State of California

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Memorandum

To : Attorney General Brown

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

I. Introduction and Chronology of Events

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Legal Implications and Policy Concerns

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

A. Constitutionality of Data Bank Program

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Offenders' Relatives' Privacy Interests

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

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

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

C. Other Policy Concerns

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

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

IV. Options

The following options are available:

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

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

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

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

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

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