

STATE OF WISCONSIN                      CIRCUIT COURT                      MANITOWOC COUNTY

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STATE OF WISCONSIN,

*Plaintiff,*

*v.*

STEVEN A. AVERY,

*Defendant.*

MANITOWOC COUNTY  
STATE OF WISCONSIN  
**FILED**

MAR 9 2006

Case No. 2005-CF-381

CLERK OF CIRCUIT COURT

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**DEFENDANT'S MOTION FOR  
ORDER LIMITING PUBLIC DISCLOSURE**

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Steven A. Avery, by counsel, now moves the Court for an order limiting all disclosures of information or opinion about this criminal proceeding by lawyers appearing in the case, by those working as supervisors or under supervision of the lawyers (including law enforcement agents, investigators, and paralegals), by agents of lawyers (including the Calumet County Sheriff and his employees), and by court personnel. The Court has inherent authority to enter such an order, which will operate only on lawyers, their agents, and court personnel, not on the media. *See generally Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Further, the order that Mr. Avery proposes hews closely to the order entered in *United States v. McVeigh*,

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(1)

931 F. Supp. 756 (D. Colo. 1996); *see also United States v. McVeigh*, 964 F. Supp. 313 (D. Colo. 1997), although it is not identical to the *McVeigh* order. Finally, the terms of the proposed order are consistent with the Wisconsin Rules of Professional Conduct for attorneys. *See* Wis. SCR 20:3.6.

As grounds for this order, Mr. Avery offers to show the following at a hearing, if this proffer is disputed:

1. This case, and the investigation leading to the filing of criminal charges against Steven Avery, has been the subject of at least seven televised press conferences or interviews (perhaps more) involving participation of the special prosecutor, Calumet County District Attorney Kenneth R. Kratz. On information and belief, press conferences or interviews involving the participation of Calumet County Sheriff Gerald Pagel have exceeded that number.

2. The case has been an object of continuing, intense, interest to the media, particularly the electronic media in the Green Bay and northeastern Wisconsin area, and the local print media in northeastern Wisconsin. Television, radio, and print coverage of the case also have been extensive in the Milwaukee and southeastern Wisconsin media markets.

3. For example, on Wednesday, March 1, the prosecutor and Sheriff Pagel conducted a press conference at 8 p.m. that lasted approximately 20 minutes. That press conference was remarkable for at least three reasons:

(a) It involved Mr. Kratz repeatedly asserting that he and law enforcement agents now "know" certain things, giving the public an impression of factual certainty based on information purportedly in the hands of authorities;

(b) It involved Mr. Kratz announcing in some detail criminal accusations he intended to make the following day, but had not yet filed in any court and as to which no judge had made a probable cause finding on a criminal complaint; and

(c) It involved Mr. Kratz repeatedly and in detail asserting facts or allegations against Mr. Avery on the basis of purported statements of Brendan Dassey that Mr. Kratz, who is an experienced and extraordinarily learned and competent prosecutor, presumably knows are unquestionably inadmissible against Mr. Avery in their entirety under both *Lilly v. Virginia*, 527 U.S. 116 (1999), and *Crawford v. Washington*, 541 U.S. 36 (2004).

4. Also for example, the following day, March 2, Mr. Kratz and Sheriff Pagel conducted another televised press conference exceeding 25 minutes in length. At that press conference, Mr. Kratz:

(a) Repeated in detail, and with narrative elaboration, the lurid allegations that he included, unnecessarily as a matter of probable cause, in the criminal complaint against Brendan Dassey;

(b) Warned children and friends or family of Teresa Halbach not to watch the press conference, given its grisly content, but never warned prospective jurors that they too ought not be watching this emotional and rhetorical presentation of unproven allegations;

(c) Again presented inflammatory factual claims about Mr. Avery as if they are known or established truths, on the basis of statements by Brendan Dassey that are wholly inadmissible against Mr. Avery under *Lilly* and *Crawford*.

5. Sheriff Pagel also has made specific factual claims to the media about physical evidence, scientific test results, statements of suspects and defendants, and his personal beliefs about who is criminally responsible for what and what is a "lie." Some of these statements have been presented dramatically or with an emotional cast.

6. The public comments of Mr. Kratz and Sheriff Pagel to date have put in obvious and serious jeopardy Mr. Avery's state constitutional right to a fair trial in the vicinage in which the charged crimes are alleged to have occurred. WIS. CONST. art. I, § 7; *see also* WIS. STAT. §§ 971.19, 971.22. In effect, the prosecution has

denied Mr. Avery his intertwined constitutional rights to a fair trial in the venue of the alleged crimes. Attempting to force a change of venue, as the prosecution and Calumet County Sheriff perhaps have, both denies the accused his constitutional rights under WIS. CONST. art. I, § 7 and seeks to contravene the Wisconsin Supreme Court's clear ruling in *State v. Mendoza*, 80 Wis. 2d 122, 258 N.W.2d 260 (1977). The right to a fair trial includes as a component the right to a trial in the venue of the alleged offense. *Mendoza*, 80 Wis. 2d at 142, 258 N.W.2d at 268.

7. Certain public comments of Mr. Kratz also are of the type that "ordinarily" are "likely" to have the effect of materially prejudicing an adjudicative proceeding, SCR 20:3.6(b), (a), to the extent that they —

- (a) related to the existence or contents of any confession, admission, or statement, SCR 20:3.6(b)(2);
- (b) related to the results of any test or the identity or nature of physical evidence expected to be presented, SCR 20:3.6(b)(3);
- (c) related to any opinion as to the guilt of Mr. Avery or Brendan Dassey, SCR 20:3.6(b)(4);
- (d) related to information the lawyer reasonably should know is likely to be inadmissible at Mr. Avery's trial and would create a substantial risk of prejudicing an impartial trial, SCR 20:3.6(b)(5);

(e) related to the criminal record, character, or guilt of Mr. Avery, SCR 20:3.6(b)(1); or

(f) related to the expected testimony of Brendan Dassey, SCR 20:3.6(b)(1).

8. There is no firm trial date yet in this case, and significant motions remain to be decided. Indeed, most pretrial motions have yet to be filed. As a firm trial date is set and the Court's decisions are rendered, it is reasonable to expect that media interest in this case will escalate.

9. Mr. Avery accordingly requests that the Court enter the following order, which is based on the *McVeigh* order and SCR 20:3.6:

(a) None of the lawyers appearing in this case and none of the persons associated with them (including any persons with supervisory authority over them) will release or authorize the release of information or opinion about this criminal proceeding which the person knows or reasonably should know likely will be disseminated by any means of public communication, if there is a reasonable likelihood that such disclosure will interfere with a fair trial of the pending charges, materially prejudice that trial or prospective jurors for the trial, or otherwise prejudice the due administration of justice. The Court further should warn counsel and the Calumet County Sheriff that some statements at press conferences,

including but not limited to the March 1 and March 2, 2006, press conferences were of a nature that would violate this subparagraph.

(b) This duty to refrain from the disclosures described in subparagraph (a) above requires all counsel to take reasonable precautions to prevent all persons who have been or are now participants in or associated with the investigation, prosecution or defense of this case from making any statements or releasing any documents that are not in the public record, that reasonably could result in public dissemination, and that would be likely to prejudice materially the fairness of this criminal proceeding, or would fall within the scope of subparagraph (a) above.

(c) Without limitation by enumeration, none of the lawyers appearing in this case and none of the persons associated with them (including any persons having supervisory authority over them) shall release or authorize the release of any extrajudicial statement which that person knows or reasonably should know likely will be disseminated by any means of public communication, concerning any of the following specific matters:

- (1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the defendants;
- (2) The existence or contents of any statements given by the defendants to any law enforcement personnel or government informants, or the

refusal or failure of the defendants to make any statements to law enforcement personnel;

(3) The performance or results of any examinations or tests or any defendant's refusal or failure to submit to any examination or tests;

(4) The identity, testimony, or credibility of all prospective witnesses (except that defense counsel may describe his or her own client as a prospective witness, within the bounds of subparagraph (d) below);

(5) The possibility of a plea of guilty to the offenses charged or to any lesser offense;

(6) Any opinion as to the guilt or innocence of the defendants or as to the merits of the case or the quality or quantity of evidence as to any charge in the case (again subject to subparagraph (d) below).

(d) The foregoing shall not be construed to prevent any of the lawyers appearing in this case or any persons associated with them (including any persons having supervisory authority over them) from quoting or referring without elaboration to public records of the court in this case; from announcing without elaboration the scheduling or result of any step in the judicial process; from requesting assistance in obtaining admissible evidence; or from stating without elaboration the general nature of the claim or defense in the case, including the defendant's assertion of innocence.



(e) Before the trial jury is empaneled, none of the lawyers in this case and none of those associated with them (including those with supervisory power over them) shall give or authorize any extrajudicial statement or interview relating to the trial or the parties or issues in the trial that the person knows or reasonably should know is likely to be disseminated by means of public communication if there is a substantial likelihood that such statement will materially prejudice the trial or the prospective jurors for the trial, or interfere with a fair trial.

(f) All court supporting personnel, including among others, sheriffs, bailiffs, sheriff's deputies, court clerks, deputy court clerks, court security officers, court reporters and employees or subcontractors retained by the court-appointed official reporters, are prohibited from disclosing to any person, without authorization by the Court, any information relating to this criminal case that is not part of the public records of the court. All personnel also are forbidden from divulging information concerning any sealed filings, or *in camera* arguments and hearings held outside the presence of the public.

(g) Counsel for the parties shall not file police reports or other discovery documents with, or quote from those in, publicly filed pleadings, motions, or briefs, unless filed under temporary seal with a simultaneous motion to seal permanently. Use of police reports or discovery documents, and the accompanying motion to seal, shall be limited to situations in which a proper presentation of a

party's position requires the use of such materials. If the party's submission would be verbal or aural in open court, then such submission shall be done *in camera* with only the parties and their lawyers in attendance, and the record of that portion of the proceeding shall be sealed.

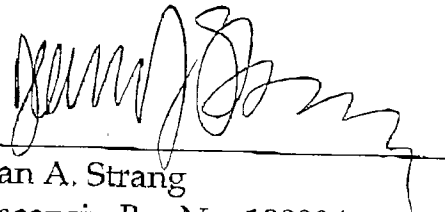
(h) To the extent that any previously filed pleadings or transcripts and minutes of pretrial hearings previously held do not comply with subparagraph (g), the clerk of court is directed to seal such pleadings, motions, briefs, transcripts, or minutes forthwith.

Mr. Avery does not submit a brief in support of this motion, but reserves the right to file a reply if the state opposes it.

Dated at Madison, Wisconsin, March 8, 2006.

Respectfully submitted,

HURLEY, BURISH & STANTON, S.C.



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