probable cause supported by oath or affirmation."

Under both constitutional schemes, the conduct of a search generally requires probable cause and a judicial warrant, or, at least, individualized suspicion.

American courts have consistently found that the collection and analysis of DNA constitutes a search for two reasons. First, bodily (or at least tissue) intrusion is necessary for DNA extraction. Second, there is a substantial and uniquely personalized nature in the information contained in the DNA itself, thereby triggering protections guaranteed under the Fourth Amendment and Article First, §7. At the same time, though, courts have upheld the operation of convicted offender DNA databanks – including the forcible extraction and banking of DNA – for two reasons: (1) because the government's interest is one of special needs beyond the need for normal law enforcement or (2) because convicted felons have a diminished expectation of privacy, as balanced against society's need to promote law and order.

The Association submits that compelling an arrestee to forcibly contribute a DNA sample violates both the federal and Connecticut guarantee against searches. At the precise moment that the sample is taken, no probable cause exists to believe that the contributor was involved in any other criminal activity. Thusly, requiring the arrestee to essentially be a witness against himself *when law enforcement may not even know he is a suspect* goes beyond that which is otherwise permitted.

C. *Extraction of Arrestee DNA Will Lead To Litigation*

The New York City Medical Examiner's Office ("NYCME") keeps a "linkage database" of DNA it gathers in the course of performing its statutorily-mandated tasks. The New York Civil Liberties Union, in conjunction with The Innocence Project, sought a court order requiring that the NYCME expunge DNA samples it gathered for anyone who was acquitted or whose conviction is reversed on appeal or otherwise vacated. This "linkage database" contained DNA samples from anyone whose DNA was obtained in the course of a NYCME investigation.

The database that Connecticut will develop should the Raised Bill be enacted will be strikingly similar to the "linkage database" kept by the NYCME. It will contain highly personal genetic information about anyone arrested for an enumerated crime. Additional searches beyond those which are needed to develop and case and are supported by probable cause violate the Fourth Amendment.

The Association submits that design of a pre-conviction DNA databank will spawn substantial litigation given the fact that the State's interest in law enforcement has never been found to overcome an individual's privacy right in matter specific to that individual's unique and personal genetic disposition until that person is *convicted* of a crime.

4) Local Police Departments Would Be Required To Absorb The Cost of Collecting DNA samples, Thereby Imposing An Additional Administrative Cost On Already-Overburdened Agencies

The Association believes that the constitutional concerns raised above are sufficient to warrant the defeat of the Raised Bill. However, in the interest of providing the Committee with the Association's full analysis, it submits the following for the Committee's consideration.

As drafted, the Raised Bill states:

Sec. 2. Subsection (a) of section 54-102h of the general statutes is repealed and the following is substituted in lieu thereof (Effective October 1, 2011):

(a)(1) The collection of a blood or other biological sample from persons required to submit to the taking of such sample . . . shall be the responsibility of the law enforcement agency that arrested such person and shall be taken at a time and place specified by that agency prior to such person's release from custody.

Thusly, any police department of any political subdivision, the Connecticut State Police or any state agency with arrest powers would be required to obtain a DNA sample *prior to releasing the arrestee*. Such a requirement functions as an additional term of release above and beyond bond/bail requirements imposed by court.

The Raised Bill, in the undersigned's reading, provides no funding mechanism for this mandate. Such possible local expenses include: covering the cost of training police officers to obtain samples; proper storage of such samples of avoid degradation;

forwarding such samples to the appropriate examining agency; the cost of additional incarceration as samples are obtained; and any liability that may accrue to due injuries to arrestees or officers in gathering such samples.

The members of this Committee are no doubt aware of the current trying economic times. As the legislature contemplates possible concessions from public employees and increasing various taxes, mandating an additional and complex local cost – which is of questionable constitutional validity – is not appropriate.

5) The Connecticut Forensic Lab Is Already Over-Burdened So The Processing of DNA Materials From Those Yet To Be Convicted Will Further Add To The Lab's Work Load.

In all candor, the criminal bar is lucky to have the State Forensic Lab (known officially as the Division of Scientific Services within the Department of Public Safety). In the undersigned's experience, they are professional, courteous, forthright and willing to assist in answering questions and discussing cases. Though the undersigned has not practiced law in any other state, other states have private labs conduct forensic investigations per the terms of a contract or have a state lab that handles some exams and assigns others to contractors.

Having an established lab like Connecticut serves to cut down on litigation. For example, the lab's compliance with various medical, ethical and laboratory standards is relatively easy to establish when compared to a private contractor whose contract may have just started or ended.

Every agency, like any business, has a maximum workload, however. People can only do so much and do it will and properly for so long. In Connecticut, our state lab handles the analysis from every investigation conducted in all thirteen Judicial Districts. In the undersigned's experience, it can take more than a year to receive DNA results for certain cases.

The undersigned submits that this delay is due solely to the lab's workload. Its employees must be precise and correct in each case without taking short cuts. The service the lab provides is often of paramount import in a criminal case. In point of fact, the State is able to convict guilty defendants based on DNA analysis while also being able to set free those wrongfully accused based on the lab's work.

The Raised Bill will impose an additional burden on the state lab. Presumptively, the lab will be required to analyze the DNA samples submitted in accordance with the Raised Bill, as it requires the state lab to perform such testing. The undersigned submits that this cost not only is unjustified, but it would further delay the processing and prosecution of existing cases.

As a lawyer in the criminal courts, the undersigned respectfully submits that additional burdens on the forensic lab will needlessly delay existing cases and does so for reasons that are based on questionable constitutional grounds.

6) Conclusion.

For any and all of the foregoing reasons, CCDLA opposes the taking of blood or other DNA samples from ***individuals arrested but not convicted*** of a felony offense. DNA databanks should be limited to DNA profiles from persons who are convicted of serious crimes. All those presumed innocent do not have a diminished right to privacy and therefore should not have their DNA included in a forensic DNA databank.

Respectfully submitted,

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