



**Discovering Weakness in the Forensic
Evidence:
What to Ask For and How to Ask for It**

November 7, 2013
Wisconsin SPD Annual Criminal Defense Conference

A Presentation By:
Anthony Rios and Travis Schwantes

**We've all been
there**



Today we will talk about

- 🌐 How to get discovery from experts
- 🌐 How to review forensic info without an expert
- 🌐 How to discuss the case with an expert



How to get what you want (and how to know what you want is what you need)



Criminal discovery statute

Wis. Stat. § 972.23

“... Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant...

(e) ... any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.

(g) Any physical evidence that the district attorney intends to offer in evidence at trial.

Juvenile discovery statute

Wis. Stat. § 938.293

(1) Law enforcement reports. Copies of all law enforcement officer reports, including the officer's memorandum and witnesses' statements, shall be made available upon request to counsel ... prior to a plea hearing.

(2) Records relating to juvenile. All records relating to a juvenile which are relevant to the subject matter of a proceeding under this chapter shall be open to inspection by ... counsel for any party, upon demand and upon presentation of releases where necessary, at least 48 hours before the proceeding.

Mental health discovery statute

Wis. Stat. § 51.20(9)(c)

“On motion of either party, all parties shall produce at a reasonable time and place designated by the court all physical evidence which each party intends to introduce in evidence. Thereupon, any party shall be permitted to inspect, copy, or transcribe such physical evidence in the presence of a person designated by the court. The order shall specify the time, place and manner of making the inspection, copies, photographs, or transcriptions, and may prescribe such terms and conditions as are just. The court may, if the motion is made by the subject individual, delay the hearing for such period as may be necessary for completion of discovery.

Sexually violent person discovery statute

Wis. Stat. § 980.036(2) What a prosecuting attorney must disclose...“Upon demand”

(h) The results of any physical or mental examination or any scientific or psychological test, instrument, experiment, or comparison that the prosecuting attorney intends to offer in evidence at trial or proceeding, and any raw data that were collected, used, or considered in any manner as part of the examination, test, instrument, experiment, or comparison.

(i) Any physical or documentary evidence that the prosecuting attorney intends to offer in evidence at the trial or proceeding.

(j) Any exculpatory evidence.

(3m) When Disclosure Must be made ... “within a reasonable time before a trial.

Case law

Wold v. State, 57 Wis. 2d 344, 349-50; 204 N.W.2d 482, 486-7 (1973).

“The duty rests upon the prosecution to obtain all evidence in the possession of investigative agencies of the state ... The test of whether evidence should be disclosed is not whether in fact the prosecutor knows of its existence but, rather, whether by the exercise of due diligence he should have discovered it.”

Practical approaches to getting discovery

Informal

- 🌐 Ask
- 🌐 Letter
- 🌐 Email
- 🌐 Meet with DA

Formal

- 🌐 Open records request
- 🌐 General discovery demand
- 🌐 Specific discovery demand
- 🌐 Motion to compel



OPEN



RECORDS



REQUESTS

Record defined

- 🌐 Any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority in connection with official purposes or function of the agency. A record includes handwritten, typed or printed documents; maps and charts; photographs, films and tape recordings; computer tapes and printouts, CDs and optical discs; and electronic records and communications.

What is not subject to Wisconsin's Open Records Law?

There are numerous federal and state laws that exempt particular records from disclosure. Common exceptions include:

Drafts, notes, preliminary documents and similar materials.

Published material available for sale or at the library.

Material with access limited due to copyright, patent or bequest.

Information obtained for law enforcement purposes, when required by federal law or regulation as a condition to receipt of state aids.

Computer programs (but the material input and the material produced as the product of a computer program is subject to the right of inspection and copying).

For more info on exemptions, see DOJ Compliance Outline.

Specific Discovery Motions

- 🌐 DNA
- 🌐 Latent Prints
- 🌐 Ballistics
- 🌐 Pharmacology
- 🌐 Pathology
- 🌐 Computer Data

These are only some examples – specific discovery not limited to a specific forensic discipline

Sample DNA Discovery Demand

but not limited to any DNA collection kits from point of sample collection up to and including current disposition of the evidence.

9. A complete list of all automated and/or manual DNA extractions, DNA purification, amplification (PCR), electrophoresis kits, reagent expiration dates, testing and analysis hardware and software used in this case, including the name of the software program, manufacturer and version used, and laboratory equipment calibration and validation as per the prescribed guidelines for each instrument and lab procedure used.
10. A copy of all licenses or other certification of accreditation in DNA sample collection and analysis held by the laboratory(ies) or clinics involved in any DNA evidence collection and/or DNA analysis in the present case.
11. The complete résumé or curriculum vitae of each individual involved in the collection, preservation, and analysis of the DNA evidence, including but not limited to job description, education and training, proficiency and competency testing and results, and testimony reviews.
12. Copies of certification exam results for each analyst, technician and reviewer responsible for preparation or analysis of subject specimens or review of analysis.
13. Copies of all documentation related to corrective actions for each analyst and technician responsible for preparation of analysis of subject specimens.
14. Copies of the corrective action report and corrective action tracking, quality assurance review tracking and non-conformity tracking for the DNA Section of the State Crime Lab.
15. A copy of the Unexpected Results Log and instances of unintended DNA transfer or sample contamination. Copies of all records maintained in the laboratory that document instances of unintended transfer of DNA or sample contamination, such as instances of negative controls that demonstrated the presence of DNA or the detection of unexpected extra alleles in the control or reference samples, and any corrective measures taken.
16. Correspondence between lab personnel and any law enforcement, prosecutorial or other state/county/jurisdictional officials.
17. All documents routinely kept in the type of case file referenced.
18. Any documents related to the case that were referenced regularly but are kept in a place other than the case file.

These records should include all the data necessary to conduct an independent analysis of the raw data and to reconstruct the analysis performed in the present case.

The Daubert Standard and Discovery

Wis. Stat. § 907.02

Expert evidence is admissible if 1) based upon sufficient facts or data, 2) the product of reliable principles or methods, and 3) the principles and methods were applied reliably to the facts of the case.

12/7/2012/FRI 10:15 AM LA CROSSE COUNTY FAX No. 608 785 5607 P. 002

STATE OF WISCONSIN : CIRCUIT COURT : LA CROSSE COUNTY
BRANCH 2

In re the Commitment of Homer L. Perren:

STATE OF WISCONSIN,

Petitioner,

-vs-

Case No. 10-CI-03

HOMER L. PERREN,

Respondent.

ORDER EXCLUDING ACTUARIAL INSTRUMENT STATIC-99R

Respondent, Homer L. Perren, requested specific data in relation to the actuarial instrument Static-99R to support his *Daubert* challenge, pursuant to Wis. Stat. § 907.02, and to adequately and fully present his defense to a jury, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, § 7 of the Wisconsin Constitution.

On October 31, 2012, the petitioner or state informed the court that it talked to Dr. David Thornton, one of the developers of the Static-99R and state witness, and that he agreed to provide the requested data to the respondent.

On November 20, 2012, after being advised that Dr. David Thornton failed to provide the state or the respondent with the requested data the court made the following finding:

That any testimony or evidence pertaining to the Static-99R, without the disclosure of the requested data, would violate the respondent's due process rights, specifically, his right to present a defense.

IT IS HEREBY ORDERED, that any evidence or testimony pertaining to the actuarial instrument Static-99R is inadmissible in this case, pursuant to the Due Process Clause of the United States and Wisconsin Constitutions.

Dated this 28th day of November, 2012.

BY THE COURT:



THE HONORABLE ELLIOTT M. LEVINE
La Crosse County Circuit Judge, Branch 2

Printed Time Dec. 7. 2012 9:32AM No. 5959

Potential issues with requesting forensic discovery



Know what you are asking for

- 🌐 Helpful resource: DNA for the Defense Bar
- 🌐 www.nij.gov/pubs-sum/237975.htm
- 🌐 Specifically designed for criminal defense attorneys
- 🌐 Provides info on the biology of DNA, proper collection procedures, interpretation of DNA analysis and findings, etc.

Know why you are asking for it

Do you really need:

“A complete list of automated and/or manual DNA extractions, DNA purification, amplification (PCR), electrophoresis kits, reagent expiration dates, testing and analysis hardware and software used in this case, including the name of the software program, manufacturer and version used, and laboratory equipment calibration and validation as per the prescribed guidelines for each instrument and lab procedure used?”

Delay in disclosure

Wis. Stat. § 973.23(7m) Sanctions for failure to comply.

(a) The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section unless good cause is shown for failure to comply. The court may in appropriate cases grant the opposing party a recess or a continuance.

(b) In addition to or in lieu of any sanction specified in par. (a), a court may, subject to sub. (3) advise the jury of any failure or refusal to disclose material or information required to be disclosed under sub. (1) or (2m), or of any untimely disclosure of material or information required to be disclosed under sub. (1) or (2m).

How to review forensic info without an expert?

- 🌐 Remember: forensics is just science applied to law
- 🌐 Look at it – see what makes sense – don't sweat what doesn't make sense – but make note
- 🌐 Review learned treatises, source books, and case law

How is the forensic info relevant?

Where does it fit in the state's case?

- 🌐 DNA in rape case where the defense is consent is very different from DNA case where the defense is it didn't happen.
- 🌐 What are the rest of the facts?
 - 🌐 Statements?
 - 🌐 Eyewitness?
 - 🌐 What does the client say?

What is the universe of facts in the case? Where does forensic evidence fit in?



Online resources

- 🌐 North Carolina Indigent Defense Services:
<http://www.ncids.com/forensic/motions/motions.shtml>
- 🌐 National Institute of Justice Forensic Science:
<http://www.nij.gov/topics/forensics/welcome.htm>
- 🌐 Wisconsin Crime Lab Physical Evidence Handbook:
<https://wilenet.org/htm/crime-lab/physevbook/index.html>
- 🌐 SPD forensic practice coordinators:
Anthony Rios (rios@opd.wi.gov) and Vincent Rust
(rustv@opd.wi.gov)

How to discuss the case with an expert?



Meet with the Analyst

Analysts should make time to meet with you (otherwise they look bad, biased, or both)

Preferred practice is to let the DA know, contact the lab, and arrange a visit.

DA may or may not want to go with you (but usually they won't because they are really busy...)



When meeting with an expert

- 🌐 Bring 2nd person to listen and take notes
- 🌐 Review analyst's CV
- 🌐 Confirm you have all of the documents the lab has
- 🌐 Review pages of lab file in chronological order with expert

Benefits to meeting with expert/analyst prior to trial

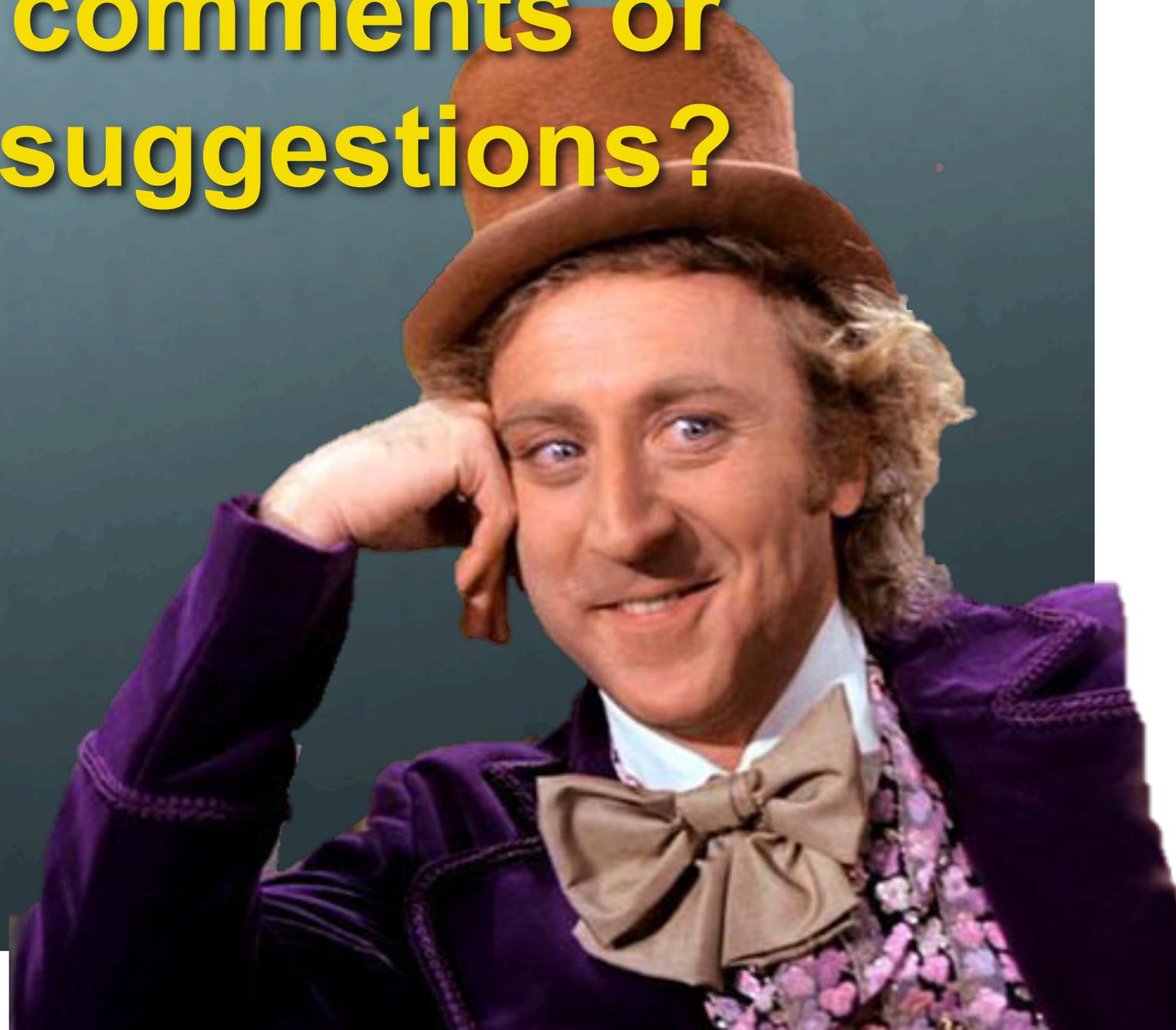
Meeting with or talking to the analyst ahead of time could pay dividends at trial or hearing.

Learn info that may not be in any lab report(s).

People tend to open up more when they are not being cross-examined in front of a judge or jury.



**Questions,
comments or
suggestions?**



Contact Info



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