STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

STEVEN A. AVERY,

Case No: 2005-CF-381

Defendant.

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE DUE TO UNLAWFUL EXECUTION OF WARRANT

INTRODUCTION

Steven Avery has moved the court for the entry of an order excluding for use as evidence at trial all physical evidence seized during multiple entries and searches of his single family trailer and garage pursuant to a single search warrant. The warrant was issued at approximately 3:30 p.m. on November 5, 2005, and law enforcement officers thereafter entered the defendant's residence at least eight times and his garage on at least three separate occasions over five days between November 5-9, 2005, without obtaining a new warrant to search these buildings. Avery argued that additional entries after the first search were improper because a

warrant may only be executed once.[1] An evidentiary hearing was held to establish facts as to the manner in which this warrant was executed.

The defendant also moved for exclusion of all derivative evidence, including statements taken from the defendant and evidence seized as a result of additional search warrants issued on November 7 and 9, 2005, December 9, 2005, and March 1, 2006, which were derived from the first defective warrant. Two November 7 warrants sought the defendant's computer and DNA; a November 9 warrant renewed the November 5 warrant to search the Avery Auto Salvage property and residences contained on that property; the December 9 warrant from Calumet County sought a wooden cabinet/bookcase from Steven Avery's bedroom; and the March 1 warrant sought another search of Steven Avery's trailer and garage. Avery will address in this brief the suppression of the November 7, 2005, search warrant for Steven Avery's computer, but will reserve argument for the suppression of other derivative evidence at a later time in subsequent pleadings.[2]

---

[1]For purposes of this motion, Avery concedes that the very first search warrant entries of the trailer and garage, at 3:48 p.m. and 3:58 p.m., respectively, consisted of only very brief searches and did not constitute a full execution of the warrant. However, the entries to Avery's trailer at 7:30 p.m. on November 5th, and his garage at 8:00 a.m. the following morning, did result in thorough, complete searches such that later entries should have been barred absent a further warrant.

[2]In addition, arguments seeking the suppression of items seized during any of the searches which exceed the scope of the warrants has been reserved until all crime lab testing is complete and it becomes clear whether such items have any relevancy to the State's case. *Maryland v. Garrison*, 480 U.S. 79, 84-85, 107 S. Ct. 1013, 94 L.Ed 2d 72 (1987) (Fourth Amendment particularity requirement limits scope of lawful search to those areas and items for which probable cause is described in the warrant application).

LEGAL STANDARDS

The Fourth Amendment prohibition against unreasonable searches and seizures is designed to safeguard the privacy and security of individuals against arbitrary invasions by government officials. *State vs. Boggess*, 115 Wis. 2d 443, 448-49 (1983). Constitutional reasonableness relates not only to the grounds for a search or seizure but also to the circumstances surrounding the search or seizure's execution. *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The Fourth Amendment limits police conduct in the execution of a search warrant. *Wilson v. Layne*, 526 U.S. 603, 611 (1999).

The majority rule in this country is that "a warrant may be executed only once." *See, generally*, LaFave, *Search and Seizure*, (4th. ed., 2004) §4.10(d), Vol. 2, p. 767. Under this rule, if the police execute a warrant, perform a search, and then leave, they may not return to search again without obtaining another warrant. *See also, State v. Trujillo*, 95 N.M 535, 624 P.2d 44, 48 (1981)(warrant is executed when a search is conducted, and its legality expires upon execution; thereafter no additional search can be undertaken on the same warrant absent exigent circumstances); *State v. Gomez*, 392 N.W.2d 308, 309-10 (Minn.App.1986); *United States v. Gagnon*, 635 F.2d 766, 769 (10th Cir. 1980); *State v. Pina*, 94 Ariz. 243, 383 P.2d 167, 168 (1963), *overruled on other grounds, Yuma County Attorney v. McGuire*, 111 Ariz. 437, 532 P.2d 157 (1975);

McDonald v. State, 195 Tenn. 282, 259 S.W.2d 524, 525 (1953); *Duncan v. State*, 11 Okla. Cr. 217, 144 P.2d 629, 632 (1914).

FACTS

The following facts were derived from an evidentiary hearing conducted on August 9-10, 2006.

Following the discovery of a Toyota RAV-4 on the property of the Avery Auto Salvage on the morning of November 5, 2005, law enforcement officers sought and obtained a search warrant which authorized the search of:

(1) Steven Avery's single family trailer and detached garage, located at 12932 Avery Road;
(2) Barbara Janda's single family trailer and detached garage located at 12930A Avery Road; and
(3) the 40 acre property of the Avery Auto Salvage, within which the above residences and garages were located, as well as numerous other outbuildings and vehicles, junked or operational in relation to the business.

See Search Warrant, November 5, 2005, court file (also attached as Exhibit 1 to Avery's Motion to Suppress). The search warrant was first executed at Steven Avery's trailer at approximately 3:48 p.m. on that same date, by Detective David Remiker from the Manitowoc County Sheriff's Department (MTSO) and Officer Gary Steier from the Calumet County Sheriff Department (CASO). Remiker kicked the front door open and the officers went through Avery's entire residence "checking closets, looking for Teresa, or any evidence that Teresa was there, any

clothing, anything obvious that would indicate Teresa would be in that residence." *See* Trans. 8/10/06, at 6. Nothing was found and the officers left the defendant's trailer at 3:58 p.m. *Id.* at 7. Thereafter, the same two officers entered and searched Steven Avery's garage between 3:58 p.m. and 4:06 p.m. on the same afternoon. *Id.* Nothing was noted except some "shell casings on the floor," which were not seized at that time. *Id.*

Later the same day, four officers entered Steven Avery's trailer a second time at 7:30 p.m. Three MTSO officers, Detective Remiker, Lieutenant James Lenk and Sgt. Andrew Colborn, along with CASO Sgt. Tyson, searched Steven Avery's trailer thoroughly for more than two and one-half hours, finally leaving at 10:05 p.m. As many as 50 pieces of evidence were seized from Avery's trailer, including bedding, handcuffs and photographs. *Id.* at 10, 17, 30. The four officers searched for trace evidence and located and seized between 10-20 swabs of possible blood stains on walls, door frames and the bathroom floor, *Id.* at 12-15, and hair and fiber evidence from Avery's bedroom, *Id.* at 16-17, as well as the vacuum cleaner bag and filter, *Id.* at 18.[3] The search for and collection of trace evidence included a thorough and careful examination which required the officers to search the floor on their hands and knees. *Id.* at 32. Detective Remiker testified that he was experienced in the

[3]None of this trace evidence was later determined to be related to Teresa Halbach.

collection of trace evidence and that he "felt very confident in my abilities." *Id.* at 16. He testified that he did as thorough and complete a job that night as he could. *Id.* at 32. Sgt. Colburn testified that he also had specialized training as an evidence technician, and he assisted Detective Remiker with swabbing and photographing the scene. *Id.* at 44, 51.

Lt. Lenk testified that when the four officers completed their search at 10:05 p.m. on November 5th they believed they had seized everything of evidentiary value from Steven Avery's trailer. Trans. 8/9/06, at 202-03. Detective Remiker stated in his written report that when the officers left Avery's trailer they "were completed with the processing of the residence." Trans. 8/10/06, at 19-20. He testified at the hearing that the four officers searched as long as necessary that evening, and that no one put any time limit on them or kicked them out before completing their search of Avery's trailer. *Id.* at 18. Remiker disagreed with Lt. Lenk's assessment that during the November 5th search they seized everything which had any apparent evidentiary value. *Id.* at 19. However, Remiker mentioned only that they had some questions about whether pornographic magazine pictures or shotguns in Avery's bedroom were relevant or were covered in the warrant, so those items were not seized at that time. *Id.* None of the officers who searched that evening testified to any concern that there was additional trace evidence left behind which would

require a later search of Avery's trailer. Indeed, they all conceded that when they returned to the scene the following morning they did not immediately continue searching Avery's trailer, but instead began to search elsewhere. Trans. 8/10/06, at 22, 24 45-46; Trans. 8/09/06 at 205.

Additional searches took place the second day, November 6, 2005. First, Steven Avery's detached garage was entered at 8:00 a.m. by the same three MTSO agents, together with CASO Deputy Kucharski. Trans. 8/09/06 at 204. The garage was a standard two car garage and all four officers were in the garage searching until they completed their search at 9:47 a.m. Lt. Lenk again testified that they searched the garage very thoroughly and believed that they had seized anything of evidentiary value by the time they left. *Id.* at 205. Detective Remiker testified that the four officers searched the garage thoroughly for one hour and 47 minutes looking for anything sought in the search warrant. Trans. 8/10/06, at 22-23. He said they searched for as long as they needed and that no one interrupted them or ordered them to leave before they completed their search of the garage. *Id.* at 23. Lenk testified that they seized some .22 caliber shells and swabs of some red stains that could possibly be bloodstains. *Id.* at 23-24. None of the searching officers testified to any intention or belief that they would need to re-enter the garage at a later time for a further search.

After the garage search was completed none of the officers returned immediately to Avery's trailer to continue their search from the night before. Instead, the third entry of Steven Avery's trailer did not occur until 12:25 p.m. on November 6, 2005, when the same four law enforcement officers "were told to go back and collect weapons, a vacuum cleaner, and bedding from the spare bedroom in the trailer." Trans. 08/09/06, at 206 (Lt. Lenk). The team leaders instructed the officers to seize only those three types of items, which was accomplished, and all of the officers left Avery's trailer at 12:48 p.m. *Id.*

Later, apparently on the evening of Sunday, November 6, 2005, Steven Avery's trailer was entered on yet a fourth occasion, this time by members of the State Crime Lab, who were ordered by unidentified law enforcement officers to use alternative light sources to check for the possible presence of blood. Trans. 8/10/06, at 87-88. No additional search warrant was obtained for this entry to Avery's trailer. The state elicited hearsay testimony from DCI Agent Thomas Fassbender that the crime lab technicians identified additional areas in Avery's trailer that showed the potential presence of blood. *Id.* at 91. Fassbender testified vaguely that some areas were collected by the crime lab, while others were "areas that were needed to go in and collect yet." *Id.* at 91-92. Fassbender said that he directed "additional entries to collect the information requested by the crime lab." *Id.* However, it is unclear in the

record whether officers were sent back into Avery's trailer to follow-up on the crime lab suggestions before or after the renewed search warrant for Avery's trailer was issued on the afternoon of November 9th.[4]

The next day, November 7, 2005, at 9:57 a.m., Lt. Lenk and Sgt. Colborn, together with CASO Sgt. Tyson, executed the fifth police entry of Avery's trailer to obtain the serial number of his computer. Trans. 8/09/06, at 207-08; Trans. 8/10/06, at 48. Lenk testified that superiors had instructed the re-entry for the sole purpose of obtaining the actual serial number of the computer. Trans. 8/09/06, at 208. Information derived from that search was then used to support a search warrant limited to the seizure of Avery's computer on November 7, 2005.

On November 8, 2005, Steven Avery's trailer was entered for the sixth time on the basis of the original warrant, nearly 72 hours after it was issued. Lt. Lenk and Sgt. Colborn entered the trailer at 8:25 a.m. and left at 12:18 p.m. *Id.* at 208-09. They were joined on this occasion by CASO Deputy Kucharski as the collection officer. The three officers searched Steven Avery's small trailer for nearly 4 hours . Trans. 8/10/06, at 48-49. The same officers then re-entered Avery's garage for the second

---

[4]Fassbender testified that "we did not get back to Steven's trailer on Monday, like we planned to." Trans. 8/10/06, at 95. He said search teams did go into Avery's trailer on Tuesday and seized his computer, but he never did testify what day the searchers actually re-entered to follow-up on the crime lab search. *Id.* Fassbender did testify that he never used the crime lab request to obtain another warrant to search, even though nothing would have prevented him from doing so. *Id.* at 146.

time and searched from 12:19 p.m. to 12:45 p.m. *Id.* at 49.

The next day, November 9, 2005, Steven Avery's trailer and garage were entered and searched several more times. The trailer was twice entered and searched-- from 10:39 a.m. to 10:59 a.m., and again from 11:40 a.m. to 11:51 a.m. *Id.* at 50. The garage was then searched for the third time, by Lt. Lenk and Sgt. Colborn, who entered at 11:51 a.m. and left at 12:10 p.m. Trans. 8/09/06, at 213. It was not until late in the afternoon of November 9, 2005, at 4:40 p.m., that a second search warrant was obtained which renewed authorization to continue searches of the Avery Auto Salvage property and Steven Avery's residence and garage. Trans. 8/10/06, at 141. Prior to that second search warrant Steven Avery's trailer had been entered on no less than eight separate occasions, and his garage no less than three times, spanning 5 days.

The state offered testimony by Agent Fassbender, a "co-leader" of the investigation, to justify the multiple entries of Avery's trailer and garage on the strength of just the original warrant issued on November 5, 2006. Fassbender testified that as early as the night of November 5th, after the thorough search of Avery's trailer by four officers, "in my mind I'm thinking" that the police were not done searching Avery's trailer. Trans. 8/10/06, at 84. He described repeated debriefings with the officers after each search was completed, where it was decided

that a subsequent entry would be undertaken to seize other items they had observed. *Id.* He testified that his thinking was that Avery's trailer "is still part of my scene. This is an ongoing search." *Id.* Fassbender also claimed that the apparent evidentiary significance of items observed in Avery's trailer changed during the course of the week. *Id.* at 85.

Fassbender also complained that he had a lack of manpower to fully search Avery's trailer and garage on the first entries, yet he admitted that the trailer was at most only 700 square feet in size and four officers spent over two and one half hours searching it thoroughly the night of November 5th. *Id.* at 131, 133. He described the logistical difficulties of searching the Avery Auto Salvage property of approximately 40 acres with over 3000 junk cars, but later admitted that he had "easily over 100" law enforcement officers searching the property, not including many additional firemen. *Id.* at 113. Fassbender initially complained that rainy conditions at the site the first night was a hindrance to completion of the search of Avery's trailer, but he later conceded that the rain should actually have benefitted that task, because additional trained officers could have been assigned to Avery's trailer search since they could not search outside when it was raining. *Id.* at 141-42.

Fassbender also testified that between the time the search warrant was first issued on November 5th and its renewal on November 9th, either he or his co-

leader, Investigator Wiegert, sought and obtained as many as 20 other search warrants related to this same investigation, including warrants for DNA, phone records, etc. *Id.* at 107. Fassbender conceded that since he already had personnel in front of a judge for those warrants, he could have also sought renewed warrants to search Avery's trailer or garage for each subsequent entry on November 6th, 7th, 8th or 9th. *Id.* at 109-111. Instead, he chose not to seek another warrant until late on November 9th, because he believed the November 5th warrant gave him "carte blanche to go in and out of his residence and trailer as many times as [he] wanted." *Id.* at 111.

ARGUMENT

I. The multiple entries to Avery's trailer and garage violated the Fourth Amendment to the United States Constitution, and Article I, Section 11 of the Wisconsin Constitution.

Avery contends that the repeated entries of his residence and garage were unlawful under the legal principle of "one warrant, one search." Under the rule of "one warrant, one search," if law enforcement agents obtain a warrant, perform a search, and then leave, as the Manitowoc County and Calumet County Sheriff's Departments did repeatedly in this case, they may not return to search again without obtaining another warrant. *See, supra,* LaFave, *Search and Seizure,* at p.767.

The basic principle of "one warrant, one search" was explained in *McDonald v. State,* 259 S.W.2d at 524-25. The authorities obtained a warrant to search for

intoxicating liquors on the premises. They searched and found nothing. An hour later they returned and searched again, on the basis of the first warrant, and found illegal alcohol. The Supreme Court of Tennessee found the second search unconstitutional, recognizing the great potential for abuse from such practice:

> In this state a search warrant may be executed and returned at any time within five days after its date. . . . If for no other reason than the officer still has it in his possession, a search warrant once served, but not returned, can be used a second time within that five days for the purpose of a second search of the premises described, then logically, it would seem to follow that such officer, with his squad of assistants, may use it to make an indefinite number of such searches during that five days. Thus, this warrant could become a means of tyrannical oppression in the hands of an unscrupulous officer to the destruction of the peaceful enjoyment of the home or workshop of him or her against whom the efforts of such officer are directed. On principle, therefore, such second search under the warrant seems to come within the prohibition of the unreasonable search and seizure clause of our constitution.

259 S.W.2d at 524-25 (citations omitted). In Avery's case, the Manitowoc and Calumet County Sheriff Departments, with a "squad of assistants," made not two, but *eight* separate searches of his trailer, and *three* of his garage, on the basis of the one warrant. And that series of searches extended over five days.

A. Wisconsin caselaw.

No Wisconsin case directly addresses the authority of an officer to make multiple entries into a premises to execute a single search warrant, but several cases have addressed multiple police searches in related contexts. For instance, the Wisconsin Supreme Court held that a search warrant does not permit a search to be continued after the items identified in the warrant have been located and seized.

State v. Starke, 81 Wis. 2d 399, 414, 260 N.W.2d 739 (1978), citing *United States v. Odland*, 502 F.2d 148 (7th Cir. 1974), *cert. denied*, 419 U.S. 1088, 95 S.Ct. 679, 42 L.Ed.2d 680. In *Starke*, the defendant, a police chief, was charged with misconduct in public office for, among other things, his failure to serve an arrest warrant on his niece and another person. The unserved arrest warrants and other items were found locked in his office desk. The court upheld the suppression of thirty-four additional items seized from his desk after the two unserved arrest warrants were found because the items sought by the search warrant had already been located and seized. 81 Wis. 2d at 414.

In *State v. Douglas*, 123 Wis. 2d 13, 365 N.W.2d 580 (1985), the Wisconsin Supreme Court addressed a second police entry and search of the defendant's home after he had impliedly consented to a first search. The police discovered three slain bodies after they responded to a 911 call from the defendant that he had shot his mother. State crime lab technicians and police were in the defendant's house investigating the crime over the next twenty-four hours. Then, more than twenty-two hours later, the police returned to the home to "re-create" the sequence of events of the crimes. During that time they found and seized a handwritten note from the defendant's bedroom. The court, affirming its earlier decision in *Kelly v. State*, 75 Wis. 2d 303, 308-09, 249 N.W.2d 800 (1977), found the note should be

suppressed. 123 Wis. 2d at 19-21, 26.

Both *Douglas* and *Kelly* involved a second entry and search after a defendant had given consent for the first entry. In *Kelly*, the second entry occurred the following day, while in *Douglas* the entry in question was nearly two full days later. Both cases found the police conduct unreasonable and the evidence seized was suppressed. In neither case had the police obtained a search warrant; the second entry was made on the basis of the initial consent.

In Avery's case, the Manitowoc and Calumet County Sheriff's Departments did obtain a search warrant on November 5, 2005, and promptly executed it the same afternoon. So the issue presented in this case differs from either *Douglas* or *Kelly*. Of note, however, is the *Douglas* court's response to the state's argument that the second search was really just a "continuation" of the first. The state argued that since the scope of the original search was not expanded and the police had kept the premises secured between the two searches, the second search was really only a continuation of the initial lawful entry and search. 123 Wis.2d at 23-24. The *Douglas* court, citing *LaFournier v. State*, 91 Wis. 2d 61, 70, 280 N.W.2d 746 (1979), explained that time is an important factor in determining whether a re-entry is simply a continuation of an initial lawful entry and search. In *LaFournier*, a subsequent warrantless entry by police within minutes of the initial entry was found to be a

continuation of the lawful initial warrantless entry because it was so "close in time and practically identical in nature so as to be analytically and factually inseparable." 91 Wis. 2d at 70. But in *Douglas*, the court found the subsequent entry the next day was factually and analytically separable such that it could not be considered a mere continuation of the first search.

> It would be contrary to the "liberal" construction to be given the fourth amendment to allow, under the guise of continuation, such separable warrantless intrusions into the home over an indefinite period simply because the initial search was broader in scope and because police were guarding the premises. If the warrantless reentry of the home occurs twenty-two and one-half hours after other investigative activities in the home have ceased, the rule of continuation will not be applied to avoid the warrant requirement without a showing by the state of overriding circumstances which would justify such application.

123 Wis.2d at 24. *See also Michigan v. Clifford,* 464 U.S. 287, 296-97 (1984) (search of basement and upstairs of fire damaged home six hours after fire had been extinguished was not a continuation of earlier valid search).

Likewise, the subsequent entries in Avery's case are separable from the initial entry on the search warrant. The entries to Steven Avery's property were separated by hours and days, not just minutes, and extended over five days by the time of the last entry on November 9, 2005.[5] The state may argue that because law enforcement

---

[5]It does not matter that the statutory five day time period under §968.15, Wis. Stats., for the warrant to be executed and returned, had not lapsed until after the multiple entries on November 5-9, 2005. *See State v. Edwards,* 98 Wis. 2d 367, 372, 297 N.W.2d 12 (1980) (irrespective of compliance with a statutory time limit, the Fourth Amendment imposes its own limits on the execution of a warrant). *See also United States v. Keszthelyi,* 308 F.3d 557, 572-73 (6th Cir 2002) (re-entry was unreasonable under Fourth Amendment even though statutory time for execution of warrant had not lapsed). The claim here is not that the November 5 search warrant had become stale and would

agents kept the entire 40 acre Avery Auto Salvage property in their secure custody from November 5-12, they technically never "left" the property so as to amount to separate entries of Steven Avery's property. However, Steven Avery's trailer and garage were separately identified as one of the locations specifically designated in the search warrant, and there is no question the officers repeatedly entered, left, and re-entered Steven Avery's property on multiple occasions before the warrant was renewed. Thus, the MTSO and CASO entries and searches of the defendant's trailer and garage were separate and distinct searches, for which only one warrant was ever obtained. Under the majority rule of "one warrant, one search," therefore, evidence seized from Avery's trailer and garage after the first entries must be suppressed.

The Manitowoc and Calumet County Sheriff Departments made no effort to obtain additional judicial authorization to permit more than one entry to Avery's trailer and garage until late on the afternoon of November 9, 2005. There were no exigent circumstances which prevented law enforcement from applying to an independent magistrate for renewed authority to re-enter Avery's property if they believed probable cause existed to justify further searches. Indeed, between the first

---

not support even one search, but, rather, that the multiple searches on the purported authority of the same warrant violated the "one warrant, one search" principle regardless when those searches took place.

and second search warrants for Avery's property, law enforcement agents sought and obtained as many as 20 other warrants, yet they never sought judicial re-authorization for the search of Avery's trailer and garage. Instead, they simply acted as if the original warrant allowed them to come and go into Avery's trailer and garage at will. It did not.

B. Federal and out of state authorities.

Although no Wisconsin cases squarely address the question, a number of federal courts have confronted the question of multiple police entries on the strength of one warrant, with varying results. These courts considered whether certain subsequent entries may be considered an exception to the "one warrant, one search" rule, because they may be viewed as a "reasonable continuation" of the first entry authorized by the warrant. The Wisconsin Supreme Court has already rejected the concept of a "continuation search" in *Douglas*, at least where the multiple entries occurred on different days as they did in Avery's case, so it is unlikely that our courts will adopt the "reasonable continuation" approach of these federal courts.[6] Nevertheless, because the precise issue remains unresolved in Wisconsin caselaw,

---

[6]There is also a growing trend towards providing greater protection to Wisconsin citizens under the Wisconsin Constitution than mandated under the United States Constitution. *See State v. Knapp*, 2005 WI 127, ¶¶1-2, 285 Wis. 2d 86, 700 N.W.2d 899; and *State v. Dubose*, 2005 WI 126, ¶¶39-41, 285 Wis. 2d 143, 699 N.W.2d 582. It may therefore be even less likely Wisconsin courts will adopt the federal approach of "reasonable continuation" searches as an exception to the "one warrant, one search" rule.

Avery will address the federal approach here.

In *United States v. Carter*, 854 F.2d 1102, 1107 (8th Cir. 1988), the federal court upheld a search where the police returned to a hotel room within a few hours after a previous search because one of the suspects told them there was $4,000 under the mattress which had not been seized. The failure to seize this money in the first search was inadvertent; the police had simply not found it. The warrant authorized the seizure of money and that is all the police took in the subsequent entry. In contrast, in Avery's case the police entries to his trailer after November 5th were not made because of an inadvertent failure to seize items in the first search. The re-entry the following afternoon was directed by law enforcement superiors for the purpose of seizing weapons and items clearly observed, but not seized, by officers on the previous entry. Subsequent entries were made to seize items which either had no apparent evidentiary value at the time of the first thorough search on the evening of November 5th or were entirely beyond the scope of those items authorized in the warrant (e.g., photographs, magazines and papers which were not described as things to be seized in the first warrant).[7]

In *United States v. Gerber*, 994 F.2d 1556, 1561 (11th Cir. 1993), the police

---

[7]The Fourth Amendment requires particularity not only to the place to be searched, but also the things to be seized. *Dalia v. United States*, 441 U.S. 238, 255 (1979). Accordingly, the seizure of any photographs, magazines or other documentary evidence must be suppressed as outside the scope of authority granted by the November 5th warrant. *Maryland v. Garrison*, 480 U.S. at 84-85.

executed a warrant to search a vehicle on a Friday, but were unable to search under the hood because they could not find the lever. They delayed only until Monday so they could obtain the assistance of a mechanic to open the hood without damaging the car. The decision to suspend the search was ruled reasonable in light of the more intrusive alternative of forcing open the hood and damaging the car when originally searched on Friday. Here, the decision to drag out the multiple searches of Avery's property, while keeping it under police guard, unlike *Gerber,* resulted in more, not less intrusion to Avery's property interests.

In *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990), a search warrant authorized the seizure of a doctor's files as evidence of insurance fraud. F.B.I. agents executed the warrant, seized files, and left the office. Only later did they discover that some files specifically described in the warrant were left behind. They returned to the scene two hours later and obtained the remaining files. The Ninth Circuit upheld the second entry as a continuation of the first. Of particular importance was the fact that files obtained in the second entry were not additional evidence unknown to the warrant magistrate - they were specifically mentioned in the warrant. Once again, like *Carter*, the earlier failure to seize the items taken in a subsequent entry was mere inadvertence. Furthermore, there was a very brief time lapse of only a few hours between the entries. Those limited circumstances are not

presented in Avery's case.

In *United States v. Squillacote*, 221 F.3d 542, 557 (4th Cir. 2000), the court permitted re-entry under unusual circumstances where there were simply too many items to review and recover in one day. *Squillacote* involved a complex investigation for espionage that included clandestine surveillance for 550 consecutive days under FISA authorization. A search warrant for the defendant's residence was eventually issued which authorized a search within the next ten days during the daytime only, and specifying the hours of 6:00 a.m. to 10:00 p.m. The search extended over six days, with FBI agents remaining inside the house each night. The defendant first argued that because the agents were in the home for five consecutive nights they were in effect "searching" beyond the specific daytime hours stated in the warrant. 221 F.3d at 554. The court rejected this argument because the evidence showed the FBI agents stopped searching each night at 10:00 p.m., and they left two agents in the home each night to prevent the destruction of evidence. *Id.* at 555-56.

The defendant in *Squillacote* alternatively argued that if the FBI actually concluded their search at 10:00 p.m. each night they should have obtained a new search warrant before beginning the next morning. *Id.* The court also rejected this argument for several reasons. First, because of the great number and type of evidence which could indicate espionage-related activities, any search would be

very time consuming. *Id.* at 557. Second, the agents explained that the home was extremely cluttered and because it was undergoing renovations some areas were difficult to search. In addition, the search of the basement, where many of the items were located, was hampered because agents found it difficult to remain in that location for long periods of time because of irritation caused by an immense amount of dust and the odor of cat urine. *Id.* The court found that "[u]nder these circumstances, the subsequent entries were not separate searches requiring separate warrants, but instead were simply reasonable continuations of the original search." *Id.* Although the search extended over a considerable period of time, "the length of the search was a function only of the nature of the evidence sought and the condition of the home." *Id.* at 558.

The search of Avery's small, single family trailer and two car detached garage can hardly be equated with the search described in *Squillacote*. Nor can a search for evidence of a murder, kidnaping or sexual assault be compared to a search for evidence of espionage-related activities, with all the coded documents, micro-chips and other sophisticated methods of concealment used in such cases. No officer testified that Avery's trailer and garage were extremely cluttered or difficult to search. Even taking into account the need to search for trace evidence under the search warrant in Avery's case, its clear that the four highly trained officers located

and seized all apparently relevant evidence during the search on the evening of November 5th. Further, the search in *Squillacote* was, by federal law, extended longer than would have been required under Wisconsin law, which does not restrict searching to daytime hours only.

In *United States v. Bowling*, 351 F.2d 236 (6th Cir. 1965), *cert. denied*, 383 U.S. 908 (1966), the police executed a warrant to search the defendant's home for stolen business machines. They found a number of machines in his basement, which they suspected were stolen. But rather than seize all of the machines, they recorded their serial numbers and checked those numbers overnight. After matching them to reports of stolen machines the police returned the next day and seized them. The Sixth Circuit upheld the search. 351 F.2d at 341. However, that same court recently limited the *Bowling* holding, in *United States v. Keszthelyi*, 308 F.3d 557, 568 (6th Cir. 2002).

In *Keszthelyi*, officers obtained a search warrant to search for drugs in the defendant's home. No drugs were found when the warrant was executed, but the defendant was taken into custody. The following day agents returned and searched again, this time finding cocaine. The Sixth Circuit found the second entry and search was unreasonable under the Fourth Amendment, even though the time for

execution of the warrant had not yet lapsed. 308 F.3d at 572-73.[8] The court acknowledged "the general rule that a warrant authorizes only one search." 308 F.3d at 568-69. Under this rule, "once a search warrant has been fully executed and the fruits of the search secured, the authority under the warrant expires and further governmental intrusion must cease." *Id.* at 569, *quoting United States v. Gagnon*, 635 F.2d 766, 769 (10th Cir. 1980), *cert. denied*, 451 U.S. 1018 (1981). The *Keszthelyi* court noted that its decision in *Bowling* did not reject this general rule: "Our decision in *Bowling*, however, does not permit the police unlimited access to the premises identified in a warrant throughout the life of the warrant." *Id.* at 568. The court recognized the dangers inherent in such a rule, and ruled that the *Bowling* decision "merely recognized that, under certain circumstances, police may temporarily suspend the initial execution of a search warrant and continue the search at another time." *Keszthelyi*, 308 F.3d at 569.

The court in *Keszthelyi* surveyed the federal cases where courts had found limited circumstances which presented exceptions to the general rule of "one

---

[8]The court nevertheless affirmed the denial of the motion to suppress on the grounds of inevitable discovery, 308 F.3d at 573, which Avery does not understand the state to be arguing in his case. The state could not meet its burden for the doctrine of inevitable discovery in any event because there is no evidence the police were independently pursuing alternate means of obtaining the items seized after the November 5th entry. *See, State v. Knapp*, 2003 WI 121, ¶215, 666 N.W.2d 881 (Abrahamson, concurring). The mere availability of a subsequent warrant cannot alone justify application of the inevitable discovery doctrine. *United States v. Lamas*, 930 F.2d 1099, 1102 (5th Cir. 1991). If the state intends to argue inevitable discovery, Avery requests an opportunity to respond.

warrant, one search." Underlying all such cases is that the decision to conduct a second entry must be "reasonable under the totality of the circumstances." 308 F.3d at 569. The reasonableness of a search under the Fourth Amendment is determined by "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner,* 471 U.S. 1, 8,85 L.Ed. 2d 1, 105 S.Ct. 1694 (1985).

Thus, in *Bowling,* the Sixth Circuit court recognized that the police could have decided upon a more intrusive alternative - - they could have simply seized all the equipment found in the defendant's home and checked it later. *Keszthelyi,* 308 F.3d at 569. The police made a reasonable decision to execute the warrant in two entries which minimized their interference in the defendant's property interests. *Id.* at 570.

In Avery's case, however, the police did not choose a less intrusive alternative. They maintained the entire 40 acre parcel under exclusive law enforcement control for one full week. They deprived Steven Avery and the other members of his family of any access to their homes, and completely shut down the auto salvage business for the whole week between November 5th and November 12th. Steven Avery's interest in his own property was completely denied by keeping the entire parcel under police guard during that extended time period. The authorities acted as if the

first search warrant gave them repeated and unlimited access to any of Avery's property, like the dreaded "general warrant" of colonial days which the founding fathers rejected by adoption of the Fourth Amendment.[9] The agents entered Avery's trailer eight times and his garage three times over a five day period before they applied to a magistrate for renewed authority. Thus, law enforcement's delayed and protracted searches in Avery's case were more, not less intrusive.

The *Keszthelyi* court also held that re-entry cannot be justified unless it is clear that the search was not completed and that there is a showing why the police could not complete the search in the previous entry. 308 F.3d at 571-75. The court ruled in favor of suppression because the testimony revealed that the first search was thorough and the agents could have stayed longer if they believed any evidence remained. *Id.* at 571. Further, "nothing impaired the ability of the agents to execute fully the warrant at the time of their initial entry." *Id.* at 572.

Similarly, the searches of Avery's trailer and garage on November 5th and the morning of November 6th were both unimpaired and thorough. Lt. Lenk testified that he believed all evidence of apparent evidentiary value was seized in their first entries of the trailer and garage. Trans. 8/09/06, at 203, 218. Detective Remiker

---

[9] *See Chimel v. California*, 395 U.S. 752, 761 (1969) (Fourth Amendment was direct response to colonists' objection to expansive searches by general warrants).

testified that the search of Avery's trailer on the evening of November 5th, and the garage the following morning, were as thorough and complete as possible. Trans. 8/10/06, at 32. In both instances the officers searched as long as they wished and no one stopped their searches prematurely. *Id.* at 18, 23. In the first search of the trailer as many as 50 items of evidence were seized, including trace evidence in the form of 10-20 swabs for blood or DNA and hair and fiber evidence. *Id.* at 12-17. Additional swabs and other items were also seized in the garage search the following morning. *Id.* at 22-23. Four fully trained and experienced officers thoroughly searched Avery's small, single family trailer for more than two and one half hours and the small two car garage for nearly 2 hours. Nothing impaired the officers from fully executing the warrant as to Avery's trailer and garage. Thus, the subsequent entries were not reasonable under the Fourth Amendment without application for renewed authority.

Of all the federal cases which considered whether to apply the "reasonable continuation" exception, the relevant factors considered in *Keszthelyi* most closely apply to the law enforcement conduct in Avery's case. The *Keszthelyi* court found that, unlike many of the above-described cases where continuation searches were approved, "nothing impaired the ability of the agents to execute fully the warrant at the time of their initial entry." *Id.* The agent's "decision to conduct two complete

searches of the defendant's residence over a period of two days, therefore, was in no sense necessary or important to the successful execution of the search warrant." *Id.* Furthermore, the court noted that "the government took no steps to limit the scope or intrusiveness of the second search." *Id.* The court thus distinguished those cases which upheld "limited continuation searches carried out for narrowly defined purposes, such as to recover a specific piece of evidence inadvertently left behind during the initial search." *Id.*

Likewise, in Avery's case, no legitimate factors impaired the ability of the law enforcement agents to complete their search of his trailer on the evening of November 5th. Indeed, the officers who conducted that search believed they had seized everything of likely evidentiary value when they stopped the search. No one told them to discontinue the search, and they expressed no exhaustion from a long day as a reason to stop, contrary to the inference suggested by Fassbender. Fassbender's decision to string out the subsequent searches over a period of the next 90+ hours was not necessary to the successful execution of the original warrant.

Fassbender's contention that he lacked the resources necessary to promptly complete a search of Avery's small residence and garage is ludicrous given the more than 100 law enforcement agents he had working on the case. This was the highest profile case in the state, and easily garnered more publicity than any in recent

memory in that area of the state. Law enforcement resources at his disposal included helicopters, multiple teams of cadaver dogs and blood hounds, volunteer firemen, and underwater dive teams. Fassbender was even able to obtain remarkably quick DNA results in just two days, Trans. 8/10/06, at 96 , from a crime lab which publicly claims to be unable to produce results for many weeks or months after samples are received. His supervisor at DCI essentially gave him the entire department for his use in the case, if necessary. *Id.* at 129-30.

Despite all these resources, Fassbender nevertheless claimed that he had few evidence collection trained technicians at his disposal. Yet he had a team of four such officers combing Avery's small trailer for more than two and one half hours the very first night, and none of them testified to a lack of time or resources to complete their tasks. Further, Fassbender admitted that he was himself trained in evidence collection, yet he found it unnecessary to lend a hand in any of the searches of Avery's trailer or garage. Tellingly, Fassbender spent less than one hour inside Avery's trailer the entire week it was under police control - and nearly all of those minutes were on the very last day in the moments before it was released back to the Avery family Trans. 8/10/06, at 118-19. When pressed on cross-examination, Fassbender admitted he did not even know how many of the 100 officers working on the case were qualified to collect evidence. *Id.* at 125-26. He also admitted that

several of the other law enforcement departments who were assisting in the investigation had evidence collection officers but he never even asked them for assistance in searching Avery's trailer or garage. *Id.* at 128-129. Thus, Fassbender's claimed lack of resources as justification for dragging out the searches of Steven Avery's property simply is not supported by the record. And, in any event, nothing prevented the state from seeking renewed judicial authorization for additional searches if Fassbender truly needed to re-enter the properties.

Moreover, rather than limiting the scope of subsequent searches, the later entries resulted in the seizure of more items than even those authorized by the warrant. The maintenance of a police guard on the property over an entire week created more, not less of an intrusion on Avery's Fourth Amendment rights. Finally, the law enforcement authorities in this case entered not just once or twice, but eight separate times into Avery's trailer and three more into his garage over those five days. These egregious circumstances preclude any characterization of these multiple entries as a mere continuation of the original search.

Therefore, the law enforcement entries and searches of Avery's trailer and garage after the thorough search of his trailer on the evening of November 5th and his garage on the morning of November 6th, are separate and distinct searches, for which only one warrant was ever obtained. Under the rule of "one warrant, one

search," evidence seized after those first thorough searches must be suppressed. The subsequent entries cannot be justified under the guise of a "continuation" of the first search.

II. The search warrant obtained on November 7, 2005, for the seizure of Steven Avery's computer was derived from the fruits of an unauthorized entry on the first warrant, and must also be suppressed under *Arizona v. Hicks*.

The original November 5, 2005 search warrant did not authorize seizure of a computer. During the first entries to Avery's trailer they discovered a computer, but could not seize it at that time. It was not until the fifth entry to his trailer that the officers chose to obtain the serial number and other particulars for the computer so that they could apply for a specific warrant to seize the computer. The evidentiary hearing established that on November 7th the law enforcement agents in charge of the investigation ordered officers to re-enter Steven Avery's trailer for the fifth time for the express purpose of obtaining the serial number of his computer so they could obtain a warrant for its seizure. For the reasons already argued above, this subsequent entry was not authorized by the rule of "one warrant, one search," and thus the computer warrant was derived from that constitutional violation. For that reason, the computer must be suppressed as the fruit of illegal law enforcement conduct.

In addition, the computer warrant must be suppressed because of an additional Fourth Amendment violation under *Arizona v. Hicks*, 480 U.S. 321 (1987),

because by searching the computer to find its serial number the officers conducted a warrantless "search" without exigent circumstances.

In *Hicks*, a bullet was fired through the floor of the defendant's apartment and police arrived to search for the shooter. While in his apartment they observed expensive stereo equipment which they suspected was stolen. Lacking probable cause for a seizure at that time, the officers moved some of the equipment so they could read and record the serial numbers. A call into the police department confirmed one of the items was stolen and it was seized immediately. Later, it was discovered that the recorded serial numbers of other items matched those of property taken in an armed robbery and a search warrant was obtained and executed for that property as well. *Id.* at 323-24. The Supreme Court suppressed the evidence because it found the police conduct of reading and recording the serial numbers on the equipment constituted a warrantless "search" under the Fourth Amendment. *Id.* at 325-27.

Likewise, the officer's entry to Avery's trailer and the recording of the serial numbers of his computer constituted a warrantless search, for which there were no exigent circumstances. The computer was not identified in the original November 5th warrant as an item to be seized, and during the first entry to Avery's trailer nothing about the computer justified its seizure under the plain view doctrine. The

November 7th computer warrant was not obtained independent of the officer's illegal entry or the subsequent warrantless "search" of the computer by locating and recording its serial numbers. *Murray v. United States*, 487 U.S.533 (1988). Therefore, the warrant later obtained for the seizure of the computer fails constitutional muster and accordingly the seizure of the computer must be suppressed from any use at Avery's trial.

CONCLUSION

For all of the foregoing reasons, Steven Avery asks this court to enter an order suppressing from use at his trial any and all evidence seized from his trailer in any entry and search conducted after 10:05 p.m. on November 5, 2005, when the search warrant was executed. Further, Avery requests this court to enter an order suppressing from use at his trial any and all evidence seized from his garage in any entry and search conducted after 9:47 a.m. on November 6, 2005, when the search warrant was executed as to the garage. Finally, Avery asks this court to enter an order suppressing from use at his trial the computer seized from his trailer as a result of the illegal entries and searches.

Dated this 12th day of September, 2006.

Respectfully Submitted,

By: _____
Jerome F. Buting
State Bar No. 1002856
Attorney for Defendant

400 N. Executive Drive, #205
Brookfield, Wisconsin 53005
(262) 821-0999
(262) 821-5599 FAX

HURLEY, BURISH & STANTON, S.C.

_____
Dean A. Strang
Wisconsin Bar No: 1009868
Attorney for Steven Avery

10 East Doty Street, Suite 320
Madison, WI 53703
(608) 257-0945
(608) 257-5764 FAX
C:\JFB\SEPT06\Avery Brief in support of Motion Suppress _ Multiple Execution.wpd