

SUPREME COURT OF THE
STATE OF NEW YORK : COUNTY OF ERIE

██████████

Petitioner,

**ARTICLE 78
VERIFIED PETITION**

v.

Oral Argument Requested

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

Index No.:

Respondents.

██████████ Esq., an attorney licensed to practice law in the State of New York,
being duly sworn, deposes and says:

1. I am attorney for Petitioner, ██████████ ROGERS, (██████████ after "Rogers") in the
above captioned matter. As such, I am familiar with the facts and circumstances in this action as
set forth in this motion.

2. This Verified Petition is submitted in support of the petition for judgment
prohibiting Respondents from maintaining Petitioner's DNA, or other person similarly situated,
absent a criminal conviction, and such other and further relief as this Court may deem just and
proper.

3. The instant application follows a request of Respondent ERIE COUNTY
DISTRICT ATTORNEY'S OFFICE to secure and maintain the DNA sample of Petitioner, who
under the Order of a Court was required to provide her DNA to Respondent ERIE COUNTY
CENTRAL POLICE SERVICES.

4. Importantly, there is no legal authority for Respondents to retain the DNA sample of any person absent a criminal conviction. Here, absent any criminal convictions, Petitioner's constitutional rights have been infringed upon by Respondents' unlawful actions.

SOURCE OF JURISDICTION

5. This Court may conduct "special proceedings" pursuant to Article 78 of New York's Civil Practice Law and Rules. See CPLR §§ 7801-7806. Petitioner seeks review of Respondent's actions relative to the storage of innocent persons' DNA, pursuant to CPLR § 7803(2).

6. Petitioner has standing to commence the instant action; the challenged administrative action (i.e. retention of DNA absent any conviction) will have a harmful effect on her and is within the zone of interests meant to be protected by the statute in question.

7. Respondents ERIE COUNTY DISTRICT ATTORNEY'S OFFICE, ERIE COUNTY CENTRAL POLICE SERVICES, and COUNTY OF ERIE are each a "body" subject to judicial review pursuant to Article 78 of Civil Practice Law and Rules. See CPLR § 7802(a).

8. Respondent ERIE COUNTY DISTRICT ATTORNEY'S OFFICE is a division within Respondent COUNTY OF ERIE, responsible for the prosecution of crimes committed in Erie County, New York.

9. Respondent ERIE COUNTY CENTRAL POLICE SERVICES is a division within Respondent COUNTY OF ERIE, responsible, in part, for providing centralized scientific support and assistance in association with criminal investigations via their forensic laboratory.

10. The instant Petition has been duly served upon the Attorney General, pursuant to CPLR 1012(b)(1), placing the same on notice of the constitutional challenge of unlawful retention of DNA sampling.

FACTS COMMON TO ALL CLAIMS

11. According to Respondent ERIE COUNTY DISTRICT ATTORNEY'S OFFICE, on or about [REDACTED] ch [REDACTED] 2022, Petitioner was a passenger within a vehicle stopped for a vehicle and traffic law violation by the Cheektowaga Police Department, purportedly for both traveling too slowly and tinted windows. See Exhibit A, Respondent's Motion for Buccal Swab.

12. The driver of Petitioner's vehicle was found to be operating the same on a suspended license, but Petitioner was a licensed occupant that could have taken control of the subject vehicle. Id; see also Exhibit B, Petitioner's Affirmation in Opposition to Buccal Swab.

13. Upon the stop by police of Petitioner's vehicle, another occupant took off. Id.

14. Police then, without legal authority or permission of the driver, sought to search Petitioner's vehicle. Id.

15. Upon the vehicle search, a gun was purportedly found within a closed backpack. Id.

16. Petitioner and driver were arrested on the charge of the gun, in violation of Penal Law § 265.03(3). Id.

17. On or about August 2, 2022, Respondent ERIE COUNTY DISTRICT ATTORNEY'S OFFICE moved before Hon. [REDACTED]ham [REDACTED]ler for an Order to compel the taking of the Petitioner's buccal sample (for DNA comparison). See Exhibit A.

18. Petitioner opposed the People's motion, or in the alternative, sought a protective order that would confine the results of the DNA profile of the Petitioner to its comparison to the DNA evidence collected in that case, and preventing any sample ordered by the Court from being entered into the local OCME DNA databank. See Exhibit B.

19. The People opposed Petitioner's request for a protective order, suggesting that the People had the authority to maintain DNA samples of innocent people in an attempt to solve "cold cases." See **Exhibit C**, Respondent Erie County District Attorney's Opposing Affidavit to Protective Order.

20. More specifically, the People claimed "CPS's local databank has produced hundreds of "cold hits" – including the linking of unsolved sexual assaults with samples taken from suspects on unrelated arrests, identifying numerous sexual assault cases that DNA comparison revealed to be the work of serial rapists, and linking a high volume of pattern burglaries and robberies by blood or other evidence left at the scenes." *Id.*

21. Ultimately, the trial Court issued an Order denying the Petitioner's request for a protective order on her DNA, reasoning in its decision that

"The further use of a DNA sample, such as entering it in LDIS is clearly a permissible use of lawfully obtained evidence. The operative phrase being "lawfully obtained evidence"... Once evidence is lawfully obtained, there is generally not artificial limitations on what law enforcement is allowed to do with said evidence..."

See **Exhibit D**, Order and Decision.

22. While Petitioner is not contesting the discretion the criminal trial Court has in ordering DNA sampling, Petitioner argues Respondents lack the legal authority to maintain her DNA sample absent any criminal conviction, and in violation of her constitutional rights.

23. On or about August 12, 2022, Petitioner presented for buccal sampling at Respondent ERIE COUNTY DISTRICT ATTORNEY'S OFFICE.

24. Upon information and belief, Petitioner's DNA sample is now being stored in the local CODIS database, by Respondent ERIE COUNTY CENTRAL POLICE SERVICES.

25. In accordance with CPLR § 217, the subject action has been duly commenced within the four-month statute of limitations.



SUMMARY OF RESPONDENT'S ERRORS

26. Respondents ERIE COUNTY DISTRICT ATTORNEY'S OFFICE, ERIE COUNTY CENTRAL POLICE SERVICES, and COUNTY OF ERIE have erred in the collection and storage of DNA samples of persons without any criminal convictions.

27. According to the assistant district attorneys of Respondent ERIE COUNTY DISTRICT ATTORNEY'S OFFICE, DNA samples of innocent persons are stored by "a local DNA database of DNA profiles generated during the analysis of cases since 2000. CPS's database is referred to as LDIS, an acronym for Local DNA Index System," where DNA profiles from crime scene evidence are also stored. See Exhibit C, pg. 3.

28. Respondent ERIE COUNTY DISTRICT ATTORNEY'S OFFICE's actions in opposing protective orders limiting DNA sampling runs contrary to the legal authority provided by statute.

29. Respondents ERIE COUNTY DISTRICT ATTORNEY'S OFFICE, ERIE COUNTY CENTRAL POLICE SERVICES, and COUNTY OF ERIE have further erred in conducting DNA comparisons of any DNA of innocent persons against cases not yet charged when the storage and use of such material is otherwise unlawful, in violation of one's state and federal constitutional rights.

30. Upon information and belief, the aforementioned unlawful actions of Respondents ERIE COUNTY DISTRICT ATTORNEY'S OFFICE, ERIE COUNTY CENTRAL POLICE SERVICES, and COUNTY OF ERIE have disproportionality prejudiced the rights of a particular race.

31. Defendant, presumed innocent at this stage, should not have her constitutional rights and privacy expectations nullified by the involuntary surrender of her DNA to a local database.

ARGUMENT

32. Petitioner seeks a review of the authority claimed by Respondents in the retention of DNA samples of persons lacking any criminal conviction.

33. Petitioner, and all persons absent any criminal history, maintain their constitutional rights to be free of unlawful searches and seizures. The intent behind this is the same for those persons that argue a right to bear arms – constitutional rights must be protected.

34. Here there is no legal authority for Respondents to maintain an innocent person's DNA for an indefinite time and for any future use absent express authority of that person, or the voluntariness of surrendering ones' DNA.

35. However, the instant sampling of Petitioner's DNA was not voluntary nor via inadvertent surrender; instead Respondents sought Petitioner's DNA on a claim for use in a particular case, to which Petitioner originally opposed.

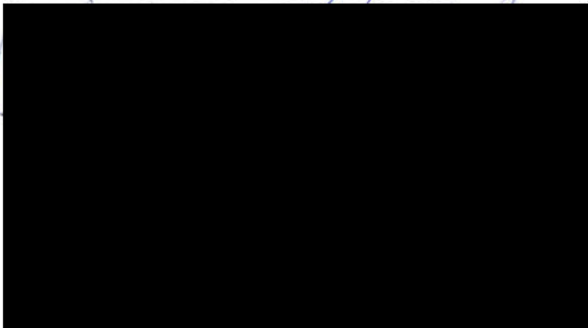
36. The requests of Petitioner's counsel to address the concerns of the instant application directly with Respondent ERIE COUNTY DISTRICT ATTORNEY'S OFFICE prior to the commencement of the instant Petition was to no avail.

37. Respondents have failed to provide any legal or statutory authority that would allow them to circumvent the storage and use provisions and requirements of article 49-B of the Executive Law (§ 995 et seq.), which otherwise provide the authority relative to local DNA databanks.

38. The laws of this state only provide for DNA storage of convicted persons; there is nothing that permits Respondents to maintain DNA samples of innocent persons in their own local database.

WHEREFORE Petitioner respectfully requests that this Court issue a judgment 1) Granting Petitioner's request for a Protective Order limiting her DNA to sampling in the pending criminal matter; 2) Compelling Respondents to cease any efforts to store DNA samples of innocent persons collected at Respondents' request in the course of criminal proceedings; 3) Compelling Respondents to destroy all those DNA samples presently stored locally in violation of the law 5) Granting costs and reasonable attorney's fees to cover expenses incurred in this proceeding; and 6) such other and further relief as this Court may deem just and proper.

Dated: October 7, 2022
Buffalo, New York

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CC: OFFICE OF THE ATTORNEY GENERAL
The Capitol
Albany, New York 12224-0341

VERIFICATION

STATE OF NEW YORK)
) SS.:
COUNTY OF ERIE)

  ROGGERS, being duly sworn, deposes and says that she is the Petitioner above named; she has read the foregoing claim and knows the contents thereof; the same is true to the knowledge of the Petitioner except for the matters herein alleged upon information and belief, and as to those matters, she believes them to be true.

