



December 14, 2009

The Honorable Patrick J. Leahy
Chairman
Senate Committee on the Judiciary
U.S. Senate
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Senate Committee on the Judiciary
U.S. Senate
Washington, DC 20510

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Statement of the American Civil Liberties Union (ACLU) for Hearing on “Ensuring the Effective Use of DNA Evidence to Solve Rape Cases Nationwide”

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of the American Civil Liberties Union, a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide, we applaud the Senate Judiciary Committee for its hearing entitled “Ensuring the Effective Use of DNA Evidence to Solve Rape Cases Nationwide.” This important and timely hearing will be helpful in bringing attention to a glaring and unacceptable deficiency in our criminal justice system: the nation’s backlog in testing rape kits – the physical evidence collected from sexual assaults. As Congress considers ways to correct this injustice and ensure timely testing of rape kits, we caution against any effort that aims to further expand the collection of DNA samples from those who have merely been arrested, and not yet convicted, of a crime. Such an effort would only aggravate the problem of ever-mounting backlogs and will do little, if anything, to make us safer.

While the majority of rape victims give their consent to the creation of a rape kit, which are critical to actually solving and prosecuting these cases, tens of thousands of such kits across the country sit in police storage facilities and crime labs, sometimes for years on end, without being tested and having the information entered into state and federal DNA databases. Earlier this year, Human Rights Watch released a report entitled “Testing Justice: The Rape Kit Backlog in Los Angeles City and County.” The report revealed that Los Angeles County has the largest known rape kit backlog in the country. The report found –

At least 12,669 untested sexual assault kits ("rape kits") - which potentially contain DNA and other evidence collected from rape victims' bodies and clothes immediately after the crime - are sitting in police storage facilities in the Los Angeles Police Department, the Los Angeles County Sheriff's Department, and 47 independent police departments in Los Angeles County. A smaller, but not inconsiderable, backlog resides at police crime labs.¹

Additionally, an editorial in *The New York Times* in November of 2008 entitled "A DNA Backlog" stated –

California is not alone. West Virginia's State Police reported that its DNA case backlog grew to 697 cases by the end of 2007, from 560 cases six months earlier, despite receiving about \$230,000 in federal money. The Miami-Dade Police Department failed to spend any of the \$200,000 it requested in 2007 to cut its DNA backlog, whose size was not reported to the federal government.²

For hundreds, indeed thousands, of rape victims across the country, justice delayed is truly justice denied. It is entirely appropriate for Congress to investigate the causes of this backlog and examine potential remedies, such as requiring states that receive funding under the Debbie Smith DNA Backlog Grant Program to use a higher percentage of those funds specifically to test backlogged rape kits.

In working to ensure the timely testing of rape kits, Congress should not attempt to add needless controversy to this worthy effort by further expanding the collection of DNA samples from arrestees. In 2006, President Bush signed into law legislation that authorized DNA collection and retention from persons arrested or non-U.S. persons detained under federal authority.³ About a dozen states have similarly expanded their DNA database statutes to include DNA from some categories of arrestees.

The routine collection and permanent storage of DNA from persons who have simply been arrested, and not yet convicted, of a crime raises a host of troubling civil liberties and privacy concerns. At its core, such an effort violates one of the fundamental principles of American law, which is that one is presumed innocent until proven guilty. Housing a person's DNA in a criminal database renders that person an automatic suspect for any future crime – without warrant, probable cause or individualized suspicion.

¹ <http://www.hrw.org/sites/default/files/reports/rapekit0309web.pdf>

² <http://www.nytimes.com/2008/11/10/opinion/10mon2.html>

³ The "DNA Fingerprint Act of 2005" was signed into law as Title X of the "Violence Against Women Act" (VAWA), H.R. 3402, 109th Cong. (2006) (enacted). ("The Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested or from non-United States persons who are detained under the authority of the United States").

One of the causes of rape kit testing backlogs has been the heedless and costly expansion of DNA databases to ever-increasing categories of individuals. A recent audit by the U.S. Department of Justice reported that, despite more than \$1 billion that the federal government has poured into crime labs around the country over the past few years, state legislative changes have resulted in a backlog of 600,000-700,000 convicted offender samples. That same report concludes that arrestee testing could derail current attempts to reduce these backlogs and “estimate[s] that the expansion of legislation to include arrestees would increase the annual receipt of DNA samples by 223 percent.”⁴ According to the FBI, there were an estimated 14,005,615 arrests in 2008 for all offenses (except traffic violations).⁵

The collection of DNA constitutes a “search” and therefore triggers the full protections afforded by the Fourth Amendment. While U.S. courts have generally ruled that DNA banking of convicted felons is permissible because a person convicted of a crime has a “diminished expectation of privacy,” this cannot be said for those who have merely been arrested or charged with a crime.⁶ To date, two state courts and one federal district court have recognized this distinction and declared routine DNA testing of arrestees unconstitutional.⁷ While any arrest involves a degree of lost privacy, the seizure, testing and storage of DNA information without a showing of guilt goes well beyond the limitations the Constitution places on searches and seizures incident to an arrest.

There is ample and solid evidence that collecting DNA at the point of arrest will do little if anything to make us safer. In Britain, where the national DNA database has in recent years been flooded with hundreds of thousands of arrestees, including children as young as 10, this expansion in the number of DNA samples in the database has *not* led to an increase in the number of crimes solved.⁸ This is because individuals who have never been convicted of a crime are unlikely to be involved in a violent crime where DNA evidence is available. The effectiveness of a DNA database is limited not by the number of *individual samples*, but instead by the number of *crime scenes samples*.

Law enforcement has always had ample authority to collect DNA from an individual in cases where DNA evidence is relevant in establishing whether that individual may have been involved in the crime. That process involves obtaining a court-issued warrant supported by probable cause. DNA samples collected under these circumstances may be tested and compared with the

⁴ <http://www.justice.gov/oig/reports/OJP/a0923/final.pdf>

⁵ U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States 2008*, <http://www.fbi.gov/ucr/cius2008/arrests/index.html>

⁶ *See, e.g.*, *Landry v. Att’y Gen.*, 709 N.E.2d 1085, 1092 (Mass. 1999); *see also Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *People v. Wealer*, 636 N.E.2d 1129 (Ill. App. Ct.); *Jones, supra* not 6, at 308.

⁷ *United States v. Mitchell*, 2009 U.S. Dist. Lexis 103575 (W. D. Penn. Nov. 6, 2009); *United States v. Purdy*, 2005 WL 3465721 (D. Neb. Dec. 19, 2005); *In the Matter of the Welfare of C.T.L.*, 722 N.W.2d484 (Minn. App. 2006).

⁸ Genewatch UK, “Human Genetics Parliamentary Briefing No. 6 -- The Police National DNA Database: An Update,” July 2006.

biological evidence collected from the crime scene in question. This warrant authority strikes an appropriate balance between meeting public safety needs while ensuring that a person is not subjected to potentially lifelong genetic surveillance unless or until he or she is first convicted of a crime.

Finally, expansion of DNA databases to arrestees perpetuates the racial biases that are systemic in our criminal justice system. The persistent and well-documented practice of discriminatory profiling in law enforcement combined with expanded DNA collection would inevitably result in an increasingly skewed criminal database in which minority populations are disproportionately overrepresented.

We thank the Committee for holding this important hearing on an often ignored aspect of our criminal justice system. Congress should pursue appropriate remedies to reduce the unacceptable national backlog in testing rape kits to ensure that justice for the survivors of sexual assault is not simply denied. As it examines ways to accomplish this worthy goal, any effort to expand DNA collection should be rejected as an unnecessary diversion of already scarce resources from the important task of rape kit testing, in addition to a fundamental violation of the presumption of innocence afforded to all arrestees.

Sincerely,



Michael W. Macleod-Ball
Acting Director, Washington Legislative Office



Jennifer Bellamy
Legislative Counsel

Cc: Senate Judiciary Committee