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December 04, 2006

The Honorable Patrick L. Willis  
Manitowoc County Circuit Court  
1010 S. Eighth Street  
P. O. Box 2000  
Manitowoc, WI 54221-2000

**[FILED UNDER SEAL]  
Sent Via Facsimile & U.S. Mail**

**Re: State of Wisconsin vs. Steven A. Avery  
Case No. 05-CF-381**

Dear Judge Willis:

Enclosed please find the State's Memorandum Regarding Motions in Limine (wrongful conviction and inmate statements), to be filed under seal, for the court's consideration. Mr. Strang was kind enough to indicate he had no objection to this being filed today, rather than last Friday.

Thank you for your attention to this matter.

Sincerely,



Kenneth R. Kratz  
District Attorney

KRK:sgb

cc: Attorney Dean Strang  
Attorney Jerome Buting  
Attorney Thomas Fallon  
Asst. D. A. Norm Gahn

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REC'D DEC 15 2006

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APM

STATE OF WISCONSIN,

FILED

Plaintiff,

DEC 15 2006

MEMORANDUM OF STATE OF WISCONSIN REGARDING MOTIONS IN LIMINE

vs.

STEVEN A. AVERY,

CLERK OF CIRCUIT COURT

Defendant.

Case No. 05-CF-381 [FILED UNDER SEAL]

**BACKGROUND**

**1. Wrongful Conviction**

The State of Wisconsin, in a document dated June 9, 2006, filed a Motion in Limine seeking to prevent the defense from introducing evidence of the defendant’s prior “wrongful conviction” for sexual assault, including the ramifications of that conviction (which necessarily would include the years the defendant spent incarcerated, and resulting civil lawsuit filed). See State’s Motion in Limine, Series 1, Paragraph 1.

As a related matter, the defense filed a “First Motion in Limine” dated July 14, 2006, wherein they seek to introduce proof of the defendant’s “wrongful conviction” and civil lawsuit filed against Manitowoc County. The defense further submits an “offer of proof” dated August 8, 2006, setting forth what facts they wish to elicit demonstrating a “bias” on the part of the Manitowoc County Sheriff’s Department.

**2. Inmate Statements**

The State, in the same Motion in Limine, Series 1 (dated June 9, 2006) seeks to introduce evidence of statements the defendant made to jail or prison inmates, as specifically set forth in Paragraph 6E of said motion. The State sets forth in detail the statements of Jesse Werlein, Anthony Myers, and Daniel Luedke. The defense submitted a memorandum opposing the State’s request to introduce the inmate statements dated June 28, 2006.

The court has invited the State to further clarify its position on both the issue of whether the defendant’s “wrongful conviction” should be admitted, and whether the statements to prison inmates should be allowed. This memorandum seeks to clarify the State’s position as to each issue.

**WRONGFUL CONVICTION**

The State concedes that in 1985 the defendant was sentenced to prison for crimes including Sexual Assault; the defense claims that Avery “served 18 of those years” before the real rapist was found. The defense fails to acknowledge that six of those 18 years the defendant was serving a concurrent sentence for Endangering Safety of Sandra Morris and Pointing a Firearm for an act occurring on November 27, 1984 (which facts were the subject of the State’s unsuccessful motion to allow the introduction of other acts evidence - Motion 4).

Therefore, as an aside, even if the defense is successful in being allowed to inform the jury of spending 18 years in prison “for a crime he did not commit”, the State must necessarily be allowed to explain that six of those years involved a “legitimate” criminal conviction against the defendant.

The defense argues that evidence of Avery’s wrongful conviction establishes a “bias” on the part of the Manitowoc County Sheriff’s Department, and its employees. In its motion and offer of proof, the defense claims that Manitowoc County Sheriff’s Department has “in its possession or has had access to one or more items from which Steven Avery’s DNA could be extracted” (defendant’s offer of proof, Paragraph 7).

If the State understands the defense position correctly, the theory is that employees of the Manitowoc County Sheriff’s Department, having been unsuccessful in securing Avery’s incarceration in the early 1980’s, either killed Teresa Halbach themselves, “planted” Avery’s DNA into this investigation, or purposefully directed the investigation to implicate Avery, at the exclusion of the “real killer”.

The State argues that such hypothesis is neither supported by fact, nor application of law, and, as indicated in the State’s Motion in Limine, introducing evidence of the defendant’s prior conviction, and/or civil lawsuit must be viewed as an attempt to elicit sympathy from the jury, and is otherwise irrelevant pursuant to Sect. 904.02 and 904.03 Wis. Stats.

Importantly, there is no evidence suggesting that Manitowoc County retained (or ever had in its possession) any of Steven Avery’s blood; it is only blood from Steven Avery that could have been “planted” in this case, as that bodily fluid was the most prevalent source of DNA extracted in this case. Any DNA sample previously provided by Avery by use of “buccal swabs” is factually inconsequential. Without proof that a law enforcement agency ever had Avery’s blood, the “planting” defense necessarily fails; without the means to plant evidence, the Manitowoc County Sheriff’s Department, even assuming they harbored ill will toward Steven Avery, failed to possess the instrumentality necessary to “set up” Mr. Avery in this homicide investigation.

That leaves the suggestion that because Avery was exonerated in 2003, Manitowoc County employees retained such “bias” towards this defendant, that the homicide investigation was slanted to the detriment of Steven Avery, and necessarily to the exclusion of the “real killer”. As this court already knows, the Manitowoc County Sheriff’s Department had no direct control over this investigation, as it was transferred to the Calumet County Sheriff’s Department and State of Wisconsin Department of Justice on November 5, 2005.

Evidentiary rules requiring evidence to have some relevance to material facts in the case (Sec. 904.01 and 904.02), and rules of exclusion when the risk of prejudice or confusion outweigh the minimal probative value that some evidence may have (Sec. 904.03), equally apply to the defense offered evidence as the State’s.

Law enforcement has taken great caution to insulate this prosecution from the appearance of any impropriety; Manitowoc County relinquished investigative control of the case, and Judge Jerome Fox assigned prosecution responsibilities to another county. To now allow the defense to infect this jury with inflammatory, prejudicial and unsupported theories of law enforcement bias would literally undermine every

effort taken, to this point, to ensure the appearance of a fair investigation and prosecution.

As this court has previously ruled that incidents occurring in the 1980's are so remote in time as to have little probative value, the State is hopeful that the court will apply the same standard to unsupported defense theories. Evidence of the defendant's "wrongful conviction" (and the required explanation of the defendant's "legitimate concurrent conviction"), should be excluded to avoid confusion of the issues, sympathy for the defendant, or other improper considerations by the jury.

### INMATE STATEMENTS

The defense suggests that it would be impossible, or at least impractical, for the court to exclude evidence of the defendant's prior prison stay, while allowing the defendant's statements to prison inmates. The State has previously suggested that it would be possible to introduce testimony of the three inmates while insulating the jury from knowledge of the defendant's prior incarceration. The State is willing to concede, for purposes of this motion, that should the court exclude evidence of the defendant's wrongful conviction and incarceration, the State will withdraw its request to introduce testimony of the three prison inmates. Therefore, should the court grant the State's motion to exclude evidence of the defendant's wrongful conviction, incarceration and resulting lawsuit, the court need go no further in this analysis.

However, should the jury be told of the defendant's prior prison incarceration, there remains no basis to exclude the highly relevant conversations of the defendant with fellow inmates, detailing his criminal plans upon his release.

As set forth in the State's detailed Motion in Limine, statements sought to be introduced include the following:

1. Jesse Werlein -- statements that the defendant had drawn up plans for a "torture chamber", indicating his intent, upon being released from prison, to abduct, rape, torture, and kill young women. Mr. Werlein provides details as to the defendant's drawings and statements.
2. Anthony Myers -- discussed with Steven Avery "bondage" and tying women up, including the defendant produced diagrams of how to bind women, demonstrating dominance and anger towards women.
3. Danial Luedke -- who engaged in conversations with the defendant and received information from Avery including, "the way to get rid of a body was to burn them".

"Relevant Evidence" includes that which has a tendency to make the existence of any fact that is of consequence more probable than it would be without the evidence (Sec. 904.01). All relevant evidence is admissible (subject to various constitutional and statutory exceptions) (Sec. 904.02, Wis. Stats.)

The State argues that nothing in Avery's history could be more relevant than his stated plan to abduct, rape, torture and kill women; his description as to disposal methods upon killing an individual is equally relevant. These facts are even more critical when considering the fate of the victim, Teresa Halbach, having been abducted, raped, tortured, murdered, and mutilated by burning.

The State understands that the defendant's stated intent (if not outright predictions) are disturbing; these are, however, the defendant's own words, and if the defendant did not want them repeated, he should not have engaged in these conversations. The defense is free to explain the context and "real meaning" of those homicidal plans if they choose.

The State also notes that there is no constitutional protection, prohibiting admission of these statements, as the statements were not made to law enforcement officials. The State understands this issue may be conceded by the defense.

The last issue for the court is whether this evidence is unfairly prejudicial; that is, whether any prejudice outweighs the probative value the statements may have. The State argues that Sec. 904.03 is only intended to exclude relevant evidence when it may mislead the jury, confuse the jury, or be a waste of time; the stated intent of a defendant, especially in a homicide case, cannot seriously be viewed as confusing, misleading, or a waste of time. While subject to cross examination, the witnesses' recollections may be tested by the defense, and the weight to be attributed to their statements will ultimately be assessed by the trier of fact. This court should not determine the weight this evidence is entitled to receive, only its admissibility.

### CONCLUSION

For the reasons stated above, and considering previous documents already on file, the State urges this court:

1. Exclude evidence of the defendant's prior "wrongful conviction", incarceration, and resulting civil lawsuit;
2. Allow defendant's prior statements to prison inmates as relevant evidence, which substantially outweigh any risk of unfair prejudice or confusion.

Respectfully submitted this 4th day of December, 2006.



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