

**THE STATE OF NEW HAMPSHIRE**

**HILLSBOROUGH, SS.  
SOUTHERN DISTRICT**

**SUPERIOR COURT  
No. 2021-CR-00944**

State of New Hampshire

v.

Danielle Dauphinais

**ORDER ON STATE'S MOTION TO CLARIFY AND/OR RECONSIDER THE COURT'S  
ORDER ON STATE'S MOTION TO PERMIT THE STATE TO CONSUME SAMPLES  
DURING FORENSIC TESTING**

The defendant, Danielle Dauphinais, is charged with first degree murder, second degree murder, three counts of witness tampering, and two counts of endangering the welfare of a child. On August 17, 2022, the State filed a motion to consume samples during forensic testing. The defendant did not object to the consumptive testing itself, but objected to such testing outside the presence of a defense expert. The Court held a hearing on that motion on October 26, 2022. On November 2, 2022, the Court granted the State's motion to the extent the consumptive testing complied with a number of procedural safeguards established by the Court. The State now moves for clarification and/or reconsideration of the Court's decision. The Court finds and rules as follows.

**Discussion**

To reiterate, the Court granted the State's request to conduct consumptive testing, while also implementing protections to ensure that the defendant could prepare a complete defense in this case. This is consistent with the Court's prior rulings in which it ordered that a defense expert must be allowed to be present during any consumptive DNA testing. Nonetheless, the State requests that the Court "[r]econsider the application of the balancing test laid out in [United States v. Gardner, No. 4:14-CR-

61-H, 2015 U.S. Dist. LEXIS 56038 (E.D.N.C. Apr. 29, 2015)].” (State’s Mot. Prayer A.)

To be frank, there is no balancing test mentioned in Gardner that would be applicable here, and that is why the Court did not use such a test in its original order. The only “test” arguably mentioned in Gardner relates to a bad faith finding should the State lose or destroy evidence. However, the State has not lost or destroyed any evidence in this case. Indeed, the State’s original motion was prospective in nature, in that no consumptive testing has been conducted. As such, to the extent the State contends that the Court must decide whether the State has acted in bad faith, that issue is not before the Court. To the extent the State is referring to some other “test,” the Court is at a loss as to which “test” the State is referring.

The State also requests that the Court clarify its order to provide guidance about the treatment of swab samples. The Court understands that the State seeks permission to consume the entire swab samples referenced in its motion in order to generate DNA liquid extract. To the extent the Court was unclear, having found that the State has provided a sufficient basis for conducting consumptive testing, the State is permitted to conduct consumptive testing on the swab samples so long as a defense expert is present during any part of the consumptive testing process. Thus, if an entire swab sample may be consumed in the process of creating DNA extract liquid, the Court’s order requires that a defense expert be afforded the opportunity to observe the consumption of the swab.

Finally, the State seeks clarification as to whether the Court intended for a defense expert to be present for forensic testing even where the consumption of a sample would not occur. The Court’s order was issued in response to the State’s

motion to conduct consumptive forensic testing. Accordingly, if the State can conduct forensic testing on evidence without consuming the entire sample, the safeguards spelled out in the order do not apply.

So ordered.

Date: February 7, 2023

A handwritten signature in black ink, appearing to be "C. Temple", written over a horizontal line.

Hon. Charles S. Temple,  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 02/08/2023