IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS, TENNESSEE
DIVISION IX

STATE OF TENNESSEE

-vs- NO. B-16645

JAMES EARL RAY,
Defendant

Filed 11:46 Am
11/3/97
by the Court

RESPONSE OF THE STATE OF TENNESSEE
TO DEFENDANT'S MOTION TO RETEST EVIDENCE RIFLE
WITH APPLICATION OF BRUSH CLEANING PROCEDURE, *et seq*
AND MOTION OF THE STATE TO BE PROVIDED TEST RESULTS *et seq.*

Comes now the State of Tennessee and in way of response to defendant's Motion to Retest Evidence Rifle with Application of Brush Cleaning Procedure, et seq, would submit the following:

STATEMENT OF THE FACTS

In a hearing conducted in this Court on February 20, 1997, the Court granted defendant permission to test the Remington Game Master Rifle and Evidence Bullet at the Rhode Island Crime Laboratory at the University of Rhode Island, Kingston, Rhode Island, and at Cam Scan USA in Cranberry Township, Pennsylvania. The three experts hired by the defendant fired a total of eighteen (18) rounds through the gun and examined them under conventional microscopes as well as a scanning electron microscope. The testing was conducted May 14, -16, 1997 in Kingston, Rhode Island and May 21, -23, 1997 in Cranberry Township, Pennsylvania.

On June 4, 1997 the parties met in Division IX of Criminal Court to set a date for releasing the test results. The Court brought counsel for the State and defendant into chambers to discuss when the results would be released. The Court ordered that defendant release the results to the State and the Court immediately and a hearing date of June 18, 1997 was selected for the public release of the results. Present at the chambers conference were John Campbell, Assistant District Attorney General, and Wayne Chastian and Jack McNeil, attorneys for defendant. Though Mr. Chastain stated he did not have any results at that time he was instructed to talk to William Pepper, lead defense attorney, and have at least an oral report given to the Court and the State. Mr. Chastain moved the Court to

issue a gag order sealing the rifle results until the matter could be presented in court on June 18, 1997.

On June 5, 1997, Mr. Chastain appeared at the office of the District Attorney General and reported to John Campbell that he had received an oral report of the rifle results from William Pepper. He informed the State that the test results were that the experts could not make a test -to- test match of the bullets or match the evidence bullet. The results were listed as inconclusive. This result was given to the Judge.

On June 6, 1997, the State was summoned to Judge Brown's chambers and informed that Judge Brown had just finished a phone conversation with William Pepper and there was to be a request for re-testing filed by the defendant. The Judge told the State and Mr. Chastain that he had been informed ~~that~~ by Mr. Pepper that one of the defense attorneys, Jack McNeil, had interfered with the rifle testing and prevented the experts from cleaning the rifle with a wire brush. The State was informed that an affidavit from Robert Hathaway, firearms examiner, was forthcoming. This affidavit was received by the Court on June 6, 1997 at 11:21 am. The Court orally restated the gag order previously made.

On June 9, 1997 the State was informed by the press that the defense stated that the hearing date of June 18, 1997 was to be continued for "additional testing protocols".

On June 10, 1997 the affidavit of Robert Hathaway was leaked to the press and appeared in the The Commercial Appeal on June 11, 1997.

On June 16, 1997 the court canceled the June 18, 1997 hearing date for the stated purpose of plugging the leak that caused the release of the affidavit of Robert Hathaway. No subsequent hearing date was selected.

On June 30, 1997 the State was instructed to be in Division IX at 11:00 am for a hearing. The State was not informed about the nature of the hearing. Upon arrival the State was informed that another affidavit had been executed by Robert Hathaway requesting an additional test of the evidence rifle. The State and Mr. Chastain were again called into Judge Brown's Chambers where they were informed by Judge Brown that he had a phone conversation with Robert Hathaway and discussed the firearms testing with him. He stated that he was told by Mr. Hathaway that the experts were able to match 12 of the test bullets by using a very unique mark they discovered on the bullet using a conventional comparison microscope. He stated that the experts wanted to retest the rifle after

cleaning the bore with a wire brush to remove copper fouling that was claimed to be obscuring marks on the bullet. The Court was also in possession of an affidavit by Robert Hathaway detailing his request. There was no written report filed with the Court outlining the results of the test, and it appears that none is being prepared. The Court stated it was satisfied with his conversation with Mr. Hathaway and the affidavit as substituting for a written report on the results. The Court then ordered the parties to be back in his chambers to view a video tape of the testing that was subpoenaed by the State from Mr. Pepper. A hearing was to be scheduled at that time. The Court also stated that it had received an affidavit of indigency from James Earl Ray and stated he would use State funds to defray the costs of transporting the experts to Memphis for the next hearing date. The State demanded that a hearing be conducted before any finding of indigency be made. All this was conducted without a court reporter transcribing the events.

On July 1, 1997 the defendant filed a request to clean the rifle with a wire brush and conduct another rifle test and served same on the State of Tennessee.

ARGUMENT AND MOTIONS

The State has examined both affidavits submitted by the defendant. As to the allegation that the experts were prevented from cleaning the rifle with a wire brush by defense counsel, the State denies this allegation and submits that the State, the Criminal Court Clerk, William Key and TBI firearms/toolmark examiner Tommy Heflin were all present when the rifle was cleaned. At no time did the experts express a desire to conduct any cleaning other than pushing a cloth patch through the bore. (See affidavits of William Key and Tommy Heflin attached.)

The State further submits that using a wire brush through this rifle could cause permanent marks to be inscribed on the bore. These marks could leave a pattern on any bullet fired through the rifle. These marks could compromise any further testing of the rifle. (See affidavits of Tommy Heflin and Kelly Fite attached.) Therefore, the State respectfully moves this Court to deny the defendant's request to use a wire brush to clean the rifle.

The State further submits that the request for retesting of the rifle should not be allowed until a complete disclosure is made regarding the findings of the first test. The Court granted the defendant extraordinary relief in allowing the testing in the first place. In the time since the testing, the defendant has not been forthcoming with the results and has only created confusion as to the nature

of the expert's findings. Justice and history require that the defendant come forward quickly with the results and not strive to create more controversy in a case that is already plagued with controversy.

The State moves this Court to order that the defendant turn over a report to the State prior to any hearing setting out the findings of the experts. The State must have this information to be prepared to proceed in any hearing. The results commented on by the Court are different then those conveyed to the State by defendant's counsel. At the present time the Court has more information than the representative of the State regarding the results of testing and any alleged problems with the cleaning of the rifle.

The State further moves the Court to require that any future disclosures made by the defense experts or counsel be filed in writing and served on the State, and not be conducted *ex parte* with the Court.

The State further moves the Court that the affidavit of indigency be copied and delivered to the State. Until the matter was mentioned on June 30, 1997, the State was unaware that an application for a finding of indigency was being pursued by the defendant. The State demands that a full hearing be conducted as to the financial status of the defendant.

Respectfully submitted,

JOHN W. CAMPBELL #10750
ASST. DIST. ATTY. GENERAL

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response/Motion was caused to be delivered to Wayne Chastain, attorney for the defendant, on this the 3rd day of July, 1997.