

Puble Henry 3/20/08  
Re: Sun & Publisher 3/27/08

31 Loomis Place  
New Haven, CT 06511

March 20, 2008

Committee on Judiciary  
General Assembly  
State of Connecticut  
Legislative Office Building  
300 Capital Avenue  
Hartford, CT 06106

**Re: S.B.692 (Raised), An Act Requiring DNA Testing of Certain Arrested Persons  
H.B. 5034, An Act Concerning DNA Collection from Certain Arrestees and  
Convicted Persons**

To the Committee:

Good afternoon. My name is David Cameron. I am a professor of political science at Yale University. I am interested in the functioning and performance of the criminal justice system in Connecticut. From time to time I have written op-eds in the New Haven Register and The Hartford Courant on that topic. I appear today to add my voice to those urging that DNA sampling be extended to those arrested for a felony or convicted of certain misdemeanors.

Extending DNA sampling to those arrested for a felony and certain class A misdemeanors would increase the size of the state's DNA database. In so doing, it would increase the likelihood that investigators solve at least some of the long-unsolved cases in which there is biological evidence from unknown persons. It would allow law enforcement personnel to prevent some individuals from repeating their offenses or committing more serious offenses in the future. And it would in all likelihood lead to the exoneration of some individuals who have been convicted of crimes they didn't commit and prevent the wrongful conviction of others in the future.

I realize that, from the perspective of preventing wrongful convictions in the future, the most urgently-needed reform is not the extension of DNA sampling but, rather, the prevention of eyewitness misidentifications. The Innocence Project has reported that the most frequent cause, by far, of the more than 200 wrongful convictions for which exonerations have been obtained through DNA has been eyewitness misidentification, which occurred in 70 per cent of the cases. For that reason, it is important that legislation such as H.B. 5832 be adopted to ensure that the procedures by which eyewitness identifications are obtained are fair and impartial and that such identifications, when obtained from live line-ups or photo boards, are not influenced or coached.

However, having attended a murder trial in New Haven last week and earlier this week in which the prosecution's case rested entirely on the out-of-court taped statements of three eyewitnesses who identified the defendant from photo boards but recanted or otherwise

backed away from their taped statements in court and claimed that they had been coached or influenced their identifications, I think H.B. 5832 needs to be strengthened. Both for the sake of maintaining the value in court of the identifications for the prosecution and preserving the right of a defendant to a fair trial, the legislation should not only require that the lineup or photo board procedure be impartially administered but that any interviews with an eyewitness prior to the identification procedure, as well as the identification procedure itself, be tape-recorded.

Legislation to ensure that eyewitness identifications are obtained through impartial procedures and are untainted as well as legislation such as S.B. 608 requiring the videotaping of statements made by persons under investigation for a serious felony will, if enacted, reduce the likelihood of wrongful convictions in the future. But such legislation will not contribute to the exoneration of those who have already been wrongfully convicted. It will not increase the likelihood that at least some of the many unsolved crimes in which there is biological evidence from an unknown source will be solved. Nor will it reduce the likelihood that some individuals will repeat their crimes or commit more serious ones in the future. Those are worthy and, indeed, important objectives for the criminal justice system and expanding the state's DNA database will increase the likelihood they will be achieved.

Connecticut created its DNA database in 1993. Until 2003, it included only samples from those convicted of sex offenses. The state now requires samples from those convicted of a felony or a crime requiring registration as a sex offender or found not guilty by reason of mental disease or defect of such crimes in Connecticut or another state and in custody here. The state's database is relatively small compared with those in many other states. According to data in the FBI's Combined DNA Index System (CODIS), as of last October it contained samples from about 29,000 convicted offenders. In a state with 3.5 million residents, that represents approximately 0.8 per cent of the population.

Many other states have databases that are larger, relative to their population. For example, the number of DNA profiles in New York's database is equivalent to 1.1 per cent of its population. For Minnesota, the figure is 1.4 per cent, for New Jersey 1.7 per cent, for Oregon and Illinois 2.2 per cent, for California 2.4 per cent, and for Virginia 3.4 per cent. Those differences may, of course, reflect differences among the states in the extent of crime, frequency of convictions, length of time the database has existed, and length of time the database has included samples from all convicted felons. Nevertheless, the fact remains that Connecticut has a relatively small database.

Why is the size of a state's database important? The larger the database the greater the likelihood of a "cold hit" – that is, a match between an unidentified sample from a crime scene and one in the database. In other words, the larger the database the greater the likelihood that, in a crime committed by someone who left biological evidence at the scene, the person who committed the crime will be identified. Put differently, the larger the database the less likely it will be that a crime committed by someone who left biological evidence at the scene remains unsolved.

Over the past several years a number of states have extended DNA sampling to include not only those convicted of felonies but those arrested for some felonies. Virginia was the first to do so in legislation adopted in 2002 that became effective in 2003. Since then, 10 other states have enacted legislation authorizing the taking of a DNA sample from some arrestees. They are Alaska, Arizona, California, Kansas, Louisiana, Minnesota, New Mexico, North Dakota, Tennessee, and Texas. (For a summary of the laws of all 50 states, see the National Conference of State Legislatures' report entitled "State Laws on DNA Data Banks," January, 2008, available at [www.ncsl.org/programs/cj/dnadatabanks](http://www.ncsl.org/programs/cj/dnadatabanks).)

In Virginia, Alaska, New Mexico, and Tennessee, samples are required from those arrested for violent felonies. But several other states have legislated that later this year or at some point next year, samples will be required from all those arrested for a felony. For example, in Kansas a sample will be required from anyone arrested for a felony after June 30 of this year. In 2004, California voters passed Proposition 69, which increased the state's database and mandated that, starting on Jan. 1, 2009, a DNA sample will be obtained from anyone arrested or charged with any felony offense. Likewise, in North Dakota, a sample will be required from anyone arrested for a felony after July 30, 2009.

In 2006, the federal government followed the lead of these innovating states. The Violence Against Women Act authorized the federal government to obtain a DNA sample from anyone arrested for a federal offense. Last year, 25 states considered legislation that would extend DNA sampling to some arrestees. Legislation was adopted in four of them – Alaska, Arizona, North Dakota, and Tennessee. Many of the states that have not yet approved an extension of DNA sampling to some arrestees are considering such legislation now.

For example, in January, the governor of Maryland proposed legislation modeled on Virginia's that, if adopted, would require a DNA sample from anyone arrested for a violent crime or burglary. In February, the Michigan House approved legislation that would require a sample from those arrested for a violent felony. That legislation is modeled on New Mexico's "Katie's Law," the name given to its 2007 legislation. Katie Sepich, a New Mexico State graduate student, was murdered in 2003. Her killer was not identified until 2005, when his DNA was entered into New Mexico's database after he was convicted of another felony. He had been arrested, but not convicted, for another felony, a burglary, prior to 2003.

Virginia, California, and most of the other states that require samples from those arrested for a felony have substantially larger databases, relative to the population of the state, than Connecticut. As noted above, controlling for the difference in population, Virginia's database is more than four times larger than Connecticut's. Virginia's database has yielded more than 1,000 "cold hits." One of the "cold hits" in Virginia was, of course, the match obtained between the DNA found on the clothing of the victim in the Tillman case and that of Duane Foster, who was arrested in Virginia last August. According to the FBI's CODIS data, Connecticut's database has aided some 400 investigations. Virginia's has aided more than 4,000.

I'm not a lawyer. But I realize that expanding DNA sampling to include some arrestees raises constitutional issues pertaining to privacy and the prohibition in the Fourth Amendment of the U.S. Constitution and in Article 1, section 7 of the Connecticut constitution against unreasonable searches or seizures. State courts have differed in their views of DNA sampling of arrestees. For example, the Minnesota Court of Appeals, in the Matter of the Welfare of C.T.L., Juvenile (2006), followed the U.S. Supreme Court in *Schmerber v. California* (1966) and upheld a district court ruling that taking a DNA sample without a search warrant based on probable cause is unconstitutional. On the other hand, the Virginia Court of Appeals, in *Angel M. Anderson v. Commonwealth of Virginia* (2007), upheld the state's statute on the grounds that a DNA sample of an arrestee is no different in character than the taking of fingerprints.

On the other hand, there does appear to be unambiguous and virtually unanimous agreement among federal courts that the "special needs" doctrine, elaborated by the Supreme Court in *New Jersey v. TLO* (1985), applied to suspicionless searches in *Griffin v. Wisconsin* (1987), and confirmed in *Illinois v. Lidster* (2004), justifies DNA indexing statutes. Following that line of reasoning, the U.S. Court of Appeals for the Second Circuit held in *Nicholas v. Goord* (2005) that a DNA-indexing statute that aims to create a DNA-identification index to assist in solving crimes constitutes a "special need" – meaning that the taking of a DNA sample from a convict did not have to be supported by either a search warrant based on probable cause or justified by evidence establishing individualized suspicion of wrongdoing -- because at the time of taking the sample does not provide evidence in and of itself of criminal wrongdoing.

In *U.S. v. Amerson* (2007), the same Court applied the "special needs" doctrine to the taking of a DNA sample from someone sentenced to probation. Following the logic of its ruling in *Nicholas*, the Court concluded that the fact that the taking of a sample does not involve any suggestion the individual is suspected of some other crime, that it is done for all persons in that legal category, that the actual taking is minimally intrusive, that the reasonable expectation of privacy for persons in that category is somewhat diminished, that there are adequate safeguards to minimize any invasion of privacy via the misuse or release of information from a database, and that the "junk DNA" used in the profiles contains no information other than the individual's identity, taken together justify such sampling. And, it noted, "there can be little doubt that the government has a compelling interest in rapidly and accurately solving crimes and that having DNA-based records of the identity of as many people as possible... effectuates this interest." That reasoning would appear to apply equally well to the taking of DNA samples from some arrestees.

Turning to the specifics of the bills under consideration, S.B. 692 and H.B. 5034 both require that a DNA sample be obtained from those arrested for a class A or class B felony. It is not obvious why such a sample should not also be required from those arrested for a class C or class D felony. I would urge that you consider extending DNA sampling to any person arrested for a felony.

H.B. 5034 also authorizes the taking of a DNA sample from those convicted of certain class A misdemeanors such as criminally negligent homicide, third-degree assault, and

stalking. This makes good sense given the nature of the crimes. In the event you decide to move forward with S.B. 692 rather than H.B. 5034, I hope that provision will be included. I might note that the National Conference of State Legislatures, in the study mentioned above, reports that 15 states require DNA samples from those convicted of some misdemeanors.

S.B. 692 would require that samples be obtained from those arrested for a felony at the time of arrest. H.B. 5034 stipulates that samples from those arrested for a felony would be taken upon arraignment rather than upon arrest. In light of the constitutional issue, it may be best to delay the taking of a sample until after arraignment and a formal judicial determination of probable cause. Taking the sample in a courthouse setting, rather than at the time of arrest, may also address some of the procedural concerns about collection, storage, and possible contamination that were raised last year.

One of the most difficult questions concerns what to do with an arrestee's sample in the event the charges are dismissed or the person is found not guilty. It may be of interest that several of the states that require DNA samples from arrestees – for example, Minnesota, Texas, and Virginia – automatically delete the sample when an arrestee is cleared. Several others – most notably, California, Louisiana, and New Mexico – allow an arrestee who is cleared to request that the sample be removed from the database. On the other hand, a few states – for example, Kansas – retain the sample even if an arrestee is cleared.

I am aware that last year you approved legislation by a decisive margin that to mandate the taking of a sample from those arrested for a class A or class B felony. I hope you will again approve legislation to extend DNA sampling and that your colleagues on the Public Safety and Security Committee and in the General Assembly will support the legislation you approve.

Thank you.

David R. Cameron