STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S RESPONSE TO STATE'S MOTION TO EXCLUDE BLOOD VIAL EVIDENCE

The State has filed a motion seeking to exclude any mention of the discovery of the unsealed vial of Steven Avery's blood in the Manitowoc County Clerk of Court's office, as well as any cross examination of State's witnesses as to why they failed to locate and test the blood if the State claims that vial could not be the source of small blood stains found inside Teresa Halbach's vehicle. Alternatively, the State seeks a continuance of the trial to permit sufficient time for the State to subject the vial to chemical testing by the FBI. Steven Avery now responds, focusing on the admissibility of the blood vial evidence.[1]

[1]The State's argument for exclusion set forth in its Motion at 2-5 appears to be directly copied from prior pleadings which were filed in this case in July. The argument presents the same issues already heard at a hearing on July 5, 2006. The defense previously replied to those arguments, and this Court already ruled against the State. Thus, Mr. Avery does not address those matters here.

Defense Notice Was Timely

First, the defense disclosure of its discovery that a box purporting to contain Steven Avery's blood was contained in his 1985 court file was not untimely. Indeed, the defense made its disclosure to the State 60 days before trial, whereas the court order on disclosure of extrinsic evidence relating to planting required only 30 days' pretrial notice. Order at ¶¶ 2-3 (July 10, 2006).

The State surmises that the defense "was aware of the existence of this vial of blood on July 20, 2006." State's Motion at 1. However, it was not until the box was opened under the authority of this Court on December 14, 2006, that the vial of liquid blood was found to remain within the box in the Clerk's office. Further, the 1985 court file is and always has been a public record equally accessible to the defense and the State. That the State's investigators and prosecutors failed to know of the existence of the box contained within that file reflects either their own negligence, or an attempt by Manitowoc County Sheriff's Department officers to hide such knowledge, or both.[2] As noted in the defense motion for access to the box

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[2] Contrary to the inference in the State's Motion, at 5, Mr. Avery has never accused anyone in the Manitowoc County Clerk of Circuit Court's office of misconduct or improper motives. At the time of Teresa Halbach's disappearance the 1985 case was a closed file that attracted understandable public and media interest. The clerk's decision to keep the file box in an easily accessible location to allow quicker response to public requests for access to the file was understandable. It is unlikely the clerk would suspect any police officer of a deliberate crime of planting evidence against a wrongly convicted person, which would likewise make it all that much easier for an officer to do what he intended without the clerk realizing it.

in the 1985 file, Lt. James Lenk (who also found in Mr. Avery's bedroom the key to the RAV-4 that no one else found on six prior searches of the bedroom), signed the crime lab evidence transmittal that resulted from the parties' examination of the wrongful conviction file in 2002, so the State cannot claim it had no knowledge of the blood's existence before the defense disclosure last month.

Next, the State misstates the record to argue that this Court's order requiring defense notice of any extrinsic evidence 30 days before trial meant the defense should have disclosed this evidence "no later than the first week of August, approximately 10 to 12 days after it was discovered by the defense on July 20, 2006." State's Motion at 1. Contrary to the State's assertion, the case was not set for trial in September at that point. On May 4, 2006, the September trial date had been rescheduled to October 16. By the terms of the Court's July 10 order, then, extrinsic evidence bearing[3] on planting would not have been due until September 16. Morever, on August 22, by joint stipulation of the parties, the trial date was moved to February 5, 2007. This Court's order following the October 19 scheduling conference then set a general discovery deadline of December 15,[4] but did not

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[3] This discussion assumes for the sake of argument that the evidence at issue even is "extrinsic." Mr. Avery addresses that question below.

[4] As defense counsel conceded on December 21, the defense failed to disclose some reciprocal discovery materials by that deadline. Those materials went by overnight courier to the lead prosecutor on December 26 and December 28, 2006. The State also has continued to provide some discovery materials after the December 15 deadline, including photographs and

supersede the earlier order requiring 30 days' notice of extrinsic evidence of planting.

In all events, the defense motion filed on December 6, 2006, provided 60 days' notice, twice that required by the Court's July 10 order, and also came nine days before the December 15 general discovery cutoff. Disclosure was timely.

The Evidence is Not Extrinsic

For that matter, it is debatable whether this evidence even falls within the Court's July 10 order requiring the defense to provide notice of "any extrinsic evidence to suggest that any of the State's evidence against the defendant was deliberately 'planted.'" Order ¶2 (July 10, 2006). As argued by the defense in court on July 5, 2006, the defense agreed to provide notice to the State if it intended to introduce extrinsic evidence such as "that one of the officers had committed some misconduct in the past that was related to this," Trans., July 5, 2006, at 168, such as occurred in *State v. Missouri*, 2006 WI App 74, 714 N.W.2d 595. When the court restated what it believed to be the areas of agreement between the parties and asked if the parties accepted its summary, Mr. Buting replied:

> I think we're clear, if we have the same understanding of extrinsic evidence, I guess. That would be evidence that's not related to this case. If there's evidence we could present, I can't really think of any analogy right now, but — so it's probably foolish to speculate at this point.

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perhaps documents in the State's possession much earlier. Within reason, the defense does not object to continued disclosure as the State becomes aware of oversights in earlier disclosure.

> But I — Again, if it relates to the actual physical evidence in this case, and it somehow relates to authenticity, or chain of custody, I do not accept, by the way, the State's claim that somehow there was no opportunity for this to have been tainted by anyone, that the vehicle could not have been tainted. I don't accept that. And I don't think the evidence will show that.
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> But certainly, anything that would go to chain of custody, or authenticity, or credibility, or reliability of the State's — or bias — of any of the State's evidence, or witnesses presenting the evidence is fair game, and is not extrinsic. In fact, it is very clear, bias is not extrinsic to a case, authenticity is not. All of those fundamental building blocks is [sic] what I'm talking about.

Id. at 181-82. Mr. Fallon accepted this statement, while noting (presciently): "But I do foresee a possible argument on the scope of extrinsic. But as counsel has stated, those comments there, we can live with that." *Id.* at 183.

Clearly, the small blood stains found in Teresa Halbach's RAV-4 are "actual physical evidence in this case" and the possibility of Avery's blood being planted there from a blood vial easily obtainable from the prior court file goes directly to the authenticity, credibility and reliability of the State's evidence and witnesses. Thus, this evidence is not the sort of "extrinsic evidence" anticipated by the defense in the July 5 discussion on the record, like, for instance, the police officer in *Missouri* against whom other acts evidence of mistreatment of blacks was held admissible.

Nevertheless, despite this ambiguity in the July 10 order, the defense chose to disclose what it did know about the potential of a source of Mr. Avery's blood — especially because just two days before the defense motion was filed the State continued to claim that it had no access to Mr. Avery's blood. *See* State's

Memorandum Regarding Motions in Limine at 2 (December 4, 2006, filed under seal). Thus, choosing to err on the side of more, rather than less, disclosure the defense filed its motion on December 6, 2006. That motion laid out in detail the information available about the box purportedly containing Mr. Avery's blood, and cited the suspicious circumstances surrounding the involvement of Lt. Lenk and Sgt. Andrew Colborn in this case. *See* Motion for Order Allowing Access to Prior Court File, at n.2 (December 6, 2006).

Continuance

Mr. Avery understands now why the State wants to test the blood vial that it apparently assumed since November 2005 did not exist. But Mr. Avery remains in jail, unable to post bail, now fully 14 months after his arrest. He is presumed innocent. Barring a modification of his conditions of bail to permit his immediate release, he will not agree to a continuance of his trial for the reasons that the State offers in seeking an adjournment. That the state only now is taking seriously Mr. Avery's assertion that his blood was planted in Ms. Halbach's RAV-4 ought not burden Mr. Avery. He first told the State, if any agent of the State had a television tuned to a Green Bay station, in early November 2005 that his blood was planted. The burden of the State's delay in addressing the vial of Mr. Avery's blood in the

clerk's office, easily accessible to anyone who might care to plant his blood, should fall instead on the State.

Dated at Brookfield, Wisconsin, January 4, 2007.

Respectfully submitted,

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