



KATHLEEN T. ZELLNER
DOUGLAS H. JOHNSON
NICHOLAS M. CURRAN
SCOTT T. PANEK
OFFICE MANAGER

KATHLEEN T. ZELLNER & ASSOCIATES, P.C.
ATTORNEYS AT LAW
Esplanade IV
1901 Butterfield Road
Suite 650
Downers Grove, Illinois 60515

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Telephone: (630) 955-1212
Facsimile: (630) 955-1111
attorneys@zellnerlawoffices.com
kathleentzellner.com
AV-Preeminent Rating

July 14, 2017

The Honorable Judge Angela Sutkiewicz
Circuit Court Judge
Sheboygan County Courthouse
615 North Sixth Street
Sheboygan, Wisconsin 53801

RE: *State of Wisconsin v. Steven Avery*,
Manitowoc County Case No. 05-CF-381

Dear Judge Sutkiewicz:

The purpose of this letter is to clarify certain issues about the scientific testing that has been completed pursuant to Mr. Avery's motion for scientific testing filed on August 26, 2016, and the Motion to Dismiss Mr. Avery's *pro se* appeal filed on July 13, 2017, with the Wisconsin Appellate Court. As the court is aware, a stipulation was agreed to between the parties and a court order was entered on November 23, 2016, for scientific testing of some but not all of the items requested by Mr. Avery's Motion for Scientific Testing.

In the November 23, 2016, Stipulation and Order For Independent Scientific Testing the parties stipulated to scientific testing of nine items of evidence:

- | | | |
|-----------------|--|--------------|
| • Item A6 | bloodstain cutting from RAV4 Driver seat | Exhibit #333 |
| • Item A8 | swab of ignition area RAV4 | Exhibit #336 |
| • Item A9 | bloodstain cutting from passenger seat | Exhibit #331 |
| • Item A10 | swab of bloodstain from CD case | Exhibit #332 |
| • Item A12 | swab from bloodstain rear passenger's door | Exhibit #334 |
| • Item A7 | blood flakes on floor by center console | Exhibit #335 |
| • Item ID | swab from hood latch | Exhibit #205 |
| • Item C | Toyota RAV4 key | Exhibit #211 |
| • Vial of blood | 1996 sample of defendant's blood | Exhibit #478 |

The parties, in their communication, agreed that the testing would be done in stages and, depending upon the outcome of the testing, further testing could be done on additional items of evidence delineated in Mr. Avery's motion for scientific

testing. Certain items of evidence have not been released for examination and retesting. They are summarized as follows:

- "[N]ew DNA testing on evidence not previously tested (the prop, the battery cable, the interior hood release of the victim's vehicle, the blinker light, the lug wrench, and the purple thong underwear)." (Motion for Scientific Testing, p. 14);
- "[N]ew and improved DNA testing of previously tested items (the license plates and swabs taken from the victim's car)." (*Id.*);
- DNA testing on burnt material found at the Radandt deer hunting camp west of the Avery salvage yard to determine whether there are any items of evidentiary value at the deer camp. (*Id.*, p. 22).
- A comparison of the fingerprints of Sergeant Andrew Colburn and Lieutenant James Lenk to unidentified prints on victim's vehicle. (*Id.*, p. 42);
- Examination of the Motorola Razr phone and box found in the victim's dining room (*Id.*, p. 42);
- Examination of the victim's vehicle. (*Id.*, pp. 21-22);
- Swabs from stains on the floor of Mr. Avery's garage, his bathroom, and his trailer. (*Id.*, p. 31-32);
- Swabs from stains in Mr. Avery's vehicle. (*Id.*, p. 37-38); and
- Unspent .22 LR ammunition recovered in Mr. Avery's trailer. (*Id.*, p. 41).

The November 23, 2016, order provided for the following types of testing to be attempted on the items of evidence described on the previous page:

- DNA methylation testing of various bloodstains;
- Ballistic testing;
- RSID (Rapid Stain Identification) testing for body fluid identification of the hood latch swab and key; and
- Trace testing of the key and hood latch swab for the presence of chemical solvents or fibers.

As the court order provided on December 12, 2016, Mr. Avery's counsel accompanied Mr. Avery's DNA expert, Dr. Karl Reich, to the Wisconsin State Crime Lab in Madison. Dr. Reich complied with the court order by observing State Crime Lab DNA Analyst Sherry Culhane divide the samples in half. Ms. Zellner met with Assistant Attorney General Thomas Fallon and Special Prosecutor Norm Gahn for approximately 90 minutes to discuss the testing and other aspects of the case. The parties had previously agreed that, after a visual examination, all samples would be split in half to afford the defense an opportunity to reexamine and test.

Swabs Had Insufficient Quantity of DNA for Methylation and/or Radiocarbon Testing

Dr. Reich analyzed the swabs from blood stains in the victim's vehicle at his laboratory, Independent Forensics in Lombard, Illinois, to determine if the DNA present on the swabs was of sufficient quantity for further testing. In particular, Dr. Reich examined Items A6, A8, A9, A10, and A12 (Trial Exhibits 331-334 and 336) to determine whether the DNA present was of sufficient quantity for DNA methylation. Dr. Reich, after analyzing these samples, determined that there was probably an insufficient amount of DNA present on the swabs for the proposed DNA methylation tests. However, Dr. Reich advised Mr. Avery's counsel to send these swabs to Dr. Christopher Mason of Weill Cornell Medicine in New York City to confirm that there was not enough DNA on the swabs for DNA methylation analyses.

On February 3, 2017, Dr. Mason received the samples. On February 20, 2017, after performing an independent examination, Dr. Mason concluded that because the DNA yield was so low, the evidence was inadequate for reliable DNA methylation testing. In fact, Dr. Mason informed Mr. Avery's post-conviction counsel that the quantity of DNA on some of the samples was undetectable. Mr. Avery's counsel informed Mr. Fallon of Dr. Mason's conclusions on February 27, 2017.

Dr. Reich also examined Item A7 (Trial Exhibit 335), blood flakes recovered from between the center console and driver's seat of the victim's vehicle, to determine whether the DNA present was of sufficient quantity for radiocarbon testing. Dr. Reich determined that the quantity of DNA was too low for radiocarbon testing. Dr. Reich recommended that the flakes be sent to Dr. Mason to combine with the previously sent swabs to attempt DNA methylation testing again because only 1 nanogram of DNA is needed for a reliable DNA methylation test result. Mr. Avery's counsel is expecting Dr. Mason to report on his efforts to conduct DNA methylation testing with the additional flakes added to the prior insufficient DNA samples from the swabs.

RSID Testing

An examination has been completed of Items ID and C (Trial Exhibits 205 and 211), the hood latch swab and Toyota key, respectively, to determine the source of Mr. Avery's DNA detected on both items, *i.e.*, did it come from his blood, saliva, skin, etc. Dr. Reich examined both of these samples at Independent Forensics and determined that the source the DNA on each was Mr. Avery's skin. Both samples were later transported to Microtrace LLC in Elgin, Illinois, for trace evidence

examination by Dr. Christopher Palenik. Dr. Palenik examined the hood latch swab and Toyota key. The results of Dr. Reich and Dr. Palenik's examinations are included in Mr. Avery's motion for post-conviction relief filed on June 7, 2017, at pp. 65-67, 155-156.

Trace Evidence Testing

Dr. Reich conducted experiments on an exemplar key regarding the quantity of DNA that was alleged to have been on the sub-key of Teresa Halbach. Further, Dr. Reich conducted experiments on an exemplar hood latch regarding the quantity of DNA that was alleged to have been recovered from the RAV4 hood latch. The results of Dr. Reich's analyses are contained in Mr. Avery's motion for post-conviction relief filed June 7, 2017, at pp. 74-75, 155-156.

On May 5, 2017, Ms. Zellner and Mr. Douglas Johnson travelled to Madison Wisconsin to meet with Mr. Fallon and Mr. Gahn to discuss the outcome of the test results and to request additional items for testing. After a 90 minute meeting it was agreed that the damaged bullet (Item FL) would be brought to Microtrace laboratories by an agent of the State for microscopic inspection at Microtrace laboratories in Elgin, Illinois.

On May 19, 2017, this court approved the release of the damaged bullet collected from Mr. Avery's garage (Item FL, Trial Exhibit 277) for reexamination. Dr. Palenik performed trace examination on the damaged bullet on May 22, 2017. The results of Dr. Palenik's examination are included in the Mr. Avery's motion for post-conviction relief filed on June 7, 2017 at pp. 140-145. The bullet fragment did not have bone fragments embedded in it as it would have if a shot through two layers of human skull but the bullet fragment did have wood and quite probably paint on it.

On July 5, 2017, an additional request was made to Mr. Fallon for the release of cranial fragments (Wisconsin State Crime Lab Items EK, EJ, KR, and KQ) for further examination. Dr. Palenik believes there is a sufficient reason to re-examine the cranial fragment defects identified as gunshot entrance wounds, at Mr. Avery's trial, to confirm with scientific certainty, using the newest SEM microscope and other technology, if the victim was even shot and, if she was shot, whether it was by a .22 LR bullet. Dr. Palenik made this request after examining the radiographs taken by Wisconsin State Crime Lab analyst Kenneth Olson and all other pertinent information related to the State's claim that the cause of death was the result of a gunshot to the head by a .22 LR bullet.

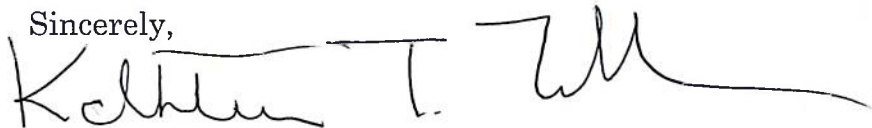
However, we do believe, contrary to Mr. Fallon's assertion, that the results of the microscopic examination of the bullet fragment (Item FL) by our experts at the

internationally renowned laboratory Microtrace with SEM microscopes not available in 2005-2007 so undermines the State's theory that Ms. Halbach was killed by two gunshots to the head that we proceeded to file our Motion for Post-Conviction Relief which relies upon that new scientific evidence combined with all of the other claims (more than 25 claims of ineffective assistance of trial counsel (*Id.*, pp. 50-130); four claims of alleged *Brady* violations (*Id.*, pp. 133-36); six claims of newly discovered evidence (*Id.*, pp. 136-156); eight claims of alleged ethical violations by one of the prosecutors (*Id.*, pp. 164-83); multiple claims of ineffective assistance of postconviction and appellate counsel (*Id.*, pp. 185-200); and a request for a new trial in the interest of justice (*Id.*, p. 202)).

On July 12, 2017, attorney Kathleen Zellner spoke to Mr. Fallon about the fact that Mr. Avery's *pro se* appeal was still pending before the Wisconsin Appellate Court. Ms. Zellner and Mr. Fallon have had several detailed conversations since the entry of this court's order regarding scientific testing and about the status of the case. Ms. Zellner informed Mr. Fallon that she was going to file a motion to dismiss the *pro se* appeal. Mr. Fallon stated that the Attorney General would not require the re-filing of Mr. Avery's post-conviction petition. Ms. Zellner and Mr. Richards prepared and sent the Motion to Dismiss to the Wisconsin Appellate Court via Federal Express on the same day (July 12) as this conversation with Mr. Fallon. The motion to dismiss was sent via Federal Express because the Wisconsin Appellate Court does not have electronic filing. All parties and this court were given notice that this motion had been filed.

On July 13, 2017, Ms. Zellner's office confirmed that the Wisconsin Appellate Court confirmed receipt and docketing of Mr. Avery's Motion to Dismiss his *pro se* appeal. Subsequent to confirming that the motion to dismiss Mr. Avery's *pro se* appeal had been filed by the Court of Appeals, the Zellner law offices received Mr. Fallon's letter filed with this court. Apparently, Mr. Fallon had not yet received the notice of filing for Mr. Avery's motion to dismiss his *pro se* appeal when he sent his letter to the court. Hopefully this letter clarifies the current status of the *Avery* case.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kathleen T. Zellner', followed by a long horizontal line extending to the right.

Kathleen T. Zellner

KTZ | kwk

Cc: Assistant Attorney General Thomas Fallon
Lynn Zigmunt, Manitowoc County Clerk of Circuit Court