

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

*Plaintiff,*

*v.*

STEVEN A. AVERY,

*Defendant.*

MANITOWOC COUNTY  
STATE OF WISCONSIN  
**FILED**

FEB 5 2007

CLERK OF CIRCUIT COURT

Case No. 2005-CF-381

**DEFENDANT'S MOTION TO EXCLUDE STATE EXPERT WITNESS  
TESTIMONY, AND MOTION TO COMPEL DISCLOSURE OF  
POTENTIALLY EXCULPATORY EVIDENCE**

Please take notice that on February 2, 2007, at 1:00 p.m., or as soon thereafter as counsel can be heard, Steven Avery, by attorneys Jerome F. Buting, of BUTING & WILLIAMS, S.C., and Dean A. Strang, of HURLEY, BURISH & STANTON, S.C., will move the Court to exclude testimony from several expert witnesses listed on the state's witness list for its failure to comply with discovery obligations regarding the state's use of those witnesses. Further, the defense moves the court to order the disclosure of potentially exculpatory DNA results referenced by the FBI in an attached report, but which results are not disclosed.

On January 19, 2007, the court heard and decided a similar motion from the State demanding more particularity in the defense expert witness disclosures. The court referenced §971.23(2m)(am), and *State v. Revels*, 221 Wis. 2d 315, 330, 585

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(1)

N.W.2d 602 (Ct. App. 1998), which interpreted that statute to “require disclosure of relevant substantive information that a defense expert is expected to present at trial.” The court ordered the defense to provide additional information as to its proposed experts, and the defense has done so.

However, the same statutory requirement equally applies to the state’s obligation for disclosure of experts, as set forth in § 971.23(1)(e), Wis. Stats. Yet the State has filed several cryptic FBI Laboratory reports which fall far short of the statutory requirements as interpreted by the court on January 19th, and as to four other expert witnesses the State has failed to provide any report or other information as to the subject matter of their testimony.

Two days ago, on January 29, 2007, the defense received a report dated January 12, 2007, from the DNA Analysis Unit II of the FBI Lab. (Exhibit 1). The report states that “specimens” were received on three separate dates in November and December of 2006, apparently for the purpose of performing DNA or mitochondrial DNA tests. The specimens are identified only as “bone fragments” and given an FBI lab number and designation as items “Q11, Q12, Q13, Q14-14.8, and Q15-45.” No further description of the items examined is given. It is impossible to tell if they are bone fragments found in the burn pit behind Steven Avery’s residence, the burn barrel behind the Janda/Dassey residence, or some other

location entirely. It is unclear whether some, all, or none of the fragments had been previously determined by the state's forensic anthropologist to be human or not. In short, the defense has no way of knowing from this cryptic report what was sent to and examined by the FBI Lab.

In addition, although the report states that due to the "condition" of the submitted items "no mitochondrial DNA (mtDNA) examinations were conducted," it does not say what conditions caused the analyst to choose not to perform a mtDNA examination. It is unknown whether the "condition" is one that existed at the time the specimens were first discovered or whether the "condition" developed after the specimens came into the custody of law enforcement authorities. Further, it appears from the report that some DNA examinations *were* conducted, but the results are conspicuously not reported. The report concludes that the items will be returned to Wisconsin "along with the processed DNA generated from the samples. The processed DNA can be found in a package" marked for refrigeration. Thus, clearly the specimens were processed and DNA was generated. The results may be exculpatory since if they were inculpatory they would certainly have been noted.

Moreover, it should be noted that the most recent FBI report makes reference to items beginning with the designation Q11 and runs up to Q45. The only other FBI DNA Analysis Unit report received by the defense, dated January 17, 2006 and

attached as Exhibit 2, refers only to one item and it is given the designation "Q1." The obvious implication is that at least nine other specimens were examined by the FBI, with designations Q2-Q10, but no report of those findings has been provided to the defense. Mr. Avery hereby demands the production of those FBI DNA examinations, and any other results of DNA tests performed by the FBI on any and all specimens sent for review in this case. Even if the results are deemed inconclusive by the State, such findings are nevertheless be potentially exculpatory to the defense.

In addition, the report of mtDNA examinations done on the single "charred remains," referenced in attached Exhibit 2, insufficiently discloses information required under *State v. Revels*. The report does conclude that "TERESA HALBACH cannot be excluded as the source of the Q1 charred remains," but no further opinions are given. The report goes on to discuss a small population base of mtDNA currently available to the FBI, but the author provides no explanation or opinion that can be derived from the results. Mr. Avery thus moves the court to prevent any testimony from the DNA analyst in Exhibit 2, Douglas Hares, other than his opinion that Teresa Halbach cannot be excluded as the source of the charred remains. The State failed to disclose any further relevant subject matter that this proposed expert

is expected to provide, so anything opinions beyond that single conclusion would be in violation of the State's statutory obligations under § 971.23, Wis. Stats.

Finally, the defense notes that there are three expert witnesses listed on the state's witness list, for whom no reports of any kind have been provided. Those are Carl Adrian (FBI), Eric Smith (FBI), and Robin Cotton. Any testimony from these witnesses must be excluded as the State failed to timely comply with § 971.23 by the December 15, 2006 deadline set by the court.

Dated at Brookfield, Wisconsin, January 31, 2007.

Respectfully submitted,

STEVEN A. AVERY, *Defendant*

HURLEY, BURISH & STANTON, S.C.

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

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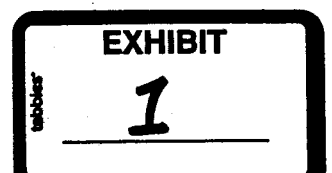
Jerome F. Buting  
Wisconsin Bar No. 1002856  
Counsel for Steven A. Avery

**FBI Laboratory**2501 Investigation Parkway  
Quantico, Virginia 22135**REPORT OF EXAMINATION****To: Milwaukee  
Squad 6, GBRA  
SA Gerald E. Mullen****Date: January 12, 2007****Case ID No.: 62D-MW-44363 - 51****Lab No.: 061108009 PM PV  
061114006 PM PV  
061227012 PM PV****Reference: Communications dated November 2, 2006, November 7, 2006,  
and December 19, 2006****Your No.:****Title: STEVEN AVERY;  
TERESA HALBACH - VICTIM (DECEASED)  
DOMESTIC POLICE COOPERATION****Date specimens received: November 8, 2006, November 14, 2006, and December 27, 2006****The following items were submitted under cover of communication dated November 2, 2006,  
assigned Laboratory number 061108009, and received in the DNA Analysis Unit II:****Q11 Bone fragment (1B5 E04033363)****Q12 Bone fragment (1B5 E04033363)****The following items were submitted under cover of communication dated November 7, 2006,  
assigned Laboratory number 061114006, and received in the DNA Analysis Unit II:****Q13 Bone fragment (1B6, E04033388)****Q14-Q14.8 Bone fragments (1B6, E04033388)**

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JAN-25-2007 15:04

FBI GBRA

920 432 1000 11.00.00

The following items were submitted under cover of communication dated December 19, 2006, assigned Laboratory number 061227012, and received in the DNA Analysis Unit II:

Q15-Q45                      Thirty-one bone fragments (1B7, E04033589)

**Remarks:**

Due to the condition of the submitted Q11, Q12, Q13, Q14-Q14.8, and Q15-Q45 bone fragments, no mitochondrial DNA (mtDNA) examinations were conducted.

The submitted items will be returned under separate cover along with the processed DNA generated from the samples. The processed DNA can be found in a package marked **PROCESSED DNA SAMPLES: SHOULD BE REFRIGERATED/FROZEN**. It is recommended that these samples be stored in a refrigerator/freezer and isolated from evidence that has not been examined.

Leslie D. McCurdy, Ph.D.  
DNA Analysis Unit II  
(703) 632-7601

This report contains the opinions/interpretations of the examiner(s) who issued the report.


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061108009 PM PV

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TOTAL P.03

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**FEDERAL BUREAU OF INVESTIGATION**  
QUANTICO, VA 22135

To: Milwaukee  
Squad 6, GBRA  
SA Gerald E. Mullen

Date: January 17, 2006

Case ID No.: 62D-MW-44363

Lab No.: 051123009 PM MR

Reference: Communication dated November 16, 2005

Your No.:

Title: STEVEN AVERY;  
TERESA HALBACH - VICTIM (DECEASED)  
DOMESTIC POLICE COOPERATION - HOMICIDE

Date specimens received: November 23, 2005

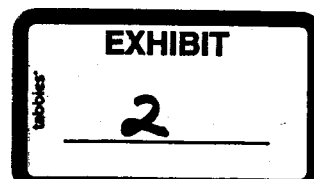
The items listed below were examined in the DNA Analysis Unit II:

- Q1 Charred remains (1B2, E03635309)
- K1 Buccal swabs from KAREN HALBACH (1B1, #CD, E03635310)

This report contains the results of the mitochondrial DNA examinations.

1- Investigator Mark Wiegert  
Calumet County Sheriff's Office  
206 Court Street  
Chilton, WI 53014

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**Results of Examinations:**

Mitochondrial DNA (mtDNA) sequences were obtained from the Q1 charred remains and the K1 buccal swab identified as coming from KAREN HALBACH, the identified mother of TERESA HALBACH. The mtDNA sequences obtained from Q1 and K1 are the same, with the exception of position 320. At this position, the presence of a cytosine (C) was observed in the Q1 charred remains. In specimen K1, evidence both a cytosine (C) and a thymine (T) was characterized at position 320.

Due to the closely related sequences obtained from specimens Q1 and K1, TERESA HALBACH cannot be excluded as the source of the Q1 charred remains.

Searching the mtDNA population database currently available to the FBI Laboratory (CODIS + Mito Popstats version 1.3, containing 5071 individuals, searching positions 16024-16365 and 73-340), the mtDNA sequence obtained from specimens Q1 and K1, including all four nucleotides, A, C, G and T, at position 320, has been observed in the following major population groups:

Database	Number of Observations	Individuals in Database	Upper Bound Frequency Estimate
African-American	0	1148	0.26%
Caucasian	0	1814	0.17%
Hispanic	0	759	0.39%

The mtDNA sequencing results are detailed below. Results are listed as differences from the published revised Cambridge Reference Sequence (rCRS).

Specimen	Q1 Remains	K1 Karen Halbach
<b>Range</b>	np 15998-16389	np 15998-16389
<b>HVI</b>	16222 T	16222 T
<b>Range</b>	np 49-408	np 49-408
<b>HVII</b>	263 G 309.1 C* 315.1 C *C8TC6-major C9TC6	263 G 309.1 C* 315.1 C 320 N *C8TC6-major C9TC6 C10TC6

No other mtDNA examinations were conducted.

**Remarks:**

The submitted items are retained in the FBI Laboratory. The final disposition will be addressed in a separate communication. The processed DNA will be found in a package marked PROCESSED DNA SAMPLES: SHOULD BE REFRIGERATED/FROZEN. It is recommended that these samples be stored in a refrigerator/freezer and isolated from evidence that has not been examined.

Douglas R. Hares, Ph.D.  
DNA Analysis Unit II  
703-632-7576