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**WRITTEN TESTIMONY OF THE CRIMINAL COURTS COMMITTEE,
THE CRIMINAL JUSTICE OPERATIONS COMMITTEE
AND THE MASS INCARCERATION TASK FORCE**

**NEW YORK CITY COUNCIL COMMITTEE ON PUBLIC SAFETY,
AND COMMITTEE ON JUSTICE SYTEM**

**OVERSIGHT HEARING T2020-5738:
DNA COLLECTION AND STORAGE IN NYC**

February 25, 2020

On behalf of the New York City Bar Association (City Bar), we respectfully request that the appended report be included in the written record for the oversight hearing being conducted by the New York City Council Committee on Public Safety and Committee on Justice System regarding DNA collection and storage in New York City. The appended report is in support of legislation currently pending in the New York State Legislature (A.7818/S.6009), which would establish a single computerized state DNA identification index and require municipalities to expunge any DNA record stored in a municipal DNA identification index. The City Bar's report explores DNA identification indexing in New York, comparing it to indices in other jurisdictions, discusses the current conundrum within the criminal courts concerning the lawfulness of the New York City's DNA index, and outlines support for the proposed legislation.

We hope this analysis can be helpful to the Committees as they review New York City's policies surrounding DNA collection and storage. Thank you for your consideration.

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**REPORT ON LEGISLATION
BY THE CRIMINAL COURTS COMMITTEE,
THE CRIMINAL JUSTICE OPERATIONS COMMITTEE
AND THE MASS INCARCERATION TASK FORCE**

**A.7818
S.6009**

**M. of A. Wright
Sen. Hoylman**

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

THIS LEGISLATION IS APPROVED

I. INTRODUCTION

New York City, through its Office of the Chief Medical Examiner, currently maintains a municipal DNA identification index, which stores, and perpetually compares to crime scene evidence, DNA profiles from people who have not been arrested or convicted of a crime.¹ This local DNA identification index includes samples collected from people suspected of crimes but who ultimately may not have been charged or convicted, such as DNA taken surreptitiously from children as well as DNA collected during NYPD DNA dragnets.² One judge has described the local DNA index as a “shadow” of the statutorily-authorized and regulated State DNA identification index.³

The existence of a municipal DNA identification index that is not subject to the strict limitations of the regulated State DNA identification index has confounded New York City-based courts, several of which have called for legislative action to resolve disputes in statutory interpretation from different judges.⁴ The New York City Bar Association (City Bar) agrees that

¹ See Jan Ransom and Ashley Southall, *The NYPD Gave A Boy, 12, a Soda. He Landed in a DNA Database*, The New York Times, August 16, 2019 (A1), <https://www.nytimes.com/2019/08/15/nyregion/nypd-dna-database.html>. (All websites cited in this report were last visited on February 18, 2020.)

² *Id.*

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

⁴ See, e.g., *People v. Flores*, 61 Misc.3d 1219(A) (Crim. Ct. N.Y. Co. 2018) (“Whereas the Executive Law does not expressly authorize or prohibit LDIS OCME from maintaining and storing DNA profiles of arrestees, suspects, exonerees and innocents, it is left to the court's discretion to interpret the current state of the law. Until such legislative amendment, there will continue to be inconsistency in these rulings.”); *Matter of Jahsim R.*, No. D-15585/19, 2019 WL 6893045, at *3 (Fam. Ct. Bronx Co. 2019) (advocating for legislation to resolve ambiguity in current law).

legislation is appropriate and encourages lawmakers to act by passing A.7818/S.6009, which clarifies the State DNA Identification Index Law and makes clear that “No county, city, town, village, or municipality, or any entity thereof, may establish or maintain a computerized DNA identification index.”

This Report explores DNA identification indexing in New York, comparing it to indices in other jurisdictions, discusses the current conundrum within the criminal courts concerning the lawfulness of the local DNA index, and, finally, recommends lawmakers act swiftly in passing this bill.

II. BACKGROUND ON DNA IDENTIFICATION INDEXES AND NEW YORK CITY’S MUNICIPAL DATABANK

a. DNA Indices Generally

A DNA identification index is a computerized system that perpetually compares forensic DNA profiles from people to crime scene DNA evidence.⁵ Such comparisons function as virtual genetic line-ups, where the numeric DNA profile of each person in the index is compared to each piece of crime scene evidence. Law enforcement may be notified when the DNA from a person either fully, or even just partially, “matches” the crime scene evidence.⁶

DNA identification indices can be useful tools for investigating crimes. But they are not without risk. Where strict oversight and scientific standards are not implemented, DNA indices can lead to arrests of innocent people. This happened recently in New York City, where a man was wrongfully arrested and prosecuted based on an erroneous match to the City’s unregulated DNA index.⁷ In a subsequent disclosure to City Council, the OCME admitted that, as part of its co-mingling of pre-conviction DNA samples and unrelated evidence samples in its local index, a possible “contamination” incident caused the wrongful arrest.⁸ The pending legislation squarely addresses this problem by disallowing the unregulated co-mingling of unrelated evidence with arrestee DNA.

DNA indices also can produce correct “matches,” but to evidence that may not be considered probative in a particular case. This happened to Terrell Gills, whose DNA matched skin cells left behind at a Dunkin’ Donuts that had been robbed.⁹ Subsequent video showed that

⁵ See Exec. L. §§995; 995(c).

⁶ See Jeremy W. Peters, *New Rule Allows Use of Partial DNA Matches*, The New York Times (Jan. 24, 2010).

⁷ See 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>.

⁸ *Id.*

⁹ See Eli Rosenberg, *Can DNA evidence be too convincing? An acquitted man thinks so*, The New York Times (May 16, 2017), <https://www.nytimes.com/2017/05/16/nyregion/can-dna-evidence-be-too-convincing-an-acquitted-man-thinks-so.html>.

Mr. Gills could not have been the perpetrator, and his DNA was instead innocently present because he was a mere coffee shop patron.¹⁰

b. The New York State DNA Identification Index

To strike the balance between the usefulness of a DNA identification index and the risks involved, New York State lawmakers carefully considered which persons' DNA should be entered into such a system, and under what circumstances. Established in 1994, the New York State DNA identification index is governed by a “comprehensive and detailed regulatory scheme”¹¹, set forth in Article 49-B of the Executive Law (Exec. L. §995, *et seq.*)¹² and Title 9, Chapter 8, of the New York State Regulations.¹³

Under this statutory scheme, only individuals deemed “designated offenders” are subject to inclusion in the DNA identification index.¹⁴ A “designated offender,” as defined by statute, is a person convicted of a New York penal law misdemeanor, or any felony offense (except for certain marijuana convictions).¹⁵

The New York State DNA identification index also follows national standards for the evidence it includes for comparisons to “designated offenders.” Those standards require that the evidence contain DNA information from at least eight “core” genetic locations, and the profile must have a “match rarity” of at least one in 10 million.¹⁶ Additionally, the State DNA index does not accept evidence deemed non-probative to determining the identity of an unknown perpetrator, such as evidence recovered from a person directly, or evidence recovered during the execution of a search warrant of a suspect's own home.¹⁷

In addition to establishing the State DNA identification index, the State Legislature also carved out a role for local DNA laboratories to develop and compare DNA samples. In New York State, there are eight such laboratories.¹⁸ State law permits each laboratory to develop crime scene-related DNA evidence, some of which, as noted above, may be shared with the State index. These laboratories are also permitted to compare DNA taken from individual suspects to individual cases. State law does *not*, however, authorize these laboratories to perform “indexing” functions that

¹⁰ *Id.*

¹¹ *Samy F. v. Fabrizio*, 176 A.D.3d 44 (1st Dept. 2019).

¹² Exec. L. §995, *et seq.*

¹³ 9 NYCRR 6192, *et seq.*

¹⁴ Exec. L. § 995(7).

¹⁵ *Id.*

¹⁶ *See* 9 NYCRR 6192.3(b) (requiring minimum genetic markers as are required for the national DNA index); CODIS and NDIS Fact Sheet, §20, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> (requiring eight core loci and one in 10 million match rarity for upload).

¹⁷ *Id.* CODIS and NDIS Fact Sheet, § 22.

¹⁸ *See* New York State Division of Criminal Justice Services “DNA Brochure,” <https://www.criminaljustice.ny.gov/forensic/dnabrochure.htm>.

allow for virtual genetic lineups in perpetuity.¹⁹ In other words, while a local laboratory may compare a putative perpetrator in a *specific* case to evidence recovered *in that case*, it may not compare that same suspect to all unsolved crimes for all time. The former activity is the legislatively-mandated role of local laboratories, while the latter is the job of the State DNA identification index.

c. New York City’s Municipal DNA Identification Index, Operated by the OCME

The New York City OCME maintains its own DNA identification index, separate from the State one, and outside of the State’s comprehensive and detailed regulatory scheme. This index does not operate under any State or local regulation. As one court pointed out, “the New York City Council has not passed local legislation permitting the creation of [the OCME] database, which would have generated the need for a preemption balancing test, the local rule to be a factor weighed against the clear policy of the New York State statutory framework.”²⁰

Untethered to any State or local rules, the OCME’s DNA identification index compares a far vaster expanse of DNA from individuals, and from purported crime scene evidence. Critically, while the State index does *not* include people who have not been convicted of crimes, the OCME index does, and in great number. As described in news reports and court decisions, and as comports with the experience of committee members, the OCME index is comprised entirely of DNA samples taken from people who have not been convicted – and sometimes not even charged – with crimes. The index currently includes juveniles,²¹ individuals who have not been charged with crimes,²² individuals who have been acquitted or had their cases dismissed,²³ and individuals who were targeted as part of NYPD DNA dragnets²⁴ – more than 31,400 individuals in total. The DNA samples taken from these individuals are frequently taken without court order or individual consent. Many of these samples have been collected surreptitiously by the NYPD from individuals in police custody, including one sample taken from a 12 year old boy’s soda that was provided to him during an interrogation.²⁵ The NYPD characterizes these DNA samples as “abandoned,” but

¹⁹ 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).

²⁰ *K.M.*, 54 Misc.3d at 830.

²¹ See George Joseph, *How Juveniles Get Caught up in the NYPD’s Vast DNA Dragnet*, Gothamist (Jan. 10, 2019), <https://gothamist.com/news/how-juveniles-get-caught-up-in-the-nypds-vast-dna-dragnet>.

²² *Supra* n. 1

²³ *Id.*

²⁴ Graham Rayman, *NYPD detectives demanded DNA swabs from hundreds of black and Latino men while hunting killer of Howard Beach jogger*, New York Daily News (May 10, 2019), <https://www.nydailynews.com/new-york/nyc-crime/ny-men-caught-up-in-nypd-jogger-dna-dragnet-object-to-the-tactic-20190510-h4i4q7p4wzhtbpmjmdilvxsc5u-story.html>.

²⁵ *Supra* n. 1.

courts disagree about whether this interpretation of the law is correct.²⁶ Whether or not the samples are lawfully taken, however, they are all included in the OCME municipal index.

OCME compares DNA from this broad group of people to a much broader class of evidence than what exists in the regulated State DNA index. The OCME accepts for DNA comparison evidence samples of lower quality and less directly connected to a crime than does the State DNA index. For example, while the State DNA index requires that all DNA evidence samples have DNA data at a minimum of eight of the “core” forensic DNA locations²⁷, the local index sets a lower threshold of *any* six locations, including those that are not considered “core” locations of greatest probative value.²⁸ The breadth of evidence collected by the OCME index – a vast store of material taken from unconvicted people and juveniles, among others – has made it a “shadow DNA index that operates in just five counties, but in reality for as many as half the state investigations implicating DNA.”²⁹ As a result, OCME will run DNA comparisons that the State will not run.

Finally, the OCME’s DNA index does not provide for expungement upon acquittal, dismissal, failure to bring charges, or adjudication as a juvenile or youthful offender. This means that, for example, the 12 year old boy whose DNA was surreptitiously collected by the NYPD had his DNA remain in the OCME index for more than a year while lawyers navigated a procedural morass to remove his profile. In part due to the lack of procedures, but also because people are simply unaware their material is stored there, and because there are not enough lawyers challenging it, the OCME has only removed seven DNA profiles from its index in the last year.³⁰

III. A REVIEW OF THE NATIONAL LANDSCAPE REVEALS THAT NEW YORK CITY’S UNREGULATED INDEX IS LESS PROTECTIVE THAN THAT OF ANY OTHER STATE, INCLUDING NEW YORK STATE ITSELF

By maintaining an unregulated DNA index that includes juveniles and people who have not been charged or convicted of crimes, New York City holds the unfortunate distinction of having the least restricted and most expansive DNA identification index in the country. Unlike New York State, which does not authorize DNA indexing of individuals without qualifying

²⁶ Compare *People v. Moore*, 61 Misc. 3d 868 (Sup. Ct. Kings Co. 2018) (surreptitiously collected cigarette butt was “abandoned”) with *People v. Flores*, 65 Misc. 3d 971, 975 (Sup. Ct. Bronx Co. 2019) (surreptitiously collected cigarette butt was “seized”). Appellate courts have not weighed in on the issue of surreptitious precinct collection of detainees, but have, in other contexts, permitted police to surreptitiously collect DNA under the “abandonment” doctrine. The abandonment doctrine is an exception to the Fourth Amendment that allows the police to seize items that were “abandoned” by the original owner. See *People v. Sterling*, 57 A.D.3d 1110 (2008) (no expectation of privacy for sentenced inmate in discarded milk carton while in State prison).

²⁷ A “core” location is a genetic location considered by the FBI to be the most probative for DNA comparisons. See <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>.

²⁸ See OCME Forensic Biology CODIS Manual, *CODIS Profile Management* (Eff. Date Jul. 15, 2019), § 4.2.4.2, https://www1.nyc.gov/assets/ocme/downloads/pdf/technical-manuals/forensic-biology-technical-manuals/profile_management_121919.pdf.

²⁹ *K.M.*, 54 Misc. 3d at 830 (explaining that the NYC DNA index could contain evidence for the vast majority of crimes committed in New York State).

³⁰ *Supra*, n. 1.

convictions, 31 states and the federal government have chosen to allow for DNA to be collected from persons upon arrest.³¹ But these jurisdictions all have enacted laws, commonly referred to as “DNA Arrestee Laws,” that, while allowing for arrestee DNA, regulate its collection, use, and expungement.

New York is among 13 states that have decided not to collect DNA from people who have not been convicted of a crime. Yet in New York City, this is happening without regulation. This is an injustice that must be remedied. Below is an overview of states’ DNA Arrestee Laws and the range of protections they provide.

a. Thirty-one States and the Federal Government Have DNA Arrestee Indexing Laws

Thirty-one states have, along with the federal government, enacted DNA Arrestee Laws. DNA Arrestee Laws “authorize the analysis of DNA samples collected from individuals arrested or charged, but not convicted, or certain crimes.”³² The states that have enacted some form of DNA Arrestee Law are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and Wisconsin.³³

Each state’s laws vary in terms of the crimes that qualify for sample collection, whether or not a probable cause hearing is required prior to DNA testing, and procedures for expungement of the sample.³⁴ A study published by the National Conference of State Legislatures in 2018 shows that 29 states allow for DNA to be collected from individuals arrested for at least some felonies, while eight states have laws that authorize DNA collection from those arrested for certain misdemeanors.³⁵ Thirteen states require a hearing to determine whether probable cause existed for an arrest that qualified for DNA sample collection and analysis in order for the sample to be maintained in the system.³⁶ Four of those states have carved out an exception to this requirement if the person was arrested pursuant to a warrant based on probable cause.³⁷ The requirement of a judicial finding of probable cause is a particularly important protection as it prevents DNA dragnets or law enforcement targeting a person for DNA collection without justification – both of which currently happen in New York City. For example, during the investigation into the murder of Karina Vetrano, NYPD officers collected DNA from more than 360 Black and Hispanic men

³¹ See National Conference of State Legislatures, *DNA Arrestee Laws*, <http://www.ncsl.org/Documents/cj/ArresteeDNALaws.pdf>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* Those states are: Colorado, Illinois, Maryland, Minnesota, Nevada, New Mexico, North Carolina, Tennessee, Texas, Utah, Vermont, Virginia and Wisconsin.

³⁷ See Nevada Stat. § 176.0913; New Mexico Stat. §§29-3-10, 29-16,10; North Carolina Stat. § 15A-266.3A; Wisconsin Stat. §§165.76, 165.84.

in Queens under a department-wide directive to take DNA from men of color.³⁸ Committee members also have represented clients whose DNA was taken in connection with so-called “gang” investigations, without any individualized suspicion of a crime.

States’ DNA Arrestee Laws also set forth procedures for expungement of individuals’ DNA samples.³⁹ Expungement comes into play when a person was arrested for a qualifying crime but is either not ultimately charged with that offense, or is found not guilty. Sixteen states provide for expungement upon the request of the individual.⁴⁰ Thirteen states provide for automatic expungement.⁴¹ These protections are significant because they regulate the destruction of DNA samples so that a person who no longer qualifies for DNA sample collection is not perpetually compared in a DNA index.

b. New York Is One of Nineteen States That Does Not Have DNA Arrestee Laws

Opponents of DNA Arrestee Laws have argued that they infringe on civil liberties and individual privacy, and permit states to collect too much genetic information absent a criminal conviction.⁴² Nineteen states, and the District of Columbia have chosen not to enact DNA Arrestee Laws, including Delaware, the District of Columbia, Georgia, Idaho, Iowa, Kentucky, Maine, Massachusetts, Montana, Nebraska, New Hampshire, New York, Oregon, Pennsylvania, Rhode Island, Washington, West Virginia, and Wyoming.⁴³

New York does not have a DNA Arrestee Law. The Legislature has not opted to allow for the collection and perpetual comparison of DNA from individuals unless they have been convicted of certain crimes. But this is precisely the regime now operating – without oversight – in New York City.

c. Although New York State Has Opted Not to Have a DNA Arrestee Law, New York City Nonetheless Maintains an Arrestee Index

Despite the fact that New York State has chosen not to adopt a DNA Arrestee Law, New York City operates a DNA arrestee index, one with no legal oversight or important due process protections. The OCME’s current practice of taking DNA samples and indexing them is not regulated. Individuals in New York City have therefore wound up with fewer protections than individuals in states that authorize greater government intrusion when it comes to the collection and analysis of DNA samples. This encroachment on civil liberties and privacy is particularly

³⁸ See Jan Ransom, *Mystery of Karina Vetrano’s Death Ends With Murder Conviction*, The New York Times, April 1, 2019, <https://www.nytimes.com/2019/04/01/nyregion/karina-vetrano-trial-verdict.html>.

³⁹ *Supra* n. 31.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See, e.g. Press Release, *ACLU Opposes Expansion of Federal DNA Program to Arrestee Testing* (June 12, 2008), <https://www.aclu.org/press-releases/aclu-opposes-expansion-federal-dna-program-arrestee-testing>.

⁴³ *Supra*, n. 31.

concerning, given that New York’s decision not to enact a DNA Arrestee Law is a reflection of a policy choice to protect those very rights.

IV. NEW YORK CITY COURTS RULE INCONSISTENTLY ON ISSUES RELATED TO THE OCME DNA INDEX

The legal parameters of the City’s unregulated DNA index have confounded local courts, leading to a litany of inconsistent decisions.⁴⁴ Appellate authority in this area is limited as the issue is not reviewable on direct appeal.⁴⁵

Cases addressing the City DNA index often arise in the context of motions by criminal defendants for a protective order barring the upload of any court-ordered sample into that databank.⁴⁶ Courts also consider post-adjudication requests for expungement, or for removal of surreptitiously-collected DNA.⁴⁷

Until 2019, courts were largely divided on the issue of whether the Executive Law’s statutory scheme governing State DNA indexing even applied to the OCME’s database.⁴⁸ Courts that determined that the Executive Law did apply to OCME typically relied on the preemption doctrine. Under this principle, if the State legislature enacts a “comprehensive and detailed regulatory scheme” in a certain area, then those regulations limit local governments from creating different rules.⁴⁹ On the other hand, courts that found the Executive Law did not apply to OCME generally found that the legislature’s reference to “state” DNA indices, as opposed to local ones, meant that the local government was free to do as it liked in the area.⁵⁰ The Appellate Division, First Department resolved this conflict in an August 2019 decision, *Samy F. v. Fabrizio*, holding that the Executive Law *does* govern OCME’s actions, and, as such, pre-empts regulations that are different from State Law.⁵¹ However, because *Samy F.* concerned a narrow question of whether a DNA sample can be stored in the OCME index after a person is adjudicated a Youthful Offender, the Court expressly reserved the larger question of the OCME’s authority to maintain an index of people who have not been convicted of crimes.⁵²

⁴⁴ See, e.g., *People v. K.M.*, 54 Misc.3d 825 (Sup. Ct. Bronx Co. 2016) (OCME DNA index pre-empted by State law); *People v. Flores*, 2018 WL 6037592 (Crim. Ct. N.Y. Co. 2018) (same); *People v. White*, 30 Misc.3d 304 (Sup. Ct. Bronx Co. 2018) (OCME DNA index permissible under State law).

⁴⁵ See *People v. James*, 173 A.D.3d 1207 (2d Dept. 2019) (motion to prevent inclusion in OCME DNA index not reviewable on direct appeal of conviction).

⁴⁶ *Supra* n. 44.

⁴⁷ See, e.g., *Samy F. v. Fabrizio*, 176 A.D.3d 44 (1st Dept. 2019).

⁴⁸ See *K.M.*, *supra*, n. 44 (Executive Law does apply); *People v. Mohammed*, 48 Misc.3d 415 (Sup. Ct. Bronx Co. 2015) (Executive Law does not apply).

⁴⁹ See *K.M.*, *supra*, n. 44, citing *People v. Diack*, 24 N.Y.3d 674 (2015) (State SORA regulations pre-empted local government from making broader registration requirements).

⁵⁰ See *Mohammed*, *supra* n. 48.

⁵¹ See *Samy F.*, 176 A.D.3d at 49.

⁵² *Id.*, 176 A.D.3d at n.1.

The narrowness of the issue presented in *Samy F.* has resulted in continued confusion in the trial courts. Some judges agree that, given the broad ruling that the Executive Law applies to the OCME, pre-conviction DNA cannot be stored in the local DNA index.⁵³ Other judges, however, find that because *Samy F.* noted that DNA may be “stored” in a local database (which, as explained in Section I, is different from an index), and because the case is not squarely on point to all DNA indexing, pre-conviction indexing *is* allowed.⁵⁴ Judges taking this position note that, “[u]ntil [there is a] legislative amendment, there will continue to be inconsistency in these rulings.”⁵⁵

As explained in the next section, pending legislation would resolve this inconsistency. A.7818/S.6009 clarifies that only a single computerized DNA index is authorized by law, and expressly prohibits any municipality from establishing or maintaining a municipal DNA identification index. The bill also clarifies that no one other than designated offenders are eligible for permanent DNA indexing. It adds pathways for DNA expungement for people whose DNA is currently stored despite not having any criminal conviction, and broadens the jurisdiction over expungement to Family Court, for juveniles who had DNA taken by police. Critically, the bill does *not* limit the ability of local DNA laboratories to store and compare – as opposed to “index” – individual DNA samples.

IV. THE LEGISLATION IS APPROPRIATELY AND NARROWLY TAILORED

The City Bar has long supported the responsible use of DNA comparisons. Indeed, in 2012, the City Bar supported the “all crimes” expansion of the State DNA index. However, unregulated local indexing of DNA from juveniles and individuals who have not been convicted of a crime treads on important privacy and due process rights, while also exposing the system to an increased risk of false matches. The City Bar therefore supports legislation to clarify that there is a single State-run, State-regulated, computerized DNA identification index, and to provide for the expungement of any DNA stored in a municipal DNA identification index.

Critically, the City Bar supports this legislation because it is narrowly-tailored to address the local indexing of people who are not convicted of crimes, while still allowing local laboratories to test evidence and submit samples for comparison to the regulated State and National DNA indices. This bill only amends the DNA identification index section of the Executive Law (§ 995-c). It leaves unchanged the portions of the Executive Law and the NYCRR that permit local laboratories to do the important work of testing DNA evidence. This work includes maintaining a database of laboratory workers whose DNA is compared to evidence to check for contamination, and storing evidence samples from crime scenes and sharing the crime scene evidence with the State and National DNA indices.⁵⁶

⁵³ See, e.g., *People v. Matthew Nunez*, Ind. No. 181/2019 (Sup. Ct. Bronx Co. Aug. 5, 2019) (unpublished).

⁵⁴ See, e.g., *People v. DaJohn Gamble*, Ind. No. 1256/18 (Sup. Ct. Bronx Co. Oct. 3, 2019) (unpublished).

⁵⁵ *Id.*, at * 3, quoting *People v. Flores*, 61 Misc. 3d 1219(A) (Crim. Ct. Bronx Co. 2018).

⁵⁶ See Exec. L. § 995—b (creating Commission on Forensic Science, with authority to set guidelines for DNA testing at local laboratories); 9 NYC RR § 6192.1(r) (defining local DNA index systems as those that test evidence and upload to “higher order” DNA indices); 9 NYC RR § 6192.3 (providing procedures for local laboratories to upload evidence samples to State databank).

Although the OCME does not appear to have taken any public position concerning this legislation, the City Bar is mindful of criticism of this bill from former NYPD Commissioner James O’Neill. In a recent op-ed, he wrote that the OCME’s municipal DNA index serves an overall policy good by solving crimes.⁵⁷ He also claimed that there had never been a false conviction, indictment or arrest based on a “hit” from the OCME database.⁵⁸ While the City Bar takes this point of view seriously, we respectfully submit that they do not withstand close scrutiny. While the New York State DNA identification index regularly publishes statistics for “cold hits,” which are cases where a DNA sample collected from person deemed a designated offender matches to DNA evidence from a previously unsolved case,⁵⁹ neither the NYPD nor the OCME make any public reporting of whether any such hits are generated. And, in at least one high-profile case, the OCME index led to the wrongful arrest and year-long prosecution of a man for a crime he did not commit.⁶⁰ Ultimately, while there are many tools that may be useful in crime solving, decisions about DNA indexing have already been made by the legislature, and any expansion of those limitations should be made by legislators who are accountable to the people of New York.

In sum, the City Bar supports this legislation for the following reasons: (1) the OCME’s DNA identification index exceeds strict limitations and regulations of the State DNA identification index; (2) the current practice violates privacy rights of individuals who have not been convicted of crimes; (3) the courts are unsure of how to treat the OCME DNA identification index; and (4) the OCME index is massive, containing at least 31,400 profiles, including those of children and people who have never been convicted of a crime.

The proposed legislation achieves the goals of the Executive Law as it was originally intended. In enacting the aforementioned DNA laws, the state legislative process worked and a balanced law was enacted. In order to preserve that balance in the City of New York, we urge the legislature to enact this important law.

February 2020

⁵⁷ See 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-t6avbtmxcbfwvadge6uwb33lsm-story.html>.

⁵⁸ *Id.*

⁵⁹ See FBI-CODIS NDIS Statistics <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics> (reporting monthly numbers for the State identification index, but nothing for any municipal index).

⁶⁰ *Supra* n.7.