SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY CRIMINAL TERM, PART ____
_____

THE PEOPLE OF THE STATE OF NEW YORK

NOTICE OF MOTION
FOR PROTECTIVE ORDER

-against-

[CLIENT] , Ind No. _____

Defendant.
_____

PLEASE TAKE NOTICE, that upon the annexed affirmation of [ATTORNEY], the undersigned is moving the Supreme Court, County of Bronx, Criminal Division, Part [___], for a protective order pursuant to C.P.L. § 240.50(1),

1. Prohibiting comparison of [CLIENT'S] DNA to DNA in any other case;

2. Prohibiting the inclusion of [CLIENT'S] DNA in the Office of the Chief Medical Examiner's ("OCME") DNA database;

3. Prohibiting the use of [CLIENT'S] DNA results for any purpose beyond this case for comparison with the DNA profile developed in forensic biology file numbered FB

4. Granting such additional relief as the Court deems just and proper.

DATED: Bronx, New York
[DATE]

_____
[ATTORNEY]
The Bronx Defenders
360 East 161st Street
Bronx, New York 10451
(718) 838-7878

TO: DARCEL CLARK
District Attorney, Bronx County
ADA Jessica E. Kingsley

Clerk of the Supreme Court
Criminal Term, Bronx County

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY CRIMINAL TERM, PART H___
_____

THE PEOPLE OF THE STATE OF NEW YORK

AFFIRMATION IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

-against-

[CLIENT NAME], Ind No. _____

Defendant.
_____

AFFIRMATION

[ATTORNEY], an attorney duly admitted to practice law in New York state, under penalty of perjury, affirms the following to be true:

1. I am associated with The Bronx Defenders and attorney of record for [CLIENT[. I am familiar with the facts of this case and the prior proceedings held in it.

2. This affirmation is made in support of [CLIENT'S] Motion for Protective Order.

3. Unless otherwise indicated, all allegations of fact are based upon inspection of the record in this case, initial investigation of the facts and circumstances surrounding the incident and are made on information and belief

FACTUAL BACKGROUND

4. FACTS OF YOUR CASE AND FACTS DESCRIBING THE SAMPLE THE PROSECUTOR SEEMS TO COMPARE YOUR CLIENT TO.

5. The People seek a DNA sample from [CLIENT] ostensibly for the purpose of comparing that sample to the DNA profiles developed from the evidence in this case. However,

absent a protective order, this limited comparison is not all that will happen to [CLIENT's] DNA sample once it arrives at the New York City Office of the Chief Medical Examiner (OCME).

6. Without a protective order, OCME will upload [CLIENT's] sample into its database, for comparison with *all* forensic samples, far beyond those in this case, from evidence collected within the five boroughs of New York City. This is due to the structure of OCME and its unique internal database.

7. The OCME is a local forensic DNA laboratory that is part of the Combined DNA Index System (CODIS), a National DNA Index System (NDIS) maintained by the FBI. New York State Identification Index is a State DNA Index System (SDIS). The OCME cannot download from CODIS or the State Databank; it can only upload two types of DNA profiles: (1) profiles developed from crime scenes (forensic unknowns); and (2) DNA profiles of offenders convicted of DNA-qualifying offenses.

8. The OCME also has its own DNA database: (1) a General DNA Index System (GDIS) consisting of DNA profiles from crime scenes (forensic unknowns); and (2) Linkage, a database that includes profiles obtained by consent or court order. Together, these are known as the local DNA Index System (LDIS). The GDIS database is connected to the State Database and is eligible for inclusion in CODIS. Linkage is connected to GDIS and is used to compare known DNA samples to forensic unknowns from crime scenes. If there is a "hit," or match between a sample uploaded to the system and a sample in *either* GDIS *or* Linkage, the OCME notifies the NYPD. If there is no hit, the DNA remains in the database unless there is an expungement order.

9. DNA profiles in Linkage cannot be uploaded to CODIS via the State databank because Executive Law § 995 *only* permits the inclusion in the State databank of known DNA profiles from those convicted of DNA-eligible offenses. Nonetheless, the OCME develops, stores,

and compares DNA profiles in Linkage—such as the suspect profile that will be developed in this case—that are not suitable for upload to the State databank or CODIS.

10. On information and belief, when Linkage obtains a "hit," the results of that hit, including all known DNA profiles, are then given to the New York City Police Department ("NYPD") or other law enforcement agents.

11. Given this database scheme, and the controlling law, [CLIENT] seeks a protective order affording two protections: (1) that use of [CLIENTS'] DNA profile be limited to comparison with specific DNA evidence under forensic biology case file FB [###]; and (2) that [CLIENT'S] known DNA profile developed pursuant to the order to provide a saliva swab in this case not be entered into the local OCME DNA databank, for comparison to "forensic unknown" evidence samples throughout the City. Without such an Order, the OCME *will* enter her information, and *will* perform such comparisons in its own, local database, maintained by OCME alone. For the reasons now set forth, both of these actions violated Ms. Duviver's State and Federal Constitutional rights, as well as controlling State Law.

ARGUMENT

POINT I

OCME'S LOCAL DATABASE IS UNAUTHORIZED BY ANY LAW; THEREFORE ANY UPLOAD OF [CLIENT'S] DNA SAMPLE TO IT SIMILARLY IS ILLEGAL

12. The state legislature established a statewide DNA databank in 1994 through Article 49-B of the Executive Law. *See, e.g. People v. Katina Murray,* -- Misc.3d --- , 2016 NY Slip Op 26403 (Sup. Ct. Bronx Co. Dec. 7, 2016) (discussing legislative history). The state databank contains DNA samples from convicted offenders, as well as samples from unsolved crimes.

13. Meanwhile, OCME maintains a *separate* "local" database. *Id.* This local database contains samples from convicted offenders, along with individuals who are merely *facing* charges and have not been convicted. It also contains "forensic unknown" samples, which are samples from alleged crimes which have not been "matched" to any individual. *Id.*

14. However, the Executive Law only authorized the creation of a state DNA database. Pursuant to Exec. Law § 995-c, such a state database may upload an individual's DNA profile into an index, *subsequent* to that individual's conviction and sentencing. *See generally* People *v. Debraux*, 50 Misc.3d 246 (Sup. Ct. N.Y. Co. 2015) (Kahn, J.). The Executive Law does *not* authorize the creation of any local lab database. Nor does it authorize the uploading of any DNA samples into such database either *before any conviction.* Indeed, *no* legislative body has authorized OCME's *sui generis* creation of its own "shadow state DNA index." *Murray*, at *4.

15. It was for this reason, among others, that a court of concurrent jurisdiction [or THIS COURT IF IFO NEWBAUER],recently granted a defendant's motion for a protective order. In *Murray*, the court held that, because "the New York City Council has not passed local legislation permitting the creation [of a local database.] [] [T]here is no reason for this court to imbue OCME's *untra vires* procedures with its own positive imprimatur by refusing to grant a protective order requested by a presumptively innocent defendant." *Id.*, at *4.

16. Thus, as in *Murray*, a protective order should be granted here to prevent any further violation of the Executive Law by uploading and comparing [CLIENT's] DNA sample in an unauthorized, illegal DNA databank.

POINT II

UPLOADING [CLIENT'S] DNA TO OCME'S DATABASE VIOLATES THE CONFIDENTIALITY PROVISIONS OF THE EXECUTIVE LAW

17. An additional reason, recognized by *Murray*, that a protective order should be granted is that the uploading and comparison of [Client's] DNA sample here within OCME's local database violates the confidentiality protections of another section of Article 49-b, Executive Law § 995-d.

18. Results of DNA testing—a person's DNA profile in particular—are subject to New York Executive Law privacy and confidentiality provisions. Thus, a saliva swab containing human DNA and a known DNA profile are distinguishable from other tangible evidence or physical property protected by the Fourth Amendment. Under N.Y. Exec. Law § 995-d:

> (1) All records, findings, reports, and results of DNA testing performed on any person shall be confidential and may not be disclosed or redisclosed without the consent of the subject of such testing. Such records, findings, reports and results shall not be released to . . . agencies . . . and may not be disclosed in response to a subpoena or other compulsory legal process or warrant, or upon request or order of any agency, authority, division, office . . . or any other private or public entity or person [.]

The law further limits disclosure to parties enumerated in section two, stating that "records, findings, and results of DNA testing, other than a DNA record maintained in the state DNA identification index, *may be disclosed in a criminal proceeding to the court, the prosecution, and the defense*." N.Y. Exec. Law § 995-d(2) (emphasis supplied).

19. This provision applies to OCME's database. To be sure, to the extent OCME's database qualifies as a legitimate DNA database at all, it is a local one, not that of the State. *See People v. Rodriguez*, 196 Misc.3d 217 (Sup. Ct. Kings Co. 2003). However, as *Rodriguez* and recent courts of this jurisdiction make clear, to the extent OCME's database is valid at all, it is

subject to Executive Law § 995-d because it necessarily is licensed by the State. *See People v. McIntosh*, Ind. No. 2931/12 (Sup. Ct. Bronx Co. March 21, 2014) (Lieb, J.), pp. 2-3. *People v. Lopez*, Ind. No. 03139/2012 (Sup. Ct. Bronx Co. (Aug. 29, 2013)(Clancy, J.), pp. 10-15.

20. Since OCME's database is governed by the Executive Law, and "based on the plain reading of Executive Law §§ 995-c and 995-d" a motion for a protective order is *required*, in order to "preventing the disclosure of [a defendant's] DNA profile for any purpose other than" the instant prosecution. *People v. Jarret Jefferson*, Ind. No. 2862/13 (Sup. Ct., Bronx Co. February 25, 2014), p.2.[1] Section 995-d of Article 49-B contains confidentiality provisions that also apply to the OCME. *See also Lopez*, p. 15 ("the provisions of Executive Law Article 49-b [including § 995-d] apply to the OCME.")

21. Including [CLIENT's] DNA in the OCME databases, or comparing his DNA profile to other DNA samples in the system without his consent would violate N.Y. Exec. Law § 995-d. As *Rodriguez* discussed, when a DNA sample is placed into the OCME's "Linkage Database," the results are "revealed to any OCME employee who has access to this database and who is not working on the instant criminal proceeding." *Id.* at 309. Because these employees are not among those enumerated in the provision, the court unequivocally stated that this "is an unauthorized disclosure." *Id*.

22. Furthermore, comparing [CLIENT's] DNA profile with unknown forensic samples from other crime scenes, i.e. DNA results *other than* the one in the immediate case, constitutes an unauthorized redisclosure, regardless of whether it yields a positive "hit." *Id*. If

[1] Other courts of concurrent jurisdiction have disagreed with this analysis, *see, e.g. People v. Mohammad*, 48 Misc.3d 415 (Sup. Ct. Bronx Co. 2015) (Barrett, J.). However, those decisions, many of which are cursory or summary opinions, err in overlooking both the "plain language," *see Jefferson, supra*, and the Legislative intent, *see Murray, supra*, behind the executive law. Nor do those cases fully consider the further constitutional arguments, raised in points III and IV below.

the match is positive the results of the "hit," including [CLIENT'S] DNA profile, will be given to the New York City Police Department or other law enforcement agents. But this is not the only type of re-disclosure.

23. Instead, the language of § 995-d (2), prohibits this redisclosure in two ways. First, officers are not among the parties enumerated in the provision, only the court, prosecutors and defense counsel are so privileged. Second, when DNA information *can* be revealed to the court, prosecution, and defense, it must be in connection with a criminal "proceeding." *See* N.Y. Exec. Law § 995-d(2). A "proceeding" requires a pre-determined suspect. *See Rodriguez*, 196 Misc. 2d at 223. Under the plain language of the provision, providing law enforcement officials with [CLIENT's] DNA results in the event of a positive match would constitute an unauthorized redisclosure.

24. Thus, even without a positive "hit," [CLIENT'S] rights to privacy and to confidentiality are violated by the comparative search against forensic unknown samples. Upon receiving a negative result, OCME employees are informed that the DNA profile does not match any other in the system. *Id.* Both situations—a positive DNA match and a negative search—are a redisclosure of DNA information to police officers or employees of the OCME, which § 995-d forbids.

25. To the extent other courts have held otherwise, they have erred. Specifically, in *People v. Lopez*¸ a court of the Supreme Court, Bronx County, despite agreeing that Executive Law § 995-d applied to OCME, failed to recognize the problem with "rediclosure" upon upload. The court stated: "the statute itself requires a written request from the court, the prosecution, or the defense and, therefore, presupposes that such DNA records, findings, reports, and results will remain confidential unless specifically requested by any of these parties in a pending criminal

proceeding." *Id.* In other words, since the prosecution is involved in the defendant's current case, there is no harm in disclosing further information about other, uncharged cases, for which the prosecution otherwise has no reasonable suspicion or probable cause.

26. This analysis misses this crucial and immediate consequence of a sample comparison in the local database: disclosure by OCME extends far beyond the limits of the case at bar. As *Lopez* itself explicitly recognized, "If there is a 'hit,' or a positive comparison between a defendant's DNA profile and a DNA profile from a previous crime, the OCME notifies the police department." *Lopez* at 5. Indeed, the disclosure that occurs upon a "hit" is an email from DNAHITS@cityhall.nyc.gov to the entire NYPD, and all Citvarious District Attorneys and members of the NYPD. This e-mail "disclose" *additional* information *far beyond* that related to the instant case, to *all* county ADAs, not just those involved in the instant case. [2]

[2] *Lopez* limited its ruling "so long as the case for which defendant's DNA profile was developed remains pending." But this curious limitation left open what would happen once the case for which the defendant's DNA profile was developed is closed. That is *exactly* what the confidentiality provisions of § 995-d are meant to address. In other words, § 995-d does not prohibit a prosecutor, prosecuting a pending matter, from submitting a DNA profile of a defendant and using the results from the OCME's comparison between the profile and the crime scene sample submitted in that case. What § 995-d prohibits is the comparison of the defendant's profile against other forensic unknowns that are not associated with the criminal proceeding. Reading the language, "criminal proceeding," to permit the prosecution to use an accused's known DNA profile to compare it to forensic unknowns in other cases, while that accused has a separate case pending, but prohibiting the same comparison once that separate pending case concludes, is an arbitrary interpretation, unsupported by the confidentiality provisions as a whole.

POINT III

ALLOWING THE COMPARISON OF [CLIENT'S] DNA PROFILE WOULD VIOLATE THE FOURTH AMENDMENT PROBABLE CAUSE REQUIREMENT

27. While C.P.L. § 240.40(2)(b)(v) grants the authority to order a saliva sample, its purpose is to provide discovery in connection with an indictment that is "pending." *See Rodriguez,* 196 Misc. 2d at 223-24. Moreover, such an order must be based on a showing of probable cause. *See* C.P.L. § 240.40(2)(b)(v).

28. Neither the prosecution nor law enforcement have suggested in any way that [CLIENT] is a suspect of any other crime. Even if probable cause exists in the present case, using [CLIENT'S] DNA for comparison purposes with DNA profiles from other crime scenes would essentially allow discovery in the present case to circumvent the probable cause requirement in other cases. As the court in *Rodriguez* held,

> [T]he purpose of CPL 240.40 (2) (b) (v) is to provide discovery for the pending criminal action, and not to permit the People to investigate unsolved crimes for which they have no reason to suspect a defendant. The People cannot be permitted to avoid constitutional restrictions, which require probable cause before a person's blood may be extracted for DNA testing (*Matter of Abe A.*, 56 NY2d 288 [1982]) under the guise of seeking discovery. In this case, if the defendant had not been indicted for this crime, the People would have been required to establish probable cause if they wished to test the defendant's blood and to compare it to another unsolved crime. Instead, the prosecution wishes to use CPL article 240 to avoid the constitutional problem. The court finds the attempt to avoid constitutional restrictions under the facade of discovery improper.

Rodriguez, 196 Misc.2d at 223-24.

29. Allowing [CLIENT'S] DNA results to be used for comparative purposes would therefore violate her Fourth Amendment rights, so a protective order should issue preventing this violation.

30. The Court in *Murray* agreed with this analysis, and further held that subsequent decisions, ostensibly concerning this issue, were inapposite. *See Murray*, at *4. First, it held that, despite the Supreme Court's holding in *Maryland v. King*, 596 U.S. --- (2013) that the *federal* constitution permits DNA comparisons upon arrest, *State law* has a more stringent requirement. *See Abe. A, supra*. "Not only is the defense argument here premised in New York State Law and policy, but the Executive Law takes precisely the opposite view of uploading a presumptively innocent defendant's DNA into a database." *Murray*, at *4.

31. Second, *Murray* found that it, like other courts of this jurisdiction, was not "bound by *People v. King*, 232 A.D.2d 111 (2d Dept. 1997)," which held that a lawfully obtained blood sample could be used for additional investigative purposes. "The facts in that case arose prior to the enactment of Article 49B and the case turned on the constitutional question." *Murray*, at *5.

32. Accordingly, where the law clearly prohibits such a comparison, none should be made and the protective order should be granted.

POINT IV

USING THE DNA PROFILE BEYOND THE SCOPE OF THE CASE AT BAR WITHOUT [CLIENT'S] CONSENT DEPRIVES [CLIENT] OF HIS PROPERTY RIGHT TO HIS OWN GENETIC INFORMATION

33. Not only does [CLIENT] have a confidentiality right under the law, she also possesses a property right in her own DNA profile. Indeed, genetic information shares many characteristics traditionally associated with property subject to ownership.

> The relationship between a person and his genetic information has many of the characteristics of [property] ownership. First, the individual possesses the DNA in his body. . . .
>
> Second, the individual has exclusive use of the genetic information in his cells. . . .

> Third, the genetic information may be wasted, modified, destroyed, or alienated only by the person in whose cells the genetic material resides. . . .
>
> Fourth, the individual has immunity from forced expropriation of the information encoded in his DNA. . . .
>
> Finally, only the person whose cells contain the genetic information can give that information away, whether by donating his cells or by providing a partial copy of his DNA to his offspring.

Valerio Barrad, Catherine M., "Genetic Information and Property Theory," 87 Nw. U. L. Rev. 1037, 1050-51 (1993).

34. *Rodriguez* recognized a contributor's "exclusive property right" in personal genetic information, which permits "disclosure [of genetic information] only for the particular need for which the DNA test was authorized." *Rodriguez,* 196 Misc. 2d at 225 (citing to legislative history in further support of a property right in genetic information). The particular need authorized in this case would be to compare [CLIENT'S] DNA profile to the DNA results associated with the other swabs in this case. Any use beyond this particular need requires further consent from [CLIENT], according to *Rodriguez*.

35. Under CPL § 240.50, the Court may issue a protective order with a showing of "good cause." Allowing [CLIENT'S] DNA results to be used beyond the immediate case would violate N.Y. Exec. Law § 995-d and her property rights, and the protections afforded to her by the Fourth Amendment. Since preventing these violations constitutes "good cause," a protective order should issue.

WHEREFORE, the affiant requests that the foregoing Motion be granted and such other and further relief as this Court may deem just and proper.

Dated: Bronx, New York
DATE

_____

[ATTORNEY]
The Bronx Defenders
Counsel to [CLIENT]