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MEMORANDUM

TO: The Senate of Pennsylvania

FROM: Andy Hoover, Legislative Director

DATE: October 31, 2011

RE: OPPOSITION TO SENATE BILL 775

In the near future, it is likely that the Senate will vote on Senate Bill 775. This bill would drastically expand Pennsylvania law on DNA collection by collecting DNA from people who have been arrested for but not convicted of a felony or one of several enumerated misdemeanors. This mass expansion of DNA collection will rollback Pennsylvanians' privacy rights, will have public safety consequences, and will include a high financial cost. The American Civil Liberties Union of Pennsylvania opposes SB 775, and on behalf of the 19,000 members of the ACLU of Pennsylvania, I urge you to please vote "no" on this bill.

There is nothing that is more personal and private than our bodies. DNA collection is an invasive procedure that is typically performed by running a swab along the inside of a person's cheek. If the government wishes to collect the biological information of people who are innocent, whether they are factually innocent or considered innocent under the law, the government has certain constitutional obligations before it can conduct that search.

And yet under SB 775, the government will collect DNA from all arrestees, regardless of the facts of the case. The person's DNA profile will then be sent to the DNA databanks of the Pennsylvania State Police and the Federal Bureau of Investigation, where the person's profile will regularly be checked against all unsolved crimes. Thus, regardless of the outcome of the original crime for which the person was arrested, he or she will be a suspect in all existing and future unsolved crimes. This type of suspicionless search contradicts the constitutional principle that Americans have a right to be free from unreasonable searches and seizures.

Supporters of SB 775 claim that those who are acquitted will have their profile expunged from the state databank. But the expungement is not automatic. The burden is on the acquitted person to request an expungement in court.

Even if the expungement process is effective, the issue of those who are acquitted only scratches the surface of problems around innocence and SB 775. For example, if a person is arrested but never charged, their DNA profile remains in the state databank for

the duration of the statute of limitations for the crime for which they were arrested. There are crimes for which the statute of limitations lasts many years, and for some crimes, there is no statute of limitations. If a person is arrested for but never charged with homicide, their DNA profile will remain in the state databank forever.

In addition, the state has no control over the FBI databank. If a person is arrested but never charged or is acquitted at trial, the commonwealth has no power to order the federal government to expunge the profile.

Finally, SB 775 is silent on cases in which a person is arrested but pleads guilty to a lesser crime for which DNA collection is not required.

A federal constitutional challenge to a similar federal law is currently before the courts. In *United States of America v. Ruben Mitchell*, a federal district court in western Pennsylvania found that preconviction DNA collection violates the Fourth Amendment. This summer, the Court of Appeals for the Third Circuit overturned that ruling in a split, 8-6 decision before the entire court.¹ Mitchell's attorneys have asked the United States Supreme Court to hear the case.

It is also possible that SB 775 would run afoul of state constitutional protections. Pennsylvania courts have consistently ruled that the state constitution provides greater privacy protections than the federal constitution. In addition, state case law suggests that collecting DNA is a search.² There is no state case law that is directly related to the provisions of SB 775, but a credible case could be made that collecting DNA from people who have not been convicted of a crime violates the constitution of Pennsylvania.

In March, then-acting commissioner of the Pennsylvania State Police Frank Noonan testified before a Senate committee that SB 775 would cost \$13 million in new spending and would increase the workload of the PSP DNA laboratories by 400 percent. This could have devastating consequences on public safety. Last year DNA analysts possessed but failed to test a biological sample of Antonio Rodriguez, an alleged serial killer in Philadelphia, before he allegedly killed a third victim. In California, significant rape kit testing backlogs allowed a rapist to attack two more victims, including a child, while his DNA sat on a shelf awaiting analysis.

SB 775 creates a big government program that is expensive, compromises public safety, and debases Pennsylvanians' constitutional rights. Please vote "no" on SB 775.

¹ *U.S. v. Mitchell*, 2011 U.S. App. LEXIS 15272 at *79 (3d Cir. 2011)

² *Dial v. Vaughn*, 733 A.2d 1, 6 ("Without question, obtaining a blood sample for testing is a search and seizure subject to the reasonableness requirement established under the fourth amendment")