

**IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY,
FLORIDA**

CASE NO. 05-1917-CFA

**STATE OF FLORIDA,
Plaintiff,**

vs.

**WALTER ROTHE,
Defendant.**

MOTION FOR ORDER COMPELLING DISCLOSURE

The Defendant, Walter Rothe, through his undersigned counsel, moves for entry of an order compelling Robert Parsons of the Indian River Regional Crime Laboratory to provide certain machine-generated data which were requested via a series of Subpoenas Duces Tecum to which Mr. Parsons nor the State filed objections.

As grounds for this Motion, the Defendant would state:

1. On July 5, 2006, the defense served a Subpoena Duces Tecum Without Deposition (hereinafter referred to as the “first Subpoena”) upon Robert Parsons (hereinafter referred to as “Parsons”) requiring disclosure of, among other things, “a copy of the raw data of the analytical tests performed on the specimens themselves”. (Item No. 7). Attached as composite Exhibit “A” is a Notice of Filing, Proof of Service and the first Subpoena.

2. Pursuant to the first Subpoena, Parsons did supply the machine-generated raw data (hereinafter referred to as the “chromatograms”) of the analytical tests performed on the Rothe and Wilfredo Rodriguez¹ samples. These are the machine-generated printouts of the gas chromatograph employed by Parsons in the testing process. Attached as composite Exhibit “B” are the blood-alcohol examination worksheet and chromatograms produced for the Rothe and Rodriguez samples. (pp 1-15).²

3. On August 2, 2006, the defense served Parsons with a second Subpoena Duces Tecum Without Deposition (hereinafter referred to as the “second Subpoena”) requiring production of, among other things, the blood-alcohol examination worksheet for blood testing performed on laboratory Case No. 2005-0722-002099 dealing with Raymond Cole. Attached as composite Exhibit “C” are copies of the Notice of Filing, Proof of Service and second Subpoena.

4. Parsons partially complied with the second Subpoena by producing the first

¹Wilfredo Rodriguez was a passenger on Rothe’s boat at the time of the crash.

²The State provided the first page of the blood-alcohol examination worksheets for Rothe and Wilfredo Rodriguez as part of its initial discovery.

page of the blood-alcohol examination worksheet for Raymond Cole. Pages 2-8 were not produced. The defense believes pages 2-8 are chromatograms which correspond to the chromatograms appearing in pages 2-7 and 9-15 of Exhibit "B" (the Rothe and Rodriguez samples).

5. As part of its discovery, the State provided the defense herein with the "analytical work list" of each of the twelve cases examined by Parsons on August 17, 2005. A copy page 10 of the discovery materials is attached hereto as Exhibit "D".

6. On August 28, 2006, the defense served Parsons with a third Subpoena Duces Tecum Without Deposition (hereinafter referred to as the "third Subpoena") for additional materials not previously requested. The third Subpoena requests the blood-alcohol examination worksheets for the remaining nine cases which were not previously subpoenaed or produced by the State as part of discovery. Attached as composite Exhibit "E" are copies of the Notice of Filing, Proof of Service and the third Subpoena.

7. Parsons did partially comply with the third Subpoena by producing nine blood-alcohol examination worksheets. However, each of the worksheets constitute partial compliance, because they omit the chromatograms which are indivisibly part of each blood-alcohol examination worksheet. Copies of these nine worksheets, plus the three worksheets already produced, are attached as composite Exhibit "F". Each of the worksheets show at the bottom right-hand corner that it is the first page of an eight page document.³ Exhibit "F" comprises all 12 worksheets in the same order as the analytical work list. Parsons specifically refused to provide the chromatograms without a court order.

8. The defense requests the Court to enter an order compelling production of the remaining seven pages of chromatograms and data of each of the cases which were tested by Parsons in the same batch with the Defendant's case.

9. The defense submits that the requested data is reasonably calculated to lead to admissible evidence at trial or to shed light on plausible theories of defense. In any event, the defense is entitled to examine the scientific reliability of the testing process employed for the batch directly involved in this case.

10. The defense has filed a separate Motion to Strike Presumption of Impairment and to Preclude Admissibility of Blood Test Results under Section 327.35, *et seq.* That Motion (hereafter also referred to as the "Motion to Strike") cites numerous discrepancies in the analytical process employed herein. The Motion to Strike concludes that the deviations constitute a lack of substantial compliance with the FDLE regulations so as to preclude the admission of the blood-alcohol test results under the implied consent law and to preclude instruction of the jury on the presumption of impairment.

11. On September 22, 2006, the defense expert, Stefan Rose, M.D., was deposed by the State. Repeatedly, the defense expert was asked whether a particular deviation caused an erroneous reading on the Defendant's blood-alcohol test results. Dr. Rose pointed out all the discrepancies specified in the Motion to Strike. Among the discrepancies was the apparent ability of the automatic feeding device to skip samples. Attached as Exhibit "G" is an excerpt from the quality control testing on August 17, 2005, wherein Parsons guesses that control

³The Rothe and Rodriguez worksheets are somewhat different. They were conjoined into a single 15 page document.

samples “skipped” either because of problems with the sample vials or the automatic feeding device.

12. Parsons’ credibility is at issue in this case. The chromatograms for each test run in the same batch as Rothe’s is relevant to determine whether Parsons complied with reasonable scientific standards and with the FDLE approved protocol.

13. In addition to deficiencies noted in the Motion to Strike, the defense has identified the following problems from the blood-alcohol examination worksheets:

A. Wilfredo Rodriguez. The worksheet shows that a Tri-Tech Kit was used. Such Tritect Kits are manufactured to contain two separate tubes. The deposition of Fish and Wildlife Commission (FWC) Officer Luis Rodriguez verifies that the vials were placed into the Kit, and that the Kit was sealed. In his deposition, Parsons asserts that the Kit arrived into his possession intact. On opening the Rodriguez Kit, Parsons found only one tube. The absence of the second tube suggests either that the chain of custody was not properly observed, or that a witness has testified falsely either regarding the packaging of the Kit at St. Mary’s Hospital or the opening of the Kit at the Crime Laboratory. An excerpt from the Tri-Tech website is attached as Exhibit “H”.

B. Elise Rainey Brunson. The worksheet shows that an NIK Kit, stock #4994, was utilized. However, this NIK Kit inexplicably failed to contain blood tubes with both a preservative and an anticoagulant. Even though the Brunson tubes were in obvious non-compliance with the FDLE regulations, Parsons went on to conduct blood-alcohol testing. Parsons’ worksheet shows that the tubes were Becton Dickinson #367012 tubes, which, according to the Becton Dickinson website, do not contain an anticoagulant. Attached as Exhibit “I” is an excerpt from the Becton Dickinson website for the #367012 tube. Even though the tubes did not contain an anticoagulant, Parsons remarked that the tubes were “unclotted”. Parsons has previously testified that the lack of clotting indicates the presence of an anticoagulant. Attached as Exhibit “J” is an excerpt from a deposition given on April 7, 2006, by Parsons on this issue in this case.

C. Adam Beausoleil. Just as in the previously mentioned Brunson case, the Beausoleil Kit was an NIK Kit erroneously containing #367012 tubes without an anticoagulant. Parsons also noted that the blood was “unclotted”, even though there was no anticoagulant.

Wherefore, the Defendant, Walter Rothe, requests the Court to issue an order requiring Parsons and the Indian River Crime Laboratory to disclose all chromatograms and raw data for all cases run in the same batch as Defendant’s.

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to David Lustgarten, ASA, Office of the State Attorney, Martin County Courthouse, 100 E Ocean Blvd., Suite 400, Stuart, FL 34995, this _____ day of _____, 2006.

Respectfully submitted,

KIRSCHNER & GARLAND, P.A.

By: _____

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_____ /

SUBPOENA DUCES TECUM WITHOUT DEPOSITION

To all and singular the Sheriffs of the State of Florida - Greetings:

TO: Robert Parsons
Indian River Regional Crime Lab
2502 S 35th Street, Bldg. I
Fort Pierce, FL 34981

You are commanded to make available for inspection and/or photocopying by the undersigned counsel for Defendant the following documents relevant to the above-styled case on or before October 24, 2006, at 2:00 P.M.:

1. Purchase order(s) and purchase documentation, including warranty information and operating manuals, for the following:
 - A. Hamilton Microlab 503A Pipettor/Dilutor/Dispenser used for Rothe's blood-alcohol testing.
 - B. Perkin-Elmer Auto System XL Gas Chromatograph with dual FID used for Rothe's blood-alcohol testing.
 - C. Perkin-Elmer Turbo Matrix 40 Headspace Sampler used for Rothe's blood-alcohol testing.
 - D. Perkin-Elmer TotalChrom GC workstation used for Rothe's blood-alcohol testing.
2. Documentation for all hardware upgrades or repairs for each of the items listed in paragraph 1.A - D. above.
3. All documentation of software modifications, upgrades and patches to the items listed in paragraphs 1.A - D. above.
4. All documentation for repairs to and inspection, assessment and/or adjustment

of the blood-alcohol testing equipment utilized in the Rothe blood-alcohol test resulting from erroneous time readings during June 28, 2005 quality control testing, specifically reprocess #'s 4275 - 4286.

If you fail to comply with this Subpoena, you may be in contempt of Court.

You are subpoenaed by the following attorneys, and, unless excused from this Subpoena by these attorneys or the Court, you shall respond to this Subpoena as directed.

Dated this _____ day of _____, 2006.

KIRSCHNER & GARLAND, P.A.

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Attorneys for Defendant**