

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 05-CF-381

STEVEN AVERY,

Defendant.

**STATE'S RESPONSE TO DEFENDANT'S MOTION
FOR SUBPOENA *DUCES TECUM***

INTRODUCTION

Generally, the State does not take a position regarding a defendant's lawful acquisition of evidence held by third parties; however, if the means are not lawful, as is the case here, the State must object. Defendant's motion for issuance of a subpoena *duces tecum* is legally deficient. There is no showing of materiality for the evidence sought during the postconviction, and Defendant's proposed *duces tecum* subpoena is legally defective in that it does not comply with Wis. Stat. § 885.01.

The Court should deny the request for subpoena *duces tecum* pursuant to Wis. Stat. § 805.07(3) and *State v. Gilbert*, 109 Wis. 2d 501, 326 N.W.2d 744 (1982).

ARGUMENT

1. The *Motion for Subpoena Duces Tecum* fails to establish the materiality of the evidence sought as required for postconviction discovery.

In *State v. O'Brien*, 223 Wis. 2d 303, 588 N.W. 2d 8 (1999), the court addressed the issue of postconviction discovery. The court held that a party who seeks postconviction discovery must first show that the evidence is consequential to an issue in the case.

The evidence is consequential only when there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. The court defined reasonable probability as a probability sufficient to undermine confidence in the outcome. The court went on to say that evidence is consequential only if the result of the proceeding would have been different. *Id.* at 320-21. The court stated that the mere possibility the evidence would change the outcome of the trial does not establish a consequential fact. *Id.* at 321

The Defendant must show the evidence is consequential. Here the Defendant has not demonstrated how the current state of the “Dassey” computer in the home of Barbara Tadych is consequential. Since the information on the computer now did not exist at the time of the trial in 2007, it could not be consequential and have an effect on the results of the trial.

The Defendant in his motion fails to identify what new evidence is on the computer that would undermine the confidence in the jury verdict in 2007. The evidence alleged to be on the “Dassey” computer (in the possession of Barb Tadych) did not exist at the time of the trial. This evidence could not undermine the results of Defendant’s trial in 2007.

Finally, there is no showing by the Defendant that any *material* evidence on the “Dassey” computer was not in the possession of Defendant’s counsel at the time of trial. The evidence on Dassey’s computer was revealed to the Defendant when the (seven) DVD’s were provided seven weeks before trial. (See State’s Resp. Def. Mot. Supp. Previously Filed Mot. Post-Conv. Relief, July 27, 2018.)

The Defendant has failed to meet his burden of proof to show how the current state of the “Dassey” computer contains consequential evidence that would establish a reasonable probability that whatever is on the computer would have had a reasonable probability of changing the outcome of the trial had it been available to the defense at the time of trial. This is an insurmountable hurdle because the evidence did not exist at the time of trial.

Defendant’s motion for issuance of a subpoena *duces tecum* for the production of Barb Tadych’s computer should be denied.

2. Wisconsin law does not permit issuance of a Subpoena *Duces Tecum* for the “Dassey” Computer in these postconviction proceedings.

Subpoena powers are set out in multiple statutes. Wisconsin Stat. § 757.01(1) provides that courts of record have subpoena power requiring the attendance of witnesses. Wisconsin Stat. § 885.01(1) authorizes courts to “*require the attendance of witnesses and their production of lawful instruments* of evidence in any action, matter or proceeding” before the court. Emphasis added. At this point, there is no hearing set to require the attendance and production of lawful instruments; in this case the computer. Wisconsin Stat. §§ 805.07(1) and (2) provide that subpoenas may be issued by any attorney in a civil case to require attendance of a witness for a deposition, or

to produce documents or other tangible items. The statutes relied upon by Defendant are for civil cases. But, this is a criminal case that has its own rules for discovery. Wis. Stat. § 974.06(2) and *State v O'Brien*, 223 Wis. 2d 303, 588 N.W. 2d 8 (1999).

Wisconsin Stat. § 805.07(3) provides that the court may quash or modify the subpoena if it is unreasonable or oppressive. In *State v. Gilbert*, 109 Wis. 2d 501, 509, 326 N.W. 744 (1982), the court construed this statute to apply to an issued subpoena *duces tecum*. Here, the subpoena *duces tecum* is being requested pursuant to civil discovery rules that are not applicable to this criminal case. Moreover, the subpoena is for the purpose of developing postconviction discovery and for which the Defendant has failed to meet the necessary criteria under *State v O'Brien*, 223 Wis. 2d 303, 588 N.W. 2d 8 (1999).

Finally, the request to issue a subpoena *duces tecum* is unreasonable. *Evidence* acquired from the “Dassey” computer as of April 21, 2006, has been provided. Any other data acquired after the trial of the Defendant could not change the outcome of his trial.

CONCLUSION

Defendant’s motion for issuance of a subpoena *duces tecum* should be denied because it does not meet the standards of pretrial discovery; *i.e.*, by demonstrating the materiality of the current state of the “Dassey” computer in the home of Barb Tadych. The motion should further be quashed or denied because the cited authorities for its production apply to civil discovery, not criminal discovery, in the postconviction

context. The Defendant is asking for an invasion into the private lives of citizens and has failed to establish adequate and legal reasons for that invasion of privacy.

Therefore, *Defendant's Motion for the Issuance of a Motion Duces Tecum* for the "Dassey" computer in the home of Barb Tadych must be denied.

Dated this 9th day of August, 2018.

Respectfully submitted,



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

Norman Gahn
Special Prosecutor
State Bar No. 1003025

Mark S. Williams
Special Prosecutor
State Bar No. 1017937

Attorneys for Plaintiff

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
Phone: (608) 266-7340
Fax: (608) 267-2778
E-mail: fallontj@doj.state.wi.us