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Testimony for the Maryland Senate Judiciary Committee
January 31, 2008
SB 51—Public Safety – DNA Data Base System – Sample Collection on Arrest
Oppose

I am a practicing lawyer in Montgomery County and an Adjunct Professor at the University of the District of Columbia, David A. Clarke School of Law (UDC-DCSL). Four years ago, I litigated a constitutional challenge to Maryland's DNA collection statute, *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004); even though the Maryland Court of Appeals sustained the constitutionality of the statute as applied to an inmate serving a sentence in the Department of Corrections, the 4 – 3 decision recognized that substantial privacy interests are at stake when the government compels the collection of DNA from its citizenry. Subsequently, with UDC-DCSL Associate Professor William G. McLain, I co-authored a critical account of the *Raines* decision for Maryland practitioners, *Maryland's DNA Databank*, Nov./Dec. 2004 MD. B.J. 17, and I remain actively involved in litigation and public commentary on issues arising at the intersection of DNA testing and civil liberties; for example, I recently appeared on CBS's Sixty Minutes newsmagazine program in a segment that focused on the emerging practice of "familial" and kinship searching of DNA databanks.

Although there are large issues about the constitutionality of legislation to collect DNA from arrestees, I am not going to address all of them (for a more comprehensive discussion, I recommend Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 33 J.L. MED. & ETHICS (2005)); rather, I am going to address today the more specific question of how the Maryland Court of Appeals will likely respond to the expansion of the State's database to include DNA seized from arrestees.

Two basic propositions are routinely advanced by proponents of this legislation: First, that the compelled collection of DNA from arrestees is no different than fingerprints taken from them at the time of booking, and second, that the constitutionality of this legislation will surely be sustained by the Maryland Court of Appeals. Both suppositions are, at best, misleadingly oversimplified, and in the view of many, simply incorrect. I will address both in turn.

It is a canard that DNA is indistinguishable from fingerprinting. This is why the notion is misleading to the point of outright deception:

- A fingerprint is nothing more than a means of identification. DNA can certainly be used for that, but to suggest that is all DNA can be used for is wildly misleading. DNA is packed with intimate information about a person. Unlike the ridges and whorls of a fingerprint – which reveal nothing about a person other than identity – DNA carries within it information that can provide insights into the most intimate workings of the human body. There are already scientists who predict that DNA’s genetic markers will soon be decoded for mental illness, sexual preference, substance abuse, and other personality traits, and it is quite likely that the emerging discipline of behavioral genetics will eventually assert the capability to predict, through DNA analysis, the likelihood of future violent or otherwise antisocial conduct. *See generally Genetics and Criminal Behavior* (David Wasserman & Robert Wachbroit eds., 2001); *see also, e.g.*, a recent article co-authored by the University of Maryland School of Law Dean Karen Rothenberg and Alice Wang, *The Scarlet Gene: Behavioral Genetics, Criminal Law, and Racial and Ethnic Stigma*, 69 LAW & CONTEMP. PROBS. 343 (2006).
- Any identifier, whatever its other uses, can also be used for surveillance purposes. That may not be alarming with respect to a convicted offender, or perhaps even an arrestee, but this difference is crucial: a fingerprint provides for only for surveillance of the person who provides it, while DNA can be used to surveill *everyone* related to the person who supplies the sample. If your parent, child, or sibling has contributed DNA to a database, you, too, may be under genetic surveillance by the government.

Secondly, proponents of the legislation assert that this scheme is clearly constitutional, and they may even cite the *Raines* case as supporting that proposition. However, as a lawyer who litigated *Raines* and who knows *exactly* what was said by each judge on the *Raines* court, I strongly doubt that the Maryland Court of Appeals will greet extension of the State’s DNA database to arrestees with an enthusiastic endorsement of its constitutionality.

To understand the position of the Court of Appeals, one must be quite clear about what happened in *Raines*:

- *Raines* was a 4 – 3 decision upholding the constitutionality of the DNA collection statute as applied to an imprisoned felony convict. There was, however, no opinion for the Court – merely an opinion for a two-judge plurality. The same two judges would, very probably, likewise sustain the constitutionality of the statute as expanded to arrestees. However, two other judges who concluded that the present statute is constitutional – Judges Raker and Wilner –

concurring only in the judgment, and both wrote separate opinions. Chief Judge Bell wrote a dissenting opinion, in which Judges Harrell and Greene joined.

- Despite the split in votes, there are overarching principles that run through the various opinions. Judge Raker sustained the constitutionality of the statute on the narrow ground that it only compelled the collection of DNA from an inmate, while Judge Wilner upheld the statute – with expressed reluctance – on the similar theory that it required DNA collection only from someone whose conduct had already been “judicially determined” to be criminal, and who had, therefore, a lessened expectation of privacy. Most importantly, a majority of the Court – Chief Judge Bell, and Judges Harrell, Greene, and Wilner – agreed that the privacy interest at stake is defined by amount and scope of the information seized, rather than by the extent of the intrusion in the taking of it.

For those reasons, I suggest that proponents of this legislation are wrong when they claim that taking an arrestee’s DNA is no different than taking a fingerprint, and I also suggest that, for the same reasons, the Court of Appeals will likely find this legislation to be constitutionally infirm on the basis of the common themes running through the opinions of five of the judges in *Raines*. But I want to stress that, in so saying, I do *not* question the good faith of any of the proponents of the bill. The proponents are, without doubt, motivated by an understandable and benevolent desire to maximize the protections afforded by the criminal justice system to victims of criminal activity. It is, however, precisely for that reason that the legislature should proceed only with due deliberation; objectively reflect on the merits of this proposal; and throughout the legislative process recall the insightful teaching of Justice Brandeis in his dissenting opinion in *Olmsted v. United States*, 277 U.S. 438, 479 (1928), echoed and emphasized by Chief Judge Bell in *Raines*, 383 Md. at 75, 857 A.2d at 64:

[I]t is ... immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

I oppose SB 51.