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Memorandum in Opposition to Defendant's Request for Supplemental Expert Reports

Terry H. Gilbert
Attorney for Sheppard Estate

George H. Carr
Attorney for Sheppard Estate

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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

Case No. 312322

**MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
REQUEST FOR
SUPPLEMENTAL EXPERT REPORTS**

STATE OF OHIO

Defendant

Attorneys for Plaintiff

Memorandum in Opposition

I. Introduction

Prior to the filing of this lawsuit, Plaintiff's investigators and attorneys began re-examining the scientific and forensic evidence involved in the murder of Marilyn Sheppard on July 4, 1954. Around the time litigation commenced in 1995, Plaintiff's investigators and attorneys presented the results of some of this investigation to the State of Ohio, specifically the Cuyahoga County Prosecutor's Office, in order to encourage re-investigation of Mrs. Sheppard's murder. That office refused to investigate further.

Since 1995, Plaintiff has been assembling experts in various fields to re-examine the circumstances of Mrs. Sheppard's murder in an effort to prove to this Court's satisfaction that Plaintiff's decedent, Dr. Samuel Sheppard, is innocent of the murder, and was wrongfully convicted of that murder in December 1954. By 1999, after four years of litigation, Plaintiff had assembled over a dozen experts in various fields who were prepared to testify at a trial of this matter beginning October 18, 1999.

By August 15, 1999, Plaintiff had submitted all of his expert reports for review by the State. On or about August 20, 1999, the Cuyahoga County Prosecutor announced his intention to exhume the body of Mrs. Sheppard in order to obtain additional evidence relating to the crime, specifically a re-examination of Mrs. Sheppard's head wounds, and sampling Mrs. Sheppard and her unborn son for later DNA analysis.

This exhumation was conducted on October 5, 1999. On October 21, the parties met with this Court, and the State requested that Plaintiff submit amended or supplemental expert reports in order to include any conclusions drawn by Plaintiff's experts from the information gleaned from

the exhumation. This Court should deny that request, and order the State to produce its expert reports in accordance with Local Rule 21.1 and normally accepted standards of litigation.

II. Law and Argument

The Rule governing this issue is:

[E]ach counsel shall exchange with all other counsel written reports of medical and expert witnesses expected to testify in advance of the trial. * * * The party with the burden of proof as to a particular issue shall be required to first submit expert reports as to that issue. Thereafter, the responding party shall submit opposing expert reports

Local Rule 21.1, Part I(A). The State now seeks to corrupt this process by demanding amended or supplemental expert reports from Plaintiff simply because it has used its governmental powers to obtain evidence not considered by Plaintiff's experts in their submitted reports. This should not be permitted.

The general rule requiring thorough and complete expert reports arises from the requirement in Local Rule 21.1, Part I(B), that experts may not be permitted to testify as to matters outside their previously exchanged reports. Thus, if Plaintiff does not submit written experts reports dealing with an issue, Plaintiff's experts may not testify regarding that issue at trial.

However, the Rule does not contemplate that expert witnesses must consider every conceivable piece of evidence in the world when rendering an expert opinion. In fact, it is a relatively common occurrence for new evidence to arise or become available after the original submission (and even exchange) of expert reports. The situation arising here is not unique.

However, the expert report exchange process provides for this new evidence in a simple fashion: it allows experts to submit supplemental reports. See Local Rule 21.1, Part I(B) (requiring counsel to secure supplemental reports when necessary to adequately set forth expert's

opinion). Thus, any expert witness, should he wish to express an opinion not previously contained in his or her report, may supplement his or her report in order to allow live testimony on issues not raised or considered in a previous report. The only limitation on such supplemental reports is that they may not be filed less than thirty (30) days prior to trial. See Local Rule 21.1, Part I(B).

No evidence has been discovered or introduced yet that would cause any of Plaintiff's experts to render supplemental reports. The fact that the State has unearthed evidence not considered by Plaintiff's experts does not impose a duty on Plaintiff's experts to consider such evidence; instead it places a burden on the State to submit expert reports explaining why the evidence discovered by the exhumation, if any, is relevant or dispositive to the case. After such opinions have been submitted, Plaintiff may be required to submit supplemental reports if he wishes to introduce any expert testimony not already contained in the existing reports.

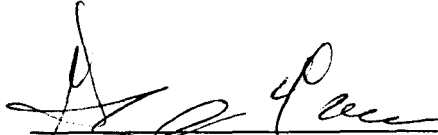
Therefore, as nothing in the Local or Civil Rules imposes a duty on Plaintiff or his expert witnesses to examine evidence outside the scope of their existing reports, the State should be required to submit reports from its expert witnesses in accordance with existing standard practice.

III. Conclusion

The State's request for supplemental reports should be denied. Plaintiff's experts have submitted written reports explaining their opinions in accordance with Local Rule 21.1. The existence or discovery of evidence not considered or discussed by those experts does not impose a duty on Plaintiff's experts to submit supplemental reports. Instead, the State bears the burden of producing expert reports that explain the relevance or value of evidence not considered by Plaintiff's experts. If such reports are submitted, and Plaintiff wishes to introduce expert testimony regarding the conclusions reached by those experts, or the evidence considered by

those experts, only then will Plaintiff's experts have a duty to produce supplemental expert reports.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terry H. Gilbert", written over a horizontal line.

Terry H. Gilbert (0021948)

George H. Carr (0069372)

Friedman & Gilbert

1700 Standard Building

1370 Ontario Street

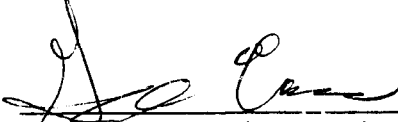
Cleveland, OH 44113

(216) 241-1430

Attorneys for Plaintiff

Certificate of Service

The undersigned certifies that the foregoing Memorandum in Opposition to Defendant's Request for Supplemental Reports has been served on William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this ^{28th}28 day of October, 1999.


George H. Carr (0069372)
Attorney for Plaintiff

GEORGE CARR, ATTORNEY AT LAW

23823 LORAIN RD, SUITE 200, NORTH OLMSTED, OHIO 44070
(440) 777-1500 FAX (440) 777-0107

October 28, 1999

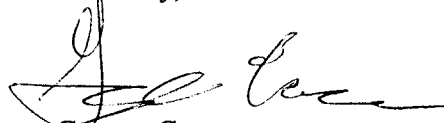
William Mason
Cuyahoga County Prosecutor
The Justice Center
9th Floor
1200 Ontario Street
Cleveland, OH 44113

Dear Mr. Mason:

Please find enclosed a copy of Plaintiff's Memorandum in Opposition to defendant's Request for Supplemental Expert Reports, which will be filed with the Court today pursuant to Court order.

Please contact me with any questions or concerns.

Sincerely,



George Carr