STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

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MANITOWOC COUNTY
STATE OF WISCONSIN
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APR 13 2006
CLERK OF CIRCUIT COURT

STATE OF WISCONSIN,

*Plaintiff,*

*v.*

Case No. 2005-CF-381

STEVEN A. AVERY,

*Defendant.*

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**DEFENDANT'S REPLY SUPPORTING MOTION TO DISMISS OR TO CONDUCT PRELIMINARY HEARING**

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## I.

## INTRODUCTION

This much occurs to Steven Avery. The state has suggested to the public more than once in press conferences, and has told this Court in arguments on bail, what a very strong case it has. Why, then, is the state so afraid of an opportunity to establish mere probable cause at a preliminary hearing? If the prosecution case is so good, and if the new counts warrant another $250,000 in cash bail and more than a lifetime's additional possible imprisonment, a preliminary hearing on these new charges seems not much to ask.

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Still, the state insists upon its right to proceed to trial on charges that the preliminary hearing did not foreshadow, and that perhaps would not gain a bindover today. Avery suggests that Wisconsin's transactional test for charges in an Information has not so completely uncoupled criminal charges from the preliminary hearing evidence. On the state's reasoning, it could file wholly fanciful charges, provided it argued hypothetically that *if* such crimes occurred they *would be* related transactionally to crimes it can prove. The preliminary hearing can remain a better screening device than that.

## II.

## REPLY

Wisconsin law in this area is confusing, and that of course is not the state's fault. But the mere fact that lawyers can argue at length over the meaning of a statute clear on its face, WIS. STAT. § 971.01(1), or that the state now plausibly can take the statutory words "shall file an information according to the evidence" and explain that this means a prosecutor has "either of two ways" to establish "the transactional link between the charges," State's Memorandum at 9 (March 31, 2006), demonstrates just how convoluted the case law in this area has become.

In reply, Avery makes three basic points with the hope of mitigating, rather than aggravating, the confusion. First, *Burke* misread *Bailey*, as does the state.

State's Memorandum at 8. When a court poses an assumption for the sake of argument ("even assuming . . .") as the Wisconsin Supreme Court did in *Bailey v. State*, 65 Wis. 2d 331, 341, 222 N.W.2d 871, 876-77 (1974), that is not a holding. It is a rhetorical device to make a point. If not before, this becomes pellucid when the same court then immediately writes, "[i]t is unnecessary to make the assumption," as *Bailey* did when it resolved the case. *Id.* The latter discussion is narrower but sufficient to resolve the case, and does not rest on an explicit *arguendo* assumption. It is the holding. The former discussion is dictum.[1]

Second, the state does not satisfy the seven *Burke* factors so easily, if at all. The three new counts add a new party, Brendan Dassey, nowhere suggested in the preliminary hearing evidence. He is the one essential witness as to the new counts, and again was neither a witness nor even hinted at in the preliminary hearing. By the same token, the preliminary hearing evidence and witnesses did not suggest or support rape, false imprisonment, or kidnaping. Geographical proximity and time

[1] Even under Wisconsin's narrow definition of *obiter dictum*, an explicit statement that a court assumes something only for the sake of argument, followed by a statement that the assumption is unnecessary, is dictum. *Compare State v. Kruse*, 101 Wis. 2d 387, 392, 305 N.W.2d 85, 88 (1981) (writing that while a statement in an earlier case "was not decisive to the primary issue presented, it was plainly germane to that issue and is therefore not dictum"); *Chase v. American Cartage Co.*, 176 Wis. 235, 238, 186 N.W. 598, 599 (1922) ("when a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum, but is a judicial act of the court which it will thereafter recognize as a binding decision"); *but see also State v. Koput*, 142 Wis. 2d 370, 386, 418 N.W.2d 804, 811 (1988) (noting of an earlier case that a certain sentence "was irrelevant to the *ratio decidendi* of the case. * * * It could have been omitted without doing violence to the logic of the opinion"). Not only was the *arguendo* assumption in *Bailey* explicitly irrelevant to the *ratio decidendi*, the court there did not decide the issue it posited for argument's sake.

are the same, but only if one looks outside the preliminary hearing evidence to Dassey's unreliable, inadmissible statement and assumes it true. The physical evidence of rape, kidnaping and false imprisonment appears to be non-existent, and in any event, not related to the physical evidence at the preliminary hearing. And neither the motive nor the intent for rape, kidnaping or false imprisonment are the same as those for murder, mutilating a corpse, or possessing a firearm as a felon.

The state's argument that once he raped, then Avery had a reason to murder is but a bootstrap. It lays inference upon inference. Indeed, it pays homage to a nursery rhyme, "The House that Jack Built." In that rhyme, malt becomes 'transactionally related' to a cock that crowed in the morn and to a priest all shaven and shorn, but only by a fanciful series of events and things that have no necessary relation to one another.[2] So, too, the supposed connection between the three new charges in the state's proposed amended Information, and the three original charges.

Third, on the state's argument here, a court could not impose a principled limitation on the prosecution's ability to conjure additional charges in an Information on the flimsiest evidence, or on no evidence at all. Were a prosecutor to imagine that perhaps Avery stole money from Teresa Halbach during the course

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[2] That nursery rhyme is old and English. Its references now make little sense to children removed from English farm life of centuries past. But it tells a simple and amusing story in which each item becomes an object upon which the subsequent item acts. Malt in Jack's house is eaten by a rat; a cat kills the rat; a dog worries the cat; a cow with crumpled horn tosses the dog; and so on. Each successive interaction builds on the one before. Another nursery rhyme once popular, "There Was an Old Lady Who Swallowed a Fly," follows the same literary pattern.

of the alleged events of October 31, that certainly would be transactionally related; unproven, unprovable, and imaginary, but transactionally related. A theft charge then might appear in the next amended Information. How about an assertion that Avery punched Halbach in the face and broke her nose in the course of the alleged events? It is not true and there is no evidence of it, but it would be transactionally related and chargeable on the state's theory. Now the state may add a substantial battery count. The state's reading of *Burke* and later cases leaves no real judicial power to bar such new counts.

As the state sees it, then, anything imaginable during that same period and involving Teresa Halbach would be transactionally related, so the prosecution's possibilities are almost unbounded. If there is no complaint to plead (and there need not be, under § 971.01(1)) and the evidence at the preliminary hearing is no more a limitation than the state argues, the state could add counts for all of these imaginary events as transactionally related.

The hypothetical Avery posits is not so farfetched. Here the state appears to have no admissible evidence of the three counts it actually intends to add. They are in that sense no different than the hypothetical theft and substantial battery counts. For that matter, the three new counts certainly are no more linked to or supported by the evidence at the preliminary hearing than would be theft or substantial battery.

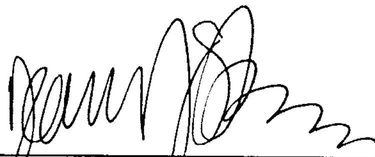
## III.

## CONCLUSION

The Court should dismiss the three new charges in the amended criminal complaint, for want of probable cause on the basis of reliable information. As a less favored alternative, 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.

Dated at Madison, Wisconsin, April 4, 2006.

Respectfully submitted,




Dean A. Strang
Wisconsin Bar No. 1009868
Counsel for Steven A. Avery

HURLEY, BURISH & STANTON, S.C.
10 East Doty Street
Suite 320
Madison, Wisconsin 53703
[608] 257-0945
[608] 257-5764 facsimile

*Jerome F. Buting*

Jerome F. Buting
Wisconsin Bar No. 1002856
Counsel for Steven A. Avery

BUTING & WILLIAMS, S.C.
400 Executive Drive
Suite 205
Brookfield, Wisconsin 53005
[262] 821-0999
[262] 821-5599 facsimile

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