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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CENTER FOR GENETICS AND SOCIETY, EQUAL JUSTICE SOCIETY, and PETE SHANKS, Plaintiffs, v. ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF JUSTICE Defendants.	Case No. CPF18516440 **Second Amended Verified Petition for Writ of Mandate and Complaint for Equitable Relief under Article I §§ 1, 13 of the California Constitution** Judge: Hon. Ethan Schulman Department: 302 Case Filed 12/10/2018 No trial date set

[1] Pending February2022 California Bar Examination; Motion for Admission as an attorney employed by a legal aid organization filed with Motion to Amend.

1. This is a challenge to two aspects of California's program of seizing, analyzing, and retaining DNA from persons arrested for a felony. The State currently seizes a DNA sample from every person it arrests on suspicion of a felony, unless it already has a sample from that person; it then analyzes and uploads these samples to its DNA database, even if the arrestee is never charged with or convicted of a crime or if a judge determines that there is no probable cause to support the arrest. It then retains all of these samples and the related DNA profiles indefinitely – again, including those seized from people never charged or convicted – unless the arrestee successfully takes action to have them expunged.

2. Plaintiffs challenge California's analysis and retention of DNA collected from people who are arrested but not charged with or convicted of a crime on the grounds that these parts of the program violate the California Constitution's protection of privacy and prohibition against unreasonable searches and seizures, Article I §§ 1, 13.

3. The analysis of a person's DNA sample reveals personal information that is not otherwise accessible about that DNA subject—making it a search and an infringement of the arrestee's privacy that the government must justify. But the government has no legitimate interest in analyzing DNA samples taken from arrestees who are arrested without probable cause, who are released without charges, or whose charges are dismissed before the sample is analyzed.

4. The retention of a person's DNA and the profile developed from it also implicates personal privacy. The government has no legitimate interest in retaining samples and profiles from people without felony convictions because they were not charged, their charges were dismissed, they were acquitted, or their cases otherwise resolved without a felony conviction. In fact, the current programs and statutory scheme recognize these situations and provide procedures to allow people without prior or present qualifying convictions to have their DNA samples expunged. However, only a tiny percentage of those eligible for expungement complete this process. This is likely because they do not know about their right to expungement (there is no requirement that they be informed of

it), they do not know their DNA is being retained in the first place, and/or they are not provided assistance with navigating the complicated expungement process. When the state violates an individual's right to privacy protected by Article I, § 1, the burden should be on the state, not the individual whose privacy is invaded, to rectify the constitutional violation.

5. The state's failure to automatically expunge these samples and profiles has led to its retention of likely hundreds of thousands of DNA samples taken from people who are eligible to have those samples expunged because they have never been convicted of a felony.

6. As discussed below, between 2009 – when the state began requiring everybody arrested on suspicion of a felony to provide a DNA sample – and 2017, *over 750,000 people*[2] were arrested on suspicion of a felony and subjected to DNA collection, but not convicted of any crime. Remarkably, only 1,282 of these people have had their DNA samples and profiles expunged. The disparity in these numbers alone demonstrates that the current system fails to protect the privacy of hundreds of thousands of Californians who have never been convicted of a crime.

7. Plaintiffs therefore request equitable relief to prohibit Defendants from continuing these unconstitutional practices that affect tens of thousands of Californians every year.

Parties[3]

8. Plaintiff Center for Genetics and Society ("CGS") works to ensure that human genetic technologies are used equitably and for the common good. Founded in 2001, CGS advocates for socially responsible uses and effective governance of these technologies. CGS works to ensure that human genetics technologies are used in socially responsible ways. CGS has long been concerned that the overexpansion of criminal DNA databases is an unnecessary invasion of personal privacy

[2] *See* Federal Bureau of Investigation, Laboratory Services, CODIS - NDIS Statistics (Oct. 2018), available at https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics. A true copy of these statistics is attached to this Complaint as **Exhibit A**.

[3] This Complaint refers to the parties as Plaintiffs and Defendants as authorized by Code of Civil Procedure § 1063.

that exploits and reinforces existing institutional racial inequalities. CGS's offices are based in Alameda County. CGS is fiscally sponsored by the Tides Center, a nonprofit 501(c)(3) organization with facilities in the City and County of San Francisco. It pays taxes every year that are used to fund Defendant department of justice, including sales taxes as a consumer.

9. Plaintiff Equal Justice Society ("EJS") seeks to use social science, structural analysis, and real-life experience to combat racial inequality by broadening conceptions of discrimination to include unconscious and structural bias in the criminal-justice system and elsewhere. Founded in 2000, it is likewise concerned that the overexpansion of criminal DNA databases both exploits and reinforces existing institutional racial inequalities. EJS is a nonprofit 501(c)(3) organization based in Alameda County. It pays taxes every year that are used to fund Defendant department of justice, including sales taxes as a consumer.

10. Plaintiff Pete Shanks is a resident of Santa Cruz County, where he owns a house with his partner. He is assessed and pays state and local taxes, including property taxes on this property as well as California income tax. He is a writer, editor, and researcher who has been a consultant for CGS since its founding. He is the author of *Human Genetic Engineering: A Guide for Activists, Skeptics, and the Very Perplexed* (Nation Books, 2005) and a regular contributor to the Center's blog, *Biopolitical Times*, where he has written about forensic DNA and DNA databanks.

11. Defendant Xavier Becerra is the Attorney General of the State of California. Under Article 5, § 13 of the California Constitution, he is the "chief law officer of the State," with a duty "to see that the laws of the state are uniformly and adequately enforced." This provision further grants him "direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law." As the head of the California Department of Justice, Defendant Becerra is ultimately responsible for the Department's actions which includes the processing, analysis, and retention of DNA samples and profiles seized from arrestees. Gov. Code § 12510.

12. Defendant California Department of Justice ("Department") is directly responsible for implementing the state's DNA database program and for ensuring that specimens are collected from arrestees, analyzed, uploaded to the State's DNA database, and retained or expunged. Penal Code § 295(g)&(h). The Department runs the Jan Bashinski DNA Laboratory in Richmond, California, which analyzes, stores, and compares the DNA samples collected from arrestees under § 296(a)(2)(C), as mandated by statute. *Id.* §§ 295(k), 295.1(c).

13. In addition, the Department has issued a number of administrative bulletins that govern local law-enforcement collection and processing of DNA samples from arrestees, as authorized by Penal Code § 295(h). All California law enforcement personnel who collect, process, analyze, or otherwise handle DNA from arrestees pursuant to § 296(a)(2)(C) therefore do so as agents of and in active participation with Defendants.

Jurisdiction and Venue

14. This Court has jurisdiction under Code of Civil Procedure §§ 1060, and 1085, and Article VI, § 10 of the California Constitution.

15. Venue is proper in this Court. Because the Attorney General has an office located in the City and County of San Francisco, any suit against Defendants that may be brought in Sacramento may also be commenced and tried in this Court. Code Civ. Pro. § 401(1). This suit could be brought in Sacramento because Defendants reside in, and some of the acts and omissions complained of herein, occurred in Sacramento. *See Id.* at §§ 393, 395(a); Gov. Code § 1060(e).

California's DNA Collection Program

16. California has long collected DNA from people convicted of serious offenses. But in 2004, the voters enacted Proposition 69, which took effect in 2009 and expanded the program to mandate collection from everybody arrested on suspicion of committing a felony. *See* Penal Code § 296(a)(2)(C).

17. The Department has directed that "DNA collection from arrestees should occur during

the booking process or as soon as possible after the arrest and before the subject is released from confinement or custody." Cal. Dept. of Justice, Info. Bulletin No. 08-BFS-02: Expansion of State's DNA Data Bank Program on January 1, 2009: Collection of DNA Samples From All Adults Arrested for Any Felony Offense, 2 (Dec. 15, 2008) (citing Penal Code § 296.1(a)(1)(A)) (hereinafter "Arrestee DNA Bulletin").[4]

18. Before taking a sample, law enforcement first fingerprints the arrestee and uses those prints to identify the arrestee using state and national automated fingerprint identification systems. This process allows them to see the arrestee's criminal history information and whether the arrestee has already provided a California DNA sample. *Id*. Officers may also call the Jan Bashinski DNA Laboratory of the Department of Justice ("Bashinksi Lab") to ask whether an arrestee has a sample on file. *See* Cal. Dept. of Justice, Bureau of Forensic Services, DNA Frequently Asked Questions, (hereinafter "DNA FAQs") (discussing how "arresting agencies or custodial facilities know if a person who qualifies for DNA collection has already provided a sample").[5] The Department's records are "updated with the appropriate 'do not collect' flag within one week of receipt of the collection kit at the Richmond DNA Lab." *Id.* (discussing the Department's "timetable for placing flags in C.I.I." after receiving a sample). If the State already has "suitable DNA sample and print impressions" on file for that arrestee, a new sample will not be taken. Arrestee DNA Bulletin at 2.

19. Samples are usually taken through the "buccal swab" method, scrapping inner cheek cells from the inside of the mouth. Penal Code § 295(e). Body tissue may be taken, however, through other methods (*e.g.*, blood sampling) at the direction of the Department. *Id*. at § 295(f). The Department provides equipment, materials, and instructions to each facility at which body tissue is to be seized. *Id*. at § 298(b)(1).

20. Refusal to submit to sampling is a crime, punishable by one year in jail and a fine. *Id*. at

[4] Available at https://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/69IB_121508.pdf.

[5] Available at https://oag.ca.gov/bfs/prop69/faqs.

§ 298.1(a). In addition, law enforcement is authorized to use physical force to compel a person to give a sample. *Id*. at § 298(b)(3).

21. Once taken, the arrestee's body tissue is forwarded to the Bashinski Lab. The Bashinski Lab then arranges for the DNA analysis to be performed, either by its own personnel or through third-party contractors.

22. The DNA analysis involves using (i) a buffer solution and solvents to break-down and release DNA from the cell; (ii) a centrifuge and filtering to separate the DNA from other cell material; determining how much human DNA (as opposed to, for example, bacterial DNA) is in the sample; (iii) primers to target specific locations – index short tandem repeats – on the DNA; (iv) a Polymerase Chain Reaction to amplify the DNA, a process that generally takes at least two hours in itself, sometimes much longer; and (v) electrophoresis to separate the index STRs and allow them to be measured. These measurements are used to generate a digital profile that is then entered into the state's DNA Database.

23. It generally takes at least one week from the time an arrestee sample is taken to the time the resulting profile is uploaded to the State's database. These samples are tested and uploaded to the state database by the 24 DNA casework laboratories operated by state and local agencies in California, which together comprise the State's Local DNA Index System (LDIS). Seven of these casework laboratories, which together provide DNA evidence testing for 46 of California's 58 counties, are operated by the Department. **Exhibit B** at 4, ¶ 6.

24. Penal Code §§ 295 *et seq.* does not require destruction of the underlying sample after the DNA profile has been created and uploaded into the database. Instead, the body tissue sample is retained indefinitely for further analysis. Thus, the statute allows the state to indefinitely maintain *all* genetic information that can be derived from an arrestee's DNA in a condition that allows for analysis of the sample.

25. California participates in the national Combined DNA Index System database "CODIS,"

which includes local, state, and national databases (known as LDIS, SDIS, and NDIS, respectively). CODIS is a nationwide program, supervised by the Federal Bureau of Investigation, that automatically shares the contents of every participating jurisdiction's, including California's, DNA databases with law enforcement throughout the nation. Most relevant to this case, CODIS contains (i) a forensic database, containing profiles of DNA recovered from crime scenes; (ii) an offender database, containing DNA profiles of persons who have been convicted of certain crimes; and (iii) an arrestee database, containing DNA profiles of people merely arrested for certain crimes.

26. The CODIS databases contain DNA profiles obtained from analysis of a number of different segments on the DNA molecule, known as "core loci." These loci are highly variable from person to person, which means that if two samples share a large number of identical core loci then they are likely to have come from the same person.

27. Before 1997, California's database included nine of these core loci for each sample. But in that same year the NDIS established a 13-loci standard, and California soon followed suit. Over the next few years, it reanalyzed some 200,000 offender samples to comply with the new standard. *See* DNA FAQs (under "Retention of Offender DNA Samples").

28. On January 1, 2017, CODIS expanded the number of core loci from 13 to 20. Federal Bureau of Investigation, Laboratory Services, Frequently Asked Questions on CODIS and NDIS, Question No.19.[6] The State intends to reanalyze its stored samples to participate in this new configuration: "Without the retained samples from CAL-DNA's existing forensic identification DNA database program, California could not effectively participate in this expansion." *See* DNA FAQs (discussing why "the CAL-DNA Data Bank Program retain[s] offender DNA samples after the submissions have been fully profiled").

29. The FBI reports that, as of October 2018, NDIS contained 13,566,716 offender profiles,

[6] Available at https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet.

3,323,611 arrestee profiles, and 894,747 forensic profiles. *See* **Exhibit A**. The FBI also reports that California's database contains 2,012,463 "offender profiles" – which includes samples taken at conviction as well as samples taken at arrest from individuals who were later convicted – and 766,514 arrestee profiles. *Id*. The State's website does not distinguish between arrestee and convicted-person samples.

30. After a DNA profile is entered into CODIS, that profile is then regularly and automatically accessed, searched, and compared with millions of other DNA profiles in the CODIS system. It is also compared to forensic samples collected from crime scenes and other locations. In general, these searches occur at least once every week.

31. CODIS data is widely available to law enforcement agencies throughout the United States and may be available to international law enforcement agencies, such as Interpol, and the national law enforcement agencies of other countries.

32. The mandatory collection of DNA from arrestees in California is intended to provide law enforcement with broad access to otherwise unavailable information about those individuals that might link them to offenses other than those for which they have been arrested.

California's Current DNA Expungement Process Is Challenging, Lengthy, and Uncertain

33. As amended by Proposition 69, California law fails to provide for the automatic expungement of data and samples taken from persons who are arrested but never charged, persons against whom charges are dropped, persons who are acquitted, persons whose convictions are overturned on appeal or habeas corpus, or even persons who are found by a court to be factually innocent of the offense for which they were arrested. Although the law allows these people to request their DNA sample be expunged, they must either file a petition for such expungement in the court of the county where the arrest occurred or try to use Defendants' non-statutory expungement process.

34. The statutory expungement process is, on its face, lengthy and uncertain. For people

who have not been charged with an offense, the law states that arrestees can file a request for expungement only if "no accusatory pleading has been filed within the applicable period allowed by law charging the person with a qualifying offense as set forth in subdivision (a) of Section 296." *Id.* at § 299(b)(1). This "applicable period allowed by law" is the statute of limitations, which ranges from a minimum of three years for even the least serious felony to a maximum of life for embezzlement of public money or for any offense that carries a life sentence. Penal Code §§ 799-801. During this waiting period, the person's profile will remain in the DNA database and be searched repeatedly.

35. Defendants have also developed a non-statutory expungement process. This process requires the applicant to complete and mail a form, found online,[7] to the Department. People who were arrested for, but not charged with, a felony must obtain and attach a letter in support of expungement from a prosecutor, certifying that no charge will be filed. However, there is no requirement that prosecutors provide these letters.

36. People who were charged only with misdemeanors must provide a file-stamped copy of the complaint in their case.

37. People who were charged, but later acquitted, or who had their charges dismissed or a conviction reversed on appeal, must provide a file-stamped copy of court records proving these facts.

38. Social-science research has shown that even minor transactional costs – such as the need to complete a form – can significantly reduce the number of people who sign up for a program, even when that program has serious, concrete benefits.

39. For example, studies show that the minimal burden of completing an enrollment form significantly reduces the number of people who join an employer's 401(k) plan, compared with a default enrollment system, even where an employer offers a 50% match after one year – potentially

[7] *See* Cal. Dept. of Justice, Streamlined DNA Expungement Application Form, DLE 244. (Orig. 02/2011), available at https://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/expungement_app.pdf.

thousands of dollars – among other benefits. Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. Econ. 1149, 1162, 1173-74, 1179-80 (2001).[8] These disparities were particularly stark for African American and Hispanic employees, as well as for young employees and employees at the low end of the compensation scale. *Id*. at 1160-61, 1173.

40. According to these studies, automatic enrollment dramatically increases 401(k) participation, particularly among the groups who would otherwise tend to have the lowest participation rates (blacks and Hispanics, the young, and those with lower compensation), even though "the direct transactions costs involved in initiating 401(k) participation or changing the 401(k) contribution rate or fund allocation are small," involving only "a simple phone call." *Id*. at 1176, 1185.

41. In another study, less than half of the participants were willing to complete a health survey, even when they would have received $25 in cash or a $50 gift certificate for doing so. Emily Haisley, Ph.D.; Kevin G. Volpp, MD, Ph.D.; Thomas Pellathy; George Loewenstein, Ph.D., *The Impact of Alternative Incentive Schemes on Completion of Health Risk Assessments*, 26 American Journal of Health Promotion 184, 185 (2012).[9]

42. The barriers to having a DNA sample expunged go far beyond simply filling-out a form. As discussed above, the statutory process is lengthy and complicated, and even the non-statutory process requires people to obtain documents from the district attorney or, in some cases, the superior court.

43. People who have been forced to provide DNA samples at arrest may not know that their DNA is being retained and searched, or that they have a right to have their samples expunged if they

[8] Available at https://www.ssc.wisc.edu/~scholz/Teaching_742/Madrian_Shea.pdf.

[9] Available at https://d1c25a6gwz7q5e.cloudfront.net/papers/download/02262013_ajhp-HRAincentives2012.pdf.

are not ultimately convicted or their convictions are overturned. There is no statutory requirement that people be informed of either their right to request expungement or the statutory and non-statutory processes for doing so, and few people without counsel are ever informed of it.

44. In contrast, the Judicial Counsel's standard felony advisement-of-rights form informs people who plead guilty or no contest, under the heading "Prints and DNA Samples," that they "understand [they] must provide biological samples and prints for identification purposes – including buccal (mouth) swab samples." Judicial Council of California, Plea Form, with Explanations and Waiver of Rights – Felony, CR-101, § 3(e) (Rev. May 25, 2018).[10] Although this advisement may not fully explain what these samples are being used for, it at least provides some information.

California Expunges Only a Tiny Percentage – Less than 1% – of Samples Taken from People Who Are Not Ultimately Convicted

45. Very few people who are eligible to have their samples expunged go through the process of doing so. This is reflected in the miniscule number of DNA profiles that have been expunged from California's database to date.

46. Approximately one-third of felony arrests do not result in a conviction of any type; many of these arrestees are not even charged with a crime. In 2017, for example, of the 218,933 people arrested on suspicion of a felony in California, for more than 73,000 people (33.3%), their arrest did not result in any sort of conviction or even a probation or parole violation. Out of these 73,000 people, police released 7,910 people without referral for prosecution, the district attorney declined to prosecute 39,815 people, and 26,678 people were acquitted or had their cases dismissed. *See* Cal. Dept. of Justice, Crime in California 2017, 49-50 (July 9, 2018) (Tables 37 & 38A).[11]

[10] Available at http://www.courts.ca.gov/documents/cr101.pdf.

[11] Available at https://openjustice.doj.ca.gov/downloads/pdfs/cd17.pdf. Note that this report considers an arrest for, or conviction of, multiple charges to be a single arrest or conviction. *See id.* at 66 ("If a person is arrested for multiple offenses, the extract selects only the most serious offense based on the severity of possible punishment. If there are multiple dispositions, the extract selects the most serious disposition and the associated offense.").

47. Of those felony arrestees who were ultimately convicted, some unknown number were only convicted of misdemeanor offenses. *See id.* at 53 ("Notes: …. Data include convictions for both misdemeanors and felonies.").

48. The data for felony arrests made between 2009, when the state first began collecting DNA from all felony arrestees, and 2017, the last year for which statistics are available, mirror these numbers. Of the 2,482,273 people arrested on suspicion of a felony in California between 2009 and 2017, 798,895 people (32.2%) were not ultimately convicted of any offense. Police released 82,483 people without referral for prosecution, the prosecutor declined to bring charges against 392,032 people, and 324,380 people were acquitted or had their cases dismissed. *See id.* at 49 (Table 37).

49. Some of these more-than 750,000 arrested-but-not-ultimately-convicted individuals would not have had a sample taken because they already had one in CODIS due to a prior arrest or conviction; but those who were required to provide a sample and did not have any prior qualifying convictions would be eligible to have that sample expunged.

50. The list of those eligible to have their DNA profiles and samples expunged undoubtedly includes hundreds of thousands of people. Plaintiffs have asked the Department for more precise figures, but the Department reported, in an August 9, 2018 letter sent in response to a public-records request, that it does not keep records on the number of people whose DNA is eligible for expungement. A true copy of this letter is attached to this Complaint as **Exhibit B**, with page numbers added.

51. Yet, only a tiny percentage of these people have actually had their samples and profiles expunged. As of the summer of 2018, the Department reports that it had granted a total of 1,282 out of 1,510 expungement requests. It granted 1,155 of these through its non-statutory process and 127 by way of court petition and order. **Exhibit B** at 2-3, ¶ 4.

52. This suggests that, even if only one-half of the over 750,000 people arrested on suspicion of a felony but not convicted of a crime were required to give a DNA sample and are now eligible for expungement, less than 1% – approximately 0.34% – of eligible people have actually had their DNA profiles and samples expunged. This would mean that 99.66% of the samples that are eligible for expungement remain in the system because of the government's failure to automatically expunge them.

53. The Department reports that it is "continually converting booking samples from adult felony arrestees to convicted offender status based on an ongoing automated review of criminal history records." **Exhibit B** at 2, ¶ 2. This indicates that the State either already has, or can create, an automated system for identifying profiles associated with people who have not been convicted of a qualifying offense and then expunge those profiles (and the corresponding samples) if there are no pending felony charges.

54. The Department has an automatic expungement process for some samples, even though the statutory scheme does not require, or perhaps, even contemplate it: The Department automatically expunges samples taken from people who were not formally arrested and booked, but who provided a sample either with consent or because they were ordered to do so by a court. **Exhibit B** at 3-4, ¶ 6-7. It is important to note that due to overt and implicit racial bias in who is cited out and arrested by police,[12] the Department's DNA collection, analysis, and retention policies disproportionately impact Black and Latinx communities.

55. Proposition 69 requires local law enforcement agencies that submit these suspect samples to report to the Department of Justice Crime Lab within two years whether the person

[12] "African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely." Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance Regarding Racial Disparities in the United States Criminal Justice System, The Sentencing Project (Mar. 2018), available at https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ (citing U.S. Bureau of Justice Statistics, *Prisoners in 2016*, 8 tbl.6 (Jan. 2018)).

remains a suspect; if the Department receives a notice that the person is no longer a suspect, it must expunge the sample. Penal Code § 297(c)(2).

56. In practice, however, the Department does not require agencies to submit this notice; apparently none have done so. **Exhibit B** at 3-4, ¶ 6. Instead, the Department requires the laboratories that tested and uploaded these samples to automatically expunge these samples after two years unless the collecting agency has directed otherwise; the Department states that this automatically removes these entries from the state database. **Exhibit B** at 3-5, ¶ 6.

57. In contrast, the Department refuses to automatically expunge samples taken from arrestees who are not ultimately charged or convicted, or whose convictions are overturned on appeal.

The State Has Taken, Analyzed, and Retained DNA Samples from People Who are Never Charged or Convicted of Any Crime

58. A few examples of people who were required to provide DNA samples at arrest but were never convicted illustrate how the statutory scheme works.

59. Kalani Ewing was arrested in September 2015 for alleged child abuse after she disciplined her then-12-year-old son, and taken to Santa Rita Jail in Alameda County. At the jail, as Ms. Ewing was being released on bail, Alameda County Sheriff's personnel demanded a DNA sample because of the arrest, without a warrant. Ms. Ewing protested that she had not been to court, much less convicted, and should not have to give a sample, but eventually complied with this demand when she was told she would not be released unless she did. The charges against Ms. Ewing were eventually dismissed; she does not believe she has any convictions that would justify retaining the sample. Nevertheless, her DNA sample was analyzed and the resulting profile uploaded to CODIS, where it remains. Ms. Ewing did not know that she could have this sample and profile expunged until she heard of the instant suit and read the initial Complaint's description of the expungement procedures.

60. Elizabeth ("Lily") Aida Haskell was the lead plaintiff in *Haskell v. Brown*, a federal challenge to the State's DNA collection law. On March 21, 2009, Ms. Haskell was arrested at a peace rally against the War in Iraq at San Francisco's Civic Center on suspicion of taking a person from police custody, a felony under Penal Code § 405b, and misdemeanor obstruction of a peace officer under Penal Code § 148, after she allegedly tried to free another protestor who had been taken into custody. After arrest, Ms. Haskell was taken to a San Francisco jail, where San Francisco Sheriff's Department personnel demanded a DNA sample. Two sheriff's deputies told Ms. Haskell that she would be charged with a separate misdemeanor if she did not provide a DNA sample. Ms. Haskell asked about access to a lawyer before providing the sample. One of the deputies told Ms. Haskell that she could talk to a lawyer but that she would still be charged with a separate misdemeanor for not immediately providing a DNA sample. She was also told that she would not be released from jail until after arraignment if she did not provide a DNA sample on the spot and without advice from a lawyer. She therefore provided the sample.

61. No charges were ever filed against Ms. Haskell based on this arrest. No law enforcement entity or personnel obtained any sort of warrant to take her DNA. Defendant nevertheless analyzed Ms. Haskell's DNA sample and uploaded her DNA profile into CODIS, where it remains. There is no other legal basis for the seizure, analysis, or retention of Ms. Haskell's DNA sample other than this arrest.

62. Reginald Ento was arrested by Sacramento law enforcement officers in early 2009, for alleged receipt of stolen property (Penal Code § 496): outdated film cameras marked "Property of U.S. Forest Service." After he was arrested, Mr. Ento was detained at the Sacramento County Jail, where a sheriff's deputy collected a DNA sample from Mr. Ento by inserting a swab into his mouth and scraping the inside of his cheek. Mr. Ento did not consent to this collection of his DNA. In fact, the deputy indicated that if necessary, the DNA sample would be collected from Mr. Ento by force.

63. No charges were ever filed against Mr. Ento based on this arrest. No law enforcement entity or personnel obtained a warrant to take Mr. Ento's DNA. Defendants nevertheless analyzed Mr. Ento's DNA sample and uploaded the resulting profile into CODIS, where it remains, even though he did not have any qualifying convictions that would justify analyzing or retaining this sample.

64. Jeffrey Patrick Lyons, Jr. participated in a demonstration outside the Israeli consulate in San Francisco in 2009, to show his solidarity with a political activist who had been seriously injured at a protest in Israel. During the demonstration, San Francisco police officers arrested Mr. Lyons for allegedly trying to take a person from police custody. He was then taken to jail at 850 Bryant Street in San Francisco and ordered to provide a DNA sample. He complied with this order. The San Francisco District Attorney's office charged Mr. Lyons with a felony, Penal Code § 405a, based on this arrest. No law enforcement entity or personnel obtained a warrant to take Mr. Lyon's DNA. His sample was analyzed and the resulting profile uploaded to CODIS, where it remains. On November 9, 2009, the case against Mr. Lyons was dismissed. Mr. Lyons has no qualifying convictions that would justify retention of his DNA sample and profile.

65. In 2009, Aakash Desai was a graduate student at the University of California, Berkeley majoring in environmental engineering. On Friday, November 20, 2009, he participated in a demonstration in Wheeler Hall on the U.C. Berkeley campus, protesting custodial layoffs and furloughs, as well as tuition fee hikes. During the demonstration, U.C. Berkeley police officers arrested Mr. Desai and took him to the Berkeley city jail, where he was told he was being charged with felony burglary. Mr. Desai was then ordered to, and did, provide a DNA sample, although he did not want to and there was no warrant authorizing this search and seizure. He was eventually released on bail. When Mr. Desai went to court for his arraignment on the Monday following his arrest, he learned that no charges had been filed against him. His DNA sample was nevertheless analyzed and the resulting profile added to CODIS, where it remains. Mr. Desai has no qualifying convictions that would justify this seizure, analysis or retention of his genetic information.

The Analysis and Retention of DNA Samples and Profiles Implicates Personal Privacy Interests and Can Have Serious Consequences for Individuals and for Society

66. Having one's DNA profile included in CODIS can have serious consequences, both concrete and more abstract.

67. The most concrete consequence is that a person with a profile in CODIS may be implicated, and sometimes arrested, charged, or even convicted for a crime they didn't commit, based on a CODIS match between their profile and DNA found at the crime scene. These "false positives" can result from a number of causes, as discussed below.

68. False positives may be the result of crime-lab error. For example, in a case involving a home invasion and kidnapping, an 18-year-old man "spent nearly four years in a Nevada prison, until the crime lab realized it had accidentally switched his sample with another suspect's tube. The lab apologized, and he was released from prison." Greg Hampikian, "The Dangers of DNA Testing," *New York Times* (Sep. 21, 2018).[13]

69. False positives may also occur when crime labs test crime-scene samples that contain DNA from multiple people. As the *New York Times* reports:

> Researchers from the National Institute of Standards and Technology gave the same DNA mixture to about 105 American crime laboratories and three Canadian labs and asked them to compare it with DNA from three suspects from a mock bank robbery. The first two suspects' DNA was part of the mixture, and most labs correctly matched their DNA to the evidence. However, 74 labs wrongly said the sample included DNA evidence from the third suspect, an 'innocent person' who should have been cleared of the hypothetical felony.

Id. The study cited in the article clarifies that these errors "involved a DNA profile developed from a discarded ski mask where the prepared [DNA] mixture contained four contributors in roughly equal amounts." **Error! Hyperlink reference not valid.**John M. Butler, Margaret C.

[13] Available at https://www.nytimes.com/2018/09/21/opinion/the-dangers-of-dna-testing.html.

Kline, Michael D. Coble, Forensic Science International: Genetics 37, at 89 (2018).[14]

70. False positives may also occur when a person's DNA is transferred to a crime scene by a third party. In one notorious case from Santa Clara County, 26-year-old Lukis Anderson was arrested, charged with capital murder, and jailed for 5 months because DNA taken from a murder scene matched his CODIS profile. There was no other evidence connecting him to the murder, and his lawyers were able to show he was in a local hospital when the crime occurred. After prosecutors dismissed the charges against him, they asserted that the false positive had occurred because the paramedics who transported Anderson to the hospital had then gone to the murder scene and contaminated the body with his DNA. *See* Osagie K. Obasogie, "High-Tech, High-Risk Forensics," *New York Times* (July 24, 2013).[15] Had Anderson's DNA profile not been in CODIS, he would not have been wrongly arrested and jailed for murder.

71. Arrestee testing threatens to exacerbate racial disparities in the criminal-justice system. People of color in California have a greater-than-average chance of being arrested for reasons that have little to do with their level of criminality, including racial profiling and the allocation of police resources. Many of these individuals may never be charged or convicted of a crime, but under the current system their DNA will remain in the database.

72. In 2015, the Legislature recognized the need to "address the pernicious practice of racial or identity profiling" in California and therefore enacted AB 953, which attempts to reduce the practice. *See* Penal Code § 13519.4(d)(5). This legislation required the Attorney General to "establish the Racial and Identity Profiling Advisory Board (RIPA) for the purpose of eliminating racial and identity profiling." *Id*. at § 13519.4(j)(1). RIPA must issue annual reports. *Id*. at § 13519.4(j)(3)(E).

73. RIPA's first annual report discusses research on racial profiling, explaining that the

[14] Available at https://www.fsigenetics.com/article/S1872-4973(18)30248-5/pdf.

[15] Available at https://www.nytimes.com/2013/07/25/opinion/high-tech-high-risk-forensics.html.

"evidence-based research executed to date, and in particular studies with the highest level of scientific rigor, have revealed significant disparities in policing activities in cities in California." California Racial and Identity Profiling Advisory Board 2018 Annual Report, 14 (Jan. 1, 2018).[16]

74. For example, the RIPA report describes a multi-year study of 28,000 Oakland Police Department stops. Researchers "found a consistent pattern of racial disparities in the community members stopped, handcuffed, searched, and arrested by the OPD. Importantly, these disparities remained even after the researchers took into account a wide range of factors known to affect police decision-making, such as neighborhood crime rates and the racial demographics of the neighborhood where the stop took place." *Id*. at 14-15.

75. Seizing, analyzing, and retaining a DNA sample from every person arrested on suspicion of a felony also creates incentives for police officers to arrest people simply to obtain a sample, perhaps without probable cause or in a circumstance that they know will not lead to prosecution. Even if people arrested because of racial profiling or for other improper reasons are released without referral for prosecution – likely meaning that no prosecutor or judge will ever review the arrest – their DNA profile will be uploaded to CODIS and immediately run against the forensic database. These profiles will almost certainly remain there indefinitely, given the tiny number of expungements under the current system.

76. The seizure, analysis, and retention of arrestee DNA samples also implicates personal privacy in other ways.

77. Although the DNA profiles that are currently stored in law enforcement databases are sometimes referred to as "DNA fingerprints," this is a misnomer, because although fingerprints and DNA resemble each other in that each is unique for each individual person, the seizure, banking, and analysis of DNA samples differs fundamentally from the mere taking of a fingerprint.

[16] Available at https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2018.pdf.

78. Fingerprinting involves the creation of an image or impression of the external physical conformation of the fingertips, and a fingerprint reveals nothing more about the person than the unique patterns on the skin of his or her fingers. Thus, while fingerprints may be used to provide evidence of the identity of a person, they reveal no other information about that person.

79. DNA, in contrast, is a microscopic arrangement of chemical constituents within the nucleus of a human cell that make up an individual's genetic blueprint. DNA analysis can reveal a vast array of highly private information, including familial relationships, ethnic traits and other physical characteristics, genetic defects, and propensity for certain diseases, such as sickle-cell anemia, Down syndrome, and certain types of cancers. The amount of information about a person that can be revealed by DNA is expanding every year. Some scientists have suggested that DNA analysis can be used to predict personality traits, propensity for antisocial behavior, sexual orientation, and an ever-expanding variety of existing and future health conditions and physical traits.

80. The CODIS profiles generated from these samples also contain indisputably private information, albeit much less so than the samples themselves. For example, DNA profiles have been used to identify a person's family members. While California does not currently allow "familial searching" on arrestee DNA, Defendants do use this process with offender profiles to attempt to identify a person whose DNA is similar to that left at a crime scene, in the hope that the near-match may be a family member of the true perpetrator. This represents an unreasonable intrusion into the private life of an individual who has not even been accused of a crime but who may (or may not) be related to someone arrested on a suspicion of a felony crime and never convicted.

81. A DNA specialist with the Department acknowledged this in a 2007 internal memorandum analyzing the desirability of allowing for familial searching. The memorandum explained that "a policy of disclosing partial database matches would shift the delicate Fourth Amendment balance that courts have struck in holding DNA database programs constitutional by diluting the state interest in the expeditious and accurate nature of the DNA database while weakening the disclosure restrictions that minimize invasions of privacy." The Department's DNA

specialist wrote, a "policy permitting the reporting of arrestee names for the purpose of investigating potential relatives, even before those arrestees have been convicted (or not convicted and consequently expunged) could be viewed as an overreaching application of the Database. In turn, this may impair DOJ's arguments in support of the Fourth Amendment reasonableness of arrestee collections in the first instance." *See* June 6, 2007 Memorandum from California Deputy Attorney General Michael Chamberlain, DNA Legal Unit, at 5, 7. A true copy of this memorandum is attached to this Complaint as **Exhibit C**.

82. Although the Department currently has a policy that allows familial searching only in its convicted-offender database, not in the arrestee database, there is nothing to prevent it from changing this policy at any time without public notice. A person whose rights under the state Constitution were violated by a search would likely have no remedy in a criminal case because of the State's truth-in-evidence provisions. *See* Cal. Const. Art. I § 28(f)(2).

FIRST CAUSE OF ACTION
For Writ of Mandate and Equitable Relief for Violation of Article I, §§ 1 of the California Constitution

(All Plaintiffs v. All Defendants)

83. Plaintiffs incorporate herein by reference the above allegations, as if set forth in full.

84. Article I, Section 1 of the California Constitution protects the right of every Californian to pursue and obtain personal privacy. This provision, adopted by the voters in 1972, is meant to guard against the overbroad collection and retention of unnecessary personal information by the government, as well as the misuse of information collected for a proper purpose.

85. The analysis of DNA samples taken from arrestees and the uploading and use of the resulting profiles infringes on the privacy protected by this provision.

86. This infringement is not justified when the people affected are not charged with a crime, have had their charges dismissed without conviction, are acquitted, or have their conviction overturned or set aside.

SECOND CAUSE OF ACTION
For Writ of Mandate and Equitable Relief for Violation of Article I, § 13 of the California Constitution

(All Plaintiffs v. All Defendants)

87. Plaintiffs incorporate herein by reference the above allegations, as if set forth in full.

88. Article I, Section 13 of the California Constitution prohibits unreasonable searches and seizures.

89. The analysis of a DNA sample that a person has been required to provide as a result of an arrest is a search because it reveals information about the sample – and the person – that cannot be detected without scientific analysis.

90. This search is unjustified and therefore unreasonable unless, at the time it occurs, the person from whom the DNA was taken is actually being prosecuted for an offense and a neutral magistrate has either found probable cause to believe that the person has committed a felony or issued a warrant authorizing a search of the DNA.

91. The process of comparing profiles generated from a DNA sample that a person has been required to provide as a result of an arrest against other profiles in the CODIS system also implicates the right against unreasonable searches.

THIRD CAUSE OF ACTION
For Writ of Mandate and Equitable Relief for Violation of Article I, § I of the California Constitution

(All Plaintiffs v. All Defendants)

92. Plaintiffs incorporate herein by reference the above allegations, as if set forth in full.

93. Article I, § 1 of the California Constitution protects against the overbroad retention of unnecessary personal information by the government, as well as collecting information for one purported purpose but then using it for a different one.

94. The retention of DNA samples and DNA profiles taken from arrestees who are not ultimately convicted of a felony constitutes the overbroad and unnecessary retention of, and misuse

of, personal information, all of which infringes upon personal privacy. The government currently allows these individuals to have these samples and profiles expunged, both under Proposition 69's statutory provisions and under a non-statutory procedure, which shows that the government has no real interest in maintaining them.

95. The current system of requiring affected people to go through a process to have a sample expunged has proven inadequate, particularly given that only a tiny percentage of those eligible for expungement have actually had their profiles expunged. As a result, the government is improperly retaining and using the DNA and profiles of tens of thousands of Californians, in violation of their right to privacy.

FOURTH CAUSE OF ACTION
For Writ of Mandate and Equitable Relief for Violation of The Information Practices Act, Civ. Code § 1798 *et seq*.

(All Plaintiffs v. All Defendants)

96. Plaintiffs incorporate herein by reference the above allegations, as if set forth in full.

97. The Legislature enacted the Information Practices Act to ensure that State agencies comply with the privacy protections of the California Constitution.

98. Defendants are violating this statute by retaining and using DNA samples and profiles relating to people who have not been convicted of a qualifying offense.

FIFTH CAUSE OF ACTION
For Unlawful Use of Taxpayer Funds under Code of Civil Procedure § 526a

(All Plaintiffs v. All Defendants)

99. Plaintiffs incorporate herein by reference the above allegations, as if set forth in full.

100. Defendants are illegally expending public funds by analyzing and retaining DNA samples and profiles, and otherwise performing their duties as described above, in violation of the constitutional provisions listed in the other causes of action.

For these reasons, Plaintiffs request the following relief:

1. That the Court issue a writ of mandate and an injunction to Defendants, their agents, and those working in concert with them,

   a) prohibiting them from analyzing DNA samples taken from arrestees unless the arrestee is, at the time of the analysis, actually being prosecuted for a felony offense as a result of the arrest and a judicial officer has found probable cause to believe the arrestee has committed that offense;

   b) prohibiting them from retaining or in any way using DNA samples and profiles relating to arrestees who have not ultimately been convicted as a result of the arrest that led to the sample being taken, or whose convictions have been overturned or set aside, unless the arrestee has a separate qualifying conviction for a crime that required them to provide a DNA sample at the time and that continued to justify retention; and

   c) requiring them to destroy and expunge DNA samples and profiles relating to arrestees who are not ultimately convicted as a result of the arrest that led to the sample being taken, or whose convictions are overturned, unless the arrestee has a separate qualifying conviction that would itself justify the retention of the DNA sample and profile.

2. That Plaintiffs be awarded attorneys' fees and costs under Code of Civil Procedure § 1021.5 and any other applicable law;

3. For such other and further relief as the Court deems proper and just.

Dated: 10/18/2021 and 12/13/21

By: /s/ Michael T. Risher
Michael T. Risher

Attorney for Plaintiffs

Verification

I, Marcy Darnovsky, am Executive Director of the Center for Genetics and Society and authorized to verify this Petition. I have read this Second Amended Verified Petition for Writ of Mandate and Complaint in *Center for Genetics and Society, Equal Justice Society, Pete Shanks, v. Xavier Becerra, Attorney General of the State of California, California Department of Justice* and am informed, and do believe, that the matters herein are true. On that ground, I allege that the matters stated herein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: 12/13/2021

Marcy Darnovsky

Marcy Darnovsky

Exhibit A

CODIS - NDIS Statistics

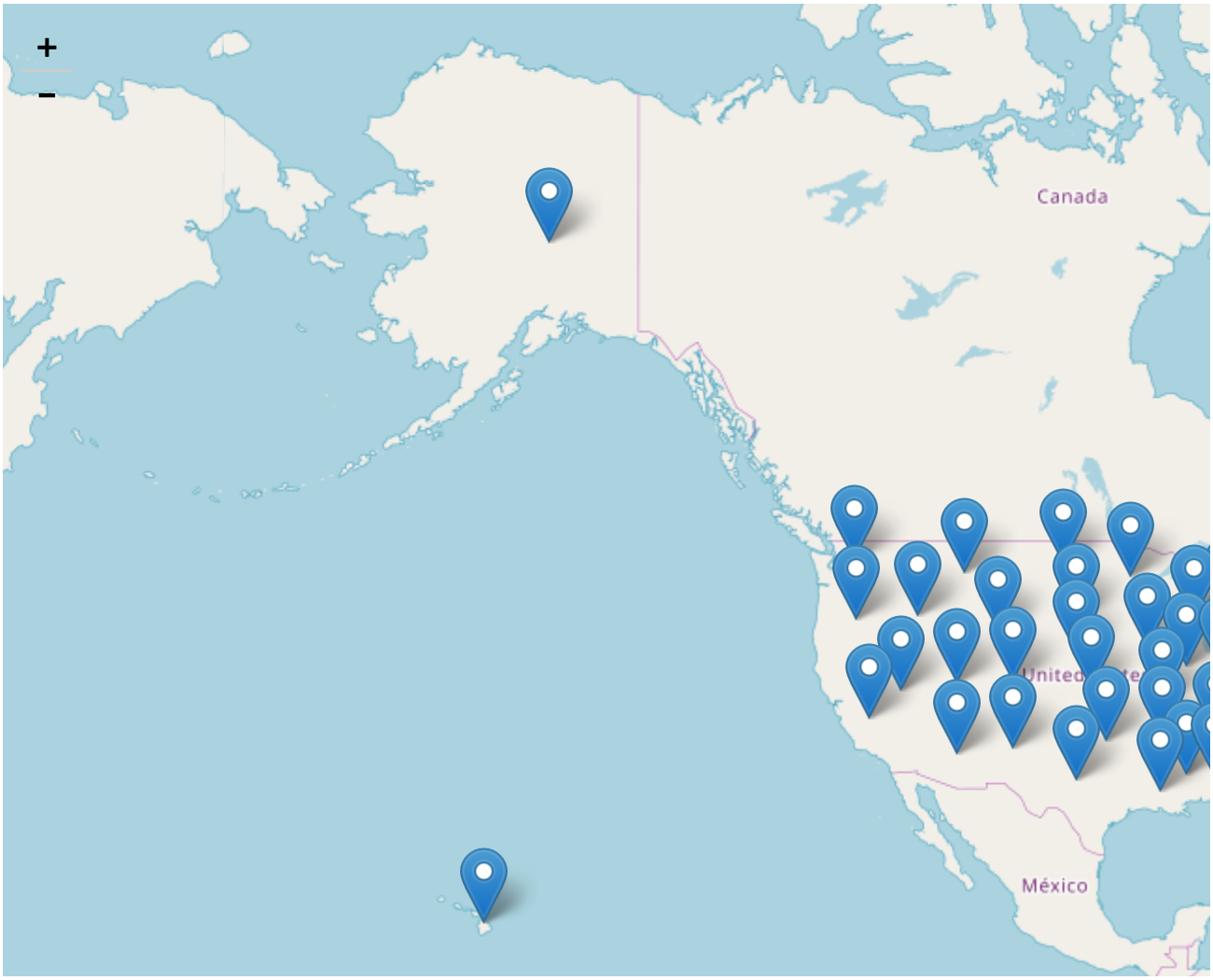
Measuring Success

The National DNA Index (NDIS) contains over 13,566,716 offender1 profiles, 3,323,611 arrestee profiles and 894,747 forensic profiles as of October 2018. Ultimately, the success of the CODIS program will be measured by the crimes it helps to solve. CODIS's primary metric, the "Investigation Aided," tracks the number of criminal investigations where CODIS has added value to the investigative process. As of October 2018, CODIS has produced over 440,346 hits assisting in more than 428,808 investigations.

[1]Offender profiles include Convicted Offender, Detainee, and Legal profiles at NDIS.

Note: Statistics are available on the map pins and in the tables below for all 50 states and Puerto Rico, as well as for the DC/FBI Lab, District of Columbia (DC), and U.S. Army. (Statistics for the latter three can be found on the Washington, D.C. map pin.)

Statistics as of October 2018



Tables by NDIS Participant

Alabama

Statistical Information	Total
Offender Profiles	245,524
Arrestee	54,424
Forensic Profiles	18,111
NDIS Participating Labs	4
Investigations Aided	7,732

Alaska

Statistical Information	Total
Offender Profiles	24,577
Arrestee	35,495
Forensic Profiles	1,954
NDIS Participating Labs	1
Investigations Aided	772

Arizona

Statistical Information	Total
Offender Profiles	351,209
Arrestee	49,494
Forensic Profiles	24,531
NDIS Participating Labs	7
Investigations Aided	11,504

Arkansas

Statistical Information	Total
Offender Profiles	166,831
Arrestee	35,495
Forensic Profiles	11,135
NDIS Participating Labs	1
Investigations Aided	5,292

California

Statistical Information	Total
Offender Profiles	2,012,463
Arrestee	766,514
Forensic Profiles	97,866
NDIS Participating Labs	24
Investigations Aided	69,703

Colorado

Statistical Information	Total
Offender Profiles	196,976
Arrestee	253,122
Forensic Profiles	20,908
NDIS Participating Labs	8
Investigations Aided	9,574

Connecticut

Statistical Information	Total
Offender Profiles	115,398
Arrestee	0
Forensic Profiles	8,639
NDIS Participating Labs	1
Investigations Aided	4,231

Delaware

Statistical Information	Total
Offender Profiles	17,702
Arrestee	0
Forensic Profiles	1,315
NDIS Participating Labs	1
Investigations Aided	221

DC/FBI Lab

Statistical Information	Total
Offender Profiles	897,426
Arrestee	304,378
Forensic Profiles	6,772
NDIS Participating Labs	2
Investigations Aided	1,754

DC

Statistical Information	Total
Offender Profiles	0
Arrestee	0
Forensic Profiles	1,923
NDIS Participating Labs	1
Investigations Aided	497

Florida

Statistical Information	Total
Offender Profiles	1,064,544
Arrestee	293,382
Forensic Profiles	77,083
NDIS Participating Labs	12
Investigations Aided	42,094

Georgia

Statistical Information	Total
Offender Profiles	334,879
Arrestee	0
Forensic Profiles	21,473
NDIS Participating Labs	4
Investigations Aided	8,047

Hawaii

Statistical Information	Total
Offender Profiles	36,863
Arrestee	0
Forensic Profiles	1,562
NDIS Participating Labs	1
Investigations Aided	666

Idaho

Statistical Information	Total
Offender Profiles	49,205
Arrestee	0
Forensic Profiles	724
NDIS Participating Labs	1
Investigations Aided	101

Illinois

Statistical Information	Total
Offender Profiles	615,167
Arrestee	540
Forensic Profiles	44,236
NDIS Participating Labs	9
Investigations Aided	23,889

Indiana

Statistical Information	Total
Offender Profiles	282,047
Arrestee	30,252
Forensic Profiles	13,747
NDIS Participating Labs	5
Investigations Aided	5,828

Iowa

Statistical Information	Total
Offender Profiles	120,693
Arrestee	0
Forensic Profiles	7,161
NDIS Participating Labs	1
Investigations Aided	2,589

Kansas

Statistical Information	Total
Offender Profiles	90,764
Arrestee	101,019
Forensic Profiles	8,151
NDIS Participating Labs	5
Investigations Aided	3,343

Kentucky

Statistical Information	Total
Offender Profiles	180,244
Arrestee	0
Forensic Profiles	7,365
NDIS Participating Labs	1
Investigations Aided	2,497

Louisiana

Statistical Information	Total

Offender Profiles	150,384
Arrestee	396,201
Forensic Profiles	17,569
NDIS Participating Labs	6
Investigations Aided	8,954

Maine

Statistical Information	Total
Offender Profiles	32,915
Arrestee	0
Forensic Profiles	3,493
NDIS Participating Labs	1
Investigations Aided	149

Maryland

Statistical Information	Total
Offender Profiles	129,529
Arrestee	39,841
Forensic Profiles	13,667
NDIS Participating Labs	6
Investigations Aided	5,095

Massachusetts

Statistical Information	Total
Offender Profiles	144,311
Arrestee	0
Forensic Profiles	11,959
NDIS Participating Labs	2
Investigations Aided	5,289

Michigan

Statistical Information	Total
Offender Profiles	382,267
Arrestee	93,552
Forensic Profiles	30,559
NDIS Participating Labs	4
Investigations Aided	14,971

Minnesota

Statistical Information	Total

Offender Profiles	165,064
Arrestee	0
Forensic Profiles	17,556
NDIS Participating Labs	3
Investigations Aided	8,160

Mississippi

Statistical Information	Total
Offender Profiles	119,592
Arrestee	3,820
Forensic Profiles	1,479
NDIS Participating Labs	1
Investigations Aided	769

Missouri

Statistical Information	Total
Offender Profiles	312,657
Arrestee	40,970
Forensic Profiles	26,682
NDIS Participating Labs	7
Investigations Aided	14,812

Montana

Statistical Information	Total
Offender Profiles	38,148
Arrestee	0
Forensic Profiles	1,219
NDIS Participating Labs	1
Investigations Aided	353

Nebraska

Statistical Information	Total
Offender Profiles	43,164
Arrestee	0
Forensic Profiles	2,130
NDIS Participating Labs	1
Investigations Aided	576

Nevada

Statistical Information	Total

Offender Profiles	94,890
Arrestee	73,881
Forensic Profiles	9,436
NDIS Participating Labs	2
Investigations Aided	4,838

New Hampshire

Statistical Information	Total
Offender Profiles	13,419
Arrestee	0
Forensic Profiles	1,879
NDIS Participating Labs	1
Investigations Aided	379

New Jersey

Statistical Information	Total
Offender Profiles	314,689
Arrestee	12,882
Forensic Profiles	22,468
NDIS Participating Labs	2
Investigations Aided	11,102

New Mexico

Statistical Information	Total
Offender Profiles	66,404
Arrestee	52,479
Forensic Profiles	9,292
NDIS Participating Labs	3
Investigations Aided	4,355

New York

Statistical Information	Total
Offender Profiles	634,390
Arrestee	0
Forensic Profiles	60,957
NDIS Participating Labs	8
Investigations Aided	24,986

North Carolina

Statistical Information	Total

Offender Profiles	280,056
Arrestee	43,518
Forensic Profiles	10,982
NDIS Participating Labs	3
Investigations Aided	4,166

North Dakota

Statistical Information	Total
Offender Profiles	12,742
Arrestee	26,493
Forensic Profiles	1,567
NDIS Participating Labs	1
Investigations Aided	867

Ohio

Statistical Information	Total
Offender Profiles	484,245
Arrestee	248,796
Forensic Profiles	66,678
NDIS Participating Labs	8
Investigations Aided	27,683

Oklahoma

Statistical Information	Total
Offender Profiles	160,890
Arrestee	265
Forensic Profiles	7,153
NDIS Participating Labs	3
Investigations Aided	3,430

Oregon

Statistical Information	Total
Offender Profiles	206,130
Arrestee	0
Forensic Profiles	15,490
NDIS Participating Labs	1
Investigations Aided	8,257

Pennsylvania

Statistical Information	Total
Offender Profiles	377,286

Arrestee	0
Forensic Profiles	19,490
NDIS Participating Labs	3
Investigations Aided	8,509

Puerto Rico

Statistical Information	Total
Offender Profiles	22,101
Arrestee	2,897
Forensic Profiles	281
NDIS Participating Labs	1
Investigations Aided	47

Rhode Island

Statistical Information	Total
Offender Profiles	25,151
Arrestee	535
Forensic Profiles	1,511
NDIS Participating Labs	1
Investigations Aided	488

South Carolina

Statistical Information	Total
Offender Profiles	203,071
Arrestee	27,194
Forensic Profiles	16,606
NDIS Participating Labs	5
Investigations Aided	8,152

South Dakota

Statistical Information	Total
Offender Profiles	27,516
Arrestee	40,509
Forensic Profiles	1,664
NDIS Participating Labs	1
Investigations Aided	816

Tennessee

Statistical Information	Total
Offender Profiles	239,532

Arrestee	118,922
Forensic Profiles	12,435
NDIS Participating Labs	4
Investigations Aided	4,826

Texas

Statistical Information	Total
Offender Profiles	887,006
Arrestee	77,475
Forensic Profiles	75,038
NDIS Participating Labs	17
Investigations Aided	32,176

US Army

Statistical Information	Total
Offender Profiles	31,182
Arrestee	72,295
Forensic Profiles	3,558
NDIS Participating Labs	1
Investigations Aided	197

Utah

Statistical Information	Total
Offender Profiles	102,593
Arrestee	10,088
Forensic Profiles	2,501
NDIS Participating Labs	1
Investigations Aided	120

Vermont

Statistical Information	Total
Offender Profiles	19,760
Arrestee	0
Forensic Profiles	887
NDIS Participating Labs	1
Investigations Aided	487

Virginia

Statistical Information	Total
Offender Profiles	434,588

Arrestee	3,935
Forensic Profiles	22,236
NDIS Participating Labs	4
Investigations Aided	10,925

Washington

Statistical Information	Total
Offender Profiles	278,466
Arrestee	0
Forensic Profiles	9,357
NDIS Participating Labs	6
Investigations Aided	3,920

West Virginia

Statistical Information	Total
Offender Profiles	29,755
Arrestee	0
Forensic Profiles	1,919
NDIS Participating Labs	1
Investigations Aided	500

Wisconsin

Statistical Information	Total
Offender Profiles	273,608
Arrestee	12,948
Forensic Profiles	19,231
NDIS Participating Labs	2
Investigations Aided	7,840

Wyoming

Statistical Information	Total
Offender Profiles	26,703
Arrestee	0
Forensic Profiles	1,162
NDIS Participating Labs	1
Investigations Aided	280

Exhibit B

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE

DIVISION OF LAW ENFORCEMENT
P.O. BOX 16189
SACRAMENTO, CA 94203-2810
Telephone: (916) 210-6300
Fax: (916) 731-2100

August 9, 2018

Via Electronic Mail

Michael T. Risher
michael@risherlaw.com

Re: California Public Records Act Request

Dear Mr. Risher:

The California Department of Justice (DOJ) is in receipt of your July 2, 2018, letter and Public Records Act request in which you write "on behalf of the Center for Genetics and Society to ask about the California Department of Justice's implementation of California's DNA collection program." The letter asserts that California's DNA collection program "also requires those agencies to inform the state DNA laboratory within two years of whether a person whose sample they have submitted remains a suspect in a criminal investigation; samples taken from people who are no longer suspects must be expunged unless there is a separate reasons to retain them. *See* Cal. Penal Code § 297(c)(2)." The letter sets forth a demand that: "If the DNA Lab is failing to expunge samples after being informed that the arrestees who provided them are no longer suspects, it should immediately expunge these samples and profiles." (Letter page 1, emphasis added.)

As a threshold matter, please be advised that the introductory narrative and concomitant request is built upon an apparent misunderstanding of Penal Code section 295 et seq. (the DNA Act), and the operation of the state's DNA database program pursuant to that Act. The letter appears to incorrectly fuse the collection of DNA database samples at booking from adult felony offenders that occurs pursuant to state law (e.g., Cal.Pen.Code, § 296 (a)(2)), with the procedures for expunging DNA profiles from suspect samples—samples which are not collected pursuant to the state's DNA Act. The DNA profiles from suspect samples are collected apart from the DNA Act by local law enforcement agencies pursuant to a warrant or other legal means and can be temporarily uploaded for searching in the state or national database by qualified local laboratories. (Cal. Pen. Code, § 297(c)). The state and federal law requirements for the suspect index and the arrestee index are discrete and cannot be mixed and matched in the manner contemplated by the letter.

Because there is no functional overlap between the suspect file and the arrestee index, DOJ cannot otherwise respond to the questions or letter demands which incorrectly merge these two entities. To the extent the PRA seeks information that can be produced, DOJ is providing the following information that corresponds with your numbered requests:

1. *The total number of known offender samples currently in California's DNA database.*

   The total number of offender profiles (arrestees plus convicted offenders) currently in the California DNA database and searchable at CODIS as of July 31, 2018 is: 2,779,447.

2. *The number of those samples taken as a result of a person's being arrested for a felony defense under Penal Code§ 296(a)(2).*

   The DOJ does not maintain records that are easily identifiable or extractable that can accurately provide "the number of those samples taken as result of a person's being arrested for a felony offense under Penal Code §296(a)(2)." The contents of the arrestee index are fluid. The Department is continually converting booking samples from adult felony arrestees to convicted offender status based on an ongoing automated review of criminal history records. Therefore, a count of the current number of arrestee samples in the searchable database does not answer the question of how many total samples in the database were taken at arrest. That is not an existing DOJ record. In addition, not all DNA samples taken at arrest are of sufficient quality to be included in the searchable database of DNA profiles.

3. *The number of those samples taken from arrestees who were not ultimately convicted of any felony offense.*

   The DOJ does not maintain records that are easily identifiable or extractable that can accurately state the "number of those samples taken from arrestees who were not ultimately convicted of any felony offense." No record exists in the form requested and may not exist at all. The DOJ Laboratory is not informed on a case by case basis whether individual arrestees who have provided DNA database samples are "ultimately convicted" as that determination is made at a local level.

   Moreover, the total number of arrestee samples currently in the database necessarily will be overestimated for numerous reasons including, but not limited to the following: duplicate samples from an arrestee may remain in the arrestee index if an offender already had provided a sample as a convicted offender; the general software for converting samples in the arrestee index to the convicted offender index does not identify substantial numbers of arrestees such as adult felony arrestees who are convicted of misdemeanors but who nonetheless qualify for the database based on a prior felony conviction.

4. *The total number of DNA samples/profiles removed/expunged from the database under the provisions of Penal Code§ 299.*

   The following reflects data responsive to questions 4 (total number of DNA samples/profiles removed/expunged from the database under section 299) and 5 (total number of DNA samples/profiles removed/expunged from the database by means of a streamlined expungement process (i.e. requests made directly to DOJ). The response is subdivided and may be added up.

I. Streamlined Requests (requests made directly to DOJ) for expungement of samples collected pursuant to the DNA Act

A. Total number of requests received: 1377

1. Response to Streamlined Requests

- Samples removed/expunged: 1155 (84%)
-Requestor informed that DOJ does not have a DNA sample of record: 50 (4%)
-Requests denied because individual has a qualifying offense of record: 67 (5%)
-Response pending court/legal decision (e.g. Proposition 47 cases), or in process: 105 (7%)

II. Court Petitions

A. Total number of requests received: 133

1. Response to Court Petitions

- Samples removed/expunged: 127 (96%)
-Requests denied (petitioner's paperwork inconsistent with criminal history records and court notified/ criminal history shows individual has qualifying offense of record): 6 (4%)

5. *The total number of DNA samples/profiles removed/expunged from the database by means of the California Department of Justice's Streamlined DNA Expungement process, (form DLE 244, available at:*
https://oag.ca. gov/sites/all/files/agweb/pdfs/bfs/expungement app .pdf.

Same response as enumerated four.

6. *The total number of DNA samples/profiles removed/expunged from the database under the provisions of Penal Code § 297(c)(2).*

The DOJ does not have or maintain a record responsive to the request for the "total number of DNA samples/profiles removed/expunged from the database under the provisions of Penal Code § 297(c)(2)," and such records that may exist are not readily retrievable or in a form that is searchable by DOJ. Moreover, the records may not exist at all, or may require an extensive and nearly limitless search by local agencies of all criminal files in their possession. Both the initial input and removal of suspect profiles from the database is accomplished by Local DNA Index System (LDIS) laboratories pursuant to suspect file procedures administered by the state. The system for the processing and retention of suspect file samples which occurs solely at the local level, is distinct from mandatory arrestee booking and convicted offender DNA identification samples which are physically processed and retained at the state level.

Unlike mandatory arrestee and convicted offenders samples collected pursuant to the state's DNA Act, suspect reference samples (such as samples from existing cases collected pursuant to a warrant) are handled as known reference samples and they are delivered under chain of custody to one of the 24 DNA casework laboratories operated by state and local agencies in California that comprise the Local DNA Index System. In accordance with DOJ policy (see California State DNA Index System (SDIS) Operational Procedure document produced in response to request number 7), the submitting local law enforcement officer provides a document to the LDIS administrator identifying the officer, the person from whom the sample was collected, and stating that the person is a suspect in an active investigation. The receiving laboratory conducts the DNA forensic identification analysis of the suspect's reference sample and imports it into the LDIS as either a "Legal" or a "Suspect, Known"

specimen category, residing in the Legal or Suspect Known indexes, respectively. Both categories are uploaded to SDIS for searching, and the Legal specimen category is uploaded to NDIS for searching if the laboratory meets NDIS criteria for that search.

Pursuant to state law and DOJ policy, when a period of two years has elapsed following the receipt of a suspect's sample by an LDIS laboratory and there has been no prior communication from the investigating agency concerning the suspect status of the individual, the LDIS laboratory is responsible for initiating removal of the sample profile from the searchable index. That action automatically removes the searchable record from SDIS as registered in the next upload and in like fashion an upload from SDIS to NDIS will delete it at that level. It is in this computerized manner that LDIS labs communicate additions and deletions to SDIS. DOJ as the SDIS administrator similarly communicates the additions and deletions to NDIS in an automated manner. Within the automated removal system, sample profiles are not tagged, tracked, or retrievable. When a profile is deleted from any index within the State DNA index system, both the profile and any index information associated with it is unrecoverable. Thus the deletion of a suspect profile from the suspect known index is not searchable, and information about these profiles cannot be provided from an automated records search. Records of the removal of suspect profiles from the searchable database, if any, therefore, would reside with the LDIS administrator or local law enforcement agencies in their own case records.

Note additionally that in the database there is likewise no overlap between the suspect index and the arrestee or convicted offender indices in terms of criminal history records, and sample processing and retention. For example, the upload of a suspect's DNA profile to the Legal or Suspect Known indices at SDIS causes no change in the individual's criminal history record; this is in contrast to the system of DNA flags employed to track DNA collection information associated with arrestees and convicted offenders under Penal Code section 296. Also, there is no conversion in CODIS of the specimen categories Legal or Suspect Known to either Arrestee or Convicted Offender caused by a subsequent felony arrest or conviction of the suspect. The indices are separate.

Although DOJ does not maintain records that reflect total suspect sample profile deletions by LDIS labs statewide, DOJ can provide the information it received from the seven DOJ Bureau of Forensic Services LDIS laboratories which perform DNA evidence testing for 46 of California's 58 counties. The LDIS laboratories contributing responsive information are BFS laboratories located in the Central Valley, Fresno, Redding, Riverside, Sacramento, Santa Barbara, and Richmond. All of these BFS LDIS laboratories are qualified to upload to the State and National DNA Index Systems, DNA case evidence samples from forensic unknowns (crime scene samples) collected by local law enforcement agencies and submitted to those laboratories for testing. These seven BFS LDIS laboratories also are properly qualified under state law to upload to the State DNA Index system, a DNA profile from a sample that a local law enforcement agency has collected by lawful means (e.g. a warrant) from a suspect in a criminal investigation. As required, the "suspect known" samples are kept in a discrete index within the State DNA Index system separate from the DNA database samples mandated by the state's DNA Act to be collected from convicted felony offenders and adult felony arrestees at booking (e.g. Cal. Pen. Code, §§ 296, 296.1).

Excluding Richmond, the six BFS LDIS laboratories report that they have uploaded a collective total of 457 DNA suspect known profiles to a suspect index for comparison to forensic unknowns. DOJ records from each of these BFS LDIS laboratories also show that of the 457 suspect DNA profiles uploaded since 2006, 410 have been removed, and 47 remain as currently compliant within a two-year retention period for suspect file samples. The Richmond data on suspect file entries and expungements, if any, is not included in the above totals because any information prior to 2015 does not exist or was kept only in now-deleted records or is not readily retrievable or trackable. Since 2015, however, Richmond records show that its LDIS lab has had only nine suspect profiles uploaded and that of those nine, six of those suspect entries have been deleted. Richmond currently has only three suspect file entries and all have been in the suspect file fewer than two years.

The DOJ records do not show that the suspect file expungements occurred after contact by a local law enforcement agency.

7. *Any forms, policies, or procedures relating to Penal Code § 297(c)(2) expungement, including those explaining how law enforcement agencies inform the Department that a person whose DNA sample they have submitted is no longer a suspect.*

In response to the request for "forms, policies, or procedures related to Penal Code § 297(c)(2) expungement...," DOJ has attached the several documents responsive to the removal of suspect file profiles that it has located, and also included some materials on expungements in general. These documents include a document on the DOJ website under an FAQ category entitled, "Suspect Samples." It can be found at: https://oag.ca.gov/bfs/prop69/faqs#suspect. This FAQ sets forth the following question and its answer:

> Suspect samples. "As an investigator, can I collect a DNA sample from someone I consider a suspect in a crime, but whom I have not yet arrested?"
>
> No, unless it is legally obtained without regard to Proposition 69. Proposition 69 does not authorize collection of DNA samples from suspects in criminal investigations. Law enforcement agencies may, however, submit to their primary lab services provider for DNA testing and entry into the State Database a known sample of a suspect's blood, saliva, or other biological substance that has been obtained without regard to Proposition 69 (e.g. by consent or warrant.) (Cal. Pen. Code, § 297 (b)(1).)[1] Once a suspect sample has been accepted for inclusion in the State's DNA Data Bank Program, the submitting agency must notify the Department of Justice within two years whether the person remains a suspect in that particular investigation."

DOJ's Proposition 69 website accessible at https://oag.ca.gov/bfs/prop69 also contains documents related to expungement procedures, expungement posters, and expungement forms and can be accessed under such titles including "Remove Your DNA Sample from the

[1] The numbering of this section later changed after statutory amendment. The operative sections are now Cal. Pen. Code, § 297 (c)(1) & (2).

DNA Database," "DNA FAQs," "DNA FORMS & INSTRUCTIONS," "LAW ENFORCEMENT INFO (https://oag.ca.gov/sites/all/files/agweb/pdfs/bfs/69IB.pdf).

Although not included in the document production given its length, DOJ also refers you to documents located on the FBI website entitled National DNA Index System (NDIS) Operational Procedures Manual which can be accessed at https://www.fbi.gov/file-repository/ndis-operational-procedures-manual.pdf/view. The differentiation between suspect sample profiles and samples that are collected pursuant to the DNA database law appears in the National DNA Index System (NDIS) Operational Procedures Manual at section 3.1.1.2 which provides in part as follows:

"For purposes of NDIS eligibility, an item taken directly from a suspect shall generally not be considered a forensic sample but shall be considered as a suspect or deduced suspect sample.... However, if a State has a DNA database collection law that authorizes the inclusion of suspect DNA records in its State DNA database, the State can request approval to upload these suspect DNA records to the Legal Index at NDIS."

8. *The number of law-enforcement agencies that have informed the Department that a person whose DNA sample they have submitted is no longer a suspect since January 1, 2017.*

The DOJ does not have or maintain a record responsive to the request for "the number of law enforcement agencies that have informed the Department that a person whose DNA sample they have submitted is no longer a suspect since January 1, 2017." The explanation and further response to this question is contained within the responses to question 6, above.

9. *The identity of each law-enforcement agency that has informed the Department that a person whose DNA sample they have submitted is no longer a suspect since January 1, 2017.*

The DOJ does not have or maintain a record responsive to the request for "the identity of each law enforcement agency that has informed the Department that a person whose DNA sample they have submitted is no longer a suspect since January 1, 2017." The explanation and further response to this question is contained within the responses to question 6, above.

10. *Any plans your department or any other state or local entity has to change your procedures or practices for complying with Penal Code § 297(c)(2).*

In response to the request for "[a]ny plans your department or any other sate or local entity has to change your procedures or practices for complying with Penal Code § 297(c)(2)," DOJ notes that it is constantly evaluating its policies and procedures to improve them if possible within budgetary constraints and other limitations. DOJ is not aware of other state or local entity deliberations.

In order to best respond to your request under the PRA, DOJ has attempted to provide clarifying information to questions that would otherwise be unanswerable. Please let us know if you have additional questions.

Sincerely,

for SHANNON PATTERSON
Staff Services Manager II
Office of the Chief
Division of Law Enforcement

For XAVIER BECERRA
Attorney General

Exhibit C

State of California

Department of Justice
455 Golden Gate Avenue
San Francisco, CA 94102

M e m o r a n d u m

To : Attorney General Brown

Date : June 6, 2007

Telephone: (415) 703-5892

FACSIMILE: (415) 703-1234
E-Mail: michael.chamberlain@doj.ca.gov

From : Michael Chamberlain
Deputy Attorney General
DNA Legal Unit
Office of the Attorney General - San Francisco

Subject : DNA Data Bank Program: Reporting "Partial Matches" to Law Enforcement

I. Introduction and Chronology of Events

The California Department of Justice is statutorily responsible for the management and administration of the State's DNA Data Bank Program. (Pen. Code, § 295(g).) The third largest forensic DNA database in the world, California's program currently searches over 875,000 offender DNA profiles against more than 16,500 "forensic unknown" profiles, and produces between 150 and 250 "cold hits" per month. California's DNA Data Bank Program is also among the nation's most expansive in scope, authorizing the collection of warrantless, suspicionless DNA samples from all convicted and adjudicated felony offenders, all sex and arson registrants, and, beginning in 2009, all felony arrestees. (§ 296.) In turn, California's program is a component of the National DNA Index System ("NDIS"), administered by the FBI and permitting the interstate comparison of offender and crime scene DNA profiles.

The authorizing legislation for California's DNA Data Bank Program (Pen. Code, § 295 et seq.) was written largely by this office's DNA Legal Unit, which has also taken the lead in successfully litigating that law's constitutionality in a number of cases in recent years. By design, the DNA Data Bank Program attempts to match DNA profiles left by perpetrators of unsolved crime to known offender reference samples.[1/] When such a match occurs, law enforcement is provided with the name of the putative perpetrator. All other offenders in the Database are excluded as suspects and avoid needless contact with police. Thus does the program discharge its mission of "assist[ing] federal, state, and local criminal justice and law enforcement agencies within and outside California in the expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other crimes, [and] the exclusion of suspects who are being investigated for these crimes . . . ." (§ 295(c).)

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1. The Program also attempts to achieve "case-to-case" matches, where the investigative lead is not an offender name, but rather the fact that two or more crimes were committed by the same unknown perpetrator.

Since 2006, Denver (Colorado) District Attorney Mitch Morrissey and Alameda County Deputy District Attorney Rock Harmon have spearheaded an effort to compel state and federal DNA database programs to modify their central premise of matching one offender profile to one perpetrator profile. In addition to that traditional function, argue Morrissey and Harmon, DNA database programs should under some circumstances report to law enforcement the names of offenders whose DNA profiles do *not* match the perpetrators', and who are thereby eliminated as suspects. The purpose would not be to investigate the offender in the database, but rather to investigate any relatives that offender may have. The theory is that if the offender in the database shares some, many, or even most of the genetic markers (i.e., alleles) belonging to the perpetrator, there is some possibility or probability that the database offender is related to the perpetrator. Basic principles of inheritance dictate that related persons are more likely to share alleles than unrelated persons, and the closer the kinship the more genetic similarities can be expected. Attachment 1 is an often-cited article by credible authors setting forth the scientific and theoretical rationales for this theory.

In July 2006, following a meeting between DA Morrissey and FBI Director Robert Mueller, the FBI administrators of NDIS reversed a longstanding policy forbidding states from disclosing to other states any offender identity other than that of the "putative perpetrator." The revised FBI policy now permits states to disclose to other states the identity of database offenders who may not be the perpetrator, but who represent a "moderate stringency match" (i.e., partial match) to the crime scene DNA profile and share at least one allele at each locus.[2/] The FBI policy relates only to the interstate exchange of information, but it does not require that states disclose partial matches to other states. It simply removes a regulatory barrier that formerly precluded the sharing of such information. Similarly, the revised FBI policy does not control the individual policies states maintain regarding disclosure of state DNA database information to their own law enforcement agencies. Thus far, several states have elected to disclose partial matches to law enforcement, including Florida, South Carolina, North Carolina, Colorado, Missouri, Oregon, Arizona, and Massachusetts.

Following the modification of the FBI policy related to interstate partial match reporting, Denver DA Morrissey made a formal request to DOJ Bureau of Forensic Services Chief Lance Gima on December 13, 2006, seeking the name of a California offender who "partially matched" the profile of a Colorado rapist. (Attachment 3, First Morrissey letter.) On December 22, 2006, DA Morrissey made the same formal request by letter to Attorney General Lockyer. (Attachment 4, Second Morrissey letter.) Following briefing by the DNA Legal Unit, Attorney General Lockyer responded by letter on December 28, 2006, declining to provide the requested offender name and affirming that DOJ's policy has always been, and continues to be, that only the name of the offender who represents the "putative perpetrator" based on DNA forensics will be reported as a "cold hit." (Attachment 5, Lockyer letter.)

Locally, Deputy DA Harmon has been actively advocating that DOJ formulate a

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2. The revised FBI policy is attached to this memorandum as Attachment 2.

revised policy that permits the reporting of partial matches under some circumstances, such as after steps have been taken by DOJ internally to enhance the likelihood that the offender in the database is in fact related to the perpetrator. In lectures to law enforcement and prosecutorial groups over the last six months, DDA Harmon has been harshly critical of DOJ's failure to pursue this novel use of the Data Bank Program.

Finally, on May 9, 2007, Los Angeles District Attorney Steve Cooley also requested formally that DOJ revise its partial match reporting policy. (Attachment 6, Cooley letter.) His letter echoes the arguments advanced last December by DA Morrissey.

II. Would Reporting Partial Matches Be Useful In Solving Crime?

If a California Database offender was truly related to the perpetrator of a crime, then disclosing that offender's name to investigators would certainly represent a major lead in the case. If the offender is not related to the perpetrator, and merely shares some number of genetic markers by chance, then the partial match represents a dead-end lead. The investigative utility of a partial match (i.e., how likely it is that the offender is a relative of the perpetrator) depends upon how "partial match" is defined. Under the definition adopted by the FBI in July 2006 (see Attachment 1), a partial match between a perpetrator's profile and a California Database profile is unlikely to occur at all, and if it does is more likely to represent unrelated individuals than related individuals. Nonetheless, scores of California Database offenders may partially match a particular perpetrator profile if the FBI's criteria are employed. Moreover, the FBI's definition of "partial match" requires that the perpetrator and offender share at least one allele at each genetic location tested, which would preclude detection of a 99.9% of brothers, many of whom have no alleles in common at a given genetic location. In sum, the FBI's partial match policy, should it be adopted in California, could result in the disclosure of many dead-end leads in some cases, and no leads in the vast majority of cases.

"Partial match" could be defined more stringently, however, resulting in an increased probability of relatedness. For example, once a candidate partial match has been identified, DOJ could conduct additional DNA testing on genetic markers – such as Y-chromosome genes possessed by males only and inherited patrilineally – that could filter out the majority of unrelated persons.[3/] Other means of filtering candidate partial matches to enhance the likelihood of kinship could also be employed, such as requiring the offender and the perpetrator to share a significant number of alleles (e.g., 15/26, 16/26, 17/26, 18/26, 19/26, or more) cross-referenced by the rarity of those shared alleles. This would be the functional equivalent of a "paternity index" commonly used to estimate paternity likelihood. Additionally, non-forensic information such as DMV records, public birth records, and geographical

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3. Y-chromosome testing could not conclusively exclude the chance of kinship because, while full brothers and fathers/sons will share Y-chromosome markers, half-brothers with the same mother may not, unless the fathers have a common male ancestor.

proximity between the crime scene and the offender's home could be used to further eliminate offender partial match candidates who have no readily-ascertainable relatives who fit the suspect's profile.

III. Legal Implications and Policy Concerns

While the statutory authority for California's DNA Data Bank Program does not expressly bar the reporting of offender identities as a means of investigating their relatives, neither does it expressly endorse or even contemplate that use of the program. Reporting partial matches to one degree or another would instead raise a number of legal and policy concerns that implicate the fundamental premises of DNA identification databases.

A. Constitutionality of Data Bank Program

The existence of DNA database programs depends upon the collection of warrantless, suspicionless DNA samples from offenders and other persons who fall within clearly defined legislative categories. Those DNA sample collections implicate the Fourth Amendment. After years of litigation, the constitutionality of those seizures is now widely accepted by courts in California and nationwide, albeit on the basis of a very delicate balance of the invasion of privacy entailed by the DNA collection against the state interest in populating the DNA database. (See, e.g., *People v. McCray* (2006) 144 Cal.App.4th 258, 265-266; *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1168; *People v. Travis* (2006) 139 Cal.App.4th 1271, 1290; *Coffey v. Superior Court* (2005) 129 Cal.App.4th 809, 817; *People v. Adams* (2004) 115 Cal.App.4th 243, 255-259; *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505-506; *People v. King* (2000) 82 Cal.App.4th 1363, 1369-1378.)

Among other factors, courts affirming the constitutionality of DNA sample collection commonly highlight the limited uses to which DNA database samples can be put, in addition to rigid disclosure restrictions, as factors that mitigate infringement on offenders' privacy interests. For example, in *Alfaro v. Terhune*, *supra*, the Court of Appeal stated that

> [t]he uses to which specimens and samples are to be put are inextricably bound up with the determination whether specimens and samples may be obtained. The cases are uniform in concluding that the extraction and DNA testing of specimens and samples is an intrusion subject to constitutional analysis. The extent of the intrusion is measured by reference to express limitations on the uses to which the specimens and samples may be put, and the governmental interests are assessed with respect to those specific uses.

(98 Cal.App.4th at p. 507.) California's DNA Database Act was written with such principles in mind, and, as noted above, codifies the purpose of the Data Bank Program as a tool to assist in "the expeditious and accurate detection and prosecution of individuals responsible for sex offenses and other crimes, [and] the exclusion of suspects who are being investigated for these

crimes . . . ." (§ 295(c).) Elsewhere, California law forbids the use or disclosure of database DNA profiles "for other than criminal identification or exclusion purposes . . . ." (§ 299.5(i)(1)(A).)

Taken together, these provisions describe the current and established function of the Database as narrowing the pool of suspects to one by matching one offender to one perpetrator, and eliminating all other offenders as suspects. That is the essence of "expeditious and accurate . . . detection" of perpetrators and disclosure of Database information for "criminal identification . . . purposes," and justifies the warrantless, suspicionless seizure of DNA samples from up to half a million people in California annually.[4/]

Reporting the identity of an offender – or potentially many offenders – who partially matches a perpetrator's DNA profile would potentially conflict with these established Data Bank Program premises, thus threatening the constitutionality of the program as a whole. Reporting a partial match means that DOJ will provide to investigators the names of offenders

(1) who are not suspects but nonetheless may be contacted by detectives;
(2) who may not even have relatives who could have committed the crime;
(3) whose relatives, if they exist, may be completely innocent; and
(4) whose relatives, if they exist, are not themselves in the Database but will fall under suspicion nonetheless.

Providing to law enforcement the names of partially matching offenders would not represent "expeditious" detection of the perpetrator as contemplated by the Data Bank Program's authorizing statutory authority. Nor would the partial match be necessarily "accurate," given its speculative nexus to the crime. And the partial match by itself will certainly not identify the perpetrator. In fact, it may often serve to broaden the field of suspects, not narrow it. The Data Bank Program, designed as an investigative scalpel, could be used instead as an indiscriminate investigative fishing net.

The risk, therefore, is that a policy of disclosing partial database matches would shift the delicate Fourth Amendment balance that courts have struck in holding DNA database programs constitutional by diluting the state interest in the expeditious and accurate nature of the DNA Database while weakening the disclosure restrictions that minimize invasions of privacy. This risk is real, especially in the Ninth Circuit.[5/] The Ninth Circuit Court of Appeals has demonstrated hostile skepticism of the constitutionality of DNA database programs even when operated in a "traditional" manner. The following, by way of illustration, is the opening

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4. Beginning in 2009, all felony arrestees will owe a DNA sample. (§ 296(a)(2)(C).) It is estimated that up to 500,000 felony arrests occur each year in California.

5. No case law on the subject yet exists in any United States jurisdiction. Thus the discussion can be framed only as informed speculation.

paragraph of the dissent in *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 842-843:[6]

> Today this court approves the latest installment in the federal government's effort to construct a comprehensive national database into which basic information concerning American citizens will be entered and stored for the rest of their lives--although no majority exists with respect to the legal justification for this conclusion. My colleagues claim to authorize merely the "compulsory DNA profiling of certain conditionally-released federal offenders," as authorized by the DNA Analysis Backlog Elimination Act of 2000 ("DNA Act") . . . . We would be lucky indeed if it were possible to so limit the effect of their opinions. For, under the rationales they espouse, especially the plurality's, all Americans will be at risk, sooner rather than later, of having our DNA samples permanently placed on file in federal cyberspace, and perhaps even worse, of being subjected to various other governmental programs providing for suspicionless searches conducted for law enforcement purposes.

The remainder of the *Kincade* dissent excoriates the concept of DNA databases by evoking imagery of J. Edgar Hoover terrorizing civil rights leaders by exploiting his domestic intelligence files, and by recalling the government harassment of suspected communists and the internment of Japanese-Americans during WWII. Notably, the dissent makes a cautionary reference to offenders' family members: "In addition, because DNA characteristics are transmitted intergenerationally, it is 'quite [possible to] identify a person who is a relative of the person contributing the [DNA] sample.'" (379 F.3d at p. 818, fn. 7.)

Even the *Kincade* plurality's endorsement of the federal DNA data bank program was carefully limited to that program's current operational parameters, and was far from a blank check approval of all future uses of the database:

> The concerns raised by amici and by Judge Reinhardt in his dissent are indeed weighty ones, and we do not dismiss them lightly. But beyond the fact that the DNA Act itself provides protections against such misuse, our job is limited to resolving the constitutionality *of the program before us*, as it is designed and as it has been implemented. [n35: In particular, we pause to note here that we express no opinion on the legality--constitutional or otherwise--of the so-called *'DNA dragnets'* cited by Kincade, his aligned amici, and Judge Reinhardt's dissent.] . . . As *currently structured and implemented*, however, the DNA Act's compulsory profiling of qualified federal offenders can only be described as minimally invasive – both in terms of the bodily intrusion it occasions, *and the information it lawfully produces*."

(*United States v. Kincade*, *supra*, 379 F.3d at pp. 837-838, italics added.) If California alters the

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6. En banc decision overturning the panel decision holding the federal DNA database unconstitutional under the Fourth Amendment.

use and disclosure parameters of its Data Bank Program in response to law enforcement pressure to report "partial matches," the constitutional validity of the entire program may once again be in question.

This uncertainty will be magnified when large-volume arrestee sampling begins in 2009, a development that will undoubtedly create a new round of constitutional challenges in and of itself. Significantly, arrestee samples are provisional in nature, i.e., they are collected with the expectation that they will be permanently included in the Data Bank Program only if the offender is ultimately convicted of charges stemming from the arrest. Otherwise, state law sets forth a detailed procedure by which the arrested person can seek expungement of his or her DNA sample and profile. (Pen. Code, § 299.) A policy permitting the reporting of arrestee names for the purpose of investigating potential relatives, even before those arrestees have been convicted (or not convicted and consequently expunged) could be viewed as an overreaching application of the Database. In turn, this may impair DOJ's arguments in support of the Fourth Amendment reasonableness of arrestee collections in the first instance.

B. Offenders' Relatives' Privacy Interests

Disclosing partial matches to law enforcement means that close relatives of offenders may become suspects – or at least "persons of interest" – in criminal investigations for no other reason than because they are related to a offender in California's Database. Those relatives may be contacted by law enforcement, and family relationships examined closely. One could imagine, for example, that a partially matching offender tells investigators that he has an illegitimate son, who is then contacted and learns the identity of his father for the first time. Such incidents, even when less dramatic in nature, could give rise to civil rights lawsuits against DOJ alleging infringement of privacy rights protected by both the federal and state constitutions.

In particular, article 1, section 1 of the California Constitution confers a more robust right of privacy than that implied under the Fifth and Fourteenth Amendments of the United States Constitution: "[N]ot only is the state constitutional right of privacy embodied in explicit constitutional language not present in the federal Constitution, but past California cases establish that, in many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts." (*American Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 326.) The investigation of private citizens by law enforcement based on nothing more than the genetic characteristics of their relatives may well constitute actionable violations of state privacy protections.

Of course, being a person of interest or even a suspect in a criminal investigation does not, by itself, violate one's Fourth Amendment protections against unreasonable search and seizure.

C. Other Policy Concerns

Privacy rights advocates and others would likely seize upon a DOJ partial match reporting policy as evidence that law enforcement investigations unduly focus on minorities and other at-risk groups. Because the population of convicted and arrested felons in California's Database (as well as NDIS) is racially unbalanced, the implicit expansion of the Database to family members who will be investigated because of partial match reporting would further embed a disproportionate minority representation in the program. Allegations of racial profiling could result.

Claims of voter deception may also be advanced should the Data Bank Program be employed to investigate relatives of offenders. The California electorate voted for an expansion of the offender DNA Database by approving Proposition 69 in 2004. Neither the statutory language of that initiative, nor the campaign literature, nor the voter information provided by the Office of the Attorney General, nor any of the implementation guidelines published by this office following the election, made any explicit or implicit reference to using the Database to investigate potential relatives of the offenders. Of course, DOJ does not maintain any DNA profiles other than those described by statutory mandates, and does not possess any special insight into the existence of offender relatives or those potential relatives' genetic characteristics. Nonetheless, reporting partial matches could fuel rhetoric accusing DOJ of using a voter-approved offender database for purposes not approved by voters, i.e., investigating relatives.

IV. Options

The following options are available:

A. Maintain the current policy of not reporting "partial matches." Given the lack of case law concerning the constitutionality of this use of a database, this approach conservatively refuses to let California's Data Bank Program – the largest and most expansive in the country – risk its existence in order to be the subject of a legal experiment. This approach also has the advantage of permitting DOJ to "wait and see" how courts in various jurisdictions, perhaps including the Ninth Circuit, view the constitutionality of other state DNA database programs that permit partial match reporting. DOJ could then decide whether to modify California policy accordingly.

The potential down-side of this approach is that DOJ could, in an unlikely scenario, encounter a truly probative "partial match" that represents a major lead in a noteworthy case (e.g., a serial killer). The policy would dictate that DOJ sit on the lead to the detriment of public safety. Lives could be lost as a direct result.

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B. Report partial matches in the California Database according to rigorous criteria designed to enhance the investigative utility of the lead. DOJ could devise a series of in-house procedures, including additional DNA testing where feasible, calculated to filter out partial matches that do not represent true relatives of the perpetrator. The legal advantage of this approach is that the efforts undertaken by DOJ before the partial match is reported permit DOJ to argue that this use of the Database represents a carefully calibrated and targeted investigated lead that is generally consistent with the statutory goals of expediency, accuracy, and criminal identification, while respecting privacy to the greatest extent possible. Although qualitatively distinct from the direct evidence supplied by a cold hit, a partial match that survives stringent in-house screening before reporting is the kind of indirect evidence that may be of actual value to law enforcement.

On the other hand, any form of partial match reporting is a deviation from the traditional and constitutionally acceptable use of DNA databases, i.e., matching one offender to one perpetrator and solving the crime. The latter is, by definition, more expeditious and accurate than any other use of the database, and epitomizes "criminal identification." The Ninth Circuit is probably the least sympathetic forum in the country for testing the legality of a novel use of a DNA data bank program, and could be quick to condemn what it perceives as "database creep" toward unconstitutional applications.

Finally, while this approach would not eliminate the possibility of privacy-related lawsuits from offenders' relatives, it would certainly reduce that likelihood, especially if the offender is actually related to the perpetrator.

C. Adopt the FBI definition of "partial match" and report all corresponding records. This approach is fraught with peril, from both legal and pragmatic perspectives. Not only will the names provided by DOJ likely not represent relatives of the perpetrator, but potential siblings of the perpetrator would probably be missed. Moreover, depending upon the nature of the perpetrator's profile, and given the large size of California's Database, law enforcement could be burdened with scores of false "leads" in some instances. This approach is also the least consistent with the statutory premises of and legal justifications for the ongoing operation of the Data Bank Program.