



New York State Defenders Association, Inc.

Public Defense Backup Center

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January 18, 2017

VIA E-MAIL (forensics@dcjs.ny.gov)

The Honorable Michael C. Green
Executive Deputy Commissioner and
Chair, NYS Forensic Science Commission
NYS Division of Criminal Justice Services
80 South Swan Street
Albany, New York 12210

Re: Special Meeting on Familial DNA searching

Dear Commissioner Green:

Thank you for the opportunity to submit written comments regarding the New York State Commission of Forensic Science and the DNA Subcommittee's consideration of whether state regulations should be amended to allow familial DNA searching, and if so, under what conditions. We are not requesting an opportunity to speak at the Commission's special meeting on February 10, 2017.

The New York State Defenders Association (NYSDA) is a not-for-profit membership association of more than 1,900 public defenders, legal aid attorneys, assigned counsel, and private practitioners throughout the state. With funds provided by the State of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to more than 6,000 lawyers who serve as public defense counsel in New York. The Backup Center also reviews, assesses, and analyzes the public defense system in the state, identifies problem areas, and proposes solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary, and other entities.

At the outset, we object to the approach the Commission and the DNA Subcommittee are taking regarding this important issue. The Commission and the DNA Subcommittee have given the public less than one month to submit written comments regarding whether familial DNA searching should be allowed in New York State and if so, the conditions under which it will be allowed. This is an insufficient amount of time for the public and interested parties to prepare detailed and thorough comments. And without any specific proposal or any guidelines for the discussion, the comments may not be as useful as they otherwise could be. This approach does not convey a serious attempt by the Commission and the Subcommittee to receive and consider public comments before making any decision.

We disapprove of any effort by the Commission and the Subcommittee to authorize familial DNA searching, both because NYSDA opposes familial DNA searching in any form and because the Commission does not have the statutory authority to promulgate regulations on this subject. Legislation recently introduced to give the Commission such authority supports our position that there is no current authority. *See A.0683 (2017),* Introduced by Assemblymember William B. Magnarelli. Further, many of the issues and questions that must be considered before allowing familial searching are beyond the purview of the Commission and should be left to the Legislature.

While there is some disagreement regarding the definition of familial DNA searching,¹ it is our understanding that it involves: the intentional or deliberate search of a DNA database using specialized software to find “partial matches” with a DNA profile from a piece of evidence; conducting additional testing and analysis to determine the likelihood that a partial match is a family member of the source of the DNA profile; the disclosure of the names of the partial matches; and the investigation of family members of the partial matches to determine if they are possible suspects. The Commission has already promulgated rules governing inadvertent partial matches and the Commission has provided general information at its meetings regarding partial matches that have occurred since those regulations took effect. However, the Commission has not provided a comprehensive public report regarding the implementation and effectiveness of the existing partial match program. Before taking any action on familial searching, the Legislature should require the Commission to issue such a report.

Among the issues and questions that familial DNA searching raise are:

- What is the relationship between the privacy protections afforded in Civil Rights Law § 79-1 and the use of familial searching?
- Can the racial, ethnic, and class disparities that arise from using existing DNA databases to conduct familial searches be mitigated? If so, how? If not, is such use justified?
- What impact will allowing familial searching have on public perceptions of the police and prosecution and public trust in government generally?
- What are the possible benefits to law enforcement investigations and how likely are they to be realized?
- What are the costs (financial and time) of implementing a familial search policy? Will DNA labs have the resources and capacity to perform the necessary searches and testing? Do law enforcement agencies have the resources and capacity to follow up on possible leads?
- Do those possible benefits to law enforcement outweigh the use of resources implicit in the prior question, the current and future privacy interests of New York residents, the disproportionate impact on certain groups, and the impact on public perception and trust?

¹ See, e.g., “Understanding Familial DNA Searching: Coming to a Consensus on Terminology” (April 2016), available at http://www.denverda.org/DNA_Documents/Familial_DNA/families-and-communities-familial-dna.pdf.

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If, after considering the issues above and receiving public comments, the Legislature decides familial DNA searching should be allowed, questions about the scope of such a program and necessary protections must be considered by the Legislature itself and then by the Commission and the DNA Subcommittee, such as:

- Will familial searching be used to investigate all crimes or only certain categories of crime?
- When in the investigative process should it be used? Once all investigative leads are exhausted? How will that be defined?
- At what points in the process will law enforcement need court approval?
- How often will the Commission be required to report on the implementation of the policy?
- Given that familial searching would constitute a dramatic expansion of the state's use of the DNA databank, should a sunset clause be required?

The Commission and the DNA Subcommittee should use the upcoming meeting to gather information that can inform the legislative process. We urge the Commission and Subcommittee to do so and to decline to proceed with any effort to promulgate regulations authorizing familial DNA searching.

Sincerely,



Susan C. Bryant
Special Counsel