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May 5, 2008

The Honorable Martin J. O'Malley  
Governor of Maryland  
State House  
Annapolis, Maryland 21401-1991

**RE: Senate Bill 211**

Dear Governor O'Malley:

We have reviewed and hereby approve Senate Bill 211, "Public Safety - Statewide DNA Data Base System - Crimes of Violence, and Burglary - Sample Collections on Charge - Postconviction DNA Testing" for constitutionality and legal sufficiency.

As introduced, Senate Bill 211 provided for DNA testing of all persons arrested for crimes of violence or for burglary. In a letter to Mr. Sean Malone, your deputy legislative officer, dated March 3, 2008, a copy of which is attached, this office advised that this version of the bill "could most likely be upheld against constitutional challenge." Since the date of that letter, no additional cases have been decided that would change this analysis. It is worth noting, however, that, in the intervening period, the United States Department of Justice has proposed regulations requiring agencies of the United States that arrest or detain individuals to collect DNA samples from "individuals who are arrested, facing charges, or convicted." 73 Fed. Reg. 21083-21087 (April 18, 2008). Thus, federal law enforcement will be conducting an even more extensive DNA collection program than that called for by Senate Bill 211.

The amendments to Senate Bill 211 since our letter to Mr. Malone narrow the definition of crime of violence and of burglary, delay the taking of a sample until the person is actually charged, and provide that the sample may not be tested or placed in the statewide DNA data base prior to the first scheduled arraignment date unless requested or consented to by the individual. The amendments also provide for automatic expungement of DNA samples and records in the event that the criminal action does not result in conviction, the conviction is finally reversed on appeal with no new trial permitted, or the individual receives an unconditional pardon. Each of these changes further increases the likelihood that the provisions of Senate Bill 211 would be upheld against constitutional challenge.

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Therefore, it is our view that Senate Bill 211 is clearly constitutional.

Very truly yours,

  
Douglas F. Gansler  
Attorney General

Attachment

DFG/KMR/kk

cc: The Honorable Thomas V. Mike Miller  
The Honorable Dennis C. Schnepfe  
Joseph Bryce  
Karl Aro