

STATE OF NEW YORK  
ERIE COUNTY SUPREME COURT

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[REDACTED] UE [REDACTED] RS,

Petitioner,

v.

ERIE COUNTY DISTRICT ATTORNEY'S OFFICE,  
ERIE COUNTY CENTRAL POLICE SERVICES,  
and COUNTY OF ERIE,

Respondents.

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Index No. 8 [REDACTED]

BRIEF IN SUPPORT OF PETITIONER

[REDACTED] EW [REDACTED] RS and  
[REDACTED] ID [REDACTED] TY  
[REDACTED] half of  
The [REDACTED] ned [REDACTED] sel [REDACTED] am [REDACTED] Erie County  
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[REDACTED] Buffalo, New York [REDACTED] 1403

On behalf of the Assigned Counsel Program of Erie County, we submit this *amicus curiae* brief in support of the relief requested by petitioner. We ask the Court to recognize the following principle: a DNA sample can be used only for its authorized purpose. If collected pursuant to the procedures set forth in Article 49-B of the Executive Law, it can be used for comparison in future criminal investigations. But if collected pursuant to a court order or voluntary submission, its use is limited to comparison in that particular case.

The Court granted permission to file this brief on February 23, 2023.

***I. Background***

Petitioner, and her co-defendants, were charged by indictment with criminal possession of a weapon in the second degree (Penal Law § 265.03[3]). Subsequently, respondent Erie County District Attorney's Office sought a buccal swab of petitioner's genetic material for DNA testing and comparative analysis. Petitioner opposed the application and, alternatively, sought a protective order limiting the use of the sample to comparison in that particular case. Respondent's request was granted; petitioner's request was denied.

Petitioner was excluded as a potential contributor to the genetic material found on the weapon. A co-defendant, who could not be excluded as a contributor to the genetic material on the weapon, pleaded guilty to the indictment. The charge against petitioner was dismissed. Nevertheless, respondent Erie County Central Police Services is retaining her DNA sample in its local databank for comparison in future criminal investigations.

New York maintains a statewide DNA databank for law enforcement purposes. This databank is governed by Article 49-B of the Executive Law (§ 995 *et seq.*). Those provisions allow for the retention, and testing, of genetic material taken from “designated offenders” (§§ 995[7], 995-c). A “designated offender,” in relevant part, is an individual convicted for any felony, or any misdemeanor defined by the Penal Law (excepting prostitution offenses). Accordingly, to have one’s DNA sample uploaded into the state databank, an individual must first be convicted of an enumerated offense. Petitioner was not convicted of any offense. She is not a designated offender.

## *II. Legal Argument*

Petitioner’s genetic material was submitted to, and has been stored in, a local DNA databank. The purpose of submitting the sample -- comparative testing related to the indictment - - has been exhausted.

In *Matter of Samy F. v Fabrizio*, the First Department held that Article 49-B applies with equal force to local DNA repositories (176 AD3d 44, 49 [1<sup>st</sup> Dept 2019]). As that court noted, Article 49-B defines a forensic laboratory as “*any laboratory operated by the state or unit of local government that perform forensic testing on crime scenes or materials derived from the human body for use as evidence in a criminal proceeding or for purposes of identification*” (Executive Law § 995[1], emphasis added). It would make little sense for the Legislature to devise an exacting regulatory scheme governing the operation of state laboratories, but leave unregulated local laboratories -- who are performing equally specialized, technical work, in equally important areas of law enforcement -- merely because they are operated by a different political subdivision.

The text must be construed as a whole, and courts must ascertain a statute's plain meaning "by looking to the particular language at issue and the language and design of the statute as a whole" (*K Mart Corp. v. Cartier, Inc.*, 486 US 281, 291 [1988]). By establishing a State DNA Index System, New York has created a "comprehensive and detailed regulatory scheme" with regard to the subject matter (*Samy F.*, at 51). The operations of Central Police Services fall firmly within the Executive Law umbrella and "must yield to that of the State in regulating that field" (*id.*, at 51-52).

Given the application of Article 49-B to local laboratories, and the exhaustion of the trial court's order to obtain a buccal swab for comparative purposes in the now-closed case, there exists no lawful basis to retain petitioner's genetic material. Petitioner does not argue that the state may not *obtain* genetic material for comparative purposes to be performed in local laboratories. Nor does petitioner claim that laboratories may not *retain* genetic material obtained from designated offenders. Instead, petitioner argues that retention of her genetic material is now unauthorized under either theory.

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The petition ought to be granted. The law does not allow the government to make innocent people into permanent suspects. The DNA sample of petitioner, and those of all other innocent people in the possession of Central Police Services, should be destroyed.

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**CERTIFICATION OF WORD COUNT**

This brief complies with the word count limit set forth in 22 NYCRR 202.8-b. The total numbers of words in the brief, exclusive of the caption and signature block, is 747.

February 27, 2023  
Buffalo, New York

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