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NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

May 19, 2008

David J. Karp, Senior Counsel
Office of Legal Policy, Rm. 4509
Main Justice Building
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: OAG Docket No. 119 – DNA-Sample Collection

Dear Mr. Karp:

I am writing to share the comments of the National Association of Criminal Defense Lawyers (NACDL) on the Department of Justice's proposed rule regarding DNA-Sample Collection Under the DNA Fingerprint Act of 2005 and the Adam Walsh Child Protection and Safety Act of 2006. The NACDL strongly opposes the proposed rule insofar as it mandates the collection of DNA samples from individuals who have been arrested but not convicted, and "non-United States persons who are detained."

By mandating the collection of DNA samples from those who have not been convicted of a crime, including mere arrestees and immigration detainees, the proposed rule flouts the presumption of innocence, misallocates resources, and expands greatly the potential for discrimination. The broad net cast by this rule reflects a troubling increase in the government's collection of personal information that threatens the fundamental concept of privacy embodied in our Constitution.

The Fourth Amendment of the U.S. Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Absent exigent circumstances, the conduct of a "search" requires probable cause and a judicial warrant, or at least individualized suspicion. Expansion of the DNA database as set forth in the proposed rule flies in the face of this fundamental guarantee and with the Fifth Amendment's individualized approach to criminal proceedings.

An individual is presumed innocent until proven guilty of a crime beyond a reasonable doubt. A mere arrestee is innocent under our Constitution, regardless of the allegations supporting the arrest. Wholesale DNA collection from the innocent, and the inclusion of such DNA in a database along with that of

convicted persons, is inconsistent with the presumption. Those detained for claimed immigration violations are detained on *administrative*, not criminal, matters, and thus do not belong in a criminal database.

Our concerns that this overbroad rule will take us further down a slippery slope are illustrated by recent state initiatives to search DNA databases for “partial matches” to crime-scene samples and to report those partial matches to the police. The use of partial matches means that the innocent relatives of persons with DNA in a database will be subjected to investigation by law enforcement. Thus, law enforcement widens the DNA database net even further.

History proves that no law enforcement database exists that is not accessed for improper purposes, and the expanded DNA database will be no more secure. DNA samples may facilitate discrimination based on genetic characteristics, including race, ethnicity, medical conditions or predispositions, mental health disorders, genetic mutations, and similar characteristics. It also may be misused in support of anticipatory punishment based on unproven theories that DNA may evidence a predisposition to aggression, recidivism or substance addiction.

Above all, persons arrested and later exonerated, or against whom charges are dismissed, do not belong in any criminal database. The government should assume the burden of expunging such profiles from CODIS. Requiring an individual to petition the government for expungement is an unreasonable burden and would particularly disadvantage those with less education and financial resources. Therefore, in cases that result in dismissed or overturned charges, the prosecutor should be charged with submitting the required court order to the Director of the FBI or the Attorney General. Such a rule would be consistent with 42 U.S.C. sec. 14132(d).

In conclusion, we urge you to narrow the proposed collection of DNA in accordance with the above views and to promulgate a rule placing the burden of expungement on the government.

Sincerely,



Norman L. Reimer
Executive Director

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