

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS**

**SUPERIOR COURT**

**STATE OF NEW HAMPSHIRE**

**v.**

**LOGAN CLEGG**

**No. 217-2022-CR-1226**

**STATE'S OBJECTION TO DEFENDANT'S MOTION REGARDING FUNDS  
FOR DNA TESTING**

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and respectfully requests that this court deny the defendant's request that the State be required to pay a portion or all of the estimated amount for observation of DNA testing in this case. In support of this motion, the State submits the following:

**BACKGROUND**

1. The defendant stands charged with two counts of knowing second degree murder, two alternative counts of reckless second-degree murder, three counts of falsifying evidence, and one count of being a felon in possession of a firearm, all related to the murders of Stephen and Djeswende Reid on April 18, 2022. At a hearing on January 30, 2023, the defendant, through counsel, invoked his right to a speedy trial and requested a trial date as soon as possible. The case is currently scheduled for trial on July 11, 2023.

2. Although most forensic testing in this case has been completed, the DNA testing of certain items is still pending. These items have not yet been tested because it is likely that, due to the nature of the samples being tested, the samples would need be consumed in order for useful results to be returned. Based on this likelihood, and after discussions with defense counsel, the State has arranged for DNA Labs International ("DLI"), a private forensic

laboratory, to conduct the outstanding testing. DLI is equipped to perform certain necessary testing functions that the New Hampshire State Police Forensic Laboratory is not. The State has specifically arranged for DLI to provide remote access to the defendant's DNA expert to observe all active phases of consumptive DNA testing. It has taken several weeks to coordinate the logistics required for DLI to make the necessary accommodations.<sup>1</sup> DLI has informed the State that testing could begin as early as the first week of April, 2023, subject to the availability of the defense's expert and the authorization of the parties.

3. On March 20, 2023, DLI provided the State with the final estimate for the cost of the potentially consumptive testing. The estimate includes both the costs and fees associated with performing the tests, which the State will pay, and a defense observation fee for each sample tested, which will be assessed to the defendant. The estimate for total fees to be paid by the State is \$30,045, while the estimate for total defense observation fees is \$1,995 per sample, applied to a maximum of 31 samples, for a total of \$59,850.<sup>2</sup> DLI will not begin testing until both the State and the defendant have approved the estimates. The State is satisfied with DLI's estimate and will approve the costs attributable to the State.

4. On the same day, March 20, 2023, the State provided defense counsel with DLI's estimate. On March 23, 2023, defense counsel informed the State that they believed the estimate for defense observation fees was too high, and that they would not authorize payment. Defense counsel stated that their reasons for not approving the estimate are: 1) DLI is charging the

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<sup>1</sup> In addition to DLI, the State contacted two other private laboratories to inquire if they could conduct the necessary testing in the required timeframe. Neither laboratory was equipped to both conduct the necessary testing, and do so in the time required.

<sup>2</sup> DLI informed the State, and the State has in turn informed defense counsel, that the estimate provided is a "maximum" estimate. The maximum estimate assumes the maximum number of tests possible, and also assumes that consumption will be required for each test. Once testing begins, it is possible that examination of the samples to be tested will reveal that consumption is not necessary for certain tests, and/or that fewer samples are necessary. This would lower the costs for both the State and the defendant. The final costs for testing are typically less than the maximum estimate.

defendant more than it is charging the State; 2) the testing is being done in batches, rather than individually; and 3) the defendant believes the total cost should be no more than \$6,000. Defense counsel further stated their belief that DLI was charging excessive fees because the parties are captive customers, and thus will be forced to pay whatever DLI charges because of the timeline of this case.

5. At the State's request, DLI provided the State with information explaining the defense observation fees. On March 30, 2023, DLI provided the State with the reasons justifying the defense observation fees, described *infra* in paragraph 11. Later the same day, the State provided defense counsel with this information. Defense counsel indicated that they maintained their objection, and would not approve the estimate. Testing can thus not begin, because DLI will not begin testing without prior approval of the estimated costs and fees from both parties.

### **ARGUMENT**

6. As this court is aware, the trial for this matter is scheduled to begin on July 11, 2023. The defendant has invoked his right to a speedy trial, and has represented through counsel that he wishes to have his trial as soon as possible. As such, it is imperative that the State be able to complete all remaining forensic testing as soon as possible, so that both parties have enough time to consider the results and take whatever steps they deem necessary prior to trial. The State has already sought (with the defendant's assent) one extension of the deadline to disclose expert material based on the delay in arranging for the remaining DNA testing to be conducted at DLI, in order to accommodate the defendant's request to have an expert observe the testing.<sup>3</sup>

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<sup>3</sup> The State filed this assented-to motion prior to the emergence of the defendant's refusal to approve the testing fees at issue in this motion.

7. The defendant's stated objections to DLI's estimate, and consequent refusal to approve testing, have already delayed the remaining testing, and risk causing further delays that could jeopardize the currently scheduled trial date. The defendant's rationale for refusing to approve DLI's estimate is neither timely nor appropriate.

8. The State recognizes that this situation is unusual, if not unique. Typically, decisions by the parties in a criminal case to obtain services other than counsel (such as expert witnesses or forensic testing) are independent of each other. In this case, however, because of the likelihood that the testing of certain items will require consumption of the samples, the State has agreed to allow the defendant's expert to observe all consumptive testing. The State thus cannot proceed with testing without the defendant's approval, since the defendant will not approve the observation fees assessed by DLI. Where the defendant has invoked his right to a speedy trial, and the currently scheduled trial date is quickly approaching, it is imperative that the remaining DNA testing be conducted as soon as possible. Any delay in conducting this testing would greatly prejudice the State by depriving it of its ability to properly and fully prosecute this case.

9. Pursuant to RSA 604-A:6, indigent defendants may seek authorization from the court to obtain funding for services other than counsel. The statute authorizes the court to approve funding in excess of \$300 if "the court determines that the nature or quantity of such services reasonably merits greater compensation." RSA 604-A:6.

10. RSA 604-A:6 therefore vests this court, rather than the defendant, with the authority to determine whether compensation for services other than counsel is reasonable. The defendant may not unilaterally decide, as he has in this case, that a quote for services is too high,

and refuse to seek authorization from the court for funding.<sup>4</sup> None of the defendant's specific objections are reasonable, nor do they provide sufficient basis to refrain from even seeking the court's approval. The fact that the total fees assessed to the defendant are higher than the total costs to the State for the testing is not, on its own, a valid basis to object to the defense estimate – there is no rule that requires that testing costs be less than observation fees, or that one party must pay more than the other. The defendant's assertion that the testing is done in batches, rather than individually, is similarly irrelevant.

11. DLI, at the State's request, has provided the following reasons for the defense observation fee:

- Given the quantity and nature of the items to be tested, it will likely require 3-5 days to complete the testing. During this time, a minimum of 2-4 lab personnel must devote 100% of their time to this case, when they would normally be able to work on and complete multiple cases during the same time frame;
- Preparation of the lab space that will be observed takes place days before the testing, and until the testing is complete, that space cannot be used for other client casework;
- Different evidence collection techniques are required for the requested testing, which requires multiple lab spaces be set up simultaneously, thus preventing those spaces from being used for other client work;
- It is not possible to batch all of the items together and test them simultaneously, given the number of items and the required corresponding control mechanisms. The size of this case will cause scheduling issues with instrumentation that will impact DLI's ability to process cases for its other clients;
- Because of the possibility of consumption, two independent analysts will need to review testing data during the process in order to determine whether or not consumption is necessary, preventing them from performing other work; and
- Observation cases require a level of continuous communication throughout the DNA testing process, involving multiple DLI employees, that is not typical of standard casework.

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<sup>4</sup> The State acknowledges that if DLI's estimate were exorbitant or completely without basis (\$1,000,000, for instance), it would be appropriate for defense counsel to refuse to even seek the court's approval. In this case, however, DLI has provided a reasonable rationale for its estimate, and the estimate is not excessive or exorbitant.

12. There is no reason to believe that DLI intends to purposely test samples in an inefficient matter in order to increase the costs; to the contrary, DLI has indicated that conducting testing with defense observation is a drain on its resources, and thus has an incentive to accomplish the testing as quickly and efficiently as possible. Finally, the defendant's estimate that testing should cost no more than \$6,000 cannot serve as valid grounds to object to the defense observation fees. Defense counsel has not provided the State with any examples of defense observation fees in similar circumstances that were \$6,000, or provided any support or documentation indicating that \$6,000 is a more appropriate amount.

13. Defense counsel's stated belief that DLI is charging excessive fees because the parties have no other choice but to use DLI is not grounded in fact or reality, and is not a valid basis to refuse authorization to pay or request that the State pay all or a portion of the estimated observation fee. The State presented defense counsel's criticisms to DLI, who have responded that doing testing for an observation case such as this is a hardship for them, rather than a windfall.

14. The State does not put forth this argument in order to defend DLI, but rather to provide the court with necessary context. The State has no interest in ensuring that DLI makes a profit. The State's only intent is to ensure that necessary forensic testing can be completed in a timely fashion that does not jeopardize the trial date in this matter. Should the State be compelled to find another lab to conduct this testing, it would be almost certain that the testing could not be completed in time for the scheduled trial date. There is also no guarantee that another lab's fees for defense observation would be less than those quoted by DLI. Another lab could charge similar or even higher fees, putting the parties in the same position. Additionally, the other labs, including the State Lab, that the State spoke with are not currently equipped to do perform all of

the necessary testing. The State is unsure, at this juncture, as to whether there is another lab who is both capable of performing the necessary testing and able to allow for defense observation, notwithstanding the timing issues.

15. The State thus respectfully requests that this court approve the testing observations fees. It is for this court to determine whether the estimate provided by DLI for defense observation fees is reasonable, not the defendant. For the reasons stated above, and to the extent this court will consider the State's input, the State does not believe that the estimate for defense observation fees is excessive or unreasonable. DLI has provided a rationale that explains the cost of the defense observation fee; the fact that the defendant may disagree with that rationale is not dispositive, and is not grounds to refuse to even seek the court's approval. The defendant is charged with multiple counts of second-degree murder, and both parties have an enormous interest in all information relative to these charges – whether inculpatory or exculpatory – being brought to light. The DNA testing at issue is incredibly important and could significantly affect the case, and thus warrants the expenditure being considered here.

16. If the Court is disinclined to authorize the observation fee, the State requests that this court grant the State permission to proceed with testing without a defense observer. The results of the testing the State seeks to conduct may constitute crucial evidence, and it is imperative that both the State and the defendant have ample time to process and respond prior to trial. The defendant's subjective belief that the cost of testing is too high should not prevent the State from obtaining potentially crucial evidence, or delay this trial from proceeding as scheduled. The defendant has no due process right that prevents the State from conducting the

forensic tests sought, or to require that this court allow a defense expert to observe the testing, where the samples that may be consumed have no apparent exculpatory value.<sup>5</sup>

17. At this court's request, the State can provide further briefing and legal arguments in support of its request to proceed with consumptive testing without a defense observer. The State requests that should this court require such briefing, it be done on an expedited schedule, so as not to jeopardize the current trial date.

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<sup>5</sup> The Due Process Clause of both the State and Federal Constitutions impose “a duty on the State to preserve evidence at least in those circumstances where its exculpatory value is apparent and comparable evidence is unavailable.” *In re Opinion of the Justices (Eliminating Requirement for Additional Breath Test Samples)*, 160 N.H. 180, 183 (2010) (citing *California v. Trombetta*, 467 U.S. 479, 489 (1984)). Here, the samples that may be destroyed cannot be characterized as exculpatory (or inculpatory) evidence because they have not yet been tested, and no determination that DNA is even present has been made. *See United States v. Anderson*, 169 F. Supp. 3d 60, 65 (D.D.C. 2016) (government had no duty to preserve DNA swabs prior to consumptive testing, since they were neither inculpatory nor exculpatory and thus not clearly material); and *State v. Lehr*, 254 P.3d 379, 389 (Ariz. 2011) (no violation where there was no indication swabs were exculpatory, indeed they proved to be inculpatory). *See also Trombetta*, 467 U.S. at 489 (holding in part that the exculpatory value of the evidence must be apparent *before* the evidence is destroyed and finding no due process violation where “the chances [were] extremely low that preserved samples would have been exculpatory”).

WHEREFORE, the State respectfully requests that this Honorable Court:

- A. Authorize the payment of the observation fee from RSA 604-A:6 funds; and
- B. Deny the defendant's request that the State assume payment of all or a portion of the observation fee; and
- C. Order such further relief as may be deemed just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

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Date: April 10, 2023

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**CERTIFICATE OF SERVICE**

I, Joshua Speicher, hereby certify that a copy of this pleading was served upon counsel of record on the above listed date, via the court's electronic filing system.

/s/ Joshua L. Speicher  
Joshua L. Speicher