



**COMMENTS OF THE  
ELECTRONIC FRONTIER FOUNDATION  
REGARDING PROPOSED RULE FOR  
DNA-SAMPLE COLLECTION FROM IMMIGRANT DETAINEES**

**Docket No: OAG-164**

**84 Fed. Reg. 56397**

**Submitted on November 12, 2019 to the Department of Justice**

The Electronic Frontier Foundation (EFF) submits the following comments to urge the U.S. Department of Justice (DOJ) to withdraw its proposed rule, published at Docket Number OAG-164, that amends existing regulations to authorize the collection of DNA samples from individuals in immigration detention.<sup>1</sup>

EFF is a non-profit organization that has worked for almost 30 years to protect civil liberties, privacy, consumer interests, and innovation in new technologies. EFF actively encourages and challenges the executive and judiciary to support privacy and safeguard individual rights as emerging technologies become more prevalent in society. With more than 30,000 contributing members, EFF is a leading voice in the global and national effort to ensure that fundamental liberties are respected in the digital environment.

**I. The Proposed Rule Vastly Expands Federal DNA Collection without Evidence that It Will Lead to Solving More Crimes.**

Unlike fingerprints, which can only be used for identification, DNA provides “a massive amount of unique, private information about a person that goes beyond identification of that person.”<sup>2</sup> A DNA sample “contains [a person’s] entire genetic code—information that has the capacity to reveal the individual’s race, biological sex, ethnic background, familial relationships, behavioral characteristics, health status, genetic diseases, predisposition to certain traits, and even the propensity to engage in violent or criminal behavior.”<sup>3</sup> Despite this, the proposed rule massively expands DNA collection and retention for an already vulnerable population without evidence that the program will increase public safety.

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<sup>1</sup> 84 Fed. Reg. 56397.

<sup>2</sup> *State v. Medina*, 102 A.3d 661, 682 (Vt. 2014) (citations omitted).

<sup>3</sup> *People v. Buza*, 4 Cal. 5th 658, 720 (2018) (Cuéllar, J., dissenting) (citations omitted).

**A. The Proposed Rule Marks an Unprecedented Shift from Collecting DNA Based on Conduct to Collecting DNA Based on Status.**

When DNA technology was first introduced in the criminal justice system, collection was limited to individuals who had been convicted of violent crimes.<sup>4</sup> Quickly, the list of qualifying offenses that authorized DNA collection expanded at both the federal and state levels. In *Maryland v. King*, the Supreme Court upheld a Maryland statute that authorized DNA collection from individuals who had been *arrested* for a violent felony.<sup>5</sup> Since this ruling — and with the rapid advancement of DNA technology making it faster, cheaper, and easier to collect and profile DNA<sup>6</sup> — many jurisdictions have moved toward collecting DNA as a matter of course for misdemeanor offenses, even where DNA may not be implicated at all in the offense.<sup>7</sup> For example, one such proposal in Virginia would have added “obstruction of justice” and “shoplifting” to the list of misdemeanor convictions that authorized DNA collection.<sup>8</sup>

The proposed rule further erodes civil liberties by shifting from DNA collection for arrest or conviction of a criminal offense to DNA collection based on an individual’s immigration status. In *King*, the Supreme Court held that a DNA swab did not violate an arrestee’s expectation of privacy “[i]n light of the context of a valid arrest supported by probable cause.”<sup>9</sup> However, for immigrants detained under U.S. authority, there is neither a valid arrest nor probable cause of the individual having committed a crime — because immigration detention is *civil*, rather than *criminal*, in nature. Although the proposed rule argues that DNA collection from immigrants “could be essential to the detection and solution of crimes they may have committed or may commit in the United States,”<sup>10</sup> studies have repeatedly demonstrated no correlation between immigrants and criminality.<sup>11</sup> In fact, the majority of individuals in immigration detention have no

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<sup>4</sup> Mariana Ortega, *Forensic DNA Database Expansion*, Generations Ahead (2011), at 3, available at [https://www.prisonpolicy.org/scans/GenAhead\\_ForensicDNADatabaseExpansion2011\\_\(2\).pdf](https://www.prisonpolicy.org/scans/GenAhead_ForensicDNADatabaseExpansion2011_(2).pdf).

<sup>5</sup> 569 U.S. 435 (2013).

<sup>6</sup> See Electronic Frontier Foundation, *Federal DNA Collection*, <https://www.eff.org/cases/federal-dna-collection>.

<sup>7</sup> See, e.g., Bill Farrar, *Proposal to Expand Mandatory DNA Collection in Virginia Raises Serious Privacy and Due Process Concerns*, ACLU Free Future Blog (Jan. 8, 2018), <https://www.aclu.org/blog/privacy-technology/medical-and-genetic-privacy/proposal-expand-mandatory-dna-collection>.

<sup>8</sup> *Id.*

<sup>9</sup> *King*, 569 U.S. at 465.

<sup>10</sup> 84 Fed. Reg. at 56399 (citations omitted).

<sup>11</sup> See, e.g., Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, Marshall Project (May 13, 2019), <https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between->

criminal convictions;<sup>12</sup> rather, they are detained under suspicion of civil immigration offenses such as being in the United States without authorization. Along with other programs that the Trump administration has implemented — such as Rapid DNA testing of family units at the border<sup>13</sup> and collection of fingerprints from all adults in households seeking to care for unaccompanied minors<sup>14</sup> — the proposed rule demonstrates a push toward normalizing biometric collection from immigrants based on specious notions of public safety. By vastly expanding the amount of DNA collected and added to national DNA databases based on status rather than conduct, the proposed rule brings us closer to a regime of DNA collection from the entire population.

**B. *There Is No Evidence that Increasing the Number of Profiles in DNA Databases Solves More Crimes.***

Despite the rush to collect DNA, research has repeatedly shown that adding more DNA profiles to databases does not solve more crimes. Instead, “improving the collecting of DNA from crime scenes,” not even from known offenders, much less those not even suspected of committing a crime, “would make the real difference in solving cases.”<sup>15</sup>

In 2010, a RAND report recognized that the ability of the police to solve crimes using DNA is “more strongly related to the number of crime-scene samples than to the number of offender profiles in the database.”<sup>16</sup> As the RAND report noted, despite the fact that

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[undocumented-immigrants-and-crime](#); Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56:2 *Criminology* 370 (May 2018), <https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9125.12175>; Walter Ewing et al., *The Criminalization of Immigration in the United States*, American Immigration Council (July 13, 2015), <https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states>.

<sup>12</sup> See, e.g., TRAC, *Immigration and Customs Enforcement Detainees: ICE Data Snapshots, up to December 2018*, [https://trac.syr.edu/phptools/immigration/detention/\(demonstrating that nearly two-thirds of immigrant detainees had no criminal record; and for those with convictions, the most common was for illegal entry, a misdemeanor\)](https://trac.syr.edu/phptools/immigration/detention/(demonstrating%20that%20nearly%20two-thirds%20of%20immigrant%20detainees%20had%20no%20criminal%20record;%20and%20for%20those%20with%20convictions,%20the%20most%20common%20was%20for%20illegal%20entry,%20a%20misdemeanor)).

<sup>13</sup> Priscilla Alvarez & Geneva Sands, *Exclusive: DHS to start DNA testing to establish family relationships on the border*, CNN (May 1, 2019), <https://www.cnn.com/2019/04/30/politics/homeland-security-dna-testing-immigration/index.html>.

<sup>14</sup> Joshua Barajas, *What changes to this fingerprinting rule could mean for migrant children in U.S. custody*, PBS (Dec. 19, 2018), <https://www.pbs.org/newshour/nation/what-changes-to-this-fingerprinting-rule-could-mean-for-migrant-children-in-u-s-custody>.

<sup>15</sup> Erin Murphy, *Inside the Cell* 271-74 (2014).

<sup>16</sup> Jeremiah Goulka et al., *Toward a Comparison of DNA Profiling and Databases in the United States and England*, RAND (2010), at 1,

California's state DNA database is the largest in the country<sup>17</sup> and the third largest in the world,<sup>18</sup> it "is anomalous in the relatively low number of investigations aided."<sup>19</sup> Similar studies looking at databases throughout Europe found the same to be true — larger databases do not solve more crimes.<sup>20</sup> A more recent study conducted in the United Kingdom concluded that "while DNA databases may offer slightly improved detection or conviction rates, the overall contribution of DNA databases to public safety may be negligible."<sup>21</sup> The study examined the UK national DNA database, described as "the most inclusive DNA database in the world,"<sup>22</sup> and found that despite the expansiveness of the database, its effectiveness was fairly limited. In fact, the study found that "DNA was 'linked to outcome' in just 0.3% of all recorded crimes in England and Wales in 2015-16," a rate that has been steady since the database's creation in 1995, despite laws and court rulings in the intervening years that expanded the scope of DNA collection for the database.<sup>23</sup>

These studies raise concerns that the government and public's predilection toward collecting DNA is disconnected from a higher success rate of solving crimes. By adding nearly 750,000 additional profiles to CODIS per year — including from children as young as 14 years old — the proposed rule will add noise to DNA databases without any evidence that it will help solve crimes.

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[http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2010/RAND\\_TR918.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR918.pdf)  
(hereinafter RAND Report).

<sup>17</sup> *Id.* at 18.

<sup>18</sup> California Office of the Attorney General, *Brown Announces Elimination of DNA Data Bank Backlog* (Sept. 10, 2007), <https://oag.ca.gov/news/press-releases/brown-announces-elimination-dna-data-bank-backlog>.

<sup>19</sup> RAND Report, *supra* note 16 at 19.

<sup>20</sup> Filipe Santos et al., *Forensic DNA databases in European countries: is size linked to performance?*, 9:12 *Life Sci Soc Policy* (Dec. 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4513018/> ("We argue that expansive criteria for inclusion and retention of profiles do not necessarily translate into significant gains in output performance."); Victor Toom, *Forensic DNA Databases in England and the Netherlands: Governance, Structure and Performance Compared*, 31:3 *New Genetics and Society* 311 (2012), [https://www.academia.edu/515387/Forensic\\_DNA\\_databases\\_in\\_England\\_and\\_the\\_Netherlands\\_governance\\_structure\\_and\\_performance\\_compared\\_2012](https://www.academia.edu/515387/Forensic_DNA_databases_in_England_and_the_Netherlands_governance_structure_and_performance_compared_2012).

<sup>21</sup> Aaron Opoku Amankwaa & Carole McCartney, *The effectiveness of the UK national DNA database*, 1 *Forensic Science International: Synergy* 45, 53 (2019), available at <https://www.sciencedirect.com/science/article/pii/S2589871X19300713>.

<sup>22</sup> *Id.* at 46.

<sup>23</sup> *Id.* at 49.

## **II. The Proposed Rule Creates the Potential for Wrongful Arrests and Future Misuse Based on the Collection and Retention of DNA Samples.**

The proposed rule does not merely collect DNA from immigrant detainees, but also stores the information indefinitely in the FBI's Combined DNA Index System (CODIS) database. The retention of DNA information increases the likelihood of innocent people being arrested and creates opportunities for future misuse.

### **A. *Inclusion in a DNA Database Increases the Likelihood that an Innocent Person Will Be Implicated in a Crime.***

While crime labs previously needed bodily fluid in order to generate a DNA profile, in the late 1990s researchers discovered that DNA can be detected from traces left by touch, known as “touch DNA.”<sup>24</sup> Because a person can shed as many as 50 million skin cells a day, touch DNA may be found not only on items that a person has touched, but also be on other items with which the person never came into contact — a phenomenon known as “secondary transfer.”<sup>25</sup> As DNA technology becomes more sensitive, smaller and smaller samples are needed to run an analysis, which can lead to questionable conclusions about DNA found at a crime scene. As researchers have recognized, “[a] DNA hit does not show that the subject is the offender and there are many reasons why the DNA of an individual may be found at a crime scene.”<sup>26</sup>

For example, in 2012, Lukis Anderson, was arrested and charged with murder during a home invasion robbery after Anderson's DNA was found on the victim's fingernails.<sup>27</sup> In fact, Anderson — who was homeless and suffered from alcohol addiction — was at a county hospital when the murder occurred.<sup>28</sup> Upon examination, investigators discovered that the paramedics likely transferred Anderson's DNA to the murder victim hours after dropping him off the hospital.<sup>29</sup> Anderson's DNA had previously been entered into a state criminal database after he was charged with a felony for breaking the window of a home while intoxicated.<sup>30</sup> The only reason Anderson was falsely implicated in the murder was because his DNA was already in the system.

Anderson's example demonstrates that the collection and retention of DNA is not without consequence. Given the lack of correlation between immigrants and criminality, *see* Part I.A., and inclusion of DNA in a database and increased public safety, *see* Part I.B,

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<sup>24</sup> Katie Worth, *Framed for Murder by His Own DNA*, *Wired* (Apr. 18, 2019), <https://www.wired.com/story/dna-transfer-framed-murder/>.

<sup>25</sup> *Id.*

<sup>26</sup> Amankwaa & McCartney, *UK national DNA database*, *supra* note 21, at 49.

<sup>27</sup> Worth, *Framed for Murder*, *supra* note 24.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

potential consequences should weigh against collection and retention of DNA from immigrant detainees.

**B. *Indefinite Retention of DNA Samples Creates Opportunities for Future Misuse.***

Given the vast amount of information that DNA can reveal about an individual, indefinitely retaining DNA profiles creates situations where the DNA information can be misused beyond its original purpose. While the proposed rule claims that the DNA profiles derived from arrestee or detainee samples cannot “disclose the individual’s traits, disorders, or dispositions,”<sup>31</sup> research continues to indicate that non-coding DNA performs specific functions in the human body and may be able to reveal more about a person than just their identity.<sup>32</sup> Because we inherit the twenty-six alleles that make up a CODIS profile directly from our biological parents, “there is a significant probability that two people who share biological ties will also share a large number of alleles in common.”<sup>33</sup> Further, DOJ retains DNA samples, not just DNA profiles, and there is no debate that DNA samples reveal extensive information about individuals — from familial relationships to medical history, and even, potentially, race, intelligence, criminality, sexual orientation, and political ideology.<sup>34</sup> Thus, DNA collected for specific purposes now — to test against existing samples in a DNA database and to store for future comparison — can be expanded for future purposes.

One area of special law enforcement interest is the use of partial match DNA analysis and familial DNA searching. The FBI defines a partial match as a “spontaneous product of a routine database search where a candidate offender profile is not identical to the forensic profile,” but the similarity between the two profiles may indicate a biological relationship.<sup>35</sup> Familial DNA searching is “an intentional or deliberate search of the database conducted after a routine search for the purpose of potentially identifying close biological relatives of the unknown forensic sample associated with the crime scene

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<sup>31</sup> 84 Fed. Reg. at 56399.

<sup>32</sup> Stephen S. Hall, *Hidden Treasures in Junk DNA*, Scientific American (Oct. 1, 2012) <https://www.scientificamerican.com/article/hidden-treasures-in-junk-dna/>; *What is noncoding DNA?*, NIH National Library of Medicine (Oct. 29, 2019), <https://ghr.nlm.nih.gov/primer/basics/noncodingdna>.

<sup>33</sup> Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 Mich. L. Rev. 291, 295 (Dec. 2010).

<sup>34</sup> Erika Check Hayden, *Ethics: Taboo Genetics*, Nature (Oct. 2, 2013), <http://www.nature.com/news/ethics-taboo-genetics-1.13858>; Lizzie Buchen, *Biology and ideology: The anatomy of politics*, Nature (Oct. 24, 2012), <http://www.nature.com/news/biology-and-ideology-the-anatomy-of-politics-1.11645>.

<sup>35</sup> Federal Bureau of Investigation, *Frequently Asked Questions on CODIS and NDIS*, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>.

profile.”<sup>36</sup> Currently, twelve states allow for familial DNA searches, which they conduct using non-CODIS software.<sup>37</sup> The FBI distinguishes between partial matches (which it describes as “spontaneous”) and familial searches (which it describes as “intentional”) and states that it allows the former but not the latter.<sup>38</sup> However, researchers have noted this is a distinction without a difference because both can be used to identify family members related to the DNA profile being searched.<sup>39</sup> Because neither is a full match with the crime scene sample, however, both have the potential to implicate innocent people for crimes they did not commit.

For example, a New Orleans filmmaker was nearly implicated in a cold case murder after police conducted a familial DNA search. In that case, Idaho Falls police sent a semen sample collected from the crime scene to a private lab, which ran the sample against a private collection of genealogical data — without a warrant.<sup>40</sup> The search yielded 41 potential matches, including one “exceptionally good” match of 34 out of 35 alleles.<sup>41</sup> Police obtained a warrant to unmask the identity of the match, Michael Usry, Sr.<sup>42</sup> Police then honed in on his son, Michael Usry, Jr., and obtained a warrant for his DNA.<sup>43</sup> After nearly a month, police finally cleared Usry as a match to the DNA collected from the crime scene.<sup>44</sup> Earlier this year, another man was arrested for the murder after authorities “test[ed] the crime scene sample for hundreds of thousands of genetic markers across the entire genome, rather than the few dozen on the Y chromosome.”<sup>45</sup> In this case, the elder Usry donated his DNA for genealogical purposes, not knowing that his DNA would be implicated in a familial search to solve a murder. The same concerns apply to immigrant detainee DNA collected and retained in CODIS, which in the future could be used for purposes not contemplated at the time of collection.

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<sup>36</sup> *Id.*

<sup>37</sup> James Rainey, *Familial DNA puts elusive killers behind bars. But only 12 states use it.*, NBC News (Apr. 28, 2018), <https://www.nbcnews.com/news/us-news/familial-dna-puts-elusive-killers-behind-bars-only-12-states-n869711>.

<sup>38</sup> FBI, *FAQ on CODIS and NDIS*, *supra* note 35.

<sup>39</sup> Natalie Ram, *Fortuity and Forensic Familial Identification*, 63 Stan. L. Rev. 751 (2011).

<sup>40</sup> Jim Mustian, *New Orleans filmmaker cleared in cold-case murder; false positive highlights limitations of familial DNA searching*, New Orleans Advocate (Mar. 12, 2015), [https://www.nola.com/news/article\\_d58a3d17-c89b-543f-8365-a2619719f6f0.html](https://www.nola.com/news/article_d58a3d17-c89b-543f-8365-a2619719f6f0.html).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Peter Aldhous, *Genetic Genealogy Helped Finally Crack the 1996 Murder of 18-Year-Old Angie Dodge*, BuzzFeed News (May 16, 2019), <https://www.buzzfeednews.com/article/peteraldhous/angie-dodge-cold-case-murder-genetic-genealogy-parabon>.

### **III. The Proposed Rule Disproportionately Impacts Communities of Color.**

The proposed rule exacerbates the racial disparities already present in our criminal justice system by subjecting communities of color to genetic surveillance. As DNA databases have expanded to include misdemeanor offenses, Black and Latino men are overrepresented in DNA databases like CODIS because they are more likely to be arrested for minor offenses.<sup>46</sup> In 2011, it was estimated that Black individuals made up 40 percent of profiles in CODIS, and that it was “possible to use the database to identify up to 17 percent of the country’s entire African-American population.”<sup>47</sup>

Adding an additional 750,000 DNA profiles of immigrant detainees annually will undoubtedly further skew the racial disparities apparent in CODIS. In 2018, Mexican nationals made up 43 percent of immigrant detainees, and nationals from Guatemala, El Salvador, and Honduras made up an additional 46 percent.<sup>48</sup> Accordingly, under the proposed rule, DHS could add over 660,000 DNA profiles of Latinx people to CODIS annually — a sizeable addition to the nearly 18 million profiles currently in CODIS.<sup>49</sup>

### **IV. Conclusion**

For the above reasons, EFF strongly urges the Department of Justice to rescind its proposal to amend regulations to collect DNA samples from immigrant detainees. If you have any questions or concerns, please contact us at [saira@eff.org](mailto:saira@eff.org) or (415) 436-9333 ext. 204.

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<sup>46</sup> Oscar Schwartz, *Do DNA Databases Make Would-Be Criminals Think Twice?*, Undark (Sept. 23, 2019), <https://undark.org/2019/09/23/dna-database-deter-crime/>.

<sup>47</sup> Jason Silverstein, *The Dark Side of DNA Evidence*, The Nation (Mar. 27, 2013), <https://www.thenation.com/article/dark-side-dna-evidence/>.

<sup>48</sup> Emily Ryo & Ian Peacock, *The Landscape of Immigration Detention in the United States*, American Immigration Counsel (Dec. 2018), at 2, [https://americanimmigrationcouncil.org/sites/default/files/research/the\\_landscape\\_of\\_immigration\\_detention\\_in\\_the\\_united\\_states.pdf](https://americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf).

<sup>49</sup> Federal Bureau of Investigation, *CODIS-NDIS Statistics*, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics>.