

FILE NUMBER: 08-CRS-_____
FILM NUMBER: _____

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WILSON COUNTY

STATE OF NORTH CAROLINA

vs.

DARRYL DOE
Defendant

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SECOND MOTION FOR DISCLOSURE OF SBI TESTING PROCEDURES & DATA

NOW COMES the Defendant, Darryl Doe, by and through the undersigned counsel, and hereby moves this Honorable Court, pursuant to Article I, §§ 19 & 23 of the North Carolina Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, N.C.Gen.Stat. § 15A-903(e), and *State v. Cunningham*, 108 N.C.App. 85, 423 S.E.2d 802 (1992), for an Order commanding the prosecution to provide the Defendant with a copy of any and all lab reports, data, and documentation generated in connection with the testing procedures conducted upon the items submitted for controlled substances analysis in connection with the instant case. In support of this Motion, the Defendant would show unto the Court as follows:

1. The Defendant was indicted in the above-captioned matter in June 2008 on charges of one count of first degree murder, three counts of second degree kidnaping, two counts of armed robbery and first degree burglary. The defendant faces life in prison without parole if convicted.
3. On July, 31, 2007, the undersigned counsel filed a Request For, Voluntary Discovery and for Brady/Agurs Material in these matters.
4. The State responded to this Request, and on December 22, 2008, the District Attorney offered defense the opportunity to review and copy pages of discovery. Counsel for Defense copied 1,915 pages of discovery on or around December 30, 2008. Included in this discovery were 14 pages from several Laboratory Reports dated September 17, 2007, November 2, 2007, May, 2, 2008, July 3, 2008 and December 19, 2008, all without any Request for Examination of Physical Evidence, or SBI Laboratory Chain of Custody forms.
5. In addition, on July 1, 2009 the defendant received a 2 page report of an SBI Laboratory report, which referenced documents and photographs provided to the SBI early in January of this year. With the exception of the 2 pages of the SBI Laboratory Reports, the defense counsel has not been provided copies of any documentary discovery material related to the January 2009 material examined by the SBI in this case or related to SBI testing done with respect to this material.
6. This failure of the SBI is in spite of an April 2009 court order requiring the SBI to turn over : 1) The Entire Case File: a complete copy of the case file, including all records made by the laboratory in connection with the testing in this case, except as otherwise noted herein; 2) Laboratory Protocols: a copy of all standard operating protocols (SOPs)

used in connection with the testing in this case, including reporting and interpretational guidelines, with notations as to any variation from those protocols in the testing performed in this case; 3) Chain of Custody: copies of all records, including handwritten as well as computer-generated documents, that document the recovery, treatment, and handling of all evidence in this case, from the initial point of collection or production and extraction to the current disposition, including documentation which indicates the specific location from where each item of evidence was collected, how the materials were handled, how the materials were stored (temperature and type of container), the amount of evidence materials which was consumed in testing, the amount of material which remains, and where and how the remaining evidence is stored (temperature and type of container); 4) Software: a list of all commercial software programs used in the DNA testing in this case; 5) Macros: if the results produced by the software are dependent on the instructions contained in macros, copies of any macros used ; 6) Data Files: copies of all data files used and created in the course of performing the testing and analyzing the data in this case, including all data necessary to independently reanalyze the raw data and reconstruct the analysis performed in this case, examples of such data to include without limitation all collection files (such as injection lists and log files); photographic quality copies of slot blots, yield gels, product gels, PM/DQA1 typing strips, and D1S80 gels; copies of all original, unedited image files generated during STR testing including Y-STR testing; paper copies of all original, unedited electropherograms and data tables generated during STR testing; paper copies of all edited image files and electropherograms generated during STR testing; and electronic files for all raw data and all original and edited image files including graphic images, electropherograms, and all other files generated during testing; 7) Validation Studies: 8) STR Frequency Tables/Database(s): copies of the allelic frequency tables and database(s) relied upon in making statistical estimates in this case (if published or publicly available, this request can be satisfied by providing a specific reference to the publicly available source); 9) Proficiency Tests: copies of any and all proficiency tests run by any and all analysts involved in the analysis or handling of evidence in this case, to establish their ability to perform DNA typing in an accurate and correct manner; 10) Profiles of Evidence Handlers: the DNA profiles of all individuals who analyzed evidence or prepared reagents used in the analysis of said evidence in this case; and 11) Resumes & CVs: a resume or curriculum vitae for any and all analysts involved in the analysis of evidence in this case.

7. The SBI was sent a copy of said court order on May 4, 2009. After the SBI failed to respond to the defense within two weeks, defense called the SBI and was informed that the material would not be sent to the defense, but it would be sent to the prosecutor.
8. The defense, on this date, July 7, 2009 more that two months later, received information from the DA which upon information and belief defense believes purports to comply with the April 22, 2009 order. The defense has not had ample time to review this material, but a May 26, 2009 letter from the SBI to the prosecutor reveals that the SBI was still analyzing latent print evidence, and forensic biology evidence at that time. The SBI's May 26, 2009 letter stated: "Please request discovery for this one it has been completed."
9. The July 1, 2009 2 page SBI Laboratory report is presumed to be the "latent print" evidence "being analyzed."
10. The defense has received no SBI Laboratory report regarding any "forensic biology" evidence being analyzed.
11. The defense is once again requesting discovery of SBI Testing Procedure, Protocols that relate to any testing done by the SBI for any defendant or co-defendant in these matters.

12. Pursuant to N.C. Gen. Stat. § 903(e):

Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements, or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by exercise of due diligence may become known to the prosecutor. In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case. (emphasis added)

13. In order to adequately represent the Defendant and to prepare for cross-examination of the State's witnesses, relative to the testing performed by each witness, the defense must be allowed to have clear and legible copies of the results of the testing procedures, as well as the data discovered as a result of the testing procedures.

14. Any failure to provide this information will not only result in the denial of the Defendant's rights to due process, a fair trial, confrontation and the opportunity for meaningful cross-examination, and compulsory process, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, but also his rights as guaranteed by the North Carolina Constitution, Article I, §§ 19 and 23 and other pertinent sections, as well as his statutorily prescribed right to pretrial discovery under N.C. Gen. Stat. § 15A-903(e).

15. In *State v. Cunningham*, 108 N.C.App. 85, 423 S.E.2d 802 (1992), the NC Court of Appeals held that a criminal defendant is entitled to information of the type requested above. In its ruling, the Court of Appeals stated:

In sum, the sole document provided to defendant before trial by the State was the SBI "laboratory report." This report, which basically is limited to a statement that the material analyzed contained cocaine, reveals only the ultimate result of the numerous tests performed by Agent Higgins. As such it does not enable defendant's counsel to determine what tests were performed and whether the testing was appropriate, or to become familiar with the test procedures. We conclude that the information sought by defendant is discoverable pursuant to Section 15A-903(e) and the North Carolina Constitution...and therefore the trial court erroneously denied the defendant's motion for pretrial discovery of these documents. *Id.*, at 196.

16. The holding of *Cunningham* clearly sets forth that N.C. Gen. Stat. § 15A-903(e) "must be construed as entitling a criminal defendant to pretrial discovery of not only conclusory laboratory reports, but also of any tests performed or procedures utilized by chemists to reach such conclusions." Based upon the holding of *Cunningham*, the conclusory report, which the defense has only been provided is deficient as a matter of law.

17. Pursuant to *Cunningham*, this Court should command the District Attorney to provide copies of all evidentiary results, generated in this matter, all bench notes related to testing, examinations or comparisons in the instant case, and copies of all proficiency exam results for all lab personnel involved in any testing or examination in the instant case, and all other items requested in Defendant's earlier motions.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That the Court enter an Order commanding the SBI or the District Attorney to provide the following materials:
 - a. Copies of all SBI Laboratory results generated by whatever means;
 - b. All bench notes related to SBI testing in the instant case;
 - c. All SOP related to any testing done by the SBI in these cases;
 - d. All protocols for any testing done by the SBI in these cases;
 - c. Copies of all proficiency exam results for all laboratory personnel involved in SBI testing in the instant case; and
2. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

Respectfully submitted this the 7th day of July, 2009.

CERTIFICATE OF SERVICE

This is to certify that on this date the attached pleading or paper was served upon the State of North Carolina by hand delivery or by mailing a copy of said motion to the Office of the District Attorney, Wilson County Courthouse, Wilson, North Carolina:

Charles R. Kinsey, III, Esq.
Assistant District Attorney
Seventh Prosecutorial District
Post Office Box B
Tarboro, NC 27886-1590

This the 7th day of July, 2009.

Attorney for Defendant