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At the April 25, 2012 Hearing on

H.R. 3361, the "Utilizing DNA Technology to Solve Cold Cases Act of 2011"

Before the House Judiciary Subcommittee on Crime,

Terrorism, and Homeland Security

Good morning Chairman Sensenbrenner, Ranking Member Scott, and Members of the Committee. Thank you for the opportunity to testify on behalf of the American Civil Liberties Union (ACLU) and its more than half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, about familial searching.

INTRODUCTION

In recent years, DNA-related technology has revolutionized the criminal justice system, helping to convict the guilty and free the innocent. It has proven to be a more precise method of linking perpetrators to crimes scenes than methods such as eyewitness testimony, fingerprints, or other forensic identification techniques.

Familial searching takes DNA technology in a new direction, one that no longer involves finding a direct match between a crime-scene sample and a perpetrator's sample. Instead, familial searching compares a crime-scene sample to scores of DNA samples taken from people who are demonstrably innocent of the crime (because their DNA does not match the crime-scene sample) in the hope that one of those known samples may belong to a blood relative of the perpetrator. Further DNA testing, analysis, and investigation are necessary to determine whether the perpetrator can be identified in this manner, a process that often will involve investigating multiple innocent family members.

Familial searching is qualitatively different from more established DNA techniques: it is inherently less precise; it implicates people in criminal activity because of who their family is and the size of that family, rather than what they have done; and it focuses investigative attention on people who are known to be innocent. Because of these differences, it is important that Congress take an active role in determining how this technique will be used.

If Congress determines that the benefits of familial DNA searching outweigh the fiscal and social costs, it should do what it did in the context of wiretapping and create a statutory framework to ensure that this powerful emerging technology is used appropriately, in ways that respect personal and family privacy and other constitutional values. Specifically, Congress should draw on the models provided by wiretap laws and require the government to obtain authorization from a neutral magistrate before engaging in familial searching. It should also limit the use of familial DNA searches to very serious cases that present a continuing threat to public safety, and require law enforcement officials to exhaust other alternatives before using this invasive technique, as does the wiretap law and California's familial-searching protocol. Finally, fundamental federalism principles mean that individual states have a right not to expend their resources assisting with familial DNA searching, particularly because the laws of many states expressly or implicitly forbid such assistance. Any protocol will have to take this into account. These safeguards will help ensure that familial DNA searching is appropriately limited without interfering with the legitimate use of the technique.

A Very Brief Introduction to DNA Databanks and Familial Searching[1]

DNA databanks comprise two distinct components: the actual biological samples and the computerized database of the profiles generated by analyzing these samples. In criminal-justice databanks, the biological samples are collected from crime scenes (forensic samples) and from known individuals (known samples). Until recently, known samples were usually obtained by drawing blood, although now most states and the federal government primarily obtain samples by swabbing the inside of a person's cheek to collect skin cells.

The government analyzes both forensic samples and known samples to create DNA profiles, which are essentially a digitized description of twenty-six parts of a person's nuclear DNA. The profiles are then uploaded to the Combined DNA Index System (CODIS), a centralized, searchable law enforcement database accessible to state and federal law-enforcement agencies. CODIS was created by the FBI in 1994 after Congress authorized it to establish a national DNA database to link existing state and local databanks. The biological samples themselves are retained by the local police or crime lab for later testing.

Once an arrestee's profile is uploaded into CODIS, it is compared to the thousands of crime-scene samples in the CODIS forensic database. As long as the arrestee's profile remains in CODIS, any new crime-scene samples will be searched against it. When an arrestee profile exactly matches a crime-scene profile, CODIS automatically notifies the agencies that provided the sample. Then that agency will usually provide the identity of the arrestee to the police authority with jurisdiction over the crime so that the latter can follow up.

It is only if there is no match – meaning that the perpetrator's DNA profile is not in CODIS – that familial searching becomes relevant. As the FBI describes the process on its website,

> 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. Familial searching is based on the concept that first-order relatives, such as siblings or parent/child relationships, will have more genetic data in common than unrelated individuals. Practically speaking, familial searching would only be performed if the comparison of the forensic DNA profile with the known

[1] The first three paragraphs of this section are adapted from Michael T. Risher, *Racial Disparities in Databanking of DNA Profiles*, in Sheldon Krimsky and Kathleen Sloan, eds., RACE AND THE GENETIC REVOLUTION (Columbia Univ. Press 2011), 48-49.

> offender/arrestee DNA profiles has not identified any matches to any of the offenders/arrestees.[2]

The FBI acknowledges several limitations of familial searching: although "a relative must already be in the database in order for the search to identify them as a potential relative of the forensic profile," "regardless of whether or not a relative is in the database, a familial search will always generate a ranked list of potential candidates for evaluation."[3] Under California's protocol, for example, this list may include as many as 168 possible candidates.[4] And "even if a relative is in the database, it is possible that the relative may not be included in the ranked list produced by the familial search." Thus, familial searching will always generate a list of suspects, but this list may not contain a relative of the perpetrator even when CODIS contains a relative's profile, because there may be a large number of profiles that are more similar to the forensic profile than is the relative's profile.

Importantly, allowing the FBI to perform familial searching with the national database will result in much larger candidate lists than are generated when individual states use the same technique in their databases, and the actual familial match may be far down the list:

> The position of a true relative (if in the database) mainly depends on the database size and the specific alleles in the profiles. In a considerable proportion of cases, a true relative may be at the bottom of the list, or even not on the list…. For an evidence profile searched against a database containing 1 million unrelated samples, more than 200 unrelated samples are expected to have higher positions in the candidate list than the true full-sib[ling of the perpetrator].[5]

This is significant because the process of eliminating all the candidates who are demonstrably unrelated to the perpetrator is extremely labor intensive. In order to eliminate candidates on the list who cannot be related to the perpetrator, the lab must analyze a different part of the DNA than is used to create the CODIS profile. Specifically, if the crime-scene sample has been analyzed and determined to belong a male, the lab will test a part of the Y chromosome, which is passed down unchanged from father to son, from the crime-scene sample. Then it will test that same part of the samples on the candidate list until it finds a match or it has tested all the samples

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[2] http://www.fbi.gov/about-us/lab/codis/familial-searching (all webpages visited April 2012).

[3] *Id.*

[4] California Department of Justice, CAL-DNA Data Bank Technical Procedures Manual, at 29 (10/17/08), available at http://www.aclunc.org/news/press_releases/asset_upload_file490_8577.

[5] Ge, Budowle, Eisenberg, & Chakraborty, *Comparing DNA Based Familial Searching Policies*, 21th international Symposium of Human Identification, San Antonio (2010), available at http://www.promega.com/~/media/files/resources/conference%20proceedings/ishi%2021/oral%20presentations/ge.ashx?la=en

on the list without finding a match.[6] To do this, the investigating agency must, for each sample to be tested, contact the law-enforcement agency that is storing the sample and arrange for it to be removed from storage and retested. As the FBI cautions individual states that are considering using the technique, "[i]mplementation of a successful familial search program takes time and requires significant resources and staff."[7] Implementing a nationwide familial search program will require even more resources and staff.

After this laboratory process is complete, "[a]ny offenders not eliminated by the [Y-chromosome] comparison could be patrilineally related to the true perpetrator and will be candidates for further investigation and consideration as potential genetic relatives of the true perpetrator."[8] In California, the next step is a "background investigation" on each possible candidate to see whether that candidate can be eliminated as "a potential relative of the true perpetrator."[9] Any candidate(s) who are not eliminated through this investigation are then identified to the investigating law-enforcement agency for follow up investigation.[10] This investigation may potentially include a wide range of law-enforcement operations, including interviews with family members, associates, or colleagues, surveillance, and other activities that may have impact the privacy or day-to-day life of the individuals subjected to them.

Costs and Benefits of Familial Searching

As a RAND Corporation report recently observed, evaluating the efficacy of CODIS is difficult because "data are seriously lacking."[11] This same difficulty occurs when trying to evaluate the efficacy of familial searching, because there is so little information. One paper that is available reports contradictory conclusions: although it states that a theoretical study at California's crime lab using "artificial families" suggested that there should be a high success rate, it also reveals that of ten familial searches done in California, only one resulted in a possible match that was

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[6] California Department of Justice, CAL-DNA Data Bank Technical Procedures Manual, *supra* n. 4, at 27 ("As part of this process the initial candidate list of offenders' DNA samples will be profiled for Y-STR type, meaning that they will be retested to check for a specifically paternal relationship.").

[7] http://www.fbi.gov/about-us/lab/codis/familial-searching

[8] *Id*. at 28.

[9] *Id*. at 32.

[10] *Id*. at 35.

[11] RAND Center on Quality Policing, *Toward a Comparison of DNA Profiling and Databases in the United States and England* (2010) at 22 ("[D]ata are seriously lacking in the U.S. system. Inadequate and insufficient data are captured by the various labs and CODIS organizations. Very little of the data that do exist and are publicly available are reported to a central repository, such as the FBI."). Available at http://www.rand.org/pubs/technical_reports/TR918.html

reported to the investigating agency; the rest were excluded in the lab.[12] Furthermore, the three partial matches obtained in Colorado that led the FBI and California to allow familial searching all failed to generate a single lead.[13] Although the value of the single match generated by these thirteen searches was great – it resulted in an arrest and prosecution for a string of murders – this means that in the other twelve cases the lab most likely had to perform new Y-chromosome analysis of all the candidate samples – up to 168 in each case – in order to eliminate them, as discussed above. These numbers must be taken into account in weighing the costs and benefits of familial searching.

Even putting aside fairness and civil-liberties issues, a real cost of familial searching is that it takes money and lab time away from other important programs. When resources are spent on familial searching, they cannot be used to, for example, reduce the enormous backlogs of untested evidence in rape cases, a step that would have huge benefits in solving and preventing crimes.[14] As a Detroit prosecutor recently lamented when discussing the 11,000 untested rape kits in her county alone, "[i]f we had the funding to examine and have all of these rape kits tested, we would do that."[15] Every dollar spent one familial searching is one that cannot be spent on this and other important projects.

Moreover, performing familial searching in the national database will involve problems that do not occur when such searches are done in individual state databases. As discussed above, the sheer size of the national database itself will lead to a larger candidate list, and thus the need for more follow-up testing of listed samples. For samples that are maintained by a state other than the one that requested the search, this process undoubtedly will be particularly time-consuming; there will also likely be questions of which state will conduct or pay for the re-testing.

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[12] Myers *et al.*, *Searching for first-degree familial relationships in California's offender DNA database: Validation of a likelihood ratio-based approach*, Forensic Science International: Genetics (2010). The one success was in the so-called Grim Sleeper case.

[13] Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Michigan Law Review 291, 291-92 (2010).

[14] A 2011 report from the National Institute of Justice acknowledges that "It is unknown how many unanalyzed sexual assault kits (SAKs) there are nationwide," but reports that "18 percent of unsolved alleged sexual assaults that occurred from 2002 to 2007 contained forensic evidence that was still in police custody (not submitted to a crime lab for analysis)." National Institute of Justice, *The Road Ahead: Unanalyzed Evidence in Sexual Assault Cases* (2011) at iii, 1 , available at https://ncjrs.gov/pdffiles1/nij/233279.pdf. The report concludes that "[d]elays in evidence being sent to a lab — as well as delays in analyzing evidence — result in delays in justice. In worst-case scenarios, this can lead to additional victimization by serial offenders or the incarceration of people wrongly convicted of a crime." *Id*. at 14.

[15]National Public Radio April 21, 2012, *Untouched, Thousands Of Rape Kits Await Justice*, available at http://www.npr.org/2012/04/21/151113247/untouched-thousands-of-rape-kits-await-justice

And the follow-up testing and investigation of out-of-state samples will be less likely to produce actual results because the perpetrator and his family are, in general, more likely to live in the state where he has committed his crimes than to live on the other side of the country. Finally, there are serious questions about what will happen if a state that receives a request to perform follow-up analysis of a sample in its custody is unwilling to assist with familial searching, perhaps because such searching is expressly prohibited by state law (as in Maryland),[16] because the legality of such testing is unsettled under state law (as in a number of other states),[17] or because the burden such testing could impose. Our federal system would not allow the FBI to compel or conscript state crime labs to perform such testing.[18]

Follow-up investigation outside the lab may also run into a variety of obstacles, many of which are attributable to the reality that family relationships in our society do not always track biological relationships. Some such issues, like the possibility that the person associated with the known sample is adopted or is a step-father or step-son, may be fairly easy to discover, if not resolve, through public records and may not be particularly controversial. But others are more problematic. A 2005 study found that approximately 3.7% of fathers are not, in fact, biologically related to those they believe to be their biological children, usually because of infidelity.[19] This can both reduce the efficacy of familial searching and also vastly increase the social costs of the technique, particularly if this information is disclosed to family members or others in the course of a follow-up investigation, an issue that the study specifically raised as a potential problem.[20] As the authors bluntly put it, "[s]uch knowledge can also destroy families;"[21] it can also lead to domestic violence,[22] situations that are likely to be exacerbated if the family is simultaneously learning that a member is being accused of a serious crime. Even when both parents are aware

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[16] Md. Code, Public Safety, § 2-506(d) ("A person may not perform a search of the statewide DNA data base for the purpose of identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the DNA sample was acquired.").

[17] A 2009 survey found that 17 states that responded prohibited familial searching. *See* Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Michigan Law Review 291, 291-92 (2010).

[18] *See Prinz v. United States*, 521 U.S. 898 (1997).

[19] Bellis *et al., Measuring paternal discrepancy and its public health consequences*, J Epidemiol Community Health 2005; 59:749-754, available at http://jech.bmj.com/content/59/9/749.full.

[20] *Id.* ("[U]sing genetic techniques in crime detection …. can inadvertently uncover inconsistencies in a family's genetics that disclose [paternal discrepancy]. However, while the opportunity to expose [paternal discrepancy] through paternity testing or routine health and judicial procedures has increased, little consideration has been given to the consequences.").

[21] *Id.*

[22] *See id.*

of a child's paternity, other family members may not be. Follow-up investigation may lead a parent to reveal the existence of other biological children that are unknown to other family members. Finally, the mere fact that government officials have become privy to this sensitive information is itself troubling for many Americans, 54% of whom reported that they had little or no trust in law enforcement having access to their genetic information.[23] Our Constitution and laws protect us from government snooping regardless of what the government intends to do with the intimate details it learns.[24]

Familial searching may also lead to an exacerbation of racial and class disparities in our criminal justice system, particularly if it is used routinely, rather than in the exceptional cases where other investigative techniques have failed. As professor Jennifer Mnookin has written about the technique,

> Put plainly, it is discriminatory. If I have the bad luck to have a close relative who has been convicted of a violent crime, authorities could find me using familial search techniques. If my neighbor, who has the good fortune to lack felonious relatives, left a biological sample at a crime scene, the DNA database would not offer any information that could lead to her.
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> When DNA databases were first put into use, there was much debate about whether they were an impermissible invasion of people's privacy. The argument that generally won out was that convicted criminals gave up some privacy rights. But those people who just happen to be related to criminals have not given up their privacy rights as a consequence of their actions. To use a search technique that targets them simply because of who their relatives are is simply not fair.

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[23] Genetics and Public Policy Center , *U.S. Public Opinion on Uses of Genetic Information and Genetic Discrimination* at 2 (2007), available at http://www.dnapolicy.org/resources/GINAPublic_Opinion_Genetic_Information_Discrimination.pdf; *see generally* E.W. Clayton, *Ethical, legal, and social implications of genomic medicine*. N. Engl. J. Med. 349, 2003. In another Johns Hopkins study, "respondents were consistently more worried" about government, as opposed to private, access to their genetic material, and "84% felt that it would be important to have a law protecting [genetic] research information from law-enforcement officials." Kaufaman, D., *et al*. *Public Opinion About The Importance of Privacy in Biobank Research,* 85 American Journal of Human Genetics Vol. 5, pp. 643-654, at 649 (2009).

[24] *See United States v. Calandra*, 414 U.S. 338, 354 (1974) ("The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong … is fully accomplished by the original search ….")

> This concern is exacerbated because African Americans and Latinos make up an outsized portion of the DNA database compared with their proportion in the population at large. This means that African Americans and Latinos not in the database would be disproportionately available to familial searching. The same point could be made for the poor and working-class populations compared with those who are wealthier. [25]

Importantly, Professor Mnookin is concerned not only about the discriminatory arrest and prosecution of people who may be guilty, but also the discriminatory failure to apprehend criminals who do not have a family member in the database:

> But apart from these disparate racial and economic factors, it is not right to have an investigative technique that targets not just convicted criminals but also their relatives while leaving the rest of us immune.[26]

Similarly, Professor Erin Murphy makes strong arguments that familial searching is incompatible with our fundamental values and that it is ineffective, noting that

> familial searches should be forbidden because they embody the very presumptions that our constitutional and evidentiary rules have long endeavored to counteract: guilt by association, racial discrimination, propensity, and even biological determinism. They are akin to adopting a policy to collect and store the DNA of otherwise database-ineligible persons, solely because they share a blood relation with a convicted person, while deliberately sheltering similarly situated individuals from similar genetic exposure. Such an approach is likely to be an ineffective means of crime control—particularly when weighed against the costs done to society by such a strategy—and even if effective, contradicts the very principles of equality and liberty that law enforcement serves to uphold and defend.[27]

If familial searching were to become a primary investigative tool, which would necessarily lead to a reduction in resources devoted to other investigative techniques, it would produce a system that disproportionately focused on people who, because of racial and economic factors or simply

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[25] Jennifer Mnookin, *Devil in the DNA database*, L.A. Times April 05, 2007, available at http://articles.latimes.com/2007/apr/05/opinion/oe-mnookin5. For a discussion of the broader issue, *see* Michael Risher, *Racial Disparities in Databanking of DNA Profiles*, in *Race and the Genetic Revolution*, 47-62 (2011).

[26] *Id*.

[27] Erin Murphy, *Relative Doubt: Familial Searches, of DNA Databases*, 109 Michigan Law Review 291, 304 (2010)

because they have large families, have a relative in the database, while reducing the investigation and apprehension of others who may have committed more serious crimes.[28]

Minimizing the Costs of Familial Searching

The only way to completely eliminate the many problems associated with familial searching is to prohibit it, a step that several states have already taken, either through legislation or administrative policy.[29] However, if Congress does decide to authorize the technique, it is possible to reduce its costs and problems while allowing familial searching in appropriate cases, just as Congress did in 1968 when it created a statutory framework to allow the appropriate use of wiretaps while protecting privacy, and has done in numerous other instances to protect the privacy of information in areas ranging from Americans' cable TV viewing habits to their finances and many other matters.[30] In fact, the wiretap framework, which has been in place for more than 40 years, may serve as a useful model for a statutory scheme to govern familial searching. California's protocol for familial searching also has important provisions that could be incorporated to create a framework that allows familial searching in appropriate cases while reducing unfairness and the dangers to genetic and familial privacy.

In its current form, the bill already includes some crucial protections, including a limitation on the types of cases in which the technique can be used, reporting requirements, and a directive to enact regulations to protect privacy. However, the current bill omits two key provisions, both of which are found in the wiretap law, that are necessary to provide oversight and prevent misuse of familial searching:

1. **The statute should require that other investigative techniques be used first.**

The reference to "cold cases" in the bill's title suggests that HR 3361 is intended to allow familial searching in cases where other law-enforcement techniques have failed. This is a sensible limitation: because of the individual and familial privacy interests at stake and the resources involved, and because of the disparate impact that these searches can have, familial searching should only be used when it is necessary. Thus, California only allows the technique when the "case is unsolved and all investigative leads have been exhausted."[31] Congress

[28] *See* Risher, supra n.25, at 53-54.

[29] *See* nn. **Error! Bookmark not defined.**-17, *supra*.

[30] *See* Orin Ker, T*he Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 855-56 (collecting federal privacy laws).

[31] California Department of Justice, Division of Law Enforcement Information Bulletin 2008-BFS-01, DNA Partial Match (Crime Scene DNA Profile to Offender) Policy (April 24, 2008) available at http://www.aclunc.org/news/press_releases/asset_upload_file490_8577.

imposed a similar limitation when it enacted the Wiretap Act to combat organized crime,[32] requiring that applications for wiretaps include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."[33] This requirement is designed "to insure that wiretapping is not resorted to in a situation in which traditional investigative techniques will suffice to expose crime."[34]

Unfortunately, the current text of the bill does not include any such requirement. This same "necessity requirement" found in the wiretap statute should apply to familial searching so that familial and genetic privacy receive at least the same level of protection as do telephone calls.

2. The statute should require judicial authorization for familial searching.

The Supreme Court has long made clear that searches conducted without a warrant are disfavored and presumptively violate the Fourth Amendment's prohibition on unreasonable searches and seizures.[35] Although no court has addressed the question of whether a warrant is required to conduct familial searching, it is clear that some parts of the procedure do constitute searches under the Fourth Amendment. Specifically, the re-testing of stored DNA samples to develop a new Y-chromosome profile is a search, as many courts have held, because it reveals information about that sample that was previously unknown.[36] And the exception to the warrant

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[32] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. § 2510 *et seq.* "The major focus of the legislation was on use of wiretapping and electronic surveillance by law enforcement officials to combat organized crime." *Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414, 418 (5th Cir. 1980).

[33] 18 U.S.C.A. § 2518(1)(c).

[34] *United States v. Webster,* 734 F.2d 1048, 1055 (5th Cir. 1984); *see United States v. Kahn,* 415 U.S. 143, 153 n.12, (1974) ("The necessity requirement exists to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.").

[35] *See e.g., Arizona v. Gant*, 556 U.S. 332, 338 (2009) (applying "the basic rule that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

[36] *See, e.g., United States v. Mitchell*, 652 F.3d 387, 407 (3d Cir. 2011) (en banc) ("The second "search" at issue is, of course, the processing of the DNA sample and creation of the DNA profile for CODIS."); *Banks v. United States*, 490 F.3d 1178, 1183 (10th Cir. 2007) ("analyzing the DNA contained within the blood sample, or even from a cheek swab, must pass Fourth Amendment scrutiny"); *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269 (9th Cir. 1998). ("These [DNA] tests may also be viewed as searches in violation of the Fourth Amendment …."); *United States v. Davis*, 657 F. Supp.2d 630, 644 (D.Md. 2009) ("the extraction of blood from Davis' clothing and the subsequent chemical analysis of his DNA profile are both searches subject to scrutiny under the Fourth Amendment"); *People v. King*, 82

requirement that allowed the initial testing of these samples – that the subjects were in prison or on parole, or (in some states) had been arrested or charged with an offense – may no longer be applicable, a change that may well make the warrantless re-testing of such samples unconstitutional, either under the Fourth Amendment or under the law of the state that maintains the sample.[37]

Creating a statutory framework under which law enforcement would apply for judicial authorization to conduct familial searching would reduce the possibility that the courts would invalidate the technique, perhaps leading to the exclusion of crucial evidence or the overturning of convictions.[38] It also would reduce the possibility that a governmental agency or individual officers would face state or federal civil liability for conducting such searches or acting on the results of them. And it would help protect the privacy of families and individuals who may, through no fault of their own, be caught up in investigations that were caused by line officers or political appointees who may, intentionally or not, go beyond what the law allows in their understandable zeal to solve a particularly notorious crime. As the Supreme Court has long made clear, "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."[39]

To obtain such an order,[40] the police would need to establish the following:

Cal. App. 4th 1363, 1370-71 (2000) ("chemical analysis of such [DNA] samples to obtain physiological data, implicate[s] Fourth Amendment privacy interests."); *see also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989) (analysis of urine for presence of drugs constitutes search under Fourth Amendment). Note that there is an important difference between retaining an already-created profile in CODIS (which some courts have held is not a new search) and re-analyzing the physical sample to obtain a new type of profile (which is necessary for familial searching), which, as the above-cited cases make clear, is a search.

[37] *See, e.g., United States v. Weikert*, 504 F.3d 1, 15-17 (1st Cir. 2007) and cases cited therein.

[38] The Supreme Court has never addressed the constitutionality of the warrantless seizure of DNA for inclusion in databanks; no court has addressed the legality of familial searching. The high Court's recent holding that GPS tracking is a search, which overruled several lower court holdings, illustrates the problems that can arise when law enforcement makes extensive use of new investigative technology without getting judicial authorization. *See United States v. Jones*, 132 S.Ct. 945 (2012).

[39] *Johnson v. United States*, 333 U.S. 10, 14 (1948); *see id.* (Fourth Amendment's "protection consists in requiring that [] inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

[40] The statute, like the wiretap statute, should avoid the use of the term "warrant" unless it requires a showing of probable cause to show that the search will discover relevant evidence. *See United States v. Salamasina*, 615 F.3d 925, 931 (10th Cir. 2010) (issuance of search warrant requires probable cause to believe "that evidence of a crime will be found in the place to be searched."); *accord Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364, 129 S.Ct. 2633,

1. Probable cause to believe that one of the crimes listed in § 2(B) of the bill have been committed.
2. Probable cause to believe that DNA evidence would help solve the crime (i.e., that DNA belonging to the perpetrator had been recovered from the crime scene and a profile created).
3. No identical match for the DNA sample collected from a crime scene can be identified in the offender index, as currently required by § 2(A).
4. That "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;" as is currently required for wiretaps under 18 U.S.C. § 2518(3)(c).
5. The scope of the search for which authorization is sought.

Such a requirement would not impede the legitimate use of familial searching because the technique itself necessarily involves a significant expenditure of time and resources and should not be used routinely. Any decision to use familial searching will only be made after extensive investigation and consideration; even after the technique is used, the necessary follow-up testing and investigation will take a considerable amount of time. Requiring the police to present a warrant application to a court will not require a significant additional expenditure of time or resources to this process. Nor, given that this technique is only to be used in very serious cases where other investigative techniques have failed, will it create any burden on the courts. Given the important privacy interests involved, and the lack of any countervailing interests, familial searching should not be allowed without judicial authorization.

CONCLUSION

Although familial searching may in some cases prove to be an effective crime-solving technique, it is one that comes with many costs, including the fiscal costs (which may exacerbate funding problems in other important programs), the unfairness of focusing on suspects simply because they have a family member who has been arrested or convicted (while ignoring those who do not have such family members), and the disruption to family privacy and integrity that the technique and the necessary follow-up investigations can cause. And it is important to remember that many of these fiscal and societal costs will occur even in those cases – perhaps the vast majority of cases – where the technique fails to solve any crime.

If Congress does decide that the benefits of familial searching outweigh the costs, it should take steps to minimize the adverse consequences of the technique, as it did with wiretaps, by requiring that law-enforcement exhaust other available investigative techniques before resorting

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2639 (2009); *Cf.* 18 U.S.C.A. § 2518(1) (referring to an "order authorizing or approving the interception of a wire, oral, or electronic communication"). Given the limitations of familial searching it seems unlikely that such a showing could be made.

to familial searching and, most importantly, that such searching only be done when authorized by a court.