Matter of Stevens v New York State Div. of Criminal Justice Servs.
2020 NY Slip Op 30861(U)
March 26, 2020
Supreme Court, New York County
Docket Number: 151522/18
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17
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In the Matter of the Application of

TERRENCE STEVENS and BENJAMIN JOSEPH,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

Index No. 151522/18

-against-

The NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, the NEW YORK STATE COMMISSION ON FORENSIC SCIENCE, MICHAEL C. GREEN, in his official capacity as Executive Deputy Commissioner of the Division of Criminal Justice Services and Chairman of the Commission ob Forensic Science, and the NEW YORK STATE COMMISSION ON FORENSIC SCIENCE DNA SUBCOMMITTEE,

Respondents.

DECISION/ORDER

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HON. SHLOMO S. HAGLER., J.S.C.:

Petitioners Terrence Stevens and Benjamin Joseph bring this Article 78 proceeding to annul the Familial DNA Search Regulations ("Regulations") adopted by respondents including the New York State Division of Criminal Justice Services (the "Division"), effective October 18, 2017. The Regulations, codified at 9 NYCRR § 6192.1 and 6192.3, were published in the New York State Register on that date (see exhibit 10 attached to the petition). Petitioners also seek an injunction permanently barring respondents from taking further action in reliance upon the Regulations, including any current or future searches of the New York State DNA Databank ("Databank"), expunging any data entered into that Databank pursuant to the Regulations, and

permanently barring respondents from drafting, adopting, or promulgating any future regulation or amendment permitting familial DNA searching, absent explicit statutory permission. Petitioners contend that the Regulations: (a) were adopted without statutory authority; (b) violate petitioners' rights under the Fourth Amendment; (c) are arbitrary and capricious; and (d) were adopted in violation of New York's Open Meetings statute, Public Officers Law § 100 *et seq.*

Background.

Pursuant to Executive Law § 995 *et seq.*, the Databank, which was created, and is maintained, by the Division, contains DNA profiles of certain classes of convicted felons and, since 2006, the DNA profiles of certain parolees. The Regulations do not, in the first instance, broaden the class of persons whose DNA profiles will be collected. Rather, it allows, in certain circumstances, for DNA that is collected from a crime scene to be matched against the records in the Databank, so as to assess, depending on the degree of similarity, the likelihood that the collected sample is that of a close relative of the person whose DNA is stored in the Databank. If the match exceeds certain kinship threshold values, the Division will release the name of the person whose DNA is in the Databank to the investigating agency. In other words, once certain required conditions have been met, the Regulations allow the investigative agency to investigate the relatives, within a certain degree of kinship, of the person whose DNA profile is stored in the Databank.

Discussion.

A. Standard for Article 78 Proceedings.

A court may not disturb an administrative or agency determination unless there is no rational basis for the exercise of discretion or the action is arbitrary or capricious *(Matter of Pell*

v Board of Educ.of Union Free School Dist. No.1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 NY2d 222, 230-231 [1974]). The arbitrary and capricious test relates to whether the administrative action should have been taken or is justified (*Id.* at 231).

B. Petitioners have standing.

As a preliminary matter, this Court turns to respondents' argument that petitioners lack standing to bring this proceeding. "A party challenging governmental action must meet the threshold burden of establishing that it has suffered an 'injury in fact' and that the injury it asserts 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted.'" *(Matter of Mental Hygiene Legal Serv. v Daniels,*33 NY3d 44, 50 [2019], quoting *New York State Assn. of Nurse Anesthetics v Novello*, 2 NY3d 207, 211 [2004]). Petitioners each allege to have a sibling whose genetic profile is maintained in the Databank. Petitioners do not claim that they have been approached by an investigating agency in connection with an investigation aided by the Regulations. However, petitioners bear that peculiar risk, as do other close relatives of persons whose DNA is stored in the Databank, a risk not shared by the general population.

In *Lino v City of New York* ,101 AD3d 552, 555 (1st Dept 2012), the plaintiffs, who had been subjected to the then "stop-and-frisk" policy of the New York City Police Department, and whose summonses had been dismissed, were held to have standing to seek, among other forms of relief, an injunction requiring that their police records be sealed. The defendants, in that case, argued that, in order to have standing, the plaintiffs needed to wait until they faced "a 'readily apparent prospective injury.'" The Court held, however, that

"it makes little sense for plaintiffs to have to wait until their job applications are in

> the mail or they are about to appear for job interviews before they have standing to bring a cause of action against the effect of their unsealed records."

Similarly, here, petitioners should not need to wait until they are approached by the police, on the basis of a lead generated by the Regulations, in order to have standing to challenge the Regulations. Moreover, inasmuch as more than four months have passed since the Regulations became effective, to deny standing to petitioners would insulate the Regulations from review, a result that would be "contrary to the public interest." (*Matter of Association. for a Better Long Is, Inc. v New York State Dept. of Envtl. Conservation,* 23 NY3d 1, 8 [2014]).

C. Respondents did not violate the Open Meetings Law.

Petitioners point out that many of the meetings at which the Regulations were formulated were not open to the public. Respondents represent, without dispute, that no quorum was present at any of the meetings discussed by petitioners. Public Officers Law ("POL") § 103 (a) provides, in relevant part, that "[e]very meeting of a public body shall be open to the general public." POL § 102 (2) defines "public body," in relevant part, as "any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state." The Appellate Division, Second and Third Departments, have held, accordingly, that POL § 103 (a) applies only to meetings at which a quorum of a public body is present (*See Matter of Orange County Pubes. Div. of Ottaway Newspapers v Council of City of Newburgh,* 60 AD2d 409, 415-416 [2d Dept 1978], *affd* 45 NY2d 947 [1978]; *see also Matter of Goodson Todman Enters. v City of Kingston Common Council,* 153 AD2d 103, 106 [3d Dept 1990]). Petitioners note that the Court of Appeals has not addressed the issue of whether POL § 103 applies solely to meetings, at which a quorum is present, and that POL §

103 (a) could easily be skirted by avoiding the presence of a quorum. That POL § 103 (a) applies solely to meetings at which a quorum is present appears to flow directly from the definition of "public body." In any event, absent a decision on this point by the Court of Appeals, or the Appellate Division, First Department, this Court is bound by the decisions of the Second and Third Departments, cited above *(D'Allessandro v Carro,* 123 AD3d 1, 6 [1st Dept 2014]).

D. The Regulations do not violate petitioners' rights under the Fourth Amendment.

Petitioners contend that the Regulations subject them to "suspicionless" searches in violation of the Fourth Amendment to the United States Constitution. Certainly, the Fourth Amendment prohibits unreasonable searches or seizures of persons and property. Virtually any *direct* intrusion on one's body such as drawing blood (*Missouri v McNeely*, 569 U.S. 141 [2013]), or using a buccal swab on a person's cheek to obtain DNA samples (*Maryland v King*, 569 U.S. 435 [2013]) would be subject to constitutional scrutiny. However, petitioners seek to extend these protections to even *indirect* intrusions into third-party searches of the Database that may (or may not) demonstrate a genetic familial connection to them. No court has ever extended these Fourth Amendment protections to such *indirect* searches.

All 50 states and the federal government collect DNA profiles of certain classes of convicted felons and maintain a DNA Databank to promote legitimate governmental interests. All Fourth Amendment challenges to these Databanks, including New York's Databank under Executive Law § 995 *et seq,* have failed (see, *Maryland v King*, 569 US 435 [2013]; *Nicholas v Goord*, 430 F3d 652 [2d Cir. 2005]; *United States v Amerson,* 483 F3d 73 [2d Cir. 2005]). Thus, the collection of DNA profiles of certain classes of convicted felons and maintenance of the New

York DNA Databank are constitutionally valid.

To be clear, respondents are not seeking to "stop-and-swab" the petitioners to obtain DNA samples. As stated above, respondents already have permissibly collected all DNA samples in the Databank. Similarly, the unknown DNA samples left abandoned and recovered at the scene of a crime are clearly not subject to Fourth Amendment protections. Petitioners allegedly each have a sibling whose genetic profile is maintained in the Databank. Respondents only have direct access to petitioners' siblings' genetic profiles, but they do not have petitioners' genetic profiles. The Regulations permit a Databank search of all known genetic profiles, including petitioners' siblings, with unknown DNA samples discarded at the scene of the crime to obtain "investigative leads." As such, this indirect search does not utilize any genetic material directly obtained from petitioners.

Petitioners object to this indirect search as an unconstitutional intrusion of their persons and privacy which may subject them to impermissible investigation due to familial relation with their convicted siblings. It is axiomatic that respondents may utilize any evidence that it collected in a lawful manner to obtain investigative leads. Generally, since respondents permissibly collected and maintained the genetic profiles of petitioners' siblings in the Databank, petitioners' do not enjoy Fourth Amendment protection to shield them from such an indirect search.

While petitioners may have some legitimate personal concerns, the Fourth Amendment simply does not protect "any third-party objection to use of one family member's DNA already lawfully in police possession to generate leads" (Jules Epstein, "Genetic Surveillance," 2009 U. ILL. J.L. Tech & Pol'y 141, 161 [2009]). Moreover, under these unique circumstances, the

Fourth Amendment does not provide petitioners protection from possible investigation as the "Fourth Amendment does not protect people from becoming suspects, persons of interest, and the like" (David H. Kaye, "The Genealogy Detective: A Constitutional Analysis of Familial Searching" 50 Am. Crim. L. Rev. 109, 158 [2013]).

Assuming *arguendo* that the Regulations implicate Fourth Amendment Protection, there has never been a successful Fourth Amendment challenge which held that a genetic search of a DNA Databank was unreasonable applying either a "Special-Needs" or "General Balancing" test (*Nicholas v Goord*, 430 F3d 652 [2d Cir. 2005]; *United States v Amerson,* 483 F3d 73 [2d Cir. 2005]). Petitioners, however, opine that *Nicholas* and *Amerson* support their Fourth Amendment challenge under a "Special-Needs" balancing test. To the contrary, *Nicholas*, in particular, would lead to the similar conclusion that the Regulations serve a "special need" and "is supported by strong governmental interests that outweigh the relatively minimal intrusion on [petitioners'] expectation of privacy" (*Nicholas*, 430 F3d at 671).

Again, petitioners wish to divorce the Regulations from the permissible operation and maintenance of the Databank. For purposes of analysis of the "Special-Needs" balancing test that is not possible as the Regulations permit the indirect search of the Databank. Simply stated, they share the same special need, different from ordinary law enforcement needs, as well as the purpose which was upheld in *Nicholas*, to wit: "its primary purpose is to create a DNA databank [and Regulations] to assist is in solving crimes should the investigation permit resort to DNA testing of evidence" (430 F3d at 668). Thus, the Regulations are supported by the same governmental interests elucidated in *Nicholas*.

Next, this Court must weigh any intrusion on petitioners' expectation of privacy against this strong governmental interest. As extensively analyzed above, petitioners have not suffered any direct physical intrusion on their bodies, such as the extraction of DNA samples, which was hotly debated and challenged in *Nicholas.* In *Nicholas*, the Second Circuit found that even physical collection of DNA samples from those convicted felons was a minimal intrusion. However, they were more concerned about the "analysis and maintenance of their DNA information in New York's Databank ... since the state analyzes DNA for information and maintains DNA records indefinitely" (*Nicholas*, 430 F3d at 670). Ultimately, the Second Circuit rejected this concern because "the New York statute as written does not provide for sensitive information to be analyzed or kept in its database. Rather, it provides only for the identifying markers" (*Id*).

The key distinction of the familial search Regulations is that it involves the genetic analysis of petitioners' siblings in the Databank to *potentially* secure partial matches to petitioners' genetic markers. To be clear, there is no direct analysis of petitioners' genetic materials. In any event, petitioners' genetic markers are *not* stored in the Databank. The Policy also does not add any users or profiles to the Databank. As such, the circumstances in *Nicholas* is the same, or even at a lesser concern, with the Regulations because petitioners' DNA will neither be directly searched and analyzed nor kept indefinitely in the Databank. In other words, the Regulations provide for a lesser intrusion to petitioners than was permitted in *Nicholas.* Therefore, as in *Nicholas*, the Regulations are "supported by strong governmental interests that outweigh the relatively minimal intrusion on [petitioners'] expectation of privacy" (*Nicholas*, 430 F3d at 671).

E. The Regulations were adopted with statutory authorization.

Petitioners allege that respondents exceeded the authority delegated to them by the Legislature, under Executive Law § 995 *et seq,* when they adopted the challenged Regulations as codified at 9 NYCRR § 6192.1 and 6192.3. This raises a knotty issue of delegation of powers between the Legislative and Executive branches.

It is a general principle that an administrative agency derives its authority or power to act from the dictates of the Legislature (*Suffolk County Builders Assn. v County of Suffolk*, 46 NY2d 613, 620 [1979]). In other words, the Legislature may delegate a broad range of powers to the administrative agency in conformity with appropriate enabling legislation. "'[A]n agency can adopt regulations that go beyond the text of [its enabling] legislation, provided they are not inconsistent with the statutory language of its underlying purposes"' *(Greater N. Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 25 NY3d 601, 608 [2015] *quoting Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254 [2004]).

A review of the enabling legislation is necessary to determine whether respondents were authorized to adopt the Regulations. In 1994, the Legislature considered privacy and crime solving issues before adopting a comprehensive statute providing for the creation of the Databank (1994 See. Law News of N.Y. Ch. 737 [A. 12252]), codified at Executive Law § 995 *et seq*. The enabling legislation created the Commission of Forensic Science ("Commission") and a subcommittee on forensic DNA laboratories and forensic DNA testing ("DNA Subcommittee")

within the Division (Executive Law §§ 995-a, 995-b[13]). The Legislature provided for the vast delegation of duties to the Commission and DNA Subcommittee to establish, operate, and maintain the Databank (Executive Law §§ 995-b[9], 995-c[1]). Specifically, Executive Law § 995-b[9] and [a] provided a broad delegation of authority to the Commission and DNA Subcommittee to "promulgate a policy for the establishment and operation of a DNA identification index [Databank] consistent with the operational requirements and capabilities of the [D]ivision" including "the forensic DNA methodology or methodologies to be utilized in compiling the index [Databank]." This encompassed "designat[ing] one or more approved methodologies for the performance of forensic DNA testing" (Executive Law § 995-b[11]). The Commission was also delegated the authority to "[p]romulgate standards for a determination of a match between the DNA records of a person submitted for comparison therewith" (Executive Law § 995-b[12]). A "DNA record" was defined as "DNA information prepared by a forensic DNA laboratory and stored in the state DNA identification index for purposes of establishing identification in connection with law enforcement investigation" (Executive Law § 995 [8]). As articulated in *Nicholas*, and clearly expressed in Executive Law § 995 (8), the primary purpose of the Databank was "to assist in solving crimes should the investigation permit resort to DNA testing of evidence" (430 F3d at 668).

Currently, the Databank consists of four indices including the "Subject Index" containing certain parolees which was added in or about 2006 by Executive Order No. 143 of then Governor Pataki, and later formally adopted by the Division. This expansion was soon challenged to be in excess of the Division's authority in *Gallo v Pataki*, 15 Misc. 3d 824 (Sup. Ct. Kings Cty. 2007). In a brief decision, the court held that the enabling legislation "constituted a large scale

delegation of authority to the executive branch" which authorized the creation of the Subject Index to fulfill its designated purpose (15 Misc. 3d at 826). In addition, in 2010, the Division established a partial match program which reports inadvertent partial matches that "indicate a perpetrator is a close blood relative of an individual whose DNA is on file in the Databank. See, 9NYCRR 6192.1(q)" ("Partial Match Program") (Green Aff., sworn to on April 24, 2018, at ¶ 18). Since the inception of the Partial Match Program about a decade ago, there has been only 92 applications (Green Aff., at ¶ 19).

Petitioners incorrectly claim that the Regulations do not involve a "determination of a match" (Executive Law § 995-b[12]) because the initial search rules out a full match of genetic markers to DNA records in the Databank. However, it is clear that then a second match determination is conducted to discover a partial match under the Regulations In essence, the familial search Regulations are a deliberate partial match program which provides for "targeted evaluation of offenders' DNA profiles in the DNA databank which generates a list of candidate profiles based on kinship indices to indicate *potential* biologically related individuals to one or more sources of evidence" [Italics added] (9 NYCRR § 6192.1[ab]). Contrary to petitioners' prediction of widespread abuse and usage, for the six- month period since the Regulations were adopted, there were only 12 applications of which 9 were approved (Green Aff., at ¶ 56). Both partial match programs have had limited applicability. The more accurate description is that the Regulations represent "incremental changes in methodology regarding how that Databank is utilized for law enforcement purposes" (Respondents' Memorandum of Law at 17-18).

As seen above, the Executive Law § 995 *et seq* that was first enacted by the Legislature in 1994 slowly expanded from three indices to four indices in 2006; the Partial Match Program was

established in 2010, and finally the Regulations were adopted in 2017. Unlike the wholesale creation of the Subject Index, the Regulations do not add a single user to the Databank. This latest extension of the Partial Match Program is another delegated method of testing permissibly collected DNA records in the pre-existing Databank, and is rooted in the enabling legislation. All these expansions incrementally occurred for the same salutary government purpose "to assist in solving crimes should the investigation permit resort to DNA testing of evidence" (*Nicholas v Goord*, 430 F3d at 668). As such, the adoption of the Regulations were within the broad and "large scale" delegation of authority from the Legislature to the Division in its enabling statute (*Gallo v Pataki*, 15 Misc. 3d at 826). While the actual Regulations were not explicitly stated in Executive Law § 995 *et seq,* the Division exercised delegated authority to adopt the Regulations which were consistent "with the statutory language of [Executive Law § 995 *et seq's*] underlying purposes" *(Greater N. Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 25 NY3d 600, 608 [2015] *quoting Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254 [2004]).

F. The Regulations do not violate the separation of powers doctrine.

A discussion of the separation of powers doctrine must begin with the analysis of the Court of Appeals' landmark decision in *Boreali v Axelrod*, 71 NY2d 1 (1987). It is somewhat difficult to discern whether the administrative agency or body overstepped its rule-making authority and veered into legislative policy-making (*Boreali*, 71 NY2d at 11). In *Boreali*, the Court of Appeals relied on four "coalescing circumstances" in deciding the separation of powers quandary (*Id*). The four distilled factors are:

(1) whether the ... regulatory agency balanc[ed] costs and benefits according to preexisting guidelines, or instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems;

(2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance;

(3) the legislature had unsuccessfully attempted to enact laws pertaining to the issue; and

(4) the agency used special technical expertise in the applicable field.

(*Garcia v New York City Dept. of Health and Mental Hygiene,* 31 NY 3d 601, 609 [2018]) (internal citations and quotation marks omitted).

In the first *Boreali* factor, this Court must consider whether the Division balanced costs and benefits according to the preexisting enabling legislation, under Executive Law § 995 *et seq,* when it adopted the Regulations, or it made difficult value judgments choosing between broad policy goals to resolve social problems (*Boreali*, 71 NY2d at 12). While it is undisputed that the Regulations necessarily concern privacy issues, as was more fully set forth above in the Fourth Amendment analysis, which will almost always occur in the exercise of law enforcement powers *(Garcia v New York City Dept. of Health and Mental Hygiene,* 31 NY 3d at 612) . This alone is insufficient to invalidate the Regulations so long as the Division was given the authority to make certain choices consistent with its mandate *(Greater N. Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 25 NY3d at 610).

Here, as in *Garcia,* the Legislature chose the "end" of public safety and the "means" to empower the Division to "promulgate a *policy* for the establishment and operation of a DNA identification index [Databank] consistent with the operational requirements and capabilities of

the [D]ivision" (Italics added)(Executive Law § 995-b[9]) as well as to "[p]romulgate *standards* for a determination of a match between the DNA records of a person submitted for comparison therewith" (Italics added)(Executive Law § 995-b[12]) *(Garcia v New York City Dept. of Health and Mental Hygiene,* 31 NY 3d at 612). The Division balanced the costs and benefits of the Regulations within this vast delegation of authority to permit familial DNA searching, which is an expansion of the Partial Match Program utilizing the pre-existing Databank. In other words, the Division properly regulated areas under its jurisdiction (*Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv.*, 27 NY3d 174, 181).

Turning to the second *Boreali* factor, this Court must determine whether the Division "filled in details of a broad policy" or "wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" (*Boreali*, 71 NY2d at 13). The Division was not writing on a clean slate as the Division was delegated vast regulatory authority to create and maintain all aspects of the Databank. Specifically, the Executive Law § 995 *et seq* directed the Division to promulgate a "policy" and "standards" to establish operational requirements and methodologies for utilization of the Databank (Executive Law § 995-b[9] and [12]). As stated above, the Division has promulgated regulations such as creating a fourth index, creating a Partial Match Program, and more recently providing for familial DNA searching. For more than a quarter of a century, the Legislature has deferred regulation of the Database to the Division without much intervention. Given this historical perspective, the conclusion is that the Division "filled in details of a broad policy" when it adopted the Regulations.

The third *Boreali* factor takes into consideration whether the Legislature had unsuccessfully attempted to enact laws pertaining to familial DNA searching (*Boreali*, 71 NY2d

at 13). Petitioners correctly noted that the Legislature attempted on several occasions to enact familial DNA searching, but failed to do so either because the bill did not move beyond committee or it "died in the Assembly." (Petition at ¶¶ 27-31). "Legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing inferences" (*Matter of NYC C.L.A.S.H., Inc.,* 27 NY3d at 184). However, since the Division has been promulgating regulations for more than 25 years without much interference from the Legislature, an inference may be made that the Legislature approves of the Division's actions or its interpretation of the enabling legislation *(Greater N. Y. Taxi Assn.*, 25 NY3d at 612).

The fourth *Boreali* factor considers whether the Division used special technical expertise to adopt the Regulations (*Boreali*, 71 NY2d at 14). The record reflects that the Division exercised unique expertise to develop the technical requirements of the familial DNA searching Regulations.

G. The Regulations have a rational basis and are not arbitrary and capricious.

Petitioners allege that, inasmuch as the majority of persons whose DNA profiles are in the Databank are people of color, the Regulations will disproportionately result in the "targeting" of people of color by the police. To be clear, the Regulations do not impose a "stop-and-swab" regimen upon petitioners or others not already in the Databank. As fully described in this record, the respondents and the investigative agency can not select DNA profiles of people of color in a familial DNA search. No "targeting" of people of color is, therefore, possible during the actual search process. While it is unfortunate that many law enforcement initiatives tend to affect people of color in a disproportionate way, there is nothing in the Regulations that fosters

disparate treatment. It also appears there may be minimal impact due to the limited use of familial DNA searching.

As stated above, since the Regulations were adopted with statutory authorization, and are not violative of law, they have a rational basis and are not arbitrary and capricious.

Conclusion

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is denied, and the proceeding is dismissed. The clerk shall enter a judgment accordingly.

Dated: March 26, 2020

ENTER:

HON SHLOMO S. HAGLER, J.S.C.