

STATE OF NEW YORK  
ERIE COUNTY COURT

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THE PEOPLE OF THE STATE OF NEW YORK

v.

**MOTION IN LIMINE/  
ANSWERING AFFIDAVIT**

Indictment No [REDACTED]

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STATE OF NEW YORK     )  
COUNTY OF ERIE        )     ss.  
CITY OF BUFFALO        )

[REDACTED], Esq., an attorney licensed to practice law in the courts of this State, under penalties of perjury pursuant to CPLR 2106(a), affirms the following statements to be true.

1. I, along with co-counsel [REDACTED], am the attorney for the defendant, [REDACTED] [REDACTED], who is charged in this indictment with murder in the second degree (Penal Law § 125.25[1]) for the fatal stabbing of [REDACTED] [REDACTED]
2. I make this affirmation (i) in response to the prosecution's motion in limine dated September 8, 2022 and (ii) in support of the defendant's motion for the relief described below.  
  
*The prosecution's motion in limine.*
3. The prosecution seeks to preclude the defense from raising an error made by [REDACTED] a forensic biologist with the Erie County Central Police Services Laboratory, in an unrelated case, an error which was missed in reviews by forensic biologists [REDACTED]

██████████ As none of these individuals performed any relevant DNA analysis in this case, the defense does not plan on raising this issue at trial.

4. The prosecution seeks to admit evidence that the defendant's DNA profile was obtained from the National DNA Index System as a result of a 2008 case out of Oregon. The defendant opposes this, as the manner in which his DNA was obtained is irrelevant to the facts before the jury and could result in undue prejudice to the defendant.
5. The prosecution seeks admission of two booking photographs of the defendant, one from ██████████, as well as the fact of the associated arrests and the addresses he provided to the police. The defense stipulates to the admission of this evidence, provided that the Court instruct the jury that it is not to consider them for the defendant's propensity to commit crime.

*The DNA evidence.*

6. Although it may be premature to rule on the admissibility of the DNA evidence, the defense will be objecting to its admission unless there are reasonable assurances that it is in its original condition – that is, that no DNA transference occurred at any point between ██████████ and the present.
7. The admissibility of a fungible item “generally requires that all those who have handled the item identify it and testify to its custody and unchanged condition” (*People v. Julian*, 41 NY2d 340, 343 [1978]). The failure to establish a chain of custody can be excused only “where the circumstances provide reasonable assurances of the identity and unchanged condition of the evidence” (*id.*).

8. It is clear, from the discovery provided by the prosecution, that there is not an adequate chain of custody. There is virtually no record of how the blood stain evidence was stored and handled between [REDACTED]. Nor can any witness testify that no DNA transference occurred, as the transfer would leave no visible evidence.
9. If the prosecution cannot prove that the DNA evidence is in its original condition, this Court should deny its admission under fundamental principles of evidence and due process of law.

***Certain evidence gathered during the original investigation is admissible at trial.***

10. By the time this case goes to trial, it will have been [REDACTED] since the murder of [REDACTED]. It will be one of the oldest cases in American history to go to trial. The defendant does not have the resources to defend the case that are available to most criminal defendants. There is no chain of custody for the DNA evidence. Key witnesses are deceased. The defendant, who was never a suspect until more than forty years after the murder, never got an opportunity to establish an alibi.
11. Accordingly, the only way for the defendant to receive a fair trial is the admission of certain evidence gathered during the original investigation of this case by the Buffalo Police Department.
12. The day of the murder, the police took a statement from [REDACTED], who lived next door to [REDACTED]. [REDACTED] told the police that she saw a man looking out the window of [REDACTED] apartment [REDACTED] on the morning of the murder.

13. ██████ gave a detailed description of this man, which the police used to help create a composite sketch. The police relied on ██████ description to the point that they released the sketch to the newspapers. She described him as a white male.
14. In a P-73 dated ██████ memorialized a conversation with ██████ ██████ said that she had a “full face view” of the man in the window, and “[s]he was certain ... that this was a white male and not a Puerto Rican or possibly an Indian or black male.”
15. In the booking photos from ██████, the defendant is distinctly Native American in appearance.
16. The defense seeks admission of all of ██████ statements to the police concerning the physical appearance of the man she saw in the window at ██████ on the morning of the murder. This will allow the jury to compare the description of the presumed killer to the booking photographs of the defendant.
17. "A defendant has a constitutional right to present a defense" (*People v. Hayes*, 17 NY3d 46, 53 [2011]), and a "defendant's right to due process requires admission of hearsay evidence when the declarant has become unavailable to testify and the hearsay testimony is material, exculpatory and has sufficient indicia of reliability" (*People v. Burns*, 6 NY3d 793, 795 [2006]).
18. ██████, then known as ██████, is unavailable to testify at trial, as she died in 2017 ([https://buffalonews.com/obituaries/baker-elizabeth-e/article\\_2d2cfad5-50d3-5a10-b4c7-6db0f47825d7.html](https://buffalonews.com/obituaries/baker-elizabeth-e/article_2d2cfad5-50d3-5a10-b4c7-6db0f47825d7.html)). Her statements are obviously material and exculpatory, given the disparity between her description and the defendant’s appearance at the time. They are also reliable, as the police relied on her description to help create the composite sketch.

19. Because the hearsay statements bear substantial assurances of trustworthiness, and are so critical to the defense, their exclusion would deprive the defendant of his constitutional right to due process of law (*Chambers v. Mississippi*, 410 US 284 [1973]).
20. The defense plans to offer the police reports themselves into evidence, which are admissible without a business records exception under the Ancient Document Rule (“A statement in a document is admissible if it is proved to be in existence for more than thirty years, and its authenticity is supported by its proper custody or otherwise accounted for, and it is free from any indication of fraud or invalidity” [Guide to NY Evidence § 8.07]).

***Further motions.***

21. The defendant reserves the right to make further evidentiary motions prior to trial should they become necessary.

Accordingly, the defendant requests that the requested relief be granted.

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