

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

STEVEN A. AVERY,

Defendant.

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

MAR 17 2006

CLERK OF CIRCUIT COURT

Case No.05 CF 381

**DEFENDANT'S REPLY TO STATE'S OBJECTION TO
MOTION TO ASSURE FAIR FORENSIC TESTING**

The defense has moved the Court to permit defense observation of all scientific or forensic testing by the State and/or to require that video recordings be made of such testing. The State objects to the request for a defense representative to be present, but has not addressed the alternative of video recording of forensic testing. The defense replies as follows.

The State recognizes Mr. Avery's concerns about the possible bias of Manitowoc County officials in this case, but expresses surprise that Mr. Avery would distrust the accuracy or reliability of the Wisconsin State Crime Lab because it was that lab which eventually exonerated him from a crime he did not commit. Yet it was the State of Wisconsin, not just Manitowoc County, that for eighteen years aggressively fought all of his prior efforts to demonstrate the wrongfulness of his conviction, and even after a judge ordered the crime lab to conduct DNA tests, that lab delayed for more than a year to conduct the tests which would

29
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ultimately free him from prison. Mr. Avery has abundant reason to be concerned about the fairness of every aspect of the State's prosecution of him in this case.

The State suggests there is nothing out of the ordinary in this case to warrant the relief sought. Yet it surely is not the ordinary case when Mr. Kratz and Sheriff Pagel conduct seven press conferences to advise the public of the progress of an investigation and present their own theories about what happened to a young lady who disappeared. In part as a result of such efforts the media coverage has been extraordinary, and has included widely expressed public doubts about the integrity of this investigation. Such concerns were only heightened when public officials denied any involvement by Manitowoc County law enforcement in the investigation of the Halbach case, yet it was later revealed that Manitowoc Sheriff Department personnel claimed to have discovered critical evidence purportedly implicating Mr. Avery in this crime. One would think the State would welcome anything to bring transparency to this prosecution. Evidently not.

If it was not already abundantly clear to the State, Mr. Avery wishes it be made so now, that the integrity of the evidence and its testing is very much at issue in this case. In 1985 Manitowoc County and the State of Wisconsin thought they got it right then, too. They were wrong, and Mr. Avery spent eighteen years in prison for a crime he did not commit while the real perpetrator went on to rape another woman before being finally caught. Mr. Avery's experience with the criminal justice system in that case justifies a healthy dose of skepticism when now told by the State to "trust us."

The State protests that the Wisconsin State Crime Lab is an accredited laboratory with quality control guidelines such that there is no need to "baby-sit and look over the shoulder" of their analysts. Without explanation, the State claims that "allowing viewers to be present during the testing process could very well jeopardize accreditation" for the crime lab. In fact there is nothing in any of the accreditation guidelines cited by the State which bars the relief the defense seeks in this case.

Appropriate safeguards can easily be implemented to secure the integrity of the laboratory environment. An expert consulted by the defense has on several occasions been permitted to be present in crime labs in Illinois and other states during forensic testing. When he does so, he complies with the very same precautions employed by the state analysts to avoid contamination of the evidence or laboratory environment, including wearing proper clothing and registering his genotype in an internal staff elimination database. The State offers no reason why the use of unobtrusively placed videotape equipment would in any way compromise lab security. Thus the State's claim that the relief sought would jeopardize laboratory security and accreditation is without merit.

The State's argument that the availability of independent DNA testing will safeguard defense concerns is flawed for several reasons. First, subsequent defense tests performed after contamination of the evidence, whether accidental or otherwise, would only confirm the erroneous results. Once contaminated, evidence becomes useless as an aid to the truth. Moreover, subsequent defense DNA tests would be more expensive than the alternative relief sought here, and perhaps unnecessary. Assuring the Crime Lab gets it right the first time may

obviate the need for further testing. Subsequent independent DNA tests will also likely further delay the trial in this case. Mr. Avery should not be forced to sit in jail longer, all the while presumed innocent, just because the State resists a transparent process now.

The State refers to a few older cases in Arizona, Kansas and New York where similar requests for defense observation of crime lab testing were denied by courts in the absence of "fraud or bad faith." But it is only in recent years that the extent of crime lab fraud or incompetence has come to public light. Problems with crime labs have now surfaced in at least seventeen states, as well as the formerly prestigious FBI lab. See, e.g., Gorman, *The Brady Solution: A Due Process Remedy for Those Convicted with Evidence From Faulty Crime Labs*, 39 Univ. S.F. Law Rev. 725, 727 (Spring 2005). In Arizona, crime lab technicians were found to have used erroneous DNA calculations in at least nine cases including a homicide which led to a conviction. *Id.* at n.10. In Kansas, a man was wrongly released from custody because the crime lab mislabeled evidence, *Id.*, and in West Virginia and Oklahoma lab chemists were accused of falsifying testimony in hundreds of cases. *Id.* at 727. Less than two years ago, an FBI analyst was found guilty of a criminal offense for falsifying statements that she followed protocols in 100 DNA reports, a fraud that went on undetected by the lab for two years. *Id.* See also, DiFonzo, *The Crimes of Crime Labs*, 34 Hofstra L. Rev. 1, 5-6 (Fall 2005) (summarizing other evidence of crime lab fraud and errors in Seattle, St. Paul, MN, Virginia, Detroit and Houston). Until these problems of fraud or incompetence arose, prosecutors in those jurisdictions were no doubt assuring the courts and public of the integrity of their crime labs, yet we now know otherwise.

Given recent exposure of serious problems with even formerly elite crime labs throughout the nation, it seems only prudent to take reasonable steps to ensure transparency in the testing in this case. Mr. Avery was wrongfully convicted once and spent eighteen years in prison. It is not asking too much to ensure fairness throughout the investigative process in this case now.

WHEREFORE, Steven Avery requests that the Court order (a) that the State permit defense observation of all scientific or forensic testing, and (b) that the State make video recordings of such testing. As a less favored alternative to granting both forms of relief, Mr. Avery requests the Court grant one or the other.

Dated this 17th day of March, 2006.


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