

**STATEMENT OF CHIEF RODNEY HARRISON
CHIEF OF DETECTIVES
NEW YORK CITY POLICE DEPARTMENT**

**BEFORE THE NEW YORK CITY COUNCIL
COMMITTEES ON PUBLIC SAFETY & JUSTICE SYSTEM
COMMITTEE ROOM, CITY HALL
FEBRUARY 25, 2020**

Good morning Chair Richards, Chair Lancman, and Members of the Council. I am Chief Rodney Harrison, the Chief of Detectives for the New York City Police Department (NYPD). I am joined today by Oleg Chernyavsky, Assistant Deputy Commissioner of Legal Matters, Deputy Chief Emanuel Katranakis, the Commanding Officer of the NYPD's Forensic Investigations Division, and Bob Barrows, Director of Legal Operations and Projects. On behalf of Police Commissioner Dermot Shea, I want to thank the Council for the opportunity to testify on the City's DNA collection and storage policies.

Every day the NYPD's dual philosophies of neighborhood and precision policing builds trust and solidifies relationships between the police and the communities we serve. These collaborative efforts between the NYPD and those that live in, work in and visit New York City make the city a better, safer place. However, we must never forget that, first and foremost, the mission of the NYPD is to fight crime. Neighborhood Policing has transformed how we fight crime by partnering with those we serve, allowing us to share information and more effectively solve cases and precisely deploy our resources. We have driven crime to historic lows while simultaneously reducing enforcement to levels not seen amongst big cities. Yet, we all know that a small fraction of our population commit a large portion of the crime in this city. This is why precision policing focuses on finding and arresting the few who weaken the fabric of our neighborhoods through violence and intimidation.

As a law enforcement agency, we have a responsibility to use available technology and scientific advancements in a constitutional and legal way in order to protect the communities we serve. Those victimized by crime unequivocally deserve the employment of every legal resource and investigative tool available. The use of DNA to solve and prosecute crimes is one vital way we advance justice. It is a tool that protects the communities we serve. While it is used to identify suspects, it also has the distinct, crucial and indispensable ability to exclude and exonerate persons suspected of committing crimes. DNA is a principal means of achieving fair policing, not a barrier to it.

The advent of DNA technology is one of the most significant scientific developments in our modern era. While the full potential of genetic markers in medicine and science continues to be explored, the utility of DNA identification in the criminal justice system is irrefutable. Law enforcement, the defense bar, and the courts have acknowledged DNA testing's unparalleled ability to both exonerate the wrongly accused and identify the guilty. Its use has significantly improved both the criminal justice system and police investigative practices.

Much attention has been paid to the process of how the NYPD obtains DNA samples. The NYPD's investigations and tactics are guided by what is required by law, by the courts, and is aligned with best practices in the law enforcement community. DNA samples are collected in criminal investigations by the NYPD, either from crime scene evidence or from suspects; individuals having an articulable relationship to an actual crime being investigated. DNA is collected primarily from suspects in two forms—either through informed consent or from abandonment of discarded property. For both of these methods, there is

longstanding jurisprudence stating that there is no reasonable expectation of privacy in an object that is either provided upon informed consent or is purposefully abandoned. This doctrine has been expanded to DNA samples left on abandoned items even when obtained by indirect means from the police. The driving motivation for the NYPD to collect DNA is to legally identify the correct perpetrator, build the strongest case possible for investigators and our partners in the district attorneys' offices, and bring justice to victims and their families.

When DNA is obtained by the NYPD, the evidence is submitted to our Forensic Investigation Division. There, the sample is vetted for DNA testing and if probative, the collected evidence is submitted to the Office of the Chief Medical Examiner (OCME) Evidence Unit. The Evidence Unit then transfers the sample to the OCME's Forensic Biology Department. If the sample meets OCME's standards for testing, OCME will generate a DNA profile for inclusion in its local DNA index system (known as LDIS).

I want to spend the remainder of my remarks today on this very subject - the city's local DNA index system, with specific attention on the city's suspect database and reforms that have been announced by the City. A robust debate has been centered on this database - with some inaccuracies. For example, I want to be clear, the local DNA index system is not an NYPD database. It is not operated nor maintained by the NYPD. The database is maintained by the Office of the Chief Medical Examiner.

The immense value of a DNA database lies in its ability to assist in identifying the correct perpetrator of violence. Last year, the database generated over 1,500 matches, or "hits," between suspect DNA profiles and DNA profiles developed from crime scene evidence. Law enforcement agencies have routinely used scientific advancements in their ability to identify those who have committed violence in our communities. The use of DNA is markedly effective. Rather than casting a wide investigative net, it enables law enforcement to narrow its investigation and ensure that charges are brought against the correct wrongdoer(s). As many criminal justice reformers have noted, one of the leading reasons for false arrests and wrongful convictions stems from inaccurate eyewitness identifications. DNA evidence is objective. It reduces human error that can accompany witness identification procedures, and, more pointedly, the use of databases, with appropriate safeguards, to extract, retain, and remove samples should be embraced.

The local DNA index system is composed of several indices, or more commonly "databases," such as a missing persons index, a crime scene evidence index, and the suspect profile index. In total, the entire system contains over 82,000 DNA profiles. While some have characterized the system of incautiously expanding the number of samples on file, the vast majority of samples are derived from crime-scene evidence taken from victims, firearms used in shootings, and other crimes scenes. Approximately 32,000 of the profiles (or 38%) within the entire system are suspect profiles. The suspect database is used to compare suspect DNA to crime-scene DNA, and DNA from one crime to DNA from other crimes scenes in order to match or exclude suspects. The identities of individuals in the local database are not disclosed to law enforcement unless there is a match found between crime-scene evidence and a suspect.

Much of the debate surrounding the local database relates to the database containing the DNA of those who may not have been convicted of a crime. State and federal databases contain only DNA from convicted persons. For example, pursuant to state law, New York's DNA databank only accepts profiles of individuals convicted of a felony or Penal Law misdemeanor. Nonetheless, 75% of the suspect profiles in the local database, also have a corresponding profile within the State's DNA databank - meaning the person associated with the profile in the local database has been convicted of a crime. Many of these convictions are violent felony and sex offender convictions. Additionally, a significant portion of the profiles in the local suspect database are associated with individuals who are suspects in multiple complex, intricate and ongoing law enforcement investigations.

Some have argued against the necessity of the local suspect database since nearly three-quarters of it overlaps with the State's DNA databank. However, on average there is a 21-day lag between when the NYPD receives DNA results from OCME and when it receives results from the State DNA databank. Time is of the essence in an investigation. Time makes all the difference to an investigator seeking to identify a violent perpetrator or to a victim of a heinous crime seeking justice and closure. The expediency of the local database allows the NYPD to take dangerous criminals off our streets sooner and keep our communities safe.

Despite false claims of reckless growth or that NYPD engages in "fishing" or dragnet expeditions to collect DNA, the number of profiles developed from arrestees and other suspects hovers at about 32,000 compared with 700,000 in the state-convicted offender database. When considering, since the inception of the local database in 1997, the millions of investigations and arrests by NYPD that have taken place, the number of profiles would be substantially higher if the Department was engaged in broad-based collection practices.

Critics of the database also claim that it is teeming with juveniles. Each year, nearly 95% of the DNA samples taken by the NYPD come from adults. The remainder mostly come from juveniles in their late teens accused of very serious crimes. Approximately 5% of the profiles in the local database came from individuals who were juveniles at the time of collection.

Our responsibility is to ensure that every profile in the database actually deserves not just initial inclusion, but continued inclusion as well. In this era of precision policing, a database that is oversaturated and provides few matches is of little use to law enforcement and prosecutors. The Department acknowledges the public debate surrounding the database, and that reforms are necessary to continue to support a criminal justice system that is fair, equitable, and does not compromise our ability to objectively identify perpetrators of violence, help our prosecutors build strong cases, and bring justice to victims.

Over the course of this past summer and fall, the NYPD and OCME engaged in collaborative efforts to review the city's policies regarding DNA collection and storage and to develop additional avenues to remove suspect profiles from the local database. The results of this collaborative effort includes the creation of a revised NYPD "Consent to Submit DNA Sample" form, amendments to the Patrol Guide and Detective Guide, the development of new guidelines for the collection of DNA from juveniles, and the creation of an exit procedure for suspect profiles in the local database without a court order.

As the centerpiece of this significant policy change, the Department will conduct regular reviews of suspect profiles that have been collected and notify OCME of approval to remove where warranted. Our first focus will be a comprehensive audit of every suspect profile in the database that is at least 2 years old or older. The entire database will also be reviewed every four years for profiles that are at least four years old and older. Lastly, going forward, all new profiles that are developed will receive an automatic review upon reaching their second-year of existence in the suspect database. This process creates multiple off-ramps and exits from the local database. The presumption is to recommend removal unless the profile is of a person who, at the time of review:

- Has been convicted of a felony or Penal Law misdemeanor – meaning that the person already has a profile in the NYS DNA databank; or
- Continues to be a suspect of a crime in a police investigation or ongoing prosecution; or
- In limited circumstances, was the subject of an arrest or prosecution where no judicial conclusion was reached on the person's innocence.

In a continued effort to increase transparency and enhance trust, the Department will publicly report data regarding these suspect profile reviews on its public website. In collaboration with OCME, the NYPD will

report the number of DNA profiles in the database, the number removed as a result of the review, as well as the frequency of how often each exception to removal has been employed.

In developing an exit process from the database, the Department strongly believes this is the optimal route to pursue. The policy inclusively addresses both samples that have been collected by consent or through abandonment. It does not rely on an individual sending correspondence to city agencies, or hiring costly legal representation to seek a court order, and it is equitable. Every profile will get multiple reviews, creating fairer results.

In addition, reforms to our DNA collection and storage process will also include:

- **Creation of a revised NYPD Consent to Submit DNA Sample Form:** While already in existence, this amended form will clearly explain that consenting to providing a sample will result in a DNA profile being developed and stored in the local DNA database. The form states that subjects may refuse to provide consent.
- **Impose strict guidelines for the collection of DNA samples from juveniles:** Collection of DNA samples from juveniles will be limited to investigations involving felonies, firearm crimes, sex crimes (and sexually motivated crimes), and hate crimes. Investigations for other crimes may be included with prior, explicit approval from the Chief of Detectives. This applies to both abandonment and consent samples.
- **Updates to the Patrol Guide and Detective Guide to ensure parental/guardian conferrals and notifications prior to obtaining a juvenile consent sample:** Prior to this change in policy, the guidance for taking a consent sample from a juvenile was that it was best practice to have a parent/guardian present when making such a request. While this occurred in most cases, the Department believes this should be standard practice – just as it is when conducting an interrogation of a juvenile. It will be required that the parent/guardian be notified, that the parent/guardian can object, and that the juvenile and parent/guardian can confer before providing such consent.
- **Streamline Process for Removing Acquitted Individuals:** OCME will accept a certificate of disposition from individuals who have been acquitted in a case for which DNA was taken for purposes of removal from the local database. This does not require the hiring of counsel, a court order or a judicial hearing. OCME will consult with the NYPD to ensure the individual is not a suspect in multiple investigations prior to removal.

Thank you for the opportunity to speak about this important issue and we look forward to answering any questions you have.

THE LEGAL AID SOCIETY

Justice in Every Borough.

TESTIMONY

The Council of the City of New York
Committee on Public Safety

Oversight: DNA Collection and Storage in NYC (T2020-5738)
February 25, 2020

The Legal Aid Society
199 Water Street
New York, NY 10038
Prepared by: Terri Rosenblatt
Shomari Ward
Anne Oredeko

Contact: Terri Rosenblatt
(212) 577-3585
trosenblatt@legal-aid.org

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We thank Chair Richards and the members of the Committee for the opportunity to provide testimony on the NYPD and OCME's collection and storage of DNA from New Yorkers, a topic of urgent concern to The Legal Aid Society and its clients. We are three attorneys from different practices in the Legal Aid Society. Each of these practices is affected by the NYPD's DNA collection and OCME's DNA index. At the end of our written testimony is a page with a summary of our recommendations.

Terri Rosenblatt is the Supervising Attorney for the Legal Aid Society's DNA Unit, a specialized unit providing support for DNA and forensic science issues for the Legal Aid Society's attorneys and investigators in all five boroughs.

Anne Oredeko is the Supervising Attorney of The Legal Aid Society's Racial Justice Unit, an institution wide unit that utilizes a multi-disciplinary approach to explicitly tackle the persistent institutional and structural racism that negatively impacts The Legal Aid Society's clients and their communities.

Shomari Ward is a Staff Attorney for the Special Litigation and Law Reform Unit of the Legal Aid Society's Juvenile Rights Practice. This unit conducts class action litigation and legislative reform efforts on behalf of children in the child welfare and juvenile justice system.

I. THE LEGAL AID SOCIETY

Since 1876, The Legal Aid Society has provided free legal services to New York City residents who are unable to afford private counsel. Annually, through our Criminal, Civil and Juvenile Practices, our staff handles about 300,000 cases for low-income families and individuals. By contract with the City, the Society serves as the primary defender of indigent people prosecuted in the State court system.

A. DNA Unit: In 2013, the Legal Aid Society created the DNA Unit to serve and support Legal Aid attorneys and investigators in our Criminal Defense Practice. The DNA Unit is

nationally recognized for its expertise and its annual two-day conference, Questioning Forensics. It has also been at the forefront of challenging the use of black box¹ algorithms in the criminal justice system.

The DNA Unit receives referrals from lawyers and investigators in all five boroughs in cases where DNA or other forensic science evidence may be used at trial. When the Unit began, those referrals often came when attorneys learned that evidence from an alleged crime was compared to, or connected with, our clients. In the past several years, however, those referrals have increased with a new type of referral: one where our attorneys learn that a client's DNA was collected in the police precinct before they were even formally charged or assigned an attorney. Our lawyers assist in attempting to determine why those samples were taken, under what circumstances, and how we can remove them from New York City's DNA identification index.

B. Racial Justice Unit: The Legal Aid Society formed the Racial Justice Unit in 2018 with the intent to reshape the internal legal practice and advocacy of the Society to center a racial justice lens. The Racial Justice Unit works with each practice to re-examine our work to ensure that we are addressing the societal structures that promulgate racial oppression and inequality as we fight for our individual clients. Since its inception, the Racial Justice Unit has worked with community activist and organizers to promote and advocate for legislative policies that support racial equity. By using litigation, advocacy, and many other tools, the Racial Justice Unit fights against structural racism within New York City and New York State.

C. Juvenile Rights Practice: The Legal Aid Society's Juvenile Rights Practice provides comprehensive representation as attorneys for children, who appear before the New York City Family Courts in juvenile delinquency, abuse, neglect, and other proceedings affecting

¹ A black box "in technology, science, and other fields, denot[es] any device, algorithm, function, or the like whose inner workings are not visible or obvious but opaque (i.e., black)." BLACK BOX, Black's Law Dictionary (11th ed. 2019)

children's rights and welfare. Last year, Legal Aid's staff represented approximately 34,000 children. Our perspective comes from daily contact with children and their families, and also from our interactions with the courts, social service providers, and City and State agencies.

The Juvenile Rights Practice also seeks to create broader, more systematic change through its Special Litigation and Law Reform Unit. This unit works in conjunction with the trial offices to address issues that are most pressing to its clients. To accomplish the most effective law reform, the Juvenile Rights Practice uses affirmative litigation and policy advocacy to improve existing laws and policies.

The Legal Aid Society's extensive history representing indigent adults and children in underserved communities in the criminal and juvenile justice systems puts it in a unique position to speak directly to the problematic practices at issue in this hearing today.

II. THE NYPD'S AND OCME'S DNA COLLECTION AND STORAGE PRACTICES VIOLATE THE LAW AND HARM ALL NEW YORKERS, ESPECIALLY NEW YORKERS IN OVER-POLICED COMMUNITIES OF COLOR

This oversight hearing today is essential because the OCME and NYPD -- the two agencies responsible for the genetic stop-and-frisk tactics that have ensnared more than 32,000 New Yorkers-- believe they are above the law. The NYPD contends that, even though the law requires a warrant, court order, or valid consent to take the DNA of an individual,² they are permitted to trick people into giving it away every time they enter a precinct or get a knock on their door. The OCME believes that, even though State law says that only adults convicted of crimes can be kept

² *Samy F. v. Fabrizio*, 176 A.D.3d 44, 53 (1st Dept. 2019).

in a DNA identification index³, they can make their own rules to store more than tens of thousands of individuals, including children⁴ and people who have never been convicted of a crime.⁵

It now appears that these two agencies intend to come before the City Council to suggest weak, self-imposed limits on power they do not possess in the first place in order to avoid direct action by the City or State legislature.⁶ On behalf of the Legal Aid Society, our clients, and the communities we serve, we are here to say their plan is grossly deficient and must not deter the City Council from taking action. Instead, we call on the City Council to issue a full demand that law enforcement follow the laws it is sworn to uphold.

Our testimony today will focus on the three key unlawful and problematic elements of the NYPD and OCME's proposal to "limit" DNA collection and storage. First, the NYPD's refusal to immediately end their widespread surreptitious and coercive DNA collection practice shows contempt for the communities they serve, as well as contempt for the law. Second, the plan for DNA expungement from the unlawful City-run DNA index and for so-called transparency has enough loopholes to render it meaningless. Third, the entire justification for broad-based DNA collection and unregulated indexing is misguided and bad public policy. These collection and

³ See Exec. L. §§ 995(7); 995-c(3)(a).

⁴ Jan Ransom, *N.Y.P.D. Detectives Gave a Boy, 12, a Soda. He Landed in a DNA Database*, The New York Times (Aug. 16, 2019), available at <https://www.nytimes.com/2019/08/15/nyregion/nypd-dna-database.html>.

⁵ *Supra* n. 4; Aaron Morrison, *Hundreds of Victim and Witness DNA Profiles Removed from New York City Database*, The Appeal (Nov. 26, 2019), available at <https://theappeal.org/new-york-dna-database-victims-witnesses-removed/>.

⁶ Anna Sanders, *NYPD shopping changes to controversial methods used to collect and keep DNA*, New York Daily News (Feb. 14, 2020), available at <https://www.nydailynews.com/new-york/nyc-crime/ny-nypd-dna-database-changes-20200214-4v6qpoqqbnbahpvevwopv2ephy-story.html>; Edgar Sandoval, *N.Y.P.D. to Remove DNA Profiles of Non-Criminals Form Database*, The New York Times (Feb. 20, 2020), available at <https://www.nytimes.com/2020/02/20/nyregion/dna-nypd-database.html>.

indexing practices not only fail to reduce crime, they raise the risk of wrongful arrests, sow community distrust, and disproportionately impact New Yorkers of color.⁷

III. NYPD'S DNA COLLECTION TACTICS ARE UNLAWFUL AND UNJUST; THEY MUST BE ENDED

The NYPD's proposal insists that it will continue its practice of precinct-based surreptitious DNA collection without any real limitation.⁸ The police call much of the DNA it collects "abandoned," even though it is no such thing. Their interpretation of "consent" – especially from children – turns the law and common sense on its head. Rather, the NYPD routinely relies upon an unlawful and coercive police-orchestrated taking of DNA in order to evade the legal requirements for court order or subpoena. The NYPD's contention that its practices are lawful is frightening. If true, it can collect DNA from any one of us, at any time, for any reason. And from our children, as well. And that is why the Council needs to act swiftly to end this practice.

A. How The NYPD Collects DNA Surreptitiously

The NYPD engages in a department-wide, precinct-based surreptitious DNA collection practice in which people are taken into interrogation rooms and given water bottles or cigarettes in order to secretly collect their DNA. The police admitted to the practice before the City Council in 2017, but implied it was rarely used, and only in cases where the evidence "will prove or disprove" a fact at issue.⁹ The Council did nothing to curb the policy then, and now, in 2020, we

⁷ Indeed, even the individual who originally developed the local DNA index believes it is being operated beyond the scope of what was envisioned and that there is no longer a justification for the index. <https://www.nydailynews.com/new-york/nyc-crime/ny-dna-pioneer-criticizes-nypd-20200224-brwloofnrfapzhn332kvvzl23y-story.html>.

⁸ *Supra*, n. 6. The NYPD proposal only proposes to limit, not end, the unlawful collection of DNA from juveniles. Its proposal would limit juvenile collection to only "investigations involving felonies, firearm crimes, sex crimes (and sexually motivated crimes), and hate crimes. Investigations for other crimes may be included with prior, explicit approval from the Chief of Detectives."

⁹ See City Council of the City of New York, *Transcript of the Minutes of The Committee on Health Jointly with the Committee on Public Safety* (Dec. 14, 2017) ("2017 Hrg. Tr."), p. 38.

know that precinct-based surreptitious collection goes far beyond what the police admitted, ensnaring hundreds, if not thousands, of New Yorkers.

The Department has largely tried to keep its surreptitious DNA collection policy under wraps. In response to a FOIL request, it refused to disclose any of the procedures in the detective's guide entitled "Collecting DNA Abandonment Suspect Samples In A Controlled Environment."¹⁰ (The title itself shows that this collection is not a random act of abandoned property, but rather a concerted effort.) It won't disclose who it takes surreptitious samples from, when it does so, or what limits, if any at all, it acknowledges exist.

Despite this secrecy, we have a good idea of how this procedure plays out because our clients, their loved ones, and community members tell us. And we have many of these interactions on videotape,¹¹ including some that our clients have allowed us to share with you.

Based on the experiences of hundreds of our clients, here is a description of the NYPD's tactics in collecting so-called "abandoned" DNA, or more accurately "surreptitiously taken DNA:"

A person -- let's imagine this is *your* 19 year old son, but it could be anyone -- is taken into custody. The reason could be anything from a turnstile jump to alleged weapons possession, or even "gang activity" questioning, as we have seen examples of all of these. Your son is detained in different parts of the precinct for hours -- the booking area, holding cell, or other waiting areas. While your person is waiting, a different room is prepared for him. This room has a table and chair and locks from the outside. An officer wipes down with bleach all of the open surfaces in this room in order to sterilize it before your son enters, because the police intend to try to extract his DNA.

¹⁰ Attached here as Exhibit A.

¹¹ George Joseph, *How Juveniles Get Caught Up in the NYPD's Vast DNA Dragnet*, Gothamist (Jan. 10, 2019), available at <https://gothamist.com/news/how-juveniles-get-caught-up-in-the-nypds-vast-dna-dragnet>.

The young man, handcuffed and escorted by officers, finally enters this sterilized room. There, he meets a detective who asks him right away if he wants a cigarette or bottle of water. The detective then reads him *Miranda* warnings (If he's just taken in for questioning, the detective might even skip this step.) Perhaps your son says he doesn't want to talk; he wants a lawyer. "OK," the detective says, "just finish up and you can leave." The detective leaves him in the room until he drinks the water or smokes the cigarette. The detective then comes back and leads your son out in handcuffs. The young man asks if he can take his water bottle with him, but the officer says "don't worry, I'll give you another one later." If it is a cigarette, he's told to put it out because there's no smoking allowed in the rest of the precinct.¹²

Once the young man is out of the room, another officer comes in and, using gloves and a secure envelope, collects the water bottle or the cigarette. The officer sends the item to OCME for DNA typing and inclusion in the local DNA index. Your son is *never* told his DNA was taken. He is *never* told that his DNA is now in the local DNA index. And, if your son is one of the thousands of people whose DNA was taken but who is never charged with a crime, or for whom there is no DNA evidence in his case, or who has his charges quickly dismissed, *he will never find out* that his DNA is in the local index forever. And, as we detail in the next section, even under the NYPD's new proposal, your son will have no way to guarantee the removal of his DNA in a timely manner – or ever at all.

Victims of this procedure include a 12 year old boy, who had his DNA taken from a water bottle and whose case was dismissed; an 18 year old who was not even charged with a crime, but had DNA taken through a cigarette; a 17 year old who had his case dismissed and who didn't even have DNA evidence in his case for comparison to begin with, but had his DNA taken, also through a cigarette; and a 23 year old woman, who was exonerated because her surreptitiously-obtained

¹² Pub. H. L. § 1339-0.

DNA from a water bottle did not match, but who remains in an DNA index anyway. We could give countless examples of this same procedure, as our lawyers learn of it every day in their cases.

None of these young men and women were warned that their DNA might be taken, told that it *was* taken, or even given a chance to have their DNA removed once their case was dismissed or they were not charged. Each of these individuals only found out about the DNA samples because they had lawyers who dug into their case files.

B. The NYPD's Surreptitious DNA Collection Practices Violate the Law

Not only are NYPD's surreptitious collection tactics appalling, but they violate the law.

1. NYPD's Surreptitious Tactics Violate The State and Federal Constitution:

Under New York State law, DNA cannot be collected from any person absent a warrant, court order or valid consent.¹³ This law flows from the State Constitution's prohibition on unlawful searches and seizures.¹⁴ New York's search and seizure protection is more protective of an individual rights' than the Fourth Amendment to the United States constitution.¹⁵ But even under the United States Constitution, DNA cannot be gathered from arrestees *carte blanche*—there must be a carefully-tailored plan for when DNA is collected and how.¹⁶

In New York, in order to obtain a DNA sample from an individual, law enforcement must obtain a warrant or court order after making a four-part showing.¹⁷ First, there must be probable cause to believe that a person committed a crime.¹⁸ Second, there must be a clear indication that relevant material evidence will come from the DNA comparison (for example, a showing that

¹³ See *Samy F. v. Fabrizio*, 176A.D.3d 44, 53 (1st Dept. 2019).

¹⁴ N.Y. State Const. Art. 1, §12.

¹⁵ See, e.g., *People v. Scott*, 79 N.Y.2d 474, 491 (1992).

¹⁶ *Maryland v. King*, 569 U.S. 435, 461 (2013) (Maryland DNA arrestee collection pursuant to statutory authority, passed on by legislators).

¹⁷ *Matter of Abe A.*, 56 N.Y.2d 288, 291 (1982).

¹⁸ *Id.*

DNA was recovered from a weapon and the suspect is believed to have handled it).¹⁹ Third, the method to take the DNA must be safe and reliable.²⁰ Finally, law enforcement must establish that the DNA sample is important enough, and the crime serious enough, to warrant the bodily intrusion.²¹ If these elements all are satisfied, then a judge may issue a warrant for a DNA swab, or a court can order it. If they are not satisfied, the law says that law enforcement simply is not entitled to take DNA.

The police are fully aware of how to obtain warrants. They do it every day to search people's homes or cars, to tap their phones,²² before they draw blood,²³ and so on. They are well-equipped to get these warrants through regular judicial process.

The NYPD claims that its DNA collection tactics are lawful because these laws do not apply to "abandoned" property.²⁴ However, the NYPD misconstrues what "abandonment" means under the law. For property to be "abandoned," such that the police can take it without a warrant, it must be discarded purposefully, and not in response to police action.²⁵ The point of the abandonment doctrine is that if a person *voluntarily* gets rid of something, he cannot later claim that the police took it unlawfully.

The abandonment doctrine simply does not apply to precinct-based, police orchestrated surreptitious DNA collection. As one judge wrote:

In fact it is a misnomer in the case where the captive defendant uses an item and the police harvest it specifically to obtain DNA. It is not abandoned but rather seized. Police would not allow a prisoner to keep his cigarette butt, a water bottle

¹⁹ *Id.*; *People v. K.M.*, 54 Misc.3d 825, 828 (Sup. Ct. Bronx Co. 2016).

²⁰ *Id.*

²¹ *Id.*

²² *People v. Mendez*, 28 A.D.2d 727 (2d Dept. 1967).

²³ *People v. Meade*, 64 Misc. 3d 1234(A) (N.Y. Crim. Ct. 2019).

²⁴ *Supra*, n. 10.

²⁵ *People v. Boodle*, 47 N.Y.2d 398 (1979).

or the like when it is a recognized investigative tactic to obtain and secure it as an “abandoned” sample.²⁶

The police position insults our collective intelligence. A person who is in a police precinct has little choice in what they do and don’t take with them -- especially from an interrogation room. In fact, we have seen videos where clients specifically ask to take water bottles with them and the police say no. Meanwhile, even if the person *did* discard his or her water bottle or cigarette, that person certainly didn’t purposefully leave DNA behind for the City to add to its permanent collection.²⁷ A person who is in police custody should be able to rely on the police following the law. Since the law says that DNA cannot be taken without a warrant, court order, or valid consent, why should someone suspect that something they leave behind would have their DNA stolen from it without any authorization at all?

2. The NYPD’s Surreptitious Collection Methods From Juveniles Are Unlawful For Additional Reasons:

The taking of surreptitious DNA from children is particularly egregious. Minor children are legally unable to consent to the taking of their DNA. By operation of law, the NYPD must either obtain a warrant or court order or obtain valid consent for DNA takings from a child’s parent or legal guardian. In addition, under Public Health Law § 2504, parental consent is required prior to performing a medical procedure on a child. DNA sampling is one such procedure. Nonetheless, adult NYPD officers routinely arrest a child or bring them in for questioning, then, offering the

²⁶ *People v. Flores*, 65 Misc. 3d 971, 975 (Sup. Ct. Bronx Co. 2019).

²⁷ A recent United States Supreme Court case, *Carpenter v. United States*, --U.S. --, 138 S. Ct. 2206 (2018), illustrates this point. In *Carpenter*, the Supreme Court held that cell site information collected by a cell phone company cannot be disclosed to the government absent a warrant *even though* this information already was held by a “third party.” *Id.* at 2221.

The *Carpenter* Court, in determining whether a person has a “reasonable expectation of privacy,” emphasized factors such as the level of intimate detail in the information and the “pervasiveness” of it in the individual’s daily life. *Id.* at 2220. Applying these criteria, the Supreme Court determined that even mere cell site tracking information rose to the level of private information for which the government could not obtain from a third party without “probable cause.” *Id.* Surely a person’s genetic code, which contains their entire genetic and familial history (and, as technology advances, their biological future) rises to – and exceeds – the privacy interest in cell phone location information

child a drink or cigarette, keep the item for DNA testing. The NYPD does so without providing notice to the child or his or her parent or guardian, and does so even in cases where the child, parent or guardian has *explicitly refused to consent* to the taking of a DNA sample.

Consider the experience of “David,”²⁸ a client of The Legal Aid Society. David was arrested by the NYPD and brought in for questioning related to allegations of weapons possession. The interrogation was video recorded. The NYPD wanted to link David to the weapon and asked David to provide them with a DNA sample during the interrogation. With his mother present, David refused to give the officers a DNA sample. At no point, notably, did the officer ask David’s mother for consent to extract DNA from David. After his refusal, the officer is seen in the video leaving the interrogation room and returning shortly thereafter with a 20oz plastic bottle of Poland Spring water. The conversation between David, his mother, and the officers continued for a short time until they all leave the room, David with the bottle of water in his hand. During the course of David’s case in Family Court, our attorneys received police records confirming that, after the video ends, David drank from the water bottle while in the precinct. The records also confirm that, having full control over how the bottle was discarded, the officers present took the bottle from David and kept it with the intention of extracting a sample of David’s saliva from the mouth of the water bottle for the purpose of DNA testing.

Corporation Counsel, the prosecutor in Family Court, implicitly recognizes that these NYPD practices are unlawful as they do not rely on these surreptitiously obtained DNA samples. Instead, Corporation Counsel will proceed to obtain a court order for DNA testing if they plan to rely on the child’s DNA in the prosecution. Yet, surreptitious collection and DNA indexing from children would continue under the NYPD’s new proposal.

3. The NYPD’s Collection Methods Violate the Right To Know Act

²⁸ We use pseudonyms to protect our clients’ identity.

Surreptitious, or secret, collection of DNA in police precincts, by its very definition also violates the Council's Right to Know Act.²⁹ The RTKA requires police officers to ask for consent before performing searches. The RTKA would not tolerate the police rifling through someone's pocketbook while her head was turned. It should not extend greater permission to the NYPD to snatch DNA under our people's noses. The RTKA also requires reporting on searches, including demographic information. Councilman Menchaca asked the NYPD about their lack of DNA reporting as part of a RTKA oversight hearing last year, but nothing has happened as a result.³⁰

C. The NYPD Also Unlawfully and Unjustly Collects DNA From Children Upon Purported 'Consent'

1. Children Cannot Consent To Provide DNA, Yet The NYPD Regularly Refuses to Even Consult Their Parents; Their 'Proposal' Lacks Any Promise To Stop This Practice

We have seen numerous cases where the NYPD coerces young people to provide a DNA sample, without even consulting their parents. The Department's new DNA proposal does not promise to immediately stop these tactics. Under the NYPD's plan, genetic stop and frisk or "knock and spit" will continue to ensnare children without their parents even being aware.

For example, "John," a 16 year old boy, was brought in to an NYPD precinct for questioning related to a crime. This interrogation, like many others was recorded on video. In the video, John can be seen answering the officers' questions and repeatedly asserting his innocence. The officer continuously says that he "knows what really happened," suggesting John's involvement. John can be seen in the video getting increasingly frustrated by the questioning. Twenty eight minutes into the interrogation, the officer asks John to provide a DNA sample to "prove that it's not you." The officer goes on to say that he "will compare [the DNA sample to others]" and "will go from there." At no point during this NYPD inquiry did the officer inform

²⁹ See N.Y.C. Admin. Code §§ 14-173 and 14-174.

³⁰ Transcript of New York City Council Oversight Hearing, April 29, 2019, pp. 88-98.

John that his parent needed to consent to the DNA taking. John, fatigued and frustrated from the interrogation, acquiesced to providing the DNA sample. Seconds later, John is given a cotton swab, swabs his mouth, and places the swab in to a plastic bag. John's case went to Family Court, but the charges against him were dismissed and his case was sealed. His DNA nonetheless remains in the local databank.

There are countless examples of DNA takings similar to John's where the NYPD obtains samples from children without parents present, and without any meaningful discussion with the children about the consequences of providing the government with their DNA sample. Requiring a court order for the taking of DNA and or at a minimum requiring access to counsel before allowing a young person to consent to the taking of their DNA provides important safeguards for youth.

Even more troublesome for the city's vulnerable youth of color is the NYPD's "knock-and-spit" practice.

When the NYPD casts a wide "dragnet" in a specific geographical area to locate a suspect of a crime using knock-and-spit tactics, the potential for the NYPD violating young people's civil rights significantly increases. Knock-and-spit involves law enforcement knocking on the door of an individual's home and asking them for a swab. Youth are undeniably more susceptible to these practices than are adults. The basis for the swab usually mirrors the justification the officer provided John in the example above—exoneration. The police assure the child that providing a DNA sample would only benefit them, since they have "done no wrong." Again, this obviously is problematic because of how vulnerable children are to police deception and how difficult it is for children to fully comprehend and anticipate the consequences of their actions.³¹

³¹ The United States Supreme Court in recent cases has recognized the important role that a developing adolescent brain plays in a young person's perceptions and actions when confronting the criminal justice system. *See, e.g., Miller v. Alabama*, 132 S.Ct. 2455 (2012) (juveniles cannot be subjected to mandatory

A stark example of the dangers of NYPD's knock-and-spit practice is the recent dragnet the NYPD conducted to apprehend suspect of the publicized Morningside Heights stabbing. In response to the stabbing, the NYPD questioned and retrieved DNA samples from scores of young people in the Northern Manhattan and Bronx areas.³² The searches were based largely on a profile that described many of the area's Black and brown youth population; many of whom come from impoverished communities with a deep-seated fear and distrust for law enforcement. This general sentiment toward the police coupled with these adolescence's inability to perceive the taking/interrogation the way an adult would is a recipe for children to unwittingly surrender their DNA where the police clearly lack a proper warrant.

2. Even Purported Parental Consent Does Not Protect Children's Rights; A Court Order Should Be Required

In all instances, consistent with firmly established state law,³³ the NYPD should obtain a court order before taking DNA, including from a young person. Rather than devising a policy that allows for extrajudicial parental consent before police can take DNA from a minor, the NYPD should seek permission from the court. At the very least, if consent is sought short of a court order, requiring access to and consultation with an attorney before allowing the child to consent is far more consistent with ensuring integrity in the law enforcement investigation.

life without parole); *Roper v. Simmons*, 543 U.S. 551, 569 (2005)(capital punishment unconstitutional for children under 18); *J.D.B v. North Carolina*, 131 S.Ct. 2394 (2011)(age is relevant in determining what constitutes police custody for *Miranda* purposes).

³² See also George Joseph, "How Juveniles Get Caught Up in the NYPD's Vast DNA Dragnet," The Gothamist, 2019, <https://gothamist.com/news/how-juveniles-get-caught-up-in-the-nypds-vast-dna-dragnet> (last viewed February 14, 2020); and Jan Ransom and Ashley Southall, "N.Y.P.D. Detectives Gave a Boy, 12, a Soda. He Landed in a DNA Database," The New York Times, 2019, <https://www.nytimes.com/2019/08/15/nyregion/nypd-dna-database.html> (last viewed February 14, 2020)

³³ *Matter of Abe A.*, 56 N.Y.2d 288 (1982).

Parental consent is insufficient because potential and actual conflicts of interest are present when a parent is asked to advise and consent to the taking of their child's DNA by law enforcement. The parental consent requirement in this context gives the veneer of protection for the child, but in reality it is meaningless.

Imagine the circumstances -- you are at the police precinct with your child, and you likely have little to no information about what has transpired. All you know is what the police are telling you in that moment. And the police are driven by their role which is to gather evidence to support their arrest. You may be angry, embarrassed, scared, confused, stressed or more likely all of those things. Your anger may be directed at your child. Maybe the relationship with your teenaged child is already strained, you are at your wits' end, and angry that your child has "gotten into trouble." You come into the situation asking yourself, how did he or she let this happen? As a parent you may also be feeling embarrassed and humiliated by the intrusion of law enforcement into the life of your family and ashamed of what that this arrest and court involvement might mean for your son and your family. These emotions and this context will certainly cloud your judgment.

At this early and precarious stage, as a parent you might feel obligated to teach your child a moral lesson rather than focus on your child's legal interests. As such, as a parent you may underestimate the power of law enforcement interrogation techniques, and or be naive to their intentions or regarding the extent of your child's innocence. Under the stress of the arrest, many parents might not understand the actual Miranda and 5th Amendment rights they are advising their child to forego, and therefore they are unable to advise their child intelligently. Also, parents may feel trauma over making a decision and giving advice that can result in a detrimental impact on the child and undermine their future relationship.

In addition, there are circumstances when an indisputable conflict of interest between the parent and the interest of the child exists. This is true when the complainant in the case is another child or family member, or when the parent might be concerned about their own exposure to criminal or civil liability, including exposure to child abuse or neglect allegations. These circumstances are not unusual when a child is arrested. Given the NYPD plans to take DNA in all sex offense cases or any felony case, many of which might be intrafamilial, this is a great concern.

Moreover, NYPD routinely obtains purported consent to the taking of a child's DNA from a child or his or her parent or guardian through deceptive and coercive tactics. For example, the NYPD convinces parents or guardians to bring a child into a precinct for questioning, sometimes for an alleged minor crime, unrelated to the crime they are in fact investigating. Once in the precinct, the NYPD begins vigorously questioning about a much more serious crime, rattling both the adult and child. As a result, the officer urges the child and adult to provide the officer with a DNA sample to exonerate the child of guilt. These practices are intentionally deceptive and can coerce consent in an insidious manner.

D. The Racial Justice Impact of The NYPD's DNA Collection Tactics; Their Proposal Does Not Repair The Community Harm They Have Inflicted

The overt racial disparities in the NYPD's unlawful surreptitious collection of DNA is a violation of the constitutional rights of many of our Black and Latinx community members. The NYPD has a long history of intentionally targeting marginalized communities with over-criminalization, over-surveillance, and deliberately violating their constitutional rights.³⁴ As more information trickles out about the NYPD's unlawful use of surreptitious DNA collections, one of the most disturbing facts is the NYPD and OCME's willful refusal to share out and/or collect information on the racial breakdown of the people whose genetic information has been unlawfully

³⁴ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

taken from them. It is extremely troubling that the NYPD and OCME appear to be obfuscating the data on the racial makeup of the local unregulated DNA Databank. It is very likely that the maintenance and collection of the samples in the local DNA Databank violates the Equal Protection Clause of the Fourteenth Amendment and could possibly leave the City open to litigation.

Although the NYPD is not providing the racial makeup of the individuals whose DNA has been collected, it is possible for us to make a strong educated guess as to which racial identities are most likely in the unregulated DNA Databank. We know that more than 360 Black men had their DNA unlawfully and coercively stolen from them by the NYPD during the investigation into the murder of Karina Vetrano. The NYPD went door to door in East New York and neighboring communities in Queens demanding that individual residents – who were under no suspicion of wrongdoing – provide the NYPD with a DNA swab. After the death of Tessa Majors, the NYPD appears to have reenacted their DNA dragnet and targeted Black young boys in Harlem. We know that on average every year, Black and Latinx people make up approximately 82% of all NYPD arrests. We know that the vast majority of the DNA collections take place prior to individuals being convicted of a crime. Most of the collections take place in the precinct sometimes prior to arrests and almost always prior to arraignment. It is obvious, even without the NYPD or OCME providing the racial breakdown of the DNA Databank, that the vast majority of the local DNA Databank is made up of Black and Latinx people.

The NYPD's use of this tactic is a continuation of their over-surveillance and criminalization of marginalized communities. In recent years, we have seen an uptick in the NYPD's abusive use of surveillance that targets Black and Latinx people, such as the secretive

gang database.³⁵ Additionally, the implications of blatantly targeting young people from Black and Latinx communities will lead to another generation being swept up into mass incarceration. This should be a concern for all New Yorkers because it is immoral and it will further exasperate the deep societal racial inequalities that lead to many of the social ills we hope to eradicate i.e. negative impact on mental and physical health, housing instability, economic inequality, etc.³⁶ It further creates an environment in which young people of color rightfully feel distrust and paranoia towards law enforcement and the state in general. It ensures that communities of color will continue to be marginalized and mistreated by the state actors who are allegedly there to protect and serve them.

This DNA Databank not only impacts the immediate person whose genetic information is surreptitiously stolen, but it has wider implications on everyone genetically connected to them. As the City Council is probably aware, the use of DNA has the potential to connect individuals who are genetically linked with one another, even if they have tenuous familial ties. For communities of color, this is especially perverse when taking into account this nation's long history of intentionally destroying familial bonds, i.e. Indigenous children and boarding schools, Black families during slavery, and migrant children being separated at the border today. The NYPD has access to technology that can genetically link people across many familial generations all with the use of unlawfully stolen DNA of unknowing individuals; while this nation has yet to adequately repair and/or – in the case of our southern border – cease this specific harm. By allowing the NYPD to continue to collect the DNA of mostly Black and Latinx people, the City of New York will

³⁵ Nick Pinto, *N.Y.P.D. Added Nearly 2,500 New People to Its Gang Database in the Last Year*, *The Intercept* (June 28, 2019), available at <https://theintercept.com/2019/06/28/nypd-gang-database-additions/>

³⁶ Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *Stan. L. Rev.* 1271, 1281-1300 (2004), available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1582&context=faculty_scholarship

essentially be allowing for the NYPD to weaponize the familial information of people who have historically and systemically been stripped of their familial ties. This disturbing fact will only continue to marginalize communities that have been historically violated in this country. The City of New York should demand better for our vulnerable communities, and should not compound the violence of the past – and present – with new technologies that will catalogue and control our communities of color.

It is clear that the NYPD is incapable of serving Black and Latinx communities without enacting harmful and unlawful policies. The City Council must curb the NYPD's instinct to criminalize, surveil, and catalogue communities of color. By addressing the rogue DNA Databank, the City can take a large step forward in the right direction towards protecting marginalized communities of color.

E. The NYPD's DNA Collection Practices, Even Under Their New Proposal, Lack Real Transparency and Accountability

While the police may claim that they understand the need for transparency, the NYPD's proposal falls far short of any meaningful information sharing. Under this plan, we still won't know how many samples the NYPD actually collects every day, week, year. Although we anecdotally know that they are collecting from people who are not charged with crimes, we won't know how many mere victims, witnesses, or visitors to the precinct have had their DNA surreptitiously collected and indexed. We won't know demographic information, either, although almost all of our clients who have been subjected to this practice are people of color. And although our Juvenile Rights Practice has seen countless children subjected to surreptitious collection, we won't have any idea exactly how many -- especially because almost 40 % of juvenile cases are diverted or adjusted without ever making it to court and having a lawyer assigned.

F. The City Council Must End Unlawful and Unjust DNA Collection

The NYPD's practice violates state and federal constitutional law and the reporting requirements of the Right to Know Act. It also breaches community trust and disproportionately impacts. But, because of the clandestine methods used, and the way our court system functions, surreptitious collection lately evades review.

Scariest than the police continually violating the law through their surreptitious DNA program is how this practice largely evades review. This is because surreptitiously-obtained DNA often isn't used in Court--its simply used to fill the City's DNA coffers. If a surreptitiously-obtained DNA sample is taken from a person who is never charged or is diverted, there is no court proceeding to challenge this collection. Or if the DNA exonerates the person, but the case is prosecuted, then the prosecution likely will not use the evidence in court. And even if the surreptitious sample does implicate our client, prosecutors usually apply for a lawful, court-ordered sample and use that instead, again avoiding any judicial scrutiny of the surreptitious sample.

Without judicial scrutiny, it is up to the City Council to maintain accountability of a lawless practice that violates New Yorker's rights and subjects them to genetic stop and frisk. There are several steps that City Council can take today to restore accountability and community trust when it comes to DNA collection. These steps are simple, and are good common sense. They also happen to be entirely consistent with the Right to Know Act, and the State and federal constitutions.

We ask City Council now to do the following:

- Direct the NYPD to stop genetic stop and frisk by immediately halting precinct-based surreptitious DNA collection.
- Require the NYPD to report all cases in which it engaged in surreptitious DNA. The police should immediately disclose the following:
 - how many surreptitious samples it has collected in the past five years;

- the age, race and gender and nature of the charge investigated for the people from whom the samples were collected;
 - how many samples were collected in cases where there were no charges pending;
 - how many samples were collected in cases where there was no DNA evidence in the case (sometimes called “database only” samples); and
 - how many samples were taken from people who were charged, but whose cases ultimately were dismissed or who were acquitted. To the extent the NYPD does not cease their surreptitious collection practices, it must also disclose this information going forward.
- Direct the NYPD to prohibit the taking of DNA from minors unless the minor has consulted with an attorney and consented;

This Council’s oversight hearing in 2017 highlighted the problems with the NYPD’s precinct-based surreptitious DNA collection methods. The NYPD falsely promised that it would limit that collection, and the Council did nothing to hold them to-task. The so-called “plan” that the NYPD has introduced proposes no limitations on surreptitious collection. Today, every single New Yorker who enters a precinct is subject to DNA collection. And the NYPD insists that there is on one who can stop them. They are wrong and we hope this Council will finally say so.

IV. The OCME Index Is Illegal And Should Be Shut Down

The NYPD collects vast amounts of DNA for one main reason: to populate the City’s DNA identification index. This index operates without any regulation, oversight or scrutiny. New Yorkers have no way of knowing if they are in it, and, in many cases, no way of getting out. In her 2017 testimony, OCME counsel Florence Hutner admitted that there is no law expressly authorizing this index to exist. Instead, she said, the OCME relies on the fact that no one has told them to stop.³⁷ Since 2017, the OCME has increased its databank by more than 30 percent and is

³⁷ 2017 Hrg. Tr., p. 58-59

adding profiles at a breakneck clip of at least 150 people per month.³⁸ It is time for them to be told to shut it down.

The NYPD and OCME are suggesting a different plan. They want to keep their unregulated DNA index growing, but promise to review it every two years. They say you can get expunged if you can prove you were acquitted, but what if you were never even charged, like the 360 men from Howard Beach? Similarly, some 40 percent of NYC youth charged in Family Court have their cases adjusted or diverted from court. Their cases are then dismissed and sealed. Many never get a lawyer and most do not see a judge. Under the NYPD's proposal, these children would never know they were in the index, let alone be informed of the process for getting their DNA removed. This plan is simply unacceptable. It is as if someone stole your wallet and told you they might give it back in 2022, so long as they had spent all your cash and maxed out your credit cards. The NYPD and OCME are not allowed to keep New Yorkers' DNA any more than someone else is entitled to your wallet. And NYPD and OCME don't have just a few dollars and an AmEx of yours; they have DNA from more than 32,000 people--none of whom should be there in the first place.

A. The Unlawful and Unregulated DNA Index Currently Has More Than 32,000 People In It Who Should Not Be There (But No Cops)

The OCME's DNA identification index currently contains more than 32,000 New Yorkers. In response to FOIL requests, the OCME admitted that they do not know how many of these people are children, are people of color, are people who have not been charged with crimes, or are people

³⁸ As of July of 2019, there were 31,446 people in the OCME's "suspect" DNA index. See Aaron Morrison, *Hundreds of Victims and Witness DNA Profiles Removed From New York City Database*, The Appeal (Nov. 26, 2019), available at <https://theappeal.org/new-york-dna-database-victims-witnesses-removed/>. In response to a FOIL request by the Legal Aid Society, the OCME reported that, as of January 10, 2020, there are 32, 158 people included. This is an increase of approximately 120 people per month.

who have been exonerated.³⁹ The composition of this DNA index is completely opaque, except for one group of people who we know for sure are not included: rank and file police officers who refuse to give DNA, even though they regularly handle evidence.⁴⁰ The OCME's DNA identification index plainly violates state law, which allows only for a state databank of DNA and only allows for the permanent databanking of people who have been convicted of crimes.

A DNA identification index carries a special definition in the law and in science. A DNA identification index is a computerized database that perpetually compares DNA taken from people to DNA taken from evidence samples. A person whose DNA is in an index is forever a suspect; he or she is placed in a virtual genetic line up for the rest of their life. A person in an index could be accused of a crime if his or her DNA "matches" crime scene DNA, or even just partially matches. And a person's family members can be implicated, too, if a partial match occurs.

A DNA databank match is devastating evidence. Juries count it as about the strongest evidence there is. And it is nearly impossible to disprove a prosecutor's allegations when a DNA match has occurred. Nonetheless, wrongful matches do occur.⁴¹ For example, in California, Lukis Anderson was wrongfully arrested and charged with capital murder when his DNA was found under the fingernails of a man who was murdered in his own home.⁴² Mr. Anderson was only cleared after hospital records showed that he could not have been present at the time of the crime.

³⁹ Aaron Morrison, *Hundreds of Victim and Witness DNA Profiles Removed from New York City Database*, *The Appeal* (Nov. 26, 2019), available at <https://theappeal.org/new-york-dna-database-victims-witnesses-removed/>.

⁴⁰ Ann Givens, *Push to solve gun cases fuels rapid growth of New York's DNA Database*, *New York Daily News* (Sept. 25, 2017), available at <https://www.nydailynews.com/new-york/nyc-crime/push-solve-gun-cases-fuels-growth-new-york-dna-database-article-1.3516711>.

⁴¹ See e.g., <https://theappeal.org/new-york-city-dna-database-lab-errors/>

⁴² Katie Worth, *Framed for Murder by His Own DNA*, *The Marshall Project* (Apr. 19, 2018), available at <https://www.themarshallproject.org/2018/04/19/framed-for-murder-by-his-own-dna>.

Here, in New York, Terrell Gills was wrongfully prosecuted for a robbery of a Dunkin Donuts.⁴³ The prosecution refused to drop the charges even though another man confessed to the crime, and that man was on video actually committing the offense. Thankfully, the jury acquitted. And recently, Darrell Harris was arrested for burglary based on an erroneous DNA match.⁴⁴ The prosecution refused to drop the charges, even though he had an alibi. It was only after the OCME itself admitted it made an error that the case was dismissed. It defies logic or common sense that these are the only men wrongfully prosecuted; they are just the ones who were lucky enough to have the error corrected.

Because DNA is given such great evidentiary weight and because it carries such personal and private information, it makes sense that lawmakers carefully considered who is subjected to these perpetual genetic line-ups. Lawmakers in Albany made a decision, applicable to the entire State, that the only people subjected to such permanent scrutiny would be people who, at least in part, gave up their right to genetic privacy by committing a crime.⁴⁵ By enacting the DNA indexing laws, which were most recently expanded in 2012 to include all people convicted of any felony or penal law misdemeanor (except marijuana in some cases), the legislature struck a considered balance between privacy and scrutiny.⁴⁶ It made clear that people who are merely

⁴³ Eli Rosenberg, *Can DNA Be Too Convincing? An Acquitted Man Thinks So*, The New York Times (May 16, 2017), available at <https://www.nytimes.com/2017/05/16/nyregion/can-dna-evidence-be-too-convincing-an-acquitted-man-thinks-so.html>.

⁴⁴ Rocco Parascandola, *'Tainted' DNA clears Queens burglary suspect; he was in New Jersey at the time of the crime*, N.Y. Daily News (Oct. 19, 2019), <https://www.nydailynews.com/new-york/nyc-crime/ny-dna-test-tainted-suspect-cleared-20191019-5stdassnugurhyrtc6g6w755a-story.html>.

⁴⁵ See Exec. L. §995(7); 995 .

⁴⁶ The Legislature deliberated at great length as it drafted the bills that authorized, and expanded, the DNA Databank; its deliberations included debate over provisions that it has not enacted into law, such as whether youthful offenders should have their genetic information added to the DNA Databank. See 2005 NY Senate-Assembly Bill S-2959, A-5474; 2005 NY Senate-Assembly Bill S-5342, A-6876; 2005 NY Senate Bill S-01018; 2005 NY Assembly Bill A-5964; 2005 NY Assembly Bill A-5967.

suspected of crimes, and all youths and juveniles, should not be under a DNA microscope for their entire lives.⁴⁷

The State, when it established its DNA index and its regulations, did not give cities like New York the right to make their own rules. Doing so would make no sense -- after all, what's the point of a carefully regulated State DNA index if the biggest city in the State can ignore those regulations and strike out on its own?

But ignoring the rules is exactly what this City has done. The OCME keeps building its index, including people who could never be in the State index, despite State law to the contrary, because it is convinced that the law does not apply to them. This Council has allowed them to continue that misimpression. It should correct that now by shutting down the OCME's unregulated DNA index, and supporting the currently-pending State law that would ensure that no laboratory in New York violates the public trust in the same way.

B. The NYPD's Proposal To Take Some People Out Of The OCME Index Ignores The Law

The NYPD and OCME apparently recognize that their unregulated DNA index has caused a crisis of confidence amongst the New Yorkers they are supposed to serve and protect. But their suggestion that an in-house, periodic, and largely subjective review somehow cures the problem is either woefully ignorant, or callously cynical, about the problem. And their proposal for transparency continues to leave us all in the dark.

⁴⁷ Assemblyman Lentol, the legislative creator of the DNA index, assured fellow lawmakers articulating those concerns that the 2012 expansion would be the last, and would never include people who have not been convicted of a crime:

MR. REILLY: *My question is would you make a definitive statement here that you, as the sponsor of this legislation and, really, the father of this concept, that you will adamantly oppose any further expansion of the database?*

MR. LENTOL: *Yes.*

N.Y. Assembly Debate on A9555, March 15, 2012 (emphasis added).

First, since the OCME is not allowed to maintain an identification index in the first place, any suggestion that it could do so under some self-imposed parameters makes no sense. If I can't steal from you in the first place, I can't decide when and how I might give your stuff back. Second, self-imposed rules are always subject to change with the rulemakers. In testimony in 2017, Dr. Sampson, as head of the OCME promised City Council that people who were not convicted of crimes could easily be expunged from the OCME index. She promised this Council then that if an attorney for a suspect "comes to us and asks us to expunge" a DNA profile "we will."⁴⁸ In our experience, this never was the case. But in any event, in 2020, OCME's written policy has changed to say that it will only expunge DNA profiles based upon court order.⁴⁹ The NYPD suggests that they will again change it now to allow expungement for acquitted people. But, of course, this proposal would continue to allow the DNA of people, including children, who could never be in the State index to be in the City index. In addition, for people whose DNA is collected, but are never charged -- including the Howard Beach 360 -- there is no crime to be acquitted of in the first place, making expungement under these new proposed rules an impossibility.

If this Council allows the OCME and NYPD to believe that the only rules that apply to them are the ones they make themselves, what's to stop those rules from changing at the drop of a hat? What is to stop the NYPD from deciding that it wants to use the DNA profiles in the index to look for physical traits or characteristics? What if OCME decides to share DNA profiles with ICE or DHS? How will anyone even know if the policy changes, let alone act quickly enough to shut it down?

⁴⁸ 2017 Hrg. Test., p. 51.

⁴⁹ See OCME Technical Manual, "Attorney Requests," available at https://www1.nyc.gov/assets/ocme/downloads/pdf/technical-manuals/forensic-biology-technical-manuals/attorney_requests_062519.pdf, § 10.

Finally, a periodic review of people in the index does nothing to cure the immediate harm that can come from wrongful inclusion. DNA evidence tested at the OCME is coming from smaller and smaller samples, where a so-called “match” is not necessarily probative of a crime. Take, for example, the case of Terrell Gills.⁵⁰ In 2016, Jenny Cheung, an attorney in the DNA Unit represented Mr. Gills, who was prosecuted for a robbery of a Dunkin Donuts that he did not commit. Even though video surveillance showed a man other than Mr. Gills committing the robbery, and that other man on the video had in fact been convicted of two other, nearly identical, Dunkin Donuts robberies, the Queens DA’s Office insisted on prosecuting Mr. Gills for one reason alone — his DNA was detected on the store’s cash register. Ms. Cheung, through her expertise as a DNA Unit member, was able to explain this innocent event: the cleaning solution used by that branch had the ability to extract and transfer DNA throughout the store. Mr. Gills, who was a regular customer at that location, had his DNA inadvertently moved from an innocent place to an incriminating one. OCME never explained this possibility to Ms. Cheung—it was only through the resources she was able to access at Legal Aid that she was able to convey this information to a jury and ultimately earn her client’s acquittal. If this DNA “match” happened to a client whose lawyer was not specially trained, a very different result is not just likely, but probable.

Another example is the recent case of Darrell Harris, a person who was wrongfully arrested based on a so-called “match” to the OCME’s DNA index. Mr. Harris was arrested for a burglary in Queens, even though he was in New Jersey at the time of the crime.⁵¹ The sole reason for his

⁵⁰ Eli Rosenberg, *Can DNA Be Too Convincing? An Acquitted Man Thinks So*, The New York Times (May 16, 2017), available at <https://www.nytimes.com/2017/05/16/nyregion/can-dna-evidence-be-too-convincing-an-acquitted-man-thinks-so.html>.

⁵¹ Rocco Parascandola, *'Tainted' DNA clears Queens burglary suspect; he was in New Jersey at the time of the crime*, N.Y. Daily News (Oct. 19, 2019), <https://www.nydailynews.com/new-york/nyc-crime/ny-dna-test-tainted-suspect-cleared-20191019-5stdassnuvgurhyrtc6g6w755a-story.html>.

arrest was a “match” between his DNA and DNA in the OCME’s local index. There was no State DNA hit in this case.

The reason the wrong match occurred, according to a report that was disclosed to the City Council in July of last year, is that an OCME analyst polluted evidence from the burglary with an NYPD-collected sample from Mr. Harris. It took more than a year for OCME to catch its error, during which time Mr. Harris lost his job and was threatened with deportation. And OCME admitted to Council that this error essentially was caught by chance -- the analyst who contaminated the evidence left the laboratory, requiring a new analyst to check the work before testifying in court. If the contaminating analyst were still there, the work never would have been reviewed, and Mr. Harris might now be behind bars for a crime he did not commit.

Critically, the wrongful “match” to Mr. Harris happened as soon as his DNA was entered into the OCME index. If we can’t trust the OCME to carefully handle the samples it has to avoid wrongful arrests, how can we trust it to keep these samples in its unlawful index for two days, let alone two years?

C. Even If An Agreement On Expungement Were Appropriate, This Plan Contains So Many Loopholes That It Is An Empty Vessel

Even if it were appropriate for the NYPD and OCME to self-set guidelines for DNA expungement, the proposal they put forward today is ridden with loopholes.

First, the NYPD claims it will audit the DNA index every two years to determine if a sample “matched” to a crime scene.⁵² But they don’t say what will happen if a sample does not match. Will expungement be automatic in those instances? A non-match to evidence can be determined in hours by the OCME-- why is there a need to wait years? And how do we even know

⁵² *Supra n.6.*

that the match was correct or not? Under the NYPD's proposal, people like Darrell Harris, who were wrongfully accused, would not be subject to expungement at all.

Second, the NYPD insists that people who, two years after collection, are still considered "suspects" are not subject to expungement. But we know from stop and frisk that the NYPD's definition of suspect often consists of three things: young, black and male. None of these warranted a search on the street, and none should warrant genetic stop and frisk either.

Third, the NYPD says that, even if a person did not match the evidence, and even if the person is not a current suspect, they still can keep the DNA in their so-called discretion. After everything we know about how the NYPD collects DNA, does the promise to exercise discretion give anyone comfort at all? This exception surely will swallow the rule and cause countless people -- all presumed innocent -- to be endlessly kept in the databank.

Finally, neither the OCME nor the NYPD have any proposal for how to implement their so-called plan. The OCME has long insisted that it doesn't get feedback on outcomes of the cases of the people who are in its DNA index.⁵³ This is different from the lawful, regulated, State DNA index, which is directly connected to the court system records.⁵⁴ Who would perform this two-year audit? Who would gather data from the courts? And who is going to be reviewing the NYPD's work? After all, this is the same department that, for many years, illegally kept juvenile fingerprints despite iron clad laws barring it.⁵⁵

⁵³ 2017 Hrg. Test., p. 49.

⁵⁴ 9 NYC RR 6193.4(1).

⁵⁵ Alice Speri, *The NYPD Kept an Illegal Database of Juvenile Fingerprints for Years*, *The Intercept* (Nov. 13, 2019), available at <https://theintercept.com/2019/11/13/nypd-juvenile-illegal-fingerprint-database/>.

D. There Is No Countervailing Law Enforcement Need For The DNA Index

Former Commissioner O'Neill claimed in an op-ed that widespread DNA collection and indexing helps solve crime, and does not result in any wrongful arrests.⁵⁶ He is wrong on both counts. This is the same justification that the NYPD used for stop-and-frisk -- a vague "crime solving" platform that had no data to back it up.

At the same time, community members are starting to learn that the NYPD can't be trusted with the basic task of giving someone a water bottle. This is especially true in neighborhoods like East New York, where the police conducted a race-based DNA dragnet. And in the South Bronx, where housing project sweeps rounded up teenagers for "gang" questioning lead to surreptitious DNA collection. Why would someone go into a precinct to give information about crime in their neighborhood if they think that their DNA might wind up stolen from them along the way? When we think of the basic act of community, sharing food and drink plays a symbolic role of trust. By violating that trust for the purpose of building a DNA databank the NYPD is turning away potentially valuable local policing sources.

The Commissioner also is wrong that collecting DNA for the local index solves crime and does not cause wrongful arrests. This Council was told in September of this year that police in Queens wrongfully arrested a man whose DNA was surreptitiously taken after an arrest. The OCME reported this wrongful arrest to the Council as part of a "Root Cause Analysis," which is a mandatory disclosure that the lab must make any time a serious error occurs.⁵⁷ In this letter, in an attempt to explain how the lab made such a serious mistake, the OCME admitted that its local

⁵⁶ James O'Neill, *The truth about the NYPD and DNA: Keep open vital database invaluable in solving crime*, New York Daily News (Nov. 19, 2019), <https://www.nydailynews.com/opinion/ny-oped-the-truth-about-the-nypd-and-dna-20191119-t6avbtmxcbfwvadgi6uwb33lsm-story.html>.

⁵⁷ See Root Cause Analysis Letter, disclosed to City Council on September 10, 2019 (attached to this testimony).

DNA index “infrequently” solves cold cases. But the more the NYPD’s aggressive DNA collection continues, the more these incidents are likely to occur, without any counterbalance.

Finally, Commissioner Shea and the Brooklyn District Attorney’s Office rattled off numbers to the Wall Street Journal last week that 1,550 individuals were “linked” to evidence through DNA. This has nothing to do with the OCME’s DNA index; instead, these were matches between individuals who were suspected of specific crimes and compared to evidence in those specific crimes. There was no need for an unregulated and rampant DNA index to solve these crimes; it is misleading for the Commissioner to say otherwise.

E. City Council Can Stop Illegal DNA Indexing Now

This Council last held a hearing into the OCME’s DNA index in December of 2017. At that time there were 64,000 total profiles. Today, a little more than two years later, there are about 20,000 more. City Council should have acted then, but it can act now, in the following ways:

- Order the OCME to close the unregulated DNA identification index portion of its local DNA databank. This would not stop OCME from testing and comparing individual DNA samples to individual suspect. It would just end the unregulated, perpetual genetic line up that ensnares victims of genetic stop and frisk;
- Require reporting from the OCME on the age, gender, and racial composition of its DNA index;
- Require an independent audit of all of the samples in the OCME DNA identification index to determine: (1) how each sample was collected; (2) whether the DNA profile from each person was actually compared to evidence; (3) whether the person whose sample was collected was charged with a crime; (4) whether the person whose sample was collected, if charged with a crime, not convicted;
- Resolve to support State legislation that would stop all local laboratories from maintaining an unlawful, rogue index.

CONCLUSION

This Council was right to hold an oversight hearing into genetic stop-and-frisk. Since the last hearing in 2017, the index has ballooned. Included in that index are the hundreds of men of color swabbed in Howard Beach; the thousands of people who had DNA stolen from them under their - or their parents' noses; people who have never been charged with or convicted of a crime. The Council has an opportunity to act now, so that we are not here in 2022 asking why there are even more people in the index, and possibly asking why their DNA caused a wrongful conviction, was shared with ICE, or was used to evaluate their mental or physical capacity.

We thank the City Council for its consideration.

RECOMMENDATIONS OF THE LEGAL AID SOCIETY

We ask City Council now to do the following:

- Direct the NYPD to stop genetic stop and frisk by immediately halting precinct-based surreptitious DNA collection.
- Require the NYPD to report all cases in which it engaged in surreptitious DNA. The police should immediately disclose the following:
 - how many surreptitious samples it has collected in the past five years;
 - the age, race and gender and nature of the charge investigated for the people from whom the samples were collected;
 - how many samples were collected in cases where there were no charges pending;
 - how many samples were collected in cases where there was no DNA evidence in the case (sometimes called “database only” samples); and
 - how many samples were taken from people who were charged, but whose cases ultimately were dismissed or who were acquitted. To the extent the NYPD does not cease their surreptitious collection practices, it must also disclose this information going forward.
- Direct the NYPD to prohibit the taking of DNA from minors unless the minor has consulted with an attorney and consented;
- Order the OCME to close the unregulated DNA identification index portion of its local DNA databank. This would not stop OCME from testing and comparing individual DNA samples to individual suspect. It would just end the unregulated, perpetual genetic line up that ensnares victims of genetic stop and frisk;
- Require reporting from the OCME on the age, gender, and racial composition of its DNA index;
- Require an independent audit of all of the samples in the OCME DNA identification index to determine: (1) how each sample was collected; (2) whether the DNA profile from each person was actually compared to evidence; (3) whether the person whose sample was collected was charged with a crime; (4) whether the person whose sample was collected, if charged with a crime, not convicted;
- Resolve to support State legislation that would stop all local laboratories from maintaining an unlawful, rogue index.

ATTACHMENT: NYPD DETECTIVE'S GUIDE



DETECTIVE GUIDE

Section: Forensics

Procedure No: 506-06

COLLECTING DNA EXEMPLAR ABANDONMENT SUSPECT SAMPLES IN A CONTROLLED ENVIRONMENT

DATE ISSUED:
12-09-13

DATE EFFECTIVE:
12-09-13

REVISION NUMBER:

PAGE:
1 of 4

PROCEDURE

[REDACTED]

INVESTIGATOR

[REDACTED]

DETECTIVE GUIDE

PROCEDURE NUMBER:	DATE EFFECTIVE:	REVISION NUMBER:	PAGE:
506-06	12-09-13		3 of 4

INVESTIGATOR (continued)

- (2) Proceed to the "Property Type Level 3" submenu drop down list and select the appropriate "specific description" of the DNA Exemplar Abandonment Suspect Sample (e.g., if DNA Exemplar Abandonment Suspect Sample is a [REDACTED])
 - (3) Proceed to the "Qty" caption and enter the number "1"
 - (4) Proceed to the "Color" submenu drop down list and select the appropriate color of the DNA Exemplar Abandonment Suspect Sample
 - (5) Proceed to the "Additional Description" caption and enter:
 1. "Suspect Exemplar," and
 2. First name and last name and date of birth of the suspect from whom the DNA Exemplar Abandonment Suspect Sample was collected.
 - d. If there is more than one DNA Exemplar Abandonment Suspect Sample being invoiced:
 - (1) Select "Add Item"; and,
 - (2) Repeat step 13.c.(1). through 13.c.(5).
 - e. Repeat steps 13.d.(1). and 13.d.(2). until all DNA Exemplar Abandonment Suspect Samples collected from the same suspect have been listed on the **INVOICE**.
14. Cross reference ALL of the related **INVOICES** by entering ALL of the related **INVOICE** numbers in the "*Additional Invoice(s)*" caption on each of the related **INVOICES**.
15. Utilize PETS to prepare a **REQUEST FOR LABORATORY EXAMINATION REPORT (PD521-165)** for each **INVOICE** that lists one or more DNA Exemplar Abandonment Suspect Samples.
- a. Ensure all of the required information is entered in the "*Details*" section on each **REQUEST FOR LABORATORY EXAMINATION REPORT** including:
 - (1) Facts regarding the offense being investigated
 - (2) Relevant information regarding the investigation
 - (3) **COMPLAINT REPORT** number for each offense associated with one or more collected DNA "evidence" samples that will be compared to one or more DNA Exemplar Abandonment Suspect Samples (i.e., **COMPLAINT REPORT** number associated with each **INVOICE** listed in the "Compare Property Clerk Invoice ITEM Number 0001 To" section of the **REQUEST FOR LABORATORY EXAMINATION REPORT**)
 - (4) When appropriate, relevant information regarding each collected DNA "evidence" sample that will be compared to one or more DNA Exemplar Abandonment Suspect Samples.

DETECTIVE GUIDE

PROCEDURE NUMBER:	DATE EFFECTIVE:	REVISION NUMBER:	PAGE:
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**INVESTIGATOR
(continued)**

- b. Ensure all of the required information regarding all relevant persons (e.g., victims, suspects, persons bleeding, arrestees) is accurately entered in the appropriate captions on **each REQUEST FOR LABORATORY EXAMINATION REPORT**
- c. Ensure all of the required information is accurately entered in the appropriate captions of the "Compare Property Clerk Invoice ITEM Number 0001 To" section of **each REQUEST FOR LABORATORY EXAMINATION REPORT**.
- 16. Obtain a photocopy of **ALL** of the associated **COMPLAINT REPORTS**.
 - a. Obtain photocopy of **ALL** of the associated Omniform **COMPLAINT REPORTS** if available; or,
 - b. Obtain photocopy of **ALL** of the associated hand written **COMPLAINT REPORT WORKSHEETS** if the corresponding Omniform **COMPLAINT REPORT** is not available.
- 17. Attach photocopy of each corresponding **COMPLAINT REPORT** and each corresponding **INVOICE** and each corresponding **REQUEST FOR LABORATORY EXAMINATION REPORT** to the BEB containing the corresponding DNA Exemplar Abandonment Suspect Sample.
- 18. Prepare a "DNA Exemplar Collected" DD-5 in the associated Enterprise Case Management System (ECMS) case file.
 - a. **When applicable**, list documents examined (e.g., driver license, employment identification card, student identification card, debit / credit card) or actions taken (e.g., interview parent, interview employer, interview school official, interview domestic partner) to verify identity of suspect.
- 19. Utilize designated ECMS scanner or fax machine to scan or fax the following documents to the "Attachment" section of "DNA Exemplar Collected" DD-5:
 - a. "Assigned Investigator" copy of the **INVOICE**; and,
 - b. Copy of **REQUEST FOR LABORATORY EXAMINATION REPORT**.
- 20. Store the following documents in the associated paper case folder:
 - a. "Assigned Investigator" copy of the **INVOICE**; and,
 - b. Copy of **REQUEST FOR LABORATORY EXAMINATION REPORT**.

ATTACHMENT: ROOT CAUSE ANALYSIS DISCLOSURE



NYC
**Office of Chief
Medical Examiner**

Louis A. Vargas
Director, Quality Assurance
421 East 26th Street, 13th Floor, New York, NY 10016
Telephone: 212-323-1905 Fax: 646-500-6707
Email: lvargas@ocme.nyc.gov
Official Website: www.nyc.gov/ocme

ROOT CAUSE ANALYSIS REPORT
RCA# 2019-01
September 10, 2019

Executive Summary

On June 17, 2019, the Office of the Chief Medical Examiner (OCME) Quality Assurance Director was informed of an event which occurred in the Department of Forensic Biology. The event involves a potential contamination which led to a DNA HIT notification and arrest. After careful review, the QA Director determined that this was a "significant event" within the meaning of Title 17, Chapter 2, Section 17-207 of the Administrative Code of the City of New York. On August 5, 2019, OCME assembled a Root Cause Analysis (RCA) Committee to identify the causal factors and corrective actions to be taken for this event, which was identified as RCA# 2019-01.

Although the RCA committee was unable to confirm if contamination had occurred, recommendations were made to prevent similar events, if such an event did occur. These recommendations included the following: implementation of a checklist to aid in the reporting of DNA matches and reminding Forensic Biology staff on various points needed to verify DNA matches before reporting them. The committee also recommends that managers clarify the language in the Verifying and Reporting DNA Matches procedure.

Background

The Department of Forensic Biology is a laboratory operating within the Office of Chief Medical Examiner and has the mission of performing DNA testing on physical evidence from criminal cases within the City of New York. Staffed by more than 181 criminalists, supervisors and managers, the Department of Forensic Biology performs serology and DNA testing on nearly every category of crime including homicide, sexual assault, felony assault, robbery, burglary, hate crimes, and weapons possession.

The Combined DNA Index System (CODIS) is a software database maintained by the FBI to aid in criminal investigations. The CODIS hierarchy includes DNA databases at the local, state and national levels. After a DNA profile is obtained and found to be suitable for entry, Forensic Biology uploads it to CODIS. If a match between an evidence sample and a known individual is identified at any level, CODIS generates a Candidate Match Detail Report. The laboratories verify the match and then case information is released. If a match is confirmed, Forensic Biology reports the match to the New York City Police Department (NYPD) and District Attorney (DA) offices through a web-based application named DNA HITS. A reported match may be classified as a "warm hit" or "cold hit". A warm hit is when an individual and evidence were previously thought by law enforcement to have been linked and the DNA results confirm this. A cold hit is

when the individual and evidence did not have a previous link or relationship. When a cold hit occurs, the DNA is providing a new investigative lead for law enforcement.

See Appendix A for a diagram of the workflow.

Event Description

On July 6, 2018, a Forensic Biology criminalist prepared samples for testing. The criminalist cut samples for two cases, the suspect exemplar submitted for comparison to a sexual assault case and an evidentiary sample submitted for a burglary case. The burglary case did not have a listed suspect and the sexual assault case was an acquaintance sexual assault case with a named suspect.

On July 30, 2018, the DNA profile obtained from the burglary case was compared to the Local DNA Index System (LDIS) and a match was found to the suspect submitted for comparison to the acquaintance sexual assault case.

On December 7, 2018, Forensic Biology issued a DNA HIT for the burglary case and the suspect was arrested on December 19, 2018. The arrest was made solely based on the DNA results even though no other aspects of the crime linked the suspect to the incident. The suspect posted bail and was released the next day.

On June 17, 2019, while preparing for grand jury testimony, Forensic Biology staff discovered that the same criminalist had processed the suspect exemplar for the sexual assault case and the evidentiary sample for the burglary case on the same day, two hours apart, but with no other cases processed in between. This suggests the possibility that the match could be due to contamination. Because the laboratory could not determine with 100% certainty if this was a true cold hit or a contamination event, Forensic Biology recalled the DNA HIT out of extreme caution.

On June 18, 2019, Forensic Biology staff alerted the Queen's District Attorney's Office to the issue. On June 28, 2019, staff confirmed that the Queens District Attorney's Office had found that the defendant had a good alibi and dismissed the burglary case.

See Appendix B for a detailed chronology of events.

Review of Remedial Actions Taken by Forensic Biology

The committee reviewed the immediate remedial actions taken by the laboratory after being informed of the potential contamination. The actions taken are listed below:

- Forensic Biology staff immediately notified the Queens District Attorney's Office of the issue and issued additional reports which stated that based on additional information, the results were inconclusive due to possible quality control issues and could not be used for comparison purposes.
- The DNA HIT was recalled.

- The remaining case sample for the burglary case, a “drawer handles” swab, was tested but an insufficient amount of DNA was obtained to perform DNA typing.
- Three retrospective studies were conducted.
 - Retrospective study #1: All samples cut by the criminalist were evaluated for potential contamination. No issues were identified, and all cold hits were confirmed to be true cold hits.
 - Retrospective study #2: All 2018 cases written as cold hits by the reporting analyst were reviewed. No issues were identified, and all cold hits were confirmed to be true cold hits.
 - Retrospective study #3: All 2018 cases reviewed by the technical reviewer that were cold hits were assessed for accuracy. No issues were identified, and all cold hits were confirmed to be true cold hits.

The RCA committee found the actions taken by the laboratory to be appropriate.

Causes and Contributing Factors

The RCA committee reviewed the evidence and was not able to determine if the match was a contamination event or an actual match for several reasons. As stated earlier, the remaining swab for the burglary case was tested but an insufficient amount of DNA was obtained in order to verify the match. The technical reviewer involved in the event was unable to recall details of the case/DNA HIT since the event occurred in 2018. And lastly, the committee was unable to interview the criminalist that prepared the samples or the reporting analyst involved in this event. Both individuals resigned their employment in late 2018. Their resignations are unrelated to this incident.

The RCA committee examined the workflow and the event timeline and employed cause and effect analysis to identify the causes and contributing factors for the potential contamination. Using this methodology, the RCA committee identified the following causal factors:

1. *The reporting analyst did not apply the criteria used to verify a DNA HIT when he entered the match information in DNA HITs.*

Evidence:

The RCA committee reviewed the laboratory’s workflow for testing and reporting DNA matches. In addition, the root cause analysis officer reviewed the standard operating procedures describing these processes.

During the review of the reporting workflow, the committee learned that if a DNA profile is determined to be suitable for entry into CODIS, it is entered to the local CODIS database and uploaded to the state and national levels for comparison to other DNA profiles. If a match is identified, a Forensic Biology analyst will review the match report, compare the DNA profiles, and confirm the match. Before reporting the match in DNA

HITS, quality control checks must be performed by the reporting analyst and technical reviewer.

When verifying a DNA HIT, the reporting analyst must apply certain criteria and verify that the hit is an actual hit and not a potential contamination event. The first set of checks prompts the reporting analyst to determine if the cases were examined by the same analyst on the same day or processed for DNA typing on the same test batches. These checks eliminate the possibility of contamination during laboratory testing. The second set of checks prompts the reporting analyst to determine if the evidence was collected or processed by the same NYPD member. This eliminates the possibility of contamination by law enforcement. If the reporting analyst determines that any of the conditions are true, then the reporting analyst's supervisor must be notified immediately.

The committee learned that the reporting analyst did not perform this check. If the reporting analyst had performed these checks, he would have learned that the same analyst had prepared the samples on the same day and notified his supervisor for further investigation before reporting the DNA HIT. During the review of this event, the committee learned that the reporting analyst resigned his OCME employment effective December 14, 2018. Consequently, he was not interviewed for this root cause analysis and the committee was unable to determine why the procedure was not followed.

2. *The technical reviewer did not apply one of the DNA HIT verification criteria when he reviewed the DNA HIT information.*

Evidence:

After the reporting analyst has confirmed the match and verified the hit by applying the DNA HIT verification criteria, he will enter the match information in the DNA HITS application. The technical reviewer then performs a second quality control check and confirms the match, verifies the hit by applying the DNA HIT verification criteria, and reviews the information entered into the DNA HITS application by the reporting analyst. If the technical reviewer determines that there are no issues, the DNA HIT is approved and notification is made to the NYPD and DA offices.

In this event, the committee learned that the technical reviewer did not apply all of the DNA HIT verification criteria as part of his review. During an interview with the technical reviewer, he stated that he was aware of all the required verification checks but did not know why he did not perform the check of whether cases were examined by the same analyst on the same day. He was unable to recall any unusual circumstances that may have impacted his performance and believed that the error was an oversight on his part. The technical reviewer was asked if there were any issues related to workload, fatigue, or rushing and he responded "no".

The root cause analysis officer confirmed with managers that the technical reviewer had completed all required training and that there were no issues with his past performance. Based on the available evidence, the committee found that the oversight was likely

human error. The technical reviewer has years of experience reviewing and reporting matches and no issues with his past performance were identified.

3. *Staff infrequently report cold hits.*

Evidence:

The committee learned that most hits reported by Forensic Biology are warm hits. Forensic Biology managers estimate that up to 90% of all reported suspect to case hits are warm hits. Although DNA HIT verification criteria are applied to both warm hits and cold hits, applying the criteria is especially important in the event of a cold hit. Eliminating the possibility of a contamination event is a critical quality control measure if the individual and evidence did not have a previous link. The infrequent reporting of cold hits may have contributed to the reporting analyst or technical reviewer not applying the cold hit criteria.

The committee also noted that the application of the DNA HIT verification criteria relies on individuals remembering to apply the cold hit criteria when needed. Taken together, the infrequent reporting of cold hits and the reliance on memory presents a risk for the consistent application of this critical quality control measure.

See Appendix C for the cause and effect analysis.

Corrective Action Plan

The RCA committee recommends the following actions to address the identified causal factors:

1. Managers must implement a DNA HIT checklist to support reporting analysts and technical reviewers in the writing and reporting of all DNA HITS. The checklist is a memory aid that will serve to remind staff to perform all the hit verifications. The checklist will also assist in countering distractions and minimizing overconfidence from mostly reporting warm hits.
2. Laboratory Management must link the newly created DNA hit checklist to the Case Management Checklist utilized daily by analysts and technical reviewers during report writing and review. This will make the criteria for verifying DNA hits more accessible to staff and reduce the possibility of relying on memory.

The RCA committee also offers the following suggestions for consideration by management:

3. Managers should review the Verifying and Reporting DNA Matches procedure and revise the procedure for clarity regarding case types and the quality control steps that must be taken when reporting matches.
4. Managers should also review the sample preparation procedure, specifically the section which describes the cleaning of instruments during examination and sampling. Training should also be reviewed to make sure it is effective and consistent with the procedure.

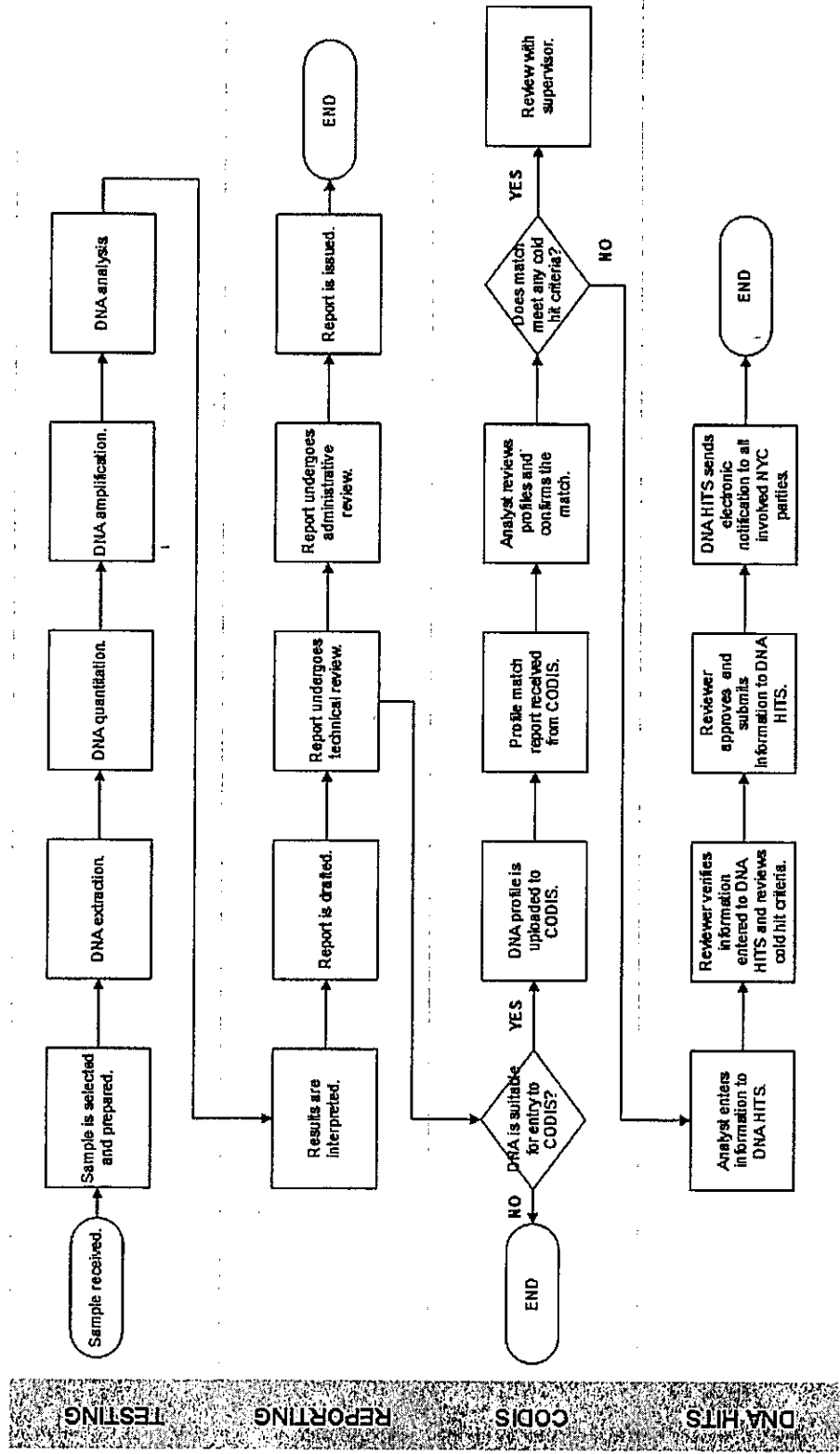
Summary of Corrective Actions

Causal Factor	Recommended Corrective Actions	Completion Date
<p>The reporting analyst did not apply the DNA HIT verification criteria when he entered the match information in DNA HITs.</p> <p>The technical reviewer did not apply one of the DNA HIT verification criteria when he reviewed the DNA HIT information.</p>	<p>1. Implement a DNA HIT checklist to support reporting analysts and technical reviewers in the writing and reporting of cold hits.</p> <p>2. Provide feedback to the technical reviewer.</p>	<p>8/29/19</p> <p>8/29/19</p>
<p>Staff infrequently report cold hits.</p>	<p>1. Link the DNA Hit checklist to the Case Management Checklist utilized daily by analysts and technical reviewers during report writing and review.</p> <p>2. Review the DNA HIT verification criteria and the new DNA HIT checklist with staff.</p>	<p>8/29/19</p> <p>8/29/19</p>
<p>Suggestion (not tied to an identified causal factor)</p>	<p>1. Review the Verifying and Reporting DNA Matches procedure and revise the procedure for clarity regarding case types and quality control steps.</p>	<p>8/29/19</p>
<p>Suggestion (not tied to an identified causal factor)</p>	<p>1. Review the procedure and training for cleaning instruments during sample preparation and examination.</p>	<p>8/6/19</p>

The Quality Manager and Laboratory Director will monitor the implementation and effectiveness of improvements.

Appendix A

OFFICE OF CHIEF MEDICAL EXAMINER
 FORENSIC BIOLOGY: GENERAL TESTING AND CODIS/DNA HITS OVERVIEW



Appendix B

CHRONOLOGY OF EVENTS

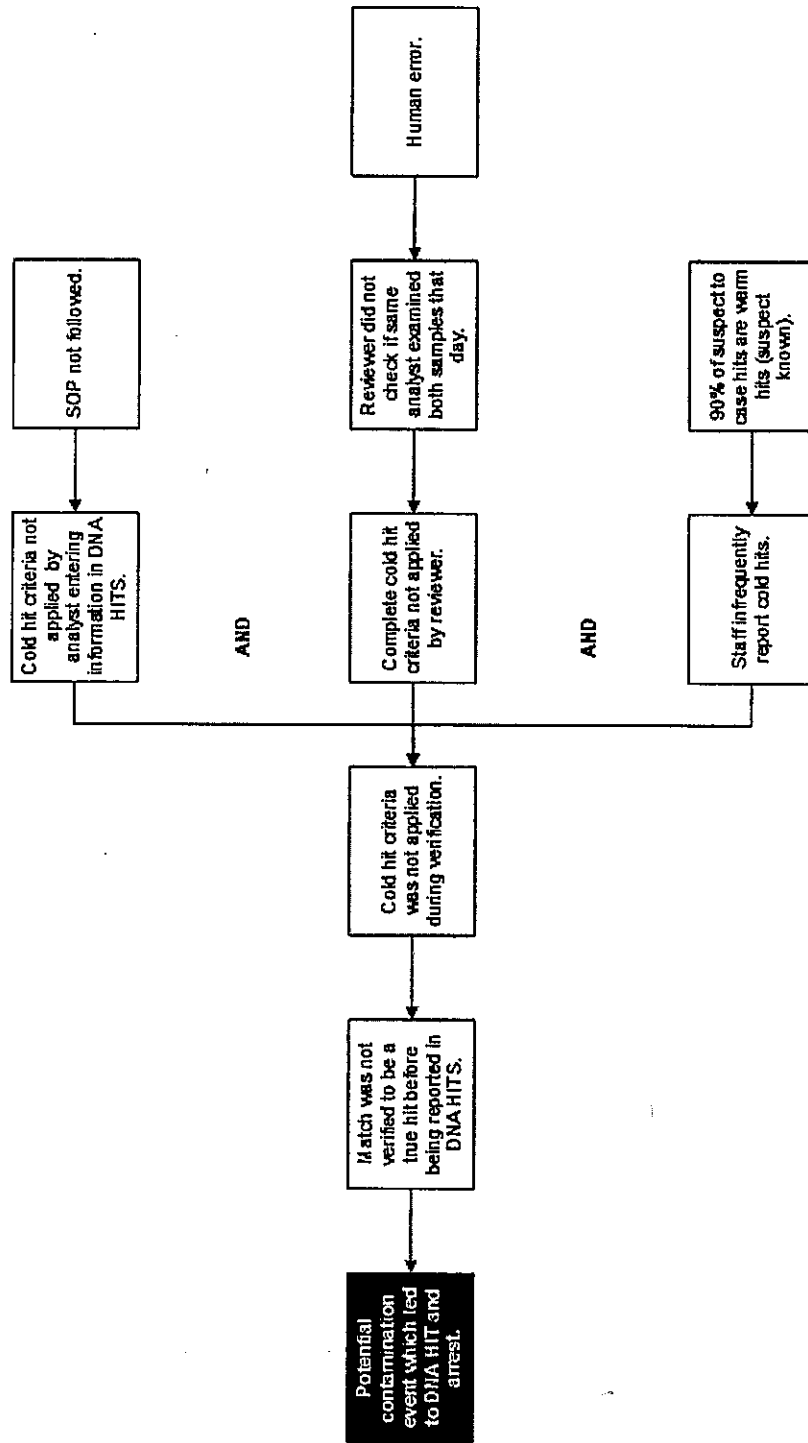
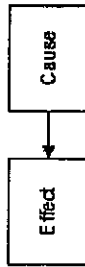
DATE	SOURCE OF INFORMATION	EVENT
6/26/18	LIMS	Forensic Biology received a DNA sample from a suspect to be compared to an acquaintance sexual assault case.
7/6/18	LIMS	A Forensic Biology criminalist processed samples for testing. The criminalist cut the suspect sample for the sexual assault case at 11:52am. The same criminalist cut the "rear bedroom window" swab for a burglary case, at 1:37pm. No other case samples were cut in between.
7/23/18	LIMS	The DNA profile from the suspect sample associated with the sexual assault case was entered into LDIS.
7/30/18	email	The DNA profile obtained from the burglary case was compared to LDIS and a match was found to the DNA profile of the suspect from the sexual assault case.
12/7/18	DNA HITS	Forensic Biology staff reviewed the match between the burglary case and the suspect sample associated with the sexual assault case. Forensic Biology staff issued DNA HIT #27122.
12/13/18	Laboratory report	Forensic Biology issued a report indicating that the suspect's DNA associated with the sexual assault case is the same as the DNA profile for Male Donor A from the burglary case.
12/19/18	email	Suspect turned himself in due to warrant issued for his arrest. The suspect was released the following morning upon posting bail.
6/17/19	LIMS/email	A Forensic Biology analyst discovered the potential contamination while preparing for grand jury testimony. Because the laboratory could not determine if this was a true cold hit or contamination, DNA HIT #27122 was recalled.
6/17/19 - 6/18/19	LIMS	Forensic Biology staff contacted the case Assistant District Attorney (ADA) and their supervisor and notified them of the issue.
6/20/19	Laboratory report	Forensic Biology issued additional reports for both cases stating that previously reported results were inconclusive due to quality control reasons.
6/21/19	LIMS	The case ADA's supervisor left a message stating that the defendant had a good alibi and that the case will be dismissed.
6/28/19	Nonconformity report	Forensic Biology staff confirmed that the Queens District Attorney's Office had dismissed the case.

Appendix C

NYC OFFICE OF CHIEF MEDICAL EXAMINER

Cause Map for RCA# 2019-01

Potential contamination event which led to DNA HIT and arrest.





Legislative Affairs
One Whitehall Street
New York, NY 10004
212-607-3300
www.nyclu.org

**Testimony of the New York Civil Liberties Union
to
The New York City Council Committees on Public Safety and Justice System
regarding
Oversight of DNA Collection and Storage in New York City.**

February 25, 2020

The New York Civil Liberties Union (NYCLU) respectfully submits the following testimony with respect to the New York City Council's Joint Hearing of the Committees on Public Safety and Justice System, regarding much-needed oversight of the collection and storage of DNA material in New York City.

I. Introduction.

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 180,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, through an integrated program of litigation, legislative advocacy, public education and community organizing. The NYCLU fights for the constitutional rights of all New Yorkers to be free from unreasonable searches, to maintain their genetic privacy, and to ensure a police force that respects the liberties and legal rights of members of its community.

The government's collection and maintenance of DNA samples implicates New Yorkers' constitutional rights to privacy, due process, reasonable search and seizure, and equal protection. Unfortunately, the collection and use of DNA by the NYPD and the New York City Office of the Chief Medical Examiner (OCME)—including surreptitious collection, the widespread collection of DNA from minors, and the maintenance of a rogue municipal database in violation of state law—run contrary to city, state, and constitutional law. And the City's continual neglect in setting policies governing the collection and use of New Yorkers' DNA is flatly unacceptable. At issue is New Yorkers' most personal information: their genetic blueprints, which can reveal everything from family relationships to ancestry to propensity for medical conditions, and hold the promise of revealing even more as technology develops further. The City's current policies (or lack thereof) are wildly inadequate given the weighty constitutional interests at stake.

A hearing into these important issues is long overdue. We thank the Committee for holding this hearing, and urge the Council to move quickly by making the long overdue policy changes needed to bring the City's DNA collection in line with the law.

II. The Council Must Ensure that All City DNA Collection, Storage, and Use Complies with the Law.

A core component of the NYCLU's work is protecting New Yorkers' right to be free from discriminatory and unwarranted searches or seizures by law enforcement. Given the severe implications for the misuse of our genetic data,¹ all DNA collection at the municipal level must be subject to meaningful rules and oversight. In New York City, such oversight requires, at a minimum, addressing and banning the current improprieties in our municipal DNA policies.

State law sets forth substantive and procedural rules that set conditions and circumstances for the use of DNA information.² Furthermore, the Right to Know Act requires that any "voluntary" DNA samples be collected only with clear informed consent (including explicit information about the right not to consent). Collection, storage, and use of DNA that falls outside of these laws – including the OCME's "rogue" database, surreptitious swab collection, and the indiscriminate collection of minors' DNA – must be banned and all improperly collected DNA must be completely purged. The current, unregulated use of New Yorker's DNA is totally improper and amounts to what Legal Aid has rightly called "genetic stop and frisk." Furthermore, in 2017 an independent review of the source code of a DNA analysis tool used by the office of the chief medical examiner raised serious questions about its validity, including whether the code may have been intentionally skewed to create more matches.³

The NYPD recently announced plans to remove DNA profiles of "Non-Criminals" from its rogue database, and says it will start expunging some of the 82,000 people in the database

¹ The public has reason to be gravely concerned about the ways in which genetic databases could be misused by government entities. As Congress has recognized, government actors throughout American history have forcibly sterilized people based on perceived genetic "defects," including "mental disease, epilepsy, blindness, and hearing loss," and have discriminated against Black people in everything from marriage to employment because of perceptions about their DNA. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 2, 122 Stat. 881 (2008), as amended Pub. L. No. 111-256, § 2(j) (2010). More recently, in the immigration context, the federal government has sought to consider immigrants' health information to assess their likelihood to need certain forms of assistance. Our history warrants concerns about the misuse of our genetic data.

² N.Y. Exec Law Art. 49-B.

³ Lauren Kirchner, *Thousands of Criminal Cases in New York Relied on Disputed DNA Testing Techniques*, PROPUBLICA (2017), <https://www.propublica.org/article/thousands-of-criminal-cases-in-new-york-relied-on-disputed-dna-testing-techniques> (last visited Jan 16, 2020).

who have never been convicted of a crime.⁴ But these (still vague) half-measures merely confirm the urgent need for third-party oversight and accountability for the NYPD's use of its community's DNA. The very existence of the OCME rogue database is unlawful, and NYPD cannot cure the illegality of its database by adopting "rules" that are similar to, but different from and inferior to, those set forth in NYS Executive Law Article 49-B and its regulations.

Furthermore, there is simply no substitute for public, robust oversight of a technology that changes and evolves rapidly. While the NYPD's existing abuses of genetic storage and testing must be stopped and corrected, the Council also has a duty to establish an oversight mechanism to prevent against *future* abuses. Just last month, the New York Times reported on localities' use of "rapid DNA" analysis machines – called a "magic box" for local police.⁵ But new technological developments – with such weighty implications for New Yorkers' privacy and due process rights – must be vetted and properly used, or else they simply become another "black box" of technology, used outside of all public oversight and accountability. New Yorkers expect and deserve responsible policies governing the use of their genetic material, and the representatives on this Council must supply them.

a. The City Council Must Ban the OCME's Unlawful "Linkage" Database

In Executive Law Article 49-B, lawmakers developed a comprehensive – and exclusive – statutory regime governing testing and data-banking of DNA samples. This body of law balances the rights of individuals and the interests of law enforcement and contains clear provisions designed to limit abuse of our genetic material.

Unfortunately, the OCME has established a so-called "Linkage Database" (or "suspect elimination database") completely outside of this state law.⁶ This rogue DNA databank maintains a broad array of both arrestee samples and "elimination samples," a vast category of DNA records capturing the information of suspects, crime scene bystanders, and anyone else police ask to provide a biological specimen. For example, in the investigation of a homicide the police may well collect elimination samples from many individuals who are not suspects. As a result, much of the information maintained in the Linkage Database comes from people who have never been convicted of, or charged with, or even suspected of, a crime.

⁴ Edgar Sandoval, *NYPD to Remove DNA of Non-Criminals from Database*, New York Times (Feb. 20, 2020), available at <https://www.nytimes.com/2020/02/20/nyregion/dna-nypd-database.html>.

⁵ Heather Murphy, *Coming Soon to a Police Station near You: The DNA 'Magic Box'*, New York Times (Jan. 21, 2019), available at <https://www.nytimes.com/2019/01/21/science/dna-crime-gene-technology.html>.

⁶ Noah Manskar, *Concerns About NYC's DNA Database Spur Demand for a Hearing*, Patch.com (Aug. 21, 2019), available at <https://patch.com/new-york/new-york-city/concerns-nycs-dna-database-spur-demand-hearing>.

Reports suggest that the NYPD's collection for samples to enter into this database have been secretive and racially discriminatory.⁷

The Linkage Database does not conform itself to state law standards for DNA record maintenance and use. For example, stories suggest that DNA profiles remain in the Linkage Database indefinitely; there is no policy for purging such profiles from the system. The database also permits DNA material that was provided pursuant to court order in a criminal proceeding to be used for totally unrelated investigative purposes. There are no privacy protections for individuals whose genetic information is contained in the database, and the database exists without any independent oversight. Absent any controls, samples within it can be analyzed for information far beyond that provided by standard investigative comparisons.⁸ The lack of regulation also means that there are no limits on use of existing sample for "familial searches."⁹

Partial-match and familial-searching DNA analysis techniques are used to identify blood relatives of an individual whose genetic material is stored in a database, such that criminal suspicion will attach to innocent persons due merely to their biological relation to a person whose DNA is in the state's databank. By definition, then, these techniques introduce imprecision, the potential for error, and the risk of sweeping innocent people into criminal investigations. Scientists and scholars have warned that use of DNA evidence to conduct familial searching is highly susceptible not only to human error, but to fraud and abuse.¹⁰

⁷ Jan Ransom and Ashley Southall, *Race-Biased Dagnet: DNA from 360 Black Men Was Collected to Solve Vetrano Murder, Defense Lawyers Say*, New York Times (March 31, 2019), available at <https://www.nytimes.com/2019/03/31/nyregion/karina-vetrano-trial.html>.

⁸ Where testing is not limited to standard 20-loci STR analysis, DNA material can be mined for a wealth of information, including a subject's skin pigmentation, bio-geographical origin, gender, and eye color, but also sensitive information about a host of medical diseases, behavioral and medical predispositions, and even potential indicators of sexual orientation.

⁹ The FBI describes the process of familial searching as follows: "Familial searching is an additional search of a law enforcement DNA database conducted after a routine search has been completed and no profile matches are identified during the process. Unlike a routine database search which may spontaneously yield partial match profiles, familial searching is a deliberate search of a DNA database conducted for the intended purpose of potentially identifying close biological relatives to the unknown forensic profile obtained from crime scene evidence." See FBI.gov, "Familial Searching," available at <https://www.fbi.gov/services/laboratory/biometric-analysis/codis>.

¹⁰ Erin Murphy, "Relative Doubt: Familial Searches, of DNA Databases," 109 Michigan Law Review 292, 297-298, 317 (2010); and Lindsey Weiss, "All in the Family: A Fourth Amendment Analysis of Familial Searching," the Selected Works of Lindsey Weiss, at 8 (2008), available at http://works.bepress.com/lindsey_weiss/2. STR typing analyzes genetic markers at 20 sites, or loci, on the genomic strand. The analysis involves identification of the number of times these markers appear at a specific locus. At each locus analysts measure two repeated strands of markers – or alleles – one inherited from the father, the other from the mother. Counting these repetitions at each of the thirteen loci provides 40 discrete measurements that can help to distinguish one individual from another. A search of 40 alleles has a high probability of identifying a single match. A partial match policy uses fewer loci as a basis for typing the genetic identity of individuals.

DNA databanks have the ability to point not just to individuals but to entire families, including relatives who are not even suspected of having committed any crime. Clearly, this poses serious issues of privacy and fairness.

Because the OCME database includes the DNA samples of over 32,000 individuals whose profiles are not in the regulated state DNA bank, the pool of individuals subject to this problematic “partial” DNA analysis is massively expanded. And because those samples disproportionately include DNA from individuals whose DNA has been collected surreptitiously, without any court order, lawful process, or even knowledge on the individual’s part, and appears to reflect disproportionate sampling of Black people, the privacy and equal protection risks of using this DNA in unregulated partial-match analysis or familial testing are greater.

The City must ban the OCME’s rogue database to ensure compliance with state law. Alternatively, should the council permit the OCME database to continue operating, it must at a minimum pass a law to ban familial matching and partial sample testing.

b. Surreptitious DNA Collection Violates State Law and the Right to Know Act.

It has been reported that the NYPD routinely collects DNA samples in an orchestrated surreptitious manner through straws, bottles, or even cigarettes, without the knowledge or consent of the searched individual and without a court order. The NYPD not only harvests DNA in a surreptitious manner from adults who are charged with crimes—they also take DNA from those who are merely brought in for questioning, and even from children they trick into providing it.¹¹ In interrogation rooms, officers will sometimes offer arrestees bottles of water and cigarettes, not as a gesture of sympathy, but as a surreptitious method of acquiring the DNA suspects subsequently “abandon” in precinct trash cans or ashtrays—or, perhaps even more egregiously, that officers directly grab from individuals’ hands. Their DNA samples are then processed into profiles and entered into the OCME “Linkage Database” without their knowledge.

New York Civil Rights Law 79(l) Part 2(a) requires informed consent for all genetic testing and provides that findings cannot be disclosed without the individual’s consent unless they are ordered by the court or authorized specifically by state law.¹² And the Right to Know Act’s “consent to search” provision requires officers to provide people information about their right

¹¹ See, e.g. Jan Ransom and Ashley Southall, *NYPD Detectives Gave a Boy, 12, a Soda. He Landed in a DNA Database*, New York Times (Aug. 15, 2019), available at <https://www.nytimes.com/2019/08/15/nyregion/nypd-dna-database.html> and Joseph Goldstein, *Before Lifting DNA, Meticulous Protocol*, (Aug. 28, 2012), available at <https://www.nytimes.com/2012/08/29/nyregion/dna-evidence-in-police-interrogation-rooms-requires-bleach.html>.

¹² New York Civil Rights Law § 79-l, part 4(b).

to refuse searches and document these requests. Surreptitious DNA collection flies in the face of these laws.

The secretive processes by which the NYPD obtains DNA from innocent people runs counter to good governance principles and threatens the privacy of all New York City residents and visitors. The Council must act to stop the NYPD's surreptitious collection of DNA, which violates state law, the Right to Know Act, and our constitutional right to privacy.

c. The Collection of Juvenile DNA without Informed Parental Consent is Unlawful.

In addition to surreptitious DNA collection, the NYPD is notorious for including the DNA of children in its rogue database.¹³ Our DNA is immutable, and collection from children implicates their privacy rights—not to mention the rights of family members, including those who have not even been born yet—for the rest of their lives. This is a significant infringement on these children's civil rights. DNA profiles of children should *never* be used to populate unregulated databases, period.

Even where the collection of DNA is done properly and pursuant to state law, minors cannot provide, and should never be asked to provide, legal consent to the irrevocable act of providing their DNA for analysis. In *People v. K.N.*, 2018 WL 6132289 (Crim. Ct. N.Y.C. November 11, 2018), Judge Sandra Roper recognized the scientific literature establishing that psychosocial, psychological and cognitive brain development of children distinguishes them from adults and rules that the signed consent for buccal swab collection in the case was deemed involuntary by virtue of the defendant's age – in violation of the child's Fourth Amendment rights against unlawful search and seizure.

The council must act to ban the collection of children's DNA by the NYPD in any case without explicit permission of a (fully informed) parent or guardian, or a court order signed by a judge.

III. The City must pass the POST Act to ensure independent oversight of the NYPD's use of DNA.

The impropriety of the NYPD's protocols for the use of our biological data is unfortunately not limited to the realm of DNA. To take one ignominious example, the NYPD built a giant facial recognition database and has been loading thousands of arrest photographs of children and teenagers into it.¹⁴

¹³ See George Joseph, *How Juveniles Get Caught Up in the NYPD's Vast DNA Dragnet*, Gothamist.com (Jan. 10, 2019), available at <https://gothamist.com/news/how-juveniles-get-caught-up-in-the-nypds-vast-dna-dragnet>.

¹⁴ See e.g. Joseph Goldstein & Ali Watkins, *She Was Arrested at 14. Then Her Photo Went to a Facial Recognition Database*, N.Y. Times, Aug. 1, 2019, <https://www.nytimes.com/2019/08/01/nyregion/nypd-facial-recognition-children-teenagers.html>; see

The NYPD uses numerous forms of powerful, invasive, and covert surveillance technologies to police New York City's streets and residents every day. These surveillance technologies can capture vast amounts of information about the places we visit, people we communicate with, the frequency of those communications, where we are located inside our home, our most recent social media post – and even what lies within our genetic material.

To date, most of what we know regarding the NYPD's use of surveillance technologies is based on costly FOIL litigation by the NYCLU and other organizations, investigative journalism, and inquiries by the criminal defense community. Notably, this information is not regularly reported by the NYPD, nor is it easily obtainable from other government agencies or officials. It is long past time for the Council to grab the reins and ensure that the NYPD's surveillance and search policies comply with the law and our constitutional values. The Council must pass Intro. 487, the Public Oversight of Surveillance Technology ("POST") Act.

Under the POST Act, prior to utilizing any new surveillance technology, the NYPD will be required to disclose its intended use policy, describing basic information about what the technology is, what rules the Department will adhere to, how the Department will safeguard private information against misuse, and whether the information gathered on New Yorkers will be shared with other public or private entities. Any DNA databank used by the NYPD would be covered by the Act, and require NYPD to provide an overview of its collection, storage, and use protocols for any DNA collection system.

This basic oversight mechanism is critical to ensuring that New York is living up to its commitment to protect our genetic material from hare-brained genetic searches, badly designed databases, and abusive DNA collection practices.

More than a dozen jurisdictions have already passed surveillance transparency laws and there are more than 30 active efforts across the country to enact similar measures.¹⁵ As more and more cities outpace New York and prove that they can make transparency work, our City Council is falling behind in its duty to protect the privacy and bodily integrity of its residents. The Council must act, pass the POST Act, and demonstrate that is committed to building trust with the community rather than permitting the NYPD's ongoing and improper secrecy surrounding its DNA collection and other surveillance technologies.

IV. Conclusion.

The current moment demands that New York City strengthen its policies for oversight and regulation of the collection of New Yorker's most precious data – their DNA. We thank

also Clare Garvie, Georgetown Law Center on Privacy & Technology, *Garbage In, Garbage Out: Face Recognition on Flawed Data*, (2019), <https://www.flawedfacedata.com/>.

¹⁵ ACLU, *Community Control Over Police Surveillance*, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance> (last accessed Dec. 17, 2019).

the Council for providing a forum to address these concerns, and urge immediate action to ban the rogue database and ensure all collection and use of New Yorker's DNA complies with the law and constitution.

TESTIMONY ON POLICE DNA POLICY - NEW YORK CITY COUNCIL
EMILY GALVIN ALMANZA, EXECUTIVE DIRECTOR, PARTNERS FOR JUSTICE

As Executive Director of Partners for Justice, a nonprofit designed to support low-income people interfacing with the justice system, it is my pleasure to testify today. My experience in designing and leading Partners for Justice has given me unique insight into some of the things that have most harmed the functionality of our public safety infrastructure, and I am hoping that by sharing what I have learned, I may assist the Council in creating better public policy.

Partners for Justice trains non-lawyers, mostly young people, to work inside public defender spaces, directly with public defender clients, on all the wide-ranging and complicated things that can destroy a person's stability after an arrest. We help people get or retain housing and employment, we find great addiction and mental health treatment programs and support our clients as they participate, we connect people with public benefits and help them retrieve seized property, and even work on taxes, child support modification, vital documents collection, or anything else that is standing between our clients and successful, positive participation in their community. Our work is about connection. It's about entering into a relationship of trust with very vulnerable people, and coming through for them, finding ways for them to move forward toward a better future.

It's also about understanding how our institutions let people down. One of our greatest challenges is helping public defender agencies redefine themselves from the "public pretender" stereotype into a space the community views as offering reliable, strong, wraparound services. We help agencies regain public trust, and grow deeper roots in their community.

Which is why I feel so compelled to speak out today on the way the NYPD has approached DNA collection. Last week, our Police Commissioner announced, perhaps feeling the pressure of this very committee, that the NYPD would begin a purge of tens of thousands of people whose DNA has been databased and stored by police in spite of their never having been convicted of a crime. This includes children, tricked by adults into giving up their genetic material, entirely without parental knowledge or consent.

That step seems deeply necessary and long overdue, but the greater issue here is community trust. Police cannot do their best work without some measure of support from the people they serve. They need witnesses to trust them enough to give information, they need people to call them when something is going wrong instead of taking matters into their own hands. To solve crimes and reduce harm, they need to be working with the community, not against them.

Which is why it's so vital that the Council direct the NYPD to stop surreptitious collection and shut down the local DNA index. Public leaders must stand up for ordinary New Yorkers, visibly and loudly, in order to ensure community members that leadership is looking out for them and standing up for fair, transparent practices.

Surreptitious collection and dragnet databasing--and the culture and mindset it reveals--are so damaging to public safety. Any officer on the street can tell you how frequently violent crimes go unsolved or unaddressed because community members don't want to come forward and are reluctant to work with--or even invite contact from--police. They're watching a stream of news that all seems to indicate a fixation on low-level harassment of black and brown people, starting with a concentration of police presence in the subways, handing out tickets, and leading all the way up to a fourteen-year-old boy being tricked into giving his DNA sample to the NYPD to hold indefinitely. This juxtaposition breaks hearts, stirs up anger, and destroys any remaining trust between the communities experiencing the highest rates of crime and the police on whom they are supposed to rely.

I am sure that you heard the argument earlier today that police need this information--and massive databasing--in order to solve crimes through technology. But others here today will remind you of the fact that though TV tells us DNA offers magic, irrefutable answers, the truth is that the system is far more imperfect and misleading than we'd like to believe. Smaller sample sizes and the increasing sensitivity of equipment used to detect DNA mean worse and worse samples for comparison, and worse and worse reliability as a law enforcement tool. All of which brings me back to the original issue of trust: to have seized people's most private data and have it result in *imperfect* conclusions that do complex, lasting, extremely severe harm to the people impacted by them is worse even than seeming to be focused on low-level enforcement rather than serious crime. My work has taught me how deeply interwoven and permanent the fallout from an arrest can be--not just can be, but almost always is. People lose jobs after only two days in jail when they miss their shift. Having a car seized can destroy not only income, but the ability to access treatment and resources for a person *and a whole family*. A few weeks behind bars can derail an education, a future, a medical regimen, cause psychiatric decompensation that can change the course of a life. Every arrest is a huge risk, and even a few days behind bars, recent research has shown, increases the chance of future criminality. So if police are going to act on their findings to take such damaging action, they better be acting on incredibly good data.

You, today, are experiencing a moment of enormous power. You hold the power to do something very visible to rein some of the most damaging overreach in our city's policing practice, and tell the community who is experiencing harm very clearly that their city sees them, hears them, is not seeking to erase their experience but rather to honor their rights and protect them from the overreach of governmental systems. You can stand up for the hundreds of thousands of city residents who are not able to be here today, but who very much need you in their corner, saying it's not okay for a city agency to mass-collect our most private data. This is your moment to act.

It is also worth considering the impact that this body's decision will have on parents within New York City. In speaking with a very diverse group of parents, I encountered an overwhelmingly consistent reaction--the feeling of betrayal, of anger, of a desire to vehemently pursue the officials responsible through every legal avenue possible. The fact that the city hasn't been sued

more only speaks to the disenfranchisement of the people most impacted and also to the secrecy the NYPD has exerted in these collections. Now that the City Council has had an opportunity to consider NYPD practices in this vein, and parents and community members throughout the five boroughs are aware of this body's power to act, a decision *not* to act not only telegraphs an abandonment of the community's fair treatment, but an abrogation of the duty to protect constituents from violations of their civil rights.

I am the wife of an immigrant, raising a child of color in this city. That my child is already more likely to be contacted by police and possibly harmed because of her race keeps me awake at night. I don't even put her image or her name on social media in order to preserve her privacy and her safety. The idea of having her tagged and tracked through the NYPD's surreptitious DNA collection, because I live in a city where leadership allowed that to happen, is almost unthinkable.

At the end of the day, this is what it's about: oversight, yes, but also about visibly and loudly protecting against police overreach. It's about people, parents, New Yorkers, seeing this body act on their behalf. I am here today to ask you to do the right thing and stand between all of us and the broken trust that will follow continued official overreach.



@ the Urban Justice Center
40 Rector Street, 9th Floor
New York, New York 10006
www.StopSpying.org | (646) 602-5600

STATEMENT OF
ALBERT FOX CAHN, ESQ.
EXECUTIVE DIRECTOR
SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT, INC.

BEFORE THE
COMMITTEE ON PUBLIC SAFETY
NEW YORK CITY COUNCIL

FOR A HEARING CONCERNING,
OVERSIGHT – DNA COLLECTION AND
STORAGE IN NYC

PRESENTED
February 25, 2020

Good morning, my name is Albert Fox Cahn, and I serve as the Executive Director for the Surveillance Technology Oversight Project (“S.T.O.P.”). S.T.O.P. advocates and litigates for New Yorkers’ privacy, fighting discriminatory surveillance. I call on the Council to address the NYPD’s abusive DNA surveillance policies.

Currently, police coerce and trick innocent New Yorkers into handing over their genetic code. The risks are greatest for children, who are least able to assert their right to refuse a DNA test. New Yorkers of color are particularly at risk as the NYPD increases DNA dragnets. The Department’s inadequate privacy protections mean that when New Yorkers are tricked or forced to hand over their DNA, they may endure a lifetime of biological tracking. Despite recent reforms, many will remain on the city’s burgeoning DNA database, even when they are completely innocent or even a crime victim.

I therefore ask the council to withhold any funding for the NYPD DNA surveillance programs until appropriate safeguards have been implemented.

(I) Coercive and Covert Collection

New York Law fails to protect our city’s children. In theory, police cannot forcibly take a DNA sample from a person without a warrant.¹ In practice, however, this restriction is entirely hollow. The NYPD undermines our fundamental rights by either coercing New Yorkers, including children, to voluntarily “consent” to providing a DNA sample, or secretly collecting a sample without any notice. These unethical tactics violate our state and federal constitutional rights against police searches.²

A. Coercion

The NYPD’s coercive DNA sampling techniques reveal a broad array of civil rights abuses. They include (1) grilling the teenage niece of a suspect about her family’s immigration status; (2) threatening to “lose” an arrestee’s casefile to delay their release from custody; and (3) keeping New Yorkers jailed on minor unrelated marijuana charges until they agree to provide a DNA sample.³

B. Deception

In other instances, the NYPD secretly collects DNA samples without any notice. Offering a witness a cigarette or soda can be pretext to sample DNA from the cigarette butt or can.⁴ Officers prefer these tricks to asking for consent, since these tests can be harder to contest in court.⁵ This is because,

¹ See *Maryland v. King*, 569 U.S. 435 (2013) (holding that DNA swabs are searches under the meaning of the Fourth Amendment, and justifying warrantless searches only under the specialized circumstances of a person who has already been legally arrested).

² *Id.*

³ Jan Ransom & Ashley Southall, *N.Y.P.D. Detectives Gave a Boy, 12, a Soda. He Landed in a DNA Database*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/nyregion/nypd-dna-database.html>.

⁴ See *id.*; George Joseph, *How Juveniles Get Caught Up in the NYPD’s Vast DNA Database*, GOTHAMIST (Jan. 10, 2019), <https://gothamist.com/news/how-juveniles-get-caught-up-in-the-nypds-vast-dna-dragnet>.

⁵ Joseph, *supra* note 4 (quoting a retired officer as saying that “consent always opens up a can of worms”).

appallingly, some courts have held that New Yorkers throw away their genetic privacy as easily as they discard a coke bottle.

Both methods are particularly concerning when applied to children. Do we seriously expect a child to resist an officer's coercive demand for a DNA sample as he grills her about her family's immigration status? Or to carefully weigh her Fourth Amendment rights when deciding whether to drink a bottle of soda? This legal fiction isn't just applied to sixteen and seventeen-year olds, but to children as young as twelve.⁶ They may not be old enough to ride in the front seat of a car,⁷ but they still can consent to a lifetime of genetic surveillance.

(II) Discriminatory Dragnets

We are not merely concerned about *how* DNA samples are collected, but also from *whom* they are collected. The NYPD employs race-based dragnets, sweeping neighborhoods door-to-door for people of a particular race. In one case, police collected DNA samples from 360 black men based on only their race and gender.⁸ The NYPD's "knock-and-spit" campaign relies on the same broken logic as stop-and-frisk, but only with more invasive searches.⁹

(III) Indefinite Retention of Data

Once the NYPD acquires a DNA sample through coercion or manipulation, it enters it into the New York City Office of the Chief Medical Examiner's massive DNA database. Already, the database compromises the genetic identities of over 82,000 New Yorker's, and the numbers are only growing.¹⁰ And, unlike the official New York State database, which only contains the genetic information of convicted criminals, the city's database retains the genetic data of all New Yorkers who provide a sample, even if they are wrongly accused. The Legal Aid society estimates that of the 82,000 entries in the database, 31,000 are from people who were wrongly suspected.¹¹

Shockingly, the NYPD's DNA surveillance intentionally evades the limits Albany set when it authorized a DNA database in the first place. State law tried to prevent many of the NYPD's abusive

⁶ Ransom & Southall, *supra* note 3.

⁷ *Child Passenger Safety, Children Ages 10 to 14 Years*, N.Y. ST. DEPT HEALTH, https://www.health.ny.gov/prevention/injury_prevention/children/fact_sheets/preteens_10-14_years/child_passenger_safety_10-14_years.htm (last visited Feb. 21, 2020).

⁸ Jan Ransom & Ashley Southall, *Race-Biased Dragnet: DNA from 360 Black Men Was Collected to Solve Vetrano Murder, Defense Lawyers Say*, N.Y. TIMES (Mar. 31, 2019), <https://www.nytimes.com/2019/03/31/nyregion/karina-vetrano-trial.html>.

⁹ Andrew Whalen, *NYPD's 'Knock-and-Spit' DNA Database Makes You a Permanent Suspect*, NEWSWEEK (Feb. 11, 2019), <https://www.newsweek.com/police-dna-database-nypd-swab-testing-collection-new-york-1326722>.

¹⁰ Ransom & Southall, *supra* note 3.

¹¹ Aaron Randle, *Why the N.Y.P.D.'s DNA Database Has Some People Worried*, N.Y. TIMES (Aug. 16, 2019), <https://www.nytimes.com/2019/08/16/nyregion/newyorktoday/nypd-dna-database.html>.

practices,¹² but the city's "rogue"¹³ database operates outside the law, without any statutory authorization.¹⁴ Yet, the OCME continues to not only operate its database, but to insist that it's exempt from state privacy protection, a position that has often proved unconvincing in court.¹⁵

Often, New Yorkers have no realistic way out of the OCME database. Most of us have no idea if our DNA is being tracked. And, even if we do somehow find out, we then need to seek an order from a court; far too onerous a process for most New Yorkers.

NYPD officers frequently hide the fact that the DNA samples they collect will be uploaded to a database.¹⁶ So, even when a person acquiesces to DNA testing during an investigation, they often assume that the DNA will only be used in connection with that case. Then, of course, there are those who don't even know that their DNA has been tested, let alone uploaded to a sprawling database. As a result, 31,000 innocent New Yorkers are subjected to a perpetual genetic lineup, having their DNA compared to investigative samples hundreds or thousands of times every year.¹⁷

In response to public outcry, the NYPD recent announced modest reforms, including "audits" of the OCME database and easier opt-out options.¹⁸ These reforms acknowledge the civil rights abuses that opponents have decried for years, but they are too little, too late. The NYPD simply cannot be trusted to maintain an unofficial DNA database, operating outside the bounds of state law.

(IV) Likelihood of Wrongful Arrests, DNA's Failures

The NYPD's DNA database places New Yorkers in a perpetual DNA lineup, not just robbing them of their medical privacy, but increasing their risk of wrongful arrest. At its outset, DNA evidence brought added certainty to the criminal justice system, but new, questionable forms of DNA analysis create significant risk of false arrest and even wrongful conviction.

In one case, a man spent six months in prison for burglary and homicide after his skin cells were found on the victim's body. It was later discovered that the man never even set foot in the victim's house, and instead his DNA was inadvertently transferred there on the equipment of first responders.¹⁹ This horrifying type of mistake is all too common. An average person sheds 50 million skin cells a day and 91% of objects in public places have a detectable amount of DNA on them.²⁰ In short: we live in a

¹² N.Y. EXEC. LAW § 995 *et seq.*

¹³ Joseph Goldstein, *Police Agencies Are Assembling Records of DNA*, N.Y. TIMES (June 12, 2013), <https://www.nytimes.com/2013/06/13/us/police-agencies-are-assembling-records-of-dna.html>.

¹⁴ *Id.*

¹⁵ *People v. K.N.*, 2018NY031674, 2018 WL 6132289 at *9 (N.Y. Crim. Ct. Nov. 14, 2018).

¹⁶ See Joseph, *supra* note 4.

¹⁷ Randle, *supra* note 11.

¹⁸ Edgar Sandoval, *N.Y.P.D. to Remove DNA Profiles of Non-Criminals from Database*, N.Y. TIMES (Feb. 20, 2020), <https://www.nytimes.com/2020/02/20/nyregion/dna-nypd-database.html>.

¹⁹ Katie Worth, *Framed for Murder by His Own DNA*, PUB. BROADCASTING SERV.: FRONTLINE (April 19, 2018), <https://www.pbs.org/wgbh/frontline/article/framed-for-murder-by-his-own-dna>.

²⁰ *Id.*

world that is covered by other people's DNA, which can easily be transferred from one place to another. So, as you touch the table in front of you, you may not just be depositing your own DNA, but the DNA of the person who rode the subway before you this morning, the store clerk who stocked your milk, and the cashier who handed you your change.

As the NYPD has expanded DNA surveillance, it's gone beyond the limits of the reliable testing, investigating small and corrupted samples that dramatically increase the risk of errors. In some cases, the NYPD has used DNA samples that are just 14 picograms;²¹ that's roughly the amount of DNA in two skin cells.²² Even worse, they rely on probabilistic DNA software, which uses proprietary code²³ to speculate what the DNA pattern of a suspect will look like, based on a contaminated sample from multiple individuals.²⁴

The NYPD's software creates such a high error rate that their DNA drag nets will almost inevitably find someone who is a false "match."²⁵ With tens of thousands of New Yorkers constantly having their DNA examined, error rates of even a hundredth of a percent would typically lead to a false positive, but the actual error rates can be astronomically higher.

Amid these serious accuracy concerns, the NYPD recently abandoned one DNA technology which it had used for decades to convict thousands of people.²⁶ Yet, rather than ending unreliable indiscriminate DNA testing, it continues to collect DNA at an astounding rate. It continues to test DNA quantities as small as 38 picograms, or 7 skin cells.²⁷ And the new technology it uses to test the DNA, STRMix, may be no more accurate than the old technology it replaced. Like other private DNA testing algorithms, it is a black box; defendants and their attorneys are unable to read the code or training data.²⁸ That means we don't know how it works, how accurate it is, or whether it is biased against defendants of color.

²¹ Lauren Kirchner, *Traces of Crime: How New York's DNA Techniques Became Tainted*, N.Y. TIMES (Sept. 4, 2017).

²² See Christiane Bäumer et al., *Exploring DNA Quality of Single Cells for Genome Analysis with Simultaneous Whole-Genome Amplification*, SCI. REP. (May 10, 2018), <https://www.nature.com/articles/s41598-018-25895-7> (stating that the average human cell contains six picograms of DNA).

²³ STRMIX, NONDISCLOSURE AND CONFIDENTIALITY AGREEMENT 1 (2019) ("STRmix is the exclusive licensee of a forensic software product known as STRmix™, as well as other privileged, confidential, and/or secret information related thereto.").

²⁴ Kirchner, *supra* note 21.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Jason Tashea, *Defense Lawyers Want to Peek Behind the Curtain of Probabilistic Genotyping*, AM. BAR ASS'N: ABA J. (Dec. 1, 2017), http://www.abajournal.com/magazine/article/code_of_science_defense_lawyers_want_to_peek_behind_the_curtain_of_probabil.

The sad truth is that the NYPD's racially-biased dragnets and vast genetic databases give us little in return for the massive invasion of privacy. In exchange for our most intimate data, New Yorkers are given little more than a hefty price tag and a heightened risk of wrongful arrest.

(V) Reforms

S.T.O.P. fully supports efforts to stem these invasive and discriminatory DNA practices. We actively back state legislation to ban all unofficial DNA databases,²⁹ including a broader ban on biometric surveillance.³⁰ We also urge the Council to restrict any use of city funds in furtherance of this bias biometric surveillance regime.

One vital reform of the NYPD's DNA surveillance is the Public Oversight of Surveillance Technologies ("POST") Act.³¹ The POST Act would require that the NYPD all surveillance technology (including DNA surveillance systems) along with its policies protecting the data they collect.

The POST Act is admittedly a modest response; the NYPD can continue using DNA sampling and testing by complying with modest protections against waste, discrimination, and misuse. Nonetheless, the Act is still need, as it would enable New Yorkers to learn how their genetic information is being taken and used.

We were grateful for the committee and Chair Donovan's support of the POST Act, but we are disappointed that in the two months since the bill was heard, it has yet to be voted upon. We call on Speaker Johnson to stand with an overwhelming majority of this Council and bring the POST forward for a vote. I thank you for giving me the opportunity to address these urgent issues, and I look forward to working with the Committee to safeguard the rights of all New Yorkers in the months and years to come.

²⁹ See, e.g., S.B. 6009, 2019–2020 Sess. (N.Y. 2019) ("An Act to amend the executive law, in relation to the establishment of a single computerized state DNA identification index and requiring municipalities to expunge any DNA record stored in a municipal DNA identification index.").

³⁰ See S.B. 7572, 2019–2020 Sess. (N.Y. 2020) ("An Act to amend the executive law, in relation to prohibiting the use of biometric surveillance technology by law enforcement; establishing the biometric surveillance regulation task force; and providing for the repeal of certain provisions upon expiration thereof.").

³¹ INT 0487-2018, N.Y.C. COUNCIL. (Feb. 14, 2018),

<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3343878&GUID=996ABB2A-9F4C-4A32-B081-D6F24AB954A0>.



TESTIMONY OF:

**Clinton Hughes
Forensic DNA Attorney**

BROOKLYN DEFENDER SERVICES

**Presented before
The New York City Council Committee on Public Safety
Jointly with the Committee on Justice System**

Oversight - DNA Collection and Storage in NYC

February 25, 2020

My name is Clinton Hughes. I am the Forensic DNA Attorney at Brooklyn Defender Services (BDS). I have practiced as a public defender for 23 years, seven of which I have specialized in forensic DNA litigation. I am part of the Forensic Science Practice at BDS. The Forensic Science Practice's mission is to provide resource and support counsel services to trial attorneys facing complex forensic issues in misdemeanor, felony, and homicide cases in Brooklyn Criminal and Supreme Court. In that role, the Practice monitors the development of emerging scientific, technical, digital, and surveillance techniques, educates our trial lawyers regarding those techniques, and analyzes the legal and scientific or technical issues raised by the techniques themselves as well as their use or misuse.

BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for nearly 30,000 clients in Brooklyn every year.

I thank Chair Donovan Richards and Chair Rory Lancman for inviting us to testify today about DNA Collection and Storage in NYC.

BDS joins with the other defenders in calling for the City Council to abolish the unauthorized suspect database maintained by the New York City Office of Chief Medical Examiner, in conjunction with the New York Police Department.

Background

In 1997, the OCME implemented a system for collecting previously-typed DNA profiles into a searchable local database. Originally, the OCME's local database was called LINKAGE. In 2014, the lab absorbed the LINKAGE database into the local level of the CODIS database, called the Local DNA Index System ("LDIS").

By way of brief background, CODIS (Combined DNA Index System) is actually the software databasing package developed and provided by the Federal Bureau of Investigation to DNA laboratories around the country. The CODIS database system consists of three levels: the National DNA Index System (NDIS); the State DNA Index System (SDIS); and the Local DNA Index System (LDIS). As the administrator of the CODIS database system, the FBI promulgates detailed regulations governing the types of samples that can be uploaded to NDIS, as well as quality assurance standards for labs conducting testing that feeds into NDIS.

In New York, the New York State legislature created the State DNA Databank in 1994 with the passage of Executive Law § 995. The database became operational in 1996. By law, when it comes to known contributors, the New York database can only house DNA collected from convicted offenders. While the list of crimes for which a conviction permits DNA sample collection has grown five times since 1996, the New York State legislature has repeatedly rebuffed efforts to expand DNA collection to arrestees.¹

Despite New York State's careful calibration of the balance between the individual's rights to genetic and basic privacy, as well as due process, and the State's interest in crime solving, the City of New York's agencies—the NYPD and the OCME—have chosen to operate a rogue DNA database that reaches samples taken from persons not authorized for collection. In other words, the OCME's "LDIS" does an end run around New York State's carefully prescribed scheme in pursuit of crime solving.

And over the last five years, the OCME's rogue database has been growing.²

¹ It is worth noting that, in 1999, the legislative record reflects that then-Mayor Rudy Giuliani even specifically requested that the legislature expand collection to arrestees. Mayor Giuliani asserted: "While the City enthusiastically supports this legislation and acknowledges the positive effect it will have on solving crime, it should be noted that the City of New York believes DNA testing upon arrest would allow for even greater efficiency and effectiveness in law enforcement. Examining DNA samples at the time of arrest would dramatically increase the ability of police to accurately identify or negate one's potential culpability while under arrest." The New York State Legislature refused to expand the database to arrestees.

² Ann Givens and Robert Lewis, "Push to solve gun cases fuels rapid growth of New York's DNA database," New York Daily News (Sept. 25, 2017), at <https://www.nydailynews.com/new-york/nyc-crime/push-solve-gun-cases-fuels-growth-new-york-dna-database-article-1.3516711>.

Growth of the OCME's Rogue Database

This unauthorized database has been fed in part by the surreptitious collection of individuals' saliva samples by the NYPD.

The NYPD's practice has developed into stacking up cartons of Newport cigarettes – the most popular cigarette in our clients' communities. The police then hand them out like candy during interrogations at precincts. No nervous arrestee or detainee, even if they were completely innocent, would envision that accepting the cigarette to smoke in the middle of a public building with the blessing of the police would mean that their profile would end up in perpetuity in a database.

We have watched videos where our clients have asserted their right to counsel as they drink from a water bottle or smoke an offered cigarette. Then they are led out of the interrogation room, the cigarette butts are left in the ashtray – what are our clients going to do, eat them? Put them in their pockets? – and the police collect the cigarette butts for evidence. The same little game plays out with water cups or bottles, and DNA profiles are collected by the thousands.

Self-regulation is not the answer here. What started as a self-regulated, unauthorized database has emerged into a vast invasion of the genetic privacy of thousands of New Yorkers, many if not most of whom, are poor people of color.

The local database is in contravention to Executive Law § 995-d, which dictates that the results of DNA testing are confidential and which specifically protects the right of a defendant to nondisclosure of his or her DNA information.

As Dr. Howard Baum, former Technical Leader of the OCME and creator of the local database has stated, he never envisioned that the database would become the repository of profiles that the NYPD dragnetted from neighborhoods of color. Our clients at BDS have been directly impacted by dragnets – the systematic search for someone like a black male in Brownsville -- practices that target our clients particularly because they are Black or because they are male or because they reside in a particular neighborhood.

Dr. Baum never envisioned that the database would include thousands of profiles who were tricked into handing over their DNA without consent or court-order. Even our clients who consented to have their DNA taken have told us that they had no real understanding that their cooperation meant that their DNA would lead to their profiles staying in a government database forever.

Dr. Baum never envisioned that the local database would include people who were merely detained – sometimes never even arrested, and many never being convicted of any crimes.

The local database was also set up long before the NYPD's Domain Awareness System was created. The Domain Awareness System ("DAS") is a software program created by the NYPD and Microsoft that aggregates data collected by the NYPD across the city. While the DAS's role in aggregating surveillance camera video is well known, another DAS function is its ability to

inform officers whether or not an individual detainee's DNA profile is in the database – thus making the detainee a target for DNA collection by individual police officers.

The OCME and NYPD DNA collection and storage practice's threat to our community's liberty is also growing.

The practices of the NYPD mean that not just the numerical profiles of Black and brown folks get warehoused in an electronic database. For each of those warehoused profiles, the OCME maintains extracts of the DNA in tiny vials like these:



As technologies emerge, law enforcement and the lab can go back to that little vial and effectively interrogate the DNA to invade the genetic privacy of the individual's genetic code in even deeper and more disturbing ways. Genetic genealogy, which has been much reported-on in the news recently, is only the latest incarnation. This technique uses DNA analysis methods that mine more of the human genome for sensitive information than a traditional forensic DNA test, and surveil not just the individuals' DNA but also the DNA of that individual's entire family line.

The DNA technique employed in genetic genealogy—Single Nucleotide Polymorphism (SNPs) testing or Next Generation Sequencing—is being considered for widespread forensic uses by the law enforcement community as we speak. Whereas traditional DNA testing—Short Tandem Repeat (STR) testing—only measures the lengths of certain segments of non-coding regions on our genome, SNPs and NextGen testing actually codes the genome (revealing the specific As, Gs, Ts, and Cs we all learned about in high school) and potentially reveals deeply intimate details including things like predisposition to disease and susceptibility to addiction. And where STR testing only looks at a very small percentage of the overall genome, SNPs testing looks at huge percentages of the overall genome, revealing the most private elements of our selves.

In the face of this brave new world of genetic testing and the overall threat to privacy, as well as our First Amendment associational freedoms, we need to think about vulnerable communities when considering emerging technologies. The OCME and the NYPD, without oversight or regulation are effectively building a warehoused library of entire community's genetic extracts. With emerging technologies like genetic genealogy and so-called Next Generation Sequencing, the genetic privacy of not only the individual but the individual's family will come under surveillance by law enforcement.

We now know that 'Junk DNA' is not really "junk" at all: it can be tied by inference to other areas on the human genome, that in turn can reveal sensitive information like susceptibility to

disease.³ As technologies emerge and forensic profiles become even more revealing of a person's biological status, it is really incumbent upon our elected officials to protect the genetic privacy of its citizens and their families.

A pledge by the NYPD to review cases it has submitted in order to 'clean up' the database is not enough. First, this self-regulation does not address that the database is not authorized by law. Second, the City Council cannot rely on the NYPD to self-regulate a problem that it has created and perpetuated with unbridled zeal.

The time is now for the Council to abolish this rogue database and allow law enforcement to work under the structure set up by the state legislature Executive Law Section 995.

³ See "Statistical Detection of Relatives Typed with Disjoint Forensic and Biomedical Loci," *Cell* 175, 848–858, October 18, 2018, and "Linkage disequilibrium matches forensic genetic records to disjoint genomic marker sets," *PNAS* | May 30, 2017 | vol. 114 | no. 22 | 5671–5676.



Testimony of

Brad Maurer

DNA & Forensics Unit

New York County Defender Services

Before the

Committee on Public Safety & Committee on Justice System

Oversight Hearing: DNA Collection and Storage in NYC

February 25, 2020

My name is Brad Maurer, and I am an attorney with the DNA & Forensics Unit at New York County Defender Services (NYCDS), a public defense office that represents tens of thousands of New Yorkers in Manhattan's criminal courts every year. We at NYCDS thank you for holding this hearing on the DNA collection and storage practices currently in use by the New York City Police Department (NYPD) and the Office of the Chief Medical Examiner (OCME).

The DNA Collection and Storage Practices of the NYPD and OCME Must Change

NYCDS joins the many defense providers, advocacy organizations, and others in condemning the DNA collection practices of the NYPD. The NYPD has tricked or coerced its way to obtaining DNA samples from vast swaths of entire communities¹ and from children as young as 12 years old.² Often the DNA samples collected in secret are obtained through the seemingly innocuous giving of a cigarette or soda bottle to a person being questioned by the police;³ little did that person

¹ Jan Ransom and Ashley Southall, *N.Y.P.D. Detectives Gave a Boy, 12, a Soda. He Landed in a DNA Database*, *The New York Times* (Aug. 16, 2019), available at <https://www.nytimes.com/2019/08/15/nyregion/nypd-dna-database.html>.

² *Id.*

³ *Id.*

know that the polite gesture was really a ruse meant to give the police an end-run around what the law requires to take someone's DNA.⁴ These egregious violations of New Yorkers' constitutional and statutory rights must be stopped.

NYCDS also joins the chorus of vehement opposition to the way DNA is being kept and used by the OCME. In building and using its local database the way OCME has, the OCME has taken the position that state laws regarding the establishment and maintenance of DNA indexes⁵ do not apply to OCME. They follow the FBI and New York state protocols when they see fit—for example, they have chosen to adhere to a strict requirement of a court order for DNA to be expunged from the local database, even if that person was eventually cleared of the initial crime.

However, when it comes to whose DNA is allowed to be *put into* the local database, OCME makes its own rules. State law requires a conviction for a DNA profile to be entered into the state-level database; OCME, by contrast, believes it is entitled to keep forever the profiles of persons who were merely questioned in connection with an investigation. Furthermore, OCME believes it has the authority to continue to compare the profiles in its "suspect" database to any and all crime scenes forever. According to OCME, if you were once a suspect—or even if you never were an actual suspect!⁶—you're quite literally forever a suspect. And as a final blow to the genetic privacy and due process rights of New Yorkers, neither NYPD nor OCME believes it is under any obligation to inform a person that their DNA has been collected and is being used in these alarming ways.

Given the above, it seems the NYPD and the OCME are operating under three basic assumptions that should alarm every New Yorker:

1. The police, limited only by their own restraint, can obtain pretty much anyone's genetic information they want—whether collected in secret or through coercive dragnets of entire communities; and
2. The DNA lab, limited only by hard-to-obtain court orders, can keep your genetic information in a database forever and compare it to all the crime-scene DNA they have, now and in the future—and they can keep the physical sample forever too, and test it with increasingly sensitive technologies which can reveal extremely private genetic information (more on this below).
3. New Yorkers have no right to know if their genetic information has been taken and is being stored and compared to crime scenes in perpetuity.

⁴ *Matter of Abe A.*, 56 N.Y.2d 288 (1982).

⁵ See Exec. L. §§ 995(7); 995-c(3)(a).

⁶ Jan Ransom and Ashley Southall, *N.Y.P.D. Detectives Gave a Boy, 12, a Soda. He Landed in a DNA Database*, The New York Times (Aug. 16, 2019), available at <https://www.nytimes.com/2019/08/15/nyregion/nypd-dna-database.html>. From the article: "The man, who requested that his name not be published to protect his privacy, said one detective told him, "We know it wasn't you, but we want to make sure.""

Put even more simply: in New York City, every single person's genetic information is now at risk of being taken, permanently stored, and compared to crime scenes forever.

The Implications of Genetic Stop-And-Frisk Are Dire

Recent advances in DNA detection and collection technology have led to more and more crime-scene DNA evidence consisting of complex, low-level, harder-to-interpret mixtures of DNA from multiple persons. Contamination of crime scenes—whether by first responders, lab personnel, or even innocent citizens via everyday DNA transfer—is a risk made all the greater when dealing with such small amounts of crime-scene DNA. Such contamination has already led to false arrests and wrongful prosecutions for serious crimes.⁷ Of course, we defense providers know that the harmful effects of this new genetic stop-and-frisk will be just like those of the old stop-and-frisk: severely disproportionately felt among poor communities and communities of color, and further eroding the trust and respect between those communities and the police and government agencies meant to serve them. And in the era of genetic stop-and-frisk, affected persons may not even know they've been stopped and frisked until they're wrongly accused of a burglary or a murder.⁸

Unfortunately, crime labs both here in NYC⁹ and elsewhere¹⁰ have shown a desire to avoid disclosing problems like contamination rather than promoting transparency. And the NYPD, for its part, has repeatedly expressed that it sees nothing wrong with its collection methods or the way OCME runs its local database. Both the OCME and NYPD appear to want to perpetuate a system in which people's genetic information can very easily make its way into an unregulated database, but it's extremely difficult to get it out once it's there.¹¹ And of course, as long as your profile is in the database, you're at risk of being wrongly accused of a crime.

Finally, the newest wave of forensic DNA technology portends an even darker future for those unlucky enough to be entangled in NYC's current DNA web. To date, one of the principal arguments put forth to quell privacy concerns over forensic DNA testing is the relatively limited information contained in the kinds of DNA profiles currently used by OCME. These profiles,

⁷ See, e.g., Rocco Parascandola, *'Tainted' DNA clears Queens burglary suspect; he was in New Jersey at the time of the crime*, N.Y. Daily News (Oct. 19, 2019), available at <https://www.nydailynews.com/new-york/nyc-crime/ny-dna-test-tainted-suspect-cleared-20191019-5stdassnuvgurhyrtc6g6w755a-story.html>; Katie Worth, *Framed for Murder by His Own DNA*, The Marshall Project (Apr. 19, 2018), available at <https://www.themarshallproject.org/2018/04/19/framed-for-murder-by-his-own-dna>.

⁸ *Id.*

⁹ Aaron Morrison, *New York City Agency Has Underreported Lab Errors in DNA Database It Oversees*, The Appeal (Feb. 24, 2020), available at <https://theappeal.org/new-york-city-dna-database-lab-errors/>.

¹⁰ One example of many in the past several years: Rene Stutzman, *FDLE kept quiet on tainted DNA*, The Orlando Sentinel (Dec. 9, 2005), available at <https://www.orlandosentinel.com/news/os-xpm-2005-12-09-dna09-story.html>.

¹¹ An obvious problem with requiring court orders, or any kind of affirmative request, to have one's DNA removed from the local database is the fact that many people are not aware that their DNA is in the database in the first place. And even if they somehow found out, those persons—again, disproportionately poor persons of color—often would not have access to the resources to actually avail themselves of the limited opportunity to request expungement.

known as STR profiles, have been likened to fingerprints in that they appear not to reveal any deeper information about a person's genetic makeup.¹²

But a new kind of testing, known as genetic genealogy, completely obliterates that analogy. The profiles derived from genetic genealogy, known as SNPs (colloquially, "snips"), contain vast amounts of a person's genome.¹³ And genetic genealogy in the forensic context also involves building out enormous family trees using genetic information, bringing what may be highly sensitive and private family and genetic relationships into the law enforcement sphere.

The discussion of whether such technology and methods *should* be used in the forensic context is complicated beyond the scope of this testimony; but the fact is that New York authorities are already making efforts to bring this technique to bear in criminal investigations. The purportedly fingerprint-like STR profiles may soon give way to SNPs, and those thousands of physical samples being held in perpetuity by OCME may take on a much more privacy-shredding character when the information potentially being derived from them goes to the core of who we are as human beings: our genetic predispositions to disease, our parentage and family relationships, and so much more. This is a Pandora's box which, once opened, will likely be impossible to close. New Yorkers deserve to feel confident that their genetic privacy is being protected against this significant encroachment, and the poor New Yorkers of color disproportionately caught in this DNA quagmire deserve to have their genetic privacy rights on equal footing with everyone else.

City Council should also seriously revisit the legal justification cited by NYPD in support of its surreptitious collection of DNA samples: that when a person drinks a bottle or smokes a cigarette, even in the controlled environment of a police interrogation room specifically created to collect that person's DNA without their knowledge, that person has no privacy interest in their DNA profile the moment they give up possession of that bottle or cigarette. The advent of genetic genealogy should cause this Council to consider very carefully whether we New Yorkers are willingly abandoning our very genomes to the government every time we drink from a plastic bottle.

NYPD's Proposals Do Nothing To Solve Our DNA Collection and Storage Problems

The NYPD and OCME seem to believe that in the arena of DNA collection and storage, self-regulation is the best regulation—and in many instances, the only regulation. The NYPD and the OCME so far have been permitted to largely call the shots with respect to how DNA is collected, stored, and used in New York City. That self-regulation has led to the abuses described above, which have gone largely unchecked to date. Hopefully this hearing is a first step toward putting an end to those practices before they lead to more severe violations of privacy, more wrongful arrests

¹² Some modern research has called this assumption into question, but that debate is beyond the scope of this testimony.

¹³ United States Department of Justice Interim Policy, Forensic Genetic Genealogical DNA Analysis and Searching, *available at* <https://www.justice.gov/olp/page/file/1204386/download>. From this policy: "Forensic DNA typing has historically been used to compare 13-20 STR DNA markers . . . [Forensic Genetic Genealogy] examines more than half a million single nucleotide polymorphisms ('SNPs'), which replace the STR DNA markers analyzed in traditional forensic DNA typing. These SNPs span the entirety of the human genome."

and prosecutions, more trampling of constitutional rights, and more erosion of trust between New Yorkers and the authorities created to serve them.

In the days leading up to this hearing, the NYPD has floated vague proposals containing marginal adjustments to a few aspects of the collection and storage practices discussed herein. As reported by various outlets, NYPD's proposed changes may include some or all of:

- Biennial audits of the local database to “flag” for expungement profiles more than two years old that are not linked to an active investigation or conviction¹⁴ (and that don't meet a vague “limited circumstances” exception where the profile will stay in the database despite no judicial conclusion having been reached as to a person's guilt or innocence,¹⁵ and that doesn't otherwise qualify for other “exceptions” to expungement not yet defined by NYPD¹⁶)
- Quadrennial audits seeking profiles more than four years old¹⁷
- “Streamlining” the process for those seeking expungement by allowing individuals “acquitted” in their cases to petition for removal without a court order¹⁸
- “Limiting” DNA collection from juveniles to certain crimes and seeking parental consent for collection¹⁹ (presumably, where consent is in fact sought in the first place—which as we know is not nearly in all cases)
- Updating the consent form signed by persons giving DNA to law enforcement²⁰ (again, where consent is in fact sought)
- Publishing the number of profiles in the local database²¹
- “Strict guidelines” regarding surreptitious collection of DNA²² (though as the Legal Aid Society points out in its written testimony, the NYPD has thus far resisted disclosing what the existing guidelines are, begging the question of how anyone will know if the new guidelines are strict and whether they are being followed)

Leaving aside whether NYPD can even give effect to any of these proposals—and given NYPD's and OCME's past insistence that NYPD had no input on the maintenance of the local DNA

¹⁴ Ben Chapman, *NYPD Overhauls Rules for DNA Evidence in Criminal Cases*, The Wall Street Journal (Feb. 20, 2020), available at <https://www.wsj.com/articles/nypd-overhauls-rules-for-dna-evidence-in-criminal-cases-11582225199>.

¹⁵ Christopher Robbins, *NYPD Promises “Common Sense” Changes To DNA Database*, Gothamist (Feb. 20, 2020), available at <https://gothamist.com/news/nypd-promises-common-sense-changes-dna-database>.

¹⁶ *NYPD announces reforms to DNA collection policies*, FOX 5 NY (Feb. 20, 2020), available at <https://www.fox5ny.com/news/nypd-announces-reforms-to-dna-collection-policies>.

¹⁷ Ben Chapman, *NYPD Overhauls Rules for DNA Evidence in Criminal Cases*, The Wall Street Journal (Feb. 20, 2020), available at <https://www.wsj.com/articles/nypd-overhauls-rules-for-dna-evidence-in-criminal-cases-11582225199>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Christopher Robbins, *NYPD Promises “Common Sense” Changes To DNA Database*, Gothamist (Feb. 20, 2020), available at <https://gothamist.com/news/nypd-promises-common-sense-changes-dna-database>.

²² *Id.*

database, it's a question very much worth exploring—these proposals do no more than tinker at the margins of much more deeply rooted problems.

For example: the new expungement policies seem at first glance to be an improvement; however, they're riddled with exceptions and ill-defined caveats. Furthermore, the requirement that a person be "acquitted" in their case to avoid the court order "requirement" only impacts an extremely small percentage of cases. The vast majority of criminal cases, whether involving DNA or not, do not go all the way to trial. A strict reading of this acquittal requirement would mean that even a person whose case was dismissed by a judge or prosecutor would not be entitled to expungement without a court order.

The limitations on juvenile collection and the updated consent form likewise do nothing of consequence to address police pressuring people into consenting. Nor do these supposed limitations purport to do anything about surreptitious collection, from adults and juveniles alike.

And lastly, the publication of how many profiles are in the database is something that should be done, but the much bigger question the NYPD and OCME also should be answering is *who* is in the local database.

From a more general perspective, even if we interpret the NYPD's proposed expungement policies to be an actual significant upgrade in that regard, the NYPD's focus on expungement ignores all the damage being done in the collection and storage. Two years (or four years?) is a long time for a person's DNA to be compared to tens of thousands of crime scene profiles, and the NYPD still doesn't want to give New Yorkers the knowledge that any of this is happening if their DNA was collected surreptitiously.

City Council Must Step In

The NYPD is not going to willingly discontinue surreptitious DNA collection or DNA dragnets. OCME is not going to willingly dismantle its local DNA database. They have made clear that they do not believe the law requires them to do either of those things. This Council must reinforce the genetic privacy and due process rights of all New Yorkers by forcing NYPD and OCME to end these harmful, corrosive practices. City Council should make clear to OCME that state law governs—and limits—the creation and maintenance of DNA databases, and City Council should make clear to NYPD that the legal requirements for law enforcement to obtain a person's DNA are not mere suggestions. Anything less could have serious consequences for genetic privacy, for the safeguarding of the constitutional rights of all New Yorkers, and for the well-being of the communities we represent.

If you have any questions about my testimony, please contact me at bmaurer@nycds.org.

**NEW YORK CITY COUNCIL
COMMITTEE ON PUBLIC SAFETY
COMMITTEE ON THE JUSTICE SYSTEM
HEARING ON DNA COLLECTION AND STORAGE IN NYC
STATEMENT OF THE INNOCENCE PROJECT
February 25, 2020**

Thank you, Chair Richards, Chair Lancman, and honorable members of the Committees on Public Safety and the Justice System, for holding this hearing on the urgent issue of New York City's unregulated DNA databases. The Innocence Project, a not-for-profit organization that exonerates the wrongfully convicted and works to reform the criminal justice system to prevent future injustice,¹ respectfully submits the following testimony that calls for **New York City to dismantle any unregulated municipal DNA databases and to expunge any DNA records stored within it that are ineligible for the State's regulated DNA database. We urge the New York City Council to take action to ensure that the use of all forensic DNA profiles adheres to the legislative intent of New York State Executive Law § 995-c.**

Imagine that you're a witness to a crime, an innocent person accused of a crime, or a victim of crime. Police have taken your cell phone and have downloaded and retained its contents. Each time a crime occurs, pieces of your cell phone life are recalled for comparison. Consider all the information that could be taken out of context if it is used in pieces or the texts and photos that you would want to keep private and over which you no longer have control. Now instead of your cell phone, imagine that the police have your DNA which holds the key to your identity, health information, and ancestry. It can be used to mine your relationship with your children, parents, and relatives. It can be used to screen for the latest gene that is hypothesized to code for criminal behavior that you've never committed or an outcome that is out of your control. Imagine all of that information in the hands of investigators without any rules for what information can be extracted, the quality of the information it can be compared against, and whether or not you – the witness, the innocent, or the victim - can fight to have your DNA profile expunged from this database. This scenario isn't a far-off hypothetical. This is the present-day reality in NYC.

The foundation of the Innocence Project's work is based on freeing innocent people through the power of forensic DNA testing and our innocent clients have everything to gain from the promise of DNA databases. Our testimony today reflects our deep conviction that unregulated DNA databases

¹ To date, the work of the Innocence Project, along with other innocence organizations and lawyers around the country, has led to the exoneration of hundreds of individuals based on new evidence of actual innocence, including DNA and other scientific evidence. These injustices demonstrated that the misapplication of forensic science is a leading cause of wrongful conviction, having played a role in the cases of almost half of the 367 wrongfully convicted people in the United States who have been exonerated by DNA testing, and a quarter of the over 2,000 people who were exonerated by DNA or by other means.

can jeopardize the innocent and unfairly subject communities of color and the poor to uncontrolled genetic surveillance, which in turn harms public safety through the damage it does to public perceptions of the legitimacy of the City's criminal investigative apparatus. New York City must dismantle its unregulated municipal DNA database and expunge DNA records stored within it that are ineligible for the State's regulated DNA database. We urge the New York City Council to take action to ensure that the use of all forensic DNA profiles adheres to the legislative intent of New York State Executive Law § 995-c which contemplated the sensitive nature of genetic information and the ethical imperatives that need to be honored if genetic information is to be collected, stored, and used for public safety purposes.

NYPD DNA Database Policies Insufficient

On February 20, 2020, the New York Times² and Wall Street Journal³ reported that the New York Police Department (NYPD) is revising its policy for the collection and use of the 82,000 DNA profiles in the unregulated database stored by the New York City Office of the Chief Medical Examiner's Office (OCME). While we appreciate NYPD's efforts to improve its DNA policies, it only obfuscates the fact that the new policy relies on keeping the unregulated municipal DNA database. The newly introduced consent form holds little value if it is offered under coercive conditions, such as when a person is under arrest or the focus of an investigation. If a person who has not been convicted of a crime is being asked to voluntarily submit their DNA, the consent form should not be signed without the presence of counsel.

Similarly, the change to the collection of DNA from children adds some process, but does not reflect the case law and evidence base on child development. The new policy appears to simply limit DNA collection from children to a defined set of crimes and require consent of the child and parental notification. The American Academy of Child & Adolescent Psychiatry issued a policy recommending that children not make decisions without counsel and notes that parents lack the capacity to protect their children:

The Supreme Court has recognized these biological and developmental differences in their recent decisions on the juvenile death penalty, juvenile life without parole and the interrogations of juvenile suspects. In particular, the Supreme Court has recognized that there is a heightened risk that juvenile suspects will falsely confess when pressured by police during the interrogation process. Research also demonstrates that when in police custody, many

² Edgar Sandoval, *N.Y.P.D. to Remove DNA Profiles of Non-Criminals From Database*, THE NEW YORK TIMES, Feb. 20, 2020, <https://www.nytimes.com/2020/02/20/nyregion/dna-nypd-database.html> (last visited Feb 23, 2020)

³ Ben Chapman, *NYPD Overhauls Rules for DNA Evidence in Criminal Cases*, WALL STREET JOURNAL, Feb. 20, 2020, <https://www.wsj.com/articles/nypd-overhauls-rules-for-dna-evidence-in-criminal-cases-11582225199> (last visited Feb 23, 2020)

juveniles do not fully understand or appreciate their rights, options or alternatives.

Accordingly, the American Academy of Child and Adolescent Psychiatry believes that juveniles should have an attorney present during questioning by police or other law enforcement agencies. While the Academy believes that juveniles should have a right to consult with parents prior to and during questioning, parental presence alone may not be sufficient to protect juvenile suspects. Moreover, many parents may not be competent to advise their children on whether to speak to the police and may also be persuaded that cooperation with the police will bring leniency. There are numerous cases of juveniles who have falsely confessed with their parents present during questioning.⁴

Lastly, the process that NYPD proposes to expunge innocent people is inadequate and should be administered through an independent process. Expungements should be automatic and should not place any burden on the innocent person who was pulled into to contact with the criminal justice system. The proposed process requires that the innocent person file an application with the NYPD and the relevant District Attorney's Office, both of which have a conflict of interest. Finally, many cases do not resolve within a two year time frame and even if the innocent person is not ultimately the person charged and prosecuted for a particular crime, their expungement would be delayed if law enforcement deemed the case "ongoing investigation" or "in litigation." That is, the innocence person would be denied expungement for the entire life of the case for which they were initially and erroneously considered to be a suspect or witness.

Clarifying Legislative Intent

When the New York State Legislature established the State DNA database, it did so with a keen understanding of the great weight given to the storage of people's genetic information. In 1994, the New York DNA database contained the profiles of only those defendants convicted of a narrowly tailored list of felonies that included only certain homicide, assault and sexual offenses.⁵ As reliance on the power of DNA evidence grew, the State expanded its database to include all convicted felony

⁴ INTERVIEWING AND INTERROGATING JUVENILE SUSPECTS, https://www.aacap.org/AACAP/Policy_Statements/2013/Interviewing_and_Interrogating_Juvenile_Suspects.aspx (last visited Feb 23, 2020)

⁵ N.Y. Exec Law § 995-b (McKinney 1994) ("'Designated offender' means a person convicted of and sentenced for any one or more of the following felonies as defined in the penal law: sections 120.05, 120.10, and 120.11, relating to assault; sections 125.15 through 125.27 relating to homicide; sections 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67 and 130.70, relating to sex offenses; sections 205.10, 205.15, 205.17 and 205.19, relating to escape and other offenses, where the offender has been convicted within the previous five years of one of the other felonies specified in this subdivision; or section 255.25, relating to incest.")

offenders and most misdemeanor offenders.⁶ However, the legislature committed to the expansion with the assumption that any DNA identification index in the State would be governed by the protections and limitations proscribed by the law. Solving serious crimes is appropriately a major governmental priority, but it must be considered alongside similarly important concerns about resource allocation, racial disparity, burdens on innocent people, privacy, and constitutional rights that are also impacted by these tools. Unregulated DNA databases disregard these finely calibrated protections envisioned by the legislature when they first passed legislation establishing a State DNA database and weaken the carefully crafted statute that governs the State DNA database.

Unregulated Databases Rupture a Social Contract

DNA databases are based on a social contract affirmed by law in New York State. New Yorkers trust that the government will restrain its use of genetic data to only what is appropriate and necessary for the provision of public safety in a manner that satisfies the rule of law. The use of DNA has become so commonplace that there has been a collective forgetting in the criminal justice system of the serious debates that established the use of DNA databases in the first place and the substantial, personal, and fundamental information that is surrendered when a person turns over their DNA. In contemplating the balance between privacy and public safety, there is a collective agreement that conviction of a crime results in the forfeiture of a person's right to withhold consent to providing their DNA. When a database is regulated, policies are developed to articulate standards for sample quality, access authority, security, and expungement processes to protect the retained genetic profiles.

Unregulated databases rupture that social contract. Individuals who have not been convicted are legally innocent and should be treated as innocent unless they are convicted. We are witness to the fact that without legislative approval, unregulated DNA databases can proliferate in our state. Innocent people who have not been charged with a crime may not know if they can refuse to provide a sample. Once their DNA profiles are stored, they will be perpetually linked to criminal databases, and will come under suspicion every time a search is run. Suspicion of participation in a serious crime is an intense burden that has very real financial, emotional, and liberty implications.⁷ In jurisdictions

⁶ N.Y. Exec Law § 995-b ("Designated offender" means a person convicted of any felony defined in any chapter of the laws of the state or any misdemeanor defined in the penal law except that where the person is convicted under section 221.10 of the penal law, only a person convicted under subdivision two of such section, or a person convicted under subdivision one of such section who stands previously convicted of any crime as defined in subdivision six of section 10.00 of the penal law.), available at <http://codes.findlaw.com/ny/executive-law/exc-sect-995.html> (last accessed, January 17, 2017).

⁷ Daniel J. Grimm, *The Demographics of Genetic Surveillance: Familial DNA Testing and the Hispanic Community*, 107 Colum. L. Rev. 1164, at 1184 (2007) ("like the African American community, the Hispanic community is subject to embedded system multipliers that converge to amplify disproportionate risks of privacy violations from DNA databanks"); see also Sonia Suter, *All in the Family: Privacy and DNA Familial Searching*, 23 Harv. J. L. & Tech. 309, at 368-369 (2010) ("[T]he statistics concerning race and crime are deeply troubling. African Americans, who make up 13% of the general population, represent, on average 40% of convicted felons, three times greater than one would expect if race were not a factor in criminal convictions. Hispanics are also overrepresented in prisons, although not to the same extent as African

where surveillance or policing strategies focus disproportionately on communities of color, these unregulated databases will reflect that disparity. As DNA databases are expanded beyond those convicted of the most serious, violent crimes, the potential for the disproportionate inclusion of communities of color increases.⁸ A person's genetic profile is a sensitive personal matter and capturing that information for storage in an unregulated database, where access authority, security, and ability to expunge unlawful profiles are unknown, is a serious intrusion of liberty. We are already aware of at least one case where an individual was wrongfully accused and arrested of a crime based on quality management issues related to the use of the unregulated municipal DNA database.⁹ In this incident, the individual was arrested for a burglary based solely on his identification from the unregulated municipal DNA database and spent six months behind bars as a burglary suspect until the contamination event that generated the accusation was resolved.

Currently, we are aware of only one unregulated municipal DNA database, but soon New Yorkers may find their genetic information feeding a second one. On November 2, 2018, NYPD stated its intention to the New York State Commission on Forensic Science DNA Subcommittee¹⁰ to purchase Rapid DNA machines and to bypass the state oversight entity's review of preliminary testing before putting the technology in place. Rapid DNA technology allows non-forensic scientists to collect DNA swabs from individuals and process them outside the confines of an accredited crime laboratory in 90 minutes. The FBI can control the quality and scope of Rapid DNA testing by limiting access to the national DNA database, CODIS. However, CODIS access no longer serves as an incentive as police departments around the country have instead pooled their DNA profiles to create private local DNA databases.¹¹ Without the need to follow federal or state regulations, "[a]s police agencies build out their local DNA databases, they are collecting DNA not only from people who have been charged with major crimes but also, increasingly, from people who are merely deemed suspicious, permanently linking their genetic identities to criminal databases."¹² NYPD also stated its intention to process crime scene samples in Rapid DNA. Rapid DNA technology is not valid for processing crime scene or "forensic" samples and DNA processed in these systems are not authorized for

Americans. The probability that an African American, Hispanic, and non-Hispanic white person will be incarcerated in his lifetime, respectively, is 18.6%, 10%, and 3.4%. Not only are minority groups convicted at disproportionate rates, but there is also evidence that they are arrested disproportionately and evidently with less basis than non-Hispanic Caucasians.").

⁸ ERIN E. MURPHY, *INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA* (2015) at 258. ("Nationally, according to the U.S. Census, Blacks are incarcerated five times more than Whites are, and Hispanics are nearly twice as likely to be incarcerated as Whites."); see also Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, Prison Policy Initiative, May 28, 2014, available at <https://www.prisonpolicy.org/reports/rates.html>.

⁹ ROOT CAUSE ANALYSIS REPORT RCA# 2019-01

¹⁰ NYS PUBLIC SAFETY, DNA SUBCOMMITTEE MEETING NOV. 2, 2018 (2019), <https://www.youtube.com/channel/UCLLbFtfAZsgUSTc9IWTW9VA> (last visited Feb 23, 2020)

¹¹ Heather Murphy, *Coming Soon to a Police Station Near You: The DNA 'Magic Box' - The New York Times*, NEW YORK TIMES, Jan. 21, 2019, <https://www.nytimes.com/2019/01/21/science/dna-crime-gene-technology.html> (last visited Feb 25, 2019)

¹² [CSL STYLE ERROR: reference with no printed form.]

searching or upload into CODIS.¹³ In addition to bypassing oversight mechanisms, implementing Rapid DNA testing on crime scene samples at this time can harm public safety by rendering samples ineligible for searching in regulated databases if the unregulated database searches yield no results and will be more readily challenged at trial.

Children Cannot Consent to Giving Up Genetic Data

Given these serious intrusions on privacy, it is irresponsible and exploitative to collect DNA profiles from children. In *People v. K.N.*, NY Slip Op 28363, Judge Sandra Roper recognized the scientific literature establishing that psychosocial, psychological and cognitive brain development of children distinguishes them from adults and opined that the signed consent for buccal swab collection in the case was deemed involuntary by virtue of the defendant's age and violated the child's Fourth Amendment rights against unlawful search and seizure. If children are unable to provide consent, then we must automatically extend their protections to prohibiting the inclusion of DNA profiles from minors in unregulated databases and including their profiles in the regulated State DNA database in only a narrow set of criminal convictions. As Terri Rosenblatt, an attorney for the Legal Aid Society, which defended K.N., stated, "Young people who are charged with crimes should have a chance to move on and have a productive and law-abiding life. Storing their genetic code forever keeps them under a microscope."¹⁴

Value of Expungement and Lasting Effect of Inclusion in Database

An extreme example of the proliferation of unregulated DNA databases can be found in Bensalem, PA. After participating in a 30 day pilot program to create a local unregulated DNA database in 2014, the Bensalem (PA) Township Police Department grew their unregulated DNA database to a multi-county network containing about 12,000 individual profiles by 2019.¹⁵ So driven were these agencies that "[i]n Bucks County, the DNA database has begun to include genetic material from people whom police consider 'even just a suspicious subject,' Detective Vandegrift said. Mr. Harran [Director of Public Safety in Bensalem Township, Bucks County] called such cases 'one of the greatest uses of this instrument.'"¹⁶ The very existence of an unregulated database contributes directly to the gathering of DNA information on any person without consideration of any of the factors that New York State considers sufficiently important to protect individual freedom, factors initially considered by the legislature in its enabling legislation.

¹³ RAPID DNA FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/rapid-dna> (last visited Feb 23, 2020)

¹⁴ George Joseph, *How Juveniles Get Caught Up In The NYPD's Vast DNA Dragnet: Gothamist*, THE GOTHAMIST, January 10, 2019, http://gothamist.com/2019/01/10/dna_nypd_judge.php (last visited Jun 6, 2019).

¹⁵ Jo Ciavaglia, *Bensalem: DNA pilot added nearly 600 profiles to database*, THE INTELLIGENCER, April 17, 2014, <https://www.theintell.com/article/20140417/NEWS/304179690> (last visited Feb 25, 2019).

¹⁶ *Ibid.*

The New York City Council has the opportunity to clarify the legislative intent of the original law and ban any unregulated DNA databases. Without state oversight, New Yorkers will be subject to the following risks:

- Innocent people are included in local, unregulated databases and come under suspicion every time a search is done.
- Expungement is part of the contract established by state law. If a person who has come under suspicion is presumed to be innocent, then it would follow that their DNA profiles should not be included in a database for convicted offenders. Unregulated databases do not heed this rule.
- Without the oversight provided at the state level, the quality of the information uploaded in these unregulated DNA databases is suspect and there is a danger that the security measures are insufficient to protect data as serious as genetic information.
- Without oversight, there is no accountability to ensure that expungement happens when it is lawfully and appropriately requested.

New York Civil Rights Law 79(l) Part 2(a) requires informed consent for all genetic testing and provides that findings cannot be disclosed without the individual's consent unless they are ordered by the court or authorized specifically by the DNA Databank law (NY Executive Law Article 49B) or post-natal health testing (NY Public Health Law §2500).¹⁷ The DNA Databank law should not be used as a loophole to authorize genetic collections without consent and erase the protections and limitations that were never intended to be separated from the collection of samples for the State DNA database. We believe that the legislature did not imagine that counties, cities, towns, villages, or municipalities would begin collecting DNA profiles of people who were innocent under the letter of the law and placing them in private unregulated databases. We believe that the legislature would not have condoned the use of DNA dragnets that indiscriminately coerced DNA profiles from people, the majority of whom are people of color. We are confident that the legislature did not imagine that DNA profiles of children would be used to populate proliferating unregulated databases without regard for their minor status or the rights of parents to protect their children's genetic information.

Legitimacy is Key to Public Safety

Today's hearing was called because the Committees on Public Safety and the Justice System understood that concerns regarding the tools of public safety could lead to public distrust which could negatively impact public safety. Public safety is a coproduction of law enforcement and the communities they serve.¹⁸ When citizens perceive law enforcement authority as legitimate, it

¹⁷ New York Civil Rights Law § 79-l, part 4(b).

¹⁸ DAVID BEETHAM, *THE LEGITIMATION OF POWER* (Macmillan) (1991)

generates public support¹⁹ or obligation²⁰ to comply with law enforcement. Scholars of police legitimacy have boiled legitimacy down to the following components – dialogue, distributive fairness, procedural fairness, effectiveness, and lawfulness.²¹ Unregulated DNA databases, by definition, operate in secret and without **dialogue**. They lack **distributive fairness** because the collection of DNA profiles that populate the databases have focused on communities of color. If standards and procedures for adding a DNA profile, methods for how profiles are searched, the categories of people included, use for ancestral investigation, the quality of the evidence that the profiles are searched against, and how a profile is removed from an unregulated database is subject only to the whim of its owners, then the management of the database lacks **procedural fairness**.

To date, New Yorkers have not been given a sense of how many cases have depended on and could not have been solved without the use of the unregulated municipal DNA Database. A NYC OCME Root Cause Analysis Report regarding the wrongful prosecution of an individual identified in the City's unregulated database stated that "Forensic Biology managers estimate that up to 90% of all reported suspect to case hits are warm hits."²² Warm hits were defined in the document as "when an individual and evidence were previously thought by law enforcement to have been linked and the DNA results confirm this. A cold hit is when the individual and evidence did not have a previous link or relationship. When a cold hit occurs, the DNA is providing a new investigative lead for law enforcement."²³ Warm hits can be solved without databases because the known suspect's DNA can be compared to the crime scene evidence. DNA databases are designed to facilitate the investigation of cold hits. Ethics and principles aside, until we know how many of those 10% of cold hit cases could not have been solved with the New York State DNA database and were dependent entirely on DNA collected from adults in NYC who have not been convicted of a crime, we can make no assumptions about the **effectiveness** or value of an unregulated municipal DNA database. In fact, Dr. Howard

¹⁹ Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOCIETY REVIEW 513–548 (2003); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton University Press) (2006)

²⁰ Anthony Bottoms & Justice Tankebe, *BEYOND PROCEDURAL JUSTICE: A DIALOGIC APPROACH TO LEGITIMACY IN CRIMINAL JUSTICE*, 102 THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 53 (2012)

²¹ LORRAINE MAZEROLLE, *LEGITIMACY IN POLICING: A SYSTEMATIC REVIEW* (The Campbell Collaboration) (2013), <https://campbellcollaboration.org/library/legitimacy-in-policing-a-systematic-review> (last visited Apr 23, 2019); Lorraine Mazerolle et al., *Procedural justice and police legitimacy: a systematic review of the research evidence*, 9 JOURNAL OF EXPERIMENTAL CRIMINOLOGY 245–274 (2013); Bottoms & Tankebe; Justice Tankebe, *Viewing Things Differently: The Dimensions of Public Perceptions of Police Legitimacy: Public Perceptions of Police Legitimacy*, 51 CRIMINOLOGY 103–135 (2013); Sunshine & Tyler; Tom R. Tyler & Jonathan Jackson, *Popular legitimacy and the exercise of legal authority: Motivating compliance, cooperation, and engagement*, 20 PSYCHOLOGY, PUBLIC POLICY, AND LAW 78–95 (2014)

²² Vargas, *supra* note 9. ("The committee learned that most hits reported by Forensic Biology are warm hits. Forensic Biology managers estimate that up to 90% of all reported suspect to case hits are warm hits. Although DNA HIT verification criteria are applied to both warm hits and cold hits, applying the criteria is especially important in the event of a cold hit. Eliminating the possibility of a contamination event is a critical quality control measure if the individual and evidence did not have a previous link. The infrequent reporting of cold hits may have contributed to the reporting analyst or technical reviewer not applying the cold hit criteria.")

²³ *Ibid.*

Baum, a former assistant director of the OCME, built the internal database in 1998 to save time with CODIS searches which were slow in the early days of CODIS.²⁴ Baum recently raised concerns that the policies put in place to limit the database contents – such as excluding children and requiring a DNA profile to have a specific association with a case – are no longer heeded, permitting the unregulated database to serve as a repository for DNA fishing expeditions. Baum stated, “The city should follow all the rules and regulations of the state database...There are no rules and regulations for the city database, and unregulated data banks have more potential for error. The technology is now quick enough. You don’t need a local DNA index.”²⁵

Lastly, given that New York State indeed possesses a State DNA database for public safety purposes, unregulated databases violate **lawfulness** as the primary purpose of their establishment is to subvert the requirements of New York State Executive Law § 995-c. By law, the State is only authorized to collect and retain DNA profiles belonging to people who have been convicted of a crime. There is no other way to collect and retain DNA profiles of witnesses, innocent people, and victims, but through an unregulated database. The presumption of innocence as a constitutional principle will sadly cease to exist if NYC does not take control of these unregulated databases.

Conclusion

In an adversarial criminal justice system that is beset with inextricable biases, forensic science **must** be the neutral, scientific truth teller. Otherwise, investigations are derailed, leaving the actual person who committed the crime unidentified, innocent people wrongfully drawn into law enforcement interactions, and crime survivors unnecessarily traumatized or re-traumatized. In her decision in *Floyd v. City of New York*, Judge Shira Scheindlin concludes presciently with a quote by New York Times columnist Charles Blow:

The idea of universal suspicion without individual evidence is what Americans find abhorrent and what black men in America must constantly fight. It is pervasive in policing policies — like stop-and-frisk, and in this case neighborhood watch — regardless of the collateral damage done to the majority of innocents. It’s like burning down a house to rid it of mice.²⁶

As New York City’s unregulated DNA database dismantles the presumption of innocence, it brings our city ever closer to the practice of universal suspicion. Forensic DNA is a powerful tool and the line between its legitimate, ethical application and its weaponization – once bright and universally

²⁴ Graham Rayman, *Developer of NYC’s DNA database 20 years ago troubled by what it has become*, NEW YORK DAILY NEWS, Feb. 24, 2020, <https://www.nydailynews.com/new-york/nyc-crime/ny-dna-pioneer-criticizes-nypd-20200224-brwloofnrfapzhn332kvyzl23y-story.html> (last visited Feb 24, 2020)

²⁵ *Ibid.*

²⁶ *David Floyd, Lalit Clarkson, Deon Dennis, and David Ourlicht, individually and on behalf of a class of all others similarly situated, against The City of New York*, F. Supp. 2d 540

visible – has now been blurred. As New Yorkers, we rely on the Committee on Public Safety and the Committee on the Justice System to reassert and reclaim the protections and limitations that were installed by New York State Executive Law § 995-c. We believe that the legislature did not imagine that counties, cities, towns, villages, municipalities, or individual police departments would begin collecting DNA profiles of people who were innocent under the letter of the law and placing them in private unregulated databases. This Committee has the power to halt the accumulating pain and injustice by **exercising oversight power to eliminate and prohibit unregulated municipal DNA databases and expunging any DNA profiles that do not meet the legal standard established by New York State Executive Law § 995-c.** People who commit crime can still be identified, innocent people can still be freed, and public safety can still be achieved through the use of the sanctioned State DNA database to investigate crime. The Innocence Project urges you to protect the lawful and legitimate use of the People’s genetic information and to help us restore our collective memory of the weight and power of this tool.

**The Bronx
Defenders**

**Redefining
public
defense**

**New York City Council
Committee on Public Safety and Committee on Justice System**

Hearing re: DNA Collection and Storage in NYC

February 25, 2020

Written Testimony of the Bronx Defenders

By Emily Prokesch, Director of Forensic Practice Group, Criminal Defense Practice

Chairman Richards and Chairman Lancman, my name is Emily Prokesch, and I am the Director of the Forensic Practice Group in the Criminal Defense Practice of The Bronx Defenders.

The Bronx Defenders (“BxD”) is a public defender non-profit that is radically transforming how low-income people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called holistic defense that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. We take what we learn from the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

At BxD, we have established a Forensic Practice Group in order to more effectively confront and utilize forensic science on behalf of our clients. The Forensic Practice Group (“FPG”) is a group of attorneys, each of whom is responsible for conducting training and consulting with others in the office on a particular area of forensic science. DNA is one of the specialty areas within the FPG.

I. Introduction

The New York City Police Department (the “NYPD”) and the Office of the Chief Medical Examiner (the “OCME”) are engaging in illegal practices when it comes to DNA collection and storage that violate the constitutional and privacy rights of New York City residents, and disproportionately affect Black and Latinx members of our community. The NYPD is conducting the equivalent of genetic “stop and frisk” by targeting predominantly young men of color who have not been convicted of a crime, and routinely collecting their DNA without a warrant, informed consent, or court order. The NYPD surreptitiously steals our clients’ DNA from water bottles and cigarette butts offered to them at the precinct under the guise of being concerned and helpful. These illegally seized DNA profiles are then submitted to the OCME who stores them permanently in their unauthorized local DNA Index (“LDIS”) for perpetual comparison to evidence from any and all cases that may come across the labs door in perpetuity. This is all happening in contravention of clearly established state law.

BxD applauds the City Council and these Committees for holding this timely hearing to bring attention to the NYPD’s rampant collection of DNA in building out the City’s sprawling and unregulated database of New Yorkers’ DNA. At BxD we regularly see DNA evidence utilized in the cases we handle. Prosecutors are using DNA evidence in most felony cases, and many misdemeanors as well. As DNA testing technology becomes increasingly sensitive, it is not only utilized where bodily fluids are detected in connection to an alleged crime—we now routinely see DNA testing where it is believed a few skin cells can be detected from a crime scene, victim, or recovered object.

But there are serious problems with the manner in which the City collects, tests, and stores DNA. The NYPD’s surreptitious DNA collection, which was documented in the press last year¹, rightfully caused alarm among the public and breeds distrust between the community and law enforcement. Nevertheless, it continues to operate in the dark with virtually no independent oversight. We believe that the City Council should take the following action to curb these practices:

- Ban the NYPD’s practice of surreptitiously collecting DNA from individuals without a warrant, informed consent or court order.
- Ban the NYPD from taking DNA samples of any kind from minors.

¹See, e.g., Jan Ransom and Ashley Southall, *N.Y.P.D. Detectives Gave a Boy, 12, a Soda. He Landed in a DNA Database*, The New York Times (August 15, 2019) <https://www.nytimes.com/2019/08/15/nyregion/nypd-dna-database.html>

- Ban the OCME from maintaining a LDIS that exceeds the authority explicitly granted by State law and skirts the regulatory oversight carefully crafted by lawmakers through the Executive Law and State Regulations.

II. The Statutory Scheme Governing the State DNA Database

Currently, the NYPD and OCME enjoy unfettered access to countless individuals' DNA profiles that they have no legal authority to possess. These DNA profiles were collected and later stored in contravention of a clearly articulated, and thoroughly debated state regulatory scheme governing when and how DNA may be collected and stored in New York State. Most of these individuals have no idea their DNA was taken from them in the first place, let alone permanently stored in unauthorized ways.

New York State authorized mandatory DNA collection and storage through Article 49-B of the Executive Law (Exec. L. §995, *et seq.*)² and Title 9, Chapter 8, of the New York State Regulations.³ This comprehensive legislation dictates when and how DNA can be stored in the State DNA Index System ("SDIS"), and was the product of thoroughly debated policy by elected officials. State lawmakers decided whose DNA may be collected and under what circumstances, and expressly authorized that DNA be collected for persons convicted of certain designated offenses, which were expanded in 2012.

Under this statutory scheme, only "designated offenders," defined by statute as a person convicted of a New York penal law misdemeanor, or any felony offense, (except for certain marijuana charges)⁴ are subject to inclusion in the DNA identification index.⁵ Critically, leading members of the Legislature indicated that this expansion in 2012 was the ceiling of DNA collection and storage. Indeed, during floor debates on the bill, Assembly Member Joseph Lentol assured fellow lawmakers that the 2012 expansion would be the last:

MR. REILLY: ... I do see this as the last incremental step before we collect everybody's DNA using the same rationale that now we can catch the criminals. And law officers, all those in the judicial system, of course, would love to have everybody's DNA, and I've heard that suggested in this very Chamber. ... [*W*]e've seen a *steady incremental expansion of the database over the last seven*

² Exec. L. §995, *et seq.*

³ 9 NYCRR 6192, *et seq.*

⁴ *Supra*

⁵ Exec. L. § 995(7).

years and, I believe, that collecting everybody's DNA is a very, very serious violation of our privacy rights.

MR. LENTOL: Well, if what you mean by "collecting everybody's DNA" you're talking about those people who are convicted of crimes, you are correct. *That's not everybody in the world. It's everybody wh[om] has been convicted of a crime.*

* * *

MR. REILLY: My question is *would you make a definitive statement here that you, as the sponsor of this legislation and, really, the father of this concept, that you will adamantly oppose any further expansion of the database?*

MR. LENTOL: *Yes.*⁶

After extensive debate, the Legislature passed Assemblyman Lentol's bill. Governor Cuomo signed it into law, codifying the Legislature's intention that only those convicted of a crime should be required to have their identity and DNA information included in the SDIS.⁷

The State legislature carved out a role for local DNA laboratories to develop and compare DNA samples. However, the state law does not authorize local laboratories to perform the indexing functions of the SDIS.⁸ Rather, local laboratories (such as the OCME) are permitted to develop crime scene-related DNA evidence, which may be shared with the SDIS. The local laboratories are permitted to compare DNA taken from individual suspects pursuant to court order or on consent to DNA profiles developed from specific pieces of evidence in a case. But local laboratories are *not* permitted to perpetually compare DNA profiles stored in its local DNA index with evidence samples or other profiles collected. This is what is happening, in contravention of New York law.

Additionally, New York State chose not to allow DNA to be taken from a person upon arrest. Meaning, the police cannot simply collect a DNA sample because they have probable cause to arrest someone for a designated crime. The Criminal Procedure Law expressly outlines how the

⁶ N.Y. Assembly Debate on A9555, March 15, 2012 (emphasis added).

⁷ See Exec. Law § 955-c(3)

⁸ See *People v. K.M.*, 54 Misc.3d 825 (Sup. Ct. Bronx Co. 2019); compare Exec. L. 995-c(9)(a) (provisions for expungement from the State DNA index) with Exec. L. 995-c(9)(b) (provisions for expungement from stored-but *not* indexed-DNA in local laboratories).

prosecution can move to compel a DNA sample from a suspect for direct comparison of a DNA sample from a suspect to a piece of evidence in a specific case.⁹ Absent a warrant, there is no authority for collecting and storing someone's DNA merely because they've been arrested for a crime.¹⁰

State lawmakers decided that only individuals convicted of crimes are required to permanently surrender their genetic material to a state regulated DNA index. Implicit in this decision is that individuals who are not convicted of crimes—be it victims, suspects, or those merely accused—should not have their DNA profiles on file for perpetual comparison to any crime scene evidence that may come along. Not only does state law reflect a policy choice of whose DNA should be on file, and at what point an individual surrenders protection over their own genetic material, it also provides for quality control and oversight.

New York City cannot preempt this clearly established State law. The State regulatory scheme for DNA collection and storage is binding on the City. This means that the local interests, including those of the NYPD and the OCME, must yield to that of the State in regulating DNA collection and storage. The Court of Appeals has made clear that “when the State has created a comprehensive and detailed regulatory scheme with regard to the subject matter that the local law attempts to regulate, the local interest must yield to that of the State in regulating that field.”

¹¹ Yet, by continuing to collect and store DNA in contravention of the State law, the NYPD and the OCME are refusing to yield to the State in regulating this field.

III The Harm Caused by the NYPD's Deceptive DNA Practices

The NYPD routinely collects DNA samples from our clients at the precinct absent a warrant, consent or court order. This occurs even when a client's right to counsel and right to remain silent have already been invoked. This practice of surreptitiously taking DNA samples overwhelmingly and disproportionately affects people of color in low income communities. These communities are already overpoliced and surveilled, and now are having their genetic material taken from them and used in unregulated ways.

⁹ See C.P.L. § 245.45

¹⁰ New York is in the minority in this respect. Thirty-one states and the federal government have chosen to allow DNA to be collected from persons upon arrest. But these jurisdictions all have enacted “DNA Arrestee Laws” that strictly regulate its collection, use, and expungement.

¹¹ *People v. Diack*, 24 N.Y.3d 674, 677 (2015) (holding that the State's comprehensive and detailed statutory and regulatory framework for the identification, regulation and monitoring of registered sex offenders prohibits the enactment of a residency restriction law such as Local Law 4.)

The harm to our clients as a result of these practices are significant. People are having their DNA taken and stored without oversight or regulation. State sanctioned protections on when DNA should be removed from SDIS do not reach the OCME's unauthorized LDIS. For example, when a person has his or her DNA taken pursuant to a court order, the limits of what the DNA may be used for is specifically delineated by the court. These protections govern what happens to the DNA following the end of the case: either the individual will be compelled to provide a profile to SIDS upon conviction of a qualifying offense, or the DNA profile will be expunged should the individual be acquitted or convicted of a non-qualifying offense. In either case, there are mechanisms in place to ensure that an individual's DNA is only taken under proper circumstances and there is oversight as to when it can be stored and compared. Moreover, should a person later be exonerated of the qualifying offense, there are automatic protections in place for the DNA profile to be expunged from SDIS. No such oversight and protections exist when an individual's DNA is taken and stored outside this regulatory scheme.

As public defenders we see this playing out—often literally before our eyes on interrogation video surveillance. In a typical case, an NYPD detective will enter an interrogation room prior to the interrogation and prepare the room for DNA collection. The detective wears gloves, wipes down the table with disinfectant, and places an ashtray on the table. During the interrogation, the detective offers the person being interrogated water and/or cigarettes, which the person is then prohibited from taking from the interrogation room when they leave. We even see detectives explicitly telling people to leave the items in the room when the interrogation is finished. This happens even when a person invokes their right to remain silent or their right to counsel either before or during the interrogation. Following the interrogation, the detective comes back into the interrogation room wearing gloves, collects the water bottles and/or cigarette butts, and places them in brown paper evidence collection bags or sealed envelopes. These items are then submitted to the OCME for testing and storage before anyone even *seeks* a court order authorizing DNA collection.

Even where a court later finds that the surreptitious collection of the DNA was illegal and suppresses the evidence, there is no mechanism for this client to have the profile taken from the water bottle or cigarette butt removed from the rogue LDIS maintained by the OCME, the way there is when DNA is lawfully entered in the SDIS and later removed due to exoneration.

There are other harms that stem from this illegal practice. A person's DNA is not only compared to the evidence in the case for which they are suspected, but is available to the OCME and the NYPD for comparison to every single evidence sample processed by the OCME. This means that an individual will be placed in essentially a permanent genetic line-up, being compared to evidence samples in cases they have no connection to whatsoever. Through genetic comparison,

the NYPD and OCME can essentially permanently surveille any individual whose DNA they obtain, regardless of how it was obtained.

IV. The NYPD's Proposed "Policy" Falls Far Short

In anticipation of this hearing, the NYPD has attempted to placate concerns with a new "policy," when it comes to illegal DNA collection and storage. The NYPD recently announced its plan "to audit a database of 32,000 samples collected from people considered suspects in criminal investigations and flag for removal of any samples more than two years old that have not been linked to an ongoing investigation or conviction."¹² This "new policy" is nothing more than a non-binding, unenforceable promise that the NYPD will contravene the state regulatory scheme in a slightly less egregious way. The "policy" does not address the fact that DNA profiles are being illegally collected in the first place, and can still be used in illegal, harmful ways in the two years before the NYPD considers removing them. And of course, there is nothing to ensure that any profiles are actually removed from the LDIS. Moreover, it should not be for the NYPD to decide which profiles are permitted to stay and which ones should be expunged. The NYPD proposal does nothing to address the heart of the issue: the NYPD together with the OCME are operating outside the bounds of a clearly established state regulatory system when it comes to DNA collection and storage.

The NYPD is trying to prevent the Council from taking action by proposing half-measures that do not solve the problems or cure the harm done to our clients. But the safeguards for our clients' genetic privacy and protections from government intrusions must be in place at the front end and not haphazardly applied after the fact.

The Council should not leave the job of regulating this critical matter of individual privacy, one that has life-long consequences, to the very institution that is disregarding the law. The NYPD and OCME cannot be entrusted with this task because it is at odds with their institutional interests. Their roles in DNA collection and storage is not to safeguard the privacy interests of individuals the way lawmakers are tasked to do. Moreover, the interest and institutional function of both the NYPD and OCME is often at odds with the interests state lawmakers balanced against solving crime when they enacted a regulatory scheme for DNA collection and storage. It is inappropriate to ask the very institutions that are operating outside the bounds of the law to self-regulate how they will conduct their illegal practices. Laws are enacted to circumscribe police behavior when it comes to protecting people's constitutional rights and privacy, not the other way around. This is akin to asking the fox to guard the henhouse.

¹² Edgar Sandoval, *N.Y.P.D to Remove DNA Profiles of Non-Criminals from Database*, The New York Times (February 20, 2020) <https://www.nytimes.com/2020/02/20/nyregion/dna-nypd-database.html>

State law does not permit the collection and perpetual comparison of DNA from individuals who have not been convicted of designated crimes. Nor does it permit the perpetual comparison of these profiles to evidence collected from a crime scene. This was a considered policy choice by the State legislature to protect civil liberties and privacy, and to circumscribe the level of government intrusion. Ironically, the City's practice of collection and storage of DNA samples has left individuals in New York City with fewer protections than individuals in states that authorize greater levels of government intrusion with DNA Arrestee Laws—and fewer protections than New Yorkers outside of the City. The City's practices are at best a blatant disregard of clearly established state law, and at worst, an end run around the very laws enacted to regulate and protect individuals from the overcollection and use of their genetic material. It must be stopped.

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 2/25/20

(PLEASE PRINT)

Name: Emily Galvin Almanza

Address: 360 Cabrine Blvd NY NY 10040

I represent: Partners for Justice

Address: See above

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THE CITY OF NEW YORK**

Appearance Card

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in favor in opposition

Date: February 25, 2020

(PLEASE PRINT)

Name: RAS OMEIL MORGAN

Address: 956 EAST 84 STREET, BK, NY 11236

I represent: COMM-LOVE-UNITY

Address: WWW.CLUBAMENDMENT.SPLASHHOT.COM

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Name: Clinton
Asia Mardis

Address: OCME 421 East 26th St

I represent: Brooklyn Defender Services

Address: _____

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Name: Barbara Sampson

Address: 520 First Ave. WY, NY

I represent: OCME

Address: 520 First Ave.

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Date: 2-25-2020

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Name: Florence Hutner

Address: 421 E 21st

I represent: OCME

Address: same

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Date: 2-26-20

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Name: ROBERT VAN PELT

Address: _____

I represent: OCME

Address: 421 E 21st St, NY, NY

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Date: _____

(PLEASE PRINT)

Name: Director Bob Barrows

Address: NYPD

I represent: _____

Address: _____

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THE CITY OF NEW YORK**

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 in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Chief Rodney Harrison

Address: NYPD

I represent: _____

Address: _____

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THE CITY OF NEW YORK**

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 in favor in opposition

Date: _____

(PLEASE PRINT)

Name: Asst. Deputy Commissioner Oleg Chernyavsky

Address: NYPD

I represent: _____

Address: _____

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THE CITY OF NEW YORK**

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in favor in opposition

Date: _____

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Name: Deputy Chief Emanuel Katranakis

Address: MPD

I represent: _____

Address: _____

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THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. DNA Res. No. _____

in favor in opposition

Date: 2/25/20

(PLEASE PRINT)

Name: BRAD MAURER

Address: _____

I represent: NEW YORK COUNTY DEFENDER SERVICES

Address: _____

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THE CITY OF NEW YORK**

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I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: _____

(PLEASE PRINT)

Name: JERRY OSHINSKI

Address: 32 Archy Road Carmel, NY 10512

I represent: Local 3005, Ac 37

Address: 55 Water St.

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THE CITY OF NEW YORK**

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Date: 2/25/19

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Name: TERRI ROSENBAUM

Address: 875 W 181 ST ST, 55 10033

I represent: DUFF UNIT - Legal Aid Society

Address: 199 Water Street NYC 10033

**THE COUNCIL
THE CITY OF NEW YORK**

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 2/25/2020

(PLEASE PRINT)

Name: Emily Prokesch, Forensic Practice Director

Address: _____

I represent: The Bronx Defenders

Address: 360 E. 161st Street, Bronx NY 10451

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THE CITY OF NEW YORK**

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in favor in opposition

Date: 2/25/20

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Name: Lee Rowland

Address: _____

I represent: New York Civil Liberties Union

Address: 1 Whitehall St. NY NY 10004

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THE CITY OF NEW YORK**

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in favor in opposition

Date: 2/25/2020

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Name: Albert Fox Cahn

Address: _____

I represent: Surveillance Tech. Oversight Project

Address: 40 Rector Street

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THE CITY OF NEW YORK**

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in favor in opposition

Date: _____

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Name: Clinton Hughes

Address: _____

I represent: Brooklyn Defender Services

Address: 177 Livingston St. Brooklyn

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THE CITY OF NEW YORK**

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in favor in opposition

Date: 2/25/20

(PLEASE PRINT)

Name: Sarah Chu

Address: ~~40 Worth St #701~~ 509 E 77th St

I represent: Innocence Project

Address: 40 Worth St, #701

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**THE COUNCIL
THE CITY OF NEW YORK**

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Date: 2/25/2000

(PLEASE PRINT)

Name: Shomari Ward

Address: 199 Water Street NY NY

I represent: The Legal Aid Society

Address: 199 Water Street, NY, NY

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THE CITY OF NEW YORK**

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[]

I intend to appear and speak on Int. No. _____ Res. No. _____

in favor in opposition

Date: 2/25/00

(PLEASE PRINT)

Name: Anne Oredoko

Address: 199 Water St

I represent: The Legal Aid Society - Racial Justice Unit

Address: 199 Water St

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