STATE OF WISCONSIN	CIRCUIT COURT	MANITOWOC COUNTY

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STATE OF WISCONSIN
FILED
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CLERK OF CIRCUIT COURT

STATE OF WISCONSIN,

Plaintiff,

v.

Case No.: 05-CF-381
Judge: Patrick L. Willis

STEVEN A. AVERY,

Defendant.

STATE'S REPLY BRIEF ON ALLEGED MULTIPLE EXECUTIONS OF SINGLE SEARCH WARRANT

I. INTRODUCTION.

The state stands by its original argument in this case. There is no constitutional infirmity. There was no violation of the "one warrant—one search principle." The efforts undertaken by law enforcement under the totality of the circumstances were reasonable and, thus, the evidence is admissible. However, should the court find that the efforts of law enforcement were unreasonable, the state offers the theory of inevitable discovery as another basis upon which to sustain the admissibility of the evidence at issue.

The state offers two more general observations regarding the defendant's supplemental memorandum. First, the warrant was not fully executed until the entire 40-acre parcel, including the defendant's residence and garage, was systematically searched. This took seven days. It took seven days because of the magnitude of the area

searched, and the nature of the evidence sought. Moreover, the nature of evidence sought was a constantly changing. As each day passed, the officers learned more and more. With each passing day of investigation, the evidentiary significance of items previously thought to be unimportant changed. The need to collect these items became more apparent.[1] The defendant argues that if the court were to accept the state's premise, such a determination would run afoul of the prohibition against general warrants and would encourage the abuse of wide ranging, general exploratory searches (defendant's brief, p. 3). The defendant, like he did in his original pleading, cites *McDonald v. State,* 195 Tenn. 282, 259 S.W.2d 524, 525 (1953). Second, he further argues in the next paragraph that it would 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 the police have unfettered discretion to come and go into his residence because not all of the surrounding land had been searched" (defendant's brief, p. 3). He argues that such would emasculate both the common law of one warrant—one search and the federal rule of the reasonable continuation search. Interesting sentiments; however, they are unsupported by argument or citation to case law. Simply to label a claimed error as unconstitutional does not make it so. *State v. Schlise,* 86 Wis. 2d 26, 29, 271 N.W.2d 619 (1978); and *State v. Scherreiks,*

153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989). "A party must do more than

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[1] An example was the collection of white ashes from an ash tray in defendant's trailer on Saturday, November 12. Perhaps the suspect had kept a souvenir. Another example was the

simply toss a bunch of concepts into the air with the hope that either the trial court or the opposing party will arrange them into viable and fact-supporting legal theories." *State v. Jackson,* 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). The defendant fails to demonstrate how the "particularity" requirement was violated. In fact, the November 5 warrant (Exhibit 15) was quite particular with respect to the places to be searched and the items to be seized. Defendant fails to explain why a determination of reasonableness under the unique facts of this case would do violence to the common law or constitutional principles at issue. Arguments undeveloped and unsupported do not merit further response.

II. INEVITABLE DISCOVERY.

The Inevitable Discovery Doctrine, although previously utilized by several of the federal courts of appeal, was first recognized by the United States Supreme Court in *Nix v. Williams,* 467 U.S. 431 (1984).

The doctrine was first recognized as viable in Wisconsin in *State v. Kennedy,* 134 Wis. 2d 308, 317, 396 N.W.2d 765 (Ct. App. 1986). Today, the proponent of the Inevitable Discovery Doctrine must show by a preponderance that the tainted fruits inevitably would have been discovered by lawful means and to do so, the prosecution must demonstrate: 1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; 2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and 3) that prior to the unlawful search, the government also was actively pursuing some

alternate line of investigation. *State v. Schwegler,* 170 Wis. 2d 487, 500, 490 N.W.2d 292 (Ct. App. 1992).

A. There was a reasonable probability that the evidence in question would have been discovered by lawful means.

In the case at bar, it is self-evident the state meets this requirement. The state applied for, received, and executed a second warrant. A copy of that November 9 warrant was attached to the state's original brief. That warrant has never been challenged. It is clear the warrant is supported by probable cause. A Return was filed by Investigator Dedering for the Calumet County Sheriff's Department on November 13, 2005.

B. The leads making discovery inevitable were possessed by the state at the time of the alleged misconduct; i.e., in this case, the repeated entries to the defendant's trailer and garage on Sunday, November 6, through Tuesday, November 8.

As previously indicated, the probable cause to search the entire 40-acre parcel of land as well as the defendant's trailer and garage never dissipated. The court need look no further than the affidavit which supported the issuance of the November 9 search warrant. More evidence was being discovered all the time. The evidence discovered continued to point to Steven Avery. The evidence uncovered on Sunday, Monday, and Tuesday all pointed to Steven Avery and no one else. All the leads developed sustained the original probable cause and supplied additional probable cause to believe there was more evidence in the defendant's trailer and garage linking him to the disappearance and subsequent murder of Teresa Halbach.

First, law enforcement was made aware on Monday, November 7, that there were both male and female blood samples in Teresa Halbach's vehicle. On Tuesday, November 8, as aptly noted on p. 11 of defendant's brief, a DNA profile was developed from the databank matching the defendant's blood with the male blood found in the vehicle. Additionally, on Tuesday, November 8, license plates for the Halbach vehicle were found in another junked vehicle in a different part of the salvage yard. Furthermore, human remains were found in the burn pit. In *Nix v. Williams,* 467 U.S. 431 (1984), the United States Supreme Court made a point of acknowledging that at the time of illegal search which brought about by the famous "Christian Burial" speech, another search was underway headed in the direction of where the body of where the little girl was found. *Nix,* 467 U.S. at 448-49. Similarly in the case at bar, other searches were already underway for evidence that supported the continuing search of defendant's residence and garage. These other searches were being conducted at the same time the defendant's residence and garage were being searched on Sunday through Tuesday.

C. The state was actively pursuing an alternate line of investigation at the time of the alleged illegality in the case at bar.

On Sunday, Monday, and Tuesday, the state was actively searching other areas of the 40-acre parcel of land subject to the search warrant. The officers located a burn barrel in the vicinity of the defendant's residence. In that burn barrel, they located a palm pilot, a camera, and a cell phone—all subsequently identified as belonging to Teresa Halbach. The officers were conducting offsite interviews in Marinette County as well as Manitowoc County. The interviews included members of the Avery family. The

interviews included the defendant.[2] Moreover, human remains were found in the burn pit behind the defendant's residence. All of this information was developing at the same time as the searches of the defendant's residence and garage. Even if that were not enough to show an alternate line of investigative work, the fact that all members of the Avery family were required to submit to DNA testing certainly demonstrates the state was pursuing alternate investigative avenues.

Next, the defendant relies on *State v. Anderson,* 160 Wis. 2d 307, 466 N.W.2d 201 (Ct. App. 1991), *rev'd. on other grounds,* 165 Wis. 2d 441, 477 N.W.2d 277 (1991). He asserts the decision in *Anderson* is dispositive on question # 3 regarding the presence or absence of an independent investigation. The defendant asserts that because there was only one investigation and not a separate independent one regarding the death of Teresa Halbach, the state's argument must fail (Defendant's brief, p. 10). Not only is the defendant's reliance on this court of appeals decision problematic, he also misreads it.

First, it is important to note that the court of appeals decision in *Anderson* was reversed. While the Wisconsin courts of appeal believe that holdings not specifically reversed on appeal retain precedential value, *State v. Dentici,* 2002 WI App 77, 251 Wis. 2d 436, 643 N.W.2d 180; *State v. Jones,* 2002 WI App 196, 257 Wis. 2d 319, 651 N.W.2d 305, the Wisconsin Supreme Court has not so ruled. *State v. Harris,* 2004 WI 64, n.6, 272 Wis. 2d 80, 680 N.W.2d 737. *See also State v. Gary M.B.,* 2004 WI 33, ¶ 44 n.1, 270 Wis. 2d 62, 676 N.W.2d 475 (Abrahamson, C.J. dissenting).

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[2] A suppression hearing has been held regarding the statements made to Marinette Detective Anthony O'Neil.

Assuming, *ad arguendo,* the rule still has validity, the case at bar is distinguishable from *Anderson* in two ways. First, there need not be a separate, independent investigation. That is a nonsensical interpretation of the rule in *Nix v. Williams*, 467 U.S. 431, which was adopted in *State v. Schwegler,* 170 Wis. 2d 487. The absurdity of this proposition is self-evident on its face. One cannot expect the police to have two separate investigations going on at the same time regarding the same crime. It is quite clear that the meaning and intent of the requirement is that the police have separate paths of investigative efforts, one of which would have inevitably led to discovery of the evidence in question. Were it otherwise, there would be duplicative resources spent on efforts to resolve one crime. The drain on law enforcement would be extreme and, quite frankly, would be a burden that could never really adequately be met.

Second, there were separate investigative paths as well. At the same time, law enforcement officers were searching the residence and garage of the defendant, other officers were pursuing separate investigative leads. As previously noted, searches were ongoing for the salvage yard business, the residence of Barbara Janda—the defendant's sister, and other members of the family. Additionally, Crime Lab analyses were underway for the blood samples collected from the vehicle of Teresa Halbach. Further, investigators from the Wisconsin Department of Justice, Division of Criminal Investigation Arson Bureau, were called in to search the fire pit located behind the defendant's residence after human remains were suspected. Consequently, there were separate investigative paths underway. The state has previously mentioned and will not repeat again that there were investigative interviews occurring in several different

counties, most notably Marinette County and Calumet County as well as searches in other parts of Manitowoc County.

The most critical distinction between the facts in *Anderson* and the case at bar stems from the fact that the subsequent search in the case at bar; *i.e.,* pursuant to the November 9 search warrant, was not tainted by any of the alleged illegality stemming from the repeated searches of the defendant's trailer and garage as happened in *Anderson*.

In *Anderson*, there were three searches at issue. Initially, the police obtained consent to search Anderson's garage from Anderson's daughter. After that search the police applied for a search warrant and executed the warrant. Eventually, Anderson was arrested, gave an inculpatory statement, and agreed to a third search the following day. The court of appeals determined that the daughter did not have authority to consent to the initial search. As for the second search, it was tainted because information obtained on the consent search was used and the officers could never locate the actual warrant. The court determined the officers executed only the affidavit in support of the warrant. The court of appeals ruled that the third search was also defective and did not comply with the inevitable discovery requirements. The court used the language cited in defendant's brief on p. 10. The Supreme Court reversed, finding the statement and the third search sufficiently attenuated. *Anderson*, 165 Wis. 2d at 447.

In the case at bar, while there was some evidence collected from the subsequent searches of the defendant's trailer and garage included in the November 9 search warrant, the balance of the warrant contains more than enough probable cause to overcome any possible taint associated with evidence collected from the repeated entries of the

defendant's trailer and garage. Again, it is important to note that *Anderson* was followed shortly thereafter by *State v. Schwegler,* 170 Wis. 2d 487. The *Schwegler* case is controlling with respect to the requirements for invoking the Inevitable Discovery Doctrine in Wisconsin.

In *Schwegler*, the court cited to the case *United State v. Cherry,* 759 F.2d 1196, 1204 (5th Cir.), *cert. den.* 479 U.S. 1056 (1985), for the proposition that there must be some pursuit of an alternate line of investigation.[3] In the *Cherry* court's discussion of this issue was its review of *United State v. Miller,* 666 F.2d 991 (5th Cir.), *cert. den.* 456 U.S. 964 (1982). In *Miller*, the Fifth Circuit recognized that evidence may still be admissible even if all three of the *Brookins* (614 F.2d 1037 (5th Cir. 1980)) prerequisites are not met when the alternate means for obtaining the evidence was an intervening and independent event occurring subsequent to the alleged misconduct. *Miller,* 666 F.2d at 997; *Cherry,* 759 F.2d at 1205. Here, the independent intervening facts are the discovery of human remains in the fire pit behind the defendant's garage on November 8, 2005. This fact, along with the identification of the defendant as the donor of the blood found in the Halbach vehicle, is the independent intervening factor permitting application of the Inevitable Discovery doctrine in this particular case.

A case which illustrates the clear intent of the *Schwegler* court's understanding of what constitutes "inevitable discovery" and which calls into question defendant's reliance on the language in *Anderson* is *State v. Lopez,* 207 Wis. 2d 413, 559 N.W.2d 264 (Ct.

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[3] *See* argument *supra* for discussion regarding the establishment of an alternate line of investigation.

App. 1996). In *Lopez*, the court of appeals found that the inevitable discovery doctrine was appropriately applied by the trial court in that case. In *Lopez,* the trial court suppressed a statement made by Lopez. The statement was made to an officer during the course of executing a search warrant at his residence. The officer asked Lopez where the key to the freezer was. The officer did not want to damage the freezer by prying it open to look for marijuana. Lopez told him where the key was. The statement was suppressed because *Miranda* warnings were not administered. Nonetheless, the trial court and the appellate court ruled that the evidence would have been inevitably discovered. There certainly was no "independent" investigation under way in the strict sense of the word offered by the defendant. Interestingly enough, *Anderson, Schwegler, and Lopez* are all appellate court decisions from District II.

Similarly, in the case at bar, the additional identification of blood, the discovery of human bones in a fire pit, and the discovery of license plates belonging to Teresa Halbach in a junked car on the Avery property, which, by the way, was located along the access road to the defendant's trailer, all led to the reasoned conclusion and belief that the defendant, Steven Avery, was involved in the disappearance and death of Teresa Halbach. All of this information pointed to the execution of additional searches at his residence. Searches which were carried out pursuant to a second search warrant. Therefore, the evidence in this case would have been inevitably discovered just as it was in *United States v. Keszthelyi*, 308 F.3d 557 (6th Cir. 2002), as well as in *State v. Lopez,* 207 Wis. 2d 413.

CONCLUSION

There was no violation of the one warrant—one search principal in this case. The state executed one search warrant for one 40-acre parcel of land which contained 3,800 junked cars, four residences, and numerous buildings belonging to the Avery Salvage Yard business. The manner in which the warrant was executed was reasonable, and there was no fourth amendment violation.

If, however, this court were to find such a violation, the evidence at issue here would have been inevitably discovered by virtue of the application, receipt, and execution of the November 9 search warrant.

Dated this 26th day of October, 2006.

Respectfully submitted,

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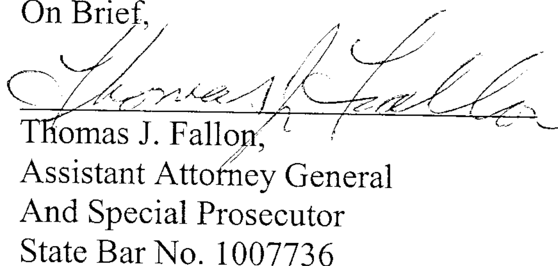
On Brief,



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