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TESTIMONY SUBMITTED TO
HOUSE JUDICIARY COMMITTEE
SUBMITTED BY
ANDREW HOOVER, LEGISLATIVE DIRECTOR, ACLU OF PA
RE: SENATE BILL 150 (DNA COLLECTION AT ARREST)
STATE CAPITOL, HARRISBURG
NOVEMBER 12, 2013

Good morning, Chairman Marsico, Chairman Caltagirone, and members of the committee. Thank you for the opportunity to provide testimony today on Senate Bill 150. My name is Andy Hoover, and I am the legislative director of the American Civil Liberties Union of Pennsylvania. The ACLU was founded in 1920 and currently includes 600,000 members nationwide. I am here today on behalf of the 20,000 members of the ACLU of Pennsylvania.

As you know, Senate Bill 150 would expand Pennsylvania's current DNA collection statute by taking DNA samples from people who have been arrested but not convicted of a felony or one of several enumerated misdemeanors. Under current law, DNA is collected from those persons convicted of one of those crimes.

Once the DNA sample is collected and analyzed, the DNA profile is submitted to databases managed by the Pennsylvania State Police (PSP) and the Federal Bureau of Investigation (FBI). At that point, the profile is available for comparison with unsolved crimes and future crimes that involve DNA evidence. This high-tech storage of a person's DNA profile turns the person into a de facto suspect indefinitely.

SB 150 also authorizes what are known as "familial searches." This provision allows DNA analysts to disclose to investigators that a DNA profile is a close enough match to a person in the database that the profile may belong to a close family member. In other words, when a person's profile is submitted to the state database, his family members are also now permanent suspects, constantly being checked against unsolved and future crimes.

The ACLU of Pennsylvania opposes Senate Bill 150. Last year, we agreed with 132 House members, including the Speaker of the House, who voted "yes" to an amendment that removed the DNA collection provision from a similar bill.

There are few things more private than our biological identity. DNA comprises an individual's entire genetic blueprint and is not simply an identifier. Our DNA reveals more than one thousand genetic conditions or traits, including susceptibility to many diseases and mental illness, ancestry, and personality traits. DNA collection is far different from fingerprinting.

Because SB 150 mandates the collection of DNA from persons who have been arrested but not convicted of a crime, it turns a fundamental concept of our criminal justice system- "innocent until proven guilty"- on its head. Certainly, a person who has been convicted of a crime has diminished privacy rights. But a person who is arrested is still innocent under the law. Many are

factually innocent. As such, fundamental American principles demand that the government seek a search warrant with individualized suspicion before it can search a person in this way.

The collection of the DNA sample involves an invasive process. To collect the sample, typically a government agent swabs the inside of the person's mouth. Any reasonable person would agree that it is a search when a government agent penetrates the bodily integrity of another person.

As you know, the United States Supreme Court upheld a similar law in Maryland earlier this year in a split, 5-4 decision. In a powerful dissent, Justice Antonin Scalia noted that the majority opinion in *Maryland v. King* leaves a "gaping hole" in the Fourth Amendment:

> Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime. It is obvious that no such noninvestigative motive exists in this case. The Court's assertion that DNA is being taken, not to solve crimes, but to identify those in the State's custody, taxes the credulity of the credulous. And the Court's comparison of Maryland's DNA searches to other techniques, such as fingerprinting, can seem apt only to those who know no more than today's opinion has chosen to tell them about how those DNA searches actually work.

The Supreme Court may have found that DNA collection of arrestees passes federal constitutional muster, but SB 150 does not get a constitutional pass yet. It is possible that this type of warrantless search would face hurdles under the state constitution. The language of the Fourth Amendment of the federal constitution[1] and of Article I, Section VIII of the state constitution is nearly identical.[2] But Pennsylvania courts have historically ruled that the state constitution provides greater privacy protections than the federal constitution.

To be clear, there is no state case law that is directly related to the situation at hand, that we are aware of. And there have been some cases in which the state Supreme Court has ruled that Article I Section VIII is in parity with the Fourth Amendment. But there are several cases related to enhanced protections in the state constitution that at least allow for speculation that warrantless DNA collection may not pass state constitutional muster.

In at least five instances, the Pennsylvania Supreme Court has ruled that the state constitution provides greater protection in search-and-seizure than the federal constitution. I would like to highlight two of those cases. In *Commonwealth v. Matos* (1996), the Pennsylvania Supreme Court held that Article I Section VIII does not permit the seizure of contraband that Matos had discarded while fleeing from the police. Matos ran at the sight of two officers. The Court found that the subsequent chase by the police was a seizure under Art. I § 8, and that in order for the seizure to be lawful, the police needed to demonstrate probable cause to make the seizure. Running from police constitutes neither the reasonable suspicion necessary to stop a person nor

[1] "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."
[2] "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed by the affiant."

the probable cause that would justify a warrantless search of their person. The Court concluded that the police coerced Matos to discard the contraband through an unlawful seizure, and the evidence could not be admitted under Art. I § 8. Under *California v. Hodari D.* (1991) the police actions would not violate the Fourth Amendment.

In *Commonwealth v. Polo* (2000), Polo was arrested after police found crack cocaine in his bag following a routine drug interdiction on a bus. The Court found that Art. I § 8 prevented the police from conducting such interdictions when there was neither reasonable suspicion to justify the stop nor probable cause to sustain a warrantless search. The federal Supreme Court reached the opposite conclusion, permitting such interdictions under the Fourth Amendment in *Florida v. Bostick* (1991).

Supporters of SB 150 argue that warrantless DNA collection from arrestees will solve crimes. It is true. This type of collection will solve some crimes. But the Maryland experience suggests that the number of crimes that will be solved is miniscule. In 2009, the Maryland State Police (MSP) collected 11,600 samples from persons who had been charged with the eligible crimes. The new collection law led to one additional conviction for an unsolved crime. In 2010, MSP collected 11,486 samples, leading to three additional convictions. In 2011, 10,666 samples were collected, which lead to nine additional convictions.[3]

In total, in a three year period from 2009 to 2011, Maryland collected 33,752 DNA samples, leading to 13 additional convictions. That is a percentage of 0.039 percent. The payoff of preconviction DNA collection does not outweigh the massive costs and burden of this type of law.

Of course, it is possible that solving unsolved crimes is only a secondary goal of the supporters. It has been estimated that annual DNA collection in Pennsylvania will increase by 400-500 percent if SB 150 is implemented.[4] This would massively expand the existing DNA database and would annually add tens of thousands of Pennsylvanians who are not currently in it. As long as large DNA databases are maintained, the temptation will be to use them for other purposes, as demonstrated by the expanded use of the Social Security Administration database. This could include accessing stored DNA samples for research on criminality or other human behavioral traits. The expansion of DNA databases to the innocent paves the way for a universal database, where DNA is collected at birth, placing every citizen under lifelong genetic surveillance.

There are also localized, rogue DNA databanks that are operating outside of a state's jurisdiction, which include the personal genetic material of innocent people and the exonerated. Some local municipalities are collecting and storing DNA samples without a warrant from witnesses and suspects. *The New York Times* reported on these local DNA databases in June,[5] and Bensalem

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[3] *2011 Annual Report: Maryland State Police Forensic Sciences Division Statewide DNA Database Report.* April 2012.

[4] Farr, S. (2012) Not quite CSI: With an 8-month backlog in processing DNA, justice is drowning in the gene pool. *Philadelphia Inquirer, February 15, 2012.* Available at http://articles.philly.com/2012-02-15/news/31063561_1_backlog-dna-lab-dna-database.

[5] Goldstein, J. (2013) Police agencies are assembling records of DNA. *The New York Times, June 12, 2013.* Available at http://www.nytimes.com/2013/06/13/us/police-agencies-are-assembling-records-of-dna.html.

Township, Bucks County, was among the municipalities highlighted in the *Times'* reporting. Expansion of databases to arrestees may serve to legitimize these local databases.

You will hear more from other witnesses about the costs of expansion of DNA collection and the impact on the workload of DNA analysts. I will not go into detail about those issues here. But it is noteworthy that an increase in the workload of the state's DNA labs could actually lead to less solved crime, or at least a slowdown in the ability to solve crimes. In addition, PSP remains hundreds of troopers below its preferred staffing levels. Expansion of DNA collection might lead to solving 0.039 percent of unsolved crimes. But spending that money instead on putting hundreds of additional troopers on the streets may prevent crime from occurring in the first place.

Expansion of DNA collection to include people who have not been convicted of a crime is a massive ballooning of the total information society. It is expensive. It causes backlogs in DNA labs. It does little to solve crime. And it may be unconstitutional under the state constitution. The ACLU of Pennsylvania encourages the members of this committee and the members of the House to reject Senate Bill 150, as the House did last year. Chairman Marsico, thank you for the opportunity to be here today.