1 UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK 2 CHAY CALLOWAY 3 Plaintiff, 4 97-CV-617 -vs-Buffalo, New York RUDY RICHTER, 5 April 28, 1999 Corrections Officer, 6 JOHN DOE, Supervisor at 7 Wende Correctional Facility, 8 Defendants. 9 10 BEFORE THE HONORABLE HUGH B. SCOTT 11 UNITED STATES MAGISTRATE JUDGE 12 APPEARANCES: 13 For the Plaintiffs: SALVATORE P. ABBATE, ESQ., JAMES OSTROWSKI, ESQ., 14 of Counsel, 396 Ellicott Square Building, 15 Buffalo, New York 14203. 16 For the Defendants: ELIOT SPITZER, NEW YORK STATE 17 ATTORNEY GENERAL, JERRY MCGRIER, SR., 18 NEW YORK STATE - ASSISTANT ATTORNEY GENERAL, 19 400 Statler Towers, Buffalo, New York 14202. 20 Court Reporter: VICTORIA SKABRY, 21 1400 Rand Building, Buffalo, New York 14203, 22 (716) 852-2223. 23 24

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 THE COURT: All right. Anything further? MR. McGRIER: Yes.

THE COURT: Yes, Mr. McGrier. Go ahead.

MR. McGRIER: Just briefly, Your Honor. I think that Mr. Speckin has testified in terms of his own experience, testified sufficiently enough to allow this Court to accept him as an expert in a field that has already been accepted by this Court and the law of this case. He testifies as to the number of documents he's reviewed. He's also testified that he's been published. He had his papers published. He's presented sworn testimony in several other courts, other jurisdictions and never been rejected, Your Honor. I think that he is more than qualified to be an expert in this court.

THE COURT: The Court is mindful of the obligation that is placed on this Court to be a gate keeper; that is to keep pseudo or false science out of consideration by factfinders, and I'm also aware and guided by the Kumho Tire Company case which is a recent Supreme Court case which extends this gate-keeping obligation frankly beyond what is generally thought to be scientific or even as to technical types of expert opinions and testimony.

I believe that the testimony of Mr. Speckin

is appropriately to be heard by the jury in the sense that this is a generally-accepted scientific protocol or test. It appears that his work in particular has been subject to peer review and publication. He has explained that the rate of error or potential error in the test is within the test itself and that this is a generally-accepted set of theories or techniques in the relevant scientific community; that is, in his own peer group. I believe that the obligation of Daubert, and certainly an extension relative to all expert testimony, is pronounced by the Supreme Court in the Kumho Tire case.

I believe Mr. Speckin is an appropriate expert to testify in this case. That will be the ruling of the Court. The jury is right now across the way. We should probably get them in as soon as we can. Stay right in place.

(Whereupon, the jury returned to the courtroom.)

THE COURT: All right. Members of the jury, good afternoon again. Mr. Speckin has been called out of order, which is what I suggested to you earlier and told you what that meant. He is called by the defense, and he has already been sworn.

Counsel, you waive having him resworn, I