

STATE OF NEW HAMPSHIRE

COÖS, SS.

APRIL 2022

State of New Hampshire

v.

Volodymyr Zhukovskyy

214-2019-CR-78

**STATE'S MOTION TO COMPEL DEFENDANT TO DISCLOSE SUPPORTING  
MATERIAL AND DOCUMENTATION FOR EXPERT REPORT**

NOW COMES the State of New Hampshire, by and through the Offices of the Coös County Attorney and the Attorney General, and respectfully requests the Honorable Court order the defendant to immediately provide the State with any and all supporting materials and documentation for the report of his expert, William Howerton. The State also requests that the court extend all deadlines related to expert witnesses. In support thereof, the State submits the following:

**I. BACKGROUND**

1. The defendant initially retained Stephen R. Benanti as an expert in the field of accident reconstruction in this case. At a hearing on November 9, 2021, less than one month before the scheduled trial date, and after having the opportunity to review material relating to Mr. Benanti provided by the State, defense counsel requested that the court continue the jury trial because they determined they could not call Mr. Benanti as a witness. The court directed defense counsel to file a written motion to continue, which defense filed that day and the court granted on November 10, 2021.

2. At a status conference over two months later, on January 12, 2022, defense counsel told the court that they had identified an expert witness to replace Mr. Benanti. The State requested the name of the defendant's expert and defense counsel objected. Ultimately, the court requested the parties attempt to reach an agreement about disclosing the expert's name and advised the State to file a motion if an agreement could not be reached.

3. That same day, the State emailed defense counsel asking what specific concerns they had about disclosing the name(s) of their expert(s) and how it would prejudice the defendant. The State informed defense counsel that the State was "more than willing to work[] out . . . assurances to minimize [their] concerns," while also stressing that the State believed it was "prudent that [they] provide the expert's name so that we [could] all do our best to continue on this trial track." Defense counsel never responded.

4. On January 31, 2021, the State again reached out to defense about their position. Defense counsel responded, indicating that they agreed to provide the expert's name under certain circumstances: (1) that the State "not make any attempt to contact or call the expert as a witness should [defense] opt not to use them or until [the State] receive[d] a report from [defense];" and (2) "[the State] would agree to provide [defense counsel] with **any information** which [the State] uncover[s] during [its] investigative process as soon as [the State is] aware of it in an effort to avoid another debacle like [counsel] had with Mr. Benanti." (Emphasis added).

5. The State agreed to the defendant's first condition, but objected to defendant's second condition. Specifically, the State informed the defendant that the State would readily turn over any information that the State is obliged to disclose under the State's discovery obligations.

6. The defendant ultimately provided the State with the name of its expert, William Howerton, on February 8, 2022, the day of a scheduled status conference.

7. At the status conference on February 8, 2022, after receiving input from counsel, the court issued a series of scheduling orders. Specifically, the court ordered the defendant to provide the State with its expert's reports by Friday, April 1, 2022. The court also ordered the State to disclose its experts' reports by April 25, 2022; to depose the defendant's experts by May 6, 2022; and file all motions regarding the defendant's experts by May 16, 2022.

8. The defendant did not provide the State with its expert report by April 1, 2022. The State received no communication from defense counsel either on April 1, 2022 or in the days leading up to it.

9. On April 2, 2022 (a Saturday morning), the State emailed counsel for the defense and inquired on the status of the report. Counsel for the defendant responded in an email the same day, stating that they were "cleaning up a few typos" and hoped to have the report to the State in the next day or two. Counsel also wrote that "We are happy to get any of the support documentation for you and are willing to have [Mr. Howerton] answer some written interrogatories prior to the depo if you need more info."

10. The defendant provided the State with Mr. Howerton's report on Monday, April 4, 2022, three days after the deadline. The report is dated April 1, 2022, and contains 4 pages of narrative, 12 photographs, and 7 "figures." The seven "figures" in the report include three photographs with markings superimposed, and four computer generated images. None of the figures contains a legend or index explaining how the various markings or images were produced.

11. Mr. Howerton's report states on the first page that "The supporting material for the analysis and testing will be provided at a later date." The report also states that "we used

“Photomodeler to develop the photogrammetry solution,” and then imported the “photogrammetric” solution and other data “into AutoCAD from which the vehicle positions were laid out.” The report later references a “parametric analysis” of the motorcycle velocity and attack angle to provide “an estimate of the effects of speed, orientation, and direction on the predicted behavior.” The report references a “model” which “reasonably predicts the post collision motorcycle path as well as the post impact velocity,” as well as the impact forces on the pickup truck driven by the defendant.

12. On Monday, April 4, 2022, immediately after receiving the report, the State sent defense counsel an email requesting that they provide the State with all supporting documentation and materials for Mr. Howerton’s report, and if they could not, to please advise the State when they expected to do so. The State received no reply.

13. On Tuesday, April 5, 2022, the State emailed defense counsel again, asking them to let the State know as soon as possible when they would provide the supporting materials and documentation for Mr. Howerton’s report. Defense counsel responded the same day, stating that they “had requested it and will forward it as soon as [they] receive it.”

14. As of the date of filing, the State has not yet received any supporting materials or documentation for Mr. Howerton’s report, despite the fact that defense counsel had previously stated they would provide it, the statement in the report that the materials will be provided, and despite the April 1, 2022 deadline one week prior.

## **II. DISCUSSION**

15. This case is currently scheduled for trial in July. The State fully intends to proceed with this trial as scheduled, and seeks to insulate the trial track from any possible delays, including any potential delays related to the defendant’s replacement expert. It has been almost exactly five

months since the defendant made the decision to replace Mr. Benanti, and two months since the defendant disclosed Mr. Howerton as its expert. The State is bound by the deadlines set by the court, and has now been prejudiced by the defendant's delay in providing necessary materials relating to his replacement expert's report.

16. The defendant's choices have created the situation in which the court was forced to issue a compressed schedule in advance of the new trial date. The current deadlines require the State to depose Mr. Howerton by May 6, less than one month from the date of filing of this motion. While it would have been difficult to accomplish this had the defendant complied with the court-ordered deadline and provided not only Mr. Howerton's report but the necessary supporting documentation by April 1, 2022, it is now all but impossible.

17. The State has already been prejudiced by the defendant's delay in providing Mr. Howerton's report by three days; the State is further prejudiced by the defendant's failure to provide any of the supporting documentation or materials that are required to fully understand the report. The report contains numerous references to models and diagrams created using computer programs that are not identified, based on data that has not been described with any specificity. In essence, Mr. Howerton's report contains a series of vague and perfunctory conclusions, without providing any information to support his findings.

18. The State will not have enough time to adequately prepare for a deposition of Mr. Howerton given the current deadline of May 6, 2022, and the fact that the defendant has thus far failed to provide the supporting materials and documentation he has previously stated that he would. If the defendant delays any further, it may jeopardize the ability of the State, the defendant, and the court to adequately prepare for trial by the scheduled date of July 18, 2022.

19. The State's concerns about expert witness delays are exacerbated by previous delays by defense counsel in providing the State with other expert reports in this case. On December 10, 2020, the State emailed defense counsel to arrange depositions for Dr. Edward Sellers, the defendant's toxicology expert, and Mr. Benanti. Defense responded that given recent discovery disclosures, "it may be some time before their supplemental reports are submitted." Six months later, in May 2021, defense counsel provided those expert addendum reports to the State; Dr. Sellers' addendum was dated December 18, 2020, and Mr. Benanti's addendum was dated November 18, 2020. Dr. Sellers and Mr. Benanti made clear at or during their depositions that those reports were submitted to defense counsel at, or near the time, of the dates listed on the reports. Defense counsel has still not provided an explanation for the above described conflict and apparent six-month delay in providing the addendums to the State.

20. The State therefore requests that the court order the defendant to **immediately** provide the State with any and all supporting documentation and materials relating to Mr. Howerton's report. The State also requests that this court extend all deadlines related to expert witnesses by one week, and require the State to disclose its experts' reports by May 2, 2022; to depose the defendant's experts by May 13, 2022; and file all motions regarding the defendant's experts by May 23, 2022.

21. Should the defendant continue to fail to provide the necessary materials to the State by Wednesday, April 12, 2022, the State would request the court schedule a show cause hearing on April 13, 2022 for the defendant to explain the reasons for the delay, to adjust the relevant discovery deadlines as appropriate, and issue whatever other sanctions the court deems appropriate.

22. The State believes these requests are eminently reasonable under the circumstances.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

- (A) Compel the defendant to immediately provide the State with any and all supporting materials and documentation for Mr. Howerton's report; and/or
- (B) Hold a hearing; and
- (B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

April 8, 2022

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CERTIFICATE OF SERVICE

I certify that this pleading has been provided to counsel of record, through the Superior Court's electronic filing system.

/S/ Joshua L. Speicher  
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