CaliforniaCivilLiberties.org

California Civil Liberties Advocacy
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Monday, March 6, 2017

Senator Steven Glazer
State Capitol
Room 5108
Sacramento, CA 95814-4900

RE: Senate Bill 781 (Glazer)

Dear Senator Glazer,

The California Civil Liberties Advocacy (CCLA) is writing to enlist its **OPPOSITION** to SB 781 for the reasons listed herein:

(1) Recent studies suggesting that the interpretation of DNA evidence are often subjective are often overlooked or ignored by our legislature in shaping public policy.

For several years, the CCLA has attempted to draw the attention of the California State Legislature to a peer-reviewed study that was published in Science and Justice in 2011. (See Attachment.) The abstract of that article states "[w]hen 17 North American expert DNA examiners were asked for their interpretation of data from an adjudicated criminal case in that jurisdiction, they produced inconsistent interpretations . . . the majority of 'context free' experts disagreed with the laboratory's pre-trial conclusions, suggesting that the extraneous context of the criminal case may have influenced the interpretation of the DNA evidence, thereby showing a biasing effect of contextual information in DNA mixture interpretation." (Dror & Hampikian, *Subjectivity and bias in forensic DNA mixture interpretation* (2011) Science and Justice.) While the consideration of DNA evidence and how it is used in California's criminal justice system may be beyond the scope of this particular bill, it is hardly an issue that should be ignored when this Legislature is presented with policy questions such as this. At the very least, these types of studies certainly cast a shadow of doubt on the reliability of DNA evidence within the context of the criminal justice system.

(2) Additional scientific studies have revealed that the potential for government abuse of DNA evidence is even worse than privacy advocates have feared.

As described by an article in the Richmond Journal of Law and the Public Interest, "the tea leaves of [DNA] profiling will reveal connections from identification to gender to family to ancestry to behavioral profiling; and further to third party witnesses, alternate suspects, near matches (suspect relatives) and genetically identical siblings . . . DNA information is never viewed in isolation but associated with other database searches that in toto are revealing a new identification mosaic." (Strutin, *DNA Without Warrant: Decoding Privacy, Probable Cause and Personhood* (2015) Rich. JL & Pub. Int.) In 2013, a genetics researcher randomly picked five anonymous people from a study group and was able to identify them by their DNA, along with their entire families (who had not participated in the study), identifying nearly 50 additional people. (Kolata, *Web Hunt for DNA Sequences Leaves Privacy Compromised* (Jan. 17, 2013) The New York Times.) And in 2015, it was revealed that the popular web-based company 23andMe had received requests from law enforcement for customer DNA data five times, but prevailed in resisting the requests. (Maldarelli, *23andMe Discloses Police Requests For Customer' DNA: Five users' DNA samples have been wanted by the cops* (Oct. 22, 2015) Popular Science.) It appears that law enforcement agencies are inching closer and closer to creating sweeping DNA dragnets — something that individuals should be protected from by both the federal and state constitutions. This idea may seem preposterous to the proponents of this bill and we do not question their *intent*, but only the *sum total effect* that will result with each small step forward that our California State Legislature takes with each session.

Making matters worse, many crime labs are turning to proprietary software for DNA analyses. In 2014, the corporation Cybergenetics was awarded a United States patent for their software, TrueAllele. (Cybergenetics, *United States Patent Awarded for Computerized DNA Mixture Analysis: Cybergenetics TrueAllele Solves Crimes That Other Methods Cannot* (Dec. 2, 2014) Businesss Wire.) According to an article featured in *The Blog* by the Huffington Post, "Quantitatively, TrueAllele seems to be more reliable in probability modeling than typical methods used by forensics labs. However, the support for this claim consists only of peer-reviews and mock tests done by Cybergenetics." (Dang, *DNA Software Claims to Prevent Wrongful Convictions, but Lacks Third-Party Validation* (Apr. 7, 2016) Huffington Post (hereinafter *Dang*).) In a recent death penalty case, relying on the Sixth Amendment, the defendant's lawyers moved to examine TrueAllele's programming code in order to properly cross-examine the software's creator. That request was denied by the judge, citing fears that production of the source code would result financial harm to Cybergenetics! (*Dang, supra.*) With no way to independently verify TrueAllele's source code, it is impossible to ensure a defendant's due process rights, or if the software's conclusions are even accurate. Couple this problem with the fact that California incentivizes convictions by tying them to crime lab fees, and the situation becomes a civil liberties nightmare. (Koppl & Sacks, *The Criminal Justice System Creates Incentives for False Convictions* (2013) 32 Crim. Just. Ethics 126, 148; See Cal. Gov. Code § 76104.6.)

No one questions whether or not law enforcement should be able to do their job effectively. But privacy protections and due process were put into place by the founders of this country for a reason, and that was to protect the people from a government that could grow too large and powerful for ordinary citizens to serve as a check against. The right of the people to be free of an overly intrusive government should never be viewed as some form of an obstacle to be overcome in favor of law enforcement efficiency.

(3) The mandatory collection of DNA samples from persons convicted of misdemeanors produces felony consequences and obscures the distinction between serious and less serious crimes, invalidating the very purpose for the distinction.

Traditional jurisprudence follows the axiom that the "punishment should fit the crime," and thus misdemeanor convictions have traditionally carried lesser consequences than those of felonies. But in modern times, as corporate corrections entities and the trade unions that staff them (sometimes thinly disguised as victims' advocacy groups) press for tougher laws and higher minimum sentencing legislation, the line is becoming ever blurred between what constitutes a lesser and a more serious crime. If misdemeanants will begin carrying the same punishments and consequences of felony convictions, including being forced to give up fundamental privacy rights, then the question is impelled as to whether or not the punishment really does fit the crime. California's state government now appears to be choosing the path in which it ceases to distinguish between lesser and more serious offenses—namely, misdemeanors and felonies—then it defeats the purpose for having the distinction in the first place and advances the very "harder, not smarter" style policies which have led to the United States becoming the most over-incarcerated nation in the world.

(4) DNA sampling of misdemeanants in the hope of finding a match is literally a suspicionless search and sidesteps due process requirements, resulting in a genetic dragnet for the 21st century.

Allegedly, the reason for requiring DNA sampling of individuals arrested for serious and violent felonies is because such crimes are relatively rare and such offenders are more likely to have committed other serious offenses than misdemeanants, although this rationale is highly debatable. For example, according to the Judicial Council of California's *2014 Court Statistics Report*, a total of 241,238 felony dispositions were processed from 2012 to 2013, while the total for misdemeanors equaled 739,512 — more than three times that of felonies. (pp. 114-115.)

While proponents argue that misdemeanant DNA testing sometimes result in a match for serious or violent felony cases, the procedure wholly circumvents due process, resulting in a genetic dragnet for the 21st century. Requiring DNA samples in the hope of finding a match is actually a suspicionless search, which the founders of this nation sought to protect its citizens from.

In the Ninth Circuit opinion *U.S. v. Kincade*, Judge Reinhardt stated, "[t]he increasing use of DNA 'dragnets,' in which police officers encourage all individuals in a particular community to provide DNA samples to local law enforcement officials in order to assist an ongoing criminal investigation despite the absence of any individualized suspicion, serves as a concrete example of the type of practices which may shortly become commonplace unless the gradual erosion of Fourth Amendment protections now set in place is reversed." (*U.S. v. Kincade* (2004) 379 F.3d 813, 849 dis. opn. of Reinhardt, J., Kozinski, J., & Hawkins, J.).)

(5) Expanding DNA databanks only perpetuate a growing bureaucracy with near-limitless authority to compile extensive dossiers on individuals, regardless of factual innocence or rehabilitation.

Proponents may argue that "if you have nothing to hide, then you have nothing to fear." But this rationale is overly broad and only begs the question. Protecting one's privacy is not a singular issue and encompasses fears of government establishing a network by which to track its citizens. Allowing the government to perpetuate an ever growing, bureaucratic framework that allows law enforcement and other government entities to compile extensive dossiers, yet denying citizens the right to participate in how that information is used smacks of "Big Brother." The balance of power, especially under a democratic state, is frustrated between the people and the government by fostering a sense of mistrust, scrutiny, helplessness, and powerlessness. This "nothing to hide" argument proceeds from the false premise that protecting one's privacy necessarily constitutes some sort of criminal wrongdoing. Thus, coercing individuals accused of lesser crimes, who may have legitimate privacy fears as to how their DNA is stored and used in the future, is morally and ethically reprehensible. For instance, if such data were used to track the movements of and keep surveillance over such ones, this could have a chilling effect on the lawful exercise of First Amendment rights, such as free speech, free association, religion, or redress of grievances. Some have also argued that irresponsible use of such data could result in defaming one's reputation by guilt through association, or exposing potentially embarrassing behaviors. (Boyd, *The problem with the 'I have nothing to hide' argument*, The Dallas Morning News, June 14, 2013.)

The legal scholar Daniel Solove recommends that "[a]ny deviation from the warrant and probable cause requirement should ensure the following:

1) Searches should be as limited as possible.
2) Dragnet searches should be restricted.
3) Searches conducted without warrants and probable cause must be done only when there are no other alternatives.
4) The government must prove convincingly why the searches are impractical with a warrant or probable cause.
5) The value of conducting the search without a warrant or probable cause must outweigh the harms caused by the search, such as invasion of privacy and the chilling of speech, association, and religion.
6) Mechanisms must be in place to ensure that people's rights are adequately protected and that law-enforcement officials don't abuse their discretion.
7) The government should be required to delete unused information after a certain period of time."

(Solove, Nothing to Hide — The False Tradeoff between Privacy and Security (2011) pg. 133.)

Due to all of the foregoing reasons, the CCLA **OPPOSES** SB 781 unless amended to address these concerns.

Respectfully,

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Cc: Senate Public Safety Committee
State Capitol, Room 2031
Sacramento, CA 95814

Senator de León
Senator Joel Anderson
Senator Nancy Skinner
Senator Steven Bradford
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