STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE DERIVED FROM MULTIPLE EXECUTIONS OF WARRANT

I.

INTRODUCTION

The state's brief in response to the defendant's motion to suppress evidence based on the multiple entries of the defendant's residence and trailer argues that because the warrant included the entire 40-acre parcel of land at the Avery Salvage property, the search of any buildings specifically identified in that warrant was not complete until all 40 acres had been thoroughly searched. Therefore, the state apparently contends that the police were justified in going in and out of Steven Avery's trailer and garage as often as they wished, even if the warrant was fully executed previously as to those buildings on the parcel of land. State's Response at 15-16. The state offers no authority in support of this proposition, and the argument must fail.

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(1)

The state also presents an alternative argument that even if evidence was seized unlawfully after the warrant was executed at Steven Avery's home and garage, such evidence should be admissible under the doctrine of inevitable discovery. *See* State's Response at 22-23. Avery submits that legal doctrine is unavailable in this case to save the fruits of the state's unlawful entries.

II.

ARGUMENT

The search warrant issued on November 5, 2005, does include the entire 40-acre parcel of land at the Avery Salvage property, but more importantly, it specifically identifies and commands the search of individual residences located on that parcel of land. That includes both the trailer and garage occupied by Steven Avery, as well as that of his sister, Barbara Janda. The warrant does so for a reason - the particularity requirements of the Fourth Amendment.

> The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

Maryland v. Garrison, 480 U.S. 79, 84 (1987). For the same reasons, Article I, Section 11 of the Wisconsin Constitution requires particularity not only as to the place to be searched, but also the things to be seized. *State v. Munroe*, 2001 WI App 104, ¶ 9, 244

Wis. 2d 1, 630 N.W.2d 223. The "core value underlying the Fourth Amendment is that law-enforcement officers not be permitted to conduct wide-ranging, general searches." *Id.*

The state's argument, that because the entire 40-acre parcel had not been fully searched the police were allowed to come and go into the individual residences at will even after those buildings had been thoroughly searched earlier, runs afoul of the prohibition against general warrants, and would encourage the abuse of wide ranging, general exploratory searches. Indeed, it is the very reason often cited for the common law rule of "one warrant, one search." *See McDonald v. State*, 195 Tenn. 282, 259 S.W.2d 524, 525 (1953) (repeated execution of warrant can become "means of tyrannical oppression in hands of unscrupulous officer"). Not even the federal cases which have adopted the more relaxed "reasonable continuation search" have ruled such a wide ranging search as reasonable under the Fourth Amendment.

It would clearly be unreasonable to permit the police to escape the particularity requirement of the Fourth Amendment by including within a warrant not only the suspect's residence, but also a large parcel of land surrounding his home, and then arguing that the police have unfettered discretion to come and go into his residence because not all of the surrounding land had been searched. That would completely emasculate both the common law rule of "one warrant, one search" and the federal rule of "reasonable continuation search." Yet that is precisely

what the state argues here. The state's proposition is entirely unsupported by any authority and must be rejected.

As argued more fully in Avery's prior motion and brief, the warrant to search his trailer was executed on the evening of November 5th when four officers searched his small home thoroughly for nearly two and one half hours and seized as many as fifty items of evidence. The warrant was executed as to his garage the following morning. Any subsequent entries to either building were unlawful and any evidence seized during those entries must be suppressed.

Likewise, the state's alternative argument that the inevitable discovery doctrine should be invoked in this case fails.

The Fourth Amendment's warrant requirement acts to prevent unconstitutional violations before they occur, by requiring an independent determination of probable cause by a neutral and detached magistrate. In *Johnson v. United States*, 33 U.S. 10, 13-14 (1948), the court explained:

> The point of the fourth amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

The warrant in turn limits the scope of the search to those items and places for which probable cause exists at a given time, as determined by the neutral magistrate, not the police officer.

Evidence seized through unlawful means by police is generally excluded from use at trial so as to deter police from violating the protections afforded by the Fourth Amendment. Exceptions to this exclusionary rule have developed over time, one of which is the "inevitable discovery" doctrine, first sanctioned by the United States Supreme Court in *Nix v. Williams*, 467 U.S. 431 (1984). In *Nix*, local townspeople were methodically searching for the body of a young kidnap victim. Before the search party legally uncovered the body, an unlawfully obtained statement led police to the actual discovery of the body. The Supreme Court allowed the state to introduce the illegally obtained evidence upon a showing that the evidence would have been ultimately or inevitably discovered independent of the illegal police conduct. The court held that "If the prosecution can establish . . . that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale of the exclusionary rule has so little basis that the evidence should be received." *Id.* at 444.

In *Nix*, the constitutional violation concerned the defendant's sixth amendment rights, which were infringed by the officer's illegal use of a "Christian burial speech" to compel a confession. *Id.* at 435-36. Inevitable discovery is more difficult to apply when a Fourth Amendment violation is involved, because it comes into direct conflict with that amendment's probable cause and warrant requirements. *See United States v. Griffin*, 502 F.2d 959, 961 (6th Cir. 1974). One

problem with the use of the doctrine to admit tainted evidence seized beyond the scope of a warrant is that it removes the magistrate's limitation as to scope, thereby providing the police unfettered discretion as to where, when and for how long the police may search. Because of its potential conflict with the fundamental protections of the Fourth Amendment, courts do not favor its widespread use to save illegally obtained evidence:

> The doctrine of inevitable discovery is not an open door through which the fruits of all defective searches may be transformed into admissible evidence. The doctrine must be used with restraint and circumspection lest is become a vehicle abrogating the right of all citizens to be free from unreasonable searches and seizures.

State v. Kennedy, 134 Wis. 2d 308, 318, 396 N.W.2d 765 (Ct. App. 1986).[1]

In Wisconsin, to avail itself of the doctrine of inevitable discovery, the state must prove by a preponderance of the evidence that 1) it is reasonably probable that the evidence would have been discovered by lawful means but for the intervening law enforcement misconduct, 2) before the misconduct occurred, the law enforcement authorities already had the leads making the discovery inevitable, and 3) the law enforcement authorities were actively pursuing some alternate line of investigation at the time of the illegality. *State v. Schwegler*, 170 Wis. 2d 487, 500, 490

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[1]The doctrine seems most often to be applied where circumstances suggest that pursuant to standardized procedures, like police inventory searches, the evidence would have been revealed later notwithstanding the constitutional violation. *See State v. Weber*, 163 Wis. 2d 116, 143-44, 471 N.W.2d 187 (1991); *State v. Kennedy*, 134 Wis. 2d 308, 318, 396 N.W.2d 765 (Ct. App. 1986); *United States v. Pittman*, 411 F.3d 813, 817 (7th Cir. 2004); *United States v. Lemons*, 153 F.Supp.2d 948, 966-67 (E.D.Wis. 2001). No such circumstances exist in Avery's case.

N.W.2d 292 (Ct. App. 1992) (citing *United States v. Cherry*, 759 F.2d 1196, 1204 (5th Cir. 1985), *cert. denied*, 479 U.S. 1056 (1987)).

In this case, if the law enforcement agents exceeded the scope of their authority by repeatedly re-entering Steven Avery's residence and trailer after the original warrant was executed, then any evidence seized during those entries would have been unlawfully obtained - just as if they were warrantless entries. But, the state argues that because the search warrant for the Avery property was renewed on November 9th, this proves that the evidence found would inevitably have been discovered by lawful means when that second warrant was executed. This argument fails for a number of reasons.

First, it is not enough to say that police *could have* obtained a warrant earlier than they did because they already had probable cause, and that therefore they should be excused for their delay in doing so. If that was all that was necessary to invoke the inevitable discovery exception, the doctrine would completely emasculate the Fourth Amendment's requirement that a neutral and independent magistrate determine *before the search* whether probable cause exists and what the scope of the warrant should be. Such a rule would eviscerate the strong incentive that the exclusionary rule provides to police to obtain warrants wherever practical and would strike at the very heart of the Fourth Amendment protections.

Thus, in Avery's case, the state cannot rely on a claim that law enforcement had probable cause for a second warrant at the time of the illegal entries, even if they failed to obtain a second warrant until days later. The mere availability of a warrant or even the intention of law enforcement to obtain a warrant later cannot alone justify application of the inevitable discovery doctrine. *United States v. Lamas*, 930 F.2d 1099, 1102 (5th Cir. 1991). There must be evidence that the police had begun to *actually pursue* a warrant at the time of the violation. *Id.* In *Lamas*, the court said:

> The Supreme Court stated in *Williams* that the inevitable discovery exception "involves no speculative elements but focuses on demonstrated historical facts." 104 S.Ct. at 2510 n. 5. This comment implies that the alternate means of obtaining the evidence must at least be in existence and, at least to some degree, imminent, if yet unrealized. If the inevitable discovery exception can be applied only on the basis of the police officer's mere *intention* to use legal means subsequently, the focus of the inquiry would hardly be on historical fact.

(emphasis added). Here, the evidence is undisputed that whether or not the police had probable cause for a new warrant at the time of the unlawful entries, or even whether or not they had any intention of renewing the warrant for Steven Avery's property at some future time, they were not actively pursuing a new warrant at the time of the unlawful entries.

There is also no evidence the state was actively pursuing an alternate line of investigation at the time of the illegality which would have inevitably led to the discovery of further evidence on Steven Avery's property. The testimony established no effort to obtain a new search warrant for Avery's property until

sometime on the afternoon of November 9th. Despite repeated successful attempts to obtain other search warrants in the case between November 5th and 9th, no such effort was made with regard to the search of Avery's residence and garage. No other alternate line of investigation was being actively pursued with respect to the search of Steven Avery's property; all efforts in that regard were made with the misguided belief that the November 5th warrant permitted repeated entries of his residence and garage even after that warrant was already executed as to that property.

The state makes passing reference to searches of the 600 to 800 acres of surrounding property and off site interviews to establish that "[t]he government was actively pursuing an alternate line of investigation." State's Response at 23. However, nothing about that alternative line of investigation made the discovery of additional evidence in Avery's trailer or garage inevitable. By way of comparison, in *Nix*, the court noted that teams of volunteers were already engaged in a large-scale grid search of the area where the victim's body was eventually discovered after the defendant's unlawfully obtained confession directed them to its location. Since that alternative investigation would have discovered the same evidence the police obtained by illegal means, there was no deterrent purpose to be gained by suppression of that evidence.

The same is not true in Avery's case. At the time his trailer and garage were unlawfully re-entered, no one was already in the process of gaining access to that

property by some legal means by which the subsequent discovery of evidence can be deemed inevitable. The undisputed historical facts prove that on November 6th, 7th and 8th, the defendant's trailer and garage were repeatedly entered without *any* attempt by the authorities to obtain a new warrant. That somebody finally suggested they obtain a new warrant on November 9th does not save the state from the penalty for repeatedly violating Avery's constitutional rights the previous three days.

The state next argues that the November 9th warrant affidavit contains "a great deal of enhanced probable cause," (State' Response at 23) in comparison to the original warrant, which is apparently offered to show that an investigation was ongoing after the November 5th warrant was issued. However, unlike *Nix*, there was no separate, independent investigation ongoing in Avery's case, but rather one continuing investigation. This distinction was discussed by the court in *State v. Anderson*, 160 Wis. 2d 307, 319, 466 N.W.2d 201 (Ct. App. 1991), which rejected the state's argument that a police officer's plain view observation of a stolen shopping cart on the defendant's property would have led to a warrant to search for evidence of a burglary, even without the benefit of two illegal searches of his property :

> The problem is that there was no independent police investigation in this case, as there was in *Nix*. Rather, there was one continuing investigation here. While in *Nix* there were two separate investigational paths, here there was but one continuing path. Although the investigational pathway in this case was originally based on valid probable cause, it became tainted in the course of two subsequent illegal searches. The doctrine thus espoused is one of inevitable investigation, not inevitable discovery. To equate discovery based on an untainted independent source with investigation based on a tainted source would transform the inevitable discovery doctrine into permission for the police to conduct a fishing expedition

> using tainted evidence as their bait. That strikes at the very heart of fourth amendment protections.

Moreover, missing from the November 9th warrant affidavit is any probable cause that further evidence may be found in Avery's trailer or garage beyond that already discovered in the thorough searches that were legally conducted, and concluded, pursuant to the first warrant on November 5th. The search warrant judge was not told that both locations had already been searched thoroughly by four trained evidence collection officers, and all known evidence already seized. If he had been so informed it is unlikely the judge would have continued issuing new warrants to search those properties on the same probable cause showing.

In addition, the record does not support a finding that *before* the unlawful entries occurred the authorities had leads which would make the discovery of additional evidence in Avery's residence or garage inevitable. The record is not entirely clear as to the precise times that additional discoveries or leads came into the possession of the authorities.[2] However, it is clear that Steven Avery was not linked to the victim's vehicle until "later on Tuesday" (November 8th) when the crime lab advised him that Steven Avery's DNA profile from the databank matched blood found inside that vehicle. Trans., 8/10/06, at 96. Similarly, it was not until

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[2]Any deficiencies in the factual record must detract from the state's argument, because the state is the party which has the burden to establish the inevitable discovery exception by a preponderance of the evidence. *State v. Schwegler*, 170 Wis. 2d at 500. If the state intended to rely on inevitable discovery it should have established a clear factual record. Any ambiguities in the record can not inure to the state's benefit.

November 8th that the bone fragments were found in the burn pit. *Id.*[3] By then, Avery's trailer had been unlawfully entered on four separate occasions on November 6th, 7th and 8th,[4] and his garage had been re-entered unlawfully on November 8th at 12:19 pm. *Id.*, at 48-49. Thus the state did not possess those leads at the time of any of the misconduct related to the unlawful entries and searches on November 6th, 7th and 8th. Therefore, at the time of those illegal re-entries on November 6th, 7th and 8th, it cannot be said that a second search warrant authorizing any further search of Avery's trailer and garage was inevitable.

Finally, the sheer number of repeated unlawful entries involved in this case should deny the state the benefit of the doctrine of inevitable discovery. After the warrant was executed at Steven Avery's residence on Saturday night, November 5th, his trailer was re-entered *six more times* without obtaining a new warrant. Similarly, after the garage was searched on Sunday morning, November 6th, it was re-entered twice more with no effort to obtain a warrant. Given the number of constitutional violations evident, application of the inevitable discovery doctrine to these facts would make a mockery of the Fourth Amendment. The inevitable

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[3]Fassbender testified that he was unsure what time of day the bone fragments were found, and could not say that they were found before the search of Avery's residence and trailer on the morning of November 8th. Trans. 8/10/06, at 96.

[4]After the November 5th search of Avery's trailer was completed at 10:05 p.m., the trailer was re-entered on November 6th at 12:25 p.m. (Trans. 8/09/-06, at 206), sometime later in the evening on November 6th (Trans. 8/10/06, at 87-88), November 7th at 9:57 a.m. (Trans. 8/09/06, at 207-08), and November 8th at 8:25 a.m. (*Id.*, at 208-09).

discovery exception was not intended to encourage shortcuts for police to eliminate the involvement of a neutral and detached magistrate. *State v. Handtmann*, 437 N.W.2d (N.D. 1989). Applying the inevitable discovery exception here would encourage, rather than deter, unlawful shortcuts to the fundamental protections of the Fourth Amendment.

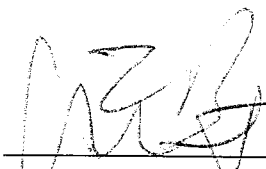
CONCLUSION

For all of the foregoing reasons, together with those advanced in Avery's prior motion and brief in support, the defendant requests 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, and any and all evidence seized from his garage in any entry and search conducted after 9:47 a.m. on November 6, 2005.

Dated at Brookfield, Wisconsin, October 12, 2006.

Respectfully submitted,

BUTING & WILLIAMS, S.C.



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