Seal + file

CALUMET COUNTY
DISTRICT ATTORNEY'S OFFICE
Kenneth R. Kratz, District Attorney

Jeffrey S. Froehlich,
Assistant District Attorney
Julie L. Leverenz/Llonda K. Thomas
Victim/Witness Assistance Coordinators

206 Court Street
Chilton, WI 53014
(920) 849-1438
FAX: 849-1464

January 12, 2007

Honorable Patrick Willis
Circuit Court Judge, Branch 1
Manitowoc County Courthouse
1010 S. Eight Street
Manitowoc, WI 54211-2000

[Filed Under Seal—Fax and US Mail]

RE: State v. Avery; Case # 05-CF-381
State's Recommendation as to "Wrongful Conviction" Evidence

Dear Judge Willis:

The court has requested the state's recommendation as to what evidence may be properly admitted regarding the defendant's "wrongful conviction" in 1985, which led to his exoneration and release from prison in September, 2003.

The state had opposed any reference to the wrongful conviction, previously arguing its lack of relevance, probative value, or in the alternative would be offered for an impermissible purpose (e.g. sympathy) and/or would tend to confuse the jury and be a waste of time (asking the court apply 904.03 in the same manner it has to exclude the state's offered other acts evidence or evidence of inmate statements). The court, alerting the state that "some version of the wrongful conviction is likely to be allowed" has now asked for direction on how much of the defense offered version of the events should be offered to the jury.

Options

The state sees several options the court has available to accomplish the goal of allowing the jury to consider the defendant's wrongful conviction, when asked to consider facts at consequence in this unrelated homicide prosecution. Although not exclusive, those facts may include:

1. That the defendant was convicted of a crime or crimes in 1985.
2. The crime(s) included rape.
3. The 1985 original sentence was for 30 years.
4. The Manitowoc County Sheriff's Department was the investigating agency, which led to the 1985 rape conviction.
5. The conviction was based primarily on eyewitness identification of Steven Avery by the rape victim at trial.
6. The defendant received a concurrent sentence of 6 years imprisonment for Endangering Safety and Pointing a Firearm, for an unrelated event.

184
(1)

7. In 2003, the defendant, with the assistance of the "Innocence Project" was successful in securing the defendant's release from prison.
8. That exoneration was on the basis of nuclear DNA testing, performed by the State of Wisconsin Crime Laboratory (Sherry Culhane, Analyst).
9. The state of Wisconsin joined the defense in securing the defendant's release in 2003.
10. James Lenk, Andrew Colborn (or any other witness involved in the current criminal investigation) were not employed with the Manitowoc County Sheriff's Department in 1985.
11. In October, 2004, the defendant filed a federal civil lawsuit against Manitowoc County (and perhaps former County officials individually). James Lenk, Andrew Colborn, or any current law enforcement employee of Manitowoc County, were not named defendants in the civil lawsuit.
12. Lt. Lenk and Sgt. Colborn were deposed witnesses in the civil lawsuit, together with many other officials, citizens and potential witnesses.
13. At the time of filing the civil lawsuit (and at its settlement), Manitowoc County was insured, meaning that no county employee, or no citizen for that matter, was at any financial "risk" as a result of the lawsuit.
14. Sometime in early 2006, the defendant settled his civil lawsuit for $400,000. None of that money was paid by Manitowoc County employees or taxpayers.

Admissibility Theory

The defense seeks introduction of many of the above recited facts (perhaps more) as "evidence" of bias—that is, witness bias as impeachment evidence (presumably against Lt. Lenk and Sgt. Colburn); institutional bias as a 6th Amendment right to present a defense (presumably against the entire Manitowoc County Sheriff's Department, citing various theories of how that might be relevant). The defense originally offered this evidence to put into context previously offered statements of prison inmates (which have since been ruled inadmissible by this court, and no longer serve any legitimate theory for its admissibility).

Bias

The state concedes that "bias" is a legitimate issue for juror's consideration of witness testimony. *State v. Williamson, 84 Wis.2d 370 (1978); State v, Missouri, 291 Wis.2d 466 (2006).* The state disagrees, however, that the right to claim bias as a defense is unlimited, or can be applied to an entire Law Enforcement community. Evidence offered to prove bias must be rationally related to the witness sought to be impeached by it. In other words...testimony offered to show bias must be "relevant" on that point. *Williamson, at p. 384.* To be relevant the evidence must have some logical or rational connection with the fact sought to be proved. *Id.* Relevant evidence on the issue of a witness' bias must also satisfy sec. 904.03, Stats., requiring the trial court to weigh the probative effect of the evidence against its prejudicial effect. *Id., at p. 384-85.*

Suggestions that employees of a Law Enforcement Agency, not employed during a complained of investigation, exhibit some BIAS against an exonerated citizen, is by itself not worthy of the category "relevant evidence." Should the defense have some evidence of bias (other than speculation that these officers may feel such embarrassment that they may very well have committed criminal acts to "pay back" the subject of their angst), this topic may be very helpful to the trier of fact. Evidence, is of course the key---usually, courts would not allow speculation, and certainly would not allow an offer of proof to include assumptions or "what ifs" to justify

introduction of such emotionally charged evidence.

So there is no confusion as to the state's position, when reputations are at stake in life (especially in the middle of such publicly charged homicide proceedings), to subject otherwise honest and dedicated Law Enforcement Officers to slurs of planting evidence, lying in court, intentional misdirection of a criminal investigation away from the true murderers towards an "innocent victim of incredible coincidence like Steven Avery", you'd better have some PROOF that backs up your claims. Subjecting these officers to charges of malfeasance, or worse, without a shred of evidence, is despicable, and at the very least falls well short of admissible evidence.

The state suggests this court also apply 904.03, finding whatever minimal probative value may exist (beyond mere speculation by the defense) is far outweighed by the danger of unfair prejudice or confusion of the real issues to be tried.

Therefore, the state urges the court reconsider its "inclination" to allow evidence of the defendant's wrongful conviction, establishing bias of any witness, much less an entire Law Enforcement community; the offer of proof lacks even a hint of real evidence related to these witnesses.

Alternative Suggestion

Should the court still believe that the 1985 wrongful conviction, and 2003 exoneration is sufficiently linked to witnesses to be considered "bias" within the meaning of 904.01 (relevant evidence), the state suggests the following facts be read, by the judge, to the jury (with appropriate admonition as to its purpose):

1. That the defendant was convicted of a crime or crimes in 1985.
2. In 2003, the defendant, with the assistance of the "Innocence Project" was successful in securing the defendant's release from prison.
3. That exoneration was based on nuclear DNA testing, performed by the State of Wisconsin Crime Laboratory (Sherry Culhane, Analyst).
4. The State of Wisconsin joined in securing the defendant's release in 2003.

Evidence of the number of years spent incarcerated necessarily require an explanation of the defendant's concurrent imprisonment, which this court does not want to include for jury consideration. Evidence of the civil lawsuit provides no additional "bias" evidence as no financial stake existed for proposed witnesses. Any "embarrassment" to the Law Enforcement community, if in fact that is the basis of the evidence's relevance, will be illustrated by the fact of the conviction, and circumstances leading to the exoneration.

Sincerely yours,

Kenneth R. Kratz
Special Prosecutor

Cc: Tom Fallon, Norm Gahn
Dean Strang, Jerome Buting