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Memo

To: Rhode Island Senate Judiciary Committee

From: Katherine Godin, Esq., *on behalf of the Rhode Island ACLU*

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Re: Constitutional concerns with 2012 RI S 2061 (Arrestee DNA bill)

The following is a preliminary list of the constitutional concerns with 2012 Senate Bill S 2061, which proposes to amend R.I.G.L. § 12-1.5-1 *et seq.*, "DNA Detection of Sexual and Violent Offenders." Presently, § 12-1.5-1 *et seq.* requires DNA samples from those convicted of certain felonies. S 2061 would broaden that DNA collection to not only those convicted of a felony, but also all those arrested for certain violent crimes.

As the RI ACLU has noted in previous written and oral testimony, it is strongly opposed to this bill

1. Inefficient/costly

The first (and perhaps, most significant) issue with this proposed legislation is the monetary cost and practical ineffectiveness of collecting, analyzing and uploading arrestee DNA samples.

Last March, the Providence Journal noted that there was a six-to-twelve month backlog for processing DNA samples collected as evidence in most violent crimes cases, and a two-year backlog for processing samples in non-violent criminal cases. Indeed, as of March 25, 2011, the State Crime Lab had a backlog of 206 cases.

Sadly, this backlog seems to have worsened. In an article just last month, the Providence Journal noted that as of January 30, 2012, the Lab will limit the amount of DNA evidence that police departments can have analyzed to five pieces of evidence in homicide and sexual assault cases, and two for property crimes. Surprisingly, the

Lab will stop processing evidence from misdemeanor drug cases unless the case is set for trial.

If the police and Attorney General's Office are already experiencing restrictions to their open investigations and criminal cases, then requiring DNA samples to be processed for all arrestees of certain violent crimes will make investigations and prosecutions nearly impossible.

In addition to impracticalities, the cost involved in implementing this proposed legislation is not feasible. In order to comply with the legislation, the State will need to hire more analysts, obtain more storage space, purchase more testing and collection supplies, and hire and train additional personnel.

If the State wants to invest more money into DNA testing, it should invest more into the current system to alleviate the 6 to 24 month backlog in pending investigations and prosecutions.

2. Ineffective to "protect the innocent"

One of the arguments the Attorney General's Office has made in the past is that this bill will help protect those who have been wrongly accused of a crime. Yet, given the existing backlog of samples, there is a major concern that rushing the DNA analysis may lead to *more* wrongful convictions. Josiah Sutton was wrongfully convicted and spent four and a half years of a 25-year sentence in prison for a rape he did not commit due to errors in DNA testing by the Houston, TX police lab. Timothy Durham was wrongfully convicted of rape, sodomy and attempted robbery, despite the fact that he had eleven witnesses testifying that he was not even in the same state when the crimes occurred. Mr. Durham was sentenced to 3,000 years in prison, and spent four of those years incarcerated due to misinterpreted DNA evidence. See William C. Thompson et al., "How the Probability of a False Positive Affects the Value of DNA Evidence," 48:1 J. of Forensic Sciences 2 (2003).

"[F]alse incriminations can occur in forensic DNA testing [by] coincidental DNA profile matches between different people, inadvertent or accidental transfer of cellular material or DNA from one item to another, errors in identification or labeling of samples, misinterpretation of test results, and intentional planting of biological evidence." William C. Thompson, "The Potential for Error in Forensic DNA Testing," Genewatch (2011), available at http://www.councilforresponsiblegenetics.org/GeneWatch/GeneWatchPage.aspx?pageId=57&archive=yes. "The risk of false incrimination is borne primarily by individuals whose profiles are included in government databases (and perhaps by their relatives." Id.

Sadly, some of those wrongfully convicted have had significant trouble getting exonerated even when the defendant proves the DNA evidence is not his. A New York Times article last November, entitled "When DNA Evidence Suggests 'Innocent,' Some Prosecutors Cling to 'Maybe,'" noted that in 194 DNA exonerations, 12% involved prosecutors who opposed the motions to vacate the conviction, even when

the DNA matched another suspect. By keeping a database of arrestees' DNA, it may increase the risk of a defendant being wrongfully convicted, and make it even more difficult to have that conviction vacated later on.

One of the most sacred tenets of the criminal justice system in America is that each and every person charged with a crime is presumed innocent until proven guilty. This bill would ignore that tenet and presume that the defendant is guilty of the violent crime before he or she has gone to trial.

There is also a concern that the legislation would constitute a Fourth Amendment unreasonable search and seizure without probable cause. Other states have had a similar concern, with Georgia recently passing a bill requiring a judge or magistrate to first find probable cause before a DNA sample is taken, and New Mexico passing the bill through its state senate last year. See also In re Welfare of C.T.L., 722 N.W.2d 484 (Minn.App. 2006) (declaring a statutory provision requiring DNA samples in cases in which the court has found probable cause of guilt, but the defendant has not yet been convicted, an unreasonable search and seizure); United States v. Purdy, 2005 WL 3465721 at *7 (D. Neb. 2005) (*unpublished*) (finding that law enforcement needs to obtain a court order before collecting an arrestee's DNA).

If an innocent person is wrongfully charged with a crime that involves DNA evidence, he or she is free to voluntarily submit a DNA sample to exonerate him or herself.

Lastly, even though the proposed legislation offers an expungement process, it is inadequate. First of all, the process puts the burden on the innocent defendant to expunge his or her DNA sample from the database. Second of all, due to the existing backlog in processing the samples, by the time the samples are processed, the Lab will only be keeping those samples taken as a result of a conviction.

3. Racial bias/discrimination

According to recent statistics, while blacks represent only 6.4% of the Rhode Island population, 18.8% of those arrested are black. While over 92% of crack defendants in America are black, they make up only 38% of reported crack users. See Gerald Uelmen, Racial Disparity, 2 Uelmen & Haddox, Drug Abuse and the Law Sourcebook § 9:9 (2006); see also Graham Boyd, Collateral Damage in the War on Drugs, 47 Vill. L. Rev. 839, 846 (2002) ("In some states…Blacks make up 90% of drug prisoners and are up to fifty-seven times more likely than Whites to be incarcerated for drug crimes"). In comparison, whites make up only 4.1% of crack defendants, yet 52% of its reported users. Id. In fact, the typical cocaine user is "a white male high school graduate living in a small city or suburb." Michael Z. Letwin, Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate, 18 Hofstra L. Rev. 795, 795-96 (1990).

The RI ACLU has deep concerns that this proposed legislation will lead to pretextual arrests of minorities for the purpose of collecting DNA samples.