STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S RESPONSE TO STATE'S MOTION FOR RELEASE OF BLOOD VIAL EVIDENCE AND BLOOD SPOT CARDS FOR SCIENTIFIC TESTING

The State has filed an eleventh hour motion seeking the opportunity to conduct undisclosed, and apparently secret, testing on an exhibit that is in the court's secure custody, and which will now be an official defense exhibit in this pending trial. The State evidently hopes it can perform these secret tests on this court exhibit some time in the next few weeks so that it can attempt to ambush the defense in rebuttal, when there will be no reasonable time for the defense to respond to challenge the validity, scientific reliability or probative value of these covert tests, let alone to hire its own consulting or testifying expert or to conduct independent testing.

1. This Court has already rejected one attempt at EDTA tests while finding, like most courts, that they are scientifically unreliable. Having failed in that

attempt, the State now changes tactics and has decided not to tell the court or defense what tests it intends to perform, no doubt because it understand there is likewise no scientific validity to these other tests. Mr. Avery objects to this last minute attempt to do what the State could have and should have done fifteen months ago, when he proclaimed loud and clear that he believed his blood was planted in that vehicle.[1]

2. The State has known for at least seven weeks that an unsecured vial of Mr. Avery's blood was sitting in the Clerk's office for years, including the early days of November, 2005, just after Teresa Halbach was reported missing. The State told this Court in December that it believed there were tests that could be done to demonstrate the blood vial was not connected to this case. Now, after all that time, the State is still unable to disclose what tests it thinks would be scientifically reliable and probative. The state's silence reveals just how unlikely it is that any such tests exist --- if reliable, scientifically acceptable tests were available the court would have been told long ago.

The State offers no authority for this extraordinary request. Instead, the State plays coy, arguing that it need not advise Mr. Avery how it intends to meet his

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[1]One exception to the State's request is the reference to fingerprint analysis, to which the defense has no objection. That can be done at the Clerk's office without the need to tamper with or alter the current condition of the vial, which is expected to be a defense exhibit in this trial.

defense (a "planting defense" he disclosed openly to the State and the public fifteen months ago). The State suggests *State v. Konkol*, 2002 WI App 174, ¶ 1, 256 Wis. 2d 725, 649 N.W.2d 300, permits the sort of ambush sought in this case. It very clearly does not.

In *Konkol*, the defendant was arrested for a fourth offense OWI, and blew a 0.12% on an Intoximeter at the police station. He told the arresting officer that he consumed only one alcoholic drink. In anticipation of that defense at trial, the prosecution arranged for an expert witness to be used in rebuttal to testify that, based on blood alcohol absorption in the body, the defendant's story of only one drink was impossible. The State withheld the expert from its pretrial witness list and the defendant cried foul. The State argued it had no idea before Konkol testified whether he would maintain the "only one drink" strategy or not, so the expert was properly a rebuttal witness when he did so testify.

The *Konkol* court of appeals agreed that the State had no duty to disclose a rebuttal witness before trial, even if it knew before trial that the witness would be called. *Id.* at ¶ 1. But the court reached that conclusion only with respect to the statutory requirements in § 971.23(1) (d), which requires a pretrial list of witnesses, but makes an exception for rebuttal or impeachment witnesses. The state's expert in *Konkol* did not conduct any scientific tests that were not disclosed before rebuttal.

The expert was simply offered to present medical testimony about blood alcohol absorption to rebut the defendant's story.

Here, the State seeks something entirely different, and the statute at issue would be § 971.23 (5) Scientific Testing:

> On motion of a party subject to s. 971.31(5), the court may order the production of any item of physical evidence which is intended to be introduced at the trial for scientific analysis under such terms and conditions as the court prescribes.

The most obvious difference between *Konkol* and this motion is that the state's request here would require scientific testing before it could be used in rebuttal. This is not just a witness who is held back for impeachment or rebuttal, but one or more undisclosed scientific tests which if suddenly sprung on the defense at that late stage would allow the defense no opportunity to challenge. The supreme court in *State v. Wold*, 57 Wis. 2d 344, 204 N.W.2d (1973), recognized the unfairness of such an approach:

> Recognizing the strong need to avoid surprise of the defense in the area of scientific evidence, the drafters of the ABA Standards stated:
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> > The need for full and fair disclosure is especially apparent with respect to scientific proof and the testimony of experts. This sort of evidence is practically impossible for an adversary to test or rebut at trial without an advance opportunity to examine it closely.

57 Wis. 2d at 351.

So too here, where the state's proposal would preclude the defense any meaningful opportunity to closely examine the results of any tests the State presents, much less locate and consult with independent experts of defense counsels' choosing. The defense would have a right to challenge whether the proposed science even satisfies the *Walstad* standard for admissibility, which could necessitate potential evidentiary hearings with dueling expert witnesses outside the presence of a jury, while the jurors wait to resume the trial. Moreover, independent defense tests could delay the proceedings for weeks. Even if the trial could be put on hold for such testing, there would be the risk that jurors would become tainted by an awareness of outside information that may result in a mistrial.

3. In addition to the practical concerns the state's motion presents, the court should deny the motion for another reason. A motion of a party for scientific testing under § 971.23(5), is expressly subject to § 971.31(5), which requires motions before trial to be made within 10 days after arraignment, "unless the court otherwise permits." Mr. Avery recognizes that rule has been relaxed for both sides, given the complex nature of legal and factual issues in this case, but it is nonetheless worth noting the lateness of this request, just 2 business days before trial. Had the State filed a motion under § 971.23(5) when it first discovered the existence of the vial, the results of any such tests may have been available by now - that is, if the State

believes now that some sort of test can be ready for its rebuttal, just 5 weeks from now, then had the State filed such a motion on December 14th, the test(s) would have been available by last week at the latest.

The State made the calculated gamble that it could avoid having to test the vial if the court ruled it inadmissible. While such a wait-and-see approach may be fine earlier in the proceedings, it was foolish, at best, and presumptuous at worst, to adopt that strategy at this late date. This court should not reward the State for taking and losing such a gamble. This is not a sporting contest, but the most serious of all criminal proceedings. Mr. Avery's constitutional right to a fair trial must not be prejudiced by the state's gamesmanship.

4. Finally, Mr. Avery objects for another, practical reason. He intends to use the blood vial as an exhibit in court, and any alteration of the condition of the vial (the amount of liquid, the condition of the top) would prejudice his right to demonstrate the viability of the defense that the vial was improperly tampered with by Lt. Lenk or Sgt. Colborn, directly or through agents. This jury should see the blood vial with its present volume, its obvious liquid State, and its location within the unsealed containers if the jury is to assess accurately the competing prosecution and defense contentions.

For all of these reasons, this court should deny the state's motion, but could order, under § 971.23(5), certain terms and conditions to permit fingerprint analysis of the blood vial, if the State still wishes that as a reasonable alternative.

Dated at Brookfield, Wisconsin, February 1, 2007.

Respectfully submitted,

STEVEN A. AVERY, *Defendant*

HURLEY, BURISH & STANTON, S.C.

10 East Doty Street, Suite 320
Madison, Wisconsin 53703
[608] 257-0945

Dean A. Strang
Wisconsin Bar No. 1009868
Counsel for Steven A. Avery

BUTING & WILLIAMS, S.C.

400 Executive Drive, Suite 205
Brookfield, Wisconsin 53005
[262] 821-0999

Jerome F. Buting
Wisconsin Bar No. 1002856
Counsel for Steven A. Avery

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