

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

DECEMBER TERM, 2022

STATE OF NEW HAMPSHIRE
V.
DANIELLE DAUPHINAIS

226-2021-CR-0944

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

NOW COMES the State of New Hampshire, by and through the Office of the Attorney General, and respectfully moves this Court to clarify and/or reconsider its Order on the State's Motion to Consume Samples During Forensic Testing. In support of this request, the State submits that:

Discussion

1. On August 2, 2022, the State filed a Motion to Consume DNA Samples During Forensic Testing. On October 26, 2022, the Court held a hearing on the issue, where the parties made oral arguments. On December 9, 2022, the Court issued an Order. The State is seeking through this Motion to clarify portions of the Court Order and/or to request that Court reconsider portions of the Court Order. *See State v. Dauphinais*, No. 226-2021-CR-0944, Court Doc. 84 (December 9, 2022) (Temple, J.).

2. As noted in the State's Motion to Consume, the State seeks to conduct forensic testing on nine samples of potential DNA evidence that were collected in bathrooms inside of the crime scene at 7 Sunset Drive in Merrimack, New Hampshire. Three of the items are physical items which will be swabbed for the potential presence of epithelial cells. The remaining six items consist of swabs taken of small red/brown stains. A determination as to whether

consumption of a given swab is required can only be made by the analyst at whichever laboratory conducts the testing.¹ Given the nature of touch DNA (the epithelial cells) and of the red/brown stains at issue, the analyst at the New Hampshire State Police Forensic Laboratory believes that the swabs will have to be consumed in order to ensure that enough DNA is obtained for testing. *See State v. Dauphinais*, No. 226-2021-CR-0944, Court Doc. 84 (December 9, 2022) (Temple, J.).

3. The Court's Order seems to suggest that the focus of the State's argument was on the expense of conducting testing. The Court writes in its order that the State distinguished the current case from the matter of *State of New Hampshire v. Ryan Barden* (See docket no.: 226-2021-CR-818) based solely on the expense required to send the samples to an outside laboratory. The State made no differentiation between the instant case and the *Barden* case based on the potential expense of testing. To the contrary, the State argued that the *Barden* case was distinguished from the instant case by the difference in evidentiary value of the evidence recovered in that case, i.e., the inculpatory or exculpatory nature of the evidence. The State focused on 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) to the facts and circumstances of the case at bar.

4. The State requests that the Court reconsider its ruling that an analysis under *United States v. Gardner*, No.4:14-CR-61-H, 2015 U.S. Dist. LEXIS 56038 (E.D.N.C. Apr. 29, 2015) is not required given that the State filed its Motion to Consume Samples prior to any testing being conducted on the samples at issue. Court Doc No. 84, p. 3 FN 1. The prospective filing of such a motion is consistent with the holding in *Gardner*, where the State in that case sought permission to consume samples prior to testing having been conducted. This prospective filing is also consistent with holdings in *United States v. Rogers*, 2010 WL 5015329, 4 (2010) and in *United States v. Haight*, 153 F. Supp.3d 240, 242 (2016). Further, counsel for the defendant agreed that the analysis in the *Gardner* decision as utilized by this Court previously was the appropriate methodology by which to review the request. While *Gardner* provides guidance for the Court, the balancing test utilized by the *Gardner* Court in making a prospective

¹ The Court notes that the State seeks to send the samples to DNA Laboratories International, however the State provided information as to both DNA Laboratories International as well as Signature Science Labs. The State has made no argument that the samples should be sent to a specific lab for analysis. As noted in the State's motion to consume, however, the State of New Hampshire has a contract with DNA Laboratories International.

determination as to whether the State can proceed with consumptive testing is based in established law including the cases of *California v. Trombetta*, 467 U.S. 479, 489 (1984) and *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

5. In order to ensure that the parties understand the scope of this Order, the State requests that the Court clarify its Order with respect to any samples that may need to be consumed. In the instant Order, the Court made no distinction between swab samples and DNA. The Order specifically discusses DNA consumption without mention of the swab samples. Therefore, the State requests that the Court clarify its Order to indicate whether the State may proceed with consumption of the swab samples and complete the chemical extraction process, which would result in the DNA sample, in the form of the DNA extract liquid. At quantitation, the analyst will determine, prior to further analysis, whether there is enough DNA extract liquid to proceed with testing without consumption of the DNA.

6. As discussed at length in the State's motion to consume and during oral arguments, the forensic testing of these samples is a chemical process in which DNA is extracted from the swab. This process results in a liquid which contains only DNA (DNA extract liquid).

7. In *United States v. Haight*, the United States District Court for the District of Columbia found that the retention of the liquid DNA extract provided sufficient remedy for potential consumption of a swab. The court stated that "[i]n other words, defendant may still obtain some remedy here – namely, an opportunity to independently test any DNA extract not consumed in the Government's test." See *Haight*, 153 F. Supp.3d 240, 242 (2016) (holding that the government could consume a swab sample).

8. The State requests that Court clarify and/or reconsider its Order to allow the analyst to consume the swab and make a determination as to whether forensic testing can be conducted without consuming the DNA sample in the form of the DNA extract liquid. If the forensic testing can proceed without consumption of the DNA extract liquid and enough of the liquid would remain for independent testing, the State requests that testing be allowed to continue without the presence of a defense expert. In the alternative, the State requests that the Court clarify its Order to provide guidance to the State about the treatment of swab samples versus DNA samples.

9. Last, in the instant Order, the Court granted the State's Motion to Consume Samples During Forensic Testing but provided several protections. As to the protections, the Court ordered as follows:

- (1) if the State can develop a usable DNA profile without consuming all of the DNA, it shall preserve the rest of the sample(s) for testing by the defendant's expert;
- (2) if the State cannot develop a usable DNA sample without consuming all of the DNA, it shall be allowed to perform consumptive tests;
- (3) At any DNA tests on the samples identified in this motion, the defendant may retain an expert to attend and observe the DNA testing and procedures performed by the State and its agents. Court Doc No. 84, p. 4.

10. The State also seeks clarification as to number three of this portion of the Court's Order. Given the language of number three, the State is unclear whether the Court intended for a defense expert to be present for forensic testing even where consumption of the DNA would not occur. The language of number three includes that the defendant may have an expert present and in attendance "at any DNA test on the DNA samples identified in th[e] Motion." However, the State believes that the Court intended to allow the State to proceed with non-consumptive forensic testing without the presence of the defense expert. Where the DNA is not consumed, it would be available for independent testing by an independent defense expert outside of the presence of the State.

WHEREFORE, the State respectfully requests that this Honorable Court:

- A. Reconsider the application of the balancing test laid out in *Gardner, et al.*
- B. Clarify the Order with respect to the consumption of swab samples versus the consumption of DNA.
- C. Clarify the Order with respect to the protections provided by the Court.
- D. Grant such further relief as may be warranted.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorney

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/s/ Bethany J. Durand

December 19, 2022

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CERTIFICATE OF SERVICE

I certify that on this day I sent a copy of the foregoing to counsel for the defendant, Jaye Rancourt, Esq., and Benjamin Falkner, Esq., through the Court's e-filing system.

December 19, 2022

/s/ Bethany J. Durand

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