

STATE OF NORTH CAROLINA
BUNCOMBE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12CRS00318

IN RE:)	
MATTER OF THE NORTH)	STATE'S MOTION FOR RELEASE
CAROLINA STATE CRIME LAB)	OF SBI TESTING INFORMATION
)	

NOW COMES THE STATE OF NORTH CAROLINA, by and through the Office of the District Attorney, Ronald L. Moore, 28th Prosecutorial District, and Assistant District Attorney Megan L. Apple and moves this Court for an Order requiring the North Carolina State Crime Laboratory, under the administration of the State Bureau of Investigation and the Attorney General's Office for the State of North Carolina, to produce the information described further herein and in support of this motion says the following:

1. This Court, as a Superior Court Judge of the State of North Carolina, has original and general jurisdiction throughout the State, sufficient to hear this matter and to enter a binding order in the same, pursuant to The North Carolina Constitution, Article IV, § 12(3). N.C.G.S. §7A-271 also provides the Superior Court with exclusive and original jurisdiction over all actions not assigned to the District Court.
2. There are numerous cases currently pending in both the Superior and District Courts of the 28th Judicial District, as well as upon information and belief cases which have been adjudicated since November of 2011, which involve scientific evidence which has been analyzed by the North Carolina State Crime Lab (hereinafter "State Crime Lab.") Upon information and belief, at least a portion of these cases likely involving misdemeanor offenses, could have originated and been adjudicated within the applicable time periods of the Forensic Sciences Act (hereinafter "the Act") as cited below. The testing performed by State Crime Lab Agents, often forms the basis for criminal charges of both a felony and misdemeanor nature.
3. The Office of the District Attorney for the 28th Prosecutorial District is a Constitutional Office with the duty to prosecute all criminal offenses within Buncombe County; this Office also has an obligation under law to ensure defendants are afforded procedural justice, including but not limited to, ensuring defendants are provided with discovery as required by law.
4. The Forensic Sciences Act, codified in Session Law 2011-19 with subsequent amendments at Session Law 2011-307, requires in pertinent part, that forensic science professionals working for the North Carolina

State Crime Laboratory, which operates under the administration of the State Bureau of Investigation obtain individual certification consistent with international and ISO (International Organization for Standardization) standards in their specialty area, unless no such certification is available for that specialty.

5. Upon information and belief, there is no certification consistent with international and ISO standards currently available for many of the specialty areas, including Forensic DNA Testing, however the State Crime Lab administration, in an apparent effort to embrace the statute, decided to require in the case of the Forensic Biology Section that all Forensic Biology personnel regardless of their specialty take a more general exam in the area of molecular and forensic biology, which is upon information and belief, a largely over-inclusive field, depending on how this subject is defined by the testing agency. In fact, the test given to Forensic Biology personnel also tested Forensic Biology personnel in other fields, such as fingerprint analysis, questionable document analysis and firearms, among other forensic science fields. The State has not been provided with any information from the State Crime Lab as to which other specialty areas were tested in a similar manner, but upon information and belief other areas outside of Forensic DNA Analysis would have lacked an available certification consistent with international and ISO standards.
6. The State has learned after speaking with actual Forensic Biology personnel, State Crime Lab Officials and after consulting the website describing the testing administered, that the testing to which the Forensic Biology personnel were subjected was comprised of 60% general questions regarding molecular and forensic biology and 40% questions in areas which the analysts had minimal, if any, training, experience or education.
7. The testing agency hired by the State Crime Lab to proctor the test given to Forensic Biology personnel, and upon information and belief as stated above presumably testing in other disciplines, is the American Board of Criminalistics, hereinafter "ABC."
8. On the afternoon of Friday, June 1, 2012, the State received a motion from defense counsel in a case scheduled for trial the following Monday, June 4, 2012, which specifically inquired as to whether the State's forensic witnesses had attained certification in compliance with The Forensic Sciences Act. While the State did not believe the Act applied, since it was not the law at the time of the offense being tried which had occurred in 2005 with subsequent prosecution originating in 2010 and therefore not affected as provided for under the explicit terms of the Act, the State placed calls to the forensic witness and State Crime Lab Officials to ask about the assertions of the defense motion. The motion stated that all lab

analysts had taken a certification exam in November or December of 2011, and not all of them passed. Prior to the filing of this defense motion, the State had not been made aware any analysts had failed any examinations.

9. During pretrial prep of the forensic witness several days earlier, the State had asked the DNA analyst whether she had taken and passed the customary proficiency tests, and was advised that she had. The State was at that time, as stated above, unaware that any test beyond the proficiency tests had been given to this particular analyst and was further unaware analysts within the Forensic Biology section had been given the general exam described above and that some had not passed. Further, the DNA analyst did not volunteer any information regarding that further testing.
10. Upon further inquiry by the State in response to receiving the defense motion, the State learned, and asserts by information and belief, that State Crime Lab Officials had previously received notice that many of their analysts had not passed the certification exams, and further that the State Crime Lab, and Officials at the State Crime Lab had informed analysts they were not to discuss the overall testing or overall results with other personnel in the State Crime Lab, or with individuals outside of the State Crime Lab. State Crime Lab Officials have confirmed the same in part but indicated that analysts were informed that if they were specifically asked about this testing they should volunteer their individual results. State Crime Lab Officials have indicated they did meet with analysts regarding the same but that there are no written memoranda, video or audio recordings of this meeting.
11. Further, upon information and belief, the State asserts that the State Crime Lab failed to advise the District Attorneys of this State about the failure notifications, and that there was in fact a high failure rate for the Forensic Biology Section. The State Crime Lab has not provided any statistical information regarding passage rates in the Forensic Biology Section or any other Section and in fact has refused to do so.
12. In the past, the State Crime Lab has used a particular notification process to make District Attorney's Offices aware of any issues which occur at the State Crime Lab, such as an analyst's separation from employment with the State Crime Lab. This process has consisted of the State Crime Lab sending to each District Attorney's Office memos outlining any issues in both "hard copy" paper form and "soft copy" email, as well as often also in fax format.
13. The 28th Prosecutorial District received a single one-page memo dated November 17, 2011, advising that testing was being conducted and specifically asking that no one schedule trials involving lab analysts

during the relevant dates of testing. This memo did not indicate which analysts would be taking tests or in which areas international/ISO certification was available and therefore required pursuant to the Forensic Sciences Act. The State asserts that no further memos or notice was provided to the District Attorney. (See attached "Exhibit A.")

14. Ron Moore, District Attorney for the 28th Prosecutorial District, after being informed about this issue arising in the pending case of Assistant District Attorney Megan L. Apple, contacted members of the District Attorney's Executive Committee during the week of June 4, 2012 and later travelled to Raleigh for the Committee's in-person meeting on Friday, June 8, 2012. Further, Mr. Moore, along with other members of the Executive Committee requested officials from the State Crime Lab attend that meeting to address why this information had not been voluntarily provided to District Attorney's Offices across the State. At that time at the Executive Committee Meeting on June 8, 2012, Crime Lab Officials represented they had sent a second memo, dated January 13, 2012, indicating some unspecified analysts had not passed examinations; however in this same memo Crime Lab Director Joseph John Sr., indicated the results of these examinations were protected under the Personnel Privacy Act found at N.C.G.S. §126-24, forbidding their release without a Court Order.
15. Upon information and belief, none of the six sitting Elected District Attorneys who were members of the Executive Committee and in attendance at the meeting had ever seen such a memo nor were they aware of the existence of any such memo or communication. Further, these same individuals had also not been made aware of the above issues by the State Crime Lab. These individuals requested from Crime Lab Officials a copy of this alleged second memo. In response on Friday June 8, 2012 after 5pm, Crime Lab Officials provided by email an electronic copy of a January 13, 2012 memo, clearly stamped "DRAFT," which they allege was sent to District Attorneys and Staff across the State. This draft memo contains a "DRAFT" watermark across the page and is not printed on State Crime Lab Letterhead or initialed by the Director of the Crime Lab. A copy of the actual memo allegedly sent by the State Crime Lab to District Attorney's Offices on letterhead and bearing the Director's initials has been requested by this Office and members of the Executive Committee and has not been provided by the State Crime Lab.
16. Also, this Office and many other District Attorney's Offices across the State have been unable to locate any such notifications from the State Crime Lab regarding these issues other than the November 17, 2011 scheduling memo. Further, State Crime Lab Officials have conceded they did not engage in any other type of notification method save the alleged January 13, 2012 memo; this included the State Crime Lab Director failing

to mention any of the issues above even when asked to speak at the Spring Elected District Attorney's Conference.

17. In addition, State Crime Lab Officials have indicated analysts who did not pass examinations administered by ABC received a two-page letter from ABC. The first page of that letter indicated the analyst had not passed the exam and the second page indicated what areas that analyst needed additional study in. The State Crime Lab has taken the position that analysts are not required to disclose these letters to the State Crime Lab. Neither the November 17, 2011 memo or the "DRAFT" copy of the alleged January 13, 2012 memo make any mention of the existence of such "further study" letters.
18. Since the date these tests were given, on or about December of 2011, and the results received at some time thereafter which date/s was and still is unknown to the State, District Attorney's Offices throughout North Carolina have been handling cases which involved evidence subject to analysis by the State Crime Lab.
19. State Crime Lab Officials also indicated at the Executive Committee Meeting that they did not have a centralized list of which analysts had been tested and which analysts had passed or not passed certification tests. These same Officials indicated they also have never obtained any personal knowledge regarding testing and test results, leaving this responsibility to individual analysts to report to their section managers on a solely voluntary basis.
20. State Crime Lab Officials have also taken the position that analyst results, including any "further study" letters are protected by State personnel regulations, prohibiting the State Crime Lab from requiring analysts turn them over to the Crime Lab or to District Attorney's Offices without a Court Order. However, as these results have not been placed into individual analysts' personnel files, they cannot be protected by legislation which protects the contents of such personnel files. Further, by definition, testing information and results, even if located or placed in personnel files, are not included in the definition of "personnel information" as dictated by N.C.G.S. §126-22 and/or N.C.G.S. §126-23 and applicable to N.C.G.S. §126-24.
21. It is of absolute necessity that the District Attorney's Office for the 28th Prosecutorial District be provided with all information regarding any testing pursuant to the Forensic Sciences Act or any other type of testing, so that the District Attorney's Office may make any necessary disclosures to defense counsel as required by law.

22. The State Crime Lab's refusal to provide the District Attorney's Office with the names, testing results and status of these forensic witnesses without a Court Order is not supported by law, denies defendants their discovery rights under North Carolina statutes and potentially Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and is arguably the very conduct which N.C.G.S. §15A-903(d) contemplates as illegal.
23. Although the position of the State is as noted above herein, i.e., a Court Order cannot be required by the State Crime Lab for release of this information, the State believes that the Superior Court needs to be made aware of this matter, and submits this Motion to the Discretion of the Court, in lieu of requesting a search warrant for the files of the State Crime Lab.

WHEREFORE THE STATE REQUESTS this Honorable Court Order the following information is not protected by any state personnel legislation and must be provided to the 28th Prosecutorial District, District Attorney's Office, for its own use as mandated by law, and also for distribution to all other District Attorney's Offices across the State for the same purpose and further Order that the State Crime Lab provide the same without delay. The State requests the following information:

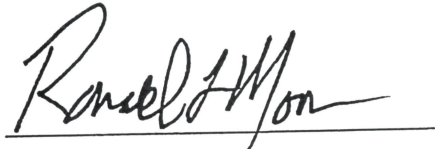
1. A full list of all discipline areas at the State Crime Lab in which international/ISO certification is available;
2. For areas where no such certification is available, what if any other testing, has been or will be given to analysts in those areas;
3. A complete list of every analyst employed at the Crime Lab, their specialty discipline and a complete record of the dates on which they have taken any testing, international/ISO certification testing or any other testing including proficiency testing, and the results of each examination, whether the individual is currently employed or has left employment after having been tested;
4. A copy of all letters provided to individual analysts by any testing organization which at all reference the results of any test, including but not limited to, scores, pass/fail indications, and areas in which the testing organization recommends or indicates an analyst may need additional study;
5. The State requests this information as in 1-4 above be provided to this District Attorney's Office and updated and maintained at a minimum bi-, annually, but with additional mandatory timely updates of any passage or failure of any examination or testing of any individual analyst;
6. The State requests information be provided which is categorized by county or prosecutorial district as to which cases each specified analyst has conducted analysis in since the date of the passage of the Forensic Sciences Act;
7. The State further requests an actual copy of the January 13, 2012 memo, if any, the State Crime Lab has represented it sent to District Attorney's

Offices across the State, as well as all documentation regarding it's sending;

8. The State also requests all documentation including but not limited to documentation of or from meetings, instructions, memos, email correspondence or the like instructing analysts in their response/s regarding testing;
9. The State further requests permission from this Court to share this information with all other District Attorney's Offices across the State of North Carolina and that in the future this information be sent biannually and updated with additional mandatory timely updates of any passage or failure of any examination or testing of any individual analyst, to all District Attorney's Offices throughout the State, with ensured receipt;
10. The State also requests the above be styled by this Court as a continuing obligation of production to this District Attorney's Office and each District Attorney's Office, without further Order of this Court;
11. The State requests and expedited hearing in this matter with shortened notice to interested parties, Roy Cooper, Attorney General for the State of North Carolina, Greg McLeod, Director of the State Bureau of Investigation, Joseph John Sr., Director of the North Carolina State Crime Lab and Joy Strickland, Assistant Attorney General assigned to the North Carolina State Crime Lab, in accord with the best interests of justice.

FOR THE ABOVE REASONS, the State moves the Court Order the above information disclosed as provided herein.

Respectfully submitted this the 12th day of June, 2012.



Ronald L. Moore
District Attorney
28th Prosecutorial District



Megan L. Apple
Assistant District Attorney
28th Prosecutorial District

CERTIFICATE OF SERVICE

I, Megan L. Apple, Assistant District Attorney for the Twenty-Eighth Prosecutorial District, hereby certify that I have served a copy of this document on the Parties by delivering a copy of said document to the Parties by:

Having copies of said document addressed and delivered to the parties at the following locations by depositing them, first class postage paid, in the U.S. Mail:

Roy Cooper
Attorney General
Phone: (919) 716-6400
Address: P. O. Box 629
Raleigh, NC 27602

Gregory McLeod
Director SBI
Address: 3320 Garner Road
Raleigh, NC 27626

Joseph John, Sr
Director of SBI Lab
Address: 121 E. Tryon Road
Raleigh, NC 27603

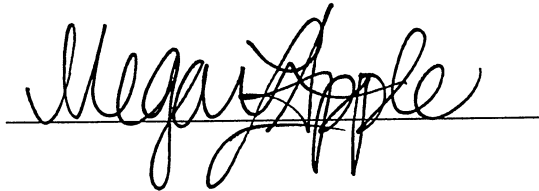
Joy Strickland
Assistant Attorney General
Address: 121 E. Tryon Road
Raleigh, NC 27603

M. LeAnne Melton
Public Defender, 28th Judicial District
2nd Floor Buncombe County Courthouse
60 Court Plaza
Asheville, NC 28801

Andy Banzhoff
Buncombe County Criminal Defense Bar
The Jackson Building
22 South Pack Square Suite 1100
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*Copies of this motion will also be sent by email and fax to the parties, however to protect the privacy of these individuals their email addresses and fax numbers are not listed on this document.

This the 12th day of June, 2012.

A handwritten signature in black ink, appearing to read "Megan L. Apple", is written over a horizontal line.

MEGAN L. APPLE
Assistant District Attorney
28th Prosecutorial District
Buncombe County Courthouse
P.O. Box 7158
Asheville, NC 28802



ROY COOPER
ATTORNEY GENERAL

NORTH CAROLINA
STATE BUREAU OF INVESTIGATION
DEPARTMENT OF JUSTICE

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GREGORY S. MCLEOD
DIRECTOR

MEMORANDUM

TO: All Elected District Attorneys and Staff

FROM: Joseph R. John, Sr. Director of the NC State Crime Laboratory

DATE: November 17, 2011

SUBJECT: Forensic Scientist Certification

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As you may be aware, the recently enacted Session Laws 2011-307 and 2011-19 require forensic science professionals at the North Carolina State Crime Laboratory to obtain individual certification in their specific scientific discipline unless no certification is available.

To meet its statutory obligations, the State Crime Lab has scheduled two dates for the majority of the forensic scientists from the Raleigh, Triad and Western labs to take the required certification examination. The examination will be administered on December 5th and December 14th, 2011. In addition, the toxicologist in the laboratory will be taking the required examination on December 12th, 2011.

The State Crime Lab will greatly appreciate your efforts in not scheduling any cases that may require the attendance of any Lab forensic scientists on these days. Although this accommodation may create an isolated issue or two, it is anticipated that each of you will recognize the essential nature of this statutory mandate for the Lab. We sincerely hope that this advance notice will be adequate for your scheduling purposes.

Thank you for your time and attention to this matter.

Exhibit A



A Nationally Accredited State Agency

An ASCLD/LAB Accredited Laboratory Since 1988

