

NORTH CAROLINA)

CATAWBA COUNTY)

STATE OF NORTH CAROLINA)

V.)

Defendant.)

FILED

SEP 29 PM 1:29

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

CATAWBA COUNTY, C.S.C.

BY _____)

MOTION TO SUPPRESS
DNA EVIDENCE FROM
ARMREST OF DEFENDANT'S
VEHICLE

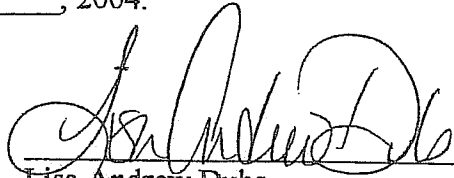
THE DEFENDANT, through counsel, hereby moves the Court for an Order Suppressing the results of SBI DNA testing on a an alleged drop of blood taken from the Defendant's vehicle. This DNA testing is inadmissible because it was conducted in violation of a Court Order. In support of this Motion, the Defendant shows the Court the following:

1. The crime in question occurred on or about April 20, 2002, nearly two and one-half years ago.
2. The State has announced its intention to seek the death penalty.
3. Out of an abundance of caution, counsel for the Defendant obtained an Order from the Court, within two days of the crime, entitled "Order To Preserve Evidence and Notes." This Order, entered by District Court Judge Jonathan L. Jones on April 23, 2002, provided as follows: "that the State, the District Attorney's Office, the Catawba County Sheriff's Department, the State Bureau of Investigation and or their agents or designates are absolutely prohibited from disposing of any notes taken during the investigation of this case and are prohibited from consuming all trace and blood evidence without prior notice to the Court and consent of the Court thereto." This Order was served on the State and on the various law enforcement agencies by defense counsel on April 23, 2002.
4. Despite service of the April 23, 2002 Order To Preserve Evidence and Notes on the State, the Sheriff's Department and the SBI, the State and the said law enforcement agencies transferred trace and blood evidence to the SBI Laboratory for analysis without prior notice to the Court and without consent of the Court.
5. Consequently, this Court should declare that the SBI Laboratory analysis of a drop of blood from the armrest of Defendant's vehicle is inadmissible because said analysis was conducted in violation of the Court's Order.
6. Furthermore, this Court should issue an Order requiring any and all law

enforcement officers or officers of the State who participated in violating the Court's April 23, 2002 Order to show cause why they should not be held in contempt of Court and punished accordingly.

WHEREFORE, Defendant moves the Court for an Order ruling that the results of the SBI Laboratory analysis of the blood from the armrest of Defendant's vehicle be deemed inadmissible in any way, and that any and all officers who participated in the violation of the Court's April 23, 2002 Order be required to show cause why they should not be held in contempt of this Court.

This the 29th day of Sept, 2004.




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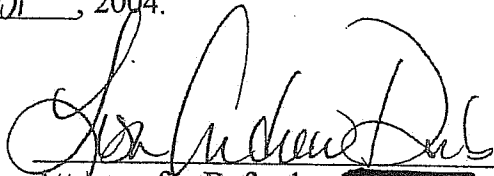

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she/he has served a copy of the foregoing document on counsel for the State by delivering a copy to Mr. Sean McGuinness, Assistant District Attorney, as follows:

 by hand delivering a copy to Mr. Sean McGuinness or to an agent or employee of the Office of the District Attorney, 25th Judicial District, Courthouse, Newton, N.C.

_____ by placing a copy into an official depository of the U.S. Postal Service, with first-class postage pre-paid, and addressed As follows: Mr. Sean McGuinness, Assistant District Attorney, P. O. Box 666, Newton, N.C. 28658.

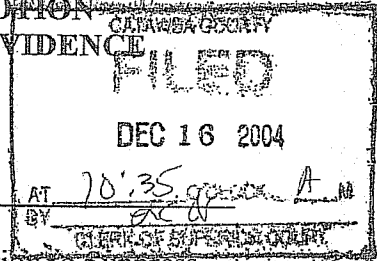
This the 29th day of Sept, 2004.


Attorney for Defendant 

NORTH CAROLINA) IN THE GENERAL COURT OF JUSTICE
CATAWBA COUNTY) SUPERIOR COURT DIVISION
[REDACTED]

STATE OF NORTH CAROLINA)
V.)
[REDACTED])
Defendant.)

AMENDMENT TO MOTION
TO SUPPRESS DNA EVIDENCE



THE DEFENDANT, through counsel hereby amends his "Motion to Suppress DNA Evidence From Armrest of Defendant's Vehicle," filed herein on September 29, 2004, as follows:

1. In the Motion previously filed herein, the Defendant requested that the results of SBI DNA testing on an alleged drop of blood taken from the armrest of Defendant's vehicle be suppressed on the grounds that the said evidence was taken in violation of a District Court Order entered herein on April 23, 2002.
2. The "Order To Preserve Evidence and Notes," entered by District Court Judge Jonathan L. Jones on April 23, 2002, provided as follows: "that the State, the District Attorney's Office, the Catawba County Sheriff's Department, the State Bureau of Investigation and or their agents or designates are absolutely prohibited from disposing of any notes taken during the investigation of this case and are prohibited from consuming all trace and blood evidence without prior notice to the Court and consent of the Court thereto." This Order was served on the State and on the various law enforcement agencies by defense counsel on April 23, 2002.
3. The Motion to Suppress DNA Evidence (filed on 9/29/04) originally was scheduled for hearing during the week of October 11, 2004. Some evidence was taken which is relevant to said Motion. However, the Court did not rule on said Motion and continued the hearing on that and other motions regarding DNA evidence until December 17, 2004. The Defendant solicited the following evidence in support of said Motion at the hearing during the week of October 11, 2004:
 - a. Former Assistant District Attorney Jason Parker testified that the State was served with a copy of the April 23, 2002 District Court Order and that Mr. Parker served a copy of said Order on the Sheriff's Department and the SBI. The Defendant also solicited evidence from law enforcement investigators to the effect that the Catawba County

Sheriff's Department and the N.C. SBI were aware of the terms of the April 23, 2002 District Court Order.

- b. During the week of October 11, 2004, several telephone conferences took place involving representatives from the N.C. SBI DNA Laboratory, the assistant district attorneys handling this case for the State and the defense attorneys. The substance of these conversations were summarized for the Court in open session. During those telephone conversations, the SBI representatives advised that, among other items, the following items of evidence were tested by the SBI:
 - i. Alleged Blood from Steering Wheel of Defendant's Vehicle: the sample of evidence alleged to be blood was entirely consumed during SBI testing and no further testing is now possible.
 - ii. Alleged DNA of Victim from Spot of Blood on Armrest of Defendant's Vehicle: the sample of evidence alleged to be the victim's blood was entirely consumed during testing. A very small sample of DNA extract (approximately 10 microliters) remains. However no samples of the original spot on the armrest remains for testing.
 - iii. Vaginal Swab from Rape Kit from Victim: originally, the SBI was unable to obtain a DNA profile from the male fraction taken from this swab. However, in the late summer of 2004, the SBI began to review certain evidence again and began extracting DNA from the vaginal swab so that a new process of DNA testing, known as capillary electrophoresis, could be accomplished.
- c. During the week of October 11, 2004, the Court ordered the SBI to cease any and all testing in which it was engaged in this case. This Order was entered by the Court because of the apparent violation of the April 23, 2002 District Court Order and because of the inaccuracies in testimony from two SBI agents regarding photographs taken of the Defendant's vehicle.¹ The Court also ordered the SBI to prepare a list of all testing which it has done in this case and a list of all evidence, reports, photographs and other matters in the possession or control of the SBI pertaining to this case; said listing was to be provided to the Office of the District Attorney and the defense

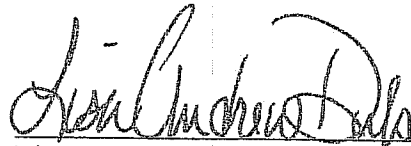
¹ At first the SBI agents were equivocal as to whether they took photographs and if they took any photographs, which camera was used; they also testified that they checked with the SBI headquarters in Raleigh to find out whether any photographs were developed for this case and were told that none had been submitted or developed; the next day, one of the agents returned to court to advise that photographs had been taken by the SBI and were in the process of being developed by the SBI Lab.

attorneys. However, as of this filing, no listings have been provided to the defense.

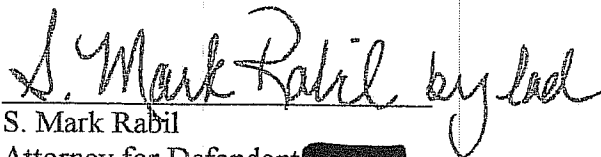
4. At the time of the filing of the Motion to Suppress DNA Evidence From Armrest of Defendant's Vehicle, the defense attorneys were not aware of the information outlined in paragraph (2) above.
5. Beginning in June 2003, the defense has been requesting, through discovery, detailed information from the SBI so that defense DNA experts may analyze the testing performed by the SBI. A letter detailing further information needed by the defense was also submitted in November 2003, and there was further correspondence in May 2003. The SBI has provided copies of reports and bench notes regarding some of the testing which it has performed; this information was submitted to the Office of the District Attorney which then provided copies to the defense. However, the SBI Laboratory has refused to provide the information necessary for the defense experts to properly review and analyze the SBI test results as to serology and DNA testing. As the Defendant's DNA expert will testify at the hearing scheduled on December 17, 2004, without the information requested, a proper review and analysis cannot be conducted. The SBI has advised the defense, through communications with the Office of the District Attorney, that it will only provide electronic data and protocols upon order of the court, and that the SBI never agrees to on-site inspections of the SBI Lab.
6. The April 23, 2002, District Court Order was entered by a court with jurisdiction over this case at the time it was entered. The State, through an assistant district attorney, accepted service of the said Order and then served law enforcement agencies with said Order. At no time did the State object to the entry or the terms of the Order. Even after the Defendant was indicted in this case, the State provided a copy of the said Order to the SBI. And, despite raising a verbal objection to the terms of the April 23, 2002 Order during the week of October 11, 2004 after the hearing in this case began, the State has never made a motion to set aside the April 23, 2004 Order, nor did the State ever file an appeal of the said order to a higher court. Rather, the State has always accepted the terms and conditions of the April 23, 2002 Order. Furthermore, the Defendant has detrimentally relied upon the actions of the State. That is, if the State had ever raised an objection to the terms and conditions of the April 23, 2002 Order prior to October 11, 2004, then the defense attorneys could have filed new motions seeking the same relief provided in the April 23, 2002 Order. The State is now estopped from contesting the April 23, 2002 Order.
7. The Defendant's due process rights, under the federal and state constitutions, have been violated by the bad faith destruction of evidence

in this case. *Arizona v. Youngblood*, 488 U.S. 51 (1988). Consequently, the charge against the Defendant should be dismissed and, alternatively, any and all evidence obtained by the State in violation of the April 23, 2002 Order should be suppressed.

This the 16 day of December, 2004.



Lisa Andrew Dubs
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Attorney for Defendant [REDACTED]
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VERIFICATION

COMES NOW LISA A. DUBS, Attorney At Law, who, being duly sworn, deposes and says that she has read the foregoing AMENDMENT TO MOTION TO SUPPRESS DNA EVIDENCE and that the contents of the same are true to the best of her knowledge and belief.

This the 16 day of December, 2004.



LISA A. DUBS

Sworn to and Subscribed
Before me this the 16th
Day of December, 2004.

Amanda B. Ewy
Notary Public

My Commission Expires: May 2, 2009


CERTIFICATE OF SERVICE

The undersigned hereby certifies that she/he has served a copy of the foregoing document on counsel for the State by delivering a copy to Mr. Sean McGinnis, Assistant District Attorney, as follows:

K by hand delivering a copy to Mr. Sean McGinnis or to an agent or employee of the Office of the District Attorney, 25th Judicial District, Courthouse, Newton, N.C.

_____ by placing a copy into an official depository of the U.S. Postal Service, with first-class postage pre-paid, and addressed As follows: Mr. Sean McGinnis, Assistant District Attorney, P. O. Box 566, Newton, N.C. 28658.

This the 16th day of December, 2004.



Attorney for Defendant 