STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

STEVEN A. AVERY,

Defendant.

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

MOTION TO ADMIT EDTA TEST RESULTS AND PERMIT EXPERT TESTIMONY IN THE STATE'S CASE-IN-CHIEF AND REPLY TO REQUEST FOR SEQUENTIAL, INDEPENDENT TESTING AND FUNDING

INTRODUCTION

On December 6, 2006, the state learned of the existence of the vial of defendant's blood. It was "sealed" by order of the court until the parties could examine the vial on December 14, 2006. The parties examined the vial on December 14. It remained under protective seal of the court until February 2, 2007. The defense knew of its existence at least as of July 20, 2006. Since it is a vial of defendant's blood, and since defense counsel had spoken to the counsel representing defendant during the 2003 postconviction testing leading to defendant's exoneration, it is reasonable to assume they knew of its existence before July 20, 2006—the day of its discovery.

By pretrial scheduling order the state was to identify expert witnesses by Friday, December 15, and identify rebuttal witnesses by Friday, January 19, 2007. After the

motion and pretrial conference on December 20, the defense was asked if they wanted to join the state in pursuing a single test or if they wanted the sample split to facilitate immediate simultaneous testing. They declined both offers. On January 3, 2007, the state moved to exclude the vial of blood or, in the alternative, postpone the trial to permit scientific testing; principally, EDTA testing. The defense opposed any adjournment of the trial to facilitate testing unless the defendant was released on bail. On January 9 the court, without deciding whether the vial was admissible, denied the state's request to adjourn and test the vial to determine whether it could be the source of defendant's blood in the Toyota RAV 4. The parties exchanged a second round of briefs on the admissibility of the vial and oral argument occurred on Friday, January 19, 2007. During oral argument on the December 19 the state forewarned the defense that if they pursued the planting and frame-up defense, they would do so at their peril.

On Tuesday, January 30, 2007, one day after the jurors reported in to fill out their Supplemental Jury Questionnaires (SJQs), the court ruled the blood vial evidence admissible. On February 2, 2007, the court relieved the state of its obligation to identify rebuttal experts relating to the blood vial and released the vial to the state for scientific testing that included fingerprinting. The court, however, denied the state's request for the "spot cards" utilized in the testing process of the vial of blood by Lab Corp in January of 1996. The defense objected to the state's requested release of those cards to assist in the current testing process. The defense claimed "work product," arguing in effect that the state was not entitled to evidence in the constructive possession of the defense. This claim was made even though the defendant was arguing that the vial of blood was the

source of the planted blood and the spot cards contained sample drops of blood from the vial. The spot cards were used by Lab Corp to conduct the analysis in 1996. The state obtained possession of the vial on Monday, February 5, 2007, the first day of jury selection. The vial of blood was sent to the FBI Laboratory in Virginia that day.

On Friday, February 16, 2007, the state received the FBI protocol. The next day, Saturday, February 17, the defense received a copy. Finally, on Thursday, February 22, the vial was returned to Calumet County. The defense was advised of its return and was asked what they would like to do. No response was forthcoming until the defense submitted its brief on this issue Sunday evening, February 25, 2007. The defense has been advised at each and every step along the way of what the state has been up to and what the state has been doing with the vial.

ARGUMENT

Relevance is one touchstone for determining the admissibility of evidence. The relevance analysis includes the common law concept of materiality. There are others; most notably and pertinent here is the right to fairly meet the arguments and evidence of the opposing party. See, *United States v. Robinson,* 485 U.S. 25, 33-34 (1998).

In this case, it is hard to imagine evidence that is more relevant, more probative, and more responsive to the defendant's theory that two deputy sheriffs, Sgt. Andrew Colborn and Lt. James Lenk, framed him by planting his blood in Teresa Halbach's Toyota RAV 4. Notwithstanding the warning issued by the state in the oral argument on January 19, the defendant has, at his peril, chosen the planting defense as one of his

principle defenses to the charges. The defense has done nothing with the existence of this vial of blood for eight months. As they argued in court, the spot cards were in their constructive possession. The defense could have retained a scientist and/or a reputable laboratory to write a new protocol or review and improve any existing protocols out in the scientific market. For instance, the defense could have obtained the protocols used in *Cooper v. Brown*, 04-CV-656H slip op. (S.D. Cal. June 2005), or utilized Dr. Kevin Ballard's protocol, assessed the criticism of it and rewritten that very same protocol. Furthermore, the defense could have sought the assistance of independent researchers, or other University research facilities, or some other laboratory that has the equipment capable of testing for EDTA and requested that they develop a protocol to test for EDTA in a biological substance. A simple search of the internet revealed one such EDTA testing protocol developed at Cornell University. *See*, *Determining EDTA in Blood*, Analytical Chemistry 1997, 69, 477A-480A. This would have been a good place to start in looking for assistance securing help in testing the blood in the vial for EDTA to support the defense. In any event, since this is the key defense, it is remarkable that defendant has chosen to spend his money on things other than an expert and a protocol on this admittedly key piece of evidence. There are many ways to effectively defend against criminal charges. Here, the defense believes the facts and circumstances of the case support an assertion of frame-up. That they did not fully appreciate the state's ability to refute that defense says nothing about the quality of their tactical choice. That may be their strongest, or only, defense to the charges. But they cannot artificially bolster the strength of that defense by keeping the state from presenting its own responsive evidence.

The defense knew the state would seek testing and seek admission of this very evidence. The defense took a calculated risk in assessing the state's ability to get the testing done timely and on whether the results would hurt or help his defense. The defendant has gambled and lost, and he must now pay off the bet. The evidence is admissible and admissible in the state's case-in-chief.

The defense inferentially and indirectly began sowing the seeds for this defense by referring to the existence of the vial of blood throughout the *voir dire* process. Virtually every potential juror examined was questioned as to their knowledge of the vial of blood. Particularly, as the court and parties are aware, one of the current jurors is married to a woman who has recently retired from the clerk of court's office in Manitowoc County. This juror was thoroughly examined by the defense as to what knowledge, if any, he had regarding the vial of blood. More importantly, the defense claimed in its opening statement that the vial of blood, which had been held in the Manitowoc County Clerk of Court's Office, was the source of the blood in Teresa Halbach's SUV. The defense informed the jury that it was their belief that Lt. Lenk and/or Sgt. Colborn obtained possession of that blood and put it in Teresa Halbach's SUV. The seeds of this defense germinated during the opening statement.

Additionally, the defense cultivated this theory during cross-examination of many witnesses; initially, the law enforcement officers who responded to the Avery Auto Salvage Yard on November 5, 2005. The defendant introduced photographs of the efforts law enforcement officers made to secure Teresa Halbach's SUV from the impending weather. Much was made of the fact that the vehicle was under a tarp for approximately one hour.

Clearly, the defense was attempting to suggest that Lt. Lenk[1] could have surreptitiously approached the vehicle, gained entrance, and planted the blood without being detected. The defense also cultivated a mutation of this defense during its cross-examination of Sgt. Andrew Colborn. The defense implied that Sgt. Colborn came upon Halbach's vehicle sometime on Thursday evening, either just before or right after visiting the defendant. The defense played a recorded dispatch telephone call from Sgt. Colborn to the dispatcher checking on the license plate number for Theresa Halbach. The inference being that Sgt. Colborn and/or Lt. Lenk thus had access to the Halbach vehicle before its discovery on November 5. Presumably, we are to infer that Sgt. Colborn and/or Lt. Lenk planted the blood in her vehicle and drove the vehicle into the salvage yard, secreted the vehicle, and waited for its ultimate discovery by the volunteer searchers.

Furthermore, the defense implied through the cross-examination of Lt. Lenk that he was somehow aware of the vial of blood because he was the evidence custodian for the Manitowoc Sheriff's Office during the postconviction proceedings that ultimately led to the defendant's release from prison. The cross-examination implied that since Lenk was aware of some of the articles from the 1985 case were being reexamined, he must have known about the vial of blood[2] and, hence, must have obtained possession of that blood by entering the clerk of court's office sometime between November 3-5, 2005. Lastly, the defendant

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1 The testimony revealed that Lt. Lenk was "on site" as of 2:00 p.m. and the testimony suggests that the vehicle was covered in the tarp from approximately 3:15 to 4:15 p.m. Sgt. Colborn did not arrive on site until approximately 5:00 p.m. on November 5, 2005.

2 *See* Exhibit # 214.

continued to cultivate this defense in his cross-examinations of DNA Analyst Sherry Culhane and Crime Lab blood spatter analyst Nick Stahlke. For example, during the cross of Culhane she was asked if blood was planted, "You wouldn't know that from these tests, would you?" Again she was asked, "There is no degree of certainty, scientific or otherwise, that Mr. Avery was ever in the vehicle." Finally, she was asked "Evidence could be contaminated before it gets to the lab, either through sloppy work or intentional contamination?"

The state is entitled to meet this theory in its case-in-chief with evidence that the blood vial in question could not be and is not the source of the defendant's blood in Teresa Halbach's SUV. *State v. Edmunds,* 229 Wis. 2d 67, 598 N.W.2d 290 (Ct. App. 1999); *United States v. Segal*, 852 F. 2d 1152 (9th Cir. 1988).

The defendant in *Edmunds* was charged with first-degree reckless homicide premised upon a shaken baby episode. Originally, the state sought admission of an other act that Edmunds had hit a young child over the head with a hardcover book while caring for that child. The state offered that evidence as a motive for the crime charged. The court initially denied this request. However, after Edmunds' counsel, in his opening statement, asserted that Edmunds was a "good and patient" child care provider, and told the jury, "You will hear from no one who ever saw Audrey do an unloving act to a child," the court, upon the request of the prosecution, revisited its decision on the other act motion and permitted evidence of the previous act. The court of appeals determined that the evidence was both relevant and admissible on the theory of motive, but also that it was offered to rebut defense counsel's assertion in opening statements to the jury that it would hear no testimony that

Edmunds had ever done an "unloving" act to a child. *Shawn B.N. v. State,* 173 Wis. 2d 343, 497 N.W.2d 141 (Ct. App. 1992); *Edmunds*, 229 Wis. 2d at 80-81. The court of appeals also cited to *United States v. Robinson,* 485 U.S. 25 (1998), for the proposition that a prosecutor should be allowed a fair response to defense counsel's argument.

Similarly, in *United States v. Segal,* the Ninth Circuit Court of Appeals ruled that the government was entitled to introduce evidence of a defendant's cocaine sales in a prosecution for failing to file a Currency Transaction Report (CTR). The defense made several references to Segal's cocaine use in his opening statement. The defense had attacked a witnesses' credibility by extensive reference to embezzlement of defendant's money. The witness sought to explain the embezzlement by reference to the cocaine transactions. Since the defense opened the door the state was entitled to walk through that very same door with other act evidence.

In the case at bar, the state offers the FBI report in its case-in-chief for two reasons. First, the evidence is admissible to rehabilitate the credibility of Officers Lenk and Colborn. Their credibility was directly challenged during cross-examination. Defense counsel repeatedly implied that they were being untruthful in their denials of planting the blood. At one point, counsel asked Lt. Lenk, "Do you really expect someone who would have done such an act to admit it under oath in court?" Lt. Lenk responded that if he had done the act, he would admit it. Secondly, the evidence is clearly admissible because it discredits the defense. Much like the admission of the other acts in the *Edmunds* and *Segal* cases, the admission of the FBI report completely discounting the vial of blood as a source for the defendant's blood in the Toyota RAV 4 is a fair response to defense counsel's opening

statement and cross-examination. The state should be allowed to present its responsive evidence in its case-in-chief. The defense has already placed the possibility of a frame-up before the jury in *voir dire*, through argument and in cross-examination. Having done so, they cannot reasonably complain when the state chooses to refute that defense sooner rather than later. The admission of this evidence is not unfairly prejudicial. It does not appeal to emotion or passion. It simply, directly, and unquestionably refutes the defense theory.

Wisconsin Stat. § 906.11(1) provides:

> The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to do all of the following:
>
> (a) Make the interrogation and presentation effective for the ascertainment of the truth.
>
> (b) Avoid needless consumption of time.
>
> c) Protect witnesses from harassment or undue embarrassment.

This statute gives the trial judge broad discretion to control the order of witnesses and the presentation of evidence at trial. *State v. James,* 2005 WI App 188, ¶ 8, 285 Wis. 2d 783. The exercise of this broad discretion will not be disturbed on appeal unless it conflicts with another statute that specifically limits it, or unless the rights of a party have been prejudiced. *Id.* ¶ 23. *State v. Smith,* 2002 WI App 118, ¶ 14-15, 254 Wis. 2d 654. This evidence is clearly relevant to and will directly affect the truth seeking function of the jury. It is necessary for the "effective ascertainment of the truth." Wis. Stat. § 906.11(1). Moreover, the Wisconsin Supreme Court has recognized the state's rights to a fair trial and the opportunity to convict. *See, State v. Copening,* 100 Wis. 2d 700, 723, 303

N.W.2d 821 (1981); and *State v. Grande*, 169 Wis. 2d 422, 485 N.W.2d 282 (Ct. App. 1992). Withholding what is ordinarily clearly admissible evidence from the jury on a basis of perceived unfairness that is caused by the defendant's selection of this particular defense, with full knowledge that it was a calculated risk and where such evidence directly refutes that defense, could preclude a conviction of the offense charged. Consequently, the state would be unfairly prevented from prosecuting this murder charge. We are in this position because Avery has chosen this theory of defense. This theory was chosen with knowledge that the state was going to have that vial of blood tested and that the state would seek the admission of any favorable result to refute the frame-up and planting evidence defense. Consequently, the defendant cannot claim that he is being unfairly prejudiced because of a trial tactic he chose. He cannot complain of error, when this predicament is the direct result of a strategic and tactical decision to delay disclosure of the discovery of this vial and pursue this defense.

EDTA TESTING RESULTS ARE ADMISSIBLE

The state moves the court for a ruling on the admissibility of expert testimony on the analysis of EDTA in dried bloodstains. As grounds for its motion, the state will be calling as a witness Marc A. LeBeau, Ph.D., Unit Chief/Supervisory Chemist from the FBI Laboratory in Quantico, Virginia, to testify to the analysis and conclusions that appear in his report dated February 26, 2007. Attached to this motion at Attachment 1 is the curriculum vitae of Marc LeBeau, the protocol for the Analysis of EDTA in Dried

Bloodstains at Attachment 2, and the report which summarizes his findings and conclusions at Attachment 3.

As grounds for its motion, the state relies upon the following statement of law regarding the admissibility of scientific evidence generally in Wisconsin. The admissibility of the analysis of EDTA levels in blood is governed by principles related to the admission of expert testimony in general, as set forth in Wis. Stat. § 907.02. The state seeks to introduce the expert testimony of Marc LeBeau regarding the analysis of EDTA in dried bloodstains. Whether to admit expert testimony rests in the discretion of the trial court pursuant to Wis. Stat. § 901.04(1), which provides that "[p]reliminary questions concerning the qualification of a person to be a witness, . . . or the admissibility of evidence shall be determined by the judge." *State v. Blair*, 164 Wis. 2d 64, 74 & n.6, 473 N.W.2nd 566 (Ct. App. 1991). Under Wis. Stat. § 907.02, a determination whether a proffered expert witness should be permitted to testify requires an evaluation of whether the witness qualifies, "by knowledge, skill, experience, training, or education," as an "expert" on the subject of the testimony and whether the testimony will "assist" the jury. Generally, expert testimony will assist the jury "when the issue to be decided requires analysis that would be difficult for the ordinary person in the community." *Blair*, 164 Wis. 2d at 75. As is quite clear from a review of the FBI's protocol for EDTA testing, the analysis of EDTA in the bloodstains in this case used a number of sophisticated analytical instruments. This technique of using Liquid Chromatography/Mass Spectrometer (hereinafter LC/MS/MS) analysis to identify whether blood evidence collected from a crime scene was "planted" is clearly outside the knowledge and experience of a lay jury.

This testimony will be helpful because it is critical to establish that the blood of Steven Avery identified by DNA analysis found in Teresa Halbach's RAV 4 does not contain the preservative that was found in the vial of blood located in the Manitowoc County Clerk of Court's Office, which the defendant claims was used by law enforcement to frame him for the murder of Teresa Halbach.

The admissibility of the EDTA analysis evidence at issue is governed by principles related to the admission of expert testimony in general, as explained in *State v. Peters*, 192 Wis. 2d 674, 687-90, 534 N.W.2d 867 (Ct. App. 1995). Accordingly, in the present case, the EDTA analysis evidence derived from the LC/MS/MS testing is admissible if: (1) it is relevant to the case; (2) the witness presenting the evidence is qualified as an expert to do so; and (3) the evidence would assist the trier of fact in determining an issue of fact. *Id.* at 687-88. Under this "relevancy" test, scientific evidence is admissible "regardless of the scientific principle that underlies the evidence." *Id.* at 688. "Once the relevancy of the evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder, and any reliability challenges must be made through cross-examination or by other means of impeachment." *Id.* at 692. Expert testimony will be excluded only if the testimony is superfluous or a waste of time. *State v. Walstad*, 119 Wis. 2d 483, 516, 351 N.W.2d 469 (1984). The reliability of an expert's testimony is a credibility determination to be made by the fact finder. *State v. Stinson*, 134 Wis. 2d 224, 234, 397 N.W.2d 136 (Ct. App. 1986). Evidence given by a qualified expert is admissible regardless of the underlying theory. *Walstad*, 119 Wis. 2d at 518-19.

> The fundamental determination of admissibility comes at the time the witness is "qualified" as an expert. In a state such as Wisconsin, where substantially unlimited cross-examination is permitted, the underlying theory or principle on which admissibility is based can be attacked by cross-examination or by other types of impeachment. Whether [an expert] witness whose testimony is relevant is believed is a question of credibility for the finder of fact, but it clearly is admissible.

Id.

Mr. LeBeau should be allowed to express an opinion that no detectible levels of EDTA were found in the tested bloodstains left by the defendant in Teresa Halbach's RAV 4, as well expressing an opinion that, to a reasonable degree of scientific certainty, the blood in the vial in the Manitowoc County Clerk of Court's Office is not the source of the bloodstains in Teresa Halbach's RAV 4. The state's proffered testing developed through the use of LC/MS/MS technology and the interpretation of the results are admissible. The recognition of LC/MS/MS technology as a reliable testing method goes beyond the narrow area of EDTA testing and is commonly embraced by a wide variety of scientists engaged in analytical chemistry. The state maintains that there is no dispute as to the scientific principles or theory underlying LC/MS/MS analysis and that the use of LC/MS/MS methodology to separate EDTA from other substances is generally accepted in the scientific community. The state maintains that there are numerous published methods for determining EDTA in various substances and that this same or similar methodology can be used for the forensic measurement of EDTA in biological substances.

AKE V. OKLAHOMA

Relying on *Ake v. Oklahoma,* 470 U.S. 68 (1985), the defense has asked this court to suspend the trial and finance an effort to find expert witnesses willing to challenge the state's blood test evidence. This court should not do so.

Ake does not help the defense because (1) Avery is not indigent, and (2) even if he is, *Ake* applies to the appointment of psychiatric experts in the context of an insanity defense when the defendant's sanity at the time of the offense is an issue. Those are not the facts of this case. Even if this court concludes that *Ake* applies to requests for expert assistance in general, it still does not help because the defense does not need expert assistance to put its frame-up theory before the jury, or to respond to the state's evidence.

General principles:

"An indigent defendant has a constitutional right to the state's assistance in securing the raw materials integral to the building of an effective defense." *State v. Kirschbaum*, 195 Wis. 2d 11, 20, 535 N.W.2d 462 (Ct. App. 1995), *citing Ake v. Oklahoma*, 470 U.S. 68, 767 (1985).

> This right includes the trial court's assistance in compelling the attendance of witnesses and the right to put before a jury evidence that might influence the determination of guilt. However, the right to the trial court's assistance is not an unfettered right that requires the trial court to give an indigent defendant unlimited access to blank checks to hire all expert witnesses that he or she desires. The trial court does not have an unequivocal duty to provide expert witness funds for indigent defendants upon a general request. Rather, in order to secure the assistance of the trial court, the

> 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.

Kirschbaum, 195 Wis. 2d at 20 (quotation marks and citations omitted). Although the court of appeals did not expressly limit the application of *Ake* to appointment of mental health professionals in insanity cases, it certainly did not expressly or impliedly suggest it should be extended in circumstances such as the case at bar.

In *Kirschbaum,* the defendant was looking for experts on childrens' memory and perception, and experts on investigative interview technique. The court of appeals found that the first area was within the ken of the jurors, and Kirschbaum failed to make a sufficient showing of need on the second. Throughout, the court focused on the fact that Kirschbaum was indigent. *Kirschbaum,* 195 Wis. 2d 26-27. Indigency is certainly an issue in this case, as will be discussed below.

> In *Ake*, the defendant was an indigent who was tried for two counts of murder and two counts of shooting with intent to kill. *Ake*, 470 U.S. at 72. During the guilt phase of the trial, the defendant's sole defense was insanity. *Id*. The defendant, however, could not afford a psychiatrist to inquire as to his mental capacity at the time of the offenses. *Id*. Counsel requested that the trial court arrange for a psychiatrist to perform the necessary examination or to provide funds so that the defense could arrange one. *Id*. The trial court concluded that the Constitution does not require that an indigent defendant receive the assistance of a psychiatrist in defending his or her case. *Id*. The Oklahoma Court of Criminal Appeals agreed. *Id*. at 73. The United States Supreme Court, however, disagreed and held, "[W]hen a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one."

Ake, 470 U.S. at 74. *Payment of Witness Fees in Brenizer,* 188 Wis. 2d 665, 669 n.1, 524 N.W.2d 389 (1994).

"If a defendant is not indigent, then *Ake* does not apply." *Perales v. State*, ___S.W.2d___, 2006 WL 3628902, *4 (Tex. App. Houston [1 Dist.] 2006) (Dec. 12, 2006). All of this begs several questions, is the defendant truly indigent in the meaning of *Ake* (notwithstanding counsel's affidavit) and whether the appointment of an expert and the disbursement of funds are necessary and whether denial would result in a fundamentally unfair trial.

The case at hand and the defendant's indigency:

As noted already with respect to the previous bail arguments and jail recording arguments, the defendant had $240,000 at his disposal for his defense. It has been used up apparently without adequately exploring the center piece of his defense, and without arrangement for an expert or scientific test. In fact, there is little evidence he has done anything since July involving the "science" of his planting defense. He has spent his money elsewhere and now wants Manitowoc County to pay off his gambling debt. For purposes of *Ake*, he should not be considered indigent. Moreover, even if he were indigent, these expenditures are not necessary to effectively put in the defense. In fact, he has just about established his defense in his cross-examination of the witnesses. He need only call the clerk of court to admit the blood vial and argue the *reasonable* inferences. *Ake,* does not stand for the proposition that due process requires an expenditure of funds for rebuttal or surrebuttal evidence. No such case law has been presented. Lastly, by his own admission, he has no idea who can or will do the testing. This predicament was caused by the choices the defendant has made. The defendant could have joined the

state's request to adjourn in January, but he opposed it. Now, when faced with the inevitable, he wants an adjournment. Unfortunately for the defendant, this request cannot and must not be granted. Similarly, the defendant cannot claim error and move for a mistrial based on the decisions and choices he has made.

Finally, even if the court were to entertain this motion, it is far from certain that *Ake* is even available to the defendant. Although the defense sites to a few cases that have adopted *Ake*, there are many that have not.

Several courts have held that *Ake* does not apply to situations beyond appointment of a psychiatrist for purposes of an insanity defense. *E.g., Harris v. Vasquez,* second amended opinion, 943 F.2d 930, 949-50 (9th Cir. 1990); *Jackson v. Ylst,* 921 F.2d 882, 885-87 (9th Cir. 1990) (appointment of expert on eyewitness identification would require an extension of *Ake*); *Kordenbrock v. Scroggy,* 919 F.2d 1091, 1119 (6th Cir. 1990) (Kennedy, J., dissenting) (*Ake* limited to psychiatrist, which is provided only "after defendant shows his sanity will be a significant factor"); *Harris v. Vasques,* 913 F.2d 606, 619 (9th Cir. 1990); *Cartwright v. Maynard,* 802 F.2d 1203, 1210-11 (10th Cir.1986); *Volson v. Blackburn,* 794 F.2d 173, 176 (5th Cir.1986); *Bowden v. Kemp,* 767 F.2d 761, 763 (11th Cir.1985); *Kansas v. Call,* 760 F. Supp. 190, 192 (D. Kan. 1991) (*Ake* does not apply to expert DEA agents who could testify about marijuana supplies); *Siebert v. State,* 562 So.2d 586, 590 (Ala. Crim. App. 1989) (quoting *Ex parte Grayson,* 479 So.2d 76, 82 (Ala. 1985), *cert. denied*, 474 U.S. 865 (1985) (*Ake* does not extend beyond psychiatrists)); *Ex parte Grayson,* 479 So.2d 76 (Ala. 1985), *cert. denied,* 474 U.S. 865 (*Ake* limited to psychiatrists and the insanity defense); *Ex parte Grayson,* 479

So.2d 76, 82 (Ala. 1985) (On Application for Reh'g) (*Ake* limited to psychiatrists and issue of insanity only); *Hough v. State,* 560 N.E.2d 511, 516 (Ind. 1990) (*Ake* does not extend to social psychologist who would assist in jury selection or psychologist who would help present non-sanity defense); *State v. Zuniga,* 357 S.E.2d 898, 908 (N.C. 1987) (investigators do not fall under *Ake* because, *inter alia,* counsel should interview witnesses); *State v. Massey,* 342 S.E.2d 811, 816 (N.C. 1986) (defendant not entitled to expert on competency to waive Miranda rights); *Williamson v. State,* 812 P.2d 384, 395 (Okla. Crim. App. 1991) (*Ake* does not extend beyond psychiatrists); *Shelton v. State,* 793 P.2d 866, 873-74 (Okla. Crim. App. 1990) (defendant not entitled to investigator); *Munson v. State,* 758 P.2d 324, 330 (Okla. Crim. App. 1988) (Ake does not extend beyond psychiatrists); *Vowell v. State,* 728 P.2d 854 (Okla. Crim. App. 1986) (same); *Stafford v. Love,* 726 P.2d 894, 896 (Okla. 1986) (*Ake* limited to psychiatric experts); *Moore v. State,* 802 S.W.2d 367, 371-72 (Texas Ct. App. 1990) (*Ake* does not extend to expert on victim's injuries, since it is limited to psychiatrists in insanity cases); *see also* West, *supra* note 19, at 1341-42 & n.111 (requests for non-psychiatric experts rejected on basis of insufficient showing of need).

CONCLUSION

In sum, the EDTA test results are admissible. The results constitute relevant, evidence necessary to a fair presentation of the evidence and the ascertainment of the truth. It is the most compelling response to the defendant's theory of defense and the state is entitled to fairly meet the arguments and evidence behind this theory. The

evidence is sufficiently reliable to be admissible under Wisconsin's expert witness law. Lastly, the defendant is not entitled to a mistrial, an adjournment, or the expenditure of public funds to support a rebuttal or surrebuttal to the state's reply. Avery must pay his own gambling debts, not Manitowoc County.

Dated this 1st day of March, 2007.

Respectfully submitted,

Kenneth R. Kratz
Calumet County District Attorney
And Special Prosecutor
State Bar #1013996

On Brief,

Norman A. Gahn
Assistant District Attorney
Milwaukee County
and Special Prosecutor
State Bar #1003025

and

Thomas J. Fallon,
Assistant Attorney General
and Special Prosecutor
State Bar No. 1007736

Attorneys for Plaintiff

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
Phone: (608) 264-9488
Fax: (608) 267-2778
E-mail: fallontj@doj.state.wi.us