

Appendix A

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2021-0427, State of New Hampshire v. Robert Breest, the court on November 16, 2021, issued the following order:**

Notice of appeal is declined. See Rule 7(1)(B).

Under Supreme Court Rule 7(1)(B), the supreme court may decline to accept a notice of discretionary appeal from the superior or circuit court. No appeal, however, is declined except by unanimous vote of the court with at least three justices participating.

This matter was considered by each justice whose name appears below. If any justice who considered this matter believed the appeal should have been accepted, this case would have been accepted and scheduled for briefing.

Declined.

Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

**Timothy A. Gudas,  
Clerk**

Distribution:

Merrimack County Superior Court, 217-1972-CR-00789

Honorable Andrew R. Schulman

Mr. Robert Breest

Attorney General

Elizabeth C. Woodcock, Esq.

File

# THE STATE OF NEW HAMPSHIRE

## JUDICIAL BRANCH

<http://www.courts.state.nh.us>

### RULE 7 NOTICE OF DISCRETIONARY APPEAL

This form should be used only for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court in (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; (6) a probation revocation proceeding; or (7) a landlord/tenant action or a possessory action filed under RSA chapter 540; (8) an order denying a motion to intervene; or (9) a domestic relations matter filed under RSA chapters 457 to 461-A, except that an appeal from a final divorce decree or from a decree of legal separation should be filed on a Rule 7 Notice of Mandatory Appeal form.

#### 1. COMPLETE CASE TITLE AND CASE NUMBERS IN TRIAL COURT

New Hampshire v. Robert Breest, No. 72-S-789

#### 2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

New Hampshire Superior Court, Merrimack County (Andrew R. Schulman, J.)

#### 3A. NAME AND ADDRESS OF APPEALING PARTY. IF REPRESENTING SELF, PROVIDE TELEPHONE NUMBER

Robert Breest

T-19038

MCI Shirley, Medium

1 Harvard Road, P.O. Box 1218

Shirley, MA 01464-1218

No E-Mail or telephone  
(incarcerated)

#### 3B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF APPEALING PARTY'S COUNSEL

Robert Breest, pro se

#### 4A. NAME AND ADDRESS OF OPPOSING PARTY

State of New Hampshire

33 Capital Street

Concord, NH 03301-6397

#### 4B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF OPPOSING PARTY'S COUNSEL

Elizabeth C. Woodcock

Office of the Attorney General

33 Capital Street

Concord, NH 03301-6397

E-Mail Address

Elizabeth.Woodcock@doj.nh.gov

Telephone number

(603) 271-3671

**RULE 7 NOTICE OF DISCRETIONARY APPEAL**

**5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT**

None

**6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING.**

August 25, 2021

DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY.

Received September 10, 2021

**7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS**

Robert Breest is serving a sentence of 40 years to life in prison

**8. APPELLATE DEFENDER REQUESTED?**

YES  NO

IF YOUR ANSWER IS YES, YOU MUST CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND ATTACH FINANCIAL AFFIDAVIT (OCC FORM 4)

**9. IS ANY PART OF CASE CONFIDENTIAL?**

YES  NO

IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.

**10. IF ANY PARTY IS A CORPORATION LIST THE NAMES OF PARENTS, SUBSIDIARIES AND AFFILIATES.**

Not applicable

**11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE?**

YES  NO

IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A:

**12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL?**

YES  NO

IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

**RULE 7 NOTICE OF DISCRETIONARY APPEAL**

13. NATURE OF CASE AND RESULT (Limit two pages double-spaced; please attach.)

14. ISSUES ON APPEAL (Limit eight pages double-spaced; please attach.)

The New Hampshire Supreme Court reviews each discretionary notice of appeal and decides whether to accept the case, or some issues in the case, for appellate review. The following acceptance criteria, while neither controlling nor fully describing the court's discretion, indicate the character of the reasons that will be considered.

1. The case raises a question of first impression, a novel question of law, an issue of broad public interest, an important state or federal constitutional matter, or an issue on which there are conflicting decisions in New Hampshire courts.
2. The decision below conflicts with a statute or with prior decisions of this court.
3. The decision below is erroneous, illegal, unreasonable or was an unsustainable exercise of discretion.

Separately number each issue you are appealing and for each issue: (a) state the issue; (b) explain why the acceptance criteria listed above support acceptance of that issue; and (c) if a ground for appeal is legal sufficiency of evidence include a succinct statement of why the evidence is alleged to be insufficient as a matter of law.

15. ATTACHMENTS

Attach to this notice of appeal the following documents in order: (1) a copy of the trial court decision or order from which you are appealing; (2) the clerk's notice of the decision below; (3) any court order deciding a timely post-trial motion; and (4) the clerk's notice of any order deciding a timely post-trial motion.

Do not attach any other documents to this notice of appeal. Any other documents you wish to submit must be included in a separately bound Appendix, which must have a table of contents on the cover and consecutively numbered pages.

16. CERTIFICATIONS

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.



Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

Sept. 20, 2021  
Date



Appealing Party or Counsel

**RULE 7 NOTICE OF DISCRETIONARY APPEAL**

Not applicable

**TRANSCRIPT ORDER FORM****INSTRUCTIONS:**

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Supreme Court 15(3)), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the court transcriber. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.
4. The transcriber will produce a digitally-signed electronic version of the transcript for the Supreme Court, which will be the official record of the transcribed proceedings. A paper copy of the transcript will be prepared for the court. Parties will be provided with an electronic copy of the transcript in PDF format.

DATE OF PROCEEDING	TYPE OF PROCEEDING	LENGTH OF PROCEEDING	NAME OF JUDGE(S)	PORTIONS PREVIOUSLY PREPARED	DEPOSIT (SEE SCHEDULE BELOW)
					\$
					\$
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					\$
					\$
					\$
					<b>TOTAL DEPOSIT:</b>
			<b>DO NOT SEND DEPOSIT AT THIS TIME</b>		

**SCHEDULE OF DEPOSITS**Length of ProceedingDeposit Amount

Hearing or trial of one hour or less

\$ 175

Hearing or trial up to ½ day

\$ 450

Hearing or trial of more than ½ day

\$ 900/day

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you may be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

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Merrimack County

### 13. Nature of Case and Results

This case is about the burden a defendant -- Robert Breest, here -- must meet to obtain dismissal of the charge pursuant to RSA 651-D:III(e), the evidence that a defendant may present to meet that burden, and whether the Superior Court erred in weighing the evidence below.

In 1973, Robert Breest was convicted of murdering Susan Randall. Since 2000, he has sought to prove his innocence through post conviction DNA testing of scrapings from underneath Susan Randall's fingernails, which the State had linked to Breest at trial.

In 2001, to decide Robert Breest's first motion for DNA testing, the Superior Court considered the significance of the fingernail evidence "in the context of the trial itself." It reasoned that an exclusionary DNA test result could mean that "Randall had a violent struggle with some person other than the defendant immediately prior to being killed by him." And, it concluded that this scenario was "so radically different from the State's argument to the jury" that -- applying the standard governing motions for new trial based on newly discovered evidence -- "post trial DNA testing [was] warranted."

In 2012, after earlier rounds of DNA testing did not exclude him, Robert Breest obtained additional DNA testing, which showed that the scrapings excluded Robert Breest at the major profile, and no conclusion could be made at the

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two of 17 loci which were the minor profile.

Robert Breest moved for a new trial pursuant to RSA 651-D:2, IV(b) which was denied by the Superior Court.

In May of 2015, the Superior Court held an evidentiary hearing based upon the 2012 DNA test results and ultimately denied the motion. The court concluded that Robert Breest had not met his burden of showing at a new trial, an acquittal would occur.

At the hearing, the State's expert, Dr. Charlotte Word testified for the State and again explained the 2001 DNA test results: she had overseen at Cellmark. Those results were concluded to be insufficient when the federal court in Breest v. New Hampshire Attorney General, No. 06-cv-361-SM, (2008) denied the State's motion to dismiss and further DNA testing was performed.

It is the 2012 test results that excluded Robert Breest at the major profile and the minor profile consists of only two markers that match Robert Breest, and the FBI has held that two markers don't establish a profile. Even Dr. Charlotte Word opined that those two markers were artifacts. Robert Breest submits that the 2008 and 20012 DNA testing establish that at those two markers, DYS456 and DYS458, Robert Breest is 15 and 19. The minor profile is 17 and 17. Robert Breest is excluded at both profiles. Dr. Charlotte Word entered the 2008 DNA test results into the U.S. database and got one match which was African American. Robert Breest is Caucasian.

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#### 14. Issues on Appeal

Issue One: To determine whether the DNA tests were favorable under RSA 651-D-2, VI(b) and warrant dismissal of the charge because a different result would be reached on retrial. The Superior Court denied the motion and stated "Denied for the Reasons set Forth in the State's Objection." Did the Superior Court err?

Reasons for Accepting Issue One: NOA Page 16

1. The Superior Court erred. The standard here is "whether the new DNA test results are of such a character that a different result will probably be reached at another trial."
2. The "statute is silent as to the appropriate standard of review." And a petitioner's burden under RSA 651-D:2, VI(b) is an important issue of first impression that implicates a fundamental liberty interest.
3. The precise burden is potentially outcome determinative here. This was a close case on the evidence, as the United States Court of Appeals and the Superior Court have already acknowledged. See Breest v. Perrin, 624 F.2d 1112, 1116 (1st Cir. 1980) ("This is not a case where...the evidence was so overwhelming that the new evidence could safely be ignored."). Perrin, supra.
4. Here the Superior Court ruled that the motion was denied on the basis of the reasons set forth by the prose-

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cution, and the prosecution argued that "there was plenty of other evidence." The prosecution then revisited the trial evidence, ignoring the new 2012 DNA evidence, and furthermore relied upon Dr. Charlotte Word and her opinion of the Cellmark 2001 DNA evidence that was the basis of the appeal to the federal District Court in Breest v. N.H. AG, Civil No. 06-cv-361-SM (2008) wherein the court denied the State's motion to dismiss and allowed Robert Breest to obtain additional DNA testing because the DNA test results from 2001 as reported by Dr. Charlotte Word and Cellmark were faulty, as noted in Breest v. N.H. AG, No. 06-361-SM (2007).

The State relying upon the trial evidence and ignoring the new 2012 DNA test results was error. The court relying upon that evidence was also error. The Superior Court should have considered the new 2012 DNA test results which corrected the incorrect 2008 test results, and which excluded Robert Breest. Dr. Charlotte Word even conceded on cross examination in 2015 that she didn't analyze the 2012 DNA test results. She, rather, returned to her faulty 2001 test results that were the basis of the federal court denying the State's motion to dismiss and allowed the new 2008 and 2012 DNA tests. The 2008 ReliaGene test results establish that Huma Nasir used half of the remaining evidence, the fingernails, and submitted this evidence to two tests. A 17 Y-STR DNA

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test that Robert Breest was not excluded and a MiniFiler DNA test, where Robert Breest did not match at eight of eight loci. Huma Nasir said because the MiniFiler test did not show any male DNA, she could not use it. But, she used half of the remaining fingernails as noted on the front page of the 2008 ReliaGene test, and as Dr. Charlotte Word determined in 2015 that there was male DNA present because it was present in the 17 Y-STR DNA test result, and that test, just as the MiniFiler test used half of the remaining fingernails.

When Huma Nasir conducted the 2012 Y-STR and MiniFiler tests, she discovered an error and corrected it. At the DYS385 a/b she originally determined that Robert Breest was 12 and 14, the same as Susan Randall's fingernails. Using the more sensitive DNA test in 2012, she determined that Susan Randall's fingernails contained DNA at that loci that was 11 and 13 and excluded Robert Breest as a potential contributor. She had already determined that Robert Breest is 15 and 19 at the DYS456 and DYS458 in 2008 at ReliaGene, and in 2012 at Orchid Cellmark determined that the two additional markers, 17 and 17 did not match Robert Breest, she never said Robert Breest was included, she only said Robert Breest couldn't be excluded, but that was error. Those markers do not match Robert Breest and he is excluded. The Superior Court has declined to consider

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this new evidence of exclusion. Has the Superior Court erred?

Issue Two: Motion to Order Orchid Cellmark to supply Robert Breest with the Raw Data to prove that the two new markers are artifacts and not true alleles. Dr. Charlotte Word at the hearing in May of 2015 testified that she wasn't sure the two markers newly reported in 2012 were true alleles. She testified that Cellmark includes all the findings, including markers that are below the recognized RFU intensity and defers to the scientist to make a determination. The 2001 Cellmark report lists markers in parentheses to show that there were markers there, but probably artifacts and thus placed in parentheses and not considered. In 2012 Orchid Cellmark did not use parentheses to distinguish any such finding. Therefore, the review of the raw data is required, just as it was when the Superior Court, Judge McGuire ordered Cellmark to supply Robert Breest with the raw data, and it was that raw data that the federal court used in 2008 to determine that Dr. Charlotte Word's DNA interpretation was faulty, and denied the State's motion to dismiss and thereby allowed Robert Breest to obtain the DNA testing that now excludes him.

Reason for accepting Issue Two: NOA Page 70

The raw data will determine that Dr. Charlotte Word was correct when she opined that the two markers at the DYS456 and DYS458 are, in fact, artifacts. And, Robert

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Breest is excluded at those loci. Did the Superior Court err?

Issue Three: The motion to vacate the psychosexual certification and sentence. After being convicted of murder, Robert Breest was sentenced to prison, and over his objection, on motion of the State was returned to the superior court several weeks later and the conviction was certified as psychosexual and the sentence was increased from life with a minimum of 18 years, to life with a minimum of 40 years.

Reasons for accepting Issue Three: NOA Pages 82 and 85

After Robert Breest's appeal was decided by this court, Robert Breest then sought a writ of habeas corpus in the United States District Court for the District of New Hampshire. That court issued an opinion on April 18, 1977, Criminal Action 77-45, and held, inter alia, that Robert Breest was not convicted of the element of psychosexual murder, and the matter was remanded to this court for action not inconsistent with that opinion. This court ordered another certification hearing and the sentence was again increased to 40 to life. Most recently Robert Breest filed an appeal in the Superior Court arguing that Sullivan v. Louisiana, 508 U.S. 275 (1993) mandates a jury finding pursuant to the Sixth Amendment to the United States Constitution on all convictions and to each and every element of the crime. On appeal to the Superior Court most recently, the Superior

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Court, most recently held that the Constitutional right to a jury determination is not recognized prior to Apprendi v. New Jersey, 530 U.S. 466 (2000) and further relied upon State v. Tallard, 149 N.H. 183 (2003), as well as Schrivo v. Summerlin, 542 U.S. 348 (2004). The United States Supreme Court in Sullivan v. Louisiana, supra, unanimously held that a criminal defendant is entitled to a jury determination on every element of the crime for which he is sentenced. And, the High Court relied upon Sparf v. United States, 156 U.S. 51 (1895). Sullivan, supra, held that no matter how overwhelming the evidence, a judge cannot direct a verdict for the state. Judge Hugh Bownes, who issued the writ of habeas corpus in Breest v. Helgemo, criminal action 77-45, held that the psychosexual statute requires the judge to make a finding of fact. The Constitution forbids that as noted in Sullivan, supra. Robert Breest submitted to the Superior Court that retroactivity was not an issue, because the holding by the trial court on certification and sentence was void ab initio. The Superior Court ruled otherwise and said that Robert Breest is not entitled to a jury finding of a fact that supported an increased sentence prior to Apprendi v. New Jersey, supra, in 2000. Did the Superior Court err?

Issue Four: The motion to have the Attorney General supply the Superior Court with a transcript of the 2015 hearing.

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Reason for accepting Issue Four: NOA Page 104

The Superior Court ruled that the motion for the transcript is moot because the Superior Court had already ruled on the motions. It is apparent that the Superior Court doesn't want to determine if Robert Breest was held to be African American and another exclusion. The federal district court held that Robert Breest is Caucasian, and the Superior Court was presented evidence by Dr. Charlotte Word that the single match she found in the U.S. database was African American. Before this court, Assistant Attorney General Elizabeth Woodcock argued that Robert Breest was excluded by the major profile, but not the minor profile. Justice Lynn interrupted and asked why the minor profile was African American, and Assistant Attorney General Elizabeth Woodcock said she couldn't explain that and then told this court a story about Sally Hastings and how DNA has now shown she had a relationship with the President of the United States and he fathered some of her children. It was a nice story, but didn't have any bearing on the case at hand. Dr. Charlotte Word found one match and it was African American, and the transcript will prove that, because it's contained from page 300 to page 310. Assistant Attorney General Elizabeth Woodcock told the First Circuit Court of Appeals that she never said Robert Breest was African American and said Robert Breest had not presented any evidence to show that she had. Thus, when Robert Breest

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filed in the Superior Court, it became necessary to have the Attorney General supply the Superior Court with a transcript of the 2015 hearing to verify, not just the African American claim, but also the other evidence that came out at the hearing pertaining to the major and minor profiles, and what Robert Breest's actual DNA profile is, and how he's been excluded by admission of the Attorney General on the major profile and how DNA experts can determine that he is also excluded by the minor profile.

Thus, the transcript of the 2015 hearing will show that what Robert Breest claims is accurate and true. For the Superior Court to say that it's already ruled on the motions and therefore the transcript is moot is to say that the Due Process Robert seeks is lacking. The Superior Court ruled without the benefit of the record. Did the Superior Court err?

Issue Five: Judgement on the pleadings should have been based on the transcript.

Reason for accepting Issue Five: NOA Page 109

The request for judgment on the pleadings should have been based upon the transcript. The Superior Court declined to order the transcript, thus the Superior Court was unable to adequately rule on the motion for judgment on the pleadings. Did the court err?

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

Merrimack Superior Court  
5 Court Street  
Concord NH 03301

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**August 26, 2021**

**ROBERT BREEST  
MCI SHIRLEY  
T-19048  
PO BOX 1218  
SHIRLEY MA 01464-1218**

Case Name: **State vs Robert Breest**  
Case Number: **217-1972-CR-00789**

Please see the decisions made on the motions enclosed within

**Catherine J. Ruffle  
Clerk of Court**

**()**

**C:**

THE STATE OF NEW HAMPSHIRE

MERRIMACK, ss

SUPERIOR COURT  
No. S-789

NEW HAMPSHIRE,

v.

ROBERT BREEST,  
Defendant.

8-25-2021

DENIED FOR THE REASONS  
SET FORTH IN THE STATE'S  
OBJECTION

*Am Sander*

Honorable Andrew R. Schulman  
August 25, 2021

2021 JUN 6 10:22:50

MOTION TO DISMISS MURDER INDICTMENT  
PURSUANT TO RSA 651-D:III(e)  
AND ACTUAL INNOCENCE BECAUSE ROBERT BREEST  
IS EXCLUDED BY THE MAJOR AND MINOR  
PROFILE OF THE CRIME SCENE BIOLOGY.

NOW COMES Robert Breest in the above captioned and numbered matter and moves this court to dismiss the murder indictment predicated on the fact that Robert Breest is actually innocent as defined by RSA 651-D:III(e) as determined by the DNA testing of the crime scene biology.

This court has authority to allow the above asked for relief pursuant to RSA 651-D:VI(a).

In 1973, Robert Breest was convicted of the murder of Susan Randall. Beginning in 2000, Robert Breest sought DNA testing to prove that he is actually innocent of the murder of Susan Randall.

Dr. Charlotte Word signed the first DNA test which was conducted by Cellmark Diagnostics in Germantown, Maryland, and concluded that Robert Breest could not be excluded at three of 13 loci, and that no conclusion could

be made regarding the remaining ten loci. However, when reviewing the ten remaining loci, Robert Breest's DNA profile does not match. See Cellmark report attached hereto as attachment 1.

Robert Breest then sought additional testing and was allowed two additional 4 Y-STR DNA test and matched at three out of four. When asking for a fourth test, Carol Ann Conboy of this court denied.

Robert Breest then sought DNA testing from the federal court, the United States District Court for the District of New Hampshire in 2007. Magistrate Judge Muirhead allowed the matter to proceed, and found inter alia, in footnote 2 that Robert Breest had submitted letters from four DNA experts, all of which indicated that Robert Breest was either excluded, or further testing was warranted. See Breest v. N.H. AG, January 3, 2007, Civil No. 06-cv-361-SM.

The attorney general's office filed an opposition, and after a hearing, Chief Judge McAuliffe denied the state's motion to dismiss and ultimately further DNA testing was conducted. See Breest v. AG for N.H., January 18, 2008, Civil No. 06-cv-361-SM.

Pursuant to the above referenced Order, Huma Nasir of Reliagene performed DNA testing using the 17 Y-STR and MiniFiler tests. At page one, under Conclusions, and at ¶ 1, it is noted that the same half of the fingernails was used in the DNA testing for both the 17 Y-STR and the

MiniFiler test. The 17 Y-STR test result indicated a match of Robert Breest to the crime scene at 15 of 15 loci where results were obtained. When the results for the MiniFiler test were reported Robert Breest did not match at all eight loci, but Huma Nasir reported that she did not find any male DNA in that test. However she used the same material where she did find male DNA in the 17 Y-STR test. See Reliagene report dated May 28, 2008, and attached hereto as Attachment 2.

After a new more sensitive test was developed and was being used, Robert Breest sought another DNA test using the more sophisticated and robust test, and the State of New Hampshire's Attorney General agreed to the testing, and the test results are reported by Orchid Cellmark in a report dated June 29, 2012, see attachments 3 and 4 attached hereto. In the interim, Orchid Cellmark had bought ReliaGene and the operation was moved to Dallas, Texas. Huma Nasir had relocated to Dallas, Texas, and was employed by Orchid Cellmark and conducted the 2012 Orchid Cellmark test. She signed both the 2008 ReliaGene test and the 2012 Orchid Cellmark test.

Ultimately, this court conducted a hearing on May 19 and 20, 2015. Huma Nasir testified for the defense and Dr. Charlotte Word testified for the prosecution. The evidence at the 2015 hearing was the basis of Robert Breest's appeal to the New Hampshire Supreme Court, which denied the appeal. Robert Breest then sought a civil action in the federal court and when denied by the United States District Court

for the District of New Hampshire, appealed to the First Circuit Court of Appeals. When Assistant Attorney General Elizabeth Woodcock submitted her brief in that court, at page 23, she claimed that the State had never claimed that Robert Breest is African American. The State's position was, they have never argued that the killer was African American, or the defendant is the product of that heritage. See, attachment 5, attached hereto.

That position is contrary to the State's position in this court, and contrary to the State's position in the Supreme Court. See this court hearing transcript starting at page 300, et seq., and the Supreme Court hearing held on October 6, 2016, at trial transcript page 13, wherein she stated that Robert Breest was excluded at the major profile, but not excluded at the minor profile, and Justice Lynn interrupted and inquired why the DNA pattern is generally found in a group of African American citizens, and Elizabeth Woodcock's explanation was that she could not explain that. See Attachments 6 and 7 attached hereto.

The federal appeals court affirmed the lower court holding denying the relief Robert Breest sought, an order that the Attorney General identify the single DNA match that Dr. Charlotte Word testified she found when she entered the crime scene DNA profile of the minor profile and as noted at pages 229 and 230 of the May 19 and 20, 2015 hearing in this court. See attachment 8 attached hereto.

The aforementioned information creates the possibility that if Robert Breest is African American, or of African American descent, he would not be excluded by the DNA test results obtained in 2012. However, the State claimed Robert Breest is of African American heritage and said so in this court, and inferred so in the Supreme Court. However, Assistant Attorney General Elizabeth Woodcock has now denied taking that position in her filing in the First Circuit Court of Appeals on October 16, 2020. Thus, the argument put forth in 2015 in this court and in the Supreme Court in 2016, is no longer viable. She has now claimed that the State has never claimed Robert Breest is African American or of African American descent. Consequently, that fact alone is proof that Susan Randall's killer is African American, based on the testimony of Dr. Charlotte Word, and the concession of Assistant Attorney General Elizabeth Woodcock, that the State has never claimed Robert Breest is African American or of African American descent.

The DNA test results from the Reliagene test dated May 28, 2008, indicate that Robert Breest's DNA at the DYS456 is 15, and his DNA at the DYS458 is 19. See Reliagene DNA report. The DNA test results from the Orchid Cellmark test dated June 29, 2012 for the crime scene indicate the DYS456 is 15 and 17, for the DYS458 it is 17 and 19.

It is a fact that Robert Breest is 15 and 19 at those two loci, and the additional markers found are 17 and 17, and thus Robert Breest is excluded because he is 15 and 19 at those loci. It should be noted that Huma Nasir did the tests at both laboratories.

The decision of the New Hampshire Supreme Court denying relief because the new data is more incriminating than exculpatory is based on Dr. Charlotte Word's change in her reporting from 2001 to 2015. In 2001 as Deputy Laboratory Director she said the results were inconclusive. In 2015 she altered her position and said that she was able to evaluate the 2001 data and determined that the chance of Robert Breest not being the person who the DNA matched was one out of 140,000 Caucasians, one out of 32,000 Hispanics or one out of 26,000 African Americans. The problem with those numbers is that Dr. Charlotte Word was referring to the Cellmark 2001 DNA report and Robert Breest was relying upon the 2012 Orchid Cellmark DNA report and when questioned about the 2012 Orchid Cellmark DNA report Dr. Charlotte Word said she could not interpret the 2012 DNA report. See attachment 9 attached hereto.

Furthermore, in Commonwealth v. Lally 473 Mass. 693 (November 6, 2015) Cellmark's Hickey dealing with finger-nail clippings testified that Cellmark does not provide statistics on secondary profiles, so it would be error to do so in the current case. Yet, Dr. Charlotte Word

also stated at page 203 of the hearing before this court that she wasn't sure the markers were true alleles for the minor profile and she also said that she was not saying the DNA found belonged to Robert Breest. See page 206 of the hearing before this court in 2015. See attachments 10 and 11 attached hereto.

In summation, Robert Breest submits that the Supreme Court's decision that the evidence was more incriminating than exclusionary is predicated on the 2001 report that Dr. Word revisited. But, that was not the report that Robert Breest relied upon for relief, he was relying on the 2012 Orchid Cellmark report and juxtaposing it with the 2008 Reliagene report. What changed everything is the concession by Assistant Attorney General Elizabeth Woodcock in the First Circuit Court of Appeals on October 16, 2020 that the State never claimed Robert Breest is African American or of African American descent, and therefore because the DNA found under Susan Randall's fingernails was of an African American, and the most recent filing by the State, it is clear that now because the DNA under Susan Randall's fingernails came from an African American, and the State conceded in the United States District Court for the District of New Hampshire in 2008 before Chief Judge McAuliffe, Breest v. AG for N.H., January 18, 2008, Civil No. 06-cv-361-SM, that DNA testing could prove critical to allowing Robert Breest establish his innocence,

a decision that was never appealed nor reconsideration sought, it became the law of the Robert Breest case, and now is controlling.

WHEREFORE, Robert Breest moves this court to consider the new information as to the State's change of its position pertaining to the African American claim, and upon that consideration to allow the dismissal of the murder indictment against Robert Breest because Robert Breest has proved he is innocent, and the State has now changed its position and concurs with the assessment, abandoning its claim that Robert Breest is African American or of African American descent. Justice has not been served. Justice warrants that this murder indictment be dismissed and that Robert Breest be released forthwith.

Dated: May 14, 2021

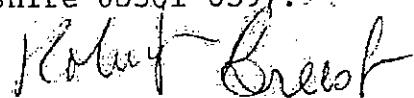
Respectfully submitted,



Robert Breest, pro se  
T-19048  
MCI Shirley, Medium  
P.O. Box 1218  
Shirley, MA 01464-1218

CERTIFICATE OF SERVICE

I, Robert Breest, hereby certify that I have served Assistant Attorney General Elizabeth Woodcock, a copy of this pleading this 20<sup>th</sup> day of May, 2021, by mailing her at 33 Capitol Street, Concord, New Hampshire 03301-6397.



Robert Breest, pro se

Table of Attachments

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**CELLMARK**  
**DIAGNOSTICS**

20271 Goldenrod Lane - Germantown, Maryland 20876  
Telephone: (301) 428-4980 (800) USA-LABS  
Administration Fax: (301) 428-4877  
Laboratory Fax: (301) 428-7946

**REPORT OF LABORATORY EXAMINATION**

March 28, 2001

Attachment 1-1

Mr. Donald Brisson  
Attorney and Counselor at Law  
18 South Water Street  
P.O. Box 8186  
New Bedford, MA 02740

Re: Cellmark Case No. F011096  
NHSP Lab No. 5124  
Dept. Case No. 566D

**EXHIBITS:**

Items of evidence were received for analysis for the above-referenced case. Polymerase chain reaction (PCR) testing was performed on the items listed below by receipt date:

February 13, 2001

Fingernail clippings in cardboard container labeled "...Ex. 25" in coin envelope labeled "...fingernail clippings from Susan Randall"

Hair in screw-cap jar labeled "...Head Hair..." in plastic bag labeled "...head hair of Susan Randall..."

February 23, 2001

One of two purple-top tubes of blood labeled "...Robert Breest..."

**RESULTS:**

DNA extracts isolated from the items listed above were tested using the AmpF/STR Profiler Plus™ and/or Cofiler™ PCR Amplification Kits. The short tandem repeat (STR) loci tested and the types obtained for each sample are listed in the attached tables.

**CONCLUSIONS:**

Fingernail clippings:

The data indicate that DNA from more than one individual was obtained from the fingernail clippings. The DNA obtained from this sample contains DNA from a male and a female. The

Attachment 1-2

Report for Case No. F011096

March 28, 2001

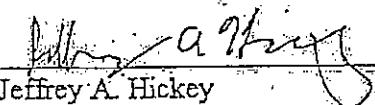
Page Two

primary DNA profile obtained from this sample matches the DNA profile obtained from the hair labeled head hair of Susan Randall at the seven loci for which results were obtained. Using

three of thirteen loci, Robert Breest cannot be excluded as the source of the secondary DNA profile obtained from this sample. At the remaining loci, no conclusion can be made regarding Robert Breest and this sample.

EVIDENCE DISPOSITION:

In the absence of specific instructions, evidence will be returned to the submitting agency by Federal Express or other appropriate carrier.

  
Jeffrey A. Hickey  
DNA Analyst II

  
Charlotte A. Ward, Ph.D.  
Deputy Laboratory Director

If expert witnesses are needed for depositions or court testimony, please notify us by telephone at 301-515-6155 at least four weeks in advance.

cc: Mr. N. William Delker  
Assistant Attorney General  
33 Capitol Street  
Concord, NH 03301-6397

## Attachment 1-3

Results for Cellmark Case No. F011096  
 Date: 03/28/01  
 Table No.: 1

## ALLELES DETECTED - PROFILER PLUS

Case	Sample	D3S1358	VWA	FGA	AMEL	D8S179	D21S11	D18S51	D5S618	D13S317	D7S820
F011096 01MP-2	FINGER/NAIL CLIPPINGS	16,(17,18	16,18,19	20,23	X,Y	(<8),12,13,14,16	28,29,30,30,2	18,20	(<7,2),10,12	8,(10),11	9,11
F011096 02MP-2	SUSAN RANDALL	16,18	16,18	20,23	X	12,13	28,30,2	18 *	12	8,11	ND
F011096 03P	ROBERT BREEST	16,17	17,19	21,22	X,Y	14,16	29,30	13,18	10,12	10,11	8,10

\* results in parentheses may be due to the presence of DNA from more than one individual or technical artifacts, and therefore were not interpreted.

\* results listed in this table above do not depict intensity differences.

ND = not detected

~ = estimated allele size

In addition to the profiles obtained from the items referenced in this report, weak results were observed. These results may be due to the presence of DNA from more than one individual or to technical artifacts, and therefore were not interpreted.

## Attachment 1-4

Results for Cellmark Case No.: F011096  
 Date: 03/27/01  
 Table No.: 2

ALLELES DETECTED - coffler

Case	Sample	D3S1358	D16S539	AMEL	TH01	TPOX	CSF1PO	D7S820
F011096 01MC	FINGERNAIL CLIPPINGS	16,18	9,12	X,Y	6,9,3	8,11	10,12	9,11
1096 03C	ROBERT BREEST	16,17	10,12	X,Y	6,9	8,11	10,11	8,10

The results listed in the table above do not depict intensity differences.

In addition to the profiles obtained from the items referenced in this report, weak results were observed. These results may be due to the presence of DNA from more than one individual or to technical artifacts, and therefore were not interpreted.



## Forensic Test Results

Patterson Belknap Webb & Tyler LLP  
Attn: Ian Dumain  
1133 Avenue of the Americas  
New York, New York 10036-6710

cc: New Hampshire Attorney General  
Attn: Richard W. Head, Esq  
33 Capitol Street  
Concord, New Hampshire 03301

ReliaGene Case # F003153/FR-234 Report Date: May 28, 2008  
US District Court Case # 1:06-cv-00361-SM  
RE: Robert Breest

### ITEMS OF PHYSICAL EVIDENCE

Reliagene Technologies, Inc. received the following items of physical evidence on March 04, 2008, AT 9:14 AM via FedEx tracking #: 791859361203 for analysis:

Ref. #	ReliaGene Sample #	Description
25	08-01152	Fingernail clippings from Susan Randall
F011096-03	08-01153	DNA extract from Cellmark - Known sample from Robert Breest

Reliagene Technologies, Inc. received the following items of physical evidence on March 21, 2008, AT 8:33 AM via FedEx tracking #: 864067336561 for analysis.

Ref. #	ReliaGene Sample #	Description
RB-173DW	08-01531	Buccal swabs of Robert Breest

*Evidence to be returned to New Hampshire State Police Forensic Lab via courier.*

### CONCLUSIONS

*Previously Reported 3/10/2008:*

PCR testing utilizing the Yfiler STR Multiplex revealed the following:  
See the attached chart for specific DNA typing results.

1. Half of each of the fingernail clippings submitted, identified as ReliaGene Sample #08-01152, was taken for testing. The fingernail clippings from Susan Randall, produced a 15-locus haplotype consistent with a single male lineage. This haplotype is suitable for comparison to known samples.
2. The DNA extract from Cellmark, identified as ReliaGene Sample #08-01153, was not tested.

*Note: Peaks below ReliaGene's thresholds may be present and are documented in the case file.*

*Previously Reported 3/25/2008:*

3. DNA test results for the fingernail clippings from Susan Randall, identified as ReliaGene Sample #08-01152, are consistent with the haplotype obtained from the buccal swabs of Robert Breest (RG #08-01531). Therefore, Robert Breest and all his male paternal relatives are not excluded as a DNA donor in the fingernail clippings.
4. Utilizing AB's database, the 15-locus haplotype obtained from the fingernail clippings of Susan Randall, identified as ReliaGene Sample #08-01152, has been observed 0 times in 3561 individuals of various population groups (99.9% excluded).

Attachment 2-2

ReliaGene Case # F003153

May 28, 2008

*Additional Testing:*

PCR testing utilizing the Minifiler STR Multiplex revealed the following:

See the attached chart for specific DNA typing results.

5. DNA test results using the Minifiler kit for the fingernail clippings from Susan Randall extracted by ReliaGene, identified as ReliaGene Sample #08-01152, are consistent with a single female donor and with the Cellmark previously reported STR profile of Susan Randall (report dated 3/28/01). No DNA foreign to Susan Randall was detected using autosomal STR testing on this extract.
6. DNA test results using the Minifiler kit for the DNA extract from Cellmark of known sample of Robert Breest, identified as ReliaGene Sample #08-01153; are consistent with the Cellmark previously reported STR profile of Robert Breest (report dated 3/28/01).
7. Minifiler STR testing may be performed on the Cellmark DNA extracts from fingernails of Susan Randall, if available.

Note: No extraction reagent blank was submitted corresponding to the Cellmark DNA extract.

**DNA TEST RESULTS : (Previously Reported by Cellmark)**

Genetic Loci	S. Randall	R. Breest
D3S1358	16,18	16,17
wVA	16,18	17,19
FGA	20,23	21,22
Amelogenin	X	X,Y
D8S1179	12,13	14,16
D21S1.1	28,30.2	29,30
D18S51	18	13,18
D5S618	12	10,12
D13S317	8,11	10,11
D7S820	ND	8,10
D16S539	NT	10,12
TH01	NT	6,9
TPOX	NT	8,11
CSF1PO	NT	10,11

NT = NOT TESTED

ND = NOT DETECTED

\* = ADDITIONAL PEAKS MAY BE PRESENT

DNA TEST RESULTS

Genetic Locl	08-01152	08-01153
Evidence:	Fingernails S. Randall	DNA extract from Cellmark
FGA	20,23	21,22
D21S11	28,30,2	29,30
D18S51	18,20	13,18
D13S317	8,11	10,11
D7S820	9,11	8,10
CSF1PO	10,12	10,11
D16S539	9,12	10,12
Amelogenin	X	X,Y
D2S1338	24,25	22

## Attachment 2-4

ReliaGene Case # F003153

May 28, 2008

## Y-STR TEST RESULTS

Genetic Locl	08-01152	08-01531
Evidence:	Fingernails S..	Suspect Buccals,
	Randall	Buccal swabs of
		(S) Robert Breest
DYS456	15	15
DYS389I	13	13
DYS390	24	24
DYS389II	29	29
DYS458	19	19
DYS19	14	14
DYS385a/b	12,14	12,14
DYS393	13	13
DYS391	11	11
DYS439	12	12
DYS635	NR	23
DYS392	NR	13
Y-GATA-H4	12	12
DYS437	15	15
DYS438	12	12
DYS448	19	19

NR = Not Reportable

The positive, negative, and reagent blank control samples processed at ReliaGene produced the expected result, indicating that the experiments were performed successfully. Laboratory records document the secure custody of evidence samples from receipt through sample testing. ReliaGene Technologies Inc. is accredited by American Society of Crime Laboratory Directors/Laboratory Accreditation Board. If you have any questions concerning this work, please contact the following individual.

*Steve Nasir*  
Steve Nasir, M.S.  
Analyst III

May 28, 2008  
Date

*Gina Pineda*  
Gina Pineda, M.S.  
Technical Leader/Assistant Forensic Director

May 28, 2008  
Date

ORCHID  
CELLMARK

13988 Diplomat Drive • Suite 100 • Dallas, TX 75234 • 214.271.8400 • 1.800.752.2774 • 214.271.8322 fax

## Report of Laboratory Examination

June 29, 2012

Ian M. Dumain  
 Patterson Belknap Webb & Tyler LLP  
 1133 Avenue of the Americas  
 New York, NY 10036

SUBJECT: Susan Randall  
 SUSPECT: Robert Breest

ORCHID CELLMARK NO: FR12-0061  
 AGENCY CASE NO: Z9999-007241  
 ADD'L AGENCY NO: 566D/F011096/F003153/F  
 R-234

## EXHIBITS

Client Item	OC Item	Received	Item Description	PCR
Z9999-007241-25	FR12-0061-01	4/10/2012	Fingernail Clippings: Susan Randall	Y

## RESULTS

DNA testing using the polymerase chain reaction (PCR) and the AmpFISTR Identifiler Plus™ Amplification Kit was performed on the indicated exhibit(s). The loci tested and the results obtained for each tested sample are listed in Table 2 (see attachment). In addition, DNA testing using the polymerase chain reaction (PCR) and the MiniFiler™ STR Amplification Kit was performed on the indicated exhibit(s). The loci tested and the results obtained for each tested sample are listed in Table 1 (see attachment). Furthermore, these results were compared to profiles previously reported by ReliaGene in a report for case F003153 dated May 28, 2008. Those profile's are listed in Table 1 (see attachment). These results were also compared to profiles reported by Celimark in a report for case F011096 dated March 28, 2001. Those profiles are listed in Tables 3 and 4 (see attachment).

## CONCLUSIONS

FR12-0061-01.01.1

The DNA profile obtained from the scrapings/swabbings of Susan Randall's fingernail clippings is a mixture of at least three individuals, including at least one unknown male. Susan Randall cannot be excluded as a possible contributor of DNA to this mixture. However, due to the mixture profile obtained and the possibility of allelic dropout, no determination can be made regarding Robert Breest as a possible contributor of DNA to this mixture.

Z9999-007241

FR12-0061

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TNOA Page 34

POPULATION DATABASE	FREQUENCY
Caucasian	44 in 4114
African American	16 in 1932
Asian	0 in 330
Filipino	0 in 105
Hispanic	12 in 1601
Native American	0 in 105
Sub-Saharan African	0 in 59
Vietnamese	1 in 103
Asian Indian	0 in 564
Chinese	0 in 577
Japanese	0 in 1078
Malay	0 in 579
Thai	0 in 246

**DISPOSITION**

In the absence of specific instruction, evidence will be returned to the submitting agency by Federal Express or another appropriate carrier.

**REVIEW**

The results described in this report have been reviewed by the following individuals:

Analyst:

Huma Nasir

Huma Nasir / Supervisor - Forensic Casing

Technical

Reviewer:

Rick W. Staub

Rick W. Staub, Ph.D. / Laboratory Director

Procedures used in the analysis of this case adhere to the Quality Assurance Standards for Forensic DNA Testing Laboratories. Orchid Cellmark is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board and Forensic Quality Services-International. The results in this report relate only to the items tested.

cc: Richard W. Head  
 New Hampshire Attorney General  
 33 Capitol Street  
 Concord, NH 03301

June 29, 2012



Z9999-007241 | FR12-0061-A

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# Report of Laboratory Examination

Orchid Cellmark- Dallas  
6/29/2012

Orchid  
Cellmark

ORCHID CELLMARK NO: FR12-0061  
AGENCY CASE NO: Z9999-007241  
ADD'L AGENCY NO: 566D/F011096/F003133/FR-234

Table 1  
Marker

Sample Name	D13S17	D7S220	AMEL	D21S138	D21S1	D16S539	D13S1	C8P10	ICGA
Fingernail Clippings: Susan Randall FR12-0061-01,01,1	4, 9, 10, 11, 12	8, 9, 10, 11	X, Y	17, 18, 22, 24, 25	28, 30, 30.2	9, 11, 12	13, 17, 18, 20	10, 11, 12	19, 20, 21, 22, 23, 25
Z9999-007241-25 Fingernail Clippings: Susan Randall Sample 08-01152	6, 11	9, 11	X	24, 25	28, 30.2	9, 12	18, 20	10, 12	20, 23
Sample 08-01153 Robert Bress DNA Extract from Cellmark 08-01153	RG	10, 11	8, 10	X, Y	22	29, 30	10, 12	13, 18	10, 11
									21, 22

RG = Profiles obtained from RekaGene® Forensic Report for Case #003153 dated May 28, 2008.

CMC = Profile obtained from Cellmark's Report for Case #011096 dated March 28, 2001.

ND = Not Detected

\* = Possible allele(s) below threshold

The results listed in the table do not depict intensity differences. Only alleles exceeding validated analysis threshold are included in table.

# Report of Laboratory Examination

Orchid Celmark- Dallas  
6/29/2012

URGENT  
CRIMINAL

ORCHID CELMARK NO: FR12-0061  
AGENCY CASE NO: 29999-007241  
ADD'L AGENCY NO: 566DF011096/F003153/FR-234

Table 2  
Identifier Plus

Sample Name	D2S1179	D21811	D7S820	CSF1PO	D39358	TH01	D133317	D165539	D2S1338	D19S433	VWA	TPOX	D18S51	AMEL	D5S818	FGA
Fingernail Clippings/Susan Randall	12, 13, 14, 16	28, 30, 30,2	9, 11	10	15, 16, 17, 18	9,3	8, 10, 11, 12	9, 11, 12	24, 25	11, 13, 14, 15	16, 18, 19	8, 9, 11	18	X, Y	11, 12	19, 20, 23, 25
FR12-0061-01.01.1																
Z9999-007241-25																

RG = Profiles obtained from RefaGen's Forensic Report for Case R003153 dated May 28, 2003.

CM = Profile obtained from Collmark's Report for Case R011096 dated March 28, 2001.

ND = Not Detected

v = Possible allele(s) below threshold

The results listed in the table do not depict intensity differences. Only alleles exceeding validated analytic threshold are included in table.

**Report of Laboratory Examination**

(Orchid Cellmark- Dallas)

6/29/2012

JRC, LLC  
CELLMARK

ORCHID CELLMARK NO: FR12-0061  
AGENCY CASE NO: Z9999-007241  
ADD'L AGENCY NO: 566DF011096/F003153/FR-234

Table 3  
Proflor Plus

Sample Name	D381358	VWA	IGA	AMEL	D851179	D21S11	D16S1	D55818	D13S17	D7S240
Susan Randall F011096 02MP-2	16, 18	16, 18	20, 23	X	13, 13	28, 30, 2	18, *	12	8, 11	ND
Robert Brasel F011096 03P F011096	CM	16, 17	17, 19	21, 22	X, Y	14, 16	29, 30	13, 18	10, 12	10, 11
										8, 10

RG = Profiles obtained from ReelaGard's Forensic Report for Case F003153 dated May 23, 2008.

CM = Profile obtained from Cellmark's Report for Case F011096 dated March 28, 2001.

ND = Not Detected

\* = Possible allele(s) below threshold

The results listed in the table do not depict intensity differences. Only alleles exceeding validated analysis threshold are included in table.

**Report of Laboratory Examination**

Orchid Cellmark - Dallas  
6/29/2012

**ORCHID CELLMARK NO: FR12-0061**  
**AGENCY CASE NO: Z9999-007241**  
**ADD'L AGENCY NO: 566D/F011096/F003153/FR-234**

Table 4  
Co犯

Sample Name	D391358	D168539	AMEL	TH01	TPOX	CSF1PO	D7S820
Susan Randall F011096 02MP-2	NT	NT	NT	NT	NT	NT	NT
Robert Breast F011096 03P	16,17	10,12	X, Y	6,9	8,11	10,11	8,10
F011096	CM						

NT = Not Tested

RO = Profiles obtained from ReliaGene's Forensic Report for Case F003153 dated May 28, 2008.

CM = Profiles obtained from Cellmark's Report for Case F011096 dated March 28, 2001.

ND = Not Detected

\* = Possible allele(s) below threshold

The results listed in the table do not depict intensity differences. Only alleles exceeding validated analysis threshold are included in table.

ORCHID  
CELLMARK

13988 Diplomat Drive • Suite 100 • Dallas, TX 75234 • 214.271.8400 • 1.800.752.2774 • 214.271.8322 fax

## Report of Laboratory Examination

June 29, 2012

Supplemental - FR12-0061-A

Ian M. Durain  
 Patterson Belknap Webb & Tyler LLP  
 1133 Avenue of the Americas  
 New York, NY 10036

SUBJECT: Susan Randall  
 SUSPECT: Robert Breest

ORCHID CELLMARK NO: FR12-0061  
 AGENCY CASE NO: Z9999-007241  
 ADD'L AGENCY NO: 566D/F011096/F003153/F  
 R-234

## EXHIBITS

Client Item	OC Item	Received	Item Description	PCR
Z9999-007241-25	FR12-0061-01	4/10/2012	Fingernail Clippings: Susan Randall	Y

## RESULTS

DNA testing using the polymerase chain reaction (PCR) and the Yfiler™ Amplification Kit was performed on the indicated exhibit(s). The loci tested and the results obtained for each tested sample are listed in Table 1 (see attachment). Due to the paternal inheritance of the Y chromosome, all males from the same male lineage are expected to share the same Y-STR profile. These results were compared to profiles reported by ReliaGene in a report for case F003153 dated May 28, 2008. This report supplements Orchid Cellmark's Laboratory Report FR12-0061 dated June 29, 2012.

## CONCLUSIONS

FR12-0061-01.01.1

The partial Y-STR profile obtained from the scrapings/swabbings of Susan Randall's fingernail clippings is a mixture of at least two males. The major profile originated from an unknown male lineage. Robert Breest cannot be excluded as a possible minor contributor to this mixture.

## STATISTICAL ANALYSIS

All possible Y-STR haplotypes obtained from the mixture profile from the scrapings/swabbings of Susan Randall's fingernail clippings (FR12-0061-01.01.1) were compared to Applied Biosystems' database of 11,393 males. The combined frequency of occurrence of these haplotypes in Applied Biosystems' database of several racial groups is provided below. Furthermore, the frequency of this mixture profile was determined by applying the 95% Upper Confidence Interval. The frequencies for the major US racial groups are as follows:

- 1 in 81 for the African American population
- 1 in 72 for the Caucasian population
- 1 in 85 for the Hispanic population

Z9999-007241

FR12-0061-A

1 of 2

NOA Page 40

**DISPOSITION**

In the absence of specific instruction, evidence will be returned to the submitting agency by Federal Express or another appropriate carrier.

**REVIEW**

The results described in this report have been reviewed by the following individuals:

Analyst: Huma Nasir  
Huma Nasir / Supervisor - Forensic Casework

Technical: Rick W. Staub  
Reviewer: Rick W. Staub  
Rick W. Staub, Ph.D. / Laboratory Director

Procedures used in the analysis of this case adhere to the Quality Assurance Standards for Forensic DNA Testing Laboratories. Orchid Cellmark is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board and Forensic Quality Services-International. The results in this report relate only to the items tested.

cc: Richard W. Head  
New Hampshire Attorney General  
33 Capitol Street  
Concord, NH 03301

June 29, 2012



Z9999-007241

FR12-0061

2 of 2

DNA HILL  
CELLMARK

## Report of Laboratory Examination

The Hill Cellmark - Dallas

6/29/2012

Supplemental - FR12-0061-A

**ORCHID CELLMARK NO:** FR12-0061  
**AGENCY CASE NO:** Z9999-007241  
**ADD'L AGENCY NO:** 566D/F011096/F003153/FR-234

Table 1  
 Y-Filer

Sample Name	DYS456	DYS389I	DYS390	DYS389II	DYS458	DYS19	DYS385a/b	DYS393	DYS391	DYS439	DYS355	DYS392	Y-GATA <sub>4</sub>	DYS437	DYS438	DYS448
Ringerhail Clippings/Susan Randall	15, 17	13	24	NR	17, 19	14	11, 13	13	11, 12	12	NR	NR	12	15	NR	NR
FR12-0061-01-01.1																
Z9999-007241-25																
Robert Bresl	15	13	24	29	19	14	12, 14	13	11	12	23	13	12	15	12	19
08-01153																
F003153	RG															

NR = No Result

RG = Profile obtained from RellaGenes report for Case F003153 dated May 28, 2008.

The results listed in the table do not depict intensity differences. Only alleles exceeding validated analysis threshold are included in table.

ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD  
ATTORNEY GENERAL

JANE E. YOUNG  
DEPUTY ATTORNEY GENERAL



*Sent via UPS Next Day Air (IZ 19A 789 23 1001 675 3)*

October 21, 2020

Maria R. Hamilton, Clerk of Court  
Office of the Clerk  
United States Court of Appeals  
U.S. Courthouse  
1 Courthouse Way, Suite 2500  
Boston, MA 02210

Re: Robert Breest v. Gordon MacDonald, New Hampshire Attorney General  
Docket No.: 20-1406

Dear Clerk Hamilton:

Enclosed please find nine bound copies of the Appellee's brief, which was filed electronically in the above-entitled matter on October 16, 2020. Our office received electronic notice that the brief was accepted on October 19, 2020. An unbound copy has been forwarded to Mr. Breest at the address listed below.

Please do not hesitate to contact me with any questions you may have. Thank you for your assistance.

Sincerely,

Maggie E. Keene  
Paralegal II  
Office of the Solicitor General  
NH Department of Justice

/mek  
Enclosures

Cc: Robert G. Breest, T-19048  
MCI Shirley  
PO Box 1218; Harvard Road  
Shirley, MA 01464-121

contamination was a significant concern. The defendant's expert, Huma Nasir, stated that it was possible for a medical examiner conducting an autopsy in the 1970s to use the same nail clippers on multiple bodies.").

Although the plaintiff seeks to focus this Court's attention on the 2012 DNA results, the state court was correct when it stated that, taken as a group, the tests were more inculpatory than exculpatory.

*Breest III*, 169 N.H. at 654. And the district court correctly noted those findings. *Breest v. MacDonald*, No. 1:18-cv-908-SM, slip op. at 12-14. In fact, the plaintiff has never been excluded as a source of DNA in any of the tests and this Court should decline to accept his representations to the contrary.

The State has never argued that the killer was an African American or that the defendant is the product of that heritage. The plaintiff asserts as much, but does not direct this Court to a part of the record where this argument was made.

The plaintiff asks this Court to replace the state and district courts' findings with his own. See PB: 8-9. Although the analysis is not entirely clear to the defendant, the plaintiff seems to combine the

CONCLUSION

WHEREFORE, the respondent respectfully requests this Court to affirm the judgment of the United States District Court for the District of New Hampshire.

Respectfully Submitted,

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October 16, 2020

1 A That's correct.

2 Q And the results that you reported in your 2013  
3 affidavit were only the Y-HRD database, right?

4 A That's correct.

5 Q And we just got the US Y-STR results this morning,  
6 right?

7 A That's correct.

8 Q The result in the US Y-STR database was a single  
9 African American profile, correct?

10 A A single profile in the African American database,  
11 correct.

12 Q Okay. What's the African American database?

13 A I'm assuming it's a database made up of individuals who  
14 have self-reported themselves as being of African American  
15 descent. That's the general definition that's used, but it may  
16 vary in different population groups or different database  
17 studies.

18 Q Ms. Word, what I'm showing you is the State's response  
19 to Mr. Breest's motion for new trial. And you'll see what I'm  
20 highlight here that the State wrote at least, "Dr. Word has  
21 concluded that with respect to the 2008 testing 15 of the 17  
22 loci for the results were obtained from all -- are consistent  
23 with the Y DNA haplotype profile for the Defendant." That's  
24 correct, right?

25 A That's correct.

1 conditions.

2 Q And you don't read that as stating that the Y-HRD  
3 database is an alternative database that may be used should a  
4 specific population other than those provided in the US Y-STR  
5 database be required. That's now how you read that.

6 A No. I read that that's what it says.

7 Q You just don't agree.

8 A Well, I don't know that I know what the appropriate  
9 population database is for this country. And these are two --  
10 or for this particular case. These are two widely accepted and  
11 widely used databases, so I simply provided the calculation for  
12 those two databases.

13 Q Well, it's interesting that you say that, when you say  
14 you simply provided the calculation for those two databases  
15 because isn't it a fact you didn't provide the calculation for  
16 the US Y-STR database because we didn't get it until this  
17 morning?

18 A I provided it in 2013. Oh, I'm sorry. For the what?

19 Q US Y-STR database.

20 A Oh, I did not do that in 2013. That's right.

21 Q Okay. And the results in the Y-HRD database shows zero  
22 haplotypes consistent with the 15 loci 2008 profile, right?

23 A That's correct.

24 Q Okay. And the results in the US Y-STR database show  
25 more than zero. They showed 1, right?

1 Q That's what it says and that's your opinion.

2 A Yes, sir.

3 Q Okay. The State also writes that, "Dr. Word has  
4 concluded that if the assertion," oh, sorry. It's hard to read  
5 this upside down. "Dr. Word has concluded if the Defendant is  
6 not the source of the DNA then the true contributor must be a  
7 male who is a very close patrilineal relation to the Defendant  
8 based on Y-STR DNA obtained." You see that?

9 A Yes.

10 Q Okay. You didn't offer that opinion this morning, did  
11 you?

12 A I believe I did.

13 Q You offered the opinion that the DNA profile in 2008  
14 must be the Defendant or a very close patrilineal relative?

15 A Well, I testified to it. I don't recall in the  
16 context, but I do believe I gave that opinion.

17 Q And at deposition I asked you --

18 A But it's certainly my opinion.

19 Q It must be a rec -- or a very close patrilineal  
20 relative. That's your opinion.

21 A Yes, sir.

22 Q Okay. And I asked you at deposition, didn't I, what  
23 very close patrilineal relative meant.

24 A I don't recall at this point.

25 Q You don't recall. You didn't say that it had to be Mr.

1 Breest or someone within several generations? You didn't say  
2 that, several patrilineal generations?

3 A I don't recall what I said in my -- in the testimony  
4 for the deposition, but based on the way these databases have  
5 been designed and the, as I said earlier, the way these kits  
6 have been designed, is to link individuals of certain  
7 patrilineal lineages. And by definition, individuals who have  
8 the same profile have -- are offspring and relatives through  
9 the patrilineal line from some common male.

10 Q Okay. And at deposition, at least, I asked you if  
11 there was something that you could point me to that would  
12 support your assertion that the DNA test results of 2008 had to  
13 come from Mr. Breest or some other or a very close patrilineal  
14 relative and your answer was, "I think it's common knowledge,"  
15 right?

16 A Yes.

17 Q You couldn't point me to any specific data, right?

18 A There's lots of data supporting that. That's what the  
19 whole Y-STR studies that have been done internationally on  
20 understanding Y chromosome inheritance. And that's what's  
21 demonstrated through the study --

22 THE COURT: Mr. Dumain, isn't that what your own  
23 witness testified, that Y-STR is by definition a patrilineal  
24 line?

25 MR. DUMAIN: It is a patrilineal line. The question,

1 Your Honor, is whether it is only a patrilineal line.

2 THE COURT: Okay.

3 MR. DUMAIN: Whether it must be Mr. Breest or one of  
4 his close relatives whether it --

5 THE COURT: No. Okay. I understand what you're  
6 saying and if you want to clarify that.

7 BY MR. DUMAIN:

8 Q Yes. Your testimony in your affidavit -- and maybe I  
9 should understand your opinion. Your opinion is that the 2008  
10 Yfiler, the opinion you offered in your affidavit was that it  
11 must be Mr. Breest, one of his very close patrilineal  
12 relatives, and nobody else in the world. That's the opinion  
13 you offered, right?

14 A That's right. By definition of the lineages defined by  
15 these test kits, that would be the reasonable conclusion  
16 because some male individual have this haplotype and there are  
17 some number of male descendants from that original individual  
18 who would all share that haplotype in the absence of mutations  
19 which would now distinguish them. So that is the patrilineal  
20 lineage. And whether that goes back a generation or four  
21 generations or ten generations it depends on where a mutation  
22 has occurred.

23 Q You said in your affidavit and the State read in its  
24 brief that the true contributor must be a male who has a very  
25 close patrilineal relation to the Defendant if it is not him,

1 very close. I asked you at deposition what does that mean.

2 You said several generations; correct?

3 A Probably.

4 Q I can read it. Do you want me to?

5 A That would be fine.

6 Q Okay.

7 A I mean, that's my opinion. It still is my opinion.

8 Q And I asked you what's that based on, where is the  
9 data. And you said, I think it's common knowledge. You said,  
10 I don't know. I don't know what's in the SWGDAM guidelines for  
11 Y testing, that it should reported that way. Will you look at  
12 the SWGDAM guidelines we were just looking at, the exhibit in  
13 front of you? The most recent exhibit we marked. I think it's  
14 Q, page three. When you look at page three, the bottom  
15 paragraph, the second sentence states, the SWGDAM guidelines.  
16 You said I don't know what's in the SWGDAM guidelines, so maybe  
17 we should just take a look. It is noted that the two specimens  
18 that exhibit the same Y-STR haplotype may have originated from  
19 either a common individual source from any male with the same  
20 paternal lineage or unrelated individuals. That's what the  
21 SWGDAM guidelines say; correct?

22 A That is what it says, yes.

23 Q Okay. You also said it might be in John Butler's  
24 textbook, when I asked you what's the support for this opinion.  
25 Now, I've looked at John Butler's textbooks, and I'll hand them

1 to you, and I invite you to show me where in John Butler's  
2 textbooks it says that a DNA profile of 17-marker Y haplotype  
3 can identify a single individual within several generations.

4 A Well, nothing is going to say that. These do not  
5 identify a single individual.

6 Q A single individual or a close male relative within  
7 several generations. That's what you said about Mr. Breest;  
8 correct?

9 A It identifies a population of highly related males in  
10 the same patrilineal lineage.

11 Q And the opinion that you offered, if I understand it,  
12 is that the 2008 15-locus profile, which is consistent with Mr.  
13 Breest, had to either come from Mr. Breest or one of his very  
14 close, several generations patrilineal relatives. That's was  
15 you said in your affidavit. I'm not sure if you're saying it  
16 now. At deposition you said Butler supports that. And I'm  
17 asking you, and we can take all the time that you need, the  
18 rest of this man's life is a stake, where in these books does  
19 it say that?

20 A I don't know where it says it in the books. This is  
21 the foundational studies and interpretation of Y-STR testing.  
22 It's the foundation of all of the research that's been done.  
23 It's the background for these databases. It's the foundation  
24 for ancestry.com. All of these types of lineage and ancestral  
25 calculations are based on that foundational study.

1 Q Dr. Word, I asked you this question at your deposition.  
2 I said please point me to something more general than everybody  
3 knows. You said everybody knows.

4 MS. WOODCOCK: Objection. This question has been  
5 asked and answered, and he's badgering the witness.

6 THE COURT: Well, I'm not sure. It is cross-  
7 examination, but I think the question has been asked and  
8 answered.

9 MR. DUMAIN: I'll move on, Your Honor.

10 THE COURT: All right. And if you want to ask it  
11 again, fine.

12 MR. DUMAIN: Okay.

13 THE COURT: I think I understand your point, and I  
14 understand the witness' point.

15 MR. DUMAIN: I just --

16 THE COURT: At least I got it the third or fourth  
17 time you made it.

18 MR. DUMAIN: Thank you, Your Honor. It is a very  
19 important point.

20 BY MR. DUMAIN:

21 Q This morning, for the first time, you produced, the  
22 State produced, database results from the U.S. Y-STR database;  
23 right?

24 A To my knowledge, I don't know if it's the first time.  
25 It's the first ones I did, yes.

1 Q Okay. The first ones that you did. And those results  
2 showed a 15-marker match to the 2008 Yfiler results in this  
3 case, correct, same haplotype?

4 A I entered the 2008 Yfiler results into the database --

5 Q And those are --

6 A -- yes.

7 Q -- the results that you say must come from Mr. Breest  
8 or a very close patrilineal relative of his; correct?

9 A To the best of my knowledge, yes, based on the  
10 understanding of Y-STR inheritance.

11 Q And the database returned one profile; correct?

12 A That's correct.

13 Q And it was an African-American profile; correct?

14 A It was in an African-American database, correct.

15 Q It was in an African-American of about 25,000 samples;  
16 right?

17 A I don't recall.

18 Q Okay. Well, we can take a look at it. U.S. Y-STR  
19 database, 25,644 total samples. Does that sound right?

20 A Yes, sir.

21 Q Okay. And there was a match to that profile in the  
22 African-American component of the database; right?

23 A That's correct.

24 Q Now, is it your opinion that that match from the  
25 African-American subsection of the U.S. Y-STR database had to

1 have come from Mr. Breest, who's sitting there, or one of his  
2 close patrilineal relatives who you may see sitting back in the  
3 gallery?

4 A Based on what we know about these profiles, that would  
5 be the logical conclusion, that --

6 Q That this profile, this African-American profile in the  
7 U.S. Y-STR database came from Mr. Breest, one of his sons, or  
8 some other very close patrilineal relative of Mr. Breest;  
9 that's your opinion?

10 A Or a relative some generations back that have --  
11 relatives who have descended from another individual, male  
12 individual generations back that share that same profile.

13 Q That's not within several generations, is it? You're  
14 now not saying the same thing, are you?

15 A Well, individuals from many generations back don't  
16 exist today, so it can't be their profile. They're not here  
17 anymore. But descendants, if there has not been any mutation,  
18 could share. He could have cousins or distant cousins that  
19 have that same profile. He could have distant cousins that are  
20 unknown to him that share that profile.

21 Q One of those distant cousins unknown to him that share  
22 the profile could be the contributor of the 2008 Yfiler sample;  
23 right?

24 A That's possible. It depends on where they are and what  
25 access they had.

1 Q So is that really what you meant in your affidavit by a  
2 close patrilineal relative?

3 A Is what I meant? I'm sorry. Your questions are not  
4 very clear.

5 Q I'm sorry. This is a confusing topic and I thought I  
6 understand what several generations meant, but apparently Mr.  
7 Breest may have a close patrilineal relative who's an African-  
8 American in this 25,000 profile database. Your opinion that  
9 this sample had to have been contributed by Mr. Breest or one  
10 of his close patrilineal relatives would include whoever the  
11 donor of that 15-locus profile in the U.S. Y-STR African-  
12 American databases would include that person?

13 A Yes. They share that profile.

14 Q If they share that profile, they could have been a  
15 contributor of the material underneath Susan Randall's  
16 fingernails?

17 A I don't know that. They can't be excluded as a source.  
18 I have no idea who the contributor is. Those are two very  
19 different questions.

20 Q I understand. Now, just a couple more small points.  
21 There was a lot of talk this morning about contamination of  
22 consumables. You heard Ms. Nasir testify yesterday. Is there  
23 anything that you would have done to analyze whether the 2012  
24 major profile was contributed by contamination consumables or  
25 was a consequence of contaminated consumables that Ms. Nasir

1 didn't do?

2       A Well, after the fact I don't know that there's anything  
3 that could have been done. At the time perhaps some of the  
4 consumables could have been tested. I don't know what type of  
5 quality control they were doing on incoming plastic ware. Even  
6 if it was done and it was clean, or even if it was  
7 contaminated, it doesn't tell us what was going on in a  
8 particular case. So based on what she testified to, it sounds  
9 like they made a very extensive effort to try to identify the  
10 possible source of that sample.

11      Q And when you say it sounds like they made a very  
12 extensive effort, you're also including all of the elimination  
13 databases that they looked at for employees at the  
14 laboratories, visitors to the laboratories, et cetera?

15      A Right. What she didn't testify to and I don't know is  
16 whether what data she was using, whether she was actually using  
17 Yfiler data, or if she did, I don't recall it, and maybe she  
18 did; or whether she was using the Identifiler Plus or MiniFiler  
19 data. I'm not sure on that.

20      Q And you don't recall whether Mr. Kennedy asked her that  
21 question?

22      A I don't, at this point.

23       MR. DUMAIN: I have nothing further at this time.

24       Thank you, Dr. Word.

25       THE WITNESS: Thank you.

STATE OF NEW HAMPSHIRE

SUPREME COURT

STATE OF NEW HAMPSHIRE,	Supreme Court Case No.
	2015-0524
Complainant,	
vs.	
ROBERT BREEST,	Concord, New Hampshire
	October 6, 2016
Defendant,	10:00 a.m.

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ORAL ARGUMENT

BEFORE THE HONORABLES LINDA S. DALIANIS, GARY E. HICKS,  
ROBERT J. LYNN, AND JAMES E. BASSETT  
JUSTICES OF THE SUPREME COURT

APPEARANCES:

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1 things, it would mean either Mr. Breest didn't do it or it  
2 would mean that Mr. Breest did do it and he did it around the  
3 time that someone else was in a violent struggle with the  
4 victim." And even that second set of facts, based on the trial  
5 record, would be so, in the court's words, radically different  
6 from the State's case to the jury that Mr. Breest is entitled  
7 to DNA testing under the standard that governs motions for a  
8 new trial. That is what Justice McGuire held in 2000 when we  
9 started down this now 16-year path of DNA testing for this  
10 case.

11 Thank you, Your Honor.

12 JUSTICE DALIANIS: Thank you, Counsel.

13 MS. WOODCOCK: Good morning, Your Honors, Elizabeth  
14 Woodcock for the State of New Hampshire. With me at counsel  
15 table is John Kennedy who also was on the brief.

16 I would like to just make on quick statement and then  
17 I'll take the Court's questions. In none of the five DNA tests  
18 from 2002 to 2012 was the Defendant excluded as a source of the  
19 DNA profile. Therefore, the fundamental premise of the  
20 Defendant's argument that the 2012 profile somehow exonerates  
21 him is simply wrong. Even though there is a major profile in  
22 that final test that is not his, he is not excluded as the  
23 source of the minor male profile, a result that is consistent  
24 with each of the previous four tests.

25 I want to talk a little bit --

1 UNIDENTIFIED SPEAKER: Can I ask --

2 UNIDENTIFIED SPEAKER: Before you go on, can you  
3 explain why the DNA pattern is generally found in a group of  
4 African-American citizens?

5 MS. WOODCOCK: Well --

6 UNIDENTIFIED SPEAKER: Or is it?

7 MS. WOODCOCK: I can't explain that in particular  
8 because I think that you don't know exactly how the -- where  
9 the DNA would have come from through generations. But I would  
10 point out that there has been DNA testing on the Hemings family  
11 which has turned out to demonstrate that probably Thomas  
12 Jefferson, or one of his close relatives was the father of a  
13 number of Sally Hemings' children. So you could wind up with a  
14 profile because of the way this country has operated over the  
15 years with a profile that was in a minority group. Dr. Word  
16 talked about that. She talked about how you couldn't  
17 determine, you could go back, all you can do is look at the  
18 results. But you can't determine exactly how this was  
19 transferred.

20 JUSTICE LYNN: Can I ask you a question that I will  
21 concede is unfair to you and it's not part of the record, but  
22 it -- I have -- my understanding of this has come from  
23 something that was part -- you know, that was either in the  
24 newspapers or in -- that -- somewhere that I read publicly. My  
25 understanding is that Mr. Breest is eligible for parole. He's

CERTIFICATE

I, Erin Perkins, CET\*\*D-601, a court approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

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ERIN PERKINS, CET\*\*D-601  
Proofreader

October 17, 2016

1 May 14, 2015, it's called ReliaGene Yfiler profile.

2 MS. WOODCOCK: And I'm going to ask that this be  
3 marked as Government -- or as State's Exhibit 6.

4 And then I'll ask that Orchid Cellmark Yfiler profile  
5 be marked as State's Exhibit 7.

6 And then I'm going to ask that this second page,  
7 Reliage -- or this third page, ReliaGene Yfiler profile be  
8 marked State's Exhibit 8:

9 BY MS. WOODCOCK:

10 Q And I'm going to ask you to take a look at these three  
11 documents and tell me, if you can, if you recognize them?

12 A Yes, I do.

13 Q What is State's Exhibit 6?

14 A This is a printout from the internet from the US Y-STR  
15 database where I entered in the results that ReliaGene  
16 generated using the Yfiler kit.

17 So, this would be the third column down at the top,  
18 2008 Yfiler, those results were entered into this US database  
19 to get a general sense of how often this particular profile has  
20 been observed or not observed in a database of males that have  
21 been tested.

22 Q And there's a date on that particular document, is  
23 there not?

24 A Yes, I did this on May 14th, 2015.

25 MS. WOODCOCK: I would offer State's Exhibit 6 as a

1 full exhibit, Your Honor.

2 MR. DUMAIN: No objection.

3 THE COURT: Granted; identification may be struck on  
4 6.

5 (State's Exhibit 6 received)

6 BY MS. WOODCOCK:

7 Q Let me take State's Exhibit 6 for a moment, put this on  
8 the ELMO here and ask you, tell us what you were able to  
9 conclude from State's Exhibit 6, what do those statistics mean?

10 A Well, it's impossible to read from here, but the bottom  
11 panel actually lists different population groups, African  
12 American, Asian, Caucasian, Hispanic, Native American.

13 And then it lists how many individuals, in that  
14 second column, it says number of haplotypes, that gives the  
15 number of male individuals that have been screened with this  
16 particular test.

17 And then the third column over, which has blue  
18 numbers, has ones or zeros and that tells us, in that  
19 particular population database, how often the profile that's in  
20 the top panel showed up. And I believe on that one it's once  
21 in the African American and I believe it's zero for all of the  
22 other population groups. And then the sort of light gray  
23 horizontal line says total and I believe it's 28,000 -- can't  
24 quite read it from here.

25 Q If I could just give you an actual copy of -- a second

1 Q And is it one of your -- it is your specialty in the  
2 world of forensic DNA analysis educating people about how to --  
3 how to interpret complex mixtures; right?

4 A That's correct.

5 Q So you're one of the leading experts in interpreting  
6 complex mixtures; right?

7 A Perhaps.

8 Q But you couldn't interpret this complex mixture?

9 A That's correct.

10 Q It's pretty complex?

11 A I don't know what "pretty complex" means. It --

12 Q I'll withdraw it. You couldn't interpret it?

13 A I could not interpret it.

14 Q And your opinion also is that it was not possible, it  
15 is not possible to provide an accurate statistical frequency  
16 calculation for the mixed DNA profile for the autosomal testing  
17 performed by Cellmark in 2012?

18 A Performed by the Dallas laboratory, yes.

19 Q Right. In 2012?

20 A In 2012.

21 Q The 2012 testing was performed by the Cellmark Dallas  
22 laboratory; right?

23 A The Orchid Cellmark Dallas laboratory.

24 Q As we covered in the deposition, it is very hard to --

25 A Yes.

1 and MiniFiler results are consistent with the DNA profile  
2 originating from at least three individuals"; right?

3 A Yes.

4 Q Okay. And your conclusion about that was that no  
5 conclusion -- your opinion, rather, was that no conclusion  
6 could be made regarding the inclusion or exclusion of Robert  
7 Breest as a potential contributor to that DNA extract that was  
8 tested in 2012; correct?

9 A That's correct.

10 Q And that was because of the complexity of the mixed DNA  
11 obtained from your testimony; right?

12 A And the use of a kit that has some issues from  
13 mixtures, yes.

14 Q Okay. What is a complex DNA mixture?

15 A My definition is three or more contributors.

16 Q Okay. And it's your opinion that complex mixtures like  
17 this one are always difficult to interpret, right?

18 A Pretty much, yes.

19 Q All right.

20 A Particularly if there's low-template DNA.

21 Q And there's evidence of low-template DNA here?

22 A That's correct.

23 Q And you've actually given presentations with titles  
24 like "Complex mixtures: Why are they so hard to interpret?"

25 A That's correct.

1 be due to the presence of DNA from more than one individual or  
2 technical artifacts and therefore were not interpreted," and  
3 there are four results in parentheses for the fingernail  
4 clippings.

5 And what our lab meant by that phrase or that  
6 statement was that we saw these results, but in our opinion we  
7 can't be sure that they're true alleles and should be  
8 interpreted or they might be technical artifacts.

9 And so, it was our policy to report those so that  
10 they were available to whomever might be looking at the report  
11 but wouldn't have access to the underlying data.

12 And so, we're providing all the data we had available  
13 to us, but making it clear that we are not making any  
14 interpretation off of those particular results because we don't  
15 know whether they're valid, true, interpretable results.

16 The second line says, "The results listed in the  
17 table above do not depict intensity differences."

18 So, again, for the fingernail clippings, some of  
19 these peaks were very, very tall peaks on the DNA profile that  
20 we generated and would be consistent with DNA coming from an  
21 individual who deposited more DNA or had more DNA present in  
22 that sample and then some of the peaks were smaller, the  
23 terminology used yesterday was major and minor contributor.

24 And we have not designated on this table that they're  
25 in fact intensity differences, one would need to look at the

1 actual profile data, electropherogram data, to see what those  
2 particular differences are.

3 Then there's ND, which means not detected, that is  
4 showing up on the far right column for Susan Randall, that  
5 means that the D7S820 locus was attempted, our amplification at  
6 that location was attempted, but we did not get any results,  
7 they are -- nothing was detected. And then the little tilde  
8 just means an approximate or estimated allele size.

9 Then below that, there's nomenclature that went on  
10 virtually all of our reports that said, "In addition to the  
11 profiles obtained from the items referenced in this report,  
12 weak results were observed. These results may be due to the  
13 presence of DNA from more than one individual or to technical  
14 artifacts and therefore were not interpreted."

15 When testing is done with any of these kits and some  
16 more than others, there is often a number of peaks that show up  
17 below the level that we can interpret.

18 And, again, we're just pointing out that we did see  
19 other information, that based on our validation studies and our  
20 protocol, we are not allowed to interpret, but it's pointing  
21 out to whoever may be reading this report that there could be  
22 more DNA from another individual, we simply don't know or there  
23 may be artifacts present.

24 Again, just disclosing as much as we could regarding  
25 the data we had available to us.

1                   What were the results that you actually got, were you  
2 able -- you were attempting to just determine whose DNA was  
3 involved in this sample, were you able to reach a determination  
4 on that?

5                   A Right. Yes, so the results are what's reported here.  
6 The conclusion from that study is we also tested DNA from the  
7 blood labeled Robert Breest and obtained results at all four of  
8 those regions for his sample. So, for the three loci where we  
9 got results from the fingernails, they were consistent with the  
10 types obtained from the blood of Robert Breest.

11                  Q Now, you're being very careful in the way that you're  
12 expressing this and I want to make something clear.

13                  You're not saying that the DNA found in this mixture  
14 belongs to Robert Breest, are you?

15                  A I am not.

16                  Q Exactly what would be the appropriate way of expressing  
17 the results from that test?

18                  A There are several ways it can be done, it can -- one  
19 can say that the results are consistent between these two  
20 samples, so the fingernails and the sample from Mr. Breest or  
21 it could be reported as Mr. Breest cannot be excluded as a  
22 possible source of this DNA. There's different terminology to  
23 communicate that he is included as a possible source.

24                  Q All right. Now, turning to the tests that were done  
25 the following year, the report of laboratory examination dated

1 (Counsel confer)

2 BY MS. WOODCOCK:

3 Q Let me show you which will, again, shortly be fully  
4 admitted as Exhibit K from yesterday and this is the report of  
5 the laboratory examination dated May 8, 2001. I would ask you to  
6 take a look at this, Dr. Word.

7 Do you recognize that?

8 A Yes, I do.

9 Q All right. Now, what were the results of that May 8th,  
10 2001 test?

11 A This was a test that was performed using an in-house  
12 developed Y-STR test system called YM1 and these results are  
13 shown on the top line of the table to my right, where it says  
14 2001 YM1. So, that test system allows us to amplify DNA at  
15 four locations; we only got results from three of the locations  
16 or three of the loci and that's what depicted in this table.  
17 There's a blank spot under DYS389 Roman Numeral II and that  
18 should have no results or not detected or some designation to  
19 that effect there; it was attempted but we didn't get any  
20 results on this test at that location.

21 Q Now --

22 A Sorry, maybe I didn't -- I think you asked me --

23 Q Well --

24 A I don't remember the question actually.

25 Q That's all right. That's all right, I can repeat it.

THE STATE OF NEW HAMPSHIRE

MERRIMACK, ss

SUPERIOR COURT  
No. S-789

8-25-2021

DENIED for the reasons  
set forth in the State's  
Objection.

2021 JUN -9 D 2 14

NEW HAMPSHIRE,

v.

ROBERT BREEST,  
Defendant.

Honorable Andrew R. Schulman  
August 25, 2021

MOTION FOR COURT TO ORDER ORCHID CELLMARK  
STAFF TO SUPPLY ROBERT BREEST WITH A COPY OF  
THE RAW DATA SHOWING THE RFU INTENSITIES OF THE  
MARKERS REPORTED IN THE JUNE 29, 2012, ORCHID  
CELLMARK REPORT PERTAINING TO ROBERT BREEST

NOW COMES Robert Breest in the above captioned and numbered matter and moves this court to order Orchid Cellmark staff to supply Robert Breest with a copy of the raw data showing the RFU intensities of the markers reported in the June 29, 2012, Orchid Cellmark report pertaining to Robert Breest, on the following grounds.

Throughout this entire prosecution, the State of New Hampshire's staff in the Attorney General's office has alleged this prosecution involved a single perpetrator of the murder of Susan Randall.

When Robert Breest first sought DNA testing to prove he is actually innocent of this murder, Judge Kathlene McGuire of this court approximately in 2000 ordered DNA testing and specifically stated that she was ordering DNA testing because this case involved a single perpetrator.

Ultimately, approximately nine DNA tests were conducted at Cellmark in Germantown, Maryland, ReliaGene in New Orleans, Louisiana, and finally at Orchid Cellmark in Dallas, Texas.

The State's expert DNA witness, Dr. Charlotte Word testified before this court in May of 2015, that she entered the DNA results into the U.S. Y-STR DNA data base and found there was one match in the African American data base, and then claimed that Robert Breest is African American.

At page 203 of the transcript of the hearing before this court in May of 2015, Dr. Charlotte Word stated that:

"And what our lab meant by that phrase or that statement was that we saw these results, but in our opinion we can't be sure that they're true alleles and should be interpreted or they might be technical artifacts." Transcript, hearing of 2015 at page 203.

See attachment 1, appended hereto.

Dr. Charlotte Word then went on to state:

"And so we're providing all the data we had available to us, but making it clear that we are not making any interpretation off of those particular results because we don't know whether they're valid, true, interpretable results." Transcript hearing of 2015 at page 203.

See attachment 1, appended hereto.

Consequently, because of the testimony of the State's DNA expert, Dr. Charlotte Word, it is clear that the raw data should be made available to Robert Breest, so that if necessary, he can have independent DNA experts evaluate the findings.

In approximately 2000, Judge Kathleen McGuire of this court, faced with the same situation, ordered that the raw data be supplied to Robert Breest, and upon independent interpretation, Robert Breest obtained the opinions of four world class DNA experts who found that Robert Breest was either excluded or further testing was warranted. Magistrate Judge Muirhead of the United States District Court wrote an opinion which included reference to those reports in his report and recommendation contained at Breest v. N.H. AG, January 3, 2007, Civil No. 06-cv-361-SM.

Most recently, assistant attorney general Elizabeth Woodcock represented to the United States Court of Appeals for the First Circuit that the State of New Hampshire has never claimed Robert Breest is African American. That position of the State is contrary to the State's position in this court in 2015, contained in the transcript starting at page 300 and continuing on to page 310, and is also confusing wherein assistant attorney general Elizabeth Woodcock when questioned by Justice Lynn about the evidence being African American responded to Justice Lynn that she couldn't explain that. However, she did concede to the Supreme Court that Robert Breest is excluded by the major profile, but argued that Robert Breest was not excluded by the minor profile, which is African American, and Dr. Charlotte Word testified in this court that Robert Breest is African American.

However, in the October 21, 2020 filing in the First Circuit Court of Appeals submitted by assistant attorney general Elizabeth Woodcock at page 23 of the brief, she stated that:

"The State has never argued that the killer was an African American or that the defendant is the product of that heritage. The plaintiff asserts as much, but does not direct this Court to a part of the record where that argument was made."

See, attachment 2, appended hereto. Thus it was necessary to include the 2015 hearing transcript before this court on pages 300 to 310 to establish that point.

Finally, Robert Breest wrote Orchid Cellmark and asked for a copy of the raw data. The letter is dated January 22, 2021, and was never answered. Four months having elapsed, it is Robert Breest's position that Orchid Cellmark does not intend to supply Robert Breest with a copy of the raw data indicating the RFU's of the markers reported absent a binding court order. See attachment 3, appended hereto.

In Commonwealth v. Greineder, 458 Mass. 207 (2018), an Orchid Cellmark DNA expert testified about Orchid Cellmark's protocol pertaining to DNA finding, and RFUs. In that case it was established that the FBI mandates that markers reported must be at least 200 RFUs, yet, in some cases, markers as low as 100 RFUs may be interpreted and used. The Orchid Cellmark expert in the Greineder case testified that Orchid Cellmark protocol allows markers with an RFU as low as 50 to be interpreted and in some cases, a marker as low as

40 RFUs may be interpreted and used. That probably is the basis of Dr. Charlotte Word's opinion contained at page 203 of the transcript of the hearing before this court in 2015, why she questioned if the markers were alleles or merely artifacts, or background computer chatter.

Robert Breest paid for the DNA testing, and therefore, he is entitled to the complete report, not merely a State witness, or laboratory analyst opinion.

WHEREFORE, Robert Breest moves this court to order the Orchid Cellmark staff and New Hampshire Attorney General to make the complete report available to him. When Judge Kathlene McGuire of this court ordered Cellmark in 2000 to supply Robert Breest with the complete report and raw data, in open court senior assistant attorney general N. William Delker gave Robert Breest the complete report and stated on the record, let the record reflect that I am giving Robert Breest the Cellmark report.

Dated: May 25, 2021

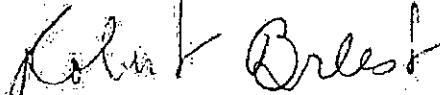
Respectfully submitted,



Robert Breest, pro se  
T-19048  
MCI Shirley, Medium  
P.O. Box 1218  
1 Harvard Road  
Shirley, MA 01464-1218

CERTIFICATE OF SERVICE

I, Robert Breest, hereby certify that I have served Assistant Attorney General Elizabeth Woodcock, a copy of this pleading this 17th day of May, 2021, by mailing her at 33 Capital Street, Concord, New Hampshire 03301-6397.



Robert Breest, pro se

Table of Attachments

	<u>Page</u>
Transcript of Hearing Before This Court page 203 pertaining to alleles or artifacts	1
Attorney General's argument before First Circuit Court of Appeals, October 21, 2020	2
Letter to Orchid Cellmark seeking copy of complete file containing raw data about RFUs pertaining to markers	3

1 be due to the presence of DNA from more than one individual or  
2 technical artifacts and therefore were not interpreted," and  
3 there are four results in parentheses for the fingernail  
4 clippings.

5 And what our lab meant by that phrase or that  
6 statement was that we saw these results, but in our opinion we  
7 can't be sure that they're true alleles and should be  
8 interpreted or they might be technical artifacts.

9 And so, it was our policy to report those so that  
10 they were available to whomever might be looking at the report  
11 but wouldn't have access to the underlying data.

12 And so, we're providing all the data we had available  
13 to us, but making it clear that we are not making any  
14 interpretation off of those particular results because we don't  
15 know whether they're valid, true, interpretable results.

16 The second line says, "The results listed in the  
17 table above do not depict intensity differences."

18 So, again, for the fingernail clippings, some of  
19 these peaks were very, very tall peaks on the DNA profile that  
20 we generated and would be consistent with DNA coming from an  
21 individual who deposited more DNA or had more DNA present in  
22 that sample and then some of the peaks were smaller, the  
23 terminology used yesterday was major and minor contributor.

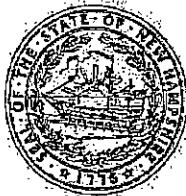
24 And we have not designated on this table that they're  
25 in fact intensity differences, one would need to look at the

ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE

83 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD  
ATTORNEY GENERAL

JANE E. YOUNG  
DEPUTY ATTORNEY GENERAL



*Sent via UPS Next Day Air (IZ 19A 789 23 1001 675 3)*

October 21, 2020

Maria R. Hamilton, Clerk of Court  
Office of the Clerk  
United States Court of Appeals  
U.S. Courthouse  
1 Courthouse Way, Suite 2500  
Boston, MA 02210

Re: Robert Breest v. Gordon MacDonald, New Hampshire Attorney General  
Docket No.: 20-1406

Dear Clerk Hamilton:

Enclosed please find nine bound copies of the Appellee's brief, which was filed electronically in the above-entitled matter on October 16, 2020. Our office received electronic notice that the brief was accepted on October 19, 2020. An unbound copy has been forwarded to Mr. Breest at the address listed below.

Please do not hesitate to contact me with any questions you may have. Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Maggie E. Keene".  
Maggie E. Keene  
Paralegal II  
Office of the Solicitor General  
NH Department of Justice

/mek  
Enclosures

Cc: Robert G. Breest, T-19048  
MCI Shirley  
PO Box 1218; Harvard Road  
Shirley, MA 01464-121

NOA Page 78

contamination was a significant concern. The defendant's expert, Huma Nasir, stated that it was possible for a medical examiner conducting an autopsy in the 1970s to use the same nail clippers on multiple bodies.”).

Although the plaintiff seeks to focus this Court's attention on the 2012 DNA results, the state court was correct when it stated that, taken as a group, the tests were more inculpatory than exculpatory. *Breest III*, 169 N.H. at 654. And the district court correctly noted those findings. *Breest v. MacDonald*, No. 1:18-cv-908-SM, slip op. at 12-14. In fact, the plaintiff has never been excluded as a source of DNA in any of the tests and this Court should decline to accept his representations to the contrary.

The State has never argued that the killer was an African American or that the defendant is the product of that heritage. The plaintiff asserts as much, but does not direct this Court to a part of the record where this argument was made.

The plaintiff asks this Court to replace the state and district courts' findings with his own. See PB: 8-9. Although the analysis is not entirely clear to the defendant, the plaintiff seems to combine the

CONCLUSION

WHEREFORE, the respondent respectfully requests this Court to affirm the judgment of the United States District Court for the District of New Hampshire.

Respectfully Submitted,

/s/ Elizabeth C. Woodcock  
Elizabeth C. Woodcock  
First Circuit Bar No.: 1041532  
Assistant Attorney General  
Criminal Justice Bureau  
33 Capitol Street  
Concord, NH 03301-6397  
Phone: (603) 271-3671  
Elizabeth.Woodcock@doj.nh.gov

October 16, 2020

Attachment 3

January 22, 2021

Robert Breest  
T-19048  
MCI Shirley, Medium  
P.O. Box 1218  
Shirley, MA 01464-1218

Orchid Cellmark  
Attn: Laboratory Director Rick W. Staub  
13988 Diplomat Drive  
Suite 100  
Dallas, Texas 75234

Re: Supplemental - FR12-0061  
Orchid Cellmark No: FR12-0061  
Agency Case No: Z9999-007241  
Add'l Agency No: 566D/FO11096/FO03153/F  
R-234

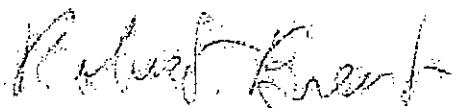
Dear Laboratory Director Rick W. Staub,

I seek a copy of the raw data in this case, specifically the material that shows the alleles and their peaks at the various loci.

Please supply me with this material, or explain what I must do to obtain this material.

Thank you.

Very sincerely yours,



Robert Breest, pro se

THE STATE OF NEW HAMPSHIRE

MERRIMACK, ss.

SUPERIOR COURT  
No. S-789.

8-25-2021

This motion is  
respectfully DENIED.  
Please see margin order  
at the bottom of Page 4.

*AS-25-2021*  
Honorable Andrew R. Schulman  
August 25, 2021

NEW HAMPSHIRE,

v.

ROBERT BREEST,  
Defendant.

2021 JUN 18 P 2:08

MERRIMACK SUPERIOR

MOTION TO VACATE PSYCHOSEXUAL MURDER  
CERTIFICATION AND SENTENCE AS UNCONSTITUTIONAL  
AS APPLIED TO ROBERT BREEST

NOW COMES Robert Breest in the above captioned and numbered matter and moves this court to vacate the psychosexual murder certification and sentence as unconstitutional as applied to Robert Breest, on the following grounds.

In Sullivan v. Louisiana, 508 U.S. 275 (1993) the Supreme Court of the United States stated that the Sixth Amendment right to trial by jury includes, as its most important element, right to have a jury, rather than judge, reach requisite finding of "guilty"; thus, although judge may direct verdict for defendant if evidence is legally insufficient to establish guilt, he may not direct verdict for state, no matter how overwhelming evidence is.

In the instant case, Robert Breest was found guilty of first degree murder by a jury on March 22, 1973, and immediately sentenced to life in prison, the life sentence had a minimum of 18 years, minus credit for good time, and allowed parole after ten years and six months. Upon

motion of the attorney general, and over Robert Breest's objection, Robert Breest was returned to court on April 5, 1973, wherein the crime was certified as psychosexual and Robert Breest was then sentenced to a life sentence with a minimum of 40 years, minus credit for good time, and allowed parole after 23 years and 8 months. See Breest v. Helgemoe, 579 F.2d 95 (1st Cir. 1978); and Breest v. Cunningham, 752 F.2d 8 (1st Cir. 1985).

In the aforementioned circuit cases, the court used and referred to the application for writ of habeas corpus as originally filed in the United States District Court for the District of New Hampshire, Breest v. Helgemoe, Crim. No. 77-45, slip opinion (D.N.H. April 8, 1977) see attached order of the court.

Additionally, Robert Breest was never charged, indicted, tried, or convicted of psychosexual murder, see order of District Court, and the District Court further found that the charge of psychosexual murder was not one of the elements of the crime of first degree murder that Robert Breest was convicted of committing. See Crim. No. 77-45, supra.

In the aforementioned cases, as well as the state supreme court proceeding, Robert Breest argued that the psychosexual murder statute for certification was unconstitutional and that matter was denied. In the federal court, Robert Breest argued that the proceeding constituted double jeopardy and violated the ex post facto guarantees, both of those claims were also denied by the federal court.

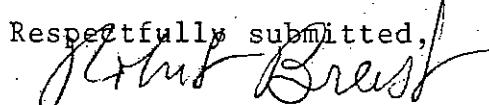
In the instant pleading, Robert Breest submits that the certification of the crime as psychosexual and the sentence flowing therefrom is unconstitutionally applied to Robert Breest because Robert Breest was deprived of a jury finding of the crime as psychosexual. This is a violation of the Sixth Amendment jury finding requirement and the Fifth Amendment Due Process Clause, Robert Breest did not receive the process he was due, and all of the above is applicable to the states via the Fourteenth Amendment Due Process Clause. All of the foregoing is explained in greater detail in Sullivan v. Lousiania, supra.

Because there was no jury finding of the crime as psychosexual, the court lacked jurisdiction to sentence Robert Breest pursuant to the psychosexual murder statute and the entire proceeding is null and void. This is not a situation where the action is voidable, rather, in the instant matter, the action is void, null from its inception. As such, it is correctable at any time.

WHEREFORE Robert Breest moves this court to vacate the psychosexual certification and vacate the sentence that flows therefrom, and for any and other relief as may be just and proper in this case.

Dated: May 31, 2021

Respectfully submitted,



Robert Breest, pro se  
MCI Shirley, Medium  
1 Harvard Road  
P.O. Box 1218  
Shirley, MA 01464-1218

CERTIFICATE OF SERVICE

I, Robert Breest, hereby certify that I have served Assistant Attorney General Elizabeth Woodcock, a copy of this pleading this 100 day of June, 2021, by mailing her a copy at 33 Capital Street, Concord, New Hampshire 03301-6397.



Robert Breest, pro se

8-25-2021

**DENIED:** The Constitutional right to proof beyond a reasonable doubt and a jury determination of sentencing factors, as recognized in the line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000) is not retroactive. See *State v. Tallard*, 149 N.H. 183 (2003); *Schriro v. Summerlin*, 542 U.S. 348 (2004). This means that those constitutional decisions are not grounds to vacate earlier convictions.

To the extent that Mr. Breest may also rely on law that was available to him at the time of his trial and direct appeal, his claim is barred by procedural default and laches.

To the extent his motion may be construed to raise claims that were already decided by the N.H. Supreme Court, it is barred by res judicata and collateral estoppel.

Honorable Andrew R. Schulman

August 25, 2021

ATTACHMENT

Pg 14  
CRIME, NOT  
OFFENDER

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW HAMPSHIRE

Robert Breest

v.

Raymond Helgemo, Warden  
New Hampshire State Prison

(150.17) 577 APPD  
Criminal Action No. 77-45 CERT

(150.17) 577

577 P2d 95

APPD  
577 CERT

DEN

481US 133

OPINION AND ORDER ON PETITION FOR  
WRIT OF HABEAS CORPUS

MERRIMACK SUPERIOR

Robert Breest, a convicted New Hampshire prisoner at the State Prison, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is presently in the custody of the respondent, the Warden of the New Hampshire State Prison. The petitioner has exhausted his State remedies as required by 28 U.S.C. § 2254(b).

The petitioner was tried and convicted and sentenced for the crime of first degree murder on March 22, 1973. NH RSA 585:1 (now NH RSA 630:1-a). A short time later, on motion of the State, his crime was certified as psychosexual in nature, and his minimum sentence was fixed at forty years pursuant to NH RSA 607:41-a-d (now NH RSA 651:45-a-d). He was represented by counsel at the trial and at both sentencing hearings.

The facts as developed at the trial are as follows.

State employees working on Interstate 93 in East Concord discovered a woman's partially clothed body lying on the ice covered Merrimack River on March 2, 1971. Police identified the body as that of Susan Randall of Manchester. Dr. George G. Katsas described a gory scene and gave "multiple blunt injuries with ruptures of the liver and fracture of the skull" as the cause of death. Tr. at 133. A friend of Susan Randall's, Judy Jenkins, testified that she last saw the victim on February 27, 1971, when she left her at the Squog Food Store near Granite Square in Manchester at midnight.

She said the victim was wearing a brown fur coat, floppy hat and large round sunglasses and that she had no pocketbook.

Other witnesses testified that they were in the Chickenhouse Restaurant on Granite Square the same night and that they observed a girl hitchhiking in front of the store and that a white car stopped and picked her up. Roland Chouinard testified that the car which stopped was a 1964 Chevrolet and that the hitchhiker had a shoulder length pocketbook. This was confirmed by the other two witnesses. The State introduced evidence that showed that the petitioner had been in Manchester on February 27, 1971.

Captain Doyon, now Colonel, of the New Hampshire State Police, testified that he interviewed the petitioner with regard to the homicide on March 15, 1971, and that he had searched the petitioner's automobile for evidence but found nothing. He also testified that the petitioner had said he was in Manchester early in the day on February 27, but that he returned to Lowell, Massachusetts, by approximately 10:30 P.M. on the 27th. This contradicted the testimony of Jenny Longval and Donna Glidden who both said that the petitioner was at the Longval home around midnight and left after a short visit.

Doyon observed some scratches on the hands of the petitioner which, as he noted in his report, seemed consistent with the petitioner's explanation that he had been scratched by a cat. Expanding his remarks at trial, he said that the scratches could have been sustained in a fight. Tr. at 692-695.

David Carita, an imprisoned felon in the Commonwealth of Massachusetts, knew the petitioner from the time that they were both incarcerated in the House of Correction in Billerica, Massachusetts, while the petitioner was awaiting extradition proceedings on his homicide charge. He testified that he had asked Breest if

he had killed Susan Randall and that the petitioner had replied that he had. Tr. at 763. Subjected to a vigorous cross-examination, Carita admitted that he had previously testified against a number of criminal defendants in order to get deals for himself. He further stated that he might be killed if he stayed in Massachusetts, and that the State of New Hampshire had agreed to provide for his safety after Breest's trial in exchange for his testimony. Tr. at 767 et seq.

Roger Beaudoin of the New Hampshire State Police Crime Laboratory testified that blood may have been present on several items taken from the petitioner's automobile pursuant to a warrant and on items recovered from the area in which the body was found. He also testified to the possible presence of blood on the petitioner's boot.

Dr. Michael Hoffman of the Alcohol, Tobacco and Firearms Laboratory testified that he performed neutron activation analysis on the particles submitted to him from the victim's coat and the petitioner's car and found similarities between the particles found in petitioner's car and those on the victim's body. Tr. at 1040 et seq.

Harvey Rowe, Jr., an Assistant Attorney General for the Commonwealth of Massachusetts, testified that when he questioned the petitioner at extradition proceedings in Massachusetts, the petitioner had denied being in New Hampshire on February 28, 1971. Tr. at 1249. The witness admitted on cross-examination that there were no inconsistencies in what the petitioner had told him on the several occasions he had questioned him in Massachusetts. Tr. at 1253.

Two expert witnesses presented by the defense testified that conclusions drawn by the State's expert from the data in his possession with respect to the neutron activation analysis were

unreliable and not supported by background studies. They testified that the paint particles taken from the coat and sweater were not similar at all to those taken from the car and that the hair particles from the coat and from the car were also dissimilar.

Several other witnesses presented by the defense testified that they had observed cars and people other than the petitioner in the area of the bridge at which the body was found on the evening of February 27, 1971, and during that week-end that the cars did not fit the description of the petitioner's car.

The grounds on which this court is asked to grant the petition for habeas corpus are numerous. First, the petitioner claims that the testimony of several State's witnesses and certain scientific evidence admitted against him should have been excluded. Second, the petitioner alleges that there were numerous violations of his due process rights: the prosecutor made statements in his summation to the jury which were not supported by evidence; petitioner's objections to the evidence were repeatedly denied; and the prosecutor failed to prove its case beyond a reasonable doubt. He further contends that the jury selection procedure violated his Sixth Amendment right to a jury of his peers. Third, he claims that the affidavit supporting the search warrant was insufficient in that it did not establish probable cause and that it omitted exculpatory evidence that the State had at the time.

The constitutionality of his sentence and the statute applied is also challenged. Petitioner alleges that the statute is vague, the use of it amounted to the application of an ex post facto law, and that he was entitled to a full due process hearing before he was sentenced.

A mere allegation that the "proceeding was a mockery of justice in that the trial court repeatedly denied [the petitioner's] . . . objections in critical rulings" without specific examples does not state a constitutional claim which I can review.

STATE COURT EVIDENTIARY RULINGS

The scope of review of a federal court in a petition for a writ of habeas corpus is limited. "The States are free to provide such procedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the Federal Constitution." Burgett v. Texas, 389 U.S. 109, 113-114 (1967).

Federal courts "do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence." Eisenba v. California, 314 U.S. 219, 228 (1941). Therefore, my inquiry into the correctness of the evidentiary rulings made at petitioner's trial is strictly limited to a review for constitutional error. Lemire v. Helgemo, Civ. No. 76-358 (D. N.H. 3/23/77). After a careful perusal of the record in this case, I find no constitutional error. In addition, I find that there was adequate evidence presented at the trial to convict the petitioner.

It is not for a federal court to rule upon the qualifications of witnesses accepted by the trial court as experts. The experts offered by the prosecution were subjected to a sufficient cross-examination to allow the jury to weigh the value of the testimony which they offered.

Petitioner urges that the testimony of David Carita was perjured and that his bias was shown in the cross-examination. The cross-examination succeeded in doing exactly what it was supposed to do. It subjected the witness' credibility to severe scrutiny by the jury. The jury, not the federal court, determines the issue of credibility.

ADMISSION OF STATEMENTS MADE TO COLONEL DOYON

Prior to the trial, the petitioner moved to suppress statements given to Captain Doyon, now Colonel, of the New Hampshire

State Police on March 15, 1971.

The petitioner alleges that he was given no Miranda warnings at the time. He urges that as a prime suspect he was entitled either to Miranda warnings or other warnings of the same nature.

Doyon testified at the suppression hearing, and again at trial, that he warned the defendant of his rights. Tr. at 47 and 686. The petitioner counters that the fact that Doyon's report fails to mention that he gave warnings subjects Doyon's assertion that he did to doubt. This is argument, not facts. I can find no error in the trial court's finding that Doyon did give the required warning.

Further, the interview, remote as it was from the petitioner's arrest, was a voluntary meeting and was not a result of custodial interrogation. Beckwith v. United States, 425 U.S. 341 (1976).

#### PREJUDICIAL STATEMENTS MADE BY THE PROSECUTORS

The State's closing argument certainly was not so inflammatory as to prejudice the jury or so inaccurate as to mislead the jury. Therefore, there was no violation of the petitioner's right to a fair trial. Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

#### ADMISSION OF TESTIMONY FROM EXTRADITION HEARING

At the trial, the State called Harvey Rowe, an Assistant Attorney General for the Commonwealth of Massachusetts, whose testimony was based in part on his memory of what the petitioner said during the course of the extradition hearings in Massachusetts and on a transcript of a portion of those proceedings.

The defendant contends that the admission of this testimony violates his right to an extradition hearing and his right against self-incrimination. He also states that the implication that he

gave false testimony at that hearing prejudiced his case and violated his Fourteenth Amendment right to due process of law. Neither the defendant nor his attorney in the State proceedings cited any case law for this proposition; nor are we able to find any.

It seems clear that testimony given at an extradition hearing is on the same footing as testimony given at a probable cause hearing; the testimony is given at the risk of self-incrimination. See Harrison v. United States, 319 U.S. 219 (1968); Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967); Smith v. Slayton, 369 F. Supp. 1213 (W.D. Va. 1973).

#### JURY SELECTION

The petitioner alleges that the method of jury selection resulted in a jury panel which was not a fair representation of the community but, rather, was skewed towards older people and thus deprived him of his right to a jury of his peers.

Under NH RSA 500-A:2, local selectmen are given authority to choose those persons who are "eligible" to serve. There is no definition of who is eligible to serve, although the statute does list the reasons for which one can be excused and for which one is exempt. NH RSA 500-A:2, 4, 10, 18, 19, 21. The petitioner, who was thirty-four at the time of the trial, contends that the statute does not assure that prospective jurors will represent a cross-section of the community from which they are chosen. He relies on questionnaires which show that only eight of the one hundred ten jurors on the array were under the age of forty.

The State has the constitutional duty to provide for the selection of jury panels drawn impartially from a cross-section of the community. Hamling v. United States, 418 U.S. 87, 137 (1974); Peters v. Kiff, 407 U.S. 493 (1972); Alexander v. Louisiana,

405 U.S. 625 (1972); Brown v. Allen, 344 U.S. 443, 473 (1953). The petitioner has the burden of proving that the absence of younger jurors was caused by a systematic or intentional exclusion. Hamling, supra, 418 U.S. at 137. In Hamling, the Court ruled that a district court had not erred in denying the defendant's motion for a jury picked from a new list. The lists were compiled from voting lists every four years, and thus excluded those between the ages of eighteen and twenty-two. Further, the Court did not rule that "the young are an identifiable group entitled to a group based protection . . . ." Id. at 137. The petitioner here has not even alleged that there was an intentional exclusion of the younger jurors. On the evidence, I can find no constitutional error in the method of jury selection.

#### ILLEGAL SEARCH AND SEIZURE

The petitioner claims that deliberate omission of evidence favorable to him in the preparation of an affidavit supporting an application for a search warrant of his automobile and home was sufficient cause for the trial court to suppress the evidence obtained in those searches under the exclusionary rule and that it erred in not excluding the evidence. With respect to this claim, the New Hampshire Supreme Court found:

[T]he omission of the items complained of in the affidavit for the search warrant in this case did not materially affect its integrity to the extent that it would negative its support for a finding of probable cause.

Where, as here, the State has provided an opportunity for full and fair litigation of the petitioner's Fourth Amendment claims, a state prisoner may not be granted habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial. Stone, Warden v. Powell,

Civ. No. 74-1055, 44 U.S.L.W. 5313 (July 6, 1976). The only review is by writ of certiorari to the United States Supreme Court.

#### SENTENCING

The petitioner was convicted of first degree murder on March 22, 1973, and sentenced to life imprisonment at the New Hampshire State Prison on the same day. He began serving his sentence immediately. (The petitioner had been incarcerated at the Merrimack County Jail while he was awaiting trial.) On March 27, 1973, the State filed a motion for resentencing pursuant to a new statute dealing with psychosexual murder. The defendant raises several grounds for reversing his sentence including the Fifth Amendment bars against double jeopardy and application of an ex post facto law. The petitioner also complains that the sentencing statute is unconstitutionally vague and that the resentencing hearing on April 5, 1973, denied him due process of law.

The indictment returned against the petitioner alleged that he committed first degree murder on February 28, 1971. Under the statute in effect when the crime is alleged to have taken place, the petitioner would have been sentenced to life imprisonment and would not have been eligible for parole.<sup>1</sup> NH RSA 607:43 (1955) and NH RSA 585:4 (1955). Effective July 1, 1971, five months after the

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1. The statutes are set out below.

607:43. Any prisoner whose conduct while in prison has been meritorious and whose minimum sentence is two years or more may be paroled by the state board of parole when he has served two-thirds of his minimum sentence, provided it shall appear to said board to be a reasonable probability that he will remain at liberty without violating the law and will conduct himself as a good citizen.

585:4. The punishment of murder in the first degree shall be death or imprisonment for life, as the jury may determine, except as provided in section 5; and the punishment of murder in the second degree shall be imprisonment for life, or for such term as the court may order. If the jury shall find the respondent guilty of murder in the first degree, the punishment shall be life imprisonment unless the jury shall add to their verdict the words, with capital punishment.

alleged murder, the New Hampshire Legislature enacted NH RSA 607:41-a which provided that those serving sentences for life imprisonment would be eligible for parole after serving eighteen years of their sentences.<sup>2</sup> Effective May 14, 1972, the Legislature enacted NH RSA 607:41-b-d which provided that those convicted of first degree murder of a psychosexual nature would be eligible for parole only after serving forty years less any credits earned.<sup>3</sup>

2. NH RSA 607:41-a, as originally enacted, is set out below.

A prisoner serving a sentence of life imprisonment may be given a life permit at any time after having served eighteen years which shall be deemed the minimum term of his sentence for the purposes of this section, minus any credits earned under the provisions of RSA 607:51-a, b and c, provided it shall appear to said board to be a reasonable probability that he will remain at liberty without violating the law and will conduct himself as a good citizen.

3. NH RSA 607:41-b, c, & d is set out below.

A prisoner serving a sentence of life imprisonment who has been convicted of murder in the first degree which was psycho-sexual in nature shall not be eligible for parole until he shall have served forty years . . . and until the board shall recommend to the superior court that said prisoner should be released on parole. The superior court shall have a hearing on the recommendation of the board at which all interested parties, including the attorney general, may appear and present evidence. If it shall appear to the superior court after said hearing that there is a reasonable probability that the prisoner will remain at liberty without violating the law and will conduct himself as a good citizen, the court may order him released on parole with such conditions as it may deem just.

Whenever any person is convicted of murder . . . the presiding justice shall certify, at the time of sentencing, whether or not such murder was psycho-sexual in nature.

→ . . . the phrase "murder which is psycho-sexual in nature" means murder in which there is evidence that the offender has committed sexual assault or abuse or attempted sexual assault or abuse of the victim before or after death.

NH RSA 607:41-a was amended at the same time to except murder in the first degree which was psychosexual in nature.

The law has since been amended to eliminate parole eligibility for all persons convicted of first degree murder. NH RSA 630:1-aIII

The petitioner contends that the application of NH RSA 607:41-b (now NH RSA 651:45-b) is the application of an ex post facto law because NH RSA 607:41-b became effective after the passage of the law which made all persons serving life sentences eligible for parole in eighteen years.

Justice Chase categorized ex post facto laws in Calder v. Bull, 3 U.S. (3 Dall.) 305, 309 (1798), as follows:

I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

*TP  
1/6*  
See also Fletcher v. Peck, 10 U.S. (6 Cranch.) 48, 77 (1810), in which Chief Justice Marshall defined an ex post facto law as a law which "renders an act punishable in a manner in which it was not punishable when committed." The Supreme Court has upheld this definition continuously. See Warden v. Marrero, 417 U.S. 653, 663 (1974); Lindsay v. Washington, 301 U.S. 397, 401 (1937); Malloy v. South Carolina, 237 U.S. 180 (1915); Medley, Petitioner, 134 U.S. 160 (1890). It has extended this definition to include matters which effect parole. Marrero, supra, 417 U.S. at 663; Lindsay, supra, 301 U.S. at 401-402.

The situation here is quite different from those in the cases cited above. In each of those where the petitioner was successful

he was accused of a crime not in existence at the time of its commission or sentenced under a statute stricter than the one in effect at the time of its commission. In this case, the sentencing statute, though harsher than its predecessor, is less harsh than the one in effect at the time when the crime was committed.

All of the cases cited above use the date when the crime was committed as the measure for determining whether or not a law has been unconstitutionally applied after the fact. The theory behind the rule against ex post facto laws is that the perpetrator should have constructive notice of the prohibition and the penalty on the date of commission of a crime. The Legislature's change of the sentencing statute so that it is less harsh than when the crime was committed, but harsher than another statute enacted after the crime was committed but prior to the statute actually used for sentencing is not unconstitutional.

I hold that the application of the psychosexual sentencing statute, NH RSA 651:45, is not the application of an ex post facto law in this case, despite the facts that there was no psychosexual sentencing scheme at the time of the crime and that petitioner's sentence under the Act is considerably longer than the sentence he could have received under the applicable sentencing limits for first degree murder not certified as psychosexual in nature. This is so because the sentence he received is less than the mandatory natural life sentence that was in effect at the time that the crime was committed.

I have given careful consideration to the petitioner's claim that the retroactive application of the psychosexual statute is a violation of due process. Although a convict's right to parole may be liberty interest protected by the Fourteenth and Fifth

Amendments, see Gagnon v. Scarpeli, 411 U.S. 778 (1973); Morrisey v. Brewer, 408 U.S. 471 (1972); Specht v. Patterson, 386 U.S. 605 (1967); Williams v. New York, 337 U.S. 241 (1949), it does not exist as an inchoate right prior to trial and conviction. See Nichols v. Helgemoe, Civ. No. 77-100 (D. N.H. 3/30/77). Moreover, I can find no case which puts forth the proposition that the Legislature cannot take away what it has given so long as there are no arbitrary classifications and no violation of due process. See Cafeteria Workers v. McElroy, 367 U.S. 885 (1961).

I reject the petitioner's contention that his second sentencing hearing placed him in jeopardy twice. The sentencing judge was required to make a determination to certify the petitioner's crime as either psychosexual in nature or not, and his task was not completed until that determination was made. The fact that the decision to certify the crime as psychosexual in nature was not made until two weeks after petitioner was sentenced to life in no way prejudiced the petitioner.

The next issue is whether the failure to have a full adversary hearing on the question of the application of the psychosexual murder statute deprived the petitioner of his constitutional right to due process of law.

The certification hearing was devoted solely to argument by counsel. The petitioner was not permitted to present any evidence, question witnesses or testify himself.

The petitioner's claim is bottomed on Specht v. Patterson, supra, 386 U.S. 605. The New Hampshire Supreme Court found that Specht was not applicable and relied on Williams v. New York, supra, 337 U.S. 241, and United States v. Stewart, 531 F.2d 326, 332 n.2, 334 (6th Cir.), cert. den., 426 U.S. 922 (1976). With all due respect, I disagree.

Specht was convicted of the crime of indecent liberties which

carried a maximum sentence of ten years; however, he was sentenced under a separate sentencing scheme, the Colorado Sex Offenders Act, for an indeterminate term of one day to life. The Supreme Court noted:

Under Colorado's criminal procedure, here challenged, the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment. The case is not unlike those under recidivist statutes where an habitual criminal issue is "a distinct issue" (Graham v. West Virginia, 224 U.S. 616, 625) on which a defendant "must receive reasonable notice and an opportunity to be heard." Oyler v. Boles, 368 U.S. 448, 452; Chandler v. Fretag, 348 U.S. 3, 8; Specht, supra, 306 U.S. at 610.

The Court unanimously held "that the requirements of due process were not satisfied," and stated:

The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact. Id. at 608.

In finding that Specht had been sentenced under a separate "commitment proceeding" the Court distinguished Williams v. New York, supra, 337 U.S. 241. In Williams, the trial judge disregarded the jury's recommendation of life imprisonment and sentenced the defendant to death on the basis of the evidence in the case and additional information obtained through the Probation Department. The use of such information was pursuant to the New York Criminal Code. In his opinion for the majority, holding that this was not a violation of due process, Mr. Justice Black stressed the "modern philosophy of penology that the punishment should fit the offender and not merely the crime." Williams at 247. The challenged New Hampshire statute is directed specifically to the type of crime, not the offender.

It is difficult for me to make a significant distinction between Specht and Williams. In both cases, the judge is making a determination based on information which the defendant has no opportunity to challenge or rebut. In neither case was the defendant given an opportunity to confront and cross-examine the witnesses responsible for the information being considered, nor did he have a chance to present mitigating evidence of his own. However, in Specht there was a statute commanding the specific findings, while in Williams the statute allowed the judge to make the findings himself. The New Hampshire statute, like the one in Specht, commands a finding by the trial judge.

A very recent Supreme Court case casts further doubt on the continued precedential strength of Williams. In Gardner v. Florida, 45 U.S.L.W. 4275 (3/22/77), a plurality of the court held that

petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain. Id. at 4278.

In Gardner, as in Williams, the trial judge sentenced the defendant to death despite a recommendation of life imprisonment by the jury. In distinguishing Williams, the Court noted that the trial judge in Williams had read pertinent parts of the sentencing report into the record at a hearing during which defendant's counsel could have taken issue with the facts if there had been some error. Id. at 4277. In addition to distinguishing Williams, the Court cited Specht with approval. Therefore, I conclude that Williams is to be confined to its facts and is of limited precedential value.

The issue in United States v. Stewart, supra, 531 F.2d 326, was whether or not the Federal Special Offender Statute, 18 U.S.C. § 3575, was unconstitutional because of vagueness and due process

defects. The Sixth Circuit found that the Act complied with Specht's due process requirements:

The statute expressly guarantees the defendant the right to assistance of counsel, compulsory process and cross-examination. As we have already noted, the statute requires findings of fact and full appeal. Thus, it fulfills the due process requirements of Specht v. Patterson, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212, 18 L.Ed.2d 326, 330 (1967), where the Supreme Court held in a case involving sentencing under a Sex Offenders Act where the invocation of the Act constituted a new and distinct criminal charge:

Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. United States v. Stewart, 531 F.2d at 332.

The Court also stated:

It is to be emphasized that the present case differs from Specht in that the statute here involved does not create a new and distinct criminal charge. Id. at 332.

The footnote which the New Hampshire Supreme Court specifically cited states:

2. The legislative history confirms this point: "The requirements of Specht v. Patterson . . . are inapplicable, since no separate charge triggered by an independent offense is at issue. Only circumstances of aggravation of the offense for which the conviction was obtained are before the court." S.Rep.No. 91-617, 91st Cont., 1st Sess. (1969), p. 163.

Legislative history, however, is not binding constitutional precedent, especially where the statute under consideration in fact meets all the requirements of Specht. Congress is not free to legislate away the Constitution by labeling by one name that which commonly goes by another.

The Colorado statute which the Supreme Court considered in Specht is strikingly similar to the one here in which "the presiding justice shall certify, at the time of sentencing, whether or not such murder was psycho-sexual in nature." NH RSA 651:45-c. This certification is like "the making of a new charge leading to criminal punishment." Specht, supra, at 610. Here, the petitioner's murder conviction was the "basis for commencing another proceeding under another Act." Specht, supra, at 608. In the certification proceeding, the trial court determined, as a matter of fact, that the criminal act which underlay the petitioner's conviction was psychosexual in nature. There was no mention in the indictment that this crime was psychosexual in nature nor was that one of the necessary elements of the crime for which the petitioner was convicted.

If the petitioner's case is to be distinguished from Specht, it is on the basis that the evidence at the trial was sufficient for a finding by the trial judge that the murder was psychosexual in nature. In Specht, evidence was adduced to show that the defendant was a danger to society only after trial. I do not believe that this distinction is sound. The prosecution admitted at the certification argument that evidence might be presented which would rebut the evidence that the crime was psychosexual in nature if an evidentiary hearing were held.

I think that the State has shown all there could reasonably be expected or even possible to have been shown. So, I think, as this case stands now that it would be termed a psycho-sexual murder. That is not to say possibly that with further evidence if we were to have an evidentiary [sic] hearing with both the State and the defense participating that in some measure this, what I would call, prima facie case of psychosexual murder couldn't be rebutted by evidence we haven't heard. (Emphasis added.)

Transcript of 4/5/73 at 4 and 5.

I hold that Specht controls the outcome of this case, and the petitioner must be afforded a due process hearing.

The petitioner never testified at the trial. At a sentencing hearing, he would be free to testify without the risk of self-incrimination. There may be hearsay or other evidence which could not be presented to the jury which would have a bearing on the issue of whether or not this was a psychosexual murder. The sentencing judge, of course, also has the right to examine evidence outside of the trial record, including the petitioner's prior record, bearing on the question of whether or not the murder was psychosexual in nature.

Due process requires that the petitioner be given an opportunity to challenge and rebut the inferences raised at the trial which were not pertinent to the issue of first degree murder, but were used to increase his minimum sentence from eighteen to forty years.

The challenge as to vagueness does not merit serious consideration. The definition of "murder which is psychosexual in nature" contained at NH RSA 651:45-d is specific and clear.

This case is remanded to the New Hampshire Supreme Court for proceedings not inconsistent with this opinion.

SO ORDERED.

Hugh H. Brown  
United States District Judge

April 18, 1977

cc: Peter W. Heed, Esq.  
Robert Breest

THE STATE OF NEW HAMPSHIRE

MERRIMACK, ss.

SUPERIOR COURT  
No. S-789

8-25-2021

Denied as moot because the court has  
ruled on all substantive motions for  
which the transcript might be relevant.  
The court does not find that the different  
descriptions of the transcript are material.

NEW HAMPSHIRE,

v.

ROBERT BREEST,  
Defendant.

*Andy Schulman*  
Honorable Andrew R. Schulman  
August 25, 2021

MOTION TO ORDER ATTORNEY GENERAL TO SUPPLY  
THIS COURT WITH A COPY OF THE MAY, 2015, HEARING TRANSCRIPT

NOW COMES Robert Breest in the above captioned and numbered matter and moves this court to order the Attorney General to supply this court with a copy of the May, 2015 hearing transcript on the following grounds:

In the pleadings presently before this court, as well as one being filed in addition to the two the Attorney General has answered, Robert Breest refers to various pages of the May, 2015, hearing transcript wherein certain things were said. The Attorney General, has on occasion challenged what Robert Breest has claimed is contained in the hearing transcript, and thus Robert Breest should submit copies of the hearing transcript of May, 2015.

However, the policy here at MCI Shirley, Medium, where Robert Breest is presently housed, does not allow hearing transcripts to be copied. See attachment 1, D. Photocopy Procedure, 1. b.

"Transcripts will not be copied."

See, also attachment 2, legal photocopy request, and under:

"For Librarian Use Only . . .  
Not original legal document."

As a result of the foregoing policy statements, Robert Breest is required to send the documents home and have his son copy them and then package them and submit them to the court. This takes time.

The Attorney General, in the pleading dated June 1, 2021, page 1, footnote 1, has offered to supply this court with a copy of the transcript of the hearing of May, 2015, if the court makes a request.

WHEREFORE, Robert Breest now moves this court to request the May, 2015, hearing transcript from the Attorney General, so that Robert Breest can more freely refer to portions of that hearing in his pleadings, and refer to the transcript page number.

Dated: June 9, 2021

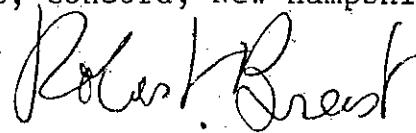
Respectfully submitted,



Robert Breest, pro se  
MCI Shirley, Medium  
1 Harvard Road  
P.O. Box 1218  
Shirley, MA 01464-1218

CERTIFICATE OF SERVICE

I, Robert Breest, hereby certify that I have served Assistant Attorney General Elizabeth Woodcock, a copy of this pleading this 16th day of June, 2021, by mailing her a copy at 33 Capital Street, Concord, New Hampshire 03301-6397.



Robert Breest, pro se  
T-19048

## D. Photocopy Procedures

1. Library photocopy services are for the purpose of reproducing original legal documents to be filed with the Courts in support of Civil and Criminal Litigation challenging the inmate's sentence, directly or collaterally, or in support of civil litigation challenging the conditions of his/her confinement. Copies of such documents will be allowed with the original going to the Court, and produced in accordance with the rules of the court. More copies will be permitted if mandated by the Court. Exhibits will only be accepted for photocopy if they are included with formal documents being filed with the court, specifically listed in a table of exhibits and properly marked as an exhibit. E.g., a letter to the Superintendent must be marked as "Exhibit A" and explicitly noted within the accompanying motion, affidavit, or memorandum, etc. as exhibit.
  - a. The Librarian, or Superintendent's designee, will be responsible for approving material submitted for photocopy under the Law Copy Procedures on Attachment A.
  - b. Transcripts will not be copied. Inmates must obtain them through their attorneys or request through the courts.
  - c. Photocopy services are not intended to take the place of Library research. Inmates will be instructed to make use of the Law Collection during regularly scheduled Library periods. Inmates who require personal copies of case law, statutes, policies, etc. must seek them from an outside source. Any documents held only by the DOC, such as DOC policies, procedures or postings may be requested through the Freedom of Information Act requests or a public records request.
  - d. Department of Corrections policies and procedures appropriate for inmate viewing will be provided by the ACA/Policy Coordinator monthly as department reviews are completed. They are for reference purposes only and are not permitted to be lent out. They will be held behind the Circulation Desk and can be accessed upon request by the inmate leaving his ID during use. Policies and procedures are to be read in the library, therefore, do not circulate.
2. Photocopies will be made according to a schedule established by the Librarian, or Superintendent's designee.
3. The Library photocopy machine will be used in accordance with the following Law Copy Procedures for law copies and will be secured at all times in the Librarian's Office.
  - a. Inmates may obtain copies of their own law materials only.
  - b. Law documents will be scanned for contraband material before accepted for photocopying. Any contraband items submitted such as STG materials will be confiscated and given to IPS.
4. All inmates seeking to have law copies duplicated must fill out completely and legibly the Legal Photocopying Request Form (Attachment A).
5. Inmates submitting documents for photocopy will remove all staples before submitting their material into the copy folder. Failure to do so will result in the return of the documents to the inmate without photocopy.
6. The copy request may then be handed to a Library clerk who will deliver it to the Librarian or the Superintendent's designee in his/her absence.
7. Completed copies will be returned to the inmate in approximately three business days from time of approval, depending upon operational needs, and availability of the Librarian or Superintendent's designee. Inmates must show their identification card before picking up any finished photocopies. No inmate can pick up another inmate's legal material.

**MCI-SHIRLEY**  
**LEGAL PHOTOCOPYING REQUEST FORM**

This form must be completely filled out if you are requesting legal photocopying.

The Librarian/designee will only copy original documents.

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Inmate Number: \_\_\_\_\_

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*(You must count two sides as two pages)*

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Cite the legal rule or Court Order or provide reason for the number of copies requested: \_\_\_\_\_

If there is a court deadline, you must write it here: \_\_\_\_\_ and attach proof.

Please inform the Librarian/ designee if there is anything else s/he needs to know in order to process this request.

*Attach the document to be copied to this Legal Photocopying Form.*

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Denied: \_\_\_\_\_ Reason for denial: \_\_\_\_\_ Not original legal document  
 Failure to cite legal rule or Court Order  
 Other \_\_\_\_\_

Date received: \_\_\_\_\_ Date completed: \_\_\_\_\_ Total Number of pages: \_\_\_\_\_

Inmate is to sign upon receipt of copies

Name: \_\_\_\_\_

Date: \_\_\_\_\_

THE STATE OF NEW HAMPSHIRE

MERRIMACK, ss.

SUPERIOR COURT  
No. S-789

NEW HAMPSHIRE,

v.

ROBERT BREEST,  
Defendant.

8-25-2021

DENIED. Please see ruling  
on the motion to vacate the psychosexual  
murder certification.

*Am Sder*  
Honorable Andrew R. Schulman  
August 25, 2021

MOTION FOR JUDGMENT ON THE PLEADINGS OF  
MOTION TO VACATE PSYCHOSEXUAL MURDER  
CERTIFICATION AND SENTENCE AS UNCONSTITUTIONAL  
AS APPLIED TO ROBERT BREEST

NOW COMES Robert Breest in the above captioned and numbered matter and moves this court for judgment on the pleadings of motion to vacate psychosexual murder certification and sentence as unconstitutional as applied to Robert Breest on the following grounds.

Robert Breest filed the motion approximately on June 10, 2021. There has been no opposition from the Attorney General who represents the state, as of this date.

The pleading is clear and concise. As the United States District Court for the District Court of New Hampshire found in Breest v. Helgemoe, Crim. No. 77-45, Robert Breest was never indicted, tried, or convicted of psychosexual murder and that was not one of the elements of the crime of murder that Robert Breest was convicted of.

It was only after Robert Breest had begun his sentence, that he was returned to the trial court where the presiding

judge made a finding of fact that the crime was psychosexual and certified the crime as psychosexual. This runs afoul of the United States Constitution, Sixth Amendment as explained in Sullivan v. Louisiana, 508 U.S. 275 (1993), and Sullivan is not new law. It was nothing more than an explanation of the requirement of the United States Constitution, Bill of Rights, Fifth and Sixth Amendments which were ratified December 15, 1791. As such Sullivan is not an issue that requires a retroactivity consideration.

WHEREFORE, Robert Breest moves for judgment on the pleadings as more than 30 days has passed and there has been no opposition filed, and consequently, Robert Breest is entitled to judgment on the pleadings.

Dated: July 20, 2021

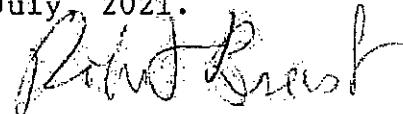
Respectfully submitted,



Robert Breest, pro se  
T-19048  
MCI Shirley, Medium  
1 Harvard Road  
P.O. Box 1218  
Shirley, MA 01464-1218

CERTIFICATE OF SERVICE

I, Robert Breest hereby certify that I have served Elizabeth Woodcock, assistant attorney general a copy of this pleading this 20th day of July, 2021.



Robert Breest, pro se