

STATE OF WISCONSIN

SEALED
CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2005-CF-381

STEVEN A. AVERY,

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED

Defendant.

JAN 17 2007

CLERK OF CIRCUIT COURT

DEFENDANT'S STATEMENT ON PLANTED BLOOD

I.

INTRODUCTION

The Court ordered the defense to disclose not later than January 12, 2007, how Steven Avery contends that his blood was planted in Teresa Halbach's car, a Toyota RAV-4. As Avery understands it, the required disclosure is governed by *State v. Richardson*, 210 Wis. 2d 694, 563 N.W.2d 899 (1997). In compliance with that scheduling order, Avery now proffers an outline of the evidence he will tender pursuant to his constitutional right to present a complete defense — here, the defense that he has stated personally and publicly since before his arrest.

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II.

DISCUSSION

A. Constitutional Right to Present a Complete Defense.

Under the Fourteenth Amendment's due process clause and the compulsory process and confrontation clauses of the Sixth Amendment, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 126 S. Ct. 1727, 1731 (2006). "This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.''" *Holmes*, 126 S. Ct. at 1731.

In Wisconsin, the state supreme court has acknowledged that an accused faces no special burden in offering evidence that he was framed. In *Richardson*, the court rejected the state's argument that the "legitimate tendency" standard of *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), should apply to proffered evidence of a frame-up. *Richardson*, 210 Wis. 2d at 705, 563 N.W.2d at 903. Rather, a defendant need only show that the frame-up evidence concerns a fact of consequence to the determination of the action, that it makes the existence of that fact more or less probable, and that it survives balancing under WIS. STAT. § 904.03. *Richardson*, 210 Wis. 2d at 706, 708, 563 N.W.2d at 903, 904.

The *Richardson* defendant passed the first two steps of the analysis, but failed to show that the trial court erroneously exercised its discretion in excluding his frame-up evidence under § 904.03. *Richardson*, 210 Wis. 2d at 708-09, 563 N.W.2d at 904-05. To the extent that *Richardson* suggests (and that case only suggests this at most) that a court may exclude frame-up evidence of slight probative value only because of a “danger of confusing the jury’s consideration of other evidence with a higher probative value,” *id.* at 709, 563 N.W.2d at 905, the Supreme Court’s more recent decision in *Holmes* calls that suggestion into real question. Although the Supreme Court had no general objection to common rules limiting defense evidence of a third-party culprit to that which has probative value outweighing factors like unfair prejudice, confusion of issues and the like, *Holmes*, 126 S. Ct. at 1732, the South Carolina rule instead was unconstitutionally arbitrary and disproportionate to its purposes because it focused only on the apparent strength, standing alone, of the prosecution’s case. *Id.* at 1734. The *Richardson* court flirts with the same mistake: discounting defense evidence because the prosecution’s evidence, considered by itself, looks stronger. But this Court surely can read *Richardson* not to endorse the South Carolina Supreme Court’s mistake.

1. Applying *Richardson* here, evidence that someone planted Avery’s blood in Teresa Halbach’s car clearly would concern a fact of consequence

to the determination of this case. If Avery himself is responsible for his blood in Halbach's car, that evidence is highly inculpatory. Avery had denied that he ever was in Halbach's car. Moreover, Halbach's blood, too, is in the car and suggests her bloody head lay against the wheel well in the cargo area — an ominous suggestion. And the car itself arguably was concealed, as if by someone conscious of guilt.

But if Avery is not responsible for his blood in Halbach's car, then his blood has no tendency to suggest his guilt at all. Quite to the contrary, he cannot be linked to her car at all, in that event. His fingerprints, palmprints, and DNA otherwise are nowhere in or on her car. A critical piece of prosecution evidence is meaningless in this case. Indeed, it becomes exculpatory. If Avery did not cause his blood to be found in her car, the fact that his blood is there suggests strongly that someone wished to make it appear that he was responsible for a crime — either suggesting that person's own consciousness of guilt, or suggesting a level of police investigative bias that would call seriously into question the integrity of other evidence in this case recovered by the same law enforcement agencies, to say nothing of the integrity of any testimony that officers from those agencies might offer. Avery well may be innocent if someone planted his blood.

Either way, the possible planting of blood concerns facts of consequence to the determination of this case. Indeed, the blood evidence is central to the case.

2. Likewise, planting evidence makes the proposed fact of Avery's role in the concealment of Halbach's car, and his linkage to her blood in the car, less probable. Again, there is *no* evidence linking Avery to Halbach's car if someone else put his blood there. Note that this evidence only need have "any tendency" to make the consequential fact less probable here. *Richardson*, 210 Wis. 2d at 706-07, 563 N.W.2d at 903. This is not a high standard. "The 'any tendency' standard reflects the broad definition of relevancy and the resulting low threshold for the introduction of evidence that the relevancy definition creates." *Id.* at 707, 563 N.W.2d at 904.

3. Finally, Avery's evidence suggesting that someone planted his blood easily survives the balancing under § 904.03 — even without considering to what extent the constitutional right to present a defense would require, in some circumstances, a court to relax the application of § 904.03. Avery has announced from the beginning of this case, or before, that he was being framed. It is his core defense. The Manitowoc County Sheriff's Department was involved in 1985 in his wrongful conviction and imprisonment, and he was suing that department and the county for millions when this case arose within the jurisdiction of the Manitowoc County Sheriff's Department. Notwithstanding a purported recusal of that department, officers of the Manitowoc County Sheriff's Department were present

when every significant piece of evidence against Avery – including the Toyota RAV-4 – was recovered, and in most cases, Manitowoc County Sheriff's Department officers were the ones who actually claimed to find the evidence. The availability of a vial of Avery's blood to the Manitowoc County Sheriff's Department, indeed to the general public, can be shown smoothly and with a short, logical succession of steps. The blood was unsecured and unsealed in the Clerk of Court's office in the courthouse; the Sheriff's Department has access by master key to that clerk's office,¹ including the location where the blood sat; and there was at the relevant time no log or other means of recording who handled the file. Indeed, at least one Manitowoc County Sheriff's Department employee with a crucial role in this case (and whose actions had been questioned in his deposition in Avery's civil case less than three weeks before Teresa Halbach disappeared) was involved in September 2002 in transmitting to the Crime Laboratory some evidence from the same court file at issue now. That is Lt. James Lenk.

There is no waste of time, no confusion of issues, and no unfair prejudice that “substantially” outweighs the probative value of the planting

¹ At a minimum, that access is available through a master key that the Sheriff's Department keeps in its office, and through keys entrusted to two uniformed sheriff's deputies who serve as bailiffs. The sheriff's department, not the City of Manitowoc Police Department, has primary responsibility for the protection of the county courthouse. And the Department of Public Works, technically the building's custodian, confirms that the Sheriff's Department, like the DPW, has a master key.

evidence, then. Wis. Stat. § 904.03. Rather, that evidence is necessary to demonstrate that it is not at all "absurd," as the state told the public, to suppose that law enforcement officers carried a vial of Avery's DNA with them at one crucial juncture, if not more.²

Avery turns now to the specifics of his proffered evidence that someone planted his blood in Halbach's Toyota.

B. *Richardson Proffer.*

Perhaps some initial context for this proffer will help. In spring 2006, the Court decided, over Avery's strenuous objection, that Avery would be tried on charges of sexual assault, kidnaping and false imprisonment, where the state had made no showing that it had *any* admissible evidence to support any one of those charges. No preliminary hearing was required; no proffer was required; no showing of any admissible evidence was required. The jury would hear the state's case on the new counts in the amended complaint.

Now the shoe is on the other foot. The question today is whether the jury will hear the defense to the original charges that Avery has offered the world from the beginning: his blood was planted in Teresa Halbach's car. As Avery demonstrates below, he has a great deal more admissible evidence to support his claim of planting

² The claim was special prosecutor Ken Kratz's, in a lengthy televised news conference on November 11, 2005.

than the state does to support its claim of rape. Whatever the skew in legal rules that require a defendant, with no burden of proof, to clear a pretrial barrier to offering a defense when the state, with the sole burden of proof, faces no similar pretrial barrier to offering its case, Avery has frame-up evidence that would have "any tendency to make the consequential fact more or less probable." *Richardson*, 210 Wis. 2d at 706-07, 563 N.W.2d at 903. In fact he has a good deal more than that. And he has a great deal more evidence than does the state of rape. He should be allowed to offer that evidence in defense.

Avery submits the blood vial evidence is both relevant and probative to the heart of the issues in this case. Evidence of the planting of blood against him is necessarily circumstantial, as is the State's entire case against Avery, but the following facts give rise to reasonable inferences that only a jury should resolve.

1. The fact that Kenneth Petersen, James Lenk, and Andrew Colborn all were deposed in Avery's \$36 million lawsuit within three weeks before Teresa Halbach disappeared.

2. The role of Andrew Colborn, and possibly of James Lenk, with respect to a 1995 or 1996 telephone call from another law enforcement agency reporting to the Manitowoc County Sheriff's Department that a person in custody

admitted committing an assault in Manitowoc County for which another man was in jail.

3. The fact that neither Sgt. Colborn nor Lt. Lenk prepared any report of that 1995 or 1996 telephone call until September 12, 2003, the day after Steven Avery's release from prison on the state's motion to vacate his conviction, when they both prepared reports of that call seven to eight years earlier.

4. The fact that Manitowoc County was able to settle the lawsuit on highly favorable terms after Avery was charged in this case.

5. The vial of blood found in the Clerk of Court's office contains notations that it is Steven Avery's blood, including his inmate number, and the handwritten notations of a nurse (M. Kraintz) who took the blood on January 2, 1996, at the Fox Lake Correctional Institution, Health Services Unit, where Mr. Avery was imprisoned on his 1985 wrongful conviction case.

6. The vial of blood was shipped from Fox Lake Correctional Institution by Federal Express to Lab Corp., a respected and independent DNA laboratory in North Carolina. That lab extracted one milliliter of blood from the tube and performed DNA tests, obtaining a DNA profile for Avery. Following the completion of DNA tests on the blood and other items of evidence from the court file, Lab Corp. returned the vial of Avery's blood to the Manitowoc County Clerk

of Circuit Court, where receipt was noted on June 6, 1996. The vial of blood was contained in a Styrofoam container which was sealed with evidence tape. The Styrofoam box was contained within a cardboard box only slightly larger than the Styrofoam, which box was also sealed with evidence tape at both ends. On information and belief, the box containing Avery's vial of liquid blood remained in the Clerk's office in that sealed condition for the next six years.

7. In 2002, with the assistance of the Wisconsin Innocence Project, Avery commenced new DNA tests which would ultimately exonerate him from the 1985 wrongful conviction, and indeed match the DNA profile of Gregory Allen, who was then incarcerated for a subsequent sexual assault and, it turns out, had been a suspect in the 1985 case all along. In the course of those efforts of the Innocence Project, the former Manitowoc County District Attorney, E. James Fitzgerald, and members of Avery's defense team, and perhaps others, met and opened packages of evidence in the 1985 court file, with the court's approval, to determine what to send out for additional tests. Notations on the outside of the white box containing Avery's blood vial indicate that DA Fitzgerald opened the box at 12:25 p.m. on June 19, 2002, and closed it again two minutes later. It is believed that the evidence tape seal was broken at that time so the parties could discover the contents. It is believed that when the vial of Avery's blood was found, the box was simply closed and not

sent out for testing as the crime lab already had Avery's DNA profile on record. The notations on the box do not indicate how the box was re-closed, but there does not appear to be another layer of evidence tape placed over the existing broken seal. Instead it appears the box simply was closed with a small piece of (easily removable) scotch tape. Records reflect that the officer who prepared the transmittal of evidence form for the transfer of the court exhibits to the Crime Lab on September 19, 2002, was none other than "Det. Sgt. James Lenk."

8. In September 2003, DNA results exonerating Avery in the 1985 case were made public, the case was dismissed, and Avery was released from prison after 18 years of confinement. The Manitowoc County Clerk of Court's office received numerous requests from media and other members of the public who wished to go through the court file in the case. To facilitate easy access for these requests, the box containing both the written pleadings and the exhibits was kept in an unsecure setting inside the clerk's office, where it remained for more than the next two years. The file box was directly accessible to any member of the public who came to the public window of the Clerk of Court's office and requested permission to look at the file, which was, of course, a public record. Until the autumn of 2006, the Clerk's office kept no record of those individuals who asked permission to look at the file.

9. On information and belief, an individual intent on obtaining a sample of Avery's blood from the vial contained in the court file would have been able to do so without detection. This could have been accomplished by asking the clerk permission to see the box, and then surreptitiously removing the vial when the opportunity presented itself, and then returning the vial later. Since the court file concerned a closed case that had been dismissed, there was no particular reason for the clerks to take extra caution with the file, and the sheer number of media and other individuals asking to see the file would have made a request for permission to view the box unremarkable.³

10. On information and belief, in November 2005, the blood vial contained in Avery's 1985 court file also was accessible to law enforcement agents in a number of ways. First, a law enforcement agent would attract little or no attention in the clerk's office and likely had ready access to the interior of the office given their presumed trustworthy status. In addition, law enforcement agents, and particularly the Manitowoc County Sheriff's Department (MTSO), had after hours access to the Clerk's office. The Manitowoc County Sheriff's Department has

³Despite Avery's repeated claims to the media in early November 2005 that someone had planted his blood in the Halbach vehicle, the State chose not to examine the 1985 court file in an effort to exclude that possibility. Had they done so, they would have discovered Avery's blood vial and could have interviewed clerks or perhaps undertaken other investigation while events were fresh in mind. Any effort to do so now, when the trial is fifteen months cold, necessarily has limited probative value.

primary jurisdiction of the courthouse for after-hours access, in the event, for instance, of a call of a break-in. Further, the Director of Public Works is the official custodian of the building and has master keys. On information and belief, the Manitowoc County Sheriff's Department also has two or more master keys to open every room in the courthouse building, including the Clerk of Court's office. Thus, a member of the Manitowoc County Sheriff's Department could have arranged easy access to the Clerk's office after hours during the week or on the weekend, and then gained ready unobstructed access to the vial of Avery's blood in the 1985 court file, which in early November 2005 was sitting on the floor or a shelf near a window in an open and battered cardboard box.

11. On December 14, 2006, when the box in the 1985 case file which purportedly contained Steven Avery's blood was finally opened in the presence of the parties to this case , several facts were apparent. The inner Styrofoam container, which was at one time closed with evidence tape, was completely unsealed as it was clear that the evidence tape had been slit open and not even scotch tape held the Styrofoam container together. Inside was a vial of still liquid blood bearing the name and inmate number of Steven Avery, with the date of January 4, 1996. The vial of blood had a lavender rubber-type stopper and was not sealed with any tape. Moreover, the stopper clearly has an apparent needle hole through it. *See attached*

Exhibits 1 & 2. Blood could thus have been extracted either with a needle through the stopper or by removing the top from the vial. The needle hole in the cap did not come from the testing Lab Corp did on the blood in 1996, because Meghan Clement, Lab Corp's technical director, asserts their lab's practice (in 1996 as now) is not to extract blood by inserting a hypodermic needle through the cap; they would have removed the cap. Lab Corp determined that the use of needles for extraction of blood samples is both dangerous to the analysts and unnecessarily expensive, so as a matter of policy hypodermic needles are not, and never have been, used. Since that blood vial was never sent to another lab for testing after Lab Corp returned it to the Clerk's office in 1996, there is no legitimate explanation for the needle hole in the cap, that we know. Even if there is a licit explanation for the needle hole, any wrong doer could have simply removed the cap to extract the small amount of blood found in the Halbach vehicle, because the cap was never sealed.

12. Lt. James Lenk and Sgt. Andrew Colborn had early involvement in the Teresa Halbach investigation, and indeed showed a particular and suspicious interest in the case both before and after Avery was charged. On November 3, 2005, Teresa Halbach was reported missing to the Calumet County Sheriff's Department. After a brief investigation, it was learned that she was last seen on October 31, 2005, and that she had two appointments as an Auto Trader photographer with customers

located in Manitowoc County. CASO Investigator Mark Wiegert called the Manitowoc County Sheriff's Department and spoke with Sgt. Colborn. He advised him that Teresa Halbach had been reported missing and that she had been to two residences in Manitowoc County on the day she was last seen, one of which was Steven Avery's. Wiegert asked for a deputy to go over to Avery's residence and speak with him, and Sgt. Colborn personally volunteered for this duty. A short while later Wiegert received an unsolicited call from Lt. Lenk, asking for information about the matter. Wiegert explained the situation and Lt. Lenk indicated he would provide assistance.

13. Shortly thereafter, on the evening of November 3, 2005, Avery received a visit from Colborn. Avery admitted Halbach had been to Avery Auto Salvage on Monday, October 31, to photograph a vehicle for sale, but that she left and he knew nothing thereafter. Avery permitted Colborn to search the interior of his residence, and Colborn saw nothing to indicate any concern.

14. The next morning, November 4, 2005, Lenk and MTSO Detective Remiker returned to Avery's residence. They again asked about his knowledge of Halbach and he again admitted she had been to his property on October 31, 2005, to photograph a vehicle for Auto Trader magazine. Avery once again allowed both

officers into his residence to look around, but they saw nothing suspicious and left. Lenk filed no report of this encounter, nor of his involvement the previous night.⁴

15. Lt. Lenk's own whereabouts on Saturday, November 5, 2005, are largely unaccounted for, and records disprove sworn testimony he has given in this case. At the motion hearing on August 9, 2006, he testified that he was off duty when he received a call from Detective Remiker who informed him that he believed Teresa Halbach's vehicle had been found on the Avery Salvage property. Trans. 8/09/06, at 196. Lenk testified that he was in Menasha looking at an RV when he received the call, and that he told Remiker "that I would be coming back and that I would be coming out to that location." *Id.* at 197. He further testified that he arrived at the Avery property "somewhere [around] 6:30 or 7 that evening. I'm not positive." *Id.* However, a police log of all persons (including law enforcement agents) entering or leaving the Avery property through police checkpoints began at 2:25 p.m., when DCI agents first arrived on the scene, and there is no record of Lenk arriving after that. The log *does* indicate that Lenk left, along with Remiker and Colborn, at 22:41 (10:41 p.m.) that night, but there is no other entry reflecting Lenk

⁴Indeed, Lenk only filed one report of any investigation he did in the Halbach missing person or homicide investigation, which concerned his search on November 8, 2005, when he allegedly found a Toyota vehicle key in plain view on the floor of Avery's bedroom, after no other officer had seen it during that search or six prior searches.

coming or going to the property that Saturday. So the time of his arrival is completely undocumented.

16. Lt. Lenk wrote no report whatsoever of any of his activities on November 5. However, a report by Deputy Inspector Greg Schetter indicates that Lt. Lenk claimed that he worked 10.0 hours on Saturday, November 5, 2005, and that his duties were described as "assist CASO search/evidence tech." If that information provided to Deputy Inspector Schetter was truthful, then Lenk would have arrived at the Avery property to "assist CASO search" — or at least arrived at work, which may be an important distinction here — at approximately 12:41 p.m., ten hours before he left the Avery property at 10:41 p.m. The records thus clearly contradict Lenk's sworn testimony that he did not arrive at the Avery property until about 6:30 or 7:00 p.m. that evening. The record of hours worked also contradicts Lenk's testimony that it "was getting dark" when he first arrived and was brought over to the location of the RAV-4. *Id.* at 198. The credibility of Lenk's sworn testimony in this case will therefore be an issue for the jury to consider. Lenk did admit, though, that he approached Halbach's car on November 5. He denied touching it. *Id.* at 197-98.

17. Lenk also volunteered to be one of the officers assigned to search Steven Avery's own residence on November 5, even though he had been advised

that his department had turned over investigative authority to the Calumet County Sheriff because of the obvious conflict of interest since Avery was suing Manitowoc County for \$36 million over his wrongful conviction. *Id.* at 198, 203. As the fourth highest ranking officer of MTSO, *Id.* at 188, Lenk should not have been volunteering to search anything, let alone Avery's personal residence, to avoid the appearance of a conflict of interest. But it was not just his high rank that should have excluded him from any direct involvement in the criminal investigation against Avery: the fact that he was personally deposed as a witness in the civil lawsuit a mere *three weeks* before Halbach disappeared also gave him a personal conflict, atop the institutional conflict. Adding further to suspicion about Lenk's motives and involvement in this investigation was his decision, as well as that of Sgt. Colborn, to withhold information from the lead investigators about their recent depositions. Trans. 8/10/06, at 122-24. Indeed, Sheriff Jerry Pagel of Calumet County first learned at an evidentiary hearing in this case that Lenk and Colborn had been witnesses in Avery's civil lawsuit within three weeks before Teresa Halbach disappeared.

18. Lenk ultimately proved to be a crucial witness for the prosecution here because he discovered, on the seventh entry to Avery's residence, a key which fit Halbach's vehicle. He claimed the key was sitting in plain view when he discovered it, yet no other officer had found it earlier in the many hours of searches preceding that. Despite hundreds of DNA tests and other examinations of virtually

every square inch of Avery's residence, the "magic key" remains the one and only piece of physical evidence found inside Avery's residence that appears to connect Avery to this crime. Oddly, that key, which should have been used by Teresa Halbach daily for approximately six years if it was her car key, did not contain her DNA; it contained only Avery's, who supposedly hid it and had possessed it for at most seven days. Further, the key also lacked any fingerprints of either Halbach or Avery.

19. Lenk's interest in the investigation of this case continued even four months later, when he again visited Avery's property during the execution of a search warrant on March 1-2, 2006, following Brendan Dassey's further statements. That Lenk chose to re-interject himself into an investigation that for four months had been under CASO control is again suspicious. Lenk was no doubt aware that four months of investigation had failed to connect Avery with physical evidence of the crime. Yet the day after Lenk visited the Avery property a small bullet fragment was found in the detached garage near Steven Avery's residence that crime lab tests later concluded contained a partial profile consistent with Halbach's DNA. Is this a mere coincidence? The State may so argue, but whether there is a more sinister explanation is for a jury to decide. That very garage had been searched many times between November 5-12, 2005, and no bullet discovered lying on its floor.

20. Avery may have no direct proof that Lt. Lenk (or any other MTSO officer) is the individual(s) who planted his blood in Halbach's vehicle, but he is not required to offer any. There is enough circumstantial evidence presented by the availability of Avery's blood in an unsecured vial in an unsecured location right next to the Manitowoc County Sheriff's Department, by the motive and bias of Lenk and others against Avery, by Lenk's involvement in the 1985 court file back in 2002, by the particular interest Lenk showed in personally calling for additional information on an otherwise routine missing person investigation on November 3, and by his suspicious decision to volunteer to be one who searched Steven Avery's own residence, while withholding from the CASO lead investigators the fact that he was personally involved as a deposed witness in Avery's civil lawsuit just three weeks earlier. Indeed, Lenk may be only one of several law enforcement officials involved, or he may have acted alone, but there certainly was a window of opportunity between the time the vehicle was discovered and when it was removed from the Avery Salvage Yard by the Crime Lab.

21. According to earlier testimony in this case, the vehicle was originally discovered by volunteer searchers Pamela and Nicole Sturm at about 10:30 a.m. on the morning of Saturday, November 5, 2005. The first law enforcement officers arrived about 11:00 a.m. Neither the Sturms nor the initial reporting officers observed any blood visible inside the RAV-4 at that time. Detective Remiker and

Sgt. Orth of MTSO arrived first, then the CASO investigators arrived at the property about 11:10 a.m. Trans. 8/9/06 at 143. Thereafter, a steady stream of law enforcement officers, prosecutors⁵ and others came and went, such that the entry log for November 5 has more than 100 entries between 2:25 p.m. and 8:42 p.m. when the vehicle was removed from the scene by the Crime Lab.

22. The decision to transfer responsibility for the investigation to Calumet County was made approximately 11:45 a.m. on November 5, by MTSO Deputy Inspector Schetter and CASO Sheriff Pagel. CASO Investigator Mark Wiegert was designated the chief investigator by Sheriff Pagel. According to reports, ADA Griesbach and DA Rohrer arrived at the scene about 12:25 p.m., and DA Kratz came onto the Avery property about 1:00 p.m. Prosecutors Kratz, Rohrer, and Griesbach, and MTSO Det. Remiker and CASO Inv. Wiegert all left the Avery Salvage Yard property at about 2:00 p.m. to obtain a search warrant from Judge Jerome Fox in the City of Two Rivers. They did not return to the Avery property until approximately 3:25 p.m. Thus, all of the prosecutors and the lead CASO

⁵ The State argues that police officers would not have known that a crime had been committed on November 5, as Teresa Halbach's remains had not yet been discovered, so there would have been no reason to plant Avery's blood in her car. The presence of several prosecutors from two counties at the scene on November 5 demonstrates clearly, however, that the State viewed the Avery Auto Salvage property as a crime scene that day. Under Wisconsin law, District Attorneys have no statutory responsibility in missing person investigations, no search and rescue duties. Indeed, a special prosecutor was appointed on November 5, and the State began to secure search warrants that day — obviously, again, because a criminal investigation was underway. The search warrant affidavit prepared about 2:00 p.m. on November 5, 2005, by Investigator Wiegert stated his belief then that "Teresa Halbach is the victim of a crime including, but not limited to homicide, sexual assault, kidnaping false imprisonment and theft."

investigator were away from the location where Halbach's vehicle was discovered for nearly one and one-half hours, during which time apparently no complete log of entries to the Avery Salvage Yard was maintained.

23. The first DCI agents did not arrive at the Avery property until 2:25 p.m., nearly three and one half hours after the first law enforcement agents had arrived there. While the RAV-4 was at the scene, the vehicle was located at the very edge of the Avery Salvage property, near a strip of small trees. There was access to the vehicle from the neighboring property to the south. At approximately 3:12 p.m. it began to rain, so several officers assisted with the creation of a makeshift tent over the RAV-4, by use of several very large tarps. Care was taken to be sure the tarps did not actually touch the RAV-4 itself, but instead created a tent-like area over and around the vehicle. While the vehicle was so protected from the elements it was likewise protected from the view of most officers in the area.

24. The Wisconsin Crime Lab field response team did not arrive until approximately 4:00 p.m. It began to get dark shortly thereafter, as the weather had turned rainy and sunset that day was 4:35 p.m. The vehicle was removed from the scene at 8:40 p.m. and taken to the Madison Crime Lab, where it was examined on Monday by DNA and fingerprint analysts.

25. When the RAV-4 was examined and photographed at the crime lab, investigators found several small blood stains, later determined by the analyst

to be consistent with Steven Avery's DNA profile. One stain was on the top of the driver's seat, and another appeared to be a reddish brown smudge on the vinyl area of the dashboard directly next to the key ignition. Significantly, neither the volunteers who discovered the RAV-4, nor the officers who originally examined the vehicle at the Avery Salvage Yard reported seeing any blood stains inside. This is so even though it was daylight on a Saturday morning when the vehicle was discovered, at least one officer used his flashlight to look inside, and another officer was looking inside the vehicle carefully enough to see a small piece of paper with the victim's name on it.

26. Avery cannot conclusively prove at what point his blood was planted inside the Halbach vehicle, but once again, he need not do so. There is abundant circumstantial evidence supporting a period of time when the vehicle was at the Avery Salvage Yard scene on the morning and afternoon/early evening of November 5 when one or more law enforcement officers would have had the opportunity to do so. It is unclear how long the RAV-4 was at the location where it was found before the Sturms discovered it, but there is an undetermined time before their discovery when someone, law enforcement or otherwise, also had the opportunity.

27. What is clear is that Lenk's whereabouts are undocumented that day until he *left* the scene at 10:41 p.m. on November 5, but he reported that he

worked 10.0 hours that day on the Halbach investigation. By his own sworn account, if he really did not arrive at the Avery property until between 6 and 7 p.m. and performed no other "work" on the Halbach investigation that day, his hours worked would have been fewer than 5.0. Five hours or more of his time on the Halbach investigation on November 5 are a mystery, and the time and manner of his arrival at the scene of her car is undocumented. Even he admits being near that car on November 5. Trans. 8/9/06 at 197-98. Avery's jury should decide what he was doing, and why the available law enforcement documents fail to support his sworn testimony of his activities.

28. Finally, note that the planting of Avery's blood need not necessarily have involved a widespread conspiracy, though it may have. The availability of the unsecured vial of Avery's blood and the substantial length of time when the vehicle remained at the scene (three and one half hours before the DCI, and five hours before the crime lab team arrived) provided ample opportunities for one or a few officers to complete the deed, and some individuals may even have unwittingly participated in parts of the scheme.

III.

CONCLUSION

Steven Avery has said from the beginning that someone planted his blood, if it was found in Teresa Halbach's car. Just as publicly, the state scoffed on

November 11, 2005, that it was "absurd" to suppose that law enforcement officers carry vials of Avery's DNA with them. For the reasons Avery explains here, that is not absurd. It is plausible. A vial of Avery's liquid blood clearly was available to the police — and to the public — at the relevant time. Not only was the seal to the container holding the vial broken, but the vial itself clearly was breached by someone. Minute contents of that vial plausibly could have been planted in Ms. Halbach's car. That does not necessarily mean that someone did plant the blood from the vial in the car. But Steven Avery has evidence sufficient to require that his jury, not the prosecution or the Court, decide the question.

Dated at Madison, Wisconsin, January 12, 2007.

Respectfully submitted,

STEVEN A. AVERY, *Defendant*

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