STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S MOTION FOR SEQUENTIAL INDEPENDENT TESTING AND FUNDING

Steven A. Avery, by counsel, now moves the Court for an order granting relief as follows:

A. Recognizing that defense testing will have to be sequential to completion of EDTA quantitation testing by the FBI Laboratory;

B. Either declaring a mistrial or making arrangements for a continuance of several months that will be necessary after the FBI completes its testing and discloses both a validated protocol and its results to the defense; and

C. Providing public funding for EDTA quantitation testing, as a matter of due process.

As grounds for this motion, Mr. Avery explains:

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1. *Background.* In advance of the December 15, 2006, deadline that this Court set for both motions in limine and general discovery in the October 19, 2006, pretrial scheduling order, counsel for Mr. Avery disclosed to the state and the Court the fact that the court file in Mr. Avery's 1985 conviction for attempted murder and sexual assault contained a box that bore a label suggesting that a whole blood sample from Mr. Avery was in the box. The defense of course did not know the actual contents of the box, because defense counsel thought it improper to open the box alone, given its potential evidentiary importance. Although Mr. Avery had claimed publicly in November 2005 that someone must have planted his blood if it was in Ms. Halbach's car, the state evidently never checked the 1985 court file, which is and was a public record. The defense did.

After the Court took custody of the box at issue, the parties opened the box jointly and videotaped the process on December 14, 2006. The box did contain a vial of blood, marked with Steven Avery's name, and still liquid. This discovery prompted several moves.

First, the state sought an order excluding the blood vial or, alternatively, an order "to have the vial of blood analyzed, which may necessitate a continuance." State's Notice of Motion and Motion to Exclude Blood Vial Evidence (January 3,

2007). Specifically, the state's memorandum supporting its motion made the following assertions, among others:

a. "At the latest, the defense was aware of the existence of this vial of blood on July 20, 2006." State's Memorandum at 1 (January 3, 2007).

b. "[I]ndependent testing by the Federal Bureau of Investigation (FBI) will establish whether this vial of blood could be a source for any of Steven Avery's blood found in Teresa Halbach's SUV." State's Memorandum at 5.

c. The state wished an "opportunity to chemically test and/or quantitate the volume of blood remaining in the vial." State's Memorandum at 6.

d. Two labs capable of conducting appropriate testing existed: the FBI Laboratory and National Medical Services in Willow Grove, Pennsylvania. State's Memorandum at 6.

e. "The State would not object to a defense admissibility of scientific evidence motion and would conduct such a hearing." State's Memorandum at 6.

f. "The FBI, however, will require 3 to 4 months from the receipt of the samples to complete the testing." State's Memorandum at 6.

g. Although the state suspected that testing would prove that the blood in the vial is not the blood of Mr. Avery found in Teresa Halbach's car, the state also wrote, "On the other hand, if independent testing shows that the vial of

blood could be the source of the defendant's blood found in Teresa Halbach's vehicle, then clearly a miscarriage of justice will be avoided by having that blood subjected to analysis prior to the trial." State's Memorandum at 8.

2. The Court conducted a hearing in Chilton on Thursday afternoon, January 4, 2007, at which the parties and the Court discussed further the state's motion. That hearing included the following pertinent comments:

a. On behalf of the state, ADA Norm Gahn asserted that the defense had "a responsibility under 971.23, the discovery statute, to tell us about this and give us the opportunity to test this. Because this is — this is the crux of the case, this vial of blood now." Transcript at 8 (January 4, 2007). Mr. Gahn did not remind the Court that the defense disclosed this potential evidence at least nine days (and perhaps 30 or more days) *before* the discovery deadline that the Court had set, 1/4/07 Tr. 14, and well before the defense knew whether the box would contain anything that the defense might want to offer into evidence at trial.

b. The state predicted that testing by the FBI "may take three to four months" and requested a continuance, if the Court was to admit the blood vial evidence at all. 1/4/07 Tr. 10.

c. Mr. Gahn expressed a strong preference to send the vial of blood to the FBI. He explained, "I do not care to send it to National Medical Services. We

want to send it to the FBI." 1/4/07 Tr. 28. He expressed the view that FBI experience and methodology would be to the state's "benefit, should there be an admissibility hearing down the road." 1/4/07 Tr. 28. He wanted to test the blood at "a credible, meaningful laboratory." 1/4/07 Tr. 28.

d. Indeed, in light of severe judicial criticism of EDTA testing by National Medical Services (from the New Jersey Supreme Court and the United States District Court for the Southern District of California), ADA Gahn conceded when the Court asked if he agreed that the defense could not rely on the capabilities of National Medical Services, "No, I agree, I do not believe that that is an appropriate lab to send it to." 1/4/07 Tr. 29.

e. ADA Gahn also explained to the Court that the FBI could not complete testing on a timeline faster than three to four months because it presently was recalibrating instruments. 1/4/07 Tr. 32-33.

The defense opposed the state's motion, unless Mr. Avery were released on bail. Were Mr. Avery released on bail, the defense did not oppose a continuance. On January 4, the Court took the motion under advisement.

3. On January 9, 2007, the Court issued a written decision and order denying the state's motion for a continuance to analyze the blood vial. The Court's decision included the following pertinent comments:

a. The Court described Mr. Avery's position – correctly – in these terms: "The defendant does not oppose the concept of testing, but does oppose an adjournment of the trial to facilitate such testing unless the Court modifies bail to facilitate the defendant's release. In addition, the defendant asks to reserve the right to challenge not only the significance of any results received as a result of such testing, but the validity of any testing process itself." Decision and Order at 4-5 (January 9, 2007).

b. In *Cooper v. Brown*, No. 04-CV-656H slip op. (S.D. Cal. June 2005), a federal district court noted (and this Court observed) that, "[T]he testing process for EDTA there took more than one year because of the lack of any standardized protocols for testing." Decision and Order at 6, citing *Cooper v. Brown*.

c. Again relying on *Cooper v. Brown*, the Court concluded that, "There are no standardized protocols for testing the concentration levels of EDTA present in a particular sample." Decision and Order at 6.

d. This Court continued, "More significantly, there are no established scientific standards for interpreting the significance of levels of EDTA found in any particular sample." Decision and Order at 6.

e. The Court then denied an adjournment because EDTA test results "lack the probative value and evidentiary certainty of other scientific evidence," even though they might be admissible in Wisconsin. Decision and Order at 8.

f. Commenting again on "some unspecified new testing method" that the FBI has developed, Decision and Order at 8, the Court implied in its order that it understood that defense testing would have to be sequential, not concurrent. "The court is not satisfied that an adjournment to facilitate EDTA testing would only require a three to four month delay of the trial," the Court wrote. "Even if the FBI conducted its testing within the time frame provided to the State, the defense, should it be dissatisfied with the FBI test results, would probably be entitled to conduct a test of its own. This is especially likely given the absence of scientifically accepted protocols for the testing of EDTA in [sic] the interpretation of results." Decision and Order at 8-9.

4. On January 31, 2007, the day after the Court ruled the blood vial admissible at trial, the state filed a motion to permit it to send blood from the vial to the FBI Laboratory. Although the state was vague about what exact tests it expected the FBI to perform, it told the Court that "due to the intercession of the US Attorney's Office, the FBI may be able to perform some scientific testing of the blood vial, for use in the state's rebuttal case." State's Motion for Release of Blood Vial

Evidence at 1 (January 31, 2007). The Court granted that motion on February 2, 2007, the Friday before trial commenced. The Court rejected defense arguments that testing now for use in rebuttal was unfair and too late, and that in the alternative a continuance was necessary to permit sequential defense testing for surrebuttal.

When the Court accepted defense counsel's request to ask Mr. Gahn if he is aware "of one credible laboratory that presently, today, can do EDTA testing of the exact sort he proposes to do, other than the FBI," Transcript at 50 (February 2, 2007), Mr. Gahn answered:

> No, Your Honor, but I will say this much, they are making it sound like this is something that is so unusual. The FBI doesn't routinely and normally do this, nor does — first of all, because it's rarely asked for by the State. Also, I suspect private laboratories do not engage in it because there's no money in it, because it is so rarely asked for on any occasion.
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> But that doesn't mean that a university research facility, or any other laboratory that has the machinery and instruments or gas chromatograph and all the instruments wanted, cannot ramp up for this test and tool — retool their equipment."

2/2/07 Tr. 50.

Defense counsel then laid out, at pages 51-54 of the February 2 transcript, a short description of an anticipated written motion. This motion now elaborates upon that argument.

5. *EDTA Testing.* The Court should understand what tests the state presumably is hoping the FBI now can do. Identifying EDTA in the blood vial, or in the drops and smears of Steven Avery's blood on Teresa Halbach's car, is not helpful to either side. The blood vial itself has a purple cap, which means that it was manufactured to contain EDTA to preserve blood injected into it. Everyone understands that there will be EDTA in the blood in the vial. Further, because EDTA is so ubiquitously present in the environment, including in common products used to clean and preserve automobiles, everyone expects that there will (or at least likely may be) detectible levels of EDTA in the blood on the car.

The only potentially useful EDTA test that the FBI might do, then, is quantitative. It might seek to determine the relative quantities of EDTA present in identical volumes of blood in the vial, and blood in the Toyota. If there were a stark difference in relative concentration of EDTA in the two blood samples, adjusted for volume, then the state might have an argument that it could prove the blood not planted. That is, the state could contend that the blood in the Toyota could not have come from the vial.

But there currently is no publicly available protocol for conducting such tests. Neither is it clear that anyone – the FBI included – ever successfully has done a reliable quantitative analysis of EDTA in blood left at a crime scene. One problem

is that there appear to be no data establishing the rate of degradation of EDTA in different environments, or indeed, in any environment in which EDTA is exposed to air, heat, cold, precipitation, background pH levels, electrical conductivity, oxidation, or other environmental insults.

There appears no reported case anywhere in the country in which quantitative testing of EDTA, or testimony about such testing, ever has been admitted.

As of its January 9 decision and order, then, Mr. Avery believes the Court was correct: there presently is no scientifically accepted protocol for quantitative testing of EDTA. Further, the state already has conceded, rightly, that there are only two labs that might attempt to develop such a protocol and conduct testing of this sort: the FBI and National Medical Services. Of those two, the state alone has access to the FBI Laboratory. The state also has consulted with National Medical Services on this case, which caused the laboratory chief there to call ADA Norm Gahn before even returning a telephone inquiry from defense counsel. Much more importantly, even if the state waived the conflict, National Medical Services no longer is a credible lab in the area of EDTA testing and the state has acknowledged that, too, in open court on both January 4 and February 2.

On February 15, 2007, just last week, the FBI Laboratory issued a protocol for the EDTA testing the state proposes here. That protocol is marked "Revision: 0,"

meaning that it is a first draft. So it appears that the FBI now has a fresh protocol, perhaps in draft form or at least unrevised, for EDTA tests that the state wishes done. But that protocol never has been validated by the FBI, let alone by independent peer review, so far as defense counsel know. It is hard to imagine how validation could have occurred, when the first draft of the protocol is hardly one week old.

Matters today stand as follows. Only one lab in North America, or maybe in the world, apparently is equipped and willing to undertake to establish a protocol for quantitative testing of EDTA; that is the FBI Laboratory. Once the FBI implements its new protocol and undertakes testing, the ensuing results necessarily will be very *unlike* other scientifically-accepted testing, for example of DNA by common methods or of controlled substances for identification. The EDTA quantitative testing results will be new science, ready only for peer review and efforts of other scientists to assess the falsifiability of the FBI procedure and results (falsifiability in the scientific sense: that is, can the results be duplicated consistently by others and are there unconsidered variables that might call into question the reliability of the conclusion of the experimenters). In other words, the results here will be akin to cutting-edge work that would be published in peer-reviewed scientific journals. Those results will not be akin to a mere application of accepted

procedures by following widely shared, peer-reviewed and validated protocols that have survived examination for falsifiability by others in the scientific community.

For this reason, simultaneous defense testing is impossible. There is no published or accepted protocol to follow, nothing yet for a peer to review or to seek to duplicate. Neither protocol – that is, lab procedure or structure of the experiment itself – nor results can be examined for falsifiability, because the protocol yet has not been examined or validated by any other lab or researcher. And no test results have been reported under that unvalidated new protocol. The correct analogy is to scientific research that may in the end push out the edges of human knowledge, but that has not yet been published or presented at a conference, and thus remains for the moment the proprietary and ongoing work of one researcher. Data that might permit a principled calculation of a curve of EDTA degradation in a relevant environment do not exist, to defense counsel's knowledge, or are private, unpublished and proprietary if they exist at all.

In Wisconsin, § 971.23(5), WIS. STAT., controls scientific testing. That section does not distinguish between a case-in-chief and rebuttal, so it is unlike the discovery provisions on witnesses. Nothing in § 971.23(5) permits unilateral access to physical evidence for scientific testing, either. To the contrary, the statute concerns all physical evidence "which is intended to be introduced at the trial,"

regardless of by which party or when. And the vial of blood at issue here is evidence that the defense, not the state, intended to introduce at trial. How surpassingly strange, then, that only the state will have an opportunity to test that blood scientifically, and that the defense will be left without time or means to conduct independent testing or even to challenge the state's scientific testing.

The defense wishes to pursue testing for surrebuttal purposes. To do so, defense counsel will have to obtain both results and protocol (validated, if possible) from the FBI Laboratory. Perhaps most difficult, the defense will have to obtain reliable data on environmental degradation of EDTA, from which a curve or rate of probable degradation could be calculated. Then the defense will have to find an academic researcher or private laboratory that has an interest in advances in this area. In effect, the defense will be seeking someone who might peer-review the FBI's innovative work, out of professional interest or competitive incentive, and either validate or invalidate the FBI's new protocol. This likely will be expensive. There is no existing industry in this area, as there is for DNA testing. It is nascent science, if it is good science at all — even that is unknown, for want of peer review. In short, the defense necessarily will be starting from scratch. Another way to look at the problem is this: the defense will be in a position similar to a charitable

benefactor offering a new grant to scientists willing to undertake new research in an unexplored field of interest to the grant donor.

6. *Indigency.* Steven Avery does not have the money to fund such a project. Mr. Avery himself is destitute, other than his personal effects and a couple of used cars and used snowmobiles. His lawyers long ago expended all available client trust moneys on Mr. Avery's defense and have more than earned their own fees, even before trial started. Hurley, Burish & Stanton, S.C., in particular has dipped deeply into its own funds for out-of-pocket expenses such as expert witnesses, investigation, and necessary trial expenses. Buting & Williams, S.C., also has shouldered some trial expenses, beyond available funds from the client. Mr. Avery will submit on Monday, February 26, 2007, in support of this motion a sealed (but not *ex parte*) affidavit of Dean A. Strang, detailing the financial straits of the defense.

7. *Sequential Testing.* On Saturday, February 17, the defense received from the state the first draft of the FBI's protocol for the EDTA testing it proposes to undertake. That protocol is about one week old, as of the filing of this motion. It has not been revised. It likely has not even been validated.

Given the fact that the protocol itself is untested, and certainly has not gained acceptance in the scientific community after peer review and assessment of

falsifiability, the first step for any responsible scientist would not be simply to follow the protocol. The first step would be to assess whether the protocol itself is sound. One aspect of that examination, of course, would be to consider the FBI's results on the maiden voyage of this new protocol. Do those results reflect adherence to the protocol itself? Or did the researchers find that the experience of testing under the new protocol required immediate revision of the protocol? Are the stated results consistent on their face with the protocol described? What methodological weaknesses, if any, appear on the face of that protocol?

For obvious reasons, then, any defense testing here must be sequential to receipt of FBI Laboratory results. Trial is ongoing. Defense counsel, who are in Chilton seven days a week (or at least six) have no sufficient time to conduct a search of North America for academic or private researchers (perhaps including the chemical industry) who may have a professional interest in peer-reviewing the FBI's work on EDTA quantitation and degradation.

Even if counsel had the time, their client has not the money. And if they had both of those, hypothetically, the assessment of the protocol could not begin until the results of the protocol's first implementation were known. Even then the assessment of the protocol would have to be followed by independent testing, either under that protocol if it passed muster of review by competent, independent peers

in the relevant scientific community, or by a modified protocol if the initial assessment of the protocol revealed scientifically unacceptable flaws (in contamination controls, in data assumptions, in methodology, or in other experimental controls to assure accuracy).

None of that can begin during the remaining weeks of this trial, no matter whose efforts are devoted to the project or what moneys are expended. The defense does not have any results from the FBI yet, so even the estimate of three to four weeks of trial remaining is meaningless. Examination of the protocol and independent testing will have to be sequential to completion of the FBI's work.

8. *Mistrial or Adjournment.* Unless the Court truly proposes rulings that knowingly allow only the state to conduct testing of the blood vial that is crucial to the defense that Mr. Avery presents, so that access to critical evidence is one-sided and denied to the defense altogether for practical purposes, a delay of several months, at a minimum, to permit defense testing will be necessary – if the Court admits results of the state's testing. Nothing in the United States or Wisconsin Constitutions, in the Wisconsin Statutes, or in the structure of the adversary system itself permits a Court to allow only one party access to critical evidence for scientific testing, but not the other party.

This case bears strong similarity to *United States v. Kelly*, 420 F.2d 26 (2d Cir. 1969). There, the government performed a new test on cocaine, neutron activation. The defense learned of this test and its results only during trial. *Kelly*, 420 F.2d at 28. The trial court refused to exclude the test results, and denied a motion for a one-month continuance for the defense to carry out its own version of the new test. *Id.*

On appeal, the Second Circuit reversed. That court noted that the government sought to bolster an "already quite strong case by a concededly new and, to any trier, quite dramatic demonstration of a method of determining trace elements in a substance . . ." *Id.* at 29. "While the newness of the test is not itself reason for depriving the jury of its results, and the opportunity to weigh conflicting claims as to its reliability, fairness requires that adequate notice be given to the defense to check the findings and conclusions of the government's experts." *Id.* The court held further that the government's course "smacks too much of a trial by ambush," *id.*, and that a new trial was required "with a fair opportunity for the defense to run its own" test. *Id.*

Here, Mr. Avery did not know the contents of the box in the Clerk's office until the same moment the state did, on December 14. Although defense counsel had discovered the existence of the *box* (as opposed to its contents, the vial that matters here) months earlier, they had no reason at all to think that either party

could perform any meaningful scientific examination of the contents. This is important: there was then no reason to think that even the FBI could or would do EDTA quantitation, and no one had a known or validated protocol for doing so. Moreover, Mr. Avery *did* disclose the existence of the box – which again, the state also could have discovered as a public record – in advance of the discovery deadline that this Court set. Disclosure was not untimely; it was early.

Then, when the state used its resources to prevail upon the FBI to consider the new test the state seeks, the state itself sought a continuance of the trial for the purpose of testing. A continuance would have allowed the defense to conduct its own testing, as the Court itself recognized at least tacitly in its January 9 decision and order. This Court wrote, "Even if the FBI conducted its testing within the time frame provided to the State, the defense, should it be dissatisfied with the FBI test results, would probably be entitled to conduct a test of its own. This is especially likely given the absence of scientifically accepted protocols for the testing of EDTA in [sic] the interpretation of results," Decision and Order at 8-9, in explaining why it was not satisfied that only the three or four month continuance that the state sought would be required.

Now, the state proposes to disclose during trial its test results, and presumably to offer them into evidence, while giving the defense no opportunity to

meet that evidence with expert testimony or independent testing, or both. Indeed, the defense first obtained from the state the very protocol to be used in testing during this trial, after one week of testimony. The tests here are at least as novel as the test in *Kelly* where, unlike this case, the defense had an expert who conceded the reliability of the process underlying the new test that the government conducted there. *Kelly*, 420 F.2d at 28. Mr. Avery has no way of assessing at this point, without any known degradation data or curves and with a freshly minted, unvalidated protocol, whether the basic principles of the FBI testing even are reliable.

And he certainly has no way to assess the reliability of the test results themselves until he knows what they are, and whether the FBI in fact adhered to its own new protocol. Independent testing would take longer still, because the defense here would have to start from the very beginning in seeking a lab willing to become the second (at least the second *credible* lab) in the country to undertake EDTA quantitation testing, with only the FBI's unvalidated protocol as a starting point. Even the prosecution conceded here that the defense would have to find a "university research facility" or other lab that would "ramp up" and "retool" its equipment. 2/2/07 Tr. 50. That cannot happen during trial. So as a practical matter, the state asks the Court to allow only it to conduct scientific testing, and

further asks the Court to deny the defense an opportunity to meet or refute that novel, unvalidated testing.

The circumstances here fully implicate both fair trial and due process concerns. Bluntly, the course that the state and Court currently are on will deny a fair trial and deprive Mr. Avery of the basic due process opportunity to be heard fully in his own defense. "A defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of the defendant or relevant to the punishment to be imposed." *California v. Trombetta*, 467 U.S. 479, 485 (1984). That right of access exceeds the right to exculpatory information that would raise a reasonable doubt about the accused's guilt, which the prosecution must disclose, if known, even without specific defense request. *Trombetta*, 467 U.S. at 485.

While it is too early to know whether tests of blood in the vial from the Clerk's office will be exculpatory, any request by the state to offer test results on the vial clearly will embrace an assertion that such test results are material to guilt or innocence. At a minimum, then, the blood vial is "evidentiary material" that "could have been subjected to tests, the results of which might have exonerated the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). Thus, again at a minimum,

the state denies due process and fundamental fairness if it destroys or permanently denies access to the blood vial in bad faith. *Youngblood*, 488 U.S. at 58.

Here, concededly the state has not destroyed or consumed the entire blood vial in testing. *Compare California v. Trombetta*, 467 U.S. 479 (1984) (destruction of breath samples in Intoxilyzer testing did not deny the accused due process, where destruction was in good faith, the likelihood of exculpatory value was very low, and the defendant had alternate means to demonstrate his innocence). But in proceeding with testing during trial, with no alternate place or manner of testing available to the defense, the state just as surely has put this evidence out of the defendant's reach when he could have used it to demonstrate his innocence as if the state had destroyed it. Only the state has the benefit of this blood vial and any testing that might be done on it; Mr. Avery is denied benefit of the blood vial for testing that might be put to use by his jury just as if the state had consumed the entire blood vial in its own testing. Mr. Avery is no more able to test this vial and offer results to the jury than if the vial did not exist at all after FBI testing. To make matters worse, the state is proceeding with that testing after opposing on February 2, 2007 Mr. Avery's alternate request for a continuance to permit him a fair opportunity to conduct independent testing and to challenge any test results the state may obtain.

The state knows that defense testing is impossible during trial, and impossible until after FBI testing is complete and disclosed, for want of any other laboratory presently able to undertake the testing and for want of any validated protocol or publicly available data on degradation that would be necessary to conduct EDTA quantitation testing. To seek to offer the results of state-conducted novel tests at Mr. Avery's trial after thwarting Mr. Avery's effort to obtain a continuance so that he, too, might conduct tests or dispute the FBI tests is to deny deliberately the necessary access to evidence that may be material to guilt or innocence, so that defense testing or challenge might develop the innocence hypothesis just as state testing may develop the guilt hypothesis. The state seeks not just to ambush, but by timing of its tests and this trial actively to disarm the defense before the state attacks.

Access to FBI test results and degradation data (data the FBI presumably must have, or the FBI Laboratory simply could not do a quantitation analysis of a blood vial that is more than 10 years old and of dried blood evidence that is 16 months old) the evidence for testing is essential to the ability to present evidence in the defendant's case-in-chief or in surrebuttal. Mr. Avery will be denied his Fifth and Sixth Amendment rights to be heard in his own defense (due process) and to present a defense (compulsory process and Sixth Amendment right to a fair trial, including with the effective assistance of counsel) if he is unable to test the blood vial and

blood on Teresa Halbach's car for EDTA quantitation and degradation, assuming that the state is allowed to conduct such tests and to offer the results into evidence.

The Court accordingly should declare a mistrial if it rules the results of FBI Laboratory testing admissible, and reschedule a new trial only after sufficient time to complete independent defense testing. Alternatively, the Court conceivably could adjourn the present trial for the months necessary to complete independent defense testing. However, Mr. Avery is unsure how the Court would isolate the current jury from prejudicial publicity and from general extrajudicial information about the case during such an extended adjournment.

9. *Public Funding*. The final problem the Court must confront in deciding whether to grant an adjournment or mistrial to allow the defense a fair opportunity to conduct independent testing of the blood vial, or to challenge the state's test results, is expense. Mr. Avery cannot pay for such testing or expert assistance. While defense counsel in theory could, by reaching into their own pockets, defense counsel is not obliged to fund a client's defense. In this country, prosecutors do not personally fund the plaintiff's case in a criminal prosecution, and defense lawyers need not personally fund the defendant's case. So Mr. Avery turns to the question of cost.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that the due process clause guaranty of fundamental fairness is implicated "when [an indigent] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." The *Ake* court held further that "the state must, at minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." *Ake* 470 U.S. at 83. *Ake* dealt specifically with psychiatric experts.

The same year, in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Supreme Court found "no need to determine as a matter of federal constitutional law what, if any, showing would have entitled the defendant to assistance of the type there sought [a criminal investigator, a fingerprint expert, and a ballistics expert]," given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial. *Caldwell* 472 U.S. at 323 n.1.

Ake and *Caldwell*, taken together, hold that a defendant, to be entitled to funds to pay for an expert, must show more than a mere possibility of assistance from an expert. Rather, the defendant must show a reasonable probability that an expert would aid in his defense and that the denial of an expert to assist at trial would result in a fundamentally unfair trial. *Moore v. Kemp*, 809 F. 2d 702, 712 (11th Cir.),

cert. denied, 481 U.S. 1054 (1987). Neither *Ake* nor *Caldwell* limits the application of the principle to a psychiatrist. The reported cases interpreting *Ake* generally has not ruled that *Ake* is limited to cases involving a psychiatrist, either.

Indeed, other jurisdictions have expanded the principles in *Ake* beyond psychiatric assistance. *See Polk v. State*, 612 So. 2d 381 (Miss. 1992) (applying reasoning of *Ake* to hold that due process considerations require defendant to have access to a DNA expert); *State v. Bridges*, 325 N.C. 529, 385 S.E.2d 337 (1989) (fingerprint expert); *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1998) (fingerprint identification expert appointed where a charge against mentally retarded, indigent defendant was based primarily on palm print found at scene of crime); *State v. Coker*, 412 N.W.2d 589 (Iowa 1987) (defendant entitled to expert on intoxication where defendant's criminal responsibility at the time of offense was significant trial issue); *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988) (hypnosis expert); *Thornton v. State*, 255 Ga. 434, 339 S.E.2d 240 (1986) (allowed appointment of dental expert where impressions of defendant's teeth were the only connecting link between the defendant and the homicide, and impressions were subject to varying expert opinions); *Washington v. State*, 800 P.2d 252, 253-54 (Okla. Crim. App. 1990) (noting that Supreme Court's decision in *Ake* "did not preclude the possibility that the principles of *Ake* should be extended to any [necessary] expert,"

the court remanded for an evidentiary hearing to determine whether a forensic odontologist and a chemist were required as "basic tools" of the defense, so that the state would be required to fund these experts); *Rey v. State*, 897 S.W.2d 333 (Tex. Crim. App. 1995) (pathologist in capital murder case); *McBride v. State*, 838 S.W.2d 248 (Tex. Crim. App. 1992) (chemist in controlled substance case); *Dubose v. State*, 662 So. 2d 1189, 1197 (Ala. 1995) (DNA); *Williams v. Martin*, 618 F.2d 1021, 1025-26 (4th Cir. 1980) ("there can be no doubt that an effective defense sometimes requires the assistance of an expert witness . . . moreover, provision for experts reasonably necessary to assist indigents is now considered essential to the operation of a just judicial system"); *Mason v. Arizona*, 504 F.2d 1345, 1351 (9th Cir. 1974) (due process and effective assistance of counsel "requires, when necessary, the . . . appointment of investigative assistance for indigent defendants in order to ensure effective preparation of their defense by their attorneys"), *cert. denied*, 420 U.S. 936 (1975); *cf. Westbrook v. Zant*, 704 F.2d 1487, 1494-97 (11th Cir. 1983) (state must furnish psychiatric or psychological experts to indigent capital defendant if evidence is not available from other sources, and experts therefore necessary to prove mitigating circumstances); *Knott v. Mabry*, 671 F.2d 1208, 1212-13 (8th Cir. 1982) (failure of counsel to obtain expert to contradict government witness may constitute "constitutional flaw in the representation of a defendant . . ."); *Starr v. Lockhart*, 23

F.3d 1280 (8th Cir.), *cert. denied,* 513 U.S. 995 (1994) (error to deny defense expert at guilt phase; defense must be provided with expert assistance where defense shows reasonable probability that an expert would aid in the defense); *Kade v. State,* 658 So. 2d (Fla. Ct. App. 1995) (DNA evidence); and *Hoskins v. State,* 702 So. 2d 202 (Fla. 1997) (neuropsychological testing and transportation costs).

In *Johnson v. Gibson,* 169 F.3d 1239 (10th Cir. 1999), the court confronted petitioner's request for funds to retain a forensic expert to rebut the testimony of a forensic chemist, a prosecution witness who presented evidence that hair, fiber and semen samples found on the victim matched those of petitioner. The *Johnson* court evaluated the petitioner's *Ake* challenge to the trial court's decision denying public funding. "In assessing due process challenges to denial of funds for non-psychiatric experts, 'we consider three factors: 1) the effect on [the petitioner's] private interest in the accuracy of the trial if the requested service is not provided; 2) the burden on the government's interest if the service is provided; and 3) the probable value of additional service and the risk of error in the proceeding if such assistance is not offered." *Moore,* 153 F.3d at 1112 (quoting *United States v. Kennedy,* 64 F.3d 1465, 1473 (10th Cir. 1995)).

The first and second prongs of this test were easily satisfied because as the Supreme Court has held, "[t]he private interest in the accuracy of a criminal

proceeding that places an individual's life or liberty at risk is almost uniquely compelling," and although the state's interest in financial economy may weigh against the provision of experts to indigent defendants, "its interest in prevailing at trial – unlike that of a private litigant – is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases." *Ake*, 470 U.S. at 78-79. Thus the critical factor in assessing whether a particular expert is a required "basic tool" of an adequate defense is the third prong of the test that deals with the probable value and risk of error associated with additional assistance. But in *Johnson*, the Tenth Circuit determined that letters from two forensic experts were not sufficient to show that denial of petitioner's request for expert assistance substantially prejudiced his case at the guilt phase of the trial, because "other than merely undermining certain aspects of the prosecution's forensic evidence . . . petitioner's proffered expert rebuttal evidence does not purport to show that he could not have committed the crime."

Wisconsin's test for a defense request for public funding for an expert's assistance is more general. "[T]he defendant must make a plausible showing that the proposed expert witness will be both material and favorable to his or her defense, *i.e.*, necessary." *State v. Kirschbaum*, 195 Wis. 2d 11, 20, 535 N.W.2d 462, 465 (Ct. App. 1995) (applying *Ake* to a defense request for a child psychologist and a

pediatrician to address the testimony of the state's principal witness, a child, in a prosecution for child neglect causing death).

If the Court admits evidence of the FBI Laboratory's EDTA quantitation testing at the state's request, Mr. Avery's case for public funding for independent EDTA quantitation testing will be much stronger than the defendant's in *Johnson* or in *Kirschbaum*. In this case, there is no real dispute that Steven Avery's blood was found in Teresa Halbach's Toyota. The fighting issue is whether he bled there while he was in the Toyota, or whether someone else planted his blood there. If he was in her Toyota and bleeding in various places, including the rear passenger door, that is highly incriminating, given where searchers discovered the Toyota, partly concealed. But if someone else planted Mr. Avery's blood, then the blood does nothing to incriminate him and, indeed, strongly suggests that someone sought to frame him more generally for the crimes against Ms. Halbach. For example, if the jury concludes that someone planted Mr. Avery's blood in the Toyota, then it is much more likely that the jury also will conclude that the Toyota key, too, was planted in his bedroom (and his DNA on it), given the undeniably peculiar circumstances of the key's purported discovery after several earlier searches of the same small bedroom.

If in theory EDTA quantitation testing can be done reliably, and can produce helpful results on relative levels of EDTA in the blood vial from the clerk's office, and in the dried blood in Teresa Halbach's Toyota, all adjusted reliably for degradation over time and in differing environments, then such independent defense testing will be highly probative of the core issue of guilt or innocence. If the FBI reliably can offer evidence that the EDTA quantities, by given volume of blood and again adjusted by degradation rates over time and environment, are meaningfully higher in the blood in the vial than in the Toyota stains, then Mr. Avery probably is guilty. But if independent tests either call the FBI results into question or show that the EDTA quantities, by given volume of blood and adjusted by degradation rates over time and environment, are not meaningfully different in the blood vial than in the Toyota stains, then Mr. Avery probably is innocent. In other words, if the blood in the Toyota well may have come from the vial, then Mr. Avery probably is being framed.

The most important aspect of Mr. Avery's need, of course, is the fact that the state itself has sought and secured EDTA quantitation testing. If that testing is important and admissible for the prosecution in rebutting Mr. Avery's defense, then it is just as important and admissible for Mr. Avery in establishing and supporting his defense, either in his case-in-chief or in surrebuttal. Notwithstanding other

evidence, if scientific testing will be critical for one side then it will be critical for both sides, if the Court admits any EDTA quantitation test results at all. Such tests appear new and at the cutting edge of human knowledge. More importantly still, perhaps, jurors reasonably could conclude that scientists, whether at the FBI Laboratory or at a university laboratory, have much less at stake and offer more objective evidence than do Lt. Lenk, Sgt. Colborn or, for that matter, Steven Avery. Clearly, if the state's testing is admissible, Mr. Avery meets the standard for public funding of his independent testing and expert assistance to meet and defeat that scientific evidence.

10. *Conclusion.* This Court would make a serious mistake, and deny Mr. Avery due process and a fair trial, were it to admit scientific testimony and evidence on EDTA quantitation from the state, but deny Mr. Avery the opportunity to conduct his own independent testing and to secure an expert to challenge the FBI results. The Court would make precisely that mistake by pressing forward with this trial on a timetable that forecloses an opportunity for the defense to conduct testing and secure an expert who can evaluate the FBI results. This is the path the Court presently is on, at the state's urging.

Mr. Avery invites the Court to change course. This is a long trial, and it should be done right the first time, for everyone's sake. If the Court presses

forward, denying the defense the chance to assess, challenge, and meet by independent testing the state's EDTA quantitation evidence, Mr. Avery's jury will decide this case having heard scientific evidence from one side only, in an area that is new, not peer reviewed, probably not even validated, and controversial. That is unfair.

There is one last point that the Court should understand without mistake. Eventually, because the state *has* preserved half of all necessary samples, there will be independent defense testing of blood for EDTA quantitation, unless Mr. Avery is acquitted now. If that independent defense testing later casts doubt on the FBI results, there almost surely will be a retrial. A second trial would not fully serve the people of Wisconsin, who would have to fund two trials rather than one; it would not serve the Halbachs, who would have to endure a whole new trial months or years from now; and it certainly would not serve Mr. Avery, who could for the second time go to prison for a crime that scientific testing later may prove he did not commit.

If this Court is inclined to admit the FBI's EDTA quantitation test results, or any other scientific test results the state obtains and first discloses during trial, the Court ought either declare a mistrial now or devise a way to assure that the present jury will not be affected by prejudicial publicity during an adjournment of several

months, until the defense is able to obtain expert assistance and conduct independent testing. Such expert assistance and independent testing should be at public expense as a matter of due process.

WHEREFOR, Steven Avery asks the Court to enter an order providing the relief described above.

Dated at Madison, Wisconsin, February 25, 2007.

Respectfully submitted,

STEVEN A. AVERY, *Defendant*

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