STATE OF WISCONSIN | CIRCUIT COURT BRANCH I | ORIGINAL MANITOWOC COUNTY

STATE OF WISCONSIN

Plaintiff,

vs.

STEVEN A. AVERY,

Defendant,

MOTION IN LIMINE - DEFENSE DNA TESTING

Case No. 05-CF-381

A. If the defendant has any concerns over evidence handling and quality testing by the Wisconsin State Crime Laboratory, the State proposes that these concerns may be addressed through independent DNA testing. Also, the State maintains that items not tested by the Wisconsin State Crime Laboratory that the defendant believes are relevant and material to the defense should be addressed through independent DNA testing.

The National Research Council (NRC) endorsed duplicate DNA testing stating that "[a] wrongly accused person's best insurance against the possibility of being falsely incriminated is the opportunity to have the testing repeated . . . A defendant who believes that the match is spurious should welcome the opportunity for an independent repeat test." (NRC) Report, Pg 87, Retesting. The National Research Council also stated that the "[t]he best protection that an innocent suspect has against an error that could lead to a false conviction is the opportunity for an independent retest." Id. at pg 88. The State encourages the defendant to consider independent DNA testing.

The State would require the defendant to identify the expert and lab conducting the re-typing, their qualifications and accreditation, and the nature of the proposed typing or analysis. Obviously, the State would ask the court to impose appropriate safeguards on any defense testing, including a demonstration by the proposed laboratory of compliance with standards and laboratory accreditation at least equal to that of the Wisconsin State Crime Laboratory.

B. If the defendant chooses not to pursue independent DNA testing, and depending on the nature of the defendant's cross examination of state's experts or the direct examination of defense experts, the State intends to elicit testimony from state's experts or defense experts, including:

1) Whether any sample remained, and if so was there enough left to do retesting,
2) Whether scientific literature, manuals, and/or protocols recognize and/or endorse preserving sample, for independent testing and why,
3) Whether the defense hypothesis of error could have been determined by retesting,
4) Whether scientists try to preserve samples for retesting and why,
5) Whether a duplicate test is necessary in this case,
6) Whether the defense ever requested the release of samples for independent testing,
7) Whether retesting by another lab or the original lab could determine whether or not an error occurred,
8) Whether the expert agrees with statements from the National Academy of Sciences regarding independent retesting of DNA test results, and/or
9) Whether independent testing was done on remaining samples.

This line of questioning by the State will depend upon the questioning by the defendant and the defendant's presentation of any DNA defense. Oftentimes, the defendant opens the door to this line of questioning through interrogation of witnesses.

Some courts have addressed this issue of "burden shifting" and found inquiry by the state regarding re-testing to have been permissible. "While it is questionable whether asking scientific experts whether they did or could have conducted duplicate testing is error at all, in this case, any possible error in confusing the jury as to the burden of proof was cured by the trial court's simultaneous curative instruction." State v. Gentry, 888 P.2nd 1105, 1122 (Wash. 1995). "Similarly, the defendant's claim as to his failure to have scientific testing performed on the evidence is unavailing. Even if it was somewhat questionable, the argument was based on the evidence and was invited by defense counsel's cross-examination, showing that a number of seized items had not been examined and hence suggesting that examination might have revealed some kind of evidence." State v. Izzo, 843 A.2nd 661, 673 (Conn.App. 2004). In State v. Roman Nose, 667 N.W.2nd 386 (Minn. 2003), the defendant challenged the thoroughness and competency of the State's DNA laboratory during cross-examination about DNA testing that was not performed. On redirect, the prosecutor asked the state's expert about the lab's policy of preserving part of the sample so that others, including the defense, could perform retesting. The court rejected the defense position that the prosecution impermissibly shifted the burden of proof stating "[w]hile we are concerned about the prosecutor's question regarding the defense ability to retest the sample, the district court could have concluded that the prosecutor's question was in response to [defendant's] attack on the adequacy of the BCA's [Bureau of Criminal Apprehension] DNA testing and not intended to suggest that [defendant] should have conducted his own testing." Id. at 400.

If the defense expert testifies as to any error in the original typing, or if this is suggested during cross-examination of the state's expert, a state witness will testify about the availability of remaining samples, the potential for retesting, and the defense choice not to retest.

Finally, the State reminds the Court that the defense stated intent to pursue re-testing of DNA samples led, in material part, to this court granting a request by the defense to continue the original trial date from September 2006.

Dated at Chilton, Wisconsin, this 19th day of October, 2006.

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