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Rogers judge chastises prosecution, investigation ***'This is not Iraq'***

By PHIL HERMANEK Peninsula Clarion

The judge in the Shawn Rogers murder trial in Kenai on Thursday called the state trooper investigation of the 2004 shooting "poor" and said the state prosecutor has been negligent in not providing information to the defense in advance of trial.

"The defense has a constitutional right. This is not Iraq," said retired Anchorage Superior Court Judge Larry Card, who is serving as judge pro-tem in the trial.

Rogers is the 33-year-old Kenai man charged with the shooting death of Brian Black, 43, of Beluga, in Fat Albert's Tavern and Bunkhouse July 26, 2004.

A debate rose to a crescendo pitch as Card told assistant district attorney Scot Leaders, in the nearly 14 years Card has been a judge, he has never seen as many discovery violations in a most-serious case — murder.

Discovery is a legal term used to mean the state is required to disclose all evidentiary information it finds in forming its case against a suspect.

"I find it shocking we have these numerous violations," Card said.

The eruption came out of the presence of the jury over the newly changed opinion of a state criminologist as to what may have caused the gun in the case to malfunction.

Originally, as documented by an October 2006 e-mail memo from Bob Shem of the state Crime Detection Laboratory, the criminologist listed several events that might cause a stovepipe malfunction in a semiautomatic handgun. Stovepipe refers to the appearance of a spent casing that is not ejected from the gun, but gets stuck in the ejection port and blocks the gun from reloading.

Stovepipe causes might be a shooter's loose grip on the gun, defective ammunition or interfering body parts or gripping hands, Shem said.

In his memo, he said, "I would put my money on interfering body parts or gripping hands."

In court, however, Shem said the memo was written during brainstorming with the district attorney's office and state investigators piecing together what happened in the case.

Witnesses who testified earlier in the trial said Black and Rogers exchanged words at the bar, Rogers pulled a loaded .45-caliber handgun and pointed it at Black, Black went and confronted Rogers, the gun went off twice and Black fell to the floor dead.

The defense has argued the gun went off during a struggle.

Shem's e-mail opinion would support the theory of the defense.

Now, in the fourth week of the trial, Shem said information about a nearly undamaged bullet found on the floor of the tavern might give him reason to offer another opinion as to which shot was the killing shot and which one caused the stovepipe malfunction.

Defense attorney Chuck Robinson protested, saying the state now “wants to tie this pristine bullet theory” to another possible cause of the malfunction — underpowered ammunition.

“It’s not so much I changed my opinion,” said Shem. “I expanded on it.”

Before Robinson could interject, Card said, “Say no more. I’ve had it.

“There was a poor investigation of the incident,” said Card. “The state cannot rest on a question brought up now.

“I’m not going to allow Mr. Shem to change his opinion now because he was just given new information three days ago. I’m not going to allow the state to ask him ... ” Card said, not finishing his sentence.

He then reminded Leaders of Rogers’ constitutional right to a fair trial.

The jury was brought into the courtroom and Shem described in detail the bullet wound on Black’s body and the hole in the victim’s shirt caused by the gunshot.

Using a fake gun and the shirt mounted on a rack, Shem demonstrated the angle of the gun as it would have been pointed in close proximity to Black when it fired.

The bullet entered his left side below the armpit, traveled through his aorta and lodged in his lower spine.

“You demonstrated how the wound would have occurred if the victim was standing up,” said Robinson.

“You didn’t demonstrate how the wound would occur if the victim were on the floor?” he asked.

“That’s correct,” said Shem. “As I said, the body could have been positioned in a number of ways for the entrance wound to line up with where the bullet ended up.”

After ruling that Shem could not change his opinion as to the possible cause of the gun’s malfunction, Card said the constitution requires that a defendant be provided all discovery before trial.

“I wish we were at pretrial,” he said. “Then we could continue for a few months ... we’re not.

“I find this lack of discovery would have a substantial impact on the jury,” he said.

“I haven’t dismissed the state’s case, and I wouldn’t, but this is so prejudicial,” Card said. Testimony in the trial is expected to resume at 8:30 this morning.

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