STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S MEMORANDUM SUPPORTING MOTION TO DISMISS OR TO CONDUCT PRELIMINARY HEARING

I.

INTRODUCTION

Steven Avery seeks a preliminary hearing on new charges unsupported by, and unrelated to, the evidence at his first preliminary hearing. The interesting question his motion calls upon the Court to answer is whether Wisconsin's "wholly unrelated" standard for charges in an Information applies to the abstract events or transaction at issue, or instead to the transaction as embraced within the evidence at the preliminary hearing. Avery believes that it is the latter: new charges must not be "wholly unrelated" to the evidence adduced at the preliminary hearing.

II.

FACTS

Originally, the criminal complaint in this case charged Steven Avery with first degree intentional homicide, mutilation of a corpse, and possession of a firearm by a felon. Avery had a preliminary hearing on that criminal complaint. At the preliminary hearing, the state offered evidence that he possessed a firearm as a convicted felon. The state also offered evidence suggesting that he murdered Teresa Halbach and burned her body. The Court found probable cause and ordered Avery bound over for trial.

The evidence at the preliminary hearing included no testimony, documents, or trace physical evidence suggesting sexual assault or kidnaping. The state did adduce evidence of handcuffs and restraints found in Avery's home, but offered nothing suggesting that these had been used to commit false imprisonment.

Upon leave of the Court, the state now has filed an amended criminal complaint adding three new charges to the existing three. The new charges are first degree sexual assault, kidnaping, and false imprisonment. Halbach allegedly was the victim of all three, and the state charges that these three crimes occurred on October 31, 2005, the same day it alleges that Avery murdered Halbach and burned her body.

Relying principally on *State v. Burke*, 153 Wis. 2d 445, 451 N.W.2d 739 (1990), the state asks permission to bypass a preliminary hearing on the new counts and to file an amended Information. Avery opposes that request. He seeks dismissal of the three new counts for want of probable cause (a request the Court denied orally on March 17, 2006, at a hearing) or, in the alternative, a preliminary hearing on the first degree sexual assault, kidnaping, and false imprisonment allegations.

III.

ARGUMENT

The Court may notice the creativity with which the state seeks to lift itself by pulling repeatedly on its own bootstraps. As to the three new counts, the state offers no admissible evidence in the amended complaint, and indeed offers only an accomplice's accusation that is too unreliable either for the Sixth Amendment or for Wisconsin's rules of evidence at any proceeding governed by those rules. Even though the complaint portends nothing admissible or reliable in court in support of the new charges, the Court has ruled that it suffices to show probable cause at the stage of a criminal complaint. From there, the state grabs its own bootstraps again to proceed directly to arraignment and to circumvent a bindover decision, by avoiding the preliminary hearing at which it would fail to show probable cause for want of admissible evidence (as the rules of evidence apply to a preliminary hearing,

WIS. STAT. § 911.01, with an exception not applicable here. WIS. STAT. § 970.03(14)(b)). Having arraigned Avery on the new counts, the state then predictably will reach for the bootstraps again, and seek to offer otherwise inadmissible uncharged sexual misconduct evidence at trial under WIS. STAT. § 904.04(2), on the theory that such evidence bears at least on the sexual assault and false imprisonment charges.

The state seeks to do all of this through amendment of charging documents, when it clearly could not obtain a bindover were these new charges in an original complaint, rather than in an amended one. Section 970.03(10), WIS. STAT., would be the insuperable obstacle the state would face were the three new charges contained in an original complaint.

The narrow question today, then, is what charges the state may file in an amended Information, with the original preliminary hearing as a reference point. A statute, WIS. STAT. § 971.01(1), addresses that question.

Wisconsin courts have considered several times the meaning of § 971.01(1), which provides in full:

> The district attorney shall examine all facts and circumstances connected with any preliminary examination touching the commission of any crime if the defendant has been bound over for trial and, subject to s. 970.03(10), shall file an information according to the evidence on such examination subscribing his or her name thereto.

Just exactly what the legislature meant when it prescribed an Information "according to the evidence on such examination" has been the crux of the problem for courts.

On its face, the statute appears not to invite the three new charges here. Strictly "according to the evidence on such examination," there was no sexual assault, kidnaping, or false imprisonment. The evidence at the preliminary hearing did not begin to suggest, let alone to establish probable cause, that any of those crimes occurred.

But the Wisconsin Supreme Court has read § 971.01(1) with a gloss, so Avery cannot rely on the plain terms of that statute. He turns first to *Bailey v. State*, 65 Wis. 2d 331, 222 N.W.2d 871 (1974), which concerned a set of facts similar in some ways to this case. The one-count criminal complaint in *Bailey* alleged first degree murder of a schoolgirl. After the preliminary hearing, the district attorney added to that murder count three more charges: indecent behavior with a child; enticement of a child for immoral purposes; and attempted enticement of a child for immoral purposes. *Bailey*, 65 Wis. 2d at 339, 222 N.W.2d at 875. The defendant contended that the three additional charges should not have been allowed, as the evidence at the preliminary hearing would not have supported a bindover on them. *Id.* at 338, 222 N.W.2d at 875.

The Wisconsin Supreme Court began with the longstanding rule in Wisconsin that, "'The state in its information may allege acts in addition to those advanced on preliminary hearing so long as they are not wholly unrelated to the *transactions or facts considered or testified to at the preliminary.*'" *Bailey*, 65 Wis. 2d at 339, 222 N.W.2d at 876, quoting *State v. Fish*, 20 Wis. 2d 431, 438, 122 N.W.2d 381, 385 (1963) (italics added). The *Bailey* court cited two other earlier Wisconsin Supreme Court decisions for that same proposition, and *Fish* had relied on a third. So *Bailey* (like *Fish* and cases before it) tied new charges in the Information to those transactions or facts "considered or testified to at the preliminary." In short, the charges in the Information could not be wholly unrelated to the evidence at the preliminary hearing.

Applying that unchanged rule to the facts in *Bailey*, then, the court initially assumed *arguendo* that there was no evidence presented as to the new counts at the preliminary hearing, and noted that "it is clear that the sex-related offenses, counts 2, 3 and 4, were not 'wholly unrelated' to the murder count. They are related in terms of parties involved, witness involved, geographical proximity, time, physical evidence, motive and intent." *Id.* at 341, 222 N.W.2d at 876-77.

Immediately after that passage, though, the court held that "[i]t is unnecessary to make the assumption" it just had entertained. *Id.* at 341, 222 N.W.2d at 877. Why? Because "[t]here was ample evidence presented at the preliminary to support

a finding of probable cause as to each of the counts contained in the information," *id.* at 343, 222 N.W.2d at 877, including the new counts. In other words, the new charges were not just related to the evidence at the preliminary hearing, but in fact the state proved probable cause on the new counts at that hearing. This passage is the narrowest ground of decision in *Bailey*, and follows an express disavowal of the *arguendo* assumption, so it properly should be understood as the holding of the court. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (cases "should be decided on the narrowest possible ground"); *Bank One, Milwaukee, N.A. v. Breakers Development, Inc.*, 208 Wis. 2d 230, 232 n.1, 559 N.W.2d 911, 911 n.1 (Ct. App. 1997). The discussion of the *arguendo* assumption is dictum.

Wisconsin courts continued after *Bailey* to adhere to the rule that an Information may "charge any offense that is not 'wholly unrelated to the facts adduced at the preliminary hearing.'" *Blalock*, 150 Wis. 2d at 698, 442 N.W.2d at 518, quoting *State v. Hooper*, 101 Wis. 2d 517, 535-36, 305 N.W.2d 110, 119-20 (1981) (internal quotation marks omitted). Again, the necessary referent points of the counts in the Information were the facts adduced at the preliminary hearing; the evidence, in other words.

The next major decision to follow in this sequence is *Burke*. The factual setting of *Burke* is important. That case concerned a single episode in the defendant's apartment, during which he committed several sexually assaultive acts on a 13-year

old girl. The evidence at the preliminary hearing included the defendant's admission that he undressed the girl, fondled her breasts, attempted vaginal intercourse, and performed anal intercourse. *Burke*, 153 Wis. 2d at 457-58, 451 N.W.2d at 744-45. Initially, the complaint had charged four separate acts of assault. *Id.* at 449, 451 N.W.2d at 741. However, to spare the girl from testifying at the preliminary hearing, the state moved to dismiss all but one count of the complaint before offering evidence. It then obtained a bindover principally by introducing the defendant's statement, in which he directly admitted the remaining count. *Id.* The state next filed an Information alleging five counts of sexual assault.

Upholding the state's prerogative to do so, the Wisconsin Supreme Court wrote that the rule as extended by *Fish* and *Bailey* "proves controlling here." *Id.* at 452, 451 N.W.2d at 742; *see also id.* at 456, 451 N.W.2d at 744 ("*Bailey* continues to be valid law"). *Burke* did not purport to extend or overrule *Bailey*; quite the contrary. But it did read *Bailey* as further establishing "that direct evidence relating to the additional counts need not have been presented at the preliminary examination." *Id.* at 453-54, 451 N.W.2d at 743. The *Burke* court went on immediately to assert that, "*Bailey* overruled the dicta to the contrary in *State v. Leicham*, 41 Wis. 565, 574-75 (1877)." *Burke*, 153 Wis. 2d at 454, 451 N.W.2d at 743.

Those two assertions, back to back, are remarkable. First, *Bailey* never used the term "direct evidence" with respect to the preliminary hearing issues there; the

term first appears in the closing discussion of the sufficiency of the evidence to sustain the murder conviction. *Bailey*, 65 Wis. 2d at 355, 222 N.W.2d at 883. Second, *Bailey* never cited *Leicham* at all, let alone claimed to overrule dicta in that case.

The *Burke* majority simply was incorrect, then, when it wrote that, "*Bailey* holds there is no requirement in sec. 971.01(1), Stats., that there must be direct evidence, much less sufficient evidence to support a probable cause finding, presented at the preliminary examination for each charge in the information." *Burke*, 153 Wis. 2d at 456, 451 N.W.2d at 744. That was not *Bailey's* holding. *Bailey* expressly found probable cause in the preliminary hearing evidence for all four counts in the Information.

The mistake appears to have occurred when *Burke* quoted at length from *Bailey*, up through its *arguendo* assumption. *Burke*, 153 Wis. 2d at 453, 451 N.W.2d at 742, quoting *Bailey*, 65 Wis. 2d at 341, 222 N.W.2d at 876-77. Then *Burke* stopped quoting *Bailey* right before the *Bailey* court disavowed its assumption: "It is unnecessary to make the assumption, however, that there was no evidence presented at the preliminary pertaining to counts 2, 3 and 4, or that such evidence would be insufficient to bind over on each of the counts independently." *Bailey*, 65 Wis. 2d at 341-42, 222 N.W.2d at 877. Again, as the narrowest discussion necessary to reach the conclusion that *Bailey* did, this is the *ratio decidendi*, the holding. The preceding *arguendo* assumption is dictum.

A circuit court reading *Burke* therefore is confronted with a dilemma. On the one hand, *Burke* purports to reaffirm and rely on *Bailey*, not to extend it. On the other hand, *Burke's* 'no direct evidence' discussion and its willingness to approve counts in an Information that had no evidentiary support at the preliminary hearing, but simply were not "wholly unrelated" to the same "transaction," together suggest considerable extension of *Bailey*. *See Burke*, 153 Wis. 2d at 457, 458, 451 N.W.2d at 744, 745.

Resolution of the dilemma may lie in comparing the parts of *Bailey* and *Burke* that really do overlap, and in looking again to facts. Like *Burke* after it, *Bailey* did note (in discussing its *arguendo* assumption) that the sex-related offenses there were not wholly unrelated to the murder charge. "They are related in terms of parties involved, witness involved, geographical proximity, time, physical evidence, motive and intent." *Bailey*, 65 Wis. 2d at 341, 222 N.W.2d at 877. *Burke* turned that passage into the second step of a two-step process that the district attorney must undertake in deciding what charges to lodge in the Information: first the prosecutor must examine the actual evidence presented at the preliminary hearing; then, confusingly, "[w]ithin the confines of that evidence the prosecutor must determine whether the charge is wholly unrelated in terms of the parties involved, witnesses involved, geographical proximity, time, physical evidence, motive and intent." *Burke*, 153 Wis. 2d at 455, 451 N.W.2d at 743-44; *see also id.* at 457, 451 N.W.2d at 744.

Burke's effort to construct this two-step process requires an unlikely and convoluted reading of WIS. STAT. § 971.01(1), although the task in *Burke* was to construe that statute, not to rewrite it. But some harmony can be found in the facts of *Bailey* and *Burke*. The preliminary hearing in *Bailey* included fairly compelling, albeit circumstantial, evidence that the defendant in fact had lured the young victim into his car and then sexually assaulted her in a chicken coop. *Bailey*, 65 Wis. 2d at 334-38, 342-43, 222 N.W.2d at 873-75, 877. The *Bailey* court was correct in ruling that, "There was ample evidence presented at the preliminary to support a finding of probable cause as to each of the counts contained in the information." *Id.* at 343, 222 N.W.2d at 877.

Likewise in *Burke*, the defendant's statement to the police, in evidence at the preliminary hearing, acknowledged each of the specific assaultive acts in the Information except a fellatio count. *See Burke*, 153 Wis. 2d at 457-58,450, 451 N.W.2d at 744, 741. With the possible exception of that fifth count, the facts in *Burke* fit well within the actual holding in *Bailey*.

And neither case did any violence to the terms of § 971.01(1) by assessing whether the counts in the Information were "wholly unrelated in terms of the parties involved, witnesses involved, geographical proximity, time, physical evidence, motive and intent," *Burke*, 153 Wis. 2d at 455, 451 N.W2d at 744, as long as that assessment was tied to the evidence at the preliminary hearing. In addition

to the evidence of murder in *Bailey*, the preliminary hearing offered ample circumstantial evidence of a sexual assault and child enticement. And in *Burke*, the facts concerned one continuous illicit sexual encounter involving only the defendant and the victim; the various counts of the Information were but a parsing of the assaultive acts that composed the encounter.

This case is different. Nothing at Avery's preliminary hearing suggested sexual assault, or for that matter kidnaping. The only evidence even weakly suggesting false imprisonment was the presence of handcuffs and leg restraints, but those of course have consensual purposes, too, and the state offered no connection to Teresa Halbach. At the preliminary hearing, the state's evidence concerned one bad actor only, Steven Avery. It did not hint at the involvement of anyone else. Now, the state's theory of sexual assault and kidnaping entails the involvement of a new person, Brendan Dassey, who also is a new necessary witness on the amended counts. His role as a witness is wholly unrelated to the evidence at the preliminary hearing. Geographical proximity and time presumably overlap with the evidence at the preliminary hearing, true. But the physical evidence of murder is entirely unrelated to physical evidence the state may have of sexual assault (if any) or kidnaping. And the motives and intent for murder are very different than the motives for and intent to rape or kidnap. One motive does not imply the other; one intent does not imply the other.

Of course, this analysis is necessary only if *Burke* truly extended the rule in *Bailey*, uncoupling charges in an Information from the evidence at a preliminary hearing in favor of an abstract relationship to the "transaction" at issue in the preliminary hearing. *Burke* itself sends a mixed message, as Avery explains above. In deciding whether *Burke* really meant to expand the *Bailey* rule, this Court might look to subsequent Wisconsin Supreme Court decisions concerning the relationship of counts in an Information to the evidence at the preliminary hearing. Those decisions retain a concrete linkage between the transaction and the evidence, rather than adopting the broader aspects of *Burke* that suggested abstraction or a free-standing transactional test.

The cases continue to tie counts in an Information to the evidence adduced at the preliminary hearing. In *State v. Richer*, 174 Wis. 2d 231, 496 N.W.2d 66 (1993), the court sought to unify its decisions from *Leicham* to *Burke*. The question was whether an Information could include a second charge of delivering LSD nine days after the one LSD delivery proved at the preliminary hearing. It could not. *Richer* concluded that "no basis can be found 'within the confines of the evidence' adduced at Richer's preliminary hearing to support the second count – neither evidence in support of the second count nor evidence linking the two transactions." *Richer*, 174 Wis. 2d at 236-37, 496 N.W.2d at 67. *Richer* went on to describe its holding this way: "all charges included in the information must at a minimum be transactionally related

to charges which are themselves supported by evidence adduced at the preliminary hearing." *Id.* at 247, 496 N.W.2d at 71. The district attorney there overstepped his authority "by filing an information that contained a count 'wholly unrelated' to the evidence adduced at Richer's preliminary hearing." *Id.* at 252, 496 N.W.2d at 73.

In *State v. Akins*, 198 Wis. 2d 495, 544 N.W.2d 392 (1996), the state supreme court considered an Information that charged armed burglary, after the commissioner bound over at the preliminary hearing on a finding that the defendant committed another felony, but not armed burglary. Once again, while acknowledging *Burke*, the court linked charges in an Information to evidence at the preliminary hearing. "The prosecutor was able to include any count in the information as long as it was transactionally related to the count on which Akins was bound over," the *Akins* court explained. "A review of the record indicates that the basis for the armed burglary count arose from a common nucleus of facts which were transactionally related, and wholly within the confines of the testimony and circumstances presented at the hearing." *Akins*, 198 Wis. 2d at 514-15, 544 N.W.2d at 399-400.

As a final example, Avery considers the apex of the Wisconsin Supreme Court's transactional approach, *State v. Williams*, 198 Wis. 2d 516, 544 N.W.2d 406 (1996). There, the court held that when a preliminary hearing court finds probable cause that a felony was committed in relation to one count, it must bind over on all

"transactionally related counts," meaning all counts that "'arose from a common nucleus of facts.'" *Williams*, 198 Wis. 2d at 522, 544 N.W.2d at 409, quoting *Richer*, 174 Wis. 2d at 246, 496 N.W.2d at 71. Even there, the Wisconsin Supreme Court noted that its holding "comports with the long-standing precedent that recognizes the prosecutor's authority, once a defendant is bound over, to include additional charges in the information 'so long as they are not wholly unrelated to the transactions or facts considered or testified to at the preliminary.'" *Williams*, 198 Wis. 2d at 528, 544 N.W.2d at 411. In other words, the transactional concept still is a function of and contained within the evidence at the preliminary hearing. It does not stand alone or transcend the evidence abstractly, as *Burke* can be read in places to suggest.

In sum, the unbroken line of Wisconsin cases examining the linkage between evidence at a preliminary hearing and charges in an Information have required a tie between the preliminary hearing evidence and the counts in the Information, at least up to *Burke*. Even *Burke* did not say that it altered that longstanding rule; taken at its word, *Burke* only reaffirmed the rule. Later cases suggest that the Wisconsin Supreme Court did not mean to expand *Bailey*, and has retained the necessary connection between evidence and counts in the Information, not just between a "transaction" and the Information.

Even if *Burke* did relax the *Bailey* rule, by uncoupling charges in an Information from the evidence in favor of more abstract linkage to the "transaction" at issue, the new counts here are wholly unrelated to the transaction proved at the preliminary hearing. On the record here, sexual assault and kidnaping are no more transactionally related to murder than was an LSD delivery transactionally related to another LSD delivery nine days earlier in *Richer*. They are no more related than would be a theft by fraud charge, had Avery allegedly used Teresa Halbach's credit card after her disappearance. The new counts do not arise from a common nucleus of facts with the original charges, as established by the evidence at the preliminary hearing. Avery should have a new preliminary hearing on the three new counts in the Amended Complaint.

A contrary decision would allow the state to put Avery to trial, possibly with otherwise inadmissible uncharged misconduct evidence under WIS. STAT. § 904.04(2), on charges for which the state presently may have no admissible evidence. It certainly would permit a trial on counts as to which the state could not establish today at a preliminary hearing that *any* felony related to sexual assault, kidnaping, or false imprisonment occurred.

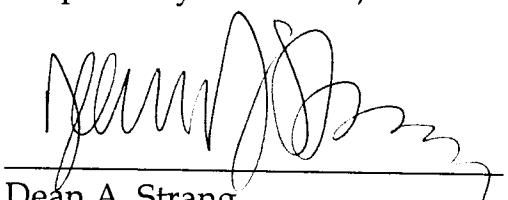
IV.

CONCLUSION

Unless it reconsiders and dismisses the three new charges in the amended criminal complaint for want of probable cause – and the complaint alleges no reliable information in support of any of those three charges – the Court should set a preliminary hearing. At that preliminary hearing, the state will have the chance to demonstrate probable cause that Avery committed a felony or felonies related to the new charges. The Court then should dismiss those new counts as to which it finds no probable cause. WIS. STAT. § 970.03(10).

Dated at Madison, Wisconsin, March 27, 2006.

Respectfully submitted,



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