

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

STEVEN A. AVERY,

Defendant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

MAR 7 2006

CLERK OF CIRCUIT COURT

Case No. 2005-CF-381

**DEFENDANT'S MOTION TO
ASSURE FAIR FORENSIC TESTING**

Steven A. Avery, by counsel, now moves the Court pursuant to the due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, § 8 of the Wisconsin Constitution, and further pursuant to WIS. STAT. §§ 165.79(1), 971.23, for an order requiring the state (a) to permit defense observation of all scientific or forensic testing of physical items seized from any place in which Steven Avery has a privacy interest recognized by the Fourth Amendment to the United States Constitution or Article I, § 11 of the Wisconsin Constitution; and (b) to require the state to make video recordings of all scientific or forensic testing of physical items seized from any place in which Steven Avery has a privacy interest recognized by the Fourth Amendment to the United States Constitution or Article I, § 11 of the Wisconsin Constitution. As a less favored alternative to granting both

planks of this motion, Mr. Avery requests that the Court grant one plank of requested relief or the other. Mr. Avery requests further that this Court hear this motion on March 17, 2006, unless some earlier time is convenient. Finally, to preserve the *status quo*, Mr. Avery requests that the Court immediately order temporary cessation of any scientific or forensic testing by the state, pending a ruling on this motion. As grounds for this motion, Mr. Avery explains the following:

1. This case arose in Manitowoc County. It is a Manitowoc County case.
2. Previously, Manitowoc County officials investigated, prosecuted, convicted and sentenced Mr. Avery for a crime that all now acknowledge he did not commit.
3. This case arose while Mr. Avery was pursuing a civil claim against current and former Manitowoc County employees, officials, and agents. Mr. Avery sought in that lawsuit tens of millions of dollars in damages for the 18 years, approximately, that he was incarcerated for a crime of which he was innocent. When this case arose, Manitowoc County was resisting liability aggressively.
4. On information and belief, Manitowoc County Sheriff's Department employees either gathered or allegedly first spotted certain physical items on which the state will rely at trial in this case.

5. On information and belief, the participation of both the Calumet County Sheriff's Department and the Calumet County District Attorney was procured at the request of Manitowoc County officials and employees.

6. Mr. Avery has said consistently that he is innocent of the crimes charged here. He also has asserted that Manitowoc County officials are biased against him, and that they may be trying to make him appear guilty here of acts that he did not undertake and intentions that he did not have.

7. The new charges against Mr. Avery's nephew, Brendan Dassey, give additional reason to assure the fairness of forensic testing, and the appearance of its fairness. Obviously, young Mr. Dassey's alleged statements are inadmissible in their entirety against Mr. Avery. Further, forensic testing may be necessary to disprove events apparently alleged by Mr. Dassey.

8. The Court, the prosecution, Mr. Avery, and Manitowoc County residents all have an interest in assuring that the handling of this case exceeds the normal standards, and that its fairness is beyond reproach or question.

9. If the investigators and prosecutor involved in this case bear no bias or inappropriate malice against Mr. Avery, and if their handling of evidence and testing of items seized is beyond reproach, they will have no objection to quiet and unobtrusive observation by a defense representative. Neither will they have any objection simply to recording in video format all of the steps they take in scientific

and forensic testing. These steps not only will assist in the search for truth by documenting all aspects of the scientific and forensic testing, they will assure both fairness and its appearance.

10. On the unusual, even unique, facts of this case and Mr. Avery's history with the Manitowoc criminal justice system, the due process interest in a fair trial requires the Court to grant the relief he requests. Again, if the state now acts without bias and seeks only the pursuit of truth, it can have no genuine objection to this relief, for —

A. Mr. Avery does not request that the defense be allowed to interfere with, dictate, modify, challenge at the time, or participate actively in any state testing.

B. Mr. Avery does not request that he personally be allowed to observe any testing, or that the Court order any other relief that would pose a security or transportation cost or risk to the state.

C. Mr. Avery does not request that the state bear the cost of defense observation or video recording. The defense can bear those expenses.

D. Mr. Avery will agree to any reasonable restriction the Court may impose on public disclosure before trial of any results of scientific or forensic testing that may become known to the defense through the relief Mr. Avery here requests.

11. Implicitly, § 165.79(1) of the Wisconsin Statutes allows the relief Mr. Avery requests here, for these reasons —

A. First, that section provides that the defense is entitled to disclosure of the State Crime Laboratory's findings prior to trial if the state uses those findings in a preliminary hearing or as provided by WIS. STAT. § 971.23. Those provisions would cover all or almost all testing the state may undertake here, so the relief requested would affect only the manner and timing of disclosure; it would not give the defense any new right to disclosure.

B. Second, § 165.79(1) expressly provides that a judge may order the State Crime Laboratory in a felony case to conduct analyses of evidence on behalf of the defendant. That power of the court should embrace the lesser power to allow the defendant to observe or have recorded the testing of items that he himself could request be tested for him.

C. To the extent that any scientific or forensic testing produces results that the state does not wish to use at trial, or that do not assist the prosecution, the results of that testing and the integrity of the process of testing (to credit its reliability) both are exculpatory information within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), and progeny. The relief Mr. Avery seeks here is a permissible method of assuring timely and full disclosure of that exculpatory information to the defense.

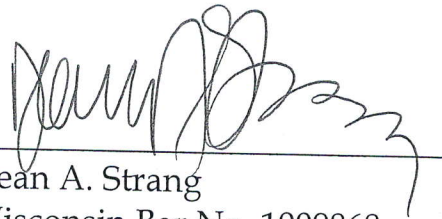
D. To the extent that the state has contracted any scientific or forensic testing to private laboratories or to organizations other than the State Crime Laboratory, this motion seeks only a natural extension of the rationale of § 165.79(1). The due process clauses of the federal and state constitutions provide adequate basis for that extension, to assure both a fair trial and its appearance in this case.

WHEREFORE, Steven Avery requests that the Court order at defense expense the two forms of relief requested in the first paragraph of this motion or, as a less favored alternative, one or the other of those forms of relief. He also asks that the Court immediately order temporary postponement of any scientific or forensic testing pending a ruling on this motion, to preserve the *status quo*. Mr. Avery does not submit a separate memorandum in support of this motion, but reserves the right to reply in the unlikely event that the state opposes the motion.

Dated at Madison, Wisconsin, March 6, 2006.

Respectfully submitted,

HURLEY, BURISH & STANTON, S.C.



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