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Tuesday, June 30, 2015

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

RE: Assembly Bill 390

Dear Public Safety Committee Members,

We are writing to enlist the CCLA's **OPPOSITION** to Assembly Bill 390.

Our reasoning is as follows:

I. The mandatory collection of DNA samples from persons convicted of misdemeanors is invasive and produces felony consequences, obscuring the distinction between serious and less serious crimes, and invalidating the very purpose for the distinction.

The author of AB 390 stated in a recent news article that collecting DNA samples is "pretty much non-invasive" because law enforcement personnel merely "swab[s] your cheek." (Gold, Cooper calls for Prop 47 reform—Former EG City Councilman's bill to change DNA collection policy for criminals, Elk Grove Citizen (Elk Grove, Calif.), March 3, 2015.) We concur that the literal procedure for collecting DNA is "pretty much non-invasive," as defined by the United States Supreme Court's majority opinion in *Maryland v. King* (2013) 133 S. Ct. 1958. However, we respectfully disagree with the majority and propound that this ruling was an error which will eventually be overturned. Joined by Justices Ginsberg, Sotomayor, and Kagan, Justice Scalia wrote critically of the majority's errant opinion in his dissent: "We are told that the 'privacy-related concerns' in the search of a home 'are weighty enough that the search may require a warrant[]' . . . [b]ut why are the 'privacy-related concerns' not also 'weighty' when an intrusion into the body is at stake?" (*King, supra*, at 1982.) Justice Scalia went on to state that "[n]o matter the degree of invasiveness, suspicionless searches are never allowed if their principal end is ordinary crime-solving. A search incident to arrest either serves other ends (such as officer safety, in a search for weapons) or is not suspicionless (as when there is reason to believe the arrestee possesses evidence relevant to the crime of arrest)." (King, supra.).

According to the Electronic Frontier Foundation, "DNA can reveal an extraordinary amount of private information . . . including familial relationships, medical history, predisposition for disease, and possibly even behavioral tendencies and sexual orientation." (Lynch, State Courts Strike Blows to Criminal DNA Collection Laws in 2014—What to Look for in 2015, Electronic Frontier Foundation (San Francisco, Calif.), January 5, 2015.). It is obvious that the breach of privacy concerns involved in the collection of DNA are, in fact, invasive in the purest sense set forth by opening words of the Fourth Amendment, guaranteeing that citizens have the right to be "secure in their persons."

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 their personnel (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 bearing 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 fits the crime. If California's government, and government as a whole, is now 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.

In passing Proposition 47 last year, the California electorate signaled that the time had come to recognize certain offenses as less serious than other crimes. By attempting to impose the same consequences as would have been prior to the passage of Prop 47, AB 390 signals the day that California's elected representatives stop listening to the will of the people.

II. DNA sampling of misdemeanants in the hope of finding a match constitutes 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. 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 sidesteps due process requirements, resulting in a genetic dragnet for the 21st century. Requiring DNA samples in the hope of

finding a match is in essence 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 in his dissent, "[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 [2004 U.S. App. LEXIS 17191] dis. opn. of Reinhardt, J., Kozinski, J., & Hawkins, J.).)

III. Even if DNA sampling of misdemeanants violates no constitutional boundaries, the government should not be granted such authority so as to store DNA profiles for limitless amounts of time.

While the author of this bill does seem to exhibit some good intent by mandating that a person's DNA profile be removed from the database if they are found innocent or the charges are dropped, what is to be done of DNA collected from convicted misdemeanants and which does not result in a match?

Statistical studies have revealed that the longer a person stays out of trouble, the less likely they are to commit a subsequent offense. (Cohen, *Does the Risk of Recidivism for Supervised Offenders Improve Over Time? Examining Changes in The Dynamic Risk Characteristics for Offenders under Federal Supervision*, Federal Probation — A Journal of Correctional Philosophy and Practice, Vol. 78, No. 2, September, 2014.)

Thus, what is the rationale for granting the government such authority to store and access DNA profiles without clearly defined limits? Such profiles should be removed after a period of time — e.g. five, ten, or twenty years, depending on the conviction. But that argument assumes the premise that suspicionless DNA testing is Constitutionally sound, in which CCJR most definitely does not.

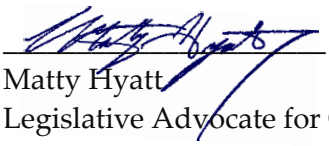
The legal scholar Daniel Solove recommends that "[a]ny deviation from the warrant and probable cause requirement should ensure the following:

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.)

Respectfully,



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cc: Senator Loni Hancock (Chair)
Senator Joel Anderson (Vice Chair)
Senator Mark Leno
Senator Carol Liu
Senator Mike McGuire
Senator Bill Monning
Senator Jeff Stone