



MEMORANDUM

TO: House Judiciary Committee
FROM: ACLU of Vermont
DATE: January 28, 2009
RE: Objections to S. 13

The ACLU of Vermont has serious concerns about certain provisions of S. 13 as passed by the Senate. As discussed below, we believe that S. 13 goes too far towards creating a Vermont in which people accused of crimes are typecast as guilty upon arraignment, are not permitted to see all the evidence against them, and can be threatened with unfair plea bargains. We urge the committee to resolve these problems before taking any action on the bill.

The committee should not permit innocent Vermonters' DNA to be included in the state DNA database (§§ 19-25)

A person is innocent until proven guilty. Collecting DNA from an individual at arraignment is requiring an innocent person to yield to a search because the state believes the person has done something wrong, which requires a warrant.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "It is settled law" that any DNA collection statute authorizing "both a physical intrusion to obtain a tissue sample and a chemical analysis to obtain private physiological information about a person" is subject to the restrictions of the Fourth Amendment. *United States v. Amerson*, 483 F.3d 73, 77 (2d Cir. 2007). Reflecting its position as a critical check upon government power, the existence of individualized suspicion of wrongdoing is heavily weighted when considering the reasonableness of a search or seizure, for "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

Nonetheless, the constitutionality of the collection and retention of DNA from convicted felons has been upheld in the federal Second Circuit (of which Vermont is a part) on the basis of the so-called special needs exception to the Fourth Amendment.¹ *See Amerson*, 483 F.3d at 89 (pre-

1 The special needs exception permits searches or seizures without individualized suspicion of wrongdoing only where the asserted government interest behind the search or seizure is not "the general interest in crime control," *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979), and does not have a "primary purpose" of discovering "evidence of ordinary criminal wrongdoing." *City of Indianapolis*, 531 U.S. at 41. Thus, for a warrantless search conducted without probable cause to be permissible under the special needs exception, courts in this Circuit must determine that the search (1) is suspicionless, and (2) serves as its "immediate purpose an objective distinct from the ordinary evidence gathering associated with crime investigation." *Nicholas v. Goord*, 430 F.3d 652, 663 (2d Cir. 2005). Once those two elements are met, courts then balance three factors: the nature of the privacy interest involved in the search, the degree of governmental intrusion into that interest, and the nature and immediacy of the government's need to conduct the search. *Cassidy v. Chertoff*, 471 F.3d 67, 75 (2d Cir. 2006). This final balancing step is undertaken to ensure that suspicionless searches are as least intrusive as possible, as

2009 federal DNA collection scheme); *Nicholas v. Goord*, 430 F.3d 652, 668-9 (2d Cir. 2005) (New York’s); *Roe v. Marcotte*, 193 F.3d 72, 82 (2d Cir. 1999) (Connecticut’s); *State v. Martin*, 2008 VT 53, ¶ 32, 955 A.2d 1144, 1157-8 (holding Vermont’s DNA collection scheme to comport with Vt. Const. ch. 1, art. 11 on the basis of the parallel special needs exception in Vermont law). In each of these cases, the reviewing court determined that the government’s interest in extracting, analyzing, and storing a convicted individual’s DNA was the creation of a database for use in identifying the perpetrators of future crimes. *Amerson*, 483 F.3d at 81; *Nicholas*, 430 F.3d at 668; *Marcotte*, 193 F.3d at 79; *Martin*, 2008 VT 53, ¶ 19, 955 A.2d at 1152-3. When weighing the government interest in creating such databases against individuals’ privacy right to avoid DNA searches, the Second Circuit and the Vermont Supreme Court have held that the government’s interest wins out because convicted felons enjoy a diminished expectation of privacy as against those who have not been convicted of a crime. *Amerson*, 483 F.3d at 87 (“In the end . . . we conclude that, given the appellants’ status as probationers, the intrusion on their privacy interests from being compelled to provide DNA samples for CODIS is quite small.”); *Nicholas*, 430 F.3d at 671 (“In other words, plaintiffs’ status as convicted felons renders minimal the degree to which the New York statute intrudes on their privacy.”); *Marcotte*, 193 F.3d at 82 (special needs balancing test favors the state over the privacy interests of convicted sex offenders “[b]ecause studies cited by [Connecticut] indicate a high rate of recidivism among sexual offenders, and because DNA evidence is particularly useful in solving such crimes”); *Martin*, 2008 VT 53, ¶ 32, 955 A.2d at 1157 (“The information in the database, then, is not information defendants can reasonably expect to keep private as convicted felons.”).

A person who is no further into the criminal justice process than arraignment is in a fundamentally different position than a person who has been convicted of the charges against him. Because of our legal system’s presumption of innocence, a person who has not been convicted is still an innocent individual. Taking DNA from an innocent person pushes against and, in our view, violates the acceptable rationale for obtaining and storing DNA.

Retention of innocent individuals’ DNA profiles violates the Fourth Amendment

Even if the committee does not agree with the ACLU of Vermont’s view on collection of DNA upon arraignment, it should not allow the retention of DNA samples from individuals who have been acquitted at trial, or who have had the relevant charges dismissed.

The language of S. 13 creates a system in which Vermonters cleared of the crimes that merited their inclusion in the state DNA database may not necessarily have their DNA expunged.² The committee should adopt language that entitles those cleared of wrongdoing to have their DNA removed from state possession.

Currently, Vermont collects DNA samples from individuals who have been convicted of felony,

“the more attenuated the government’s need[,] the more minimal must the invasion of privacy be to be countenanced under the Fourth Amendment.” *Amerson*, 483 F.3d at 84.

2 This memorandum equates “DNA database” and “DNA data bank,” although the two phrases refer to different collections of information. The blood or biological tissue extracted from an individual is referred to as a “DNA sample.” Vt. Stat. Ann. tit. 20, § 1932(5). The DNA sample itself is stored in a collection of like materials known as the “DNA data bank.” *Id.* §§ 1932(11), 1938(c). When the Vermont Forensic Laboratory types a DNA sample, it isolates the data encoded at eleven places on the DNA thought to collectively represent a unique combination of chemicals identifying the individual. The resulting data is referred to as a “DNA record” or a “DNA profile,” and is stored in the state “DNA database.” *Id.* §§ 1932(4),(10), 1938(d).

or of any other offense if as part of a plea agreement the individual agrees to submit a sample. Vt. Stat. Ann. tit. 20, § 1932(12). Expungement of an individual's DNA sample occurs when an individual's "conviction of a designated crime is reversed and the case is nolle prosequere or dismissed," or when the individual "is granted a full pardon." *Id.* § 1940(a) (emphasis added). S. 13 greatly expands DNA collection to sweep in any individual "for whom the court has determined at arraignment that there is probable cause that the person has committed" a felony, domestic assault,³ or any registrable offense.⁴ Crucially, S. 13 also changes the circumstances under which Vermonters may have their DNA samples expunged, conditioning expungement upon things other than being cleared of the criminal charge for which submission to the data bank was initially required. Under S. 13, expungement would only occur where "the felony charge which required the DNA sample is downgraded to a misdemeanor by the prosecuting attorney, upon a plea agreement or the person is convicted of a lesser offense that is a misdemeanor," or "[i]f the sample was taken post-arraignment, the person is acquitted after a trial of all charges related to the incident which prompted the taking of the DNA sample," or if "all criminal charges related to an incident that caused the DNA sample to be taken are dismissed by either the court or the state after arraignment, unless the attorney for the state can show good cause why the sample should not be destroyed." S. 13, § 25 (emphasis added). Thus, although one can only get into the DNA data bank by virtue of probable cause having been found for a designated crime, one can be kept in the data bank for any criminal charge, regardless of triviality, so long as the charge is related to designated crime. This paradox contravenes the United States Constitution, has been avoided by every other state to conduct pre-conviction DNA collection, and violates the federal statute governing state participation in the national DNA clearinghouse.

Of the thirteen states that collect pre-conviction DNA samples, none retains the DNA profile of individuals where the charge that merited their inclusion in the database results in dismissal or acquittal. *See* Alaska Stat. § 44.41.035(i) (requiring destruction of DNA where "the conviction or adjudication that subjected the person to having a sample taken . . . is reversed" or "the person arrested was released without being charged," or "the criminal complaint, indictment, presentment, or information for the offense for which the person was arrested was dismissed"); Ariz. Rev. Stat. §§ 13-610(J)-(M) (individual whose sample has been taken as a result of a an arrest or conviction for qualifying offense may have sample expunged where charge not timely filed or dismissed, or where the trial results in acquittal); Cal. Penal Code § 299(b) (DNA sample subject entitled to expungement of her or his sample if "[f]ollowing arrest, no accusatory pleading has been filed within the applicable period allowed by law charging the person with a qualifying offense . . . or if the charges which served as the basis for including the DNA profile in the state's DNA Database and Data Bank Identification Program have been dismissed prior to adjudication," if "[t]he underlying conviction or disposition serving as the basis for including the DNA profile has been reversed and the case dismissed," or if the person "has been found not guilty or . . . has been acquitted of the underlying offense"); Kan. Stat. Ann. § 25-2511(e)(4),(5) (expungement mandatory where "a court later determines that there was not probable cause for the arrest, charge or placement in custody or the charges are otherwise dismissed" or where "a conviction against a person, who is required to submit such specimen or sample, is expunged or a verdict of acquittal with regard to such person is returned"); La. Rev. Stat. Ann. § 15:614(A) ("A person whose DNA record or profile has been included in the data base or data bank" is entitled to expungement where "[t]he arrest on which the authority for including his DNA record or profile was based does not result in a conviction or plea agreement resulting in a conviction," or

3 Vt. Stat. Ann. tit. 13, § 1042.

4 *See* Vt. Stat. Ann. tit. 13, § 5401(10).

where “[t]he conviction on which the authority for including his DNA record or profile was based has been reversed and the case dismissed”); Md. Code Ann., Pub. Safety § 2-511(a)(1) (expungement automatic where “a criminal action begun against the individual relating to the crime does not result in a conviction of the individual,” or where “the conviction is finally reversed or vacated and no new trial is permitted”); Minn. Stat. Ann. § 299.C105(3)(a) (expungement of post-arraignment DNA samples available upon acquittal or dismissal of the qualifying charge); N.M. Stat. Ann. § 29-16-10(A) (expungement available where “the conviction that led to the inclusion of the sample has been reversed,” or where “the arrest that led to the inclusion of the sample has resulted in a felony charge that has been resolved by a dismissal, nolle prosequi, successful completion of a pre-prosecution diversion program or a conditional discharge, misdemeanor conviction or acquittal; or not resulted in a felony charge within one year of arrest”); N.D. Cent. Code § 31-13-07 (expungement occurs when “the arrest that led to the inclusion of the DNA profile has not resulted in a felony charge within one year; has been resolved by a dismissal, acquittal, or misdemeanor conviction; has not resulted in a felony conviction; or the conviction on which the authority for including the DNA profile was based has been reversed or the case dismissed”); S.D. Codified Laws § 23-5A-28 (expungement occurs where “the arrest that led to the inclusion of the person’s DNA record or DNA profile has not resulted in a felony charge within one year; has been resolved by a dismissal, acquittal, or misdemeanor conviction; or has not resulted in a felony conviction; or the conviction or delinquency adjudication on which the authority for including that person’s DNA record or DNA profile was based has been reversed and the case dismissed”); Tenn. Code Ann. § 40-35-321(e)(2) (expungement automatic if “the charge for which the sample was taken is dismissed or the defendant is acquitted at trial”); Tex. Gov’t Code Ann. § 411.1471(e) (expungement automatic on acquittal or dismissal of a listed felony); Va. Code Ann. § 19.2-310.2:1 (expungement automatic “[i]f the charge for which the sample was taken is dismissed or the defendant is acquitted at trial”).

The state’s interest in keeping the DNA profiles and samples of individuals who have been acquitted of a DNA search-triggering criminal charge is unlikely to pass muster under the special needs exception. Special needs searches must be as least intrusive as possible, as “the more attenuated the government’s need[,] the more minimal must the invasion of privacy be to be countenanced under the Fourth Amendment.” *Amerson*, 483 F.3d at 84. Where the government’s interest in a person’s DNA is as attenuated as it would be for a person cleared of the criminal charge that warranted a DNA sample in the first place, the nature of the government invasion of bodily integrity authorized by the special needs exception must be proportionally minor. It is difficult to see what government interest in innocent Vermonters would authorize an agent of the state to seize biological tissue, subject it to chemical analysis, and retain it indefinitely.⁵

The committee can avoid plunging Vermont’s DNA collection scheme into constitutional doubt by modifying the existing expungement procedure set forth in Vt. Stat. Ann. tit. 20, § 1940(a) to permit those not convicted of a qualifying offense to have their DNA profiles and samples

5 On the other hand, were the state to assert an individualized interest in a particular Vermonter’s DNA, any seizure of that person’s DNA would require probable cause and a warrant, because search or seizure under those auspices falls outside of the special needs exception. See *Amerson*, 483 F.3d at 89 n.16 (a rationale of “preventing the particular individual tested from committing crimes and solving any future crime he committed . . . cannot be a special need”); *Nicholas*, 430 F.3d at 668-9 (in upholding New York’s convicted felon DNA collection statute as a special need exception, “we find it crucial that the state . . . is not trying to determine that a particular individual has engaged in some specific wrongdoing”).

purged. Such a procedure would permit Vermonters to retain their constitutionally protected privacy interest in their DNA by removing from the state and national databases profiles of those not convicted of the criminal charge that merited the taking of a DNA sample.

Retention of innocent individuals' DNA profiles violates federal statutory law

Finally, the committee should decline to modify the existing expungement procedure because the language contained in S. 13 violates the terms of Vermont's participation in the federally operated national DNA database, CODIS. Federal law governing CODIS participation predicates states' use of CODIS upon certain minimum standards, one of which is the expungement of records belonging to those acquitted of a crime for which they were included in the state's DNA database.

CODIS (the "Combined DNA Index System") was established as a national DNA profile clearinghouse operated by the Federal Bureau of Investigation. 42 U.S.C. § 14132(a). States utilize CODIS by uploading DNA profiles of individuals charged with, or convicted of, crimes under the applicable state DNA collection statutes, and by comparing DNA profiles held in state databases against CODIS. § 14132(a)(1)(A),(B). However, states participating in CODIS are required to expunge the record of anyone whose conviction has been overturned, or who has not been convicted of the charge for which s/he was included in CODIS. "As a condition of access" to CODIS, any participating state "shall promptly expunge from that index the DNA analysis of a person included in the index by that State if" the relevant state official

receives, for each conviction of the person of an offense on the basis of which that analysis was or could have been included in the index, a certified copy of a final court order establishing that such conviction has been overturned; or [if] the person has not been convicted of an offense on the basis of which that analysis was or could have been included in the index, and the responsible agency or official of that State receives, for each charge against the person on the basis of which the analysis was or could have been included in the index, a certified copy of a final court order establishing that such charge has been dismissed or has resulted in an acquittal or that no charge was filed within the applicable time period.

42 U.S.C. § 14132(d)(2)(A) (emphasis added). Thus, the CODIS statute specifically requires that expungement be adjudged on the basis of each individual charge for which the person could have been included in the database and not, as S. 13 would have it, on the basis of whether the person was convicted of any of the charges related to the incident which prompted the taking of the DNA sample regardless of whether the person was cleared of the qualifying offense.

Moreover, the federal government remains committed to the existing CODIS expungement procedure despite its recent move to begin collecting DNA from all arrestees. *See* Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction, 73 Fed. Reg. 74,932 (Dec. 10, 2008). Notwithstanding the change in federal practice to DNA collection from arrestees, the Department of Justice sees no need to change existing expungement procedure, because the CODIS statute already provides for expungement "if the FBI receives a certified copy of a final court order establishing that the conviction has been overturned," or where "it receives a certified copy of a final court order establishing that the charge has been dismissed or

has resulted in an acquittal or that no charge was filed within the applicable time period.” *Id.* at 74,940.

An example illustrates how S. 13’s expungement procedure contravenes the CODIS requirements. Were S. 13 to become law, an individual in Vermont arraigned for first degree murder (a felony)⁶ and unlawful trespass (a misdemeanor)⁷ arising from a fight with a neighbor would have her DNA sample taken following arraignment, on the basis of the first degree murder being a qualifying offense. The individual’s profile would be uploaded to CODIS as part of the Vermont Forensic Laboratory’s periodic practice of doing so. If the individual were acquitted of the first degree murder charge but convicted of the trespass charge, the federal statute requires that the individual’s profile be expunged from CODIS because “the person has not been convicted of an offense on the basis of which that analysis was or could have been included in the index,” *i.e.*, the felony. 42 U.S.C. § 14132(d)(2)(A)(2). S. 13 nevertheless purports to forbid expungement in that instance, because the individual would not have been acquitted of “all charges related to the incident which prompted the taking of the DNA sample.” Because the CODIS statute mandates that participating states *shall* expunge a record under such circumstances, Vermont would no longer be entitled to participate in CODIS were S. 13 to become law.

Vermont should not run afoul of this policy by retaining the profiles of those ultimately cleared of a qualifying offense. The committee can avoid contravening federal law by simply providing Vermonters not convicted of a qualifying offense the right to have their DNA record expunged from the state database.

The committee should not strip Vermonters of the right to depose a complaining child witness in criminal prosecutions (§ 26)

Vermont criminal procedure currently provides for the availability of depositions in preparation for trial on request of either party in a felony prosecution, or upon agreement of the parties in a misdemeanor prosecution. Vt. R. Crim. P. 15(a), (e)(4). The current text of Rule 15 makes special procedures available for the protection of “sensitive” deponents; these include the presence of an advocate for the witness, and the ability of a court to impose conditions upon the deposition “including, in its discretion, a requirement that the deposition be taken in the presence of a judge or special master.” Vt. R. Crim. P. 15(f)(2). Nonetheless, the Senate bill proposes a flat prohibition against deposing a child under the age of sixteen who is alleged to be the victim of lewd and lascivious conduct with a child, sexual assault, aggravated sexual assault, or aggravated sexual assault of a child.⁸

Two sound reasons counsel against modification of Rule 15. First, there is no deficiency in the present rule that requires modification in order to shield alleged victims who are children. Unlike civil depositions, the rule governing Vermont criminal depositions provides that the deponent may have an advocate with him or her at the deposition,⁹ that the state will provide a

6 Vt. Stat. Ann. tit. 13, § 2301.

7 *Id.* § 3705.

8 The first three are codified at Vt. Stat. Ann. tit. 13, §§ 2602, 3252, and 3253. The aggravated sexual assault of a child charge is provided for by § 30 of S. 13.

9 Vt. R. Crim. P. 15(f)(1).

victim advocate at no expense,¹⁰ and ahead of the deposition, the deponent or the state may have a court dictate the conditions under which the deposition will take place, including the time, place, scope of the questioning, and presence of a neutral referee.¹¹ Once the deposition is underway, either the deponent or the state may halt a deposition to request a protective order from the court on the grounds that the deposition is exposing the witness to “emotional harm, unnecessary annoyance, embarrassment, oppression, invasion of privacy, or undue burden of expense or waste of time,” and a court considering such a motion is permitted to consider

the age, health, level of intellectual functioning and emotional condition of the witness, whether the witness has knowledge material to the proof of or defense to any essential element of the crime, whether the witness has provided a full written, taped or transcribed account of his or her proposed testimony at trial, whether the witness’s testimony will relate only to peripheral issue in the case, or whether an informal interview or telephone conference with the witness will suffice for the purposes of discovery in the case.

Vt. R. Crim. P. 15(f)(3).¹² By contrast, civil depositions provide no such protection for a witness’s feelings, perhaps fostering the public’s impression that depositions are a locus of poor attorney behavior. *See* Vt. R. Civ. P. 26(c) (protective order only available to prevent “annoyance, embarrassment, oppression, or undue burden or expense,” *not* emotional harm; conditions on deposition do not include availability of judicial supervision).

Simply put, the availability of Rule 15’s protective mechanisms render unnecessary the “protection” of child witnesses by making them unavailable for deposition – the protective measures already existing in Rule 15 can, upon request, make the deposition occur under conditions identical to trial, and can furnish a protective order that explicitly contemplates the witness’s age, knowledge of the crime, and emotional condition. Where Vermonters are being asked to trade one of their important criminal procedural rights for the protection of child complaining witnesses, the trade-off should be justified by an actual need for increased protective mechanisms.

Secondly, even if the actual text of existing rule were discounted, basic fairness counsels against modifying Rule 15. In the civil context, it would be unimaginable for one not to be able to examine a complainant’s testimony prior to trial, so that one knew whether the matter should reach an agreed-upon resolution. To pick an example intimately familiar to many Vermonters, if one imagines oneself the defendant in a divorce, custody, or property dispute, it would be unthinkable to be offered a settlement by the plaintiff, only to be told that it’s impossible to determine whether it is a good offer because no one is allowed to see the evidence until trial. No one would be willing to bet one’s life savings, children, or house on the outcome of a trial under those conditions. They would be much less willing to do so in a criminal context, when facing substantial periods of incarceration.

¹⁰ *Id.*

¹¹ Vt. R. Crim. P. 15(f)(2).

¹² *Cf.* Vt. R. Civ. P. 26(c) (protective order only available to prevent “annoyance, embarrassment, oppression, or undue burden or expense,” *not* emotional harm; conditions on deposition do not include availability of judicial supervision).

The committee should not permit abuse substantiation determinations to rest on constitutionally infirm hearsay evidence (§ 29)

S. 13 aims to radically change the manner in which abuse substantiation hearings are conducted. If it becomes law, S. 13 Human Services Board hearing officers would be permitted to rely upon evidence “of the type commonly relied upon by reasonably prudent persons in the conduct of their affairs” when adjudicating Department for Children and Families (DCF) abuse substantiation proceedings. S. 13 also prevents the respondent from calling a child accuser as a witness, by deeming Vt. R. Evid. 804a inapplicable to such hearings. The ACLU of Vermont strongly urges the committee not to agree to such modifications.

The most obvious objection to permitting Human Services Board abuse substantiation hearings to consider hearsay¹³ and other evidence that would in any other context be barred by the Vermont Rules of Evidence is a due process one. With respect to hearsay, the traditional judicial suspicion of hearsay springs from understandable concerns over the trustworthiness of the hearsay, and Vermont has adopted extensive evidentiary rules governing what hearsay is, and when and how it may be used.¹⁴ Although there is no constitutional bar on the use of hearsay during administrative proceedings, there is a due process requirement that any such evidence be reliable. *Richardson v. Perales*, 402 U.S. 389, 402 (1971). Indicators of this constitutional minimum of reliability “include the opportunity to cross-examine the declarant, the detail contained in written reports, corroboration among independent hearsay reports, and the preparation of reports according to an established routine.” *United States v. Int’l Bhd. of Teamsters*, 978 F.2d 68, 72 (2d Cir. 1992). The cross-examination requirement, in particular, is vital, because “the availability of subpoenas to protect the right to confront witnesses is a quid pro quo for allowing important administrative determinations to be made based on written hearsay evidence.” *Langlois v. Dep’t of Employment & Training*, 149 Vt. 498, 503 (1988) (reversing denial of unemployment benefits where defendant admitted written testimony of a key witness but refused to permit plaintiff to subpoena the witness for in-person testimony).

At present, the due process minimum standard of evidentiary reliability is provided for by the Vermont Rules of Evidence, and in particular, Rule 804a.¹⁵ The rule, discussed at greater length below, governs the use of out-of-court statements made by children under the age of ten – the most likely source of hearsay evidence sought to be used by the Department for Children and Families against an abuse substantiation respondent. The rule permits the admission of a prior statement by a child provided the statement meets some basic standards: the statement must have been made “in a civil, criminal or administrative proceeding,” the statement cannot have been “taken in preparation for a legal proceeding,” the child who made the statement must be “available to testify in court or under Rule 807,” and the hearing officer must be satisfied that “the time, content and circumstances of the statements provide substantial indicia of trustworthiness.” Vt. R. Evid. 804a(a)(1)-(4). These protections offer rudimentary assurance against a party crafting self-serving hearsay for use as evidence. The requirement that hearsay

13 Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Vt. R. Evid. 801(c). The “declarant” is the person making the statement that is hearsay. Vt. R. Evid. 801(b). Evidence described by the phrase “of the type commonly relied upon by reasonably prudent persons in the conduct of their affairs” includes hearsay. *See generally In re Odessa Corp.*, 179 Vt. 640, 646 (2006) (discussing the interaction between the Vermont Rules of Evidence and the administrative hearsay exception).

14 *See* Vt. R. Evid. 801-807.

15 *Cf. In re C.M.*, 168 Vt. 389, 396 (1998) (absent statutory provision to the contrary, Vt. R. Evid. 804a “applies in determining the admissibility of child hearsay statements concerning sexual abuse in an expungement hearing”).

admitted under R. 804a be made in a prior “civil, criminal, or administrative proceeding” means that the statement will have been sworn to by the declarant under pain of perjury. The requirement that the declarant be available to testify guarantees that the declarant can be cross-examined as to the statement, so that the truth of the statement can be probed. The need for these protections was recognized by the Advisory Committee at the time it created Rule 804a and insisted that subsections (a)(1)-(4) be a mandatory part of the rule, “to safeguard the right of confrontation while at the same time curing the frequent problem of lack of corroboration caused by the traditional hearsay rules” and permit a fact-finder to consider such hearsay only “when there is minimal risk of fabrication.” Vt. R. Evid. 804a reporter’s note.

Affirmatively barring these protections invites the adjudication of abuse allegations on the basis of deficient, biased sources of information such as interview statements from complaining witnesses and the pre-sentence reports that § 36 of S. 13 proposes to automatically file with DCF. Permitting statements from children to be used as evidence in Human Services Board hearings in the absence of Rule 804a is particularly troublesome because it will encourage the crafting of such statements for the purpose of use against the accused. Absent 804a, the statements may be taken *ex parte*, need not be sworn, can perfectly well be taken in anticipation of litigation,¹⁶ and will never be probed on cross-examination. The committee should avoid the constitutional deficiencies inherent in such a scheme by striking § 29 from S. 13.

The committee should not modify the rules of evidence to broaden the hearsay exception for statements of an alleged victim made when alleged victim is aged twelve years or fewer (§ 28)

Currently, the Vermont evidentiary rules contain an explicit exception to the general prohibition against hearsay permitting the introduction at trial of out-of-court statements made by a child ten years old or younger at the time of trial, where the prior statements were made “in a civil, criminal, or administrative proceeding” in which the child was alleged to have been the victim of a sex crime. Vt. R. Evid. 804a(a). Section twenty-eight of S. 13 proposes to greatly broaden the exception by permitting the introduction of such prior statements if the child was aged twelve years or younger at the time the statements were made, thus making the statements available for the life of the child.

The ACLU of Vermont’s objection to § 28 is twofold: first, basic concerns of fairness to the individual against whom the statements are introduced dictates that the indefinite look-back period is too long. This objection is grounded upon the same principle that underlies statutes of limitations upon criminal and civil actions, *i.e.*, it is fundamentally unreasonable to expect that a person can competently provide detailed explanations for actions that took place many years ago.

Secondly, codification of § 28 ensures that the state will have an infinitely useful source of

¹⁶ The ability of the state to generate the very evidence that it will use against an individual in an administrative proceeding is a danger that the United States Supreme Court weighs in favor of a heightened evidentiary standard. Due process requires that a state meet a higher burden of proof where its “ability to assemble its case . . . dwarfs the [respondent]’s ability to mount a defense” because the state empowers employees “both to investigate the [respondent]’s situation and to testify against the [respondent].” *Santosky v. Kramer*, 455 U.S. 745, 763 (1982). This mismatch creates a due process problem because “the State’s unusual ability to structure the evidence increases the risk of an erroneous factfinding.” *Id.* at 764 n.13. *See also Valmonte v. Bane*, 18 F.3d 992, 1004 (2d Cir. 1994) (administrative determinations that child abuse has occurred “are inherently inflammatory, and unusually open to the subjective values of the factfinder,” a problem compounded “where one side has the greater ability to assemble its case”) (internal quotation and citation omitted).

information by which to bolster complaining witnesses who are impeached during cross-examination. Currently, out-of-court statements of children may not be used as non-hearsay if the child is over the age of ten at the time the statement is introduced at trial; this leaves limited means by which prosecutors may use such statements if the child is older than ten at the time of trial. Under Vt. R. Evid. 801(d)(1)(B), the child's prior statements may be used if they are "consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive," a means of bolstering a child's credibility in front of a jury by repairing any damage done to the child's appearance of truthfulness by cross-examination. However, the Vermont Supreme Court has held that 801(d)(1)(B) statements may not be used "solely for the purpose of repeating the same general story." *State v. Hazelton*, 181 Vt. 118, 125 (2006). Instead, the statements must "particularly dispel, explain, modify, or clarify the inconsistency" brought out on cross-examination. *Id.* at 124. Extending the period during which a child's prior statement is admissible permits prosecutors to admit the statement under Rule 804a regardless of the age of the child, and route around the strictures of *Hazelton* – thus permitting a jury to hear "the entire repeated recitation" of the child's testimony, falsely reinforcing the credibility of the witness. *Hazelton*, 181 Vt. at 128.

The committee should not disturb *Hazelton* by adopting § 28. The limits placed on hearsay evidence serve an important due process function limiting the state's ability to bolster its witnesses with out-of-court statements produced in the course of DCF investigations, and Vermonters should not be stripped of these protections.

The committee should not require pre-sentence reports to draw on the DCF abuse registry (§ 36)

S. 13 proposes to require that pre-sentence investigation reports for certain criminal defendants draw upon DCF abuse registry entries. The ACLU of Vermont opposes this change in the law for the reason that DCF abuse substantiation proceedings do not afford the respondent a full and fair opportunity to refute the allegations against her, and should therefore not be treated as conclusively establishing the fact of the abuse or the dangerousness of the respondent.

If substantiated, a report of abuse or neglect must be placed in a child protection registry maintained by DCF, and the alleged abuser must be notified of her or his placement on the registry. Vt. Stat. Ann. tit. 33, §§ 4916(a)(1),(3). The registry entry not only identifies the person alleged to have mistreated the child, but assigns the person "a designated child protection level related to the risk of future harm to children" that DCF determines by considering, among other things, "the person's prior history of child abuse or neglect as either a victim or perpetrator" and "the person's response to the investigation." *Id.* § 4916(d).

A person may challenge her or his listing on the registry in two ways: first, within fourteen days of receiving notice of substantiation from DCF, the person may request administrative review of the decision. At the administrative review, the respondent is permitted to present evidence, but DCF bears the ultimate burden "of proving that it has accurately and reliably concluded that a reasonable person would believe that the child has been abused or neglected by that person." *Id.* § 4916a(e). Should DCF's administrative review nonetheless determine that the abuse substantiation was accurate and reliable, the person listed on the registry retains the option of appealing to the Human Services Board for a hearing as provided by Vt. Stat. Ann. tit. 3, § 3091. Notably, such hearings conduct *de novo* review of DCF's substantiation decision, *In re Bushey-Combs*, 160 Vt. 326, 328-329 (1993), but it is not clear which party bears the burden of proof.

Based on a statutory provision existing at the time of the decision, *Bushey-Combs* held that DCF bore the burden, *id.* at 329, but the Legislature deleted the provision in question in 2007. In the absence of a statutory provision specifying otherwise, the Agency of Human Services fair hearing rules¹⁷ place the burden of proof upon the appellant, by a preponderance of evidence. 13-020-002 Vt. Code. R. § 1000.3(O)(4).

An individual responding to an allegation of abuse at either the administrative review or fair hearing stage of the DCF substantiation procedure does not necessarily have an interest in testifying on her own behalf. In relevant part, the Fifth Amendment to the United States Constitution forbids individuals to be compelled in any criminal case to be a witness against herself, and the United States Supreme Court has construed this prohibition to forbid forcing an individual “to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The right against self-incrimination carries with it a concomitant command that, generally, “adverse state action may not be taken as a consequence of a person’s invocation of the self-incrimination privilege,” *Asherman v. Meachum*, 957 F.2d 978, 981 (2d Cir. 1992), with a notable exception: states may base administrative decisions upon “a refusal to answer relevant questions, so long as the administrator does nothing to impair the later invocation of the privilege.” *United States v. Johnson*, 446 F.3d 272, 280 (2d Cir. 2006). This administrative exception to the self-incrimination protection operates, for instance, to permit the revocation of supervised release of an individual who fails to answer the questions of her probation officer even where the questions are self-incriminating. *Asherman*, 957 F.2d at 983.

For the Vermonter facing an abuse substantiation proceeding, the functional unavailability of the right against self-incrimination means that she must decide whether to waive her right to keep silent, or invoke her right and thereby fail to counter the evidence against her. Worse, because DCF not only purports to determine whether abuse occurred, but how dangerous the respondent is based upon her “response to the investigation,” Vt. Stat. Ann. tit. 33, § 4916(d), Vermonters electing to stay silent with an eye towards an upcoming criminal prosecution will suffer twice from invoking the right against self-incrimination.¹⁸

Thus, a Vermonter facing an abuse substantiation proceeding has every incentive not to fully litigate DCF’s determination that abuse occurred. The reality of this Hobson’s choice makes abuse substantiations particularly unfit for use by the courts in sentencing, where a defendant’s presence on the abuse registry – and possible higher dangerousness classification for having refused to testify – may be taken as proof of the occurrence of the abuse. For these reasons, the Committee should avoid mandating that DCF abuse substantiations be included in every presentence investigation report as proposed by § 36 of S. 13.

17 See Vt. Stat. Ann. tit. 3, § 3091(b) (mandating the Board “adopt rules with reference to appeals”).

18 Abuse substantiation appeals “may be stayed upon request of the person . . . if there is a related criminal or family court case pending in court which arose out of the same incident of abuse or neglect for which the person was substantiated,” Vt. Stat. Ann. tit. 33, § 4916a(c), but this safeguard is incomplete because of its insistence that a stay only occur when a prosecution is “pending in court.” Abuse substantiation proceedings can perfectly well occur prior to the commencement of a prosecution, *see* Vt. Stat. Ann. tit. 13, § 4508 (prosecution begins with either the warrantless arrest of the defendant, the issuance of a citation to appear, or the “presentation of an information or indictment to a judicial officer for the purpose of obtaining a summons or arrest warrant”); § 4501 (setting forth time limits upon prosecution of felonies).

Conclusion

The ACLU of Vermont has serious concerns about the provisions of S. 13 discussed above. The rights of the marginalized and despised are always the hardest to acknowledge. Sex offenders in particular elicit little sympathy, yet the taking of anyone's rights represents a potential threat to everyone's rights. Any restrictions imposed on any group must be imposed in a constitutional manner. S. 13 goes too far towards creating a Vermont in which people accused of crimes are typecast as guilty upon arraignment, are not permitted to see all the evidence against them, and can be threatened with unfair plea bargains. We urge the committee to resolve these problems before taking any action on the bill.